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.	))))	Case No. EO-2022-0190

CO-MO'S SUR-RESPONSE TO AMEREN MISSOURI'S MOTION FOR SUMMARY DETERMINATION

COMES NOW Co-Mo Electric Cooperative ("Co-Mo") and for its Sur-Response to Ameren Missouri's Motion for Summary Determination hereby states as follows:

Ameren Missouri's Reply to Co-Mo's Response to Ameren Missouri's Motion for Summary Determination (Ameren Missouri's Reply) reflects Ameren Missouri's ongoing strenuous attempt to force a cooperative member, Mr. Thurman, against his preference to take electric service from Ameren Missouri when the new law passed last session by the General Assembly provides a method by which that result certainly can be avoided by the exercise of new powers granted to the Commission. It also reflects Ameren Missouri's continuing effort to delay this proceeding and thereby frustrate Mr. Thurman's planned construction schedule.

AMEREN MISSOURI'S ARGUMENT

Apparently abandoning its earlier argument about the "exclusivity" of its certificate, Ameren Missouri's fundamental argument in its Reply appears to be that Subsection 3 of Section 386.800 RSMo[1] only is triggered, and the Commission granted jurisdiction, when--and only

[1] *RSMO 386.800.3*: "In the event an electrical corporation rather than a municipally owned electric utility lawfully is providing electric service in the municipality, all the provisions of subsection 2 of this section shall apply equally as if the electrical corporation were a municipally owned electric utility, except that if the electrical corporation and the rural electric cooperative are unable to negotiate a territorial agreement pursuant to section 394.312 within forty-five days, then either electric service supplier may file an application with the commission for an order determining which electric service supplier should serve, in whole or in part, the area to be annexed. The application shall be made pursuant to the rules and regulations of the commission governing applications for certificates of public convenience and necessity. The commission after the opportunity for hearing shall make its determination after consideration of the factors set forth in subdivisions (1) to* (7) of subsection 2 of this section, and section 394.080 to the contrary notwithstanding, may grant its order upon a finding that granting of the applicant's request is not detrimental to the public interest. The commission shall issue its decision by report and order no later than one hundred twenty days from the date of the application unless otherwise ordered by the commission for good cause shown. Review of such commission decisions shall be governed by sections 386.500 to 386.550. If the applicant is a rural electric cooperative, the commission shall charge to the rural electric cooperative the appropriate fees as set forth in subsection 9 of this section."

when--the electrical corporation/investor-owned utility (IOU) is "extending" its service territory. It arrives at this result by arguing that the Commission should simply substitute "electrical corporation" for "municipally owned electric utility" in the first sentence of Subsection 2 of RSMo 386.800.[2] This approach would make the first sentence of Subsection 2 read: "*Any electrical corporation may extend, pursuant to lawful annexation, its electric service territory to include areas where another electric supplier currently is not providing permanent service to a structure".* While making Ameren Missouri's requested word substitution certainly makes sense respecting all the other applicable sentences in Subsection 2, it does not work or make any sense respecting the first sentence for two reasons. The first is the phrase *"pursuant to annexation".* The second is the phrase *"to include areas where another electric supplier currently is not providing permanent service to a structure".*

The first phrase is discussed in detail below. The second phrase is quickly disposed of because on its face it would constitute a radical change to longstanding law that certainly could not have been the legislative intent. While the cooperatives certainly wish there was, there never has been such a restriction placed on IOUs by statute or by Commission decision. In fact, there have been numerous instances over many years where the IOU received its certificate, over the objections of the neighboring cooperative, authorizing it to serve in areas where the cooperative

[2] Section 386.800.2*: "*Any municipally owned electric utility may extend, pursuant to lawful annexation, its electric service territory to include areas where another electric supplier currently is not providing permanent service to a structure. If a rural electric cooperative has 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 the existing developers, landowners, or prospective electric customers in the area proposed to be annexed may, anytime within forty-five days prior to the effective date of the annexation, submit a written request to the governing body of the annexing municipality to invoke mandatory good faith negotiations under section 394.312 to determine which electric service supplier is best suited to serve all or portions of the newly annexed area. In such negotiations the following factors shall be considered, at a minimum:

(1) The preference of landowners and prospective electric customers;
(2) The rates, terms, and conditions of service of the electric service suppliers;
(3) The economic impact on the electric service suppliers;
(4) 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;
(5) Avoiding the wasteful duplication of electric facilities;
(6) Minimizing unnecessary encumbrances on the property and landscape within the area to be annexed; and
(7) Preventing the waste of materials and natural resources.

If the municipally owned electric utility and rural electric cooperative are unable to negotiate a territorial agreement pursuant to section 394.312 within forty-five days, then they may submit proposals to those submitting the original written request, whose preference shall control, section 394.080 to the contrary notwithstanding, and the governing body of the annexing municipality shall not reject the petition requesting annexation based on such preference. This subsection shall not apply to municipally owned property in any newly annexed area."

already was providing permanent service to structures.[3] Surely Ameren Missouri is not really suggesting that such a new restriction is now imposed on the IOUs by new Subsection 2, but if it is, as it must be using Ameren Missouri's own method of interpretation in this proceeding, the Commission and Ameren Missouri should expect the cooperatives to demand enforcement of that restriction in all future IOU certificate cases.

A. Only Municipally Owned Utilities Extend Their Service Territory Pursuant to Annexation

Simply substituting "electrical corporation" for "municipally owned electric utility" in Subsection 2 in order to deny the Commission jurisdiction in this case ignores the very next phrase, "*pursuant to lawful annexation*". Electrical corporations do not and cannot extend their electric service territory pursuant to lawful annexation under Missouri law. Missouri's annexation statutes, found in Chapters 71, 72, 77, 79, 81 and 82, make no mention whatsoever of electrical corporations regulated by the Commission. The only way an IOU can "extend" its service territory is to apply for and receive a certificate of convenience and necessity from the Commission.[4] Subsections 2 & 3 of newly revised RSMo 386.800 do not substitute annexation for the long-standing method of extending IOU service territories pursuant to Section 393.170. If that was the legislative intent, Section 393.170 would be somehow referenced in the new law. Ameren Missouri cannot merely substitute words and then ignore the logical effect these new words have when read in light of other laws. A legitimate statutory interpretation that arrives at the correct legislative intent is not a matter of mere substitution of selected words, especially when those words placed in context with the rest of the sentence simply make no sense. Sections 393.170 and new Section 386.800 both relate to the same subject matter: where, when, and to

[3] See, e.g. State ex rel. Ozark Electric Cooperative v. PSC, 527 S.W.2d 390 (Mo. App. 1975).
[4] Section 393.170 RSMo.

what extent and IOU may provide service. On its face, Ameren Missouri's interpretation grants it the new right to extend its service territory solely by virtue of municipal annexation, which results in a direct conflict with Section 393.170. When a statutory conflict appears, the conflicting statutes must then be read together. "We read statutes relating to the same subject matter *in pari materia,* meaning that we interpret and apply them with reference to each other."[5] However, attempting to harmonize the two statutes under Ameren Missouri's approach necessarily must negate and render meaningless the entire phrase "pursuant to lawful annexation". There is a long history of case law in Missouri which asserts that imparting words into a statute that are not plainly written or necessarily implied should be avoided and missing words should only be supplied when, as written, the statute leads to "absurd" results.[6] Ameren Missouri's approach places words in a sentence that are not there, and in so doing, renders the remaining words in the sentence at best meaningless, and at worst, contrary to other law. Section 386.800 under Co-Mo's interpretation does not lead to such "absurd" results, while Ameren Missouri's does and is, therefore, unsupported under Missouri case law.

