

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

In the Matter of the Application of Thomas L.)
Chaney for Change of Electrical Supplier.) Case No. EO-2011-0391

POST-HEARING BRIEF OF AMEREN MISSOURI

COMES NOW Union Electric Company d/b/a Ameren Missouri (Ameren Missouri or Company), and for its post-hearing brief, states as follows:

INTRODUCTION

Thomas L. Chaney, a customer of Cuivre River, has requested that the Missouri Public Service Commission (Commission) allow him to switch electrical providers so that he can be served by Ameren Missouri. Mr. Chaney's request is based solely upon the fact that Ameren Missouri pays a rebate for solar installations and Cuivre River does not. This reason, however, ignores the threshold question of whether the Commission has jurisdiction to order a change in electric supplier given the undisputed facts at issue here. Furthermore, setting the jurisdictional question aside, Mr. Chaney's request on its own provides an insufficient basis under Missouri law to justify a change of supplier.

FACTS¹

Ameren Missouri is an electric utility subject to the jurisdiction of the Missouri Public Service Commission (Commission). § 386.250 RSMo.

Cuivre River is a rural electric cooperative, organized pursuant to Chapter 394 of the Revised Statutes of Missouri.

Mr. Chaney is the named Cuivre River member² for the electric account at 1110 St. Theresa Lane in Dardenne Prairie, Missouri.

¹ All facts are supported by the Joint Stipulation of Facts and Law filed on July 6, 2012, unless otherwise noted.

Cuivre River and Ameren Missouri have a Territorial Agreement which allocates between Ameren Missouri and Cuivre River territory in which each may exclusively provide electric service.

The Territorial Agreement provides that Cuivre River is the only utility with the right to serve the property located at 1110 St. Theresa Lane in Dardenne Prairie.

The Territorial Agreement was approved by the Commission on March 5, 1993.

The current provider of electric service for 1110 St. Theresa Lane is Cuivre River.

The Territorial Agreement allows Ameren Missouri and Cuivre River to enter into agreements to change which utility would serve a structure on a case-by-case basis.

Ameren Missouri and Cuivre River have not entered into any agreement to change which utility could serve the home at 1110 St. Theresa Lane.

Missouri's "anti-flip-flop" statutes are found at § 393.106.2 and § 394.315.2, RSMo 2000.

At Mr. Chaney's request, Cuivre River upgraded and re-routed Mr. Chaney's service from 200 amps to 320 amps in September of 2010, without cost to Mr. Chaney.

Transfer of Mr. Chaney's service to Ameren Missouri will cost Cuivre River's members \$3,525 in stranded investments and expense of retiring the service.

Transfer of Mr. Chaney's service to Ameren Missouri will not reduce the amount of right-of-way maintained by Cuivre River. The overhead conductor presently serving Mr. Chaney will continue to be required for service to other Cuivre River members.

Transfer of Mr. Chaney's residential service to Ameren Missouri will require Ameren Missouri to extend 500 feet of underground primary cable and install a new pad transformer, service and meter (duplicating and paralleling Cuivre River's installed

² Customer of Record

facilities) at a cost of approximately \$7,100, none of which will be charged to Mr. Chaney.³

To transfer this residential service, Mr. Chaney would be required to incur expenses related to hiring a surveyor, digging a three foot trench and providing and installation of conduit. Mr. Chaney would need to provide Ameren Missouri with easements for this installation. In order to reach Ameren Missouri's distribution facilities, Mr. Chaney would need to excavate past his neighbors' homes on St. Theresa Lane and directional bore a conduit under the street. This work could cost at least \$2,500.

The cost to Mr. Chaney would be higher than \$2,500 if it is determined Mr. Chaney would need to relocate the service outlet for his air conditioner from the southeast portion of his home to the northeast portion. This may be necessary to reduce the distance from Ameren Missouri's facilities and to ensure Mr. Chaney's service does not degrade when his air conditioner turns on each day in the summer.⁴

The basis for Mr. Chaney's request to change electric suppliers is that Ameren Missouri is required by § 393.1030.3 to pay a rebate (\$2 per installed watt up to 25 kW per system) for new installations of solar generation.

