

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 11th day
of February, 2009.

In the Matter of the Application of The Empire)
District Electric Company for Authority to Sell)
and Transfer Part of its Works or System to the)
City of Monett, Missouri) **Case No. EO-2009-0159**

ORDER APPROVING THE TRANSFER OF ASSETS

Issue Date: February 11, 2009

Effective Date: February 21, 2009

Background and Procedural History

On October 28, 2008, The Empire District Electric Company ("Empire")¹ filed an application² with the Commission seeking to sell and transfer a portion of its works and systems to the City of Monett ("City").³ The two areas affected by the proposed sale and transfer are the Valley View Estates subdivision and the Heim Trailer Court. These areas were annexed by the City in 2003 and 2005, respectively.

Empire currently provides electrical service to 42 residential customers, 5 private outdoor lighting accounts, and 1 commercial structure in the Valley View Estates area, and

¹ Empire is a Kansas corporation with its principal office and place of business at 602 Joplin Street, Joplin, Missouri 64801. Empire is engaged in the business of providing electrical and water utility services to customers in its Missouri service areas. Empire is an "electrical corporation," a "water corporation," and a "public utility" as those terms are defined in § 386.020, RSMo, and is subject to the jurisdiction and supervision of the Commission as provided by law.

² The application was filed pursuant to Section 393.190, RSMo 2000, and Commission Rules 4 CSR 240-2.060 and 4 CSR 240-3.110. All statutory references are to RSMo 2000, and its amendments and revisions, unless otherwise noted.

³ The City of Monett, Missouri (the "City"), is a municipality of the third class. The City currently provides electric utility service within its corporate limits through its municipal electric utility, City Utilities. Although the City is a party to the Agreement, they did not join in the application. Consequently, the Commission joined the City as a party to the case on October 29, 2008.

to 46 residential customers and one vacant commercial structure located within the Heim Trailer Court area. If the proposed sale and transfer is approved, these customers would receive their electric service from the City. A copy of the proposed “Agreement for the Sale of Electric Utility Facilities” (“Agreement”) was included with the Application.

On October 29, 2008, the Commission issued notice and set an intervention deadline. The Commission ordered that any person wishing to intervene in this case file an application to do so no later than November 18, 2008. No applications to intervene were filed, and no party requested a hearing in this matter. Because no party requests a hearing, the Commission may grant the applicants’ request based upon the application and Staff’s recommendation.⁴

Applicable Statutes and Standards for Approval

On December 2, 2008, the Commission’s Staff filed a preliminary response to Empire’s application. In this pleading, Staff indicated when it would provide its recommendation on the requested transfer, but it also asserted that implicit with the requested transfer of assets was a request to change electric suppliers. Sections 91.025 and 393.106 govern requests for change of electric suppliers involving municipalities and regulated utilities, and Staff claimed that Empire’s application was deficient for not having met the requirements of those statutes and the Commission’s related rules. Staff also took issue with notice the City provided to its customers stating:

⁴ See *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989). Moreover, this is not a contested case pursuant to 536.010(2) because it does not involve a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be **determined after hearing.**” (Emphasis added). Neither Section 393.190, nor Section 393.106, nor any other provision of law requires a hearing be held for these determinations. Being a non-contested case, there is no evidence, no record, and no written and separately stated findings of fact. *State ex rel. Public Counsel v. Public Service Com’n*, 210 S.W.3d 344, 353-355 (Mo. App. 2006); Section 536.090. The decision reached by the Commission is totally a matter of the exercise of its discretion. *Id.* Because this is a non-contested case, judicial review is restricted to determining only whether or not the Commission abused its discretion in denying a hearing and whether or not the commission’s order was lawful. *Id.*

According to the application, Empire serves about 100 customers in the two areas annexed by the City of Monett. Affected customers last received notice of a proposed impending change in electrical utility service by publication in The Monett Times on August 31, 2007. That notice expressed the City of Monett's intent to acquire Empire's facilities in the newly annexed areas as provided by Section 386.800 RSMo. 2000. The City of Monett never consummated that acquisition, and due to the lapse of time cannot now avail itself of that statute. In addition, the annexed area described in that notice appears to be in error and is being investigated.

