

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Sullivan)
Development Properties, LLC for change of)
electric supplier from Union Electric)
Company d/b/a Ameren to Farmington City)
Light and Water)
File No. EO-2024-0251

**AMEREN MISSOURI'S AND CITY OF FARMINGTON'S MEMORANDUM OF LAW
IN SUPPORT OF JOINT MOTION TO DISMISS FOR LACK OF SUBJECT MATTER
JURISDICTION AND FOR SUMMARY DETERMINATION**

COME NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”) and the City of Farmington ("Farmington"), and for their memorandum of law in support of their motion to dismiss for lack of subject matter jurisdiction and for summary determination regarding the request for a change of electric supplier filed by Sullivan Development Properties, LLC ("Sullivan"), pursuant to 20 CSR 4240-2.117(1), state as follows:

I. INTRODUCTION AND SUMMARY

Commission rule 20 CSR 4240-2.117(1)(E) authorizes the Commission to dispose of any case "if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material facts, that any party is entitled to relief as a matter of law as to all or any part of the case, and the Commission determines that it is in the public interest." The standard for granting a motion for summary determination is essentially the same as the standard for summary judgment set forth in the Missouri Rules of Civil Procedure.¹

As discussed below, the Commission lacks subject matter jurisdiction to grant the relief sought by Sullivan because Farmington lacks the authority to serve the structure(s) located on the subject property at 259 Kenwood Drive, Farmington, Missouri 63640 (the "259 Kenwood Drive

¹ Cf. Mo. R. Civ. P. 74.04.

Property"). Granting summary determination is particularly appropriate here since the undisputed facts clearly establish that Ameren Missouri and Farmington are entitled to judgment as a matter of law. Additionally, the Missouri Public Service Commission has recognized that "[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest."²

II. ARGUMENT

The material facts pertinent to this motion are not in dispute and are set forth in the Motion to Dismiss for Lack of Subject Matter Jurisdiction and Summary Determination filed concurrently herewith. The Commission has previously determined that the burden of proof in change of supplier cases is on the applicant.³

Municipally owned electric utilities, such as the electric utility owned and operated by Farmington, are not authorized to provide retail electric service to structures located outside of the municipality's corporate boundaries unless:

- (1) The structure was lawfully receiving permanent service from the municipally owned electric utility prior to July 11th, 1991;
- (2) The service is provided pursuant to an approved territorial agreement under Section 394.312;
- (3) The service is provided pursuant to lawful municipal annexation and subject to the provisions of this section; or
- (4) The structure is located in an area which was previously served by an electrical corporation regulated under this chapter in Chapter 393, and the electric corporation's authorized service territory was contiguous to or inclusive of the municipality's previous corporate boundaries, and the electric corporation's ownership or operating rights within the area were acquired in total by the municipally owned electric system prior to July 11th, 1991. []⁴

² *In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases*, Case No. EU-2005-0041 (Mo. P.S.C.), Determination on the Pleadings and Order Denying Application, (October 7, 2004).

³ *In the matter of the Application of Wasatch Investments, L.C.*, Case No. EO-2008-0031, 2008 WL 2444659 at *1 (Mo. P.S.C.), Order Granting Summary Determination and Dismissing Application (June 8, 2008).

⁴ RSMo. § 386.800.1.

It is undisputed that the 259 Kenwood Drive Property is located outside of Farmington's corporate boundaries. Likewise, it is undisputed that none of the exceptions listed in § 386.800.1 are applicable: 1) the structure(s) on the 259 Kenwood Drive Property were not receiving electric service from Farmington prior to July 11, 1991; 2) there is no known territorial agreement between Farmington and Ameren Missouri that would permit Farmington to provide electric service to the 259 Kenwood Drive Property; 3) Farmington has not annexed the 259 Kenwood Drive Property; and 4) Farmington has not acquired any electric corporation that previously served the 259 Kenwood Drive Property. Accordingly, under § 386.800.1, Farmington lacks the power to serve any structures located on the Kenwood Drive Property and Sullivan has no alternate supplier to "switch to". For these reasons, the Missouri Public Service Commission Staff has acknowledged that

"as things now stand Staff does not see a pathway for the Commission to grant the application. Given allegations of material facts that do not appear to be in actual genuine dispute, [RSMo. § 386.800.1] appears to prohibit [an Order granting a change of supplier]."⁵

Additionally, the Commission lacks subject matter jurisdiction to hear this change of supplier case. Sullivan relies on RSMo. § 393.106.2 to support its application to change suppliers.