Cuivre River is not obligated to nor does it pay any rebate for new installations of solar generation.

If Mr. Chaney's residential service is transferred to Ameren Missouri and Mr. Chaney does not install solar generation, the Commission has no authority through which to force the installation of solar generation or otherwise remedy the situation.

³ Tr. p. 85, l. 1.

⁴ Tr. p. 85, l. through p. 86, l. 3.

JURISDICTION ARGUMENT

As with any case before the Commission, the first question to be addressed must be whether the Commission has jurisdiction over the requested relief. Unlike a circuit court, this Commission is a body of limited jurisdiction possessing only those powers expressly given it by the General Assembly.⁵ In this case, that limited jurisdiction simply does not include granting the relief Mr. Chaney seeks because Mr. Chaney is asking the Commission to do something the Commission has no power or jurisdiction to do; that is, grant a “change of supplier” when in fact there exists only one supplier with authority to provide service to Mr. Chaney.

Mr. Chaney seeks a “change of supplier” under § 394.315 RSMo, but this option is available to him only if two electric suppliers (e.g., an electric utility and a cooperative) both have a concomitant right to serve a particular area.⁶ *If, but only if*, that concomitant right exists, can the Commission order a change of suppliers for a “reason other than rate differential,” presuming the Commission finds it is in the public interest to do so. However, where there is no such concomitant right, as here, § 394.315 RSMo simply does not apply and the Commission lacks subject matter jurisdiction to grant the relief sought by Mr. Chaney. The Commission itself has recognized this limitation on its jurisdiction before. *See, e.g., In the Matter of the Application of Wastach Investment, L.C., supra.* In that case, the Commission dismissed the request to change electric suppliers of Wastach Investment, because only Ameren Missouri has the right to serve

⁵ *State ex rel. City of St. Louis v. Pub. Serv. Comm’n*, 73 S.W.2d 393, 400 (Mo. banc 1934).

⁶ *In the matter of the Application of Wastach Investments, L.C.*, Case No. EO-2008-0031, 2008 WL 2444659 (Mo. P.S.C.), Order Granting Summary Determination and Dismissing Application (June 8, 2008) (citing *Union Elec. Co. v. Platte-Clay Elec. Coop*, 814 S.W.2d 643 (Mo. App. W.D. 1991))

the property in question, despite the fact that the electric facilities of a cooperative ran adjacent to the property. The Commission held:

§ 393.106 only authorizes the Commission to grant a change of supplier request if two electric suppliers, such as an electric utility and an electric cooperative or two electric cooperatives, both have a concomitant right to serve a particular area.⁷

As the undisputed facts make clear, there is a Territorial Agreement in place, which was approved by the Commission. This Territorial Agreement gives Cuivre River the exclusive right to serve Mr. Chaney as a matter of law because once approved by the Commission, it gave Cuivre River the *exclusive* right to serve certain territory – including Mr. Chaney’s property. There is not – and cannot be – a concomitant right to serve when one supplier and one supplier alone has the right to serve, which in turn means that the Commission lacks authority under § 394.315 RSMo or otherwise to grant the relief requested by Mr. Chaney.

Case law (and previous Commission findings) is clear. If there is only one supplier with the legal right to serve a particular customer, the Commission has no authority to order a change in electric supplier. This is confirmed by the express language of the statute, which reads:

Once a rural electric cooperative, or its predecessor in interest, lawfully commences supplying retail electric 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

⁷ *Id.* § 393.106 RSMo is the sister statute to § 394.315 RSMo. They contain much the same language, the only difference is one is the anti-flip-flop law for rural cooperatives and one is the anti-flip-flop law for investor-owned utilities.

pursuant to a territorial agreement approved under section 394.312. (§ 394.315.2 RSMo) (emphasis added).