Empire responded to Staff's concerns on December 30, 2008. Empire asserts that the statutes pertaining to applications requesting a change in electric supplier are only applicable in situations where a customer or landowner is seeking such a change. In any event, Empire notes that the only significant difference with proceeding under the change of provider statutes would be: (1) the additional filing requirement of a list of names and addresses of all affected customers;⁵ and (2) the standard the Commission must apply to approve the transfer, the "not detrimental to the public interest" test for a transfer of assets or the "in the public interest" test for a change of suppliers. Empire stated that it had already provided the Commission with the list of affected customers, and Empire contends that it can meet both of the standards for approval because "network reliability for customers in the annexed areas should not be harmed and may, in fact, be enhanced because those customers would be transferred to a City utility substation closer in proximity to the customers' loads."

Empire further stated that it agreed with Staff that customer notice was a legitimate issue and affirmed its willingness to work with Staff to address the issue to the Commission's satisfaction. With regard to the defect in the notice concerning the legal description of annexed area, Empire responded:

⁵ See Commission Rule 4 CSR 240-3.140(1)(l).

Staff correctly notes that there was an error in the legal description in the published notice affecting the parcel of property upon which the Heim Trailer Park is located. It should be noted, however, that the owner of that property had requested voluntary annexation in order to secure City services. In any event, the City has taken steps to remedy any perceived deficiency. On December 5, 2008, it adopted Ordinance No. 7908 bearing a corrected legal description and caused notice to be published in the Monett Times newspaper on December 11, 2008. A copy of Ordinance No. 7908 and a proof of publication are attached for the Commission's information.

Both Empire and Staff are partially correct regarding the appropriate statutory standards. Section 91.025, governing requests for a change of supplier from a municipally owned or operated electrical system, expressly applies only to customer requests for a change in supplier.⁶ However, the language in Section 393.106 is not as concrete, and requests for change of suppliers may come from any "affected party"⁷ despite the fact that later in the statute it refers to customers.⁸

Regardless, whether Empire's application under Section 393.190 involves a change in suppliers for the affected customers, or whether Empire itself is an "affected party", the proposed transaction also involves a transfer of assets currently serving those affected

⁶ Section 91.025.2 provides, in pertinent part: "The public service commission, **upon application made by a customer**, may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential, and the commission is hereby given jurisdiction over municipally owned or operated electric systems to accomplish the purpose of this section." (Emphasis added).

⁷ A party "affected" by a matter is one "interested therein...with respect to any matter determined therein." *State ex rel. Riverside Pipeline Co., L.P. v. Public Service Com'n of State*, 215 S.W.3d 76, 81 (Mo. banc 2007).

⁸ Section 393.106.2 provides, in pertinent part: "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. (Emphasis added). 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. (Emphasis added). **No customer** shall be allowed to change electric suppliers by disconnecting service between May 1, 1991, and July 11, 1991. (Emphasis added).

customers. Essentially Empire would, in this situation, be required to meet the requirements of both statutory schemes and the Commission's associated rules, and there is no question that Commission approval is required for this transaction. All that remains at issue is the proper standard for approval of the transactions contemplated by the agreement between the City and Empire.

A "pure" transfer of assets case is governed by the "not detrimental to the public interest standard," while a "pure" change of supplier case is governed by the "in the public interest standard." At first blush this terminology may seem inconsequential, but the standards are dramatically different. Simply put, to satisfy the "in the public interest" standard, the applicant must demonstrate that the transaction in question promotes or provides a positive benefit to the public interest. Whereas, to satisfy the "not detrimental to the public interest" standard, the applicant must demonstrate that no net detriment would result (i.e. a zero-sum game), not that a positive benefit would result.⁹

Should Empire satisfy the "in the public interest" standard, the higher burden, it will have satisfied the tests for granting approval of either a transfer of assets or a change of supplier.¹⁰ And, when applying the correct standard, the Commission must be mindful of what constitutes the "public interest."

⁹ *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 399-400 (Mo. banc 1934); *In the Matter of the Application of Union Electric Company and Crawford Electric Cooperative, Inc., for Approval of a Written Territorial Agreement Designating the Boundaries of Each as Electric Service Supplier within Jefferson, Crawford, Franklin and Gasconade Counties of Missouri*, Case No. EO-91-204, 1991 WL 498639 (Mo. P.S.C.) Report and Order, August 16, 1991.

¹⁰ While not conceding that the higher standard applies, Empire alleges that its application meets the higher burden.

