BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Garrett Stancer and Southway Storage for Change of Electric Supplier from The Empire District Electric Company d/b/a Liberty to White River Valley Electric Cooperative, Inc.	))))))	**File No. EO-2024-0194**

STAFF'S RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission (Staff), through counsel, and provides the Commission with its recommendation on the application described in the case caption. Staff recommends that the application be granted.

Introduction

On December 12, 2023, Garrett Stancer and Southway Storage[1] filed an application with the Missouri Public Service Commission requesting that the electric supplier be changed from The Empire District Electric Company d/b/a Liberty ("Liberty") to White River Valley Electric Cooperative. Inc. ("White River"). On December 18, 2023, the Commission issued its order making Liberty and White River parties to the proceeding and setting deadlines for Liberty, White River, and Mr. Stancer to file pleadings. The Commission also issued orders for a Staff recommendation. Following further proceedings, the Commission set March 12, 2024, as the deadline for Staff's recommendation.

[1] Hereinafter, unless otherwise stated, "Mr. Stancer" will refer both to Garrett Stancer and Southway Storage.

To summarize: Mr. Stancer has property located at the southwest corner of F Highway and Highway 65 in Ozark, Missouri. Currently, it has no electric service, and no structure now existing there has ever had service. In the past, White River has serviced other structures on the property that no longer exist, and White River still has servicing facilities in the immediate area. The legal landscape, however, changed when the City of Ozark annexed the area and property in question in that Liberty was the franchised and CCN authorized provider for properties within the City of Ozark at the time of the annexation. Mr. Stancer asks for the Commission's order allowing him to obtain his service from White River because it will cost him much less for White River to bring new service to him than for Liberty to do so: a charge of zero for White River versus $88,629.38 for Liberty.[2]

Liberty opposes the application. Liberty's response to the application admits that the property currently receives no service. Its response sets out the legal history of the property apropos the respective rights and duties of Mr. Stancer, White River, and Liberty. The origin of Liberty's current claim to superior right was Ozark's annexation of the property. Liberty's response further contends that prior to annexation, White River provided no service to the property; that there is no territorial agreement respecting the property; that "Liberty is not aware of any legal basis to allow for White River to begin providing electric service to this property"; that although Liberty does not serve the subject property and has no customers there, it serves many customers "on the opposite corner"; that it does not appear that it will have to bore under the highway to bring service to the

[2] Liberty's answer to Staff's Data Request No. 003; White River's answer to Staff's Data Request 0006.1.

area; and that there are no known reliability or service issues with Liberty's providing service to the area.

Liberty's response contends that per its CCN, it is "obligated to serve" the property. Liberty argues, further, that White River cannot prevail under Missouri's anti flip-flop laws, Sections 393.106 and 394.315, RSMo, because the applicant's stated reason for a change of suppliers is costs.[3] Liberty argues, additionally, that the Commission lacks the authority to grant the application under Section 394.315, RSMo, because the application may be granted per that statute only if Liberty and White Water have concomitant rights to service the area.

White River has filed pleadings. White River does not take issue with whether the property is in the city limits of the City of Ozark, Missouri. White River states, however, that it has served the area in the past, including a permanent structure once on the property in question but now demolished; and that its facilities and lines continue to traverse the property in question and the surrounding City of Ozark area. White River alleges that it can provide electrical service at minimal cost due to those existing facilities. White River contends:

> Because the Property and the home once upon it were permanently served by White River, and because the structure has since been demolished with intention to replace it with a new structure, White River may provide permanent service to

[3] It appears that Liberty argues that these costs—the costs of bringing service to where service was previously non-existing--fall under the rubric of a rate differential as prohibited by the two anti-flip flop statutes. Liberty cites no authority for that proposition, nor has Staff Counsel located any, one way or the other. Staff, however, believes the question—which points to endless "what if" hypotheticals—need not be reached here: The point is moot because as is argued here, for other reasons neither anti flip-flop statute applies.

Further, as a sidebar: An argument that the applicant should not be allowed to avoid the cost of bringing a service to where none exists with new service facilities that don't now exist seems somewhat predatory and cynical. The statute's purpose is to protect the company's investment in an existing capital asset, not to protect some predatory opportunity to force a customer to fund a new capital asset--*where the customer never then gets value or benefit matching what he pays.*

the new structure upon the request of the Owner. This is also supported by a public interest determination should the Commission proceed with that analysis in this case.

