

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 or Company), and for its Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Summary Determination regarding the Change of Electric Supplier filed by Wasatch Investments, LC (Wasatch) pursuant to 4 CSR 240-2.117, respectfully requests that the Missouri Public Service Commission (Commission) grant this motion in favor of AmerenUE and against Wasatch.

While Commission rules require a Motion for Summary Determination to be filed at least 60 days prior to the hearing, the Commission's Order scheduling a hearing for June 11, 2008 was issued on April 15, 2008. AmerenUE could not have filed this motion 60 days prior to the hearing date as the order scheduling the hearing was issued less than 60 days prior to the hearing. Prior to the April 15, 2008 order, this case had been closed and reopened, making it unclear if AmerenUE would need to file for summary determination. Under the circumstances, AmerenUE makes this filing as soon after the April 15, 2008, order as possible and asks the Commission for leave to file this motion less than 60 prior to the hearing. The other parties to this case will not be disadvantaged as there is still time for Wasatch (or other parties) to respond to this motion within the 30

days set forth in the rules and for the Commission to rule prior to the June 11, 2008 hearing date.

Moreover, as outlined below and in the Company's Memorandum of Law filed concurrently herewith, the Commission lacks subject matter jurisdiction over Wasatch's application and therefore must dismiss it as a matter of law. Lack of subject matter jurisdiction can be raised at any time in a proceeding, a defense based thereon cannot be waived, and the parties cannot confer subject matter jurisdiction on a tribunal by consent or agreement. *See, e.g., State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. 1982).

I. Background

This action seeks a Commission order allowing Wasatch to take electric service from Cuivre River Electric Cooperative, Inc. (Cuivre River), and was initiated by Wasatch in August of 2007. Wasatch's facility is located in AmerenUE's service territory but is not currently taking service from AmerenUE or any other electric provider.

After closing and reopening this case, the Commission issued an order on April 15, 2007, which set this matter for hearing on June 11, 2008. On January 10, 2008, the parties filed Stipulation of Facts, signed by all parties in the case including Wasatch, Cuivre River and AmerenUE (Stipulation of Facts). Although the Commission provided the parties an opportunity to file a list of facts in dispute, no party filed a pleading listing any facts in dispute.

II. Material, Undisputed Facts

The material facts at issue in this matter have already been resolved by the Stipulation of Facts filed by the parties in this case. See Exhibit A. 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. § 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 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. Cuivre River does serve customers within the city limits of O’Fallon. 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. 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. Argument and Conclusion

Missouri law limits an electrical cooperative’s ability to provide retail electric service to “rural areas” or when there exists one of two circumstances. Either the area is already being served by the cooperative when it becomes the subject of a municipal annexation or when there is a Territorial Agreement between the cooperative and a utility such as AmerenUE. The City of O’Fallon does not meet the definition of a rural area as it has more than 1,500 inhabitants and neither of the two exceptions is applicable to the situation in question. There is no municipal annexation involved and there is no Territorial Agreement between AmerenUE and Cuivre River.

Wasatch filed its application in reliance on § 393.106, which applies only if two electric suppliers (e.g., an electric utility and a cooperative) both have a concomitant right to serve a particular area. *Union Elec. Co. v. Platte-Clay Elec. Coop*, 814 S.W.2d 643 (Mo. App. W.D. 1991) *If, but only if*, that concomitant right exists, the Commission can then allow a change of suppliers for a “reason other than rate differential” if the Commission finds it is in the public interest to do so. However, where there is no such

concomitant right, as here, § 393.106 is never triggered; it simply does not apply, and the Commission lacks subject matter jurisdiction to grant the relief sought by Wasatch.

Consequently, the Commission must grant summary determination in favor of AmerenUE by dismissing this case for lack of subject matter jurisdiction.

Respectfully Submitted,

/s/ Wendy K. Tatro

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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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/s/ Wendy K. Tatro
Wendy K. Tatro

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

In the Matter of the Application of Wasatch)	
Investments, L.C., for Change of Electric)	Case No. EO-2008-0031
Supplier.)	
<u>Stipulation of Facts</u>		

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE), Staff of the Missouri Public Service Commission (Staff), Office of Public Counsel (OPC), Wasatch Investments, L.C. (Wasatch) and Cuivre River Electric Cooperative, Inc. (Cuivre River), and for their Stipulation of Facts, state as follows:

1. Wasatch is the owner of real property located at 1665 Kemmar Court, within the city limits of O’Fallon, Missouri.
2. AmerenUE is an electric utility subject to the jurisdiction of the Missouri Public Service Commission (Commission). § 386.250 RSMo.
3. Cuivre River is a rural electric cooperative, organized pursuant to Chapter 394 of the Revised Statutes of Missouri.
4. 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.
5. 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.

6. The City of O’Fallon has a population of 46,169, according to the US Census Bureau’s 2000 census report as published in the 2005-2006 edition of the Missouri State Manual.

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

8. Currently, Cuivre River does serve customers within the city limits of O’Fallon. 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.

9. 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.

10. The Kemmar Court property is located within the certified service territory of AmerenUE.

11. AmerenUE has a franchise agreement with the City of O’Fallon.

12. Cuivre River does not have a franchise agreement with the City of O’Fallon.

13. 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.

14. Wasatch is currently not receiving electric service at the Kemmar Court location from any electric provider.

15. 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.

16. Cuivre River has distribution lines that bisect the Kemmar Court location.

17. AmerenUE does not currently have the facilities in place to serve the Kemmar Court location without obtaining additional easements and a permit from the Missouri Department of Natural Resources.

18. Neither AmerenUE nor Cuivre River is providing temporary service to Applicant at the Kemmar Court location.

Respectfully submitted,

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WIDGER & JOHNSON, L.L.C.**

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