

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

In the Matter of the Application of)
JERRY WEST and SHARON WEST)
to Change the Electrical Supplier for)
Part of their Property)

Case No. EO-2009-0272

STAFF RECOMMENDATION

COMES NOW Staff (“Staff”) of the Missouri Public Service Commission (“Commission”) and, for its recommendation that the Commission deny the Applicants’ request for relief, respectfully states as follows:

1. On November 14, 2008, Jerry and Sharon West (“Applicants”), filed a *Formal Complaint* with the Commission seeking for Cuivre River Electric Cooperative (“CREC”) to be the permanent electric service provider to all structures on their approximate six acres of property located at 7333 Weldon Spring Road, Dardenne Prairie, Missouri (hereinafter “Property”). The Property consists of a newly constructed residential home and caretaker home, two dog kennels, and a business office. The new residential home replaced an existing residential structure CREC served. Presently CREC provides permanent electric service to the longstanding structures on the Property and provides temporary electric service to the new structures per an agreement with Union Electric Company d/b/a/ AmerenUE (“AmerenUE”). This agreement between CREC and AmerenUE terminates on April 15, 2009.

2. In its Memorandum, attached hereto as Appendix A, Staff, for the grounds explained below, recommends the Commission determine it is without authority to authorize CREC to be the permanent electric service provider to new structures on the six acres of property located at 7333 Weldon Spring Road, Dardenne Prairie, Missouri, and deny the

Applicants' request. Staff reviewed the Commission's authority to grant this request under law applicable to territorial agreements and under changes of supplier law (anti-flip-flop statutes).

3. Commission Rule 4 CSR 240-2.070(10) states as follows:

The commission may order, at any time after the filing of a complaint, an investigation by its staff as to the cause of the complaint. The staff shall file a report of its findings with the commission and all parties to the complaint case. The investigative report shall not be made public unless released in accordance with sections 386.480, 392.210(2) or 393.140(3), RSMo, or during the course of a hearing involving the complaint.

Thus, the Staff's Report is a non-public document and the Staff is filing it as "Highly Confidential."

4. The Applicants' property is subject to a Territorial Agreement ("TA") entered into and approved by the Commission between CREC and AmerenUE on October 30, 1992 and March 5, 1993, respectively; designated Case No. EC-93-166.¹ "Competition to provide retail electric service, as between rural electric cooperatives, electrical corporations and municipally owned utilities may be displaced by written territorial agreements. . .". § 394.312 RSMo²; 4 CSR 240-3.140. Applicants were put on notice of the TA after contacting CREC about obtaining electrical service during the construction period. Then, Applicants sought AmerenUE's permission to release its rights in order to be served exclusively by CREC.

5. On December 19, 2008 AmerenUE filed an *Answer*. AmerenUE admitted to the allegations made in the Applicant's *Complaint*, other than that it would bore under a street to serve the Property, and agreed that it was not willing to release its right to serve new structures within its service territory to CREC, pursuant to the TA. AmerenUE sought for the

¹ *In the matter of the application of Union Electric Company and Cuivre River Electric Co-op, Inc., for approval of a written territorial agreement designating the boundaries of each as electric service supplier within a portion of St. Charles, County, Missouri*, Vol.2 MPSC 3d. 110 Case No. Eo-93-166 (Report and Order, decided March 5, 1993).

² All statutory references are from the 2000 edition unless otherwise noted.

Commission to dismiss the *Complaint* or otherwise change the case designation to a *Change of Supplier Case*.

6. On February 11, 2009, CREC filed its' *Response to Order Directing Filing*. CREC acknowledge Applicants request for it to be their exclusive service provider. CREC also directed the Commission to the TA entered into by CREC and AmerenUE, and noted that unless AmerenUE agreed to allow CREC to be the service provider to new structures that it could not grant Applicants' desires. CREC also noted at that date, it had not entered into an agreement with AmerenUE.

7. Applicants are the owners of the Property located at 7333 Weldon Spring Road, Dardenne Prairie, Missouri, Saint Charles County 63368 which they acquired in 1997. Dardenne Prairie was incorporated on October 20, 1981. The Property was annexed into the city on October 29, 1985. Dardenne Prairie, Mo., Ordinances § 61 (1985). According to the 1990 official United States decennial census report Dardenne Prairie's population was 1,769 and according to the 2000 official United States decennial census report, Dardenne Prairie's population was 4,384.³ In April 2001 the town of Dardenne Prairie became a Fourth Class City pursuant to § 79.010 RSMo.

8. A further look into the nature of the Property shows that it is located in a municipality. Rural Electric Cooperatives have the statutory authority to serve in "Rural Areas." § 394.030 RSMo. CREC is a rural electric cooperative subject to chapter 394 RSMo. 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(2) RSMo. The population of Dardenne Prairie is greater than 1,500 people.

³ United States Census Bureau, <http://factfinder.census.gov> (last visited Feb. 19, 2009).

9. The Commission's authority is limited to what powers are conferred upon it by statute. *Utilicorp United Inc., v. Platte-Clay Electric Co-op*, 799 S.W.2d 108, 109 (Mo.App.WD. 1990); *State ex. rel. Utility Consumers Council of Missouri, Inc. v. PSC*, 585 S.W.2d 41, 49 (Mo. banc. 1979). Statutes shall be interpreted by the plain language contained within the text of the statute. § 1.090 RSMo. Section 394.312.4 and 394.312.5 expressly give the Commission the authority to approve a territorial agreement after holding an evidentiary hearing if it concludes that the territorial agreement is not detrimental to the public interest. The Commission held an evidentiary hearing and approved the TA between CREC and AmerenUE pursuant to their statutory authority by its *Report and Order* in Case No. EC-93-166.