White River then contends that the application satisfies the Commission's 10-Factor test on Change of Supplier Cases:

1. Whether the customer's needs cannot adequately be met by the present supplier with respect to either the amount or quality of power;

2. Whether there are health or safety issues involving the amount or quality of power;

3. What alternatives a customer has considered, including alternatives with the present supplier;

4. Whether the customer's equipment has been damaged or destroyed as a result of a problem with the electric supply;

5. The effect the loss of the customer would have on the present supplier;

6. Whether a change in supplier would result in a duplication of facilities, especially in comparison with alternatives available from the present supplier, a comparison of which could include; (i) the distance involved and cost of any new extension, including the burden on others -- for example, the need to procure private property easements, and (ii) the burden on the customer relating to the cost or time involved, not including the cost of the electricity itself;

7. 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 (6)(ii) above;

8. What efforts have been made by the present supplier to solve or mitigate the problems;

9. The impact the Commission's decision may have on economic development, on an individual or cumulative basis; and

10. The effect the granting of authority for a change of suppliers might have on any territorial agreements between the two suppliers in question, or on the negotiation of territorial agreements between the suppliers.

Contemporaneously with this pleading Staff is filing its technical memorandum. Staff has conducted an investigation, and its investigation, factual findings and conclusions, and expert opinions are set out fully and in detail in that memorandum. Technical staff concludes that based upon all current filings and data responses, granting the application is consistent with the Commission's Ten-Factor Test for supplier change.[4]

Staff Counsel believes that the following statutes are in play in this case in ascending order:

Section 394.315.2 states, in relevant part, that

> . . . [O]nce a rural electric cooperative, 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 and section 394.080, or pursuant to a territorial agreement approved under section 394.312. 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 and the commission is hereby given jurisdiction over rural electric

[4] *In the Matter of the Application of Brandon Jessop for Change of Electric Supplier from Empire District Electric to New-Mac Electric*, EO-2017-0277 (2018).

cooperatives to accomplish the purpose of this section. 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. , , ,

Section 393.106, RSMo states, in relevant part:

. . . [O]nce 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 and section 394.080, or pursuant to a territorial agreement approved under section 394.312. 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 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. . . .

Section 393.130.1, RSMo, states in relevant part:

1. Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

Section 393.130.3, RSMo, states in relevant part:

3. No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Additionally in play is Liberty's Tariff, P.S.C. 6, Section 5, Original Sheet no. 17c, stating:

8e. Non-residential Customers

> The Company will provide overhead or underground distribution facilities to serve an individual non-residential customer at no cost to the customer provided the estimated revenue from three (3) years of electric service equals or exceeds the estimated direct and indirect costs of construction. The Company shall require contributions in aid of construction for the portion of the investment in the total extension of the service to the customer that cannot be supported with the estimated revenues.

In the course of Staff's investigation, it has found that Liberty will charge the applicant $88,629.38 to bring the service to Mr. Stancer's property, while the cost *to White River* will be about $22,000, but nothing *to Mr. Stancer*.[5] As explained in detail in Staff's memorandum, White River has existing nearby facilities while Liberty has never provided service to the property or the area on the west side of Highway 65; and to bring service there, must cross Highway 65.

Argument

Synopsis

In the first instance, Staff contends that neither anti flip-flop statute, Section 394.315, RSMo, nor Section 393.106, RSMo, controls the case outcome. White River has no standing under the former because it has no "concomitant right" with Liberty's right to provide service to the subject property. Liberty has no standing under

[5] White River's Response to Staff Data Request 0006.1:

> "White River estimates this700-foot, 3 phase extension at 422,500 (labor and materials). Standard underground materials will be used, i.e., conduit, underground cable, unction cabinet, et. This cost will be covered at 100% by White River."

the latter because no "change of service" as defined by the statute is involved. With both anti flip-flop statutes out of play, does Liberty's CCN standing alone, nevertheless, simply trump the case by default? Staff says no.

Liberty premises its argument that it has a right to provide the service on the proposition that per its CCN, it is "obligated" to provide service. To synopsize Staff's response here: If Liberty means that that duty creates a right, then Staff responds that the mandate does not end at the word "service" and responds that Liberty's "right" depends entirely upon its ability to actually perform the "obligation" that Liberty claims as the premise for its "right." Liberty is subject to a statutory obligation to provide service that is safe and adequate *at rates that are just and reasonable*; and subject to a concomitant statutory absolute prohibition against making or demanding any unjust or unreasonable charge. Because the customer is manifestly the intended beneficiary of the obligations and prohibitions laid upon the utility, the customer has an *ipso facto* concomitant right to safe and adequate service at just and reasonable rates and an absolute right to be free of unjust or unreasonable charges.

