

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

In the Matter of the Application of Brandon Jessip)
for Change of Electric Supplier from Empire District)
Electric to New-Mac Electric)

Case No. EO-2017-0277

STAFF’S INITIAL POST-HEARING BRIEF

Introduction

Because The Empire District Electric Company insists that it has the exclusive right to provide electrical service to existing buildings on the Jessip’s 30 acres located at 7082 Nighthawk Road, Neosho, Missouri, and because New-Mac Electric Cooperative, Inc., will not serve the house on that tract without a Commission order authorizing it to do so, Brandon Jessip is seeking an order from this Commission that will allow New-Mac to serve the house.

The issues for determination are:

1. 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 at 7082 Nighthawk Road, Neosho, Missouri?

2. If so, 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?

If the Commission decides the first question against Empire, it need not go on to the second question.

Based on the competent evidence in the record, Staff’s positions are (1) that the evidence does not show Empire has the exclusive right to provide electricity to the

house, the barn, or the wellhouse on the tract, and (2) that “it is in the public interest for a reason other than a rate differential” for New-Mac to serve the house, the barn, and the wellhouse.

Facts

When the Jessips acquired the tract bordered on the north by Foliage Road and the east by Nighthawk Road on January 2, 2014,¹ it had a barn, an uninhabitable,² termite-ridden³ house with rotten floors,⁴ and a wellhouse, all located just south of the intersection of Foliage and Nighthawk Roads.⁵ The property had been abandoned for at least five years.⁶ The barn is over 50 feet north of the house.⁷ The wellhouse is immediately west of the house, located within five feet of the center of the west wall of the house.⁸ Empire had an electric line which ran westwardly from Empire’s line along the west side of Nighthawk Road to a pole between the barn and house upon which its meter was mounted.⁹ Empire’s transformer used to serve the tract was located on a

¹ Ex. 1, ¶ 2.

² Ex. 1, ¶¶ 3, 6; Tr. 2: 31, 33-34.

³ Ex. 1, ¶ 3; Tr. 2: 46.

⁴ Ex. 1, ¶ 3.

⁵ Ex. 100, Rebuttal Testimony of Staff witness Daniel I. Beck, Schedule DB-r2; Tr. 2: 33-36, 43.

⁶ Ex. 1, ¶ 2; Tr. 2: 32, 44-45.

⁷ Based on measurements of Ex. 100, Rebuttal Testimony of Staff witness Daniel I. Beck, Schedule DB-r2 and the acreage of the Jessips’ tract. One acre is 43,560 square feet. The tract is 29.79 acres. The east-west length of the tract in Schedule DB-r2 is about 11.5 cm., the north-south length is about 5.7 cm. and the distance between the house and barn is about 0.4 cm. Since 11.5 cm. by 5.7 cm. (65.55 cm.²) represents 29.79 acres, it also represents 1,297,652 sq. feet; therefore the square root of 65.55 cm.² represents the square root of 1,297,652 sq. feet, i.e., the number of feet each cm represents. In this case 1139 ft./8.10 cm , or about 141 ft./cm. 141 ft./cm. * 0.4 cm. = 56.4 feet.

⁸ Tr. 2: 33.

⁹ Tr. 2: 36-37, 49.

pole in its line along Nighthawk Road.¹⁰ On the customer side of Empire's meter, overhead electric lines ran from Empire's pole to the house, the barn and the wellhouse.¹¹ According to Empire, it turned the service off on August 25, 2010.¹²

At Mr. Jessip's request, Empire turned on the service on or about September 8, 2014.¹³ Mr. Jessip used the service only to power the well to obtain water in five-gallon buckets once or twice a week for watering about 15-18 chickens.¹⁴ He turned the power to the well on and off at a breaker so that the well was only energized when he was obtaining the water.¹⁵ After Mr. Jessip received two monthly billings exceeding \$50 that he viewed to be based on unreasonably high usages, he questioned Empire about them.¹⁶ After Empire responded that it was his "problem," not Empire's,¹⁷ Mr. Jessip informed Empire that he planned to demolish the house and requested Empire to terminate service, and to remove the pole, meter, line and its transformer.¹⁸ Empire discontinued service to the meter on or about January 12, 2015, and removed the pole, meter, and line, as well as its transformer located on a pole near the house in Empire's line running along Nighthawk Road.¹⁹

¹⁰ Tr. 2: 49.

¹¹ Tr. 2: 43, 49-50, 68.

¹² Ex. 200, Rebuttal Testimony of Empire witness Mulvaney, p. 2.