This statute provides in pertinent part:

Once an electric corporation or joint municipal utility commission, or its predecessor in interest, lawfully commences supplying retail energy to a structure through permanent service facilities, it shall have the right to continue serving such structure, and other suppliers of electrical energy shall not have the right to provide service to the structure except as might be otherwise permitted in the context of municipal annexation pursuant to section 386.800 and section 394.080, or pursuant to a territorial agreement approved under section 394.312. The public service commission, upon application made by an affected party, may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential.

⁵ Staff's Status Report and Recommendation at 4.

The Commission has previously acknowledged that "Section 393.106 only authorizes the Commission to grant a change of supplier request if two electric suppliers . . . both have a concomitant right to serve a particular area."⁶

The facts of this case are similar to *In the Matter of the Application of Wasatch Investments, LC, for Change of Electric Supplier*, File No. EO-2008-0031 (June 8, 2008). In that case, Wasatch Investments, LC ("Wasatch") sought to change electric suppliers from Union Electric Company to Cuivre River Electric ("Cuivre River"), a rural electric cooperative authorized to serve rural areas.⁷ The Commission found that Wasatch's property was not located within a rural area, and that there was no territorial agreement between Union Electric Company and Cuivre River that would permit Cuivre River to serve Wasatch's property.⁸ Therefore, the Commission found that Cuivre River did not have a right to provide service to the structure in question and concluded that the Commission was without subject matter jurisdiction to approve Wasatch's application.⁹ The Commission therefore granted Union Electric Company's motion to dismiss for lack of subject matter jurisdiction and motion for summary determination.¹⁰

Similar to *Application of Wasatch Investments*, here, the 259 Kenwood Drive Property is not located within Farmington's city limits and none of the exceptions under § 386.800.1, which would permit Farmington to serve a structure outside of its city limits, is applicable. Therefore, Sullivan cannot meet its burden of proof to support its application and the Commission is without subject matter jurisdiction to order a change of supplier.

⁶ *Application of Wasatch Investments*, Case No. EO-2008-0031, 2008 WL 2444659 at *6 citing *Union Elec. Co. v. Platte-Clay Elec. Coop.*, 814 S.W.2d 643, 648 (Mo. App. W.D. 1991).

⁷ *Id.* at *1–*2.

⁸ *Id.* at *2.

⁹ *Id.* at *7.

¹⁰ *Id.* at *8.

Although Sullivan has expressed an intent to pursue annexation by Farmington, even if Farmington and Sullivan proceed with annexation, the Commission would still be without subject matter jurisdiction under § 393.106.2. The statute applies "[o]nce an electric corporation or joint municipal utility commission . . . lawfully commences supplying retail energy to a structure through permanent service facilities."¹¹ In this case, Ameren Missouri has not established service to any structure on the 259 Kenwood Drive Property. If the annexation is completed, the 259 Kenwood Drive Property would be a competitive area and presumably, Sullivan would have a choice to receive service from either Farmington or Ameren Missouri.

The bottom line is that the Missouri Court of Appeals has previously explained that the Commission's jurisdiction under RSMo. § 393.106 is limited to determining "whether a change of suppliers is in the public interest between two electric suppliers *with concomitant rights*" to serve an area.¹² In this case, the Commission has no jurisdiction to apply § 393.106 because Ameren Missouri is the only electric supplier that currently has rights to serve structure(s) on the 259 Kenwood Drive Property.

WHEREFORE, Ameren Missouri and Farmington respectfully request that the Commission grant summary determination on all issues in this case against Sullivan and find that it is without authority under Missouri law to grant the requested relief.

¹¹ RSMo. § 393.106.2.

¹² *Union Elec. Co. v. Platte-Clay Elec. Coop.*, 814 S.W.2d 643, 648 (Mo. App. W.D. 1991).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed in EFIS on this 20th day of August 2024, with notification of same being sent to all counsel of record.

/s/ William D. Holthaus, Jr.
William D. Holthaus, Jr.