BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

<u>LIBERTY'S STATEMENT OF POSITIONS AND PRE-HEARING BRIEF</u>

COMES NOW The Empire District Electric Company d/b/a Liberty ("Liberty" or the "Company"), and, utilizing the List of Issues identified in the Joint List of Issues filed by the Staff of the Missouri Public Service Commission ("Commission") on August 12, 2024, Liberty respectfully submits its Statement of Positions and Pre-Hearing Brief for the Commission's consideration.

<u>Introduction</u>

The Application for Change of Electric Service Provider filed herein, in which Southway Storage states that "(t)he cost to provide service to the requested property is much less with White River," must be dismissed or denied by the Commission. The Commission has no authority to order that service be provided by White River Valley Electric Cooperative ("WRVE") to a non-existent building in an area where WRVE has no statutory authority to provide electric service. Based on the undisputed facts and the applicable law, Missouri's anti-flip flop statutes (RSMo. §§393.106 and 394.315) are inapplicable to the case at hand, and the Commission lacks the legal authority to make a public interest determination regarding Southway Storage's application. Liberty is the only entity authorized to provide service to this property, and the provision of service in this location is governed by Liberty's Commission-approved tariffs.

Notable undisputed facts that are relevant to the Commission's determination are: (1) the property at issue is located within the city limits of Ozark, Missouri; (2) no electric supplier

currently provides service to the property; (3) no electric supplier was providing service to the property at the time it was annexed into the city of Ozark; and (4) the property is within Liberty's certificated service area.

Issue 1: Notwithstanding the provisions of Section 394.315.2, RSMo. and sections 91.025, 393.106, and 394.080 to the contrary, can White River Electric provide new permanent electric service to a new structure and to other new structures anticipated with the commercial development of a parcel of property, at the request of the owner of the property, when such property once had a home and water well served by White River but no longer does because service was discontinued, the home was demolished and water well abandoned, the property no longer receives electric service from White River, and where such property is now within the city limits of Ozark, Missouri and therefore within territory served by Liberty?

Issue 6:[1] Does the anti flip-flop statute (Section 393.106, RSMo.) have any legal import on the determination of the issues in this case when there is no existing structure on the property that has received electric service from either White River Electric or Liberty Utilities?

Liberty's Position Statement and Argument on Issues 1 and 6: The Commission has no authority to order that WRVE provide electric service in this case, as WRVE has no statutory authority to serve the subject property. WRVE is governed by Chapter 394 of the Revised States of Missouri (Rural Electric Cooperatives). The Missouri Supreme Court has described the purpose of Chapter 394 as follows:

> The primary purpose of Chapter 394 is to bring electric service to members of the cooperative living in **rural areas** not otherwise served. Section 394.080 allows an exception due to changed conditions, but this exception is not to be extended by implication because it runs counter to the spirit and purpose of the chapter as a whole, which does not contemplate the expansion of the cooperative's facilities or the addition of new members or new customers in the annexed areas. Accordingly, the cooperative cannot extend service to the owners of homes and businesses built after annexation on lots purchased from preannexation members who have subdivided their original land holdings. The franchised utility is entitled to supply this kind of new demand for electric energy in the annexed areas and in view of the cooperative's announced intentions is entitled to be protected against this type of competition by injunctive relief.

[1] The issue numbers in Liberty's Statement of Positions and Pre-Hearing Brief follow the order of the eight issues contained in the Joint List of Issues filed by Commission Staff on August 12, 2024.

Mo. Pub. Serv. Co. v. Platte-Clay Elec. Coop., Inc., 407 S.W.2d 883, 894 (Mo. 1966) (emphasis added). Chapter 394 defines a "rural area" "to mean any area of the United States not included within the boundaries of any city, town or village having a population in excess of sixteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof." RSMo. §394.020(3).

Section 394.080 provides, in relevant part, that a rural electric cooperative, such as WRVE, has the following powers:

> 1. ….
>
> (4) Except as provided in section 386.800, to generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in **rural areas** to its members, to governmental agencies and political subdivisions, and to other persons not in excess of ten percent of the number of its members; provided, however, that where a cooperative has been transmitting, distributing, selling, supplying or disposing of electric energy in a rural area which, by reason of increase in its population, its inclusion in a city, town or village, or by reason of any other circumstance ceases to be a rural area, such cooperative shall have the power to continue to transmit, distribute, sell, supply or dispose of electric energy therein until such time as the municipality, or the holder of a franchise to furnish electric energy in such municipality, may purchase the physical property of such cooperative located within the boundaries of the municipality . . . .