¹³ Ex. 1, Direct Testimony of Mr. Jessip, ¶ 4; Tr. 2: 37-38; Ex. 200, Rebuttal Testimony of Empire witness Mulvaney, p. 3 and Schedule PJM-1; Tr. 2: 38-41.

¹⁴ Ex. 1, Direct Testimony of Mr. Jessip, ¶ 4; Tr. 42-43, 59.

¹⁵ Ex. 1, Direct Testimony of Mr. Jessip, ¶ 4; Tr. 2: 59.

¹⁶ Ex. 1, Direct Testimony of Mr. Jessip, ¶ 4; Tr. 2: 41, 59.

¹⁷ Ex. 1, Direct Testimony of Mr. Jessip, ¶ 4; Tr. 2: 41, 59.

¹⁸ Ex. 1, Direct Testimony of Mr. Jessip, ¶ 4; Tr. 2: 45-47.

¹⁹ Tr. 2: 37, 49; Ex. 200 Rebuttal Testimony of Empire witness Mulvaney, p. 3 and Schedule PJM-1.

Mr. Jessip began demolishing the house in early 2017.²⁰ Soon after, he decided it could be reconstructed and began to preserve it, removing the floors, removing most of the interior walls, and replacing about one-half of the exterior walls.²¹ When he approached New-Mac about providing electric service to the house, New-Mac declined to do so unless Empire agreed.²² Empire did not agree.²³ Mr. Jessip then contacted Missouri Commission Staff on or about March 14, 2017, who then inquired of Empire which, in part, responded,

Since Empire supplied retail electric energy to the property at issue, and the property is not subject to statutory exceptions related to municipal annexation or territorial agreement, Empire has the right to continue serving the property unless the public service commission changes suppliers on the basis that it is in the public interest for a reason other than a rate differential. Empire asserts that a change in utility supplier is not in the public interest.²⁴

This formal complaint followed.

Currently neither Empire nor New-Mac are providing electric service to any part of the tract, although both have electric lines that cross it. Empire's line runs along the west side of Nighthawk Road and New-Mac's line runs north-south through the tract parallel to Nighthawk Road approximately 170 feet west of the house.²⁵ The shortest distance from the nearest pole on Empire's line to the weatherhead on the north side of

²⁰ Ex. 1, Direct Testimony of Mr. Jessip, ¶ 5; Tr. 2: 52, 61.

²¹ Ex. 1, Direct Testimony of Mr. Jessip, ¶ 5; Exs. 3-7; Tr. 2: 46, 52, 61.

²² Ex. 1, Direct Testimony of Mr. Jessip, ¶ 5; Tr. 2: 47.

²³ Ex. 1, Direct Testimony of Mr. Jessip, ¶ 5; Ex. 100, Rebuttal Testimony of Staff witness Daniel I. Beck, p. 5, Schedule DB-r4.

²⁴ Ex. 100, Rebuttal Testimony of Staff witness Daniel I. Beck, Schedule DB-r4.

²⁵ Ex. 100, Rebuttal Testimony of Staff witness Daniel I. Beck, Schedule DB-r2 (See footnote 6, 1.2 cm. * 141 ft./cm. = 169 ft.); Ex. 1, Direct Testimony of Mr. Jessip, ¶ 3, Tr. 2: 36, 37.

the house is about 71 feet.²⁶ Both utilities readily could provide electricity to the house, the barn, and the wellhouse from their existing lines.²⁷

Statutory Analysis

A.

The law that controls in this case is § 393.106.2, RSMo., which provides:

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 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 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 cancelled 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.

"Structure" is statutorily defined at § 393.106.1(2), RSMo., as follows:

"Structure" or **"structures"**, an agricultural, residential, commercial, industrial or other building or a mechanical installation, machinery or

²⁶ Ex. 100, Rebuttal Testimony of Staff witness Daniel I. Beck, Schedule DB-r2 (See footnote 6; 0.5 cm. * 141 ft./cm. = 71 ft.).

²⁷ Ex. 100, Rebuttal Testimony of Staff witness Daniel I. Beck, p. 7.

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.

Since exclusivity of service is in derogation of the common law free market, it should be viewed narrowly. Until 1982, where multiple utilities lawfully could serve electricity in the same area, consumers could choose who provided that service at any time, regardless of whether they already had electric service. That year the legislature enacted HB 1646.²⁸ It relied on “metering points” and included a 60-day prohibition on switching suppliers, unless the Commission ordered otherwise. With HB 1486 in 1986²⁹ the legislature changed the criteria from “metering points” to “structures” and authorized those supplying service as of August 13 1986, to continue to supply service thereafter, eliminating the 60-day prohibition. Then in 1991, the legislature enacted the current version with SB 221,³⁰ which relies on “permanent service” to “structures” and a right to continue to serve after “lawfully commenc[ing] to supply retail electric energy to a structure.”