Liberty's costs for bringing the applicant service are $88,629.38. Per its tariff, these costs must be borne by the customer. Per the Section 393.130.3, RSMo, prohibition against granting undue or unreasonable preferences, Liberty arguably cannot waive the charge. If Liberty's waiving or lowering the charges to a just and reasonable level be an undue or unreasonable preference, then Liberty's hands seem tied: It cannot do what the statute legally mandates—provide service at just and reasonable rates. Whether Liberty's hook-up charge can be waived or decreased is not before the Commission to consider in this case based on the current filings. The point is moot

because Liberty has given no indication that it would do so and has actually pretty clearly refused to do so in pleadings that state that applicant's main reason for going with White River is the cost factor. Why say that if the Company will waive the point? The inference is pretty inescapable that Liberty won't waive the charge. White River's costs, on the other hand, are about $22,000, and White River will not charge any of that off to the applicant.

To summarize this synopsis: Staff contends that (a) if neither anti flip-flop statute is in play and, accordingly, this Commission is free to consider the cost differential[6]; (b) if Liberty cannot perform its just and reasonable charges duties; and (c) if the Commission has a duty to enforce the statute and should not issue an order licensing the conduct that the statute prohibits: then the Commission should grant the application.

Anti Flip-Flop Statutes

Liberty suggests that Section 394.315, RSMo, is case dispositive. It contends that the anti "flip flop" statutes as applied in *Union Elec. Co. v. Platte-Clay Elec. Co-op, Inc.*, 814 S.W.2d 643 (Mo. App. W.D. 1991) ("*Platte-Clay*" when referring to the case) require that the application be denied. In that case, Union Electric brought a declaratory judgment action in the circuit court seeking to declare its exclusive right to provide electric service to "new structures" built on property in its franchise area. The area had been previously annexed into the City of Excelsior Springs and prior to annexation was located in a rural area served by the Platte-Clay Electric Cooperative, Inc. Subsequently to annexation, Platte-Clay provided service to the property to facilitate the construction of two new structures that had not existed on the property prior to the date of annexation.

[6] Assuming, for argument's sake here, that the costs of bringing service to where service was previously non-existing fall under the rubric "rate differential."

Platte-Clay was still providing service as of the action before the court, and Union Electric filed a petition seeking injunctive relief against Platte-Clay, asking the court to enjoin Platte-Clay from providing permanent electric service to the new structures and for a declaration that providing temporary service was illegal.

Liberty cites to the *Platte-Clay* case for the following proposition:

> Additionally, as previously noted by this Commission, RSMo Section 393.106 only authorizes the Commission to consider a change of supplier request if two electric suppliers, such as an electric investor-owned utility and an electric cooperative, both have a concomitant right to serve a particular area [citations omitted]. If, and only if, that concomitant right exists, may the Commission order a change of supplier for a reason other than rate differential.[7]

The *Platte-Clay* case set that proposition out and then proceeded to the question of whether the coop, Platte-Clay, had a concomitant right with Union Electric to provide service. That question, answered in the negative, turned on the definitions of a "structure" set out in the applicable anti flip-flop statute, Section 394.315, RSMo. The statute applicable in the *Platte-Clay* case stated the following, quoted from the case with the court's italics:

> (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 which was in existence on August 13, 1986, but *shall not include or be construed to apply to noncontiguous additions to or expansions of new structures upon which construction is commenced after August 13, 1986, or to confer any right on a rural electric cooperative to serve new structures on a particular tract of land because it was serving an existing structure on that tract prior to August 13, 1986.*[8]

[7] Liberty's Response, page 3.
[8] Emphasis in the original. *Union Elec. Co. v. Platte-Clay Elec. Co-op., Inc*. 814 S.W.2d 643, 647 (Mo. App. W.D. 1991).

