

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 29th day  
of May, 2008.

In the Matter of the Application of Wasatch                     )  
Investments, LC, for Change of Electric Supplier.        ) **Case No. EO-2008-0031**

**ORDER GRANTING SUMMARY DETERMINATION  
AND DISMISSING APPLICATION**

Issue Date: May 29, 2008

Effective Date: June 8, 2008

**Syllabus:** This order grants, on the basis of the undisputed evidence before the Commission and the governing law, Union Electric Company d/b/a AmerenUE's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Summary Determination and dismisses the Application of Wasatch Investments, LC, for Change of Electric Supplier.

**BACKGROUND**

On August 1, 2007, Wasatch Investments, LC, ("Wasatch") filed a verified application for a change of electric supplier from Union Electric Company, d/b/a AmerenUE, to Cuivre River Electric ("Cuivre River"). The change of supplier request was for electric service supplied to a business to be operated by Mr. Ronald L. Fruend at 1665 Kemmar Court, O'Fallon, Missouri 63145.

On August 2, 2007, the Commission issued a Notice of Request for Change of Electric Supplier, Order Adding Parties, and Order Directing Filings. That order, among other things, added AmerenUE and Cuivre River as necessary parties and directed the Commission's Staff to file a recommendation regarding the application.

On September 14, 2007, Staff filed its recommendation. Based upon its review of Wasatch's application, Staff recommended the Commission dismiss that application as unlawful. However, Staff believed Wasatch 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.<sup>1</sup> Staff further recommended the Commission direct Wasatch, AmerenUE and Cuivre River to respond to its analysis.

On October 1, 2007, the Commission issued an order directing each party to file a response to the arguments raised on pages 2 through 5 of Staff's recommendation. AmerenUE, Cuivre River and Wasatch each filed a response. Based upon Staff's recommendation, AmerenUE asked the Commission to deny Wasatch's application and Cuivre River retracted its prior request that the Commission grant the application. In its response Wasatch agreed that the Kemmar Court location is within the city limits of O'Fallon, Missouri, and therefore Cuivre River cannot provide service to that location absent a territorial agreement between Cuivre River, AmerenUE, and O'Fallon. However, Wasatch nevertheless reiterated its request that the Commission grant its change of supplier request.

On October 18, 2007, the Commission issued an order, which among other things, directed the parties to prepare and file both a list of stipulated facts to which all parties agree and a list of facts in dispute. After significant delays, the parties jointly filed a Stipulation of Facts on January 10, 2008. A list of facts in dispute was never filed.

Prehearing conferences were conducted on November 1, 2007, and on January 29, 2008. This matter is currently set for an evidentiary hearing on June 11, 2008.

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<sup>1</sup> All references to the Revised Statutes of Missouri are to the 2000 edition unless otherwise noted.

On April 30, 2008, AmerenUE filed a motion for summary determination asking the Commission to dismiss Wasatch's application for lack of subject matter jurisdiction. AmerenUE alleges that there are no disputed material facts and that Wasatch's application should be dismissed as a matter of law. On May 6, Cuivre River filed a pleading concurring in that motion. On May 14, the Commission issued an order establishing May 23 as the deadline by which any party wishing to file a response in opposition to AmerenUE's motion for summary determination must do so. On May 23 Wasatch filed its response to AmerenUE's motion to dismiss for lack of subject matter jurisdiction.

### **FINDINGS OF FACT**

The Commission finds the following facts, stipulated to by all parties in the Stipulation of Facts filed on January 10, 2008, are true:

1. AmerenUE is an electric utility subject to the jurisdiction of the Commission.
2. Cuivre River is a rural electric cooperative, organized pursuant to Chapter 394 of the Revised Statutes of Missouri.
3. Under Section 394.080.1(4) RSMo Cuivre River has the power to "...generate, manufacture, purchase, acquire, accumulate and transmit 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."
4. A "rural area" is defined under Section 394.020(3) RSMo 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."
5. Wasatch is the owner of real property located at 1665 Kemmar Court.
6. 1665 Kemmar Court is located within the city limits of O'Fallon, Missouri.

7. The City of O'Fallon, Missouri, has a population of 46,169.<sup>2</sup>
8. Currently, Cuivre River serves customers within the city limits of O'Fallon, Missouri. 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.
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.
10. Cuivre River does not desire at this time, or anticipate in the future, entering into a Territorial Agreement with any other electric supplier that encompasses the Kemmar Court location within the city limits of O'Fallon.
11. The Kemmar Court location is within the certificated service territory of AmerenUE.
12. AmerenUE has a franchise agreement with the City of O'Fallon.
13. Cuivre River does not have a franchise agreement with the City of O'Fallon.
14. The Missouri anti-flip-flop statutes, Sections 393.106.2 and 394.315.2 RSMo, and the exceptions contained therein, are applicable only after an electric corporation or cooperative "commences" providing electric service to a facility.
15. Wasatch is currently not receiving electric service at the Kemmar Court location from any electric provider.

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<sup>2</sup> U.S. Census Bureau's 2000 Census Report.

