BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Co-Mo Electric Cooperative for Approval of Designated Service Boundaries Within Portions of Cooper County, Missouri	))))	**File No.: EO-2022-0190**

STAFF'S LEGAL MEMORANDUM IN OPPOSITION TO AMEREN MISSOURI'S CONTENTION THAT ITS CCN EXCLUDES CO-MO FROM THE FOX HOLLOW DEVELOPMENT AREA

Commission Rule 20 CSR 4240-2.117(1) (E) authorizes summary determination "if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, 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." Ameren Missouri has asked for summary determination that the Commission has no jurisdiction to grant Co-Mo Electric Cooperative ("Co-Mo") a Section 386.800, RSMo designated service area because Ameren Missouri has an certificate of convenience and necessity which excludes Co-Mo from the subject area. Staff contends that the undisputed material facts establish that as a matter of law Ameren Missouri has no such "exclusive" certificate and, accordingly, that Ameren Missouri's motion for summary determination should be denied.

I
The 1990 Cases/What They Said and Didn't Say

Union Electric, d/b/a Ameren Missouri ("Ameren") has filed a motion for summary determination. The major premise of its argument is that Ameren has an area certificate

of convenience and necessity ("CCN") for the Fox Hollow area[1] which excludes rural electric cooperatives by virtue of the 1990 cases.

CRESCO was one of the candidates for a CCN in the 1990 cases. CRESCO was not a rural electric cooperative. It was a general business corporation and a wholly-owned subsidiary of Cuivre River Electric Cooperative ("Cuivre"), which was a rural electric cooperative (the "cooperative" or the "coop").[2] The area requested by CRESCO also covered most of the service area of the coop.[3] CRESCO and not the coop was the CCN applicant. CRESCO already held a CCN to render service in parts of the City of Lake St. Louis. CRESCO had no employees or facilities and proposed providing them through a contract with the coop. The proposal before the commission involved the coop's transfer of its entire electrical system to CRESCO in exchange for 100 percent of CRESCO's stock. Thus, the cooperative would own stock, and CRESCO would own the electrical system. Further, CRESCO's earnings would be transferred to the coop, and the coop's general manager would be CRESCO's general manager. The coop's board of directors would be CRESCO's board. CRESCO would adopt the coop's rate structure. The coop's headquarters building would be CRESCO's. CRESCO would be required to purchase all power requirements from the coop. CRESCO's expanded operations would be financed with loans from the coop.

The Commission denied CRESCO's request for a CCN. In reaching that result the Commission considered CRESCO's argument that granting it a CCN to the exclusion of

[1] "Fox Hollow area" will refer to the area for which Co-Mo seeks a Section 386.800, RSMo order approving designated service boundaries.
[2] Hereinafter, the Cuivre River Electric Cooperative may be referred to as the "cooperative" or the "coop."
[3] Case No. EA-87-102/EA-87-159, p. 3.

Union Electric would eliminate wasteful duplication. The Commission rejected this argument with the following reasoning:

> CRESCO's allegation of need is that a certificate is required to stop wasteful duplication of facilities by competing companies. The Commission recognizes the problems created by destructive competition but finds that granting CRESCO's application will not eliminate the potential for harm. *If CRESCO's application is granted, the parent cooperative will not cease to exist. An expanded CRESCO will represent a third competitor in the service area where now two exist*.[4]

In support of this reasoning, the Commission cited to *Application of Sho-Me Power Corporation et al.*, 29 Mo. P.S.C. (N.S.) 415, 418 (1988):

> The Commission's jurisdiction over the cooperatives is limited to safety matters pursuant to section 394.160, RSMo 1986, as amended, and the settling of change of supplier disputes pursuant to Sections 393.106 and 394.315, RSMo 1986, as amended. The Commission lacks the jurisdiction necessary to prevent the cooperatives from duplicating facilities in order to compete for prospective customers unless in so doing the cooperatives violate safety rules or the change of supplier statutes. Section 386.310(2), RSMo 1986, as amended. Sho-Me's General Manager, John Davis, admitted under cross-examination that Sho-Me's proposal provided for no restriction on cooperatives to refrain from extending distribution lines to gain the advantage of being closer to a prospective customer. Therefore, whether or not this certificate is granted, the cooperatives will be free to duplicate facilities in order to compete with other regulated providers there, provided they do so safely.[5]

For this and other reasons, the Commission denied CRESCO's request for a CCN.