Under the statute, there are only two circumstances where another supplier could have a right to serve a structure already being served by an electrical supplier who has the sole right to serve the structure pursuant to a territorial agreement: (1) under certain circumstances involving a municipal annexation, or (2) pursuant to the terms of the territorial agreement itself. Here, municipal annexation is not at issue, and the Territorial Agreement does not allow Ameren Missouri to serve Mr. Chaney unless Cuivre River agrees in writing – Cuivre River has not agreed and has no intention of agreeing. Accordingly, by its express terms, § 394.315 RSMo. prohibits Ameren Missouri from serving Mr. Chaney as a matter of law. This Commission has no power to somehow “override” that prohibition.

This interpretation is consistent with how the courts have interpreted the anti-flip-flop laws (§ 394.315 RSMo., § 394.314 RSMo. and § 393.106 RSMo. – the anti-flip-flop statutes for Electric Cooperatives, Investor-Owned Utilities and Municipalities, respectively.) In *Platte-Clay*, 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.⁸ As explained earlier, concomitant rights to serve Mr. Chaney’s property do not exist. Only Cuivre River has the right to serve this property.

For this reason, the Commission simply has no jurisdiction to apply §393.315 RSMo. Mr. Chaney has no other supplier to “switch to.” If Ameren Missouri and Cuivre River had concomitant rights to serve the property, then Mr. Chaney could ask the

⁸ Union Elec. Co. v. Platte-Clay Elec. Coop, 814 S.W.2d 643 (Mo. App. W.D. 1991). While the underlying facts of this case are different, the controlling legal principle is the same and is set forth in this case.

Commission to allow him to switch to Ameren Missouri (for reasons other than rate differential) if the Commission determined the switch was in the public interest.⁹ But as far as the law is concerned Cuivre River, for Mr. Chaney, is the “only game in town.”

Because the Commission lacks subject matter jurisdiction to grant the relief Mr. Chaney seeks, its only option, as a matter of law, is to dismiss Mr. Chaney’s application. *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]).

As noted earlier, the only way Ameren Missouri could obtain the right to serve Mr. Chaney’s structure would be through an agreed-upon modification of the Territorial Agreement. Not only have Ameren Missouri and Cuivre River not agreed to modify the Territorial Agreement, they are not going to do so, nor must they. See § 394.080.5 RSMo, which provides:

Notwithstanding the provisions of subsection 2 of this section, after a public hearing upon a complaint, the public service commission may order that service be provided by another supplier if it finds that service from another supplier of electricity is in the public interest for a reason other than rate differential. **Nothing in this section shall be construed as conferring upon the public service commission jurisdiction over the rates, financing,**

⁹ Even if the Commission had jurisdiction to grant Mr. Chaney’s request, Ameren Missouri and Cuivre River do not believe that Mr. Chaney’s desire to receive a solar rebate is a reason “other than a rate differential” that is in the public interest. Indeed, if Mr. Chaney is permitted to switch suppliers simply to take advantage of the tariffed rebate program, there is no reason any other customer would be disqualified from using this same justification to switch electric suppliers.

accounting or management of any electric cooperative.
(emphasis added).

The Commission has recognized that this provision prohibits it from requiring a cooperative to enter into a modification of a territorial agreement. “Although the Commission has authority to grant a change of supplier request from an electric utility to an electric cooperative under certain circumstances, § 394.080.5 RSMo expressly withholds from the Commission the authority to mandate any action by an electric cooperative’s management, including requiring it to serve a given customer or structure.”¹⁰

At one point in the hearing, it was asked if a contractual agreement between Ameren Missouri and Cuivre River can take away the Commission’s authority to determine which utility should serve Mr. Chaney.¹¹ In answering this question, it should be noted that territorial agreements are more than merely a private contract between two parties. Territorial agreements are a statutory creation, found at § 394.312 RSMo, designed to displace competition for retail electric service between rural cooperatives and investor-owned utilities.¹² There are specific requirements that must be satisfied before the territorial agreement becomes effective. Most importantly, the statute requires that “...before becoming effective, all territorial agreements...shall receive the approval of the public service commission by report and order.”¹³ In that report and order, the Commission must find that “...the territorial agreement in total is not detrimental to the

¹⁰ *In the matter of the Application of Wastach Investments, L.C.*, Case No. EO-2008-0031, 2008 WL 2444659 (Mo. P.S.C.), Order Granting Summary Determination and Dismissing Application (June 8, 2008) (citing *Union Elec. Co. v. Platte-Clay Elec. Coop.*, 814 S.W.2d 643 (Mo. App. W.D. 1991))

¹¹ Tr. p. 42, l.15-23.