16. Neither AmerenUE nor Cuivre River is currently providing temporary service to Wasatch at the Kemmar Court location.

17. AmerenUE and Cuivre River have not entered into, and have no plans to enter into, a territorial agreement that would include the Kemmar Court location.

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

19. AmerenUE does not currently have facilities in place to serve the Kemmar Court location and must obtain additional easements and a permit from the Missouri Department of Natural Resources prior to installing the requisite facilities.

Based upon party positions and admissions contained in pleadings and on-the-record statements of position made during the January 29, 2008 Prehearing Conference, the Commission finds the following additional facts are true:

20. Cuivre River is not willing to provide electric service to Wasatch at the Kemmar Court location.<sup>3</sup>

21. The provisions of Sections 394.080(4) and 394.020(3) RSMo do not allow Cuivre River to serve Wasatch.<sup>4</sup>

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<sup>3</sup> Tr. page 17, lines 2-16; See also: *Cuivre River Electric Cooperative Inc.'s Response to Order Directing Parties to Respond*, filed in this case on October 9, 2007; and *Cuivre River Electric Cooperative Inc.'s Concurrence to Union Electric d/b/s AmerenUE's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Summary Determination*, filed in this case on May 6, 2008.

<sup>4</sup> *Wasatch Investments, LC, Response to Order Directing Parties to Respond*, filed in this case on October 12, 2007; *Staff Recommendation the Commission Issue Order to Show Cause*, filed in this case on September 14, 2007, page 2; *AmerenUE Response to Order Directing Parties to Respond*, filed in this case on October 12, 2007; and *Cuivre River Electric Cooperative Inc.'s Concurrence to Union Electric d/b/a AmerenUE's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Summary Determination*, filed in this case on May 6, 2008.

## **CONCLUSIONS OF LAW**

### **Jurisdiction over Parties**

AmerenUE is an electrical corporation within the intendments of Section 386.020(15) and a public utility pursuant to Section 386.020(42) RSMo Supp. 2007. The Commission thus has jurisdiction over Ameren's services, activities, and rates pursuant to Sections 386.020(42), 386.250 and Chapter 393.

Cuivre River is a rural electric cooperative, organized pursuant to Chapter 394 RSMo. The Commission does not have jurisdiction over the services, activities, and rates of rural electric cooperatives such as Cuivre River except as specified in Section 394.160 and Section 394.312.

### **Standard of Review for Summary Determination**

Commission Rule 4 CSR 240-2.117, which is titled "Summary Disposition," authorizes the Commission to decide all or any part of a case "by disposition in the nature of summary judgment or judgment on the pleadings." One type of summary disposition permitted under the Commission's rules, called "determination on the pleadings," is authorized by Commission Rule 4 CSR 240-2.117(2), which allows the Commission to decide a case on the pleadings in "appropriate circumstances."<sup>5</sup> Those circumstances are set forth in the text of the rule as follows:

Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.

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<sup>5</sup> Determination on the Pleadings, *In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc.*, Case No. TD-2003-0582 (Nov. 4, 2004).

This is not a case seeking a rate increase, or a case subject to an operation of law date. The public interest clearly favors the quick and efficient resolution of matters before the Commission on the pleadings without an evidentiary hearing when the circumstances dictate.<sup>6</sup> Moreover, to do so in this particular case will not be “otherwise contrary to law” since no genuine factual dispute remains for hearing,<sup>7</sup> one of the parties is entitled to a determination in its favor as a matter of law,<sup>8</sup> and the contents of the parties’ pleadings, including the Stipulation of Facts, the responses to the Commission’s October 1, 2007 Order Directing Parties to Respond, Cuivre River’s concurrence to AmerenUE’s motion to dismiss and for summary determination, Staff’s recommendation, as well as on-the-record positions taken during the January 29 Prehearing Conference,<sup>9</sup> make it plain that the merits of this controversy can be fairly and fully decided in a summary manner. Indeed, the Commission has previously recognized that “[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the

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<sup>6</sup> Determination on the Pleadings, *The Staff of the Missouri Public Service Commission v. Taney County Utilities Corporation*, Case No. WC-2004-0342 (Oct. 19, 2004).

<sup>7</sup> Determination on the Pleadings, *In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc.*, Case No. TD-2003-0582 (Nov. 4, 2004). See also Order Denying Motion for Determination on the Pleadings, *Tony Walker v. Kansas City Power & Light Company*, Case No. EC-2006-0451 (Aug. 28, 2006) (denying request for determination on the pleadings under 4 CSR 240-2.117(2) as contrary to law and the public interest where it was obvious that the parties did not agree on the essential facts underlying the complainant’s claim for relief); *McGuire v. Dir. of Revenue*, 174 S.W.3d 87, 89 (Mo. App. E.D. 2005) (a motion for judgment on the pleadings should be denied where there is a genuine issue of material fact on the face of the pleadings).

<sup>8</sup> Determination on the Pleadings, *In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc.*, Case No. TD-2003-0582 (Nov. 4, 2004); *Neel v. Strong*, 114 S.W.3d 272, 274 (Mo. App. E.D. 2003) (“A motion for judgment on the pleadings is properly granted . . . if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law.”)

