BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Brandon Jessip for Change of Electric Supplier from Empire District Electric to New-Mac Electric Cooperative, Inc.	)))))	**File No. EO-2017-0277**

NEW-MAC'S POST HEARING REPLY BRIEF

COMES NOW New-Mac Electric Cooperative, Inc., (New-Mac) by and through its undersigned counsel, and for its Post-Hearing Reply Brief respectfully states the following:

INTRODUCTION

In its Initial Post-Hearing Brief, New-Mac stated its position regarding the application of Brandon Jessip for a change of electric supplier. New-Mac, in agreement with Empire District Electric (Empire), asserted that the anti-flip flop law applies in this case and further asserted that the only way in which the Commission can grant Mr. Jessip's requested relief is if it finds the relief to be in the public interest for reasons other than a rate differential. New-Mac takes no position on whether Mr. Jessip has met this public interest burden.

In this reply brief, New-Mac will address arguments brought by Staff in its initial post-hearing brief. New-Mac's silence on any issue should not be considered to be partial or full agreement with the positions and recommendations advanced by other parties. New-Mac respectfully requests that the Commission enter its Order in a manner that preserves and upholds the anti-flip flop law.

ARGUMENT

1. Empire's Right to Continue to Serve Mr. Jessip's Property

In its initial post-hearing brief, Staff argues that the "record is completely devoid of evidence that Empire lawfully commenced to supply retail electric energy to either the barn or the house." (Staff Brief. p. 7). This is contrary to undisputed facts in this case that demonstrate that Empire previously provided permanent service to Mr. Jessip's residence. (Exhibit No. 200, Rebuttal Testimony of Patsy J. Mulvaney, 2:9-3:9; Evidentiary Hearing Transcript, October 10, 2017, 43:5-11, 46:5-24, 47:24-48:2, 48:3-16, 75:16-75:22, 76:6-9). The facts show that the residential structure is furnished with an electric meter box. (Exhibit No. 8; Evidentiary Hearing Transcript, October 10, 2017, 43:5-11, 64:2-8). According to testimony given by Daniel I. Beck, the meter box and weather head that presently exist on Mr. Jessip's residential structure are indicative that permanent service once existed to that structure. (Evidentiary Hearing Transcript, October 10, 2017, 65:1-66:9). Additionally, there is no dispute that Empire has been the only supplier to this structure. (Evidentiary Hearing Transcript, October 10, 2017, 48:13-16, 65:24-66:1).

Staff, for the first time in its Initial Post-Hearing Brief, raises an issue regarding the definition of the word "adjacent" found in Section 393.106.2, RSMo. Staff argues that Empire did not obtain a protected right to serve because an Empire meter was physically located between the barn and residence instead of being attached to the house. (Staff Brief. p. 7). This argument is erroneous and distracts from the main issue of permanent service. It has already been determined that there was once a meter attached to the residence according to Staff witness, Daniel I. Beck. (Evidentiary

Hearing Transcript, October 10, 2017, 65:1-66:9). Additionally, as has been referenced above, the installations on the customer side of the demarcation between utility and customer responsibilities are indicative of permanent service. (Evidentiary Hearing Transcript, October 10, 2017, 64:2-8). Therefore, the location of Empire's second or current meter is legally irrelevant.

New-Mac objects to the "distance test" that Staff is creating and endeavoring to read into the statute. The part of the statute at issue states: "'Structure' or 'structures', an agricultural, residential, commercial, industrial or other building or a mechanical installation, machinery or apparatus at which retail electric energy is being delivered through a metering device which is located on or adjacent to the structure and connected to the lines of an electrical supplier." RSMo § 393.106.

Staff relies on a dictionary which defines the term adjacent as, "lying near, close, or contiguous; adjoining; neighboring." (Staff Brief. p. 7). Staff, on this basis, argues that an electric meter standing between two structures that are 50 feet apart does not satisfy the terms near, close, adjoining, or neighboring those structures. Staff diminishes the definition of "adjacent" to require an immediate abutting of structures and something less than fifty feet, but that is not a meaning of "adjacent" in the definition recited by Staff nor one that has ever been used by utilities.

Staff presumes that its interpretation of law advances the "intendment" of the Legislature. (Staff Brief. p. 8). However, when ascertaining the intent of the Legislature from the language used in a statute one must consider the words used in their plain and ordinary meaning. *Metro Auto Auction v. Director of Revenue,* 707 S.W.2d 397, 401 (Mo. banc 1986). And, where a statute's language is clear and unambiguous, there is no

room for construction. *Id.* In determining whether the language is clear and unambiguous, the standard is whether the statute's terms are plain and clear to one of ordinary intelligence. *Alheim v. F.W. Mullendore,* 714 S.W.2d 173, 176 (Mo.App.1986). Moreover, the plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language. *Blue Springs Bowl v. Spradling,* 551 S.W.2d 596, 600 (Mo. banc 1977).