Ameren Missouri's deceptively simple word substitution approach easily could be seen to effectively nullify Section 393.170 with respect to the annexation scenario. The result of this nullification would be to remove Commission jurisdiction in favor of unilateral action by a municipality, which is contrary to public policy of the regulation of investor-owned utilities by the Commission. If the General Assembly's intent was to carve out an exception to, or to override, Section 393.170 it would have included "notwithstanding" language. It did not. The General Assembly did, however, include such "notwithstanding" language with regard to Section

[5] State ex rel BPS Tel. Co. v. Missouri Pub. Serv. Comm'n, 285 S.W.3d 395, 405 (Mo. Ct. App. 2009), citing *Allright Props., Inc. v. Tax Increment Fin. Comm'n of Kansas City*, 240 S.W.3d 777, 779 (Mo. App. W.D. 2007).
[6] Ming v. Gen. Motors Corp., 130 S.W.3d 665, 669–70 (Mo. Ct. App. 2004) citing *See Wilkinson *670 v. Brune*, 682 S.W.2d 107, 111 (Mo.App. E.D.1984); *State ex rel. May Department Stores Co.*, 395 S.W.2d 525, 527 (Mo.App.1965).

394.080 (the 1,600 rule) for the Cooperatives, thereby demonstrating a clear intent to carve out an exception to the 1,600 rule in the new law.[7] Such a carve out relating to Section 393.170 would be necessary in order for Ameren Missouri's approach to truly reflect the legislative intent.

B. Attempting To "Put The Square Peg Into The Round Hole"

Ameren Missouri's suggestion of moving and replacing "electrical corporation" in Section 2 of the new Section 386.800 also ignores the fact that the General Assembly has set out separate IOU and municipally owned electric utility boundary/territory laws. Municipally owned utilities historically have only been able to expand their service territory by annexation.[8] In contrast, IOUs historically have only been able to extend their service territory by obtaining a certificate of convenience and necessity from the Commission.[9]

Ameren Missouri's suggestion of moving words around in new RSMo 386.800 has the effect of making Subsection 3 virtually useless as it would then only apply in those relatively rare situations where the IOU has not already sought and received a certificate of convenience and necessity covering the subject property. A look at the Commission's own IOU electric service territory map illustrates just how rare such a situation would be given the large geographic extent of the IOU's service areas throughout most of the state. This certainly could not have been the General Assembly's intent given that new Section 386.800 clearly applies to *all* municipally owned electric utilities in *every* context of municipal annexation. If it applies to all municipally owned electric utilities whenever there is an annexation, it is likewise reasonable to conclude that it also applies to all IOUs whenever there is an annexation.

Contrary to the logical result of Ameren Missouri's argument, new Section 386.800 does not purport to change existing longstanding service area boundary laws but rather

[7] See Section 386.800.2, 3 and 10.
[8] Section 386.800, subsections 2 and 4 RSMo.
[9] RSMo 393.170

that it allows, on a case-by-case basis, customer/annexing landowners to have a choice of service provider prior to annexation under both the municipally owned electric utilities and IOU scenarios--and then only **IF** the landowner requests service from the cooperative and the specified procedures are followed. There necessarily will be numerous situations where the customer/annexing landowner will not prefer service from the cooperative, for example, when the IOU or municipally owned electric utility provides incentives (such as tax benefits or economic development rates that the cooperative cannot offer), or when it simply does not matter to them and whichever supplier that is serving within the municipality's boundaries wins by default. This practical reality is apparent in the processes set forth in the new law, and in any event, certainly can be "necessarily implied". Ameren Missouri's approach asks the Commission to totally ignore all this. "Provisions not found plainly written or necessarily implied from what is written will not be imparted or interpolated therein in order that the existence of (a) right may be made to appear when otherwise, upon the face of (the statutes), it would not appear."[10] We will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an "absurd" or illogical result.[11] Ameren Missouri's selective word substitution approach necessarily leads to such results.

