

In the Matter of the Application of )  
Wasatch Investments, LC, for Change ) Case No. EO-2008-0031  
of Electric Supplier. )

**COMES NOW** Union Electric Company d/b/a AmerenUE (AmerenUE) and for its memorandum of law in support of its motion to dismiss for lack of subject matter jurisdiction and for summary determination regarding the request for a change of electric supplier filed by Wasatch Investments, LC (Wasatch), pursuant to Missouri Public Service Commission (Commission) rule 4 CSR 240-2.117, and states as follows:

Commission rule 4 CSR 240-2.117 authorizes the Commission to decide any case or issue on the pleadings under appropriate circumstances and provides that “the commission may grant the motion for 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.” 4 CSR 240-2.117(1)(E). As discussed below, the Commission lacks subject matter jurisdiction to grant the relief sought by Wasatch because Cuivre River Electric Cooperative lacks the power to serve Wasatch’s property. Thus, the Company entitled to relief as a matter of law, and indeed the Commission is required as a matter of law to dismiss Wasatch’s application.

The Commission's rule for determination on the pleadings is 'similar to judgment on the pleadings,' and is designed to "make litigation before the Commission more efficient and less costly for each entity and each person involved." *In the Matter of the Proposed Rulemaking 4 CSR 240-117*, Case No. AX-2002-159, Order Finding Necessity for Rulemaking, September 27, 2001. The Commission has previously held that the public interest favors resolution of a case or an issue by summary determination when possible so as to avoid the time and cost required to hold hearings on a matter. "Moreover, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing inasmuch as '[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.'" *Missouri Coalition for Fair Competition*, Case No. GC-2007-0169, Order Granting Summary Determination, April 29, 2007, p. 2.

Judgment on the pleadings is appropriate where the moving party has clearly established that no material issue of fact remains to be resolved and "if, from the face of the pleadings, the moving party is entitled to a judgment as a matter of law." *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122,134 (Mo. banc 2000).

In this case, there are no material issues of fact that remain unresolved and AmerenUE is entitled to judgment on its Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Summary Determination as a matter of law because the Commission lacks subject matter jurisdiction to grant the relief requested by Wasatch.

## **II. Material Facts**

The material facts at issue in this matter have already been resolved by the Stipulated Facts or in other pleadings filed by the parties in this case. The agreed upon facts are listed below.

1. Wasatch is the owner of real property located at 1665 Kemmar Court, within the city limits of O’Fallon, Missouri. *Stipulation of Facts*, p. 1.

2. Wasatch is currently not receiving electric service at the Kemmar Court location from any electric provider. *Id.* at. 3.

3. AmerenUE is an electric utility subject to the jurisdiction of the Missouri Public Service Commission (Commission). § 386.250 RSMo. *Id.* at 1.

4. The Kemmar Court property is located within the certified service territory of AmerenUE. *Id.* at 2.

5. AmerenUE has a franchise agreement with the City of O’Fallon. *Id.*

6. Cuivre River Electric Cooperative, Inc. (Cuivre River) is a rural electric cooperative, organized pursuant to Chapter 394 of the Revised Statutes of Missouri. *Id.* at 1.

7. Cuivre River has distribution lines that bisect the Kemmar Court location. *Id.* at 3.

8. Cuivre River has the power to “...generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute sell, supply, and dispose of electric energy *in rural areas* to its members, to governmental agencies and political subdivisions, and to other persons not in excess of ten percent of the number of its members.” § 394.080.1(4) RSMo. 2000. *Id.* at 1 (emphasis added).

9. A “rural area” is defined as “...any area of the United States not included within the boundaries of any city, town or village having a population in excess of fifteen hundred inhabitants.” § 394.020(3) RSMo. 2000. *Id.*

10. The City of O’Fallon has a population of 46,169, according to the U.S. Census Bureau’s 2000 census report as published in the 2005-2006 edition of the Missouri State Manual. *Id.* at 2.

11. The City of O’Fallon is not a “rural area” as defined by § 394.020(3) RSMo. 2000. *Id.*

12. The provisions of § 394.080(4) and 394.020(3) RSMo. 2000 do not allow Cuivre River to serve Wasatch. *Wasatch Investments, LC, Response to Order Directing Parties to Respond*, October 12, 2007, p. 2. *Staff Recommendation the Commission Issue Order to Show Cause*, September 14, 2007, p. 2. *AmerenUE Response to Order Directing Parties to Respond*, October 12, 2007, p. 1.

13. Currently, Cuivre River does serve customers within the city limits of O’Fallon. However, these customers are only within those areas of the City of O’Fallon that are either the subject of one or more Territorial Agreements entered into between Cuivre River and AmerenUE and approved by the Commission or were in existence prior to such area being annexed by the City of O’Fallon. For these services, the City of O’Fallon requires Cuivre River to pay, pursuant to O’Fallon Municipal Code Section 635.020, a license tax equal to 5% of the gross receipts from such electric service. *Stipulation of Facts*, p. 2.

14. Currently, Cuivre River has no Territorial Agreement with any other electric supplier that encompasses the Kemmar Court location within the city limits of

O’Fallon and does not desire at this time or anticipate in the future, entering into any such agreement encompassing the Kemmar Court location. AmerenUE and Cuivre River have not entered into and have no plans to enter into a territorial agreement which would include the Kemmar Court location. *Id.* at 2 and 3.

15. Cuivre River does not have a franchise agreement with the City of O’Fallon. *Id.* at 2.

16. The Missouri anti-flip-flop statutes, and the exceptions contained therein, are applicable only after an electric corporation or cooperative “commences” providing electric service to a facility. § 393.106.2 and 394.315.2, RSMo 2000. *Id.* at 3.