¹² § 394.312.1 RSMo.

¹³ § 394.312.4 RSMo.

public interest.”¹⁴ That finding was made in Case No. EO-93-166, where the Commission approved the territorial agreement and from and after its approval there are only two circumstances – both prescribed by statute – where a different supplier could again have the right to serve a structure located in territory allocated to a different supplier under the territorial agreement: municipal annexation, or *pursuant to* the terms of the territorial agreement itself. § 394.315.2 RSMo.¹⁵ Put another way, § 394.315.2 RSMo does limit the Commission’s authority to decide from whom Mr. Chaney can take service because, once the Territorial Agreement was approved by the Commission, the statute has already answered that question: Mr. Chaney must take service from Cuivre River because his structure is located in territory lawfully allocated to Cuivre River.

PUBLIC INTEREST ARGUMENT

Having established that the Commission’s only lawful choice in this case is to dismiss Mr. Chaney’s application for lack of subject matter jurisdiction, the “public interest” question need not be answered. However, Commissioner Kenney, at the hearing, asked the parties to address the question of whether there is a reason other than rate differential upon which the Commission could approve the change in electric supplier. Presuming for a moment that the Commission has jurisdiction, the answer to this question is “no,” meaning Mr. Chaney’s request would also have to be denied on that basis. The answer is “no” because, for a multitude of reasons, such a change is not in the public interest. To the contrary, it is only in Mr. Chaney’s personal financial interest.

At the hearing, Commissioner Kenney pointed out that this case is “a pretty significant question of public policy because it does implicate [the statutorily imposed]

¹⁴ § 394.312.5 RSMo.

¹⁵ EO-93-166, Report and Order, March 15, 1993. A copy of the Report and Order is attached to the Joint Stipulation of Facts and Law, submitted on July 6, 2012, in this case.

solar rebate....”¹⁶ While Ameren Missouri does not deny that the state of Missouri has adopted a public policy of encouraging renewable energy generation by its investor-owned utilities, the reach of that public policy should not be overstated, and by its terms only applies to customers of regulated, investor-owned utilities. The statute, which became law through an initiative petition,¹⁷ does not impose the same requirement upon other electrical suppliers – neither municipal utilities nor electric cooperatives are required to comply with the renewable energy standard or to pay a solar rebate. Accordingly, the voters acknowledged and approved the fact that not all customers in the state would have access to the solar rebate. Allowing Mr. Chaney to change electric suppliers merely to obtain the money provided by the solar rebate does not advance the public policy set by the statute. Had the voters wanted to impose this requirement on all electrical suppliers, they could have done so. They didn’t. Had the voters wanted the public policy to extend to cooperative customers, like Mr. Chaney, they could have so provided. They didn’t. In summary, denial of Mr. Chaney’s request does not violate the state policy reflected in the solar rebate statute because it does not deny a customer of an investor-owned utility the right to obtain the rebates.

Mr. Chaney’s argument, if accepted, could be extrapolated to justify all customers of Cuivre River (and every other electric cooperative possessing a legal, exclusive right to serve a territory) switching to Ameren Missouri (or to another investor-owned utility). Taken even more to its extreme, the argument that the solar rebate statute reflects a policy that electric cooperative customers (or municipal customers) ought to also be able to

¹⁶ Tr. p. 115, l. 20-21.

¹⁷ However statutes adopted by initiative petition are to be “judged on the same basis as any statute passed by the legislature” *Labor’s Educ. And Political Club – Independent, et al v. Ashcroft et al.*, 561 S.W.2d 339, 343 (Mo. 1977).

access the solar rebate could be used to justify nullification of territorial agreements *in total*. It is simply not credible to read into the solar rebate statute an intention to in effect amend the Territorial Agreement and anti-flip-flop statutes in the manner in which they would have to be amended in order to grant Mr. Chaney's request. And, if such an intention cannot be gleaned from the solar rebate statute, then there is no public policy to advance by granting Mr. Chaney's request. Consequently, even if the Commission has the jurisdiction to do so (which it does not), it is obvious that doing so cannot be in the public interest. The argument justifying Mr. Chaney's request alone isn't any different and it isn't any more valid.