The only reasonable way to properly understand the first sentence of new Subsection 2 is to give the word "extend" the express meaning in its structural position in the sentence, which results in its application being limited to municipally owned utilities only. Further, "expansion via annexation" cannot lawfully apply to an IOU in the absence of specific changes to other statutes, e.g. Sections 393.170, 386.250 RSMo. Contrary to Ameren Missouri's interpretation,

[10] Missouri Pub. Serv. Co. v. Platte-Clay Elec. Co-op., Inc., 407 S.W.2d 883, 891 (Mo. 1966), quoting Allen v. St. Louis-San Francisco Ry. Co., 338 Mo. 395, 402, 90 S.W.2d 1050, 1053, 105 A.L.R. 1222, cited with approval in State ex rel. Mills v. Allen, 344 Mo. 743, 128 S.W.2d 1040, 1043.' St. Louis County Library District v. Hopkins, Mo.Sup., 375 S.W.2d 71, 75.

[11] Perkins v. Bridgeton Police Dep't, 549 S.W.3d 504, 506 (Mo. Ct. App. 2018); citing *Lumetta v. Sheriff of St. Charles Cty.*, 413 S.W.3d 718, 720 (Mo. App. E.D. 2013).

Co-Mo's interpretation is much more consistent with the public policy that requires Commission review and jurisdiction over IOU service territories.

C. The General Assembly's Public Policy

New Section 386.800 is the most recent pronouncement by the General Assembly which reflects its intent regarding "the coexistence of the regulated and unregulated suppliers of electricity and of the competition such coexistence engenders".[12] The General Assembly has specifically encouraged the use of territorial agreements to address such competition as the stated and preferred public policy of the state.[13] Likewise, the Commission itself has encouraged Ameren Missouri's predecessor (and the Cooperatives) to use territorial agreements.[14] As the Commission knew then and knows now, such agreements are voluntary. The General Assembly in new Section 386.800 accordingly has now, in practical effect, provided an "incentive" for IOUs (which was absent in the prior law) to try to voluntarily resolve territorial issues in the first instance by, for the first time, allowing a cooperative to petition the Commission to determine "*which electric supplier should serve, in whole or in part, the area to be annexed"* when the landowner request for service from the cooperative.[15] The General Assembly again has encouraged territorial agreements specifically in new Section 386.800, not only in new Subsections 2 and 3, but also by adding a new reference to territorial agreements in new Section 1(4).[16] Co-Mo in good faith attempted to negotiate a territorial agreement with Ameren Missouri prior to filing its Application with the Commission. Negotiations were ineffectual as Ameren Missouri thus far has refused to consider any scenario in which Co-Mo would serve Mr.

[12] Case No. EA-87-159 et al., 30 Mo. P.S.C. (N.S.) 185, 196
[13] *Id.*
[14] *Id.*
[15] Section 386.800.2 RSMo.
[16] Section 386.800.1(4), the "City of Utilities of Springfield section".

Thurman's Fox Hollow Subdivision. Despite Ameren Missouri's unwillingness to negotiate, Co-Mo remains ready and willing to do so throughout Co-Mo's rural service area.

But more importantly, the entire focus of new Section 386.800 is on the customer and that customer's preference on which electric supplier is to provide service, as demonstrated in numerous places throughout the new law. Customer preference is given priority as the very first factor listed in Subsection 2. It is even reflected in the new change to new Subsection 8(1) respecting buy outs of other suppliers by municipally owned utilities.[17] It further continues to again acknowledge competition, and again focus on the customer (and not the suppliers), by specifically giving the competing suppliers "two bites of the apple" or chances to convince the new customer prior to annexation.[18] That the new law's emphasis on customer preference is the overriding intent of the General Assembly also is reflected in making the customer preference *final* in the case of municipally owned electric utilities, where there is no "appeal" to the Commission. Only in the IOU scenario are the competing suppliers allowed the additional, further option of coming before the Commission to determine whether the customer's preference would somehow be detrimental to the public interest. This additional step in the IOU scenario is entirely consistent with the state's public policy of plenary Commission regulation of IOUs.