### **III. Discussion**

Electric cooperatives may only “distribute, sell, supply and dispose of electric energy in rural areas . . .” § 394.080(4), RSMo. A “rural area” is defined as an area “not included within the boundaries of any city, town or village having a population in excess of fifteen hundred inhabitants . . .” § 394.020(3), RSMo. It is undisputed that the City of O’Fallon has more than 46,000 inhabitants, and it is undisputed that Wasatch’s property is located within the boundaries of the City.<sup>1</sup> Consequently, absent other statutory authority, Cuivre River lacks the power to serve Wasatch. Indeed, any attempt by Cuivre River to serve Wasatch’s property would be *ultra vires*.

There is only one other possible source of state law that would permit Cuivre River to serve Wasatch; that is, § 394.312, RSMo., which deals with territorial agreements. § 394.312, by its express terms, is an exception to § 393.020 and § 394.080,

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<sup>1</sup> “Wasatch agrees with Staff that Cuivre is not qualified to provide service within the city limits of O’Fallon, Missouri due to the property not falling under the classification of “rural Area” [sic] as defined by §394.020(3) RSMo. 2000.” *Wasatch Investments, LC, Response to Order Directing Parties to Respond*, October 12, 2007, p. 2.

which as noted above, limit the areas within which a cooperative has the power to serve customers. However, § 394.312 applies only if there exists a Commission-approved territorial agreement between the cooperative and another electric service provider. It is undisputed that a territorial agreement does not exist. Thus, § 394.312 does not aid Wasatch.

Wasatch is thus left to argue, incorrectly, that § 393.106.2 authorizes Cuivre River to serve its property. Wasatch misinterprets § 393.106.2, as demonstrated by *Union Elec. Co. v. Platte-Clay Elec. Coop*, 814 S.W.2d 643 (Mo. App. W.D. 1991).

In *Platte-Clay*, Union Electric sought injunctive relief in the Platte County Circuit Court against Platte-Clay to prevent Platte-Clay from serving a new building under construction on a parcel of land within Excelsior Springs, Missouri. The Cooperative contended that the Commission had jurisdiction over the matter, and the trial court agreed and dismissed Union Electric's petition. As discussed below, the Court of Appeals reversed the trial court, and held that Platte-Clay had no authority to serve the new structure. This is because like O'Fallon, Excelsior Springs was an incorporated city with a population in excess of 1,500 inhabitants and thus was not a "rural area." Moreover, like O'Fallon, Excelsior Springs was within Union Electric's service territory and Union Electric held a franchise from the City. Platte-Clay nevertheless argued that because it had formerly served a barn on this parcel (the barn no longer existed) it had the right, under § 394.315,<sup>2</sup> to continue to serve the new structure.

As noted earlier, the Court of Appeals disagreed. The Court of Appeals found that § 394.315 (the same reasoning necessarily applies to the identical language of §

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<sup>2</sup> § 394.315 is essentially identical to § 393.106, except that it applies to structures formerly served by a rural electric cooperative, whereas § 393.106 applies to structures served by an electrical corporation or joint municipal utility commission.

393.106) prohibits a rural electric cooperative from serving a new structure on land not within a rural area *even if* the rural electric cooperative formerly served a different structure on that same land before the area ceased to be rural. Calling the cooperative's contention "without merit," the Court of Appeals explained that the Commission's jurisdiction under § 393.106 and 394.315 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. *A fortiori*, a rural electric cooperative (i.e. Cuivre River) has no authority to serve a new structure on land in a non rural area for which the rural electric cooperative, as here, has *never served any* structure.

Concomitant rights to serve the Wasatch property do not exist, for the reasons outlined earlier: (a) the Wastach property is not in a rural area; (b) there is no territorial agreement granting Cuivre River the right to serve the Wasatch property; and (c) Cuivre River has never served a structure on the Wasatch property – either before or after the Wasatch property became part of the City of O'Fallon. As stated succinctly by the Court of Appeals in construing § 394.315, "a rural electric cooperative . . . is not authorized to supply service to a new structure built on property which has ceased to be in a rural area..."

The bottom line is that § 393.106 (as is § 394.315), cited by Wasatch, is completely irrelevant to this case. The Commission simply has no jurisdiction to apply 393.106 (or 394.315) because Wasatch has no other supplier to "switch to." If AmerenUE and Cuivre River had concomitant rights to serve the Wasatch property, then Wastach could ask the Commission to allow it to switch from AmerenUE to Cuivre River, or vice-versa, for reasons other than rate differential if the Commission determined

the switch was in the public interest. However, absent those concomitant rights, Wasatch is not entitled to ask for this switch, the Commission cannot grant Wasatch's request, and the Commission thus has only one option as a matter of law: to dismiss this action for lack of subject matter jurisdiction. *See, e.g., State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. 1982), wherein the Supreme Court ordered the Administrative Hearing Commission to dismiss a case for which it lacked subject matter jurisdiction, explaining that "subject matter jurisdiction concerns 'the nature of the cause of action or the relief sought' and exists only when the tribunal 'has the right to proceed to determine the controversy or question in issue between the parties or grant the relief prayed.'" (citations omitted). Like the Administrative Hearing Commission, lacking subject matter jurisdiction, the Commission must dismiss Wasatch's application.

WHEREFORE, AmerenUE respectfully requests that the Commission grant summary determination on all issues in this case in favor of the Company and against Wasatch and find that it cannot grant the relief sought under Missouri law.



Respectfully Submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the following parties via electronic mail (e-mail) or via regular mail on this 30th day of April, 2008.

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