<sup>9</sup> Commission Rule 4 CSR 240-2.010(13) defines a “pleading” as “any application, complaint, petition, answer, motion, staff recommendation, or other similar written document, which is not a tariff or correspondence, and which is filed in a case.” Furthermore, in the context of a judgment on the pleadings, “[a]n exhibit to a pleading is a part of the pleadings.” *McGuire*, 174 S.W.3d at 89.

public interest.”<sup>10</sup> Therefore, the Commission may finally dispose of this case on the basis of the pleadings before it.

### **Precedential Effect**

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.<sup>11</sup> The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.<sup>12</sup>

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.<sup>13</sup> “Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.”<sup>14</sup> The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided

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<sup>10</sup> Determination on the Pleadings, *In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases*, Case No. EU-2005-0041 (Oct. 7, 2004).

<sup>11</sup> *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo.1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

<sup>12</sup> *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

<sup>13</sup> *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

<sup>14</sup> *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).



is no ground alone for a reviewing court to reverse the decision.<sup>15</sup> “In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”<sup>16</sup>

### **Subject Matter Jurisdiction**

Section 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.<sup>17</sup>

As a rural electric cooperative, organized pursuant to Chapter 394 RSMo 2004, Cuivre River has the power to “...generate, manufacture, purchase, acquire, accumulate and transmit electrical 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)<sup>18</sup> A rural area is defined in Section 394.020(3) RSMo 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, and such term shall be deemed to include both the farm and nonfarm population thereof.

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<sup>15</sup> *Id.*

<sup>16</sup> *State ex rel. Gulf Transport Co. v. Public Service Com'n of State*, 658 S.W.2d 448, 466 (Mo. App. 1983) (Shangler, J. dissenting); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S. Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); §§ 386.490 and 386.510; 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

<sup>17</sup> *Union Elec. Co. v. Platte-Clay Elec. Coop.*, 814 S.W.2d 643 (Mo. App. W.D. 1991)

<sup>18</sup> Section 394.080.1(4) RSMo 2000.

As set out above, Cuivre River is not currently providing service to the structure for which a change of supplier is requested, and that structure is not located in a rural area. Accordingly, Cuivre River does not have a right to provide service to the structure in question.

Although the Commission has authority to grant a change of supplier request from an electric utility to an electric cooperative under certain circumstances, Section 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. Section 394.080.5 RSMo, pertaining to rural electric cooperatives 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, accounting or management of any electric cooperative.** (emphasis added)

### **Burden of Proof**

The Commission has ruled on prior applications of this nature and has determined that the burden of proof in change of supplier cases is on the applicant.<sup>19</sup>

### **DECISION**

Section 393.106 RSMo 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. Cuivre River is not currently providing service to the structure for which a change of

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<sup>19</sup> *In the Matter of Cominco American, Inc. for Authority to Change Electrical Suppliers*, 29 Mo. P.S.C. (N.S.) 399, 405-407 (1988), Case No. EO-88-196. See also Case Numbers EO-97-314, EO-93-170, EO-93-295, and EC-2007-0106.

supplier is requested, and that structure is not located in a rural area. Accordingly, Cuivre River does not have a right to provide service to the structure in question.

Wasatch fails to offer any legal argument to suggest that the Commission has subject matter jurisdiction over its application. Rather, Wasatch simply states that the Commission has subject matter jurisdiction to grant its request, because the Commission granted a change of electric supplier request from a regulated utility to an electric cooperative in a non-rural area in 2002. As addressed in detail above, an administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts. Accordingly, the Commission need not distinguish the 2002 case, but will evaluate and make its decision based upon the applicable law and facts in this case.

Even if the Commission were authorized to consider Wasatch's change of supplier request, Wasatch has not met its burden under Section 393.106 RSMo to show that the requested change of supplier would be in the public interest for a reason other than a rate differential. As set out above, because the Commission does not have authority to order Cuivre River to provide service to Wasatch, the Commission does not find it to be in the public interest to release the regulated utility obligated to serve Wasatch, AmerenUE, from that obligation by granting a change in supplier request, given that the proposed replacement supplier is unwilling to provide Wasatch service.

Because the Commission lacks the authority to grant Wasatch the relief requested and is therefore without subject matter jurisdiction to approve Wasatch's application, it shall grant AmerenUE's motion to dismiss for lack of subject matter jurisdiction and for summary determination and dismiss Wasatch's change of supplier application.

**IT IS ORDERED THAT:**

1. Union Electric Company d/b/a AmerenUE's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Summary Determination filed on April 30, 2008, is granted.
2. Wasatch Investments, LC's application for a change of electric supplier from Union Electric Company, d/b/a AmerenUE, to Cuivre River Electric, Inc., for electric service supplied to 1665 Kemmar Court, O'Fallon, Missouri is denied.
3. This order shall become effective on June 8, 2008.
4. This case may be closed on June 9, 2008.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', is written over a horizontal line.

Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Clayton,  
Jarrett, and Gunn, CC., concur.

Voss, Regulatory Law Judge