

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

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

**STAFF SURREPLY TO EMPIRE’S REPLY TO
STAFF’S RESPONSE TO APPLICATION**

COMES NOW the Staff of the Public Service Commission of Missouri (Staff) and for its Surreply, states as follows:

1. Normally Staff would not file a surreply, but in this instance Staff believes it may help avoid confusion that may be caused by Empire’s stating a too narrow construction of Section 393.106.2¹. Empire’s position of limiting the construction of the term “affected party” is inconsistent with prior positions taken by both the Commission and the Company in other cases. The term “affected party” as written in this section includes electrical suppliers as affected parties that fall under the Commission’s jurisdiction over change of supplier applications.

2. In para. 4 of its Reply, Empire disputes Staff’s construction of Sect. 393.106.2 RSMo which states 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*) Empire asserts:

“The statutory provision to which Staff directs the Commission’s attention deals with the circumstance in which a customer or landowner seeks leave to

¹ All statutory references are to RSMo 2000, unless otherwise noted.

change electric suppliers. That provision was put in place to limit a customer's ability to switch electric service suppliers solely based on which competing provider offers a more advantageous rate....In footnote 1 of the Response, Staff['s] points to the term 'affected party' as being universally inclusive but that fails to note that throughout the legislation are numerous references to the term "electrical supplier" or some variation of that phrase. Had the General Assembly intended that an applicant include an electrical supplier, it needed only to have said so."

Staff disagrees. Past Commission decisions do not follow such an overly narrow construction of this statute. The phrase "...upon application made by an affected party..." includes applications made by electrical service corporations and other electrical suppliers, and is not restricted solely to customers or landowners.

3. In its December 30, 2008 *Order Approving Application For Change of Supplier* in Case No. EO-2009-0181, a case initiated by Empire, the Commission sets forth the proper construction of 393.106.2 regarding its jurisdictional basis in change of supplier cases. The Commission states in para. 1 of its Conclusions of Law section:

1. The Commission's jurisdiction includes changing an electrical corporation's right to supply electricity as follows:

The public service commission, upon application made by an affected party, may order a change of suppliers [FN 3 citing Section 393.106.2]

A party "affected" by a matter is one "interested therein...with respect to any matter determined therein." [FN 4 citing *State ex rel. Riverside Pipeline Co., L.P. v. Public Service Com'n of State*, 215 S.W.3d 76, 81 (Mo. Banc 2007)] Such parties include the suppliers – current and prospective- who filed the application, so the Commission has jurisdiction to decide the application.

4. While the points made above may not be dispositive to Staff's ultimate recommendation in this matter, the Staff believes the Commission's Order in Case No. EO-2009-0181 provides the proper construction of Sect. 393.106.2 and is helpful to clarifying the Commission's jurisdiction over parties in the above-captioned case. (See Commission Order in Case No. EO-2009-0181 attached as Appendix A).

WHEREFORE, the Staff respectfully submits its Surreply to clarify the construction of Sect. 393.106.2 RSMo that sets forth the Commission's jurisdiction over the parties in this matter.

Respectfully submitted,

/s/ Robert S. Berlin

Robert S. Berlin
Senior Counsel
Missouri Bar No. 51709

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 526-7779 (Telephone)
(573) 751-9285 (Fax)
email: bob.berlin@psc.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 8th day of January 2009.

/s/ Robert S. Berlin

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 30th day of
December, 2008.

In the Matter of the Joint Application)
of The Empire District Electric Company)
and Carthage Water & Electric Plant)
for Approval of a Change in Electrical)
Supplier for Certain Customers for)
Reasons in the Public Interest)

Case No. EO-2009-0181

ORDER APPROVING APPLICATION FOR CHANGE OF SUPPLIER

Issue Date: December 30, 2008

Effective Date: January 9, 2009

The Missouri Public Service Commission approves an application ("the application") to change the supplier of electricity to three outdoor advertising signs ("the billboards") southeast of the intersection of US Highways 71 and Missouri Highway HH in Carthage, Jasper County.

Procedure

On November 13, 2008, The Empire District Electric Company ("Empire") and Carthage Water & Electric Plant ("the City") jointly filed the application. The application included affidavits in support of the application from Empire, the City, Lamar Outdoor Advertising ("Lamar"), and Grace Energy Corporation ("Grace"). On December 5, 2008, the Commission's staff ("Staff") filed its recommendation and affidavit in favor of the application. The Commission also gave notice of the application to the McCune-Brooks Regional Hospital ("the Hospital"), and gave the Hospital until December 19, 2008, to file a response. The Hospital filed no response.

The Commission convened no hearing on the application for several reasons. First, the statute that creates Empire's exclusive right to continue serving the billboards does not require a hearing before deciding the application.¹ Also, the current supplier, prospective supplier and billboard owners all favor the application. Further, no person sought a hearing on the application.²

Based on the affidavits of Lamar and Grace ("the billboard owners"), Empire, the City, and Staff, the Commission makes the following findings of fact.

Findings of Fact

1. Empire is an electrical corporation. Empire is current on filings of annual reports and its assessment dues. Empire has no pending or final unsatisfied decision against it from any state or federal court involving customer service or rates within three years of the date of the application's filing.

2. The City is a municipal utility of the City of Carthage, Missouri. The City is not required to file annual reports or pay assessment fees with the Commission. The City has no pending or final unsatisfied decision against it from any state or federal court involving customer service or rates within three years of the date of the application's filing.

3. The City is authorized to provide electric service within, and to certain facilities outside, the city limits of Carthage, Missouri.

