

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

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

**THE EMPIRE DISTRICT ELECTRIC COMPANY'S
STATEMENT OF POSITIONS**

COMES NOW The Empire District Electric Company ("Empire" or "Company"), by and through counsel, and respectfully files its Statement of Positions in the above-captioned case. In this regard, Empire states as follows to the Missouri Public Service Commission ("Commission"):

Introduction

By at least 1980, Empire, an investor-owned utility regulated by the Commission, was providing electric service to the subject property, including a home on the property, pursuant to the Company's Commission-approved tariffs. Empire provided service to the property at the request of Brandon Jessip, the applicant in this matter, as well as at the request of prior owners. Following a customer-requested lapse in service, Mr. Jessip requested that his electric service provider be changed from Empire to New-Mac Electric Cooperative ("Cooperative"). Both Empire and the Cooperative denied this request pursuant to RSMo. 393.106 and its "anti-flip flop" protection. Mr. Jessip then filed his Application at the Commission, and Empire and the Cooperative again stated their opposition to the requested change.

Issue One – Empire's Exclusive Right to Serve the Subject Property

Question: By Section 393.106, RSMo., does The Empire District Electric Company presently have the right to continue to serve any of the structures on the Jessips' approximately 30-acre tract of land located in Neosho, Missouri?

Pursuant to RSMo. 393.106, "Definitions--electric power suppliers exclusive right to serve structures, exception--change of suppliers, procedure," Empire has the exclusive right to continue

to serve the structures located on the subject property. The terms of the statute are clear and unambiguous. The complete text of the statute is set forth below (emphasis added):

393.106. 1. As used in this section, the following terms mean:

(1) "Permanent service", electrical service provided through facilities which have been permanently installed on a structure and which are designed to provide electric service for the structure's anticipated needs for the indefinite future, as contrasted with facilities installed temporarily to provide electrical service during construction. Service provided temporarily shall be at the risk of the electrical supplier and shall not be determinative of the rights of the provider or recipient of permanent service;

(2) "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. Such terms shall include any contiguous or adjacent additions to or expansions of a particular structure. Nothing in this section shall be construed to confer any right on an electric supplier to serve new structures on a particular tract of land because it was serving an existing structure on that tract.

2. 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, RSMo, and section 394.080, RSMo, or pursuant to a territorial agreement approved under section 394.312, RSMo. **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. Except as provided in this section, nothing contained herein shall affect the rights, privileges or duties of existing corporations pursuant to this chapter. Nothing in this section shall be construed to make lawful any provision of service which was unlawful prior to July 11, 1991. Nothing in this section shall be construed to make unlawful the continued lawful provision of service to any structure which may have had a different supplier in the past, if such a change in supplier was lawful at the time it occurred. However, those customers who had canceled service with their previous supplier or had requested cancellation by May 1, 1991, shall be eligible to change suppliers as per previous procedures. No customer shall be allowed to change electric suppliers by disconnecting service between May 1, 1991, and July 11, 1991.

The exclusive right to serve afforded by RSMo. 393.106 was triggered when Empire, an electrical corporation, lawfully commenced supplying retail electric energy to structures on the subject property through permanent service facilities. All of the elements required to trigger the protection afforded by the statute have been satisfied, with all of these facts being uncontroverted.

RSMo. 393.106 Statutory Requirements	Supporting, Uncontroverted Facts
“Once an electrical corporation or joint municipal utility commission, or its predecessor in interest,”	Empire is an “electric corporation” and a “public utility” as those terms are defined in RSMo. 386.020 and is subject to the jurisdiction and supervision of the Commission as provided by law.
“lawfully commences”	Empire began its lawful provision of electric service to the subject property by at least 1980.
“supplying retail electric energy”	Empire’s provision of electric service to the subject property was at retail and pursuant to its Commission-approved tariffs.
“to a structure” (“Structure” is defined by statute as “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.”)	Empire provided service to the home on the subject property, the same home that is being rehabilitated by Mr. Jessip at this time, as well as to a barn and a well on the subject property.
“through permanent service facilities” (“Permanent service” is defined by statute as “electrical service provided through facilities which have been permanently installed on a structure and which are designed to provide electric service for the structure's anticipated needs for the indefinite future, as contrasted with facilities installed temporarily to provide electrical service during construction.”)	Empire provided service to the subject property through permanently installed facilities, which were designed to provide electric service for the indefinite future. Empire did not provide service only through temporary facilities installed to provide service during construction.

Although all elements required to trigger the protection afforded by the statute have been satisfied, the Staff of the Commission (“Staff”) argues that the statutory protection is inapplicable and that Empire does not have the right to serve the subject property. It appeared that Staff was

basing its opinion on the fact that Mr. Jessip requested that service be discontinued and then went without service for approximately two and one-half years. By data request, Empire asked Staff to provide any legal support (laws, orders, rules, etc.) that Staff has in support of its opinion that the statute is inapplicable. Staff's response referred Empire back to Staff's Motion to Dismiss.