The *Platte-Clay* court found the emphasized language to be dispositive. The Court stated:

> The definition of "structure" in the statute clearly draws a distinction as to that which is considered a "structure" and that which is considered a "new structure" and, thus, this court construes this language as even further limiting Cooperative's "grandfather rights". This court does not find Cooperative's interpretation of the language of 394.315.2 persuasive, because its interpretation is that Subsection deals solely with "structures" as defined by the statute, and not "new structures".[9]

The *Platte-Clay* court then turned to the coop's argument, stating:

> Cooperative argues that since it has supplied electric energy to the Bartlett property prior to the annexation of this property, and further because it would have supplied service to the Bartlett property within the last sixty days, it is entitled to continue that service pursuant to Sections 394.080 (4) and 394.315.2.. Such reasoning, however, ignores the general rules of statutory construction and the plain, unambiguous meaning of Section 394.315, when read in its entirety.[10]

The court then held:

> The meaning of the language of § 394.315.1 is plain and clear. The statute prohibits a rural electric cooperative, such as Cooperative, from providing electrical energy to new structures on a particular tract of land even though it was serving an existing structure on that tract prior to August 13, 1986. (That date being the date when Section 394.315 came into effect, as amended).[11]

Liberty did not note, but Staff will note for the Commission's benefit, that following the *Platte-Clay* case, the Missouri Supreme Court decided *Farmers' Elec. Co-op, Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266, 270 (Mo. banc 1998). Again, as in *Platte-Clay*, the Supreme Court relied upon Section 394.315.1(2)'s declaration that "[n]othing in this section shall be construed to confer any right on a rural electric cooperative to serve **new** structures on a particular tract of land because it was serving an existing structure on that tract." (emphasis in the original). Based on that proposition,

[9] *Union Elec. Co. v. Platte-Clay Elec. Co-op., Inc*. 814 S.W.2d 643, 647 (Mo. App. W.D. 1991).
[10] *Union Elec. Co. v. Platte-Clay Elec. Co-op., Inc*. 814 S.W.2d 643, 647 (Mo. App. W.D. 1991).
[11] *Union Elec. Co. v. Platte-Clay Elec. Co-op., Inc*. 814 S.W.2d 643, 647-648 (Mo. App. W.D. 1991).

the Supreme Court stated: "In this case, Farmers' may not provide service to Crossroads merely because it has the authority under section 394.080.1(4) to continue providing service to the structures it was serving before the land was annexed."[12]

In connection with the City of Ozark annexation, White River did not timely invoke its rights per Section 386.800, RSMo, and, accordingly, has no "concomitant" right with Liberty per the Section 394.315, RSMo statute. The upshot of the *Platte-Clay* cluster of cases is that because White River has no "concomitant" right to provide service to the area in question, White River has no standing to assert a right to provide the applicant with service. Liberty cites good law, and Liberty's argument looks elegant. But any follow-up conclusions that Liberty has the right, therefore, to provide service or that the applicant has no right to choose his service are non-sequiturs. For White River to prevail under Section 394.315, RSMo, it needed standing. For Liberty to prevail under Section 393.106, RSMo, it also needs standing. The fundamental question under that statute is whether any Liberty service, as defined in the relevant statute, is being "changed from," i.e., flipped. If not, then Liberty has no anti flip-flop standing to assert that the applicant's sole reason for preferring White River is a rate (or cost) differential. Section 393.106, RSMo, states in relevant part:

> . . . [O]nce 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 and section 394.080, or pursuant to a territorial agreement approved under section 394.312. 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 commission's jurisdiction under this section is limited to public interest determinations and

[12] *Farmers' Elec. Co-op, Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266, 270 (Mo. banc 1998).

> excludes questions as to the lawfulness of the provision of service, such questions being reserved to courts of competent jurisdiction. . . .

White River has no standing to assert a right to serve the applicant flowing solely from Section 394.315, RSMo. But likewise, Liberty has no right to do so flowing solely from Section 393.106, RSMo. Liberty does not and has never supplied retail electric energy to any structure on the property, past or present, "through permanent service facilities." So its position does not even get past the "once" test, i.e., the "once the utility has commenced service test." Failing there, Liberty's position equally fails all of the rest of the statutory tests. Although it has the authority to provide service to the property, it has not done so nor built facilities ready to do so; so there are no Liberty *permanent service facilities*, and Liberty fails that test. At this time, there is no *structure* on the property, and no structure owned by the applicant or anyone else now existing on the property in question has ever received service from anyone. Liberty's position, thus, fails the *structure* test. Regardless of how one reads the statute as an anti flip-flop statute, it applies when and only when, i.e., only "once," service has been provided "through permanent service facilities" by someone to a "structure" owned by someone. No service has been provided. No Liberty permanent service facilities exist. No structure exists. Regardless of how you flip and look at the statute, Section 393.106, RSMo, is not in play and does not prohibit the applicant (or this Commission) from giving consideration to rate (or hook-up costs, if they be a "rate") differentials.