The Commission then took up Union Electric's ("UE") application for a CCN. First, it noted that UE had filed its application in response to the Commission's suggestion that it was desirable for electric companies to convert line certificates to area certificates.[6] Second, it noted that UE's application was predicated on the existence of authority which it has presumed to have for many years through existing line certificates and existing facilities.[7]

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[4] Case No. EA-87-102/EA-87-159, pp. 4-5 (emphasis added).
[5] Case No. EA-87-102/EA-87-159, p. 5.
[6] Case No. EA-87-102/EA-87-159, p. 10.
[7] Case No. EA-87-102/EA-87-159, p. 11.

It then granted the certificate with the following order:

> 2. That the application of Union Electric Company, filed herein on June 8, 1987, seeking permission, approval and a certificate of convenience and necessity authorizing it to own, control, manage and maintain an electric power system for the public in most of the service territory of its former subsidiaries, be, and is, hereby granted.
>
> 3. That within thirty (30) days from the effective date of this Report and Order Union Electric Company shall file for Commission approval proposed tariffs containing a metes and bounds description of the service area herein involved and a service area map in compliance with 4 CSR 240-2.060(2)(A)(7).

To summarize: First, the Order denied CRESCO a CCN. One of the Commission's express reasons for denying the CCN was that its affiliate rural electric cooperative, Cuivre, was already providing service to the area in question; as a rural electric cooperative would continue to have the power to do so; and, thus, would constitute a third competitor in the area (UE + CRESCO + Cuivre, the rural electric cooperative). In reaching this conclusion, the Commission expressly stated that it had no jurisdiction to curtail a Missouri rural electric cooperative's jurisdictional area.

Second, the Order granted Union Electric a CCN. The order, however, nowhere described the CCN as "exclusive" of anyone, and nowhere stated that the CCN excluded the Cuivre rural electric cooperative from the subject service area. Instead, it was issued for the same case where, in the same order, the competing company was denied a CCN for the precise reason that the competing company's affiliated coop would have continuing authority, which the Commission could not jurisdictionally curtail, to operate in the subject service area.

II
The Role of Section 386.800, RSMo

An underlying premise ratified in the 1990 cases was that the Commission could not exclude a rural electric cooperative from its jurisdictional service area by granting another electric company a CCN for the same area. The rural electric cooperative's jurisdictional service area is circumscribed by Sections 394.080 and 394.020(3), RSMo. A rural electric cooperative requires no Commission approval to construct facilities or provide service in any "rural area" in the state. Section 394.080, RSMo. "Rural area" means "any area of the United States not included within the boundaries of any city, town, or village having a population in excess of 1600 inhabitants." Section 394.020(3), RSMo. The Fox Hollow service area at issue here is within what was a "rural area," but which has now been recently annexed into a municipality by Boonville. Boonville has more than 1600 inhabitants, so the Fox Hollow area is no longer in a "rural area." Ameren rather than a Boonville owned electric facility has been providing electric service in Boonville.

Section 386.800, RSMo speaks to the situation where, by annexation, a municipality extends its corporate boundaries into a "rural area." Subsection 3 addresses the situation where an electrical corporation, such as Ameren, rather than a municipally owned electric utility, is providing electric service in the municipality that has extended its corporate boundaries into a "rural area." Thus, the statute contemplates the situation presented here.

Subsection 3 of Section 386.800 begins by stating that with stated exceptions, subsection 2 will apply. So to take up the rule before taking up its exceptions: Subsection 2, which concerns the extension of municipally owned electric utility service

by annexation, sets out the requirements and procedures for where a rural electric cooperative is involved. They are as follows:

- At the gateway, to qualify the rural electric cooperative must have existing electric service facilities with adequate and necessary service capability located in or within one mile outside the boundaries of the area proposed to be annexed.
- A majority of existing developers, landowners or prospective electric customers in the area may, anytime within 45 days prior to the effective date of the annexation, submit a writing request to the city to invoke negotiations per 394.312 to determine which electric service supplier is best suited to serve all or portions of the newly annexed area. The statute sets out seven factors that "shall be considered. . .in such negotiations." (These will be set out below when we review subsection 3.)
- If the municipally owned electric utility and rural electric cooperative are unable to negotiate a territorial agreement within 45 days, then they may submit proposals to those submitting the original written request, "whose preference shall control."

Subsection 3 applies where an electrical corporation such as Ameren rather than a municipally owned electric utility is providing electric service in the municipality. Per subsection 3, all subsection 2 provisions continue to apply unless the electrical corporation and the rural electric cooperative are unable to reach a territorial agreement within 45 days. In that event, the following procedures are triggered:

- Either service provider may file an application with the commission for an order determining which should serve, in whole or in part, the area to be annexed.
- The application must be made pursuant to the rules and regulations of the commission governing applications for CCNs.
- The Commission will decide which service provider wins, using the 7 factors set out in subsection 2, which were to be considered in the TA negotiations.