B.

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 at 7082 Nighthawk Road, Neosho, Missouri?

²⁸ Laws of Missouri, 81st General Assembly 1982, p. 603.

²⁹ Laws of Missouri, 83rd General Assembly 1986, pp. 974-75.

³⁰ Laws of Missouri, 86th General Assembly 1991, pp. 754-69.

Unless the evidence establishes that Empire has the right to continue to serve the structures on the tract, then Empire does not have that right. In other words, Empire has the burden of showing it has the right to continue to serve the house, barn and wellhouse.

The Jessips' house, barn and wellhouse are all structures within the meaning of § 393.106 because they are all buildings or installations. Empire's meter was not located "on" any of them. Therefore, unless it was "adjacent" to one or more of them, Empire did not acquire the exclusive right to serve them. The definition of "adjacent" relating to physical proximity is "lying near, close, or contiguous; adjoining; neighboring."³¹ The evidence in this case indicates that the barn and house are somewhat more than 50 feet apart and the pole with Empire's meter was located somewhere undisclosed between them.

The record is devoid of evidence that Empire lawfully commenced to supply retail electric energy to either the barn or the house, although the presence of its pole, transformer, meter, and line on the tract, and the lines from the meter to the house and barn when the Jessips bought it, are circumstantial evidence that Empire provided electric service to them at some point in the past, as is Mr. Jessip's testimony of former neighbors and tenants living in the house. Additionally, Empire's meter connected to its line was located on a pole that was sited between the barn and the house, which the evidence indicates are over 50 feet apart. Since the statutory language is "located on or adjacent to the structure" and the common dictionary definition of "adjacent" is

³¹ Dictionary.com "adjacent," in *Dictionary.com Unabridged*. Source location: Random House, Inc. <http://www.dictionary.com/browse/adjacent>. Available: <http://www.dictionary.com/>. Accessed: October 13, 2017.

“lying near, close, or contiguous; adjoining; neighboring,” it appears the legislature’s intent is for “adjacent” to mean close physical proximity. Based on the evidence, Empire’s meter was not located on the house; in fact, it was located perhaps as far away as 50 feet from the house. It is Staff’s opinion the evidence does not establish Empire’s meter was “adjacent to” the house within the intendment of that phrase as used in the § 393.106.2, RSMo., definition of “structure.” If Staff is correct, then Empire never acquired the right to continue to serve the house, the barn, or the wellhouse.

It is undisputed that at Mr. Jessip’s request, Empire began electric service in September 2014 to power the well on the tract and that approximately four months later, again at Mr. Jessip’s request, Empire disconnected that service and removed its meter, line, pole and transformer used to provide that service. Staff witness Daniel I. Beck testified:

Based on Staff’s investigation the structures located at 7082 Nighthawk Road, Neosho, Missouri have not had electric service for at least two and one-half years and Empire removed its facilities (a pole, transformer and service line) two and one-half years ago that would be required to serve this property. Both Empire and New-Mac have easements and lines that cross the property, and both are within a reasonable distance to extend service to the house and outbuilding. In addition, the old house was a shell that lacked floors, most interior walls and the electrical wiring in the house due to theft. While some repairs have been done, the house will need extensive work before it is inhabitable.³²

and

Q. The photo labeled file6.jpeg (Ex. 8) shows a meter base and weatherhead. Does this mean that service could be reconnected tomorrow?

³² Ex. 100, Staff witness Daniel I. Beck Rebuttal Testimony, p. 2.

A. No. The photo titled file5.jpeg (Ex. 7) shows the interior of the wall where the meter base and weatherhead are currently located. The round hole in the wall is the same hole that can be seen within the meter base. Normally, a breaker box would be installed inside the home before service is connected. Instead, this resembles a home that is being built, but needs extensive electrical work before permanent service can be established. Normally, I would expect a customer to establish temporary service near such a house that requires extensive interior construction so the vast majority of the interior work can be completed before connecting permanent electrical service.