The “public interest” is a matter of policy to be determined by the Commission.¹¹ Determining what is in the interest of the public is a balancing process.¹² In making such a determination, the total interests of the public served must be assessed.¹³ This means that some of the public may suffer adverse consequences for the total public interest.¹⁴ Individual rights are subservient to the rights of the public.¹⁵ The “public interest” necessarily must include the interests of both the ratepaying public and the investing public; however, as noted, the rights of individual groups are subservient to the rights of the public in general.¹⁶

Staff’s Recommendation

On January 26, 2009, Staff filed its verified recommendation and memorandum regarding Empire’s application. Staff’s recommendation and supporting memorandum indicate that Staff has closely examined the proposed transaction and that the notice issue has been rectified. Staff concludes that the proposed transfer of assets and change of electric supplier is in the public interest for a reason other than rate differential and recommends that it be approved. Specifically, Staff states that the change of supplier for

¹¹ *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956). *State ex rel. Intercon Gas, Inc. v. Public Service Com’n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

¹² *In the Matter of Sho-Me Power Electric Cooperative’s Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

¹⁶ In *State ex rel. City of St. Louis v. Public Service Com’n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934), the Missouri Supreme Court has previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property.

nearly 100 customers in the two areas annexed by the City would: (1) improve reliability of service because Monett's substation is closer to the customer loads and Empire will no longer be serving customers in what amounts to two "islands" surrounded by Monett's customers; (2) reduce customer confusion; and, (3) provide for quicker emergency response because power supply and customer support personnel are in closer proximity to customer loads in the two annexed areas.

Staff, however, does recommend several conditions and modifications. First, Empire had proposed to relinquish that portion of the service area coincident with the areas annexed by the City, but because the Commission doesn't certificate municipal utilities, the Staff maintains that the service area for Empire need not be modified for this Application. Second, Staff believes that any rate making treatment of the proposed sale should be dealt with in the context of Empire's next rate case.¹⁷ Third, Staff recommends that the Commission require Empire to provide a current list of the names and addresses of the affected customers as contemplated in 4 CSR 240-3.140(1)(I) because the list provided by Empire dates back to March 2008.¹⁸

Empire's Response

On February 3, 2009, Empire timely responded to Staff's recommendation. Empire makes clear that while its application may require the authorization for a change in electric suppliers, Commission approval of this transaction must necessarily include the authorization for it to transfer the assets utilized in providing the electric service. Bearing

¹⁷ The Application states: "The purchased price for the facilities, which is based on the depreciated book value of the assets that Empire proposes to sell to the City, will be \$56,052.14. Empire would retain all of the meters and there would be five (5) locations where the physical isolation would take place that would accomplish the "cutover" from Empire to Monett."

¹⁸ Commission rule 4 CSR 240-3.140(2) allows for information to be provided to supplement the Application as long as it is furnished prior to the granting of the authority sought.

this one caveat in mind, Empire has no objections to Staff's suggested conditions and agrees with Staff that it is not necessary that Empire relinquish any portion of its service area to effectuate this transaction. Empire further states that, in conjunction with its response, it provided the Commission with the most up-to-date list of affected customers in conjunction with its response.

The Office of the Public Counsel, the only other party to this case, has not filed a recommendation, and has not responded to Staff's recommendation.

Decision

Based on the information provided in the verified application, and upon the verified recommendation and memorandum of Staff, the Commission finds that the proposed transfer of assets and change of electric supplier is in the public interest for a reason other than rate differential. The Commission concludes that the application should be approved.

THE COMMISSION ORDERS THAT:

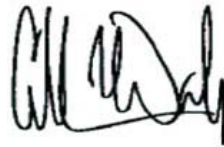
1. The Empire District Electric Company's application, for approval of the transfer of the assets described in its application to the City of Monett, is granted.
2. The Empire District Electric Company is granted authority for the change of electric supplier that will necessarily result from the approved transfer of assets.
3. The Empire District Electric Company is authorized to do and perform, or cause to be done and performed, such other acts and things, as well as make, execute and deliver any and all documents as may be necessary, advisable and proper to the end that the intent and purposes of the approved transaction may be fully effectuated.

4. So that the Commission may know when the approved transaction is completed, The Empire District Electric Company shall file an appropriate notice in this case upon the closing of the approved transaction.

5. Nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes. The Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions and their results in cost of capital, in any later proceeding.

6. This order shall become effective on February 21, 2009.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

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

Stearley, Senior Regulatory Law Judge