Also through a data request, Empire asked what length of service disruption Staff believes is sufficient to render the anti-flip flop provision of RSMo. 393.106 inapplicable. Staff acknowledged that "service disruption" is not mentioned in the statute and again referred Empire back to Staff's Motion to Dismiss. When asked if Staff believes that a property owner may chose his service provider without regard to the application of RSMo. 393.106, so long as no utility is currently providing electric service to the property, Staff responded "no." Staff's Motion to Dismiss does not contain any statutory or case citations in support of Staff's recommendation in this case. In "Staff's Positions" filed herein, Staff states as follows:

Staff anticipates the evidence will not establish to which, if any, structures on the tract Empire supplied electricity before it stopped providing electric service to the tract in 2010.

This is despite the fact that Staff admits that Empire served a well on the property in 2014-2015. Staff's Positions, p. 2. Staff's position is also contrary to Empire's Rebuttal Testimony which establishes: Empire provided service to the subject property as far back as 1980, with a house located thereon; that the same house was located on the subject property when Empire provided service to the property at Mr. Jessip's request and is still located on the property today; that Empire also provided service for the well located on the property; and that no other electric service provider has served the property at any time. No party to the case filed Surrebuttal Testimony. Mr. Jessip's Direct Testimony and "Staff's Positions" also make it clear that the house on the property today is the same house that was located on the property when Empire previously provided electric

service to the property and that Mr. Jessip had Empire remove its service line that had been connected to the house. It remains unclear why Staff believes the statute is inapplicable.

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.” *State ex rel. Deere & Co. v. Missouri State Highway & Transp. Comm’n*, 873 S.W.2d 921, 924 (Mo.App. W.D. 1994); citing *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). In this case, the statute is clear and unambiguous and does not contain a time limitation.¹ There is simply no reasonable argument to support Staff’s position that the “exclusive right to serve” protection afforded by RSMo. 393.106 is somehow inapplicable to the case at hand.

The exclusive right to serve afforded by RSMo. 393.106 was triggered when Empire lawfully commenced supplying retail electric energy to structures (home, barn, well) on the subject property through permanent service facilities, neither exemption set forth in the statute is applicable,² and Empire thus has the right to continue serving the structures on the property unless the Commission determines that the requested change would be in the public interest.

Issue Two – The Public Interest

Question: Is it in the public interest for a reason other than a rate differential for those structures to be served by New-Mac Electric Cooperative, Inc., rather than The Empire District Electric Company?

¹ This is in contrast to an older version of the statute. The anti-flip flop protection was previously based on service to particular owners/customers and was applicable only when service was currently being provided or when service had been provided within the last 60 days. *See State ex rel. Union Electric Co. v. MoPSC*, 765 S.W.2d 626 (Mo.App. W.D. 1988). The current version of RSMo. 393.106 specifies that “those customers who had canceled service with their previous supplier or had requested cancellation by May 1, 1991, shall be eligible to change suppliers as per previous procedures.”

² The two exemptions pertain to municipal annexation, pursuant to 386.800 and 394.080, and a territorial agreement approved under section 394.312.

It is in the public interest for the “anti-flip flop” provision of RSMo. 393.106 to be enforced and for Empire to continue to have the right to provide electric service to the subject property. Pursuant to RSMo. 393.106.2, the requested change of supplier may be granted only “on the basis that it is in the public interest for a reason other than a rate differential.” No testimony has been presented in this case to demonstrate that the requested change of supplier is in the public interest, and Empire is not aware of any facts which could support such a claim.

Mr. Jessip states in his letter to the Commission dated August 22, 2017 (“Direct Testimony”) that he was upset by the amount of his bills from Empire. Empire witness Patsy Mulvaney explains in her Rebuttal Testimony that the Jessips were billed pursuant to Empire’s lawful tariffs, that the charges were reasonable, and that the Jessips did not request a meter test or any action other than disconnection. Mr. Jessip’s only other purported support for his request to change suppliers are unsubstantiated statements that Empire’s employees are “a very entitled group” and that Empire is an “unapologetic, unhelpful, and unresponsive monstrosity.”

By data request, and referring to page 2, lines 1-7 of the Rebuttal Testimony of Staff witness Dan Beck, Empire asked Staff to please state each fact/reason, other than a rate differential, that Staff believes renders the requested change of service to be in the public interest. Staff responded by referring Empire to Mr. Beck’s Rebuttal Testimony, beginning on line 18 of page 6 and continuing until the end. Staff recommends that the Commission consider five factors in determining whether the requested change of supplier is in the public interest: (1) the relative abilities of Empire and the Cooperative to serve the structures; (2) the relative benefits to Empire and New-Mac of serving the structures; (3) the impacts of the existing utility easements on the property; (4) the impacts of making the house habitable; and (5) Mr. Jessip’s strong preference in service provider. Beck Rebuttal, p. 6, lines 18-23.