Additionally, the Commission must weigh whatever public policy benefit this case could provide against the very real cost to Ameren Missouri and Cuivre River (and ultimately to their other customers) that will arise from changing electric suppliers. Transferring Mr. Chaney to Ameren Missouri will leave Cuivre River and its members with stranded costs of over \$3,000. There is no allegation that the service provided by Cuivre River was anything other than reliable. Mr. Chaney indicated no dissatisfaction with Cuivre River of any kind. As recently as 2010, Cuivre River upgraded and re-routed its service to Mr. Chaney. This was done at no cost to Mr. Chaney. Additionally, transferring Mr. Chaney's structure to Ameren Missouri will cost \$7,100, none of which will be charged directly to Mr. Chaney, but all of which will ultimately be reflected in rates paid by Ameren Missouri's customers. In total, this transfer will cost over \$10,000, none of which will be charged to Mr. Chaney. This cost is not justified by the limited public policy before the Commission in this case, any more than the Commission would

be able to order a change in electric supplier because one utility provided more bill assistance revenues to its low-income customers than another utility.

Finally, Ameren Missouri asks the Commission to consider the public policy of encouraging and honoring territorial agreements, which are a statutory creation and are binding upon investor-owned utilities, rural cooperatives and municipalities alike. In particular, this Territorial Agreement was found to be more than not detrimental to the public interest but to in fact be *in* the public interest:

The record reflects that heretofore the relationship between UE [Ameren Missouri] and Cuivre River has been decidedly antagonistic. The relationship between the two organizations has produced a substantial amount of wasteful duplication of facilities, inefficient use of assets, and substantial litigation. To avoid these societal costs, UE and Cuivre River have negotiated a territorial agreement governing a part of their coextensive service territories. The Commission finds in this territorial agreement many advantages to the public. They include the reduction of unnecessary duplication of services, the ability to more accurately predict future growth and capacity needs in the area, an increased efficiency in design and operation of the electric system, an increase in aesthetics and safety as a result of a reduction in duplicative facilities, and a reduction in customer confusion regarding the appropriate electric service supplier. This agreement recognizes what is in place and attempts to use it as efficiently as possible while preventing future inefficiencies. To that end the parties have designated exclusive service territories for each supplier. All *new* customers within the exclusive territory of UE or Cuivre River shall automatically go to that supplier. Existing customers will remain with the supplier they chose...The Commission specifically concludes and finds herein that the agreement “in total” should be approved in that it is not detrimental to the public interest and, in fact, is in the public interest.¹⁸

This Territorial Agreement was and still is in the public interest for all of the reasons the Commission cites above. The investigation into the question of whether

¹⁸ EO-93-166, Report and Order, March 15, 1993.

changing Mr. Chaney's electric supplier is in the public interest cannot stop with the issue of the solar rebate or the small increase in renewable generation that his home will provide (and which can be provided regardless of which utility serves the structure – the question is not whether Mr. Chaney can install solar panels; the question is how much will it cost him to do so). The statute has set the two public policies which the Commission must consider. That is, that territorial agreements control and that rural cooperative customers don't qualify for solar rebates. If the General Assembly wants more Missourians to have access to solar rebates, that is a public policy decision for it - and it alone - to make. For these reasons, Mr. Chaney's request cannot be considered to be in the public interest.

WHEREFORE, Ameren Missouri respectfully requests that the Commission deny Mr. Chaney's request to change electric service providers, and that it dismiss the application for lack of subject matter jurisdiction.

Respectfully submitted,

UNION ELECTRIC COMPANY,
d/b/a Ameren Missouri

/s/ *Wendy K. Tatro*

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 19th day of October, 2012.

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