So pivoting back now to subsection 2: It states that the following 7 factors shall be considered, at a minimum:

- The preference of landowners and prospective electric customers;
- The rates, terms, and conditions of service of the electric service suppliers;
- The economic impact on the electric service suppliers;
- Each electric service supplier's operational ability to serve all or portions of the annexed area within three years of the date the annexation becomes effective;
- Avoiding the wasteful duplication of electric facilities;
- Minimizing unnecessary encumbrances on the property and landscape within the area to be annexed; and
- Preventing the waste of materials and natural resources.

III
Ameren Missouri's Argument

Ameren Missouri's argument begins with the proposition that Section 386.800.3, RSMo does not apply and confer rights upon Co-Mo because it applies only where the

service provided by a utility is "extended" into a "rural area" as a result of lawful annexation. Ameren's argument is:

> Ameren did not extend its service territory to include Fox Hollow because its service territory *already included Fox Hollow*. The verb 'extend' simply does not apply; there is nothing to extend, indeed an extension is not possible. For the same reasons, neither did (or could) Boonville's annexation of Fox Hollow "extend" Ameren Missouri's service territory to include it (Ameren Missouri's emphasis).[8]

Ameren Missouri goes on to argue that the General Assembly's purpose in amending subsections 2 and 3 of Section 386.800, RSMo was not to automatically give a municipally owned electric utility or electrical corporation serving the municipality the right "to service undeveloped, *open competition* land annexed by the municipality (Ameren Missouri's emphasis)." Ameren Missouri argues that the statute changed that for open competition land. Reaching its argument's end point, Ameren then asserts:

> However, this land is not open competition land. The Commission already decided in litigation involving, not surprisingly, a 4-year battle between Missouri cooperatives and Ameren Missouri, that the public convenience and necessity dictated that Ameren Missouri be granted an exclusive right and obligation to serve the land in question. . .In summary, because the statute, as amended, does not apply unless the annexed area in question is open competition area, Co-Mo is unable to invoke any authority or jurisdiction on the part of the Commission to designate Fox Hollow as its service area because the Commission simply has no such authority.[9]

In summary, Ameren asserts that the Fox Hollow development area is "non-competitive" and not subject to Section 386.800.3 because Ameren was granted an "exclusive" CCN in the 1990 cases. Those cases, however, granted Ameren a CCN in the same breath that they denied competitors' requests for CCNs for the express reason that the competitors' affiliated rural electric cooperatives would continue to be able to

[8] Ameren Missouri's Memorandum, p. 5.
[9] Ameren Missouri's Memorandum, p. 6.

operate--because "[t]he Commission lacks the jurisdiction necessary to prevent the cooperatives from duplicating facilities in order to compete for prospective customers. . ."

Ameren says the 1990 cases foreclosed the Commission's jurisdiction to apply Section 386.800, RSMo. In fact, the 1990 cases foreclosed the Commission's jurisdiction to exclude Co-Mo from Section 386.800 consideration. If the Commission's granting CRESCO a CCN for an area could not have excluded its affiliated Cuivre River Electric Cooperative from servicing the same area for the simple reason that it was a rural electric cooperative, then ipso facto neither could granting Union Electric a CCN for the Fox Hollow area have excluded Co-Mo from servicing that area. Ipso what fact? The fact that Co-Mo, like Cuivre River Electric Cooperative, is a rural electric cooperative. Ameren's certificate is not "exclusive."

To summarize: Ameren Missouri says the 1990 cases mean the Commission now lacks jurisdiction to consider Co-Mo's Section 386.800 application. But those cases actually said that the Commission lacked jurisdiction to exclude a rural electric cooperative from the same area for which Ameren Missouri was granted service authority. One is reminded of Abraham Lincoln's (possibly apocryphal) twisted fence argument to a jury. He compared the case to a fence so twisted and full of holes that each time the pig escaped through a hole on one side--he found himself on the same side. The 1990 cases upon which Ameren Missouri relies leave Ameren Missouri on the same side of the fence it is trying to escape: They did not deprive the Commission of jurisdiction to consider Co-Mo's application. Instead, they deprived the Commission of jurisdiction to refuse to consider the application.

WHEREFORE, Staff suggests that the Commission deny Ameren Missouri's Motion for Summary Determination.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned by his signature below certifies that the foregoing pleading was served upon all counsel of record on this 16th day of March, 2022, by electronic filing in EFIS, electronic mail, hand-delivery, or U.S. postage prepaid.

/s/ Paul T. Graham