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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office
in Jefferson City on the 21st
day of April, 1995.

In the matter of the application)
of Martin J. Sinclair for change)
of electric supplier.)

CASE NO. EO-95-165

ORDER DENYING MOTION TO DISMISS

On November 16, 1994, applicant Martin J. Sinclair (Applicant) filed an application for change of electric service provider, seeking to change his supplier from White River Valley Electric Cooperative (White River) to The Empire District Electric Company (Empire). On April 3, 1995, White River filed a Motion to Dismiss, requesting that Applicant's application be summarily dismissed for failure to present a cause upon which the request for relief could be granted. On April 5, 1995, a prehearing conference was held, at which time the parties were given an opportunity to orally argue the motion. All parties except Empire chose to do so. In addition, the parties were informed that they could file a written response to the motion within 10 days from the day the motion was filed. Staff subsequently filed a written response on April 7, 1995.

In support of its motion, White River contends that in response to interrogatory questions, Applicant admitted that his complaint is not about bad service, but rather the awkwardness of having two suppliers on the same premises. White River alleges that this is a judicial admission, and that Applicant cannot and will not show that his service is inadequate or unreliable. Thus, White River asserts, even if Applicant's allegations are all taken as true, Applicant's claims do not and cannot approach the reasonable threshold for justifying a change in supplier, and to hold otherwise would do great harm to the legislative aims of utility stability and non-duplication.

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Staff indicates its belief that White River's motion should be denied. Staff cites the Commission to its decision in the **Bakie** case, Case No. EO-93-170 -- which opined that one of the factors which may be considered in change of supplier cases is whether the Applicant can show that there is an economic burden on the Applicant not related to the cost of the electricity -- and concludes that Applicant had at least made a prima facie showing sufficient to proceed with the case. Staff maintains that because White River relies upon interrogatory answers in support of its motion, the motion to dismiss should be treated as a motion for summary judgment. Staff notes that the appropriate standard of review on a motion for summary judgment is whether there is a genuine issue of material fact to be determined, citing **Brown v. Highway and Transportation Commission**, 805 S.W.2d 274, 279 (Mo. App. 1991). Since Applicant has claimed damage to the reputation of his business establishment as a result of having two separate electric suppliers, and since loss of good will is a judicially recognized economic injury, Staff contends that Applicant has presented enough information to show that a genuine issue of material fact exists. Public Counsel states that it agreed there is an issue to be determined in this case, and maintains that it would be premature to dismiss the case at this point.

The Commission has reviewed White River's Motion to Dismiss, Applicant's application and interrogatory answers, and the oral and written arguments made by the various parties with respect to the Motion to Dismiss, and determines that Applicant's allegations are sufficient to withstand a motion to dismiss and warrant an evidentiary hearing. The Commission has repeatedly stressed that a case-by-case analysis should be utilized in determining whether an application for change of electric suppliers should be granted. **Re Cominco American, Inc.**, 29 Mo.

P.S.C.(N.S.) 399, 407 (1988). See also *Re the application of Thomas J. and Barbara A. Bakie*, Case No. EO-93-170, Report and Order, issued August 6, 1993, at 12, and *Re the application of Carol June Tyndall*, Case No. EO-93-295, et al., Report and Order, issued May 27, 1994, at 32. The *Bakie* and *Tyndall* cases both list a number of factors which the Commission may consider in a change of supplier case. *Bakie* at 10-12; *Tyndall* at 29-30. In addition, both cases suggest that a single factor need not be determinative, but the various factors may be balanced instead. *Bakie* at 12; *Tyndall* at 32.

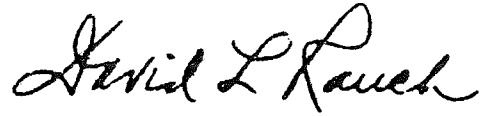
White River's claim that Applicant has admitted his complaint is not about bad service, even if accepted as true, is not sufficient in and of itself to support a motion to dismiss, as bad service is but one factor which may be considered. Although the Commission agrees with Staff that White River's Motion to Dismiss is in the nature of a motion for summary judgment, this is not determinative, as the motion fails to meet the standard of either a motion for summary judgment or a motion to dismiss. As was stated by the Missouri Court of Appeals in *AAA Excavating, Inc. v. Francis Construction, Inc.*, 678 S.W.2d 889, 893-894 (Mo. App. 1984): "Under modern pleading principles, a petition is not to be dismissed for failure to state a claim for relief unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Thus the Commission finds that it would be inappropriate to dismiss Applicant's application at this juncture in the proceedings, and will therefore deny White River's motion.

IT IS THEREFORE ORDERED:

1. That the Motion to Dismiss filed by White River Valley Electric Cooperative on April 3, 1995, be and is hereby denied.

2. That this order shall become effective on the date hereof.

BY THE COMMISSION

A handwritten signature in cursive script, reading "David L. Rauch".

David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Perkins,
and Crumpton, CC., Concur.
Kincheloe, C., Absent.