The Site

4. U.S. Highway 71 runs north and south. In the City of Carthage, Jasper County, Missouri, U.S. Highway 71 intersects Missouri Route HH ("the intersection"). The billboards

¹ Section 393.106.2. All sections are in the 2007 supplement to the 2000 Revised Statutes of Missouri, except as otherwise noted.

² Moreover, when the law provides a hearing before deciding the application, the waived opportunity for such hearing satisfies the hearing requirement. *State ex rel. Deffenderfer Ent., Inc. v. Public Serv. Comm'n of the State of Mo.*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

are southeast of the intersection. Southwest of the intersection is the Hospital and, further west, a predominantly residential area.

5. The Hospital faces east toward U.S. Highway 71's west outer road. Between the outer road and the front of the Hospital runs Empire's three-phase, 12-kV, distribution line. The distribution line includes three poles; 1,108 feet of 7,200 volt conductor; and crossarms, anchors, and guys ("the facilities"). From the facilities:

- a. West, along the south the boundary of the Hospital and turning north along the Hospital's west boundary, the City runs a circuit to supply the residential area and the Hospital with electricity.
- b. East, across U.S. Highway 71, Empire runs a tap to supply electricity to the billboards.

The billboards are the only structures to which Empire is supplying electric service in that area on the east side of Highway 71.

6. On the east side of Highway 71, for all customers neighboring the billboards, electric service comes from the City. The City has constructed its own highway crossing, extending its service to the east side of U.S. Highway 71. That area has commercial zoning, includes a restaurant to which the City recently began providing service, and will be a source of increased demand over time.

Relocation

7. Since the Hospital's construction began, the Hospital has desired to relocate the facilities from the front of the Hospital to the rear of the Hospital for aesthetic purposes ("the relocation"). To accommodate the relocation, the City constructed poles of sufficient height and class to provide sufficient clearance on the west and south sides of the Hospital. The Hospital began operation in 2008.

8. The Hospital asked Empire to perform the relocation, and Empire agreed.

9. Empire also agreed to sell the facilities to the City. The Hospital has agreed to bear the expense of the relocation. The Hospital has also agreed to bear the expense of removing Empire's highway crossing.

The Billboards

10. The relocation would change the cost effectiveness of providing electricity to the billboards. Empire could not maintain service efficiently, and could not extend its facilities as efficiently as the City, because Empire would have to build a new crossing. Because the City already has a crossing in place suitable for supplying the billboards, it is less expensive to change the billboards' electrical supplier from Empire to the City.

11. The City has agreed to extend a line northward to provide electric service to the billboards. The City has also agreed to pay the costs associated with extending its service to the billboards. The billboards' owners agree to the change of supplier.

12. Efficiency, load management and equipment optimization thus favor changing the supplier from Empire to the City.

Conclusions of Law

1. The Commission's jurisdiction includes changing an electrical corporation's right to supply electricity as follows:

The public service commission, upon application made by an affected party, may order a change of suppliers [³]

A party "affected" by a matter is one "interested therein . . . with respect to any matter determined therein."⁴ Such parties include the suppliers—current and prospective—who filed the application, so the Commission has jurisdiction to decide the application.

³ Section 393.106.2.

2. The application is subject to the following standard:

... that it is in the public interest for a reason other than a rate differential.^{5]} The commission's jurisdiction under this section is limited to public interest determinations[. ^{6]}

The Commission's regulation echoes that requirement:

In addition to the requirements of 4 CSR 240-2.060(1), applications for the approval of a change in electrical suppliers shall include:

* * *

(G) The reasons a change of electrical suppliers is in the public interest[. ^{7]}

The public interest includes factors related to "efficient facilities and substantial justice between patrons and public utilities[.]"⁸

3. Such factors are present in the application, as Staff's recommendation and the parties' affidavits show. A utility patron—the Hospital—seeks to relocate the facilities, which creates the incentive to change suppliers to the billboards, which is the purpose of the application. The application has the support of Empire, the City, the Hospital, and the billboard owners. All agree that changing the billboards' supplier to the City is better than maintaining the supply from Empire, and have agreed to a division of the expenses. Conditioned on fulfillment of those agreements, the Commission concludes that approving the application is in the public interest.

⁴ *State ex rel. Riverside Pipeline Co., L.P. v. Public Service Com'n of State*, 215 S.W.3d 76, 81 (Mo. banc 2007).

⁵ A rate differential is not among the grounds cited in the application or in any supporting affidavit.

⁶ Section 393.106.2. Similar statutes apply to other entities. Section 394.315, RSMo 2000, applies to rural electrical cooperatives. To change from a municipal utility requires the application of a customer under § 91.025.2, RSMo 2000.

⁷ 1 CSR 240-3.140(1).

⁸ Section 386.610, RSMo 2000.

THE COMMISSION ORDERS THAT:

1. The application is granted subject to the following conditions:
 - a. McCune-Brooks Regional Hospital shall pay the costs associated with the relocation.
 - b. McCune-Brooks Regional Hospital shall pay the costs associated with removing The Empire District Electric Company's highway crossing.
 - c. The Empire District Electric Company shall perform the relocation.
 - d. The Empire District Electric Company shall sell the facilities at book value to the City.
 - e. Carthage Water & Electric Plant shall extend a line northward to provide electric service to the billboards.
 - f. Carthage Water & Electric Plant shall bear the expense of extending its service to the billboards.
2. This order shall become effective on January 9, 2009.
3. This case shall be closed on January 10, 2009.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

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

Jordan, Regulatory Law Judge