The weight of the evidence is that, at most, Empire initiated service to the wellhouse in September 2014. However, even if one assumes that Empire's initiating service in September 2014 entitled it to continue to serve the house afterward, an assumption Staff does not concede, then the right Empire obtained was "to continue serving [the house]." Albeit at Mr. Jessip's request, Empire discontinued service to any structure on the tract in January of 2015. There is no evidence to contradict Mr. Jessip's testimony that when he requested Empire to discontinue service in January 2015, he intended to demolish the house, and it was not until some two years later (early 2017) that he decided to reconstruct the house and began taking steps to preserve it. It is Staff's opinion, as expressed in its motion to dismiss and in Staff witness Daniel I. Beck's Rebuttal Testimony (Ex. 100), that this discontinuance of service for over two years without any electric service to the tract, and Empire's removal of its facilities, ended any rights Empire had to continue to serve the house, as well as the wellhouse and the barn.³³

³³ Staff is not arguing the facilities Empire removed were "facilities installed temporarily to provide electrical service during construction" as that phrase is used in § 393.106(1), RSMo. 2016; Tr. 2: 66.

C.

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?

Should the Commission determine that Empire has the right to continue to serve any of the structures on the tract—the barn, the house, or the wellhouse, so that the Commission must go on to consider whether a change of supplier is in the public interest for a reason other than a rate differential, Staff recommends the Commission consider the following factors:

- (1) Both Empire and New-Mac have distribution lines near to the structures and are readily capable of safely and reliably serving each of the structures;
- (2) Both Empire and New-Mac would incur similar costs to extend their lines to serve the structures, New-Mac slightly more than Empire;
- (3) Both would benefit from additional revenue received for serving the structures, neither having received any revenues for serving them for over two years;
- (4) The tract is burdened by a New-Mac line easement through the center of it and an Empire easement in the road on the east property line;
- (5) The Jessips' plans to make the house inhabitable may hinge on the electric service provider and increasing the availability of such housing stock in the area between Diamond and Neosho is not insignificant;

(6) Mr. Jessip has demonstrated his strong preference to be served by New-Mac by prosecuting this case;³⁴ and,

(7) The Jessips intend to build another house near the center of the tract in the near future and plan for New-Mac to provide the electric service to that house.³⁵

On page 14 of its January 5, 2011, *Report and Order in In the Matter of the Application of Cardwell Lumber, Inc., for Approval of a Change of Electric Supplier at its 5927 Highway 50 West, Jefferson City, Missouri Location from Union Electric Company to Three Rivers Electric Cooperative*, 30 Mo.P.S.C.3d 99, 109; Case No. EO-2011-0052, the Commission said the following regarding customer preference:

Both Staff and Ameren refer to Commission cases, finding that customer preference alone is an insufficient basis to order a change of supplier. However, if thought out, a customer's preference is what drives an application for a change of supplier. The customer "prefers" another supplier over its current supplier. Most certainly, some of the factors discussed above play a part in a customer's preference for an alternate supplier.

Notably, a customer's preference is guided by whether its needs can be met by the current supplier, health and safety issues, available alternatives, damage to equipment, whether there will be duplicative services, overall burden on the customer, efforts made by the current supplier to solve or mitigate problems and, particularly in this case, the impact the decision may have on economic development. That leaves only two factors that do not impact customer preference; effect on territorial agreements and the effect the loss of the customer will have on the present supplier.

³⁴ Ex. 100, Staff witness Daniel I. Beck Rebuttal Testimony, pp. 6-8.

³⁵ Tr. 2: 57-58, 60, 69.

It is Staff's opinion that the weight of the relevant factors supports a finding in favor of Mr. Jessip's application.

Conclusion

The first issue presented for the Commission's determination, whether or not Empire has acquired a right to permanently serve the existing structures on the Jessips' tract, turns on the construction of the word "adjacent." It is Staff's position that a meter located as much as 50 feet from a structure is not adjacent to it within the meaning of the statute. If the Commission agrees with Staff, then the case is decided and the Commission need not reach the second question.

The second question turns on the public interest and disallows the customer's desire for lower rates from a different supplier. The facts show that Mr. Jessip intends to build a second house on the property. As a brand new structure, Mr. Jessip will have the right to choose the provider that supplies electricity to it and he has stated his preference for New-Mac. Certainly, the public interest would favor having all of the structures on the Jessips' tract served by one provider.

After considering all the relevant factors in this case, Staff is confident the Commission will conclude it is in the public interest for New-Mac to serve the existing structures on the tract for a reason other than a rate differential.

Respectfully submitted,

/s/ Nathan Williams

Nathan Williams
Deputy Staff Counsel
Missouri Bar No. 35512

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-8702 (Telephone)
(573) 751-9285 (Fax)
nathan.williams@psc.mo.gov (e-mail)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 27th day of October, 2017.

/s/ Nathan Williams