

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

In the Matter of the Application of Wasatch Investments, LC for change of supplier.	) ) )	Case No. EO-2008-0031
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**STAFF RECOMMENDATION THE COMMISSION ISSUE ORDER TO SHOW CAUSE**

Comes now the Staff of the Missouri Public Service Commission (Staff), by counsel, and for its Recommendation the Commission issue an order to show cause why the application should not be dismissed, states as follows:

It appears this application should be dismissed because the application was not filed by an attorney licensed to practice law in the state of Missouri when the Applicant is a legal entity. It also appears this application should be dismissed because no utility is providing permanent service to the Applicant.

The application filed by Wasatch Investments, LC, was signed by Ronald Lee Fruend as “member.” According to the Missouri Secretary of State website Wasatch Investments, LC is a Missouri limited liability company created August 24, 2001, that changed its name to Secure N’ Save Storage LLC on August 20, 2007. There is no indication that Mr. Fruend is a Missouri licensed attorney. As a limited liability company the Applicant must be represented by an attorney before the Commission. Rule 4 CSR 240-2.040(5) provides that a natural person may only represent himself before the Commission.

“A corporation cannot appear in a legal proceeding except through an attorney”. *Stamatiou v. El Greco Studios, Inc.*, 935 S.W.2d 701,702, and *See Reed v. Labor and Industrial Relations Commission*, 789 S.W.2d 19, 21 (Mo. banc 1990); *Property Exchange & Sales, Inc. v. Bozarth*, 778 S.W.2d 1, 2 (Mo.App.1989); *Credit Card Corporation v. Jackson County Water*

*Company*, 688 S.W.2d 809, 811 (Mo.App.1985); *Dobbs Houses, Inc., v. Brooks*, 641 S.W.2d 441, 443 (Mo.App.1982).

The application in this case should be dismissed because there is no indication it was filed by an attorney licensed to practice law in this state as required by not only Rule 4 CSR 240-2.040(5), but also Missouri law.

The Applicant is seeking Commission authorization for Cuivre River to supply electric service to its structure in O'Fallon, Missouri.

The anti-flip-flop statutes of 393.106 and 394.315, RSMo. 2000, provide that the Commission is to determine whether a change of provider to a structure "is in the public interest for a reason other than a rate differential." It is the Staff's understanding that Cuivre River Electric Cooperative, Inc., is providing temporary service to Applicant. Therefore, neither of the anti-flip-flop statutes applies.

Under section 394.080.1(4) an electric cooperative has 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. (emphasis added)

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.

The Applicant's property is located within the city limits of O'Fallon, Missouri at 1665 Kemmar Court. O'Fallon has a population of 46,169 according to the US Census Bureau's 2000 dicennial census report as published in the 2005-2006 edition of the Missouri State Manual. Therefore, unless an exception applies, Cuivre River is prohibited by law from serving the Applicant.

None of the exceptions appear to apply. Section 394.080.1(4) provides that:

Where a cooperative has been transmitting, distributing, selling, supplying or disposing of electric energy in a rural area which, by reason of increase in its population, its inclusion in a city, town or village, or by reason of any other circumstance ceases to be a rural area, such cooperative shall have the power to continue to transmit, distribute, sell, supply or dispose of electric energy therein until such time as the municipality, or the holder of a franchise to furnish electric energy in such a municipality, may purchase the physical property of such cooperative located within the boundaries of the municipality...

Accordingly, the cooperative may continue to serve those customers in the city limits of O'Fallon that it served prior to annexation. Those customers are subject to a "grandfather" provision to allow the cooperative to continue to provide electricity to those structures after annexation. Section 394.080.1(4) and see *Farmers Elec. Co-op., Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266 (Mo. banc 1998).

But the grandfather provision in section 394.080.1(4) is limited by section 394.315.2:

Once a rural electric cooperative...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 permitted in the context of municipal annexation, pursuant to section 386.800 RSMo, and section 394.080, or pursuant to a territorial agreement approved under section 394.312.

The cooperative must be serving a specific structure prior to annexation in order to have authority to continue service. In *Union Electric Company v. Platte-Clay Electric Cooperative, Inc.*, 814 S.W.2d 643, Platte-Clay Electric Cooperative sought to serve a customer annexed into the City of Excelsior Springs. At the time of annexation the only structure on the property was a barn that did receive electric service from the coop. The barn was razed and no structure existed on the property for several months. Thereafter, the coop provided electricity to the property to facilitate construction of two new structures. The coop continued to serve two new structures when Union Electric filed a petition to enjoin the coop from providing permanent electric service to the new structures. The court held that "the meaning of the language of 394.315 is plain and

clear. The statute prohibits a rural electric cooperative...from providing electrical energy to new structures on a particular tract of land even though it was serving an existing structure on that tract prior August 13, 1986” (the date 394.314 became effective).

In the same way the Missouri Supreme Court in *Farmers’ Electric Cooperative, Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266, held that only the city [or its franchisee] could lawfully supply electricity to a new structure built after annexation. In *Farmers’*, the Dept. of Corrections entered into a 20-year contract with the Farmers’ Electric Coop to supply the department with all the electricity that the department may need on a tract of land. The tract was outside the city of Cameron at the time of the contract. In 1988 the department built a new facility, the Western Missouri Correctional Center (Western), on the tract and Farmers’ continued to serve the new structure. In 1994 the city of Cameron annexed the tract of land including Western. At the time of annexation, Cameron had more than 1500 inhabitants. In 1995 the department announced plans to build a second facility, Crossroads Correctional Center (Crossroads), on the same tract of land and sought bids from Farmers’ and Cameron to supply electricity. The department awarded the contract to Cameron and Farmers’ sued for breach of contract. The Court held that “Farmers’ may not provide service to Crossroads merely because it has the authority under section 394.080.1(4) to continue providing service to the structures it was serving before the land was annexed.” *Id.* at 270. “Because Farmer’s never provided electricity to Crossroad prior to annexation, section 394.315.2 does not provide a basis for Farmers’ to provide electric service to Crossroads. Once the land in the contract was annexed, Farmers’ no longer had the right to provide electric service to any new structures built on the land.” *Id.* at 271.

In the case before the Commission, the facts alleged do not establish that Cuivre River was serving the Applicant's structure prior to annexation of the area by O'Fallon. It appears the Applicant is a new customer with a new structure that needs electric service. Unless Cuivre River had served the Applicant's structure prior to annexation of the area by the city of O'Fallon, Cuivre River does not have the statutory authority to serve the applicant.

The Staff believes the Applicant could lawfully obtain electric service from Cuivre River through a territorial agreement between Cuivre River, AmerenUE and the City of O'Fallon under section 394.315.2, RSMo 2000.

Counsel suggests that the Commission direct the applicant, Union Electric Company, d/b/a AmerenUE, and Cuivre River to respond to this analysis.

Wherefore, the Staff recommends the Commission issue an order directing the Applicant to show cause why its application should not be dismissed for the grounds stated above, and directing AmerenUE and Cuivre River to respond to the Staff's analysis.

Respectfully submitted,

**/s/ Steven C. Reed**

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 14th day of September, 2007.

/s/ Steven C. Reed\_\_\_\_\_