

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

In the Matter of the Application of)	
Brandon Jessip for Change of)	<u>File No. EO-2017-0277</u>
Electric Supplier from Empire)	
District Electric to New-Mac Electric)	

**EMPIRE’S SUGGESTIONS IN OPPOSITION
TO STAFF’S MOTION TO DISMISS**

COMES NOW The Empire District Electric Company (“Empire”) and submits its Suggestions in Opposition to Staff’s Motion to Dismiss. In this regard, Empire respectfully states as follows to the Missouri Public Service Commission (“Commission”):

Introduction

Brandon Jessip filed his application herein, seeking to change his electric provider from Empire to New-Mac Electric Cooperative, Inc. Empire filed its Answer, requesting that the application be denied, as Mr. Jessip did not allege sufficient grounds to warrant a change of supplier pursuant to RSMo. §393.106. Thereafter, the Staff of the Commission (“Staff”) filed a Motion to Dismiss, alleging that Empire does not currently serve the subject property and that the protection afforded by RSMo. §393.106 is inapplicable. Staff’s Motion to Dismiss must be denied.

Standard for Motion to Dismiss

Dismissal for failure to state a claim is not warranted “unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Goe v. City of Mexico*, 64 S.W.3d 836, 839-40 (Mo.App. E.D. 2001). Empire assumes that Staff’s Motion to Dismiss is based on the argument that if RSMo. §393.106 were inapplicable, then Mr. Jessip’s application for change of electric supplier should be dismissed for failure to state a claim or cause of action. Staff’s Motion, however, does not argue or demonstrate that Mr. Jessip, based

solely on the adequacy of his application, has failed to state a claim or cause of action. Instead, Staff points to discussions with Mr. Jessip and Empire representatives¹ as collective basis for ignoring the plain language of RSMo. §393.106.

Applicability of the Protection Afforded by RSMo. §393.106

RSMo. §§393.106.2 and 394.315.2 are commonly referred to as the “Missouri anti-flip-flop statutes” and reflect the reasonable goal to prevent the destructive competition that may arise when utilities invest capital to provide permanent service only to lose the customer to a competing utility. Once established, a change of electric supplier is permitted in rare circumstances, none of which exist in this matter.

Empire, of course, does not believe that Mr. Jessip should prevail with his request to change suppliers, but it is extremely important to Empire and all of Empire’s customers that Mr. Jessip’s application not be dismissed summarily as requested by Staff. Whether or not Mr. Jessip is able to prove sufficient grounds to warrant a change of supplier pursuant to RSMo. §393.106 is a factual and legal matter to be addressed later. Based on a plain reading of the statute, and as a matter of law, the “anti-flip-flop” protection must apply in this case.

To conclude its Motion to Dismiss, Staff cites a prior Commission decision: “the Missouri anti-flip-flop statutes . . . are applicable only after an electric corporation or cooperative “commences” providing electric service to a facility.” This prior Commission decision relied on RSMo. §393.106.2, which states as follows:

¹ Interestingly, Empire’s responses to Staff that Empire presently serves customers surrounding Mr. Jessip’s property and “would only need to hang a transformer and run about 70 feet of overhead service line; no new poles would need to be set” to re-establish electric service were omitted from Staff’s Motion to Dismiss. Empire provides electric services to the area and is on site available to re-establish its permanent service that was interrupted to accommodate Mr. Jessip’s construction.

Once an electrical corporation or joint municipal utility commission, or its predecessor in interest, 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 otherwise permitted in the context of municipal annexation, pursuant to section 386.800 and section 394.080, or pursuant to a territorial agreement approved under section 394.312. The public service commission, upon application made by an affected party, may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential. The commission's jurisdiction under this section is limited to public interest determinations and excludes questions as to the lawfulness of the provision of service, such questions being reserved to courts of competent jurisdiction.

Mr. Jessip's application clearly states that Empire commenced providing electric service to the property, and Staff's Motion to Dismiss does not allege otherwise.

Once permanent services lawfully commence, the protection afforded by RSMo. §393.106 is applicable,² and a change of supplier may be ordered by the Commission only "on the basis that it is in the public interest for a reason other than a rate differential." Empire lawfully commenced supplying retail electric energy through permanent service facilities to the structure that is the subject of Mr. Jessip's application prior to 1980. Empire supplied retail electric services to the structure for more than 35 years, before Mr. Jessip requested that Empire remove certain service facilities in order for him to raze the structure. In lieu of razing the structure, Mr. Jessip performed a remodel.

Neither the disconnect requested by Mr. Jessip, nor the passage of time without retail electric energy being supplied to the structure during the remodel, supports Staff's view that RSMo. §393.106 is somehow inapplicable in this situation. The protection of the statute was triggered by Empire's commencement of services. There is no time limit contained in the statute.

² Municipal annexation pursuant to RSMo. §§386.800 and 394.080 and a territorial agreement approved under RSMo. §394.312 are not applicable to this matter.

Conclusion

The granting of Staff's Motion to Dismiss would essentially nullify the protection of RSMo. §393.106 and would allow the arbitrary passage of time to take the place of the Commission's determination of whether or not there is a public interest basis, other than a rate differential, to support a request for change of supplier.

Empire, an electrical corporation, lawfully commenced supplying retail electric energy services to Mr. Jessip's property through permanent service facilities. Empire disconnected service only at Mr. Jessip's request and stands ready, willing, and able to provide safe and adequate electric service at just and reasonable rates to Mr. Jessip's remodeled property.

WHEREFORE, Empire respectfully requests that the Commission deny Staff's Motion to Dismiss, and, thereafter, deny Mr. Jessip's Application. Empire requests such additional or further relief as is just and proper under the circumstances.

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CERTIFICATE OF SERVICE

I hereby certify that the above document was filed in EFIS, on this 6th day of July, 2017, with notification of the same being sent to all parties of record. I further that a true and correct copy of the above document has been sent by electronic mail or U.S. mail, postage prepaid, to all parties.

/s/ Diana C. Carter