Staff discusses each of these factors in Mr. Beck’s Rebuttal Testimony, finding that (1) Empire and the Cooperative are equally capable of providing safe and reliable electric service to the property, (2) Empire and the Cooperative would equally benefit from serving the property, since “additional revenue that contributes towards fixed costs would be of benefit,” and (3) that Empire and the Cooperative both have easements across the property. Regarding Staff’s fourth factor, Staff states that remodeling the home on the property is in the public interest, but that factor does not point in favor of either Empire or the Cooperative.

For Staff’s factor five, Staff notes that Mr. Jessip prefers to be served by the Cooperative. Beck Rebuttal, pp. 7-8. In response to a data request, Staff acknowledged that an owner’s preference alone does not establish the necessary “public interest” for a requested change of supplier. This is in line with the Commission’s determination that a single-factor test should not be used. *See Smith v. Union Electric Company*, 2006 Mo. PSC Lexis 1624, Case No. EC-2007-0106, Opinion issued December 5, 2006. The Commission noted that the customer requesting the change of supplier bears the burden of proof and stated that it conducts a “case-by-case analysis applying a ten-factor balancing test.” *Id.* The ten factors used by the Commission and a statement regarding the facts in this proceeding related to each factor are set forth in the below table.

Factors for Determining the Public Interest Case No. EC-2007-0106	Facts Related to Mr. Jessip’s Application Case No. EO-2017-0277
Whether the customer’s needs cannot adequately be met by Empire with respect to either the amount or quality of power.	There is no allegation that Empire is unable to meet Mr. Jessip’s needs in terms of the amount and/or quality of power.
Whether there are health or safety issues involving the quality of power.	There is no allegation that the power supplied by Empire presents a health and/or safety issue.
What alternatives a customer has considered, including alternatives with the present supplier.	Mr. Jessip sought a change of supplier without attempting to resolve any complaints with Empire.
Whether the customer’s equipment has been damaged or destroyed as a result of a problem with the electric supply.	There is no allegation of any alleged damage or destruction.

The effect the loss of the customer would have on the present supplier.	No utility is currently providing service to the subject property. However, Empire's remaining customers are financially harmed when customers leave the system, and Empire's customers benefit economically from customer growth.
Whether a change in supplier would result in a duplication of facilities.	Both Empire and the Cooperative provide electric service to the area. Empire's line was originally extended 95' feet from the main feeder, along the customer's lane, for the sole purpose of serving this premise. For Empire, the only addition that would be needed would be the 70-ft service drop that was previously removed at Jessip's request. It is Empire's understanding that the Cooperative would need to set at least 2 poles and run at least 200 feet of service line. The service entry point on the home is closer to the existing Empire service pole than to the Cooperative's service pole.
The overall burden on the customer caused by the inadequate service including any economic burden not related to the cost of the electricity itself, and any burden not considered with respect to factor six.	There is no evidence of any burden on Mr. Jessip related to Empire's electric service.
What efforts have been made by the present supplier to solve or mitigate the problems.	There is no evidence of any efforts made by Mr. Jessip to inform Empire of any alleged problems which could be solved or mitigated. When Mr. Jessip was unhappy with his bills, he terminated service.
The impact the Commission's decision may have on economic development, on an individual or cumulative basis.	Empire provides electric service to 202 customers within a two mile radius of the subject property and provides electric service to a total of 17,421 customers in the Neosho area. There is no evidence that Empire's provision of electric service to the subject property will somehow negatively impact economic development.
The effect the granting of authority for a change of supplier might have on any territorial agreements between Empire and the Cooperative.	Both Empire and the Cooperative oppose Mr. Jessip's request for change of supplier.

Empire is acting in the best interests of its customers, by seeking to enforce the protection afforded by RSMo. 393.106 and exercising its right to serve the subject property. Empire's

remaining customers are financially harmed when customers leave the system, and Empire's customers benefit economically from customer growth. Mr. Jessip has demonstrated no basis for his requested change of supplier other than his own preference. This is simply not enough to establish the necessary "public interest" required to authorize the change – a change which will harm Empire and its customers.

WHEREFORE, Empire respectfully submits this statement of its positions on the issues. Empire requests that Staff's Motion to Dismiss be denied and that Mr. Jessip's request for change of supplier be denied. Empire requests such further relief as is prudent under the circumstances.

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

/s/ Diana C. Carter
Diana C. Carter #50527
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Phone: (573) 635-7166
Fax: (573) 634-7431
E-Mail: DCarter@BrydonLaw.com

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was filed in EFIS on this 4th day of October, 2017, with notice of the same being sent to all counsel of record. A copy of this pleading was also sent by U.S. mail, postage prepaid, to the pro se applicant.

/s/ Diana C. Carter