Ameren's argument in this case is contrary to the clear intent and policy of the General Assembly as first reflected in 1989, further strengthened today in *all* the sections of new RSMo 386.800, and in the other still existing statues when read together and in overall context. Ameren Missouri knows full well that IOUs do not obtain or extend their "service territory" through *annexation* but rather through procedures outlined in Section 393.170 and that the new law was

[17] Section 386.800 RSMo addresses the process to be followed in a municipally owned utility buy out of the existing customers and facilities of a cooperative or an IOU as part of annexation. If the parties are unable to agree, the matter would go before the Commission. The prior version of the law allowed only the municipally owned utility to petition the Commission. The new law now allows either party to petition the Commission and also now requires the Commission to take into account the preference of the owner of any affected structure.

[18] Ameren Missouri had plenty of opportunities to convince Mr. Thurman to choose its service over Co-Mo's prior to the annexation.

not intended to limit IOU expansion only into areas where a competing supplier is not serving existing structures. It nevertheless would have the Commission adopt such a statutory interpretation because, of course, that means that Ameren Missouri can force customers to take its service in this and in all similar cases in the future.

Under new Section 386.800, *the Commission* is given the jurisdiction to determine whether the IOU or the cooperative gets to extend its existing facilities in order to serve the new customer when an annexation occurs. This power is granted to the Commission, not to Ameren Missouri. Ameren Missouri's existing certificate authority merely gives it the legal right to compete for the new customer, not force the new customer to take its service by default through a deceptively simple statutory interpretation requiring the substitution of words. That the General Assembly chose not to duplicate the lengthy language contained in Section 2 into Section 3 but rather simply incorporated new Subsection 2 into Subsection 3, does not mean that the legislative intent of the new law was to, by default, deny the landowner their preference, nor by default preclude the Commission from hearing this Application and making a determination of which supplier should serve, nor to create a statute which would be in direct conflict with or override Section 393.170. The General Assembly has provided the Commission new authority to determine whether the IOU or the Cooperative should provide service within the context of competition and customer preference. The Commission should liberally construe its powers to do so in the interest of substantial justice between patrons and public utilities.[19] It is the interests of the customer, and the public generally, that should control here, not Ameren Missouri's private pecuniary interests.

The Commission should reject Ameren Missouri's argument to simply substitute words in new Section 386.800 while ignoring the effect of the sentence in full context because it: (1)

[19] Section 386.610 RSMo

creates an "absurd" result in violation of case law on statutory interpretation; (2) obliterates longstanding Commission law and the supervisory powers bestowed upon it by the General Assembly through longstanding and separate service area statutes for IOUs and municipally owned utilities, without any support therefore in the statute itself; and (3) runs counter to the clear intent of the General Assembly's new and clear focus on the customer, as opposed to the electric provider, in new Section 386.800.

WHEREFORE, Co-Mo respectfully requests that the Commission issue an Order denying Ameren Missouri's Motion for Summary Determination and granting Co-Mo's Application. Co-Mo requests such other and further relief as is just and proper under the circumstances.

Respectfully submitted,

/s/ Megan E. Ray
Megan E. Ray #62037
Andereck Evans, L.L.C.
3816 S. Greystone Court, Suite B
Springfield, MO 65804
Telephone: 417-864-6401
Facsimile: 417-864-4967
Email: mray@lawofficemo.com

Attorney for Co-Mo Electric Cooperative

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail, on March 1, 2022, to the following:

Office of the Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, Missouri 65102
opcservice@ded.mo.gov

Missouri Public Service Commission
Staff Counsel Department
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, Missouri 65102
staffcounselservice@psc.mo.gov

Wendy Tatro
Director and Assistant General Counsel
1901 Chouteau Ave., MC 1310
St. Louis, MO 63103
AmerenMOService@ameren.com

James B. Lowery
JBL Law, LLC
3406 Whitney Ct.
Columbia, MO 65203
lowery@jbllawllc.com

/s/ Megan E. Ray