Thus, neither utility has a superior right over and against the other utility to provide service solely on the basis of any anti flip-flop statute, and, thus, neither has any anti flip-flop statutory defense against the applicant based upon his preference not to pay Liberty's high costs. Does either utility have a superior right per some other legal basis?

The property has been annexed to the City of Ozark and, failing to exercise any rights per Section 386.800, RSMo, White River has lost any superior right position. Liberty, on the other hand, has a CCN for the property and the City of Ozark franchise to serve the property. Must Liberty, as the "last one left standing," therefore, now win by default?

The answer is no—not if the applicant "loses," as explained here. Staff contends that any Commission's order in this case must square with its own duties to enforce the Section 393.130, RSMo, "just and reasonable" mandates and prohibitions: The Commission should not issue a decision licensing a result which Section 393.130, RSMo, expressly prohibits. Any right Liberty has must be exercised in accord with that statute's mandates and any right Liberty has is strictly hedged by that statute's prohibitions. That statute mandates that the utility provide safe and adequate service at just and reasonable rates and strictly prohibits a utility from charging unjust or unreasonable rates. In statutory construction, language should be construed to effect the intent of the legislature and to avoid an absurd result. See *Anderson ex re. Anderson v. Ken Kauffman & Sons Excavating, LLC*, 248 S.W.3d 101 (Mo. App. W.D. 2008). It would be absurd for the legislature in one breath to prohibit a utility from charging unjust and unreasonable rates but in the next breath confer on the utility, through a CCN granted per the authority of Section 393.170, RSMo, the right to do so.

Staff has noted that the application of Section 393.106, RSMo, begs the question of whether a "service" as defined by the statute is being flipped. Obviously, Liberty may likewise argue that it is Staff that is the one actually begging the question here, by assuming a conclusion that must be proved, i.e., that the $88,629.38 charge is unjust and unreasonable. Liberty's argument would be that if the reasonable utility cost to

Liberty of providing the service is actually $88,629.38, that if the tariff requires the company to charge the cost through to the customer, and that if 393.130.3, RSMo, prohibits a waiver, then the charge must be *ipso facto* just and reasonable. Again: Although this argument appears tight and elegant, it starts with the wrong bench mark: It is the Staff's position that where there is new service to a previously unserved area and no previous company capital investment is involved, and where there is a choice in the matter,[13] then Liberty doesn't prevail simply by establishing that the reasonable cost to Liberty of extending the service is really $88,629.38. If Mr. Stancer can obtain the same service for substantially less or nothing from White River, who has the service facilities substantially ready to go; and if giving the service to White River will leave no Liberty asset stranded nor deprive it of the benefit of any investment Liberty has actually made; and if denying the application will cost Mr. Stancer $88,629.38 while granting it will avoid that cost completely: Then the facts speak for themselves. A Commission order requiring Mr. Stancer to pay $88,629.38 in those circumstances would be wholly inconsistent with the *Commission's duty* to enforce the mandates and prohibitions of Section 393.130, RSMo.

Recommendation

Liberty's filings give no hint it would agree to waive the approximate $88,629.38 or to charge some lesser amount, and, indeed, pretty clearly say otherwise. Based upon all pleadings and filings and Staff's investigation, findings and conclusions as set out in its Memorandum, Staff recommends that the application be granted.

[13] Indeed, a very easy choice in light of the ten change of supplier factors as applied here; see technical Staff's memorandum.

WHEREFORE, Staff recommends that the Commission accept this recommendation as conforming to the Commission's orders.

Respectively Submitted,

/s/ *Paul T. Graham*

Paul T. Graham #30416
Senior Staff Counsel
P.O. Box 360
Jefferson City, Mo 65102-0360
(573) 522-8459
Paul.graham@psc.mo.gov

Attorneys for the Staff of the
Missouri Public Service Commission

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to counsel of record as reflected on the certified service list maintained by the Commission in its Electronic Filing Information System this 12th day of March, 2024.

/s/ *Paul T. Graham*