10. The TA sets out the boundaries of the electric service areas in which CREC and AmerenUE are designated as exclusive providers. *See* Appendix B, *Territorial Agreement* § 1(e). The Property is located within the service area designated exclusively to AmerenUE. The TA provides that existing structures located within AmerenUE's service area currently being served by CREC may continue being served by CREC.

11. The TA states that any new structures built within AmerenUE's or CREC's service area shall be governed by the TA. A "New Structure" is defined in the TA as "any structure which did not receive electric energy from either party prior to the effective date of this Agreement." *See* Appendix B, *Territorial Agreement* § 1(e). The TA states "[AmerenUE and CREC] shall have the exclusive right to furnish electric service to all new structures located within its respective electric service area . . .". Appendix B, *Territorial Agreement* § 2. In compliance with the TA, both of the new structures are to be served by AmerenUE.

12. However, the TA allows for a case-by-case exception in which AmerenUE and CREC may agree to "allow structures to receive service from one party though the structure is

located in the electric service area of the other. Such agreement shall be in writing and approved by both parties.” See Appendix B, *Territorial Agreement* § 7.

13. Although Applicants direct attention to the case-by-case exception set forth in the TA, AmerenUE and CREC have not to come to a written agreement to allow CREC to provide permanent service to the new structures on the Property. See Appendix B, *Territorial Agreement* §§ 2, 7. Since AmerenUE and CREC have not come to this agreement, the case-by-case exception is not applicable. The Commission’s authority with regard to territorial agreements is to determine in the first instance whether they are not detrimental to the public interest and, upon complaint, whether circumstances have changed such that the territorial agreement is no longer in the public interest; therefore, the Commission does not have the authority to determine if AmerenUE is being unreasonable in this matter. § 394.312 RSMo; *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission of Missouri*, 924 S.W.2d 597 (Mo. App. 1996). In 1993, by approving the TA, the Commission granted AmerenUE the authority to be the supplier of electrical service to the Property and found that the TA was not detrimental to the public interest. *In the matter of the application of Union Electric Company and Cuivre River Electric Co-op, Inc., for approval of a written territorial agreement designating the boundaries of each as electric service supplier within a portion of St. Charles, County, Missouri*, Vol.2 MPSC 3d. 110 Case No. Eo-93-166 (Report and Order, decided March 5, 1993). To allow CREC to serve the new structures would increase the lack of uniformity of service providers in the service area designated exclusive to AmerenUE in the TA rather than encourage the duplication of facilities in that area which is significant near the Property as shown by the photographs and description in Appendix A.

14. The anti-flip-flop statutes, sections 393.106 and 394.315 RSMo, authorize the Commission upon application by an affected party, to order a change of electrical suppliers if it is in the public interest for a reason other than a rate differential. In order to use these statutes the structures must be receiving permanent service. Pursuant to sections 393.106.1(1) and 394.315.1(1) permanent service is defined as “electrical service provided through facilities which have been permanently installed on a structure and which are designed to provide electric service for the structure’s anticipated needs for the indefinite future . . .”. Pursuant to sections 393.103.1(2) and 394.315.1(2) structure is defined, pertinent to the facts here as “. . . an agricultural, residential, commercial, industrial or other building . . . connected to the lines of an electrical supplier.” That the structures are receiving permanent service is a requirement when asking the Commission to change suppliers. § 393.106 RSMo; § 394.315 RSMo; 4 CSR 240-3.140; *see St. Joseph Light & Power v. United Electric Co-op*, 43 S.W.3d 330, 334 (Mo. App. W.D. 2001). The Applicants are requesting that CREC be the supplier of electricity to the new structures on their Property, which are not receiving permanent service; therefore, there is no relief available to them under the anti-flip-flop statutes.

15. Applicants claim their reason for wanting CREC to be their service provider for the new structures is that they are concerned for safety in the event of a fire or other emergency; potential confusion as to which company services which buildings; resale value potentially affected by having to electrical supplies; and not having duplicated equipment on the property. As noted in Appendix A, an avenue in which the Applicants could accomplish their goal would be to request, under the anti-flip-flop statutes and Commission rule 4 CSR 240-3.140(1), that the existing structures be serviced by AmerenUE, rather than CREC.

16. Although CREC may be ready, willing, and able to serve the Property, Staff believes the Commission is without authority from legislature to order the relief the Applicants' request. Absent an agreement between AmerenUE and CREC to the contrary, the TA is binding and in effect and governs the Applicants' request.⁴

WHEREFORE, for the foregoing reasons discussed in detail in the Staff's Memorandum, the Staff recommends the Commission issue an Order in which it (1) denies Jerry and Sharon West the relief they request.

Respectfully submitted,

/s/ Jaime N. Ott

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⁴ Additionally, Staff explored for other issues that might affect the Applicants' ability to achieve their goal. Staff looked into CREC's authority to serve in a municipality with a population greater than 1,500 inhabitants. Pursuant to § 394.080(2) RSMo, a cooperative may continue to supply electricity in a municipality that has exceeded a population of 1,500 if (1) "the cooperative was the predominate supplier of retail electric energy" before the census report declared the town greater than 1,500 inhabitants; and (2) "the city, town or village has granted the cooperative a franchise to supply electric energy within the city, town or village." Staff was unable to ascertain whether CREC was the predominate supplier of electrical energy prior to the 1990 census report and whether Dardenne Prairie granted CREC a franchise to serve in the city. Also, no party raised this issue in the matter. Therefore, Staff was unable to provide a complete and accurate analysis in regards to this concern. Furthermore, the "Grandfather provision" contained in § 394.080.1(4) RSMo is not relevant to this matter because the statute is only applicable to existing structures prior to annexation. Since the Applicants' are requesting service to the new structures, this provision is not applicable.

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 20th day of March, 2009.

/s/ Jaime N. Ott