Staff cites no case law as to the legal definition of the word “adjacent.” Without any legal support, Staff is merely attributing its own intent as an unspoken intent of the Legislature. This makes ambiguous that which is clear and unambiguous. The term adjacent is plain and clear to one of ordinary intelligence to mean what the definition given by Staff states: close, near, contiguous, adjoining, neighboring. This definition has been meaningful and practical for the utilities, electric cooperatives, and municipal utilities bound by this standard. If the Commission accepted Staff’s argument to define “adjacent” as requiring that a meter immediately abut a structure, it would be a prohibited administrative interpretation of a clear and unambiguous statute. This position, if adopted by the Commission, would overturn the understanding of legislative intendment that has well served a generation of utility managers and attorneys for reduction of utility duplication and resolution of utility disputes.

Customary practice shows that a large majority of service providers in rural areas provide service to multiple structures at a single location through a single meter located on a utility pole or pedestal not physically attached to a house or other structure. In fact, many rural utility service providers intentionally place meters on poles and pedestals 50

to 100 feet from customers' homes primarily for safety and utility efficiency and duplication reasons. Placement of a meter on a pole between a house and barn allows both structures to share a single meter with minimal voltage reduction on energy line loss at either structure. Meters do not need to be on or immediately abutting the structure that they serve to provide electricity to the structure and in rural areas of Missouri, most meters are not on or immediately abutting a structure.

To define adjacent as requiring something closer than fifty feet or abutment would degrade the anti-flip flop law, would institute absolute customer choice of provider, and would further encourage utilities to change the way they presently serve their customers. Electric suppliers would be bound to invest in duplicate electric distribution facilities upon request. Further, utilities have an availability charge for each meter and a customer benefits by having a single meter on a pole serve a well, house, and barn, for example, because the customer then incurs a single availability charge. If abutment was the new standard, utilities would be inclined to place meters on every single structure to protect their territory. This would result in decreased efficiency, increased utility costs to serve a customer, increased customer costs, and increased duplication of facilities and meters. This is counter to the very nature of the statute in question which seeks to promote utility efficiency.

New-Mac asks the Commission to reject this position and to look at the facts of this case and the clear meaning of the word adjacent in the context of utility service. The facts demonstrate that an Empire electric meter was attached to the residence satisfying the statute. The argument concerning the meter on the pole is irrelevant and requires the Commission to speculate facts that are not in the record of evidence.

Staff argues that even if Empire once provided permanent service to Mr. Jessip's residential structure, the passage of two and one-half years of no service from any supplier and the removal of Empires facilities, makes the anti-flip flop statute inapplicable. (Staff Brief. p. 9). There is no statement in the anti-flip flop law allowing any period of service interruption to bypass the law requiring a Commission determination of public interest. As discussed fully in New-Mac's initial post-hearing brief, the legislative history of Section 393.106, RSMo. is clear that the Legislature intended to remove any time limits from previous iterations of the statute to give the Commission full authority over all change of supplier questions. This deliberate and unambiguous legislative action should not be disregarded in this case in favor of an ambiguous administrative time or distance standard.

New-Mac urges the Commission to enter its Order in a manner that preserves the effectiveness of the anti-flip flop law.

2. Burden of Proof

New-Mac respectfully takes no position on whether Mr. Jessip has met his burden of proving that the requested change of supplier is in the public interest.

CONCLUSION

WHEREFORE, New-Mac respectfully requests that the Commission either grant Mr. Jessip's request to change electric service providers if it finds that this request is in the public interest for reasons other than a rate differential or that it deny Mr. Jessip's request to change electric service providers if it finds that the request is not in the public interest for reasons other than a rate differential.

Respectfully submitted,

ANDERECK, EVANS, WIDGER, LEWIS & FIGG L.L.C.

By: /s/ Megan E. Ray

Megan E. Ray, # 62037
3816 S. Greystone Court, Suite B
Springfield, MO 65804
(417) 864-6401 Phone
(417) 864-4967 Facsimile

ATTORNEYS FOR NEW-MAC ELECTRIC COOPERATIVE, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a complete copy of the foregoing instrument was served upon:

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

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

Diana C. Carter
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P. O. Box 456
Jefferson City, Missouri 65102-0456
DCarter@BrydonLaw.com

Missouri Public Service Commission
Nathan Williams
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
nathan.williams@psc.mo.gov

Brandon Jessip
11728 Palm Road
Neosho, MO 64850
brandonljessip@gmail.com

By e-mail and/or enclosing same in envelopes addressed to the parties or the attorneys of record of said parties at their business addresses as disclosed in the pleadings of record therein, with first class postage fully prepaid, and by depositing said envelope in a U.S. Post Office mail box in Springfield, Missouri, on November 15, 2017.

/s/ Megan E. Ray