(emphasis added).

The area in question was annexed by the city of Ozark in September of 2022. As of the most recent Official Manual of the State of Missouri (2023-2024), Ozark is listed as having had a population of 21,284 as of the 2020 Census. Once annexed by the city of Ozark, the property in question was no longer in a "rural area." Liberty, on the other hand, has a Certificate of Convenience and Necessity from the Commission to serve within the city of Ozark and has a franchise from Ozark.

At the time the property was annexed by the city of Ozark, there was no structure on the property being served by WRVE. WRVE had previously provided service to a single-family residential home and a well from 1983 to 1994; the home has since been demolished, and WRVE has not provided electrical service to any structure at this location for approximately 30 years.[2] The proposed facility, a commercial storage facility, which does not exist as of today, differs greatly in character from a single-family residential home and well.

In regard to an area that has ceased to be a rural area because of annexation, WRVE has the right to continue service where it was supplying electric energy at the time of annexation. WRVE, however, has not supplied electric energy to the property in question since 1994. Thus, RSMo. §394.080.1 does not provide WRVE with any authority to serve this property.

Section 394.080.2 contains the following exception in regard to a former rural area that have been annexed:

> In addition to all other powers granted in this section, rural electric cooperatives shall have the power to supply electric energy at retail after August 28, 1989, in cities, towns and villages having a population in excess of fifteen hundred inhabitants under the following conditions:
>
> (1) The cooperative was the predominant supplier of retail electric energy within the city, town or village at the time any official United States Census Bureau Decennial Census Report declares the population of such city, town or village to be in excess of fifteen hundred inhabitants;
>
> (2) The city, town or village has granted to the cooperative a franchise to supply electric energy within the city, town or village.

In regard to the area at issue in this matter, WRVE was neither the "predominant supplier of retail electric energy" within Ozark at a time when its population exceeded fifteen hundred inhabitants, nor is there any evidence that Ozark has granted WRVE a franchise to supply electric energy within Ozark.

[2] WRVE Responses to Liberty Data Requests, attached hereto as Appendix A, Responses to DRs 1-3.

Another statutory exception regarding WRVE's service area is found in RSMo. §386.800.2, which provides, in part:

> If a rural electric cooperative has existing electric service facilities with adequate and necessary service capability located in or within one mile outside the boundaries of the area proposed to be annexed, a majority of the existing developers, landowners, or prospective electric customers in the area proposed to be annexed may, anytime within forty-five days prior to the effective date of the annexation, submit a written request to the governing body of the annexing municipality to invoke mandatory good faith negotiations under section 394.312 to determine which electric service supplier is best suited to serve all or portions of the newly annexed area.

WRVE made no such election as to the property in question and failed to send a timely request, and, as such, no good faith negotiations took place. RSMo. §386.800.2 has no applicability to the case at hand.

Staff suggests that because the "property has been annexed to the City of Ozark and, failing to exercise any rights per Section 386.800, RSMo, [WRVE] has lost any superior right position." (Staff Recommendation, p.14). In fact, WRVE has not merely lost a "superior right position," it has lost any statutory basis it might have had to provide service to this property. Staff asks "[m]ust Liberty, as the "last one left standing," therefore, now win by default?" (*Id.*) There is nothing to "win." Liberty is the only entity authorized to provide service to this property, and the provision of service in this location is governed by Liberty's Commission-approved tariffs.

RSMo. §§393.106 and 394.315, commonly referred to as Missouri's anti-flip flop laws, typically govern change of supplier requests. RSMo. §394.315 refers to rural electric cooperatives (like WRVE), while §393.106 refers to electric corporations (like Liberty) and joint municipal utility commissions. The anti-flip flop statutes, however, have no applicability to this case.

The Commission may only consider a change of supplier request under RSMo. §§393.106 and 394.315 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. Further, if a concomitant right exists, the Commission may only order a change of supplier for a reason other than rate differential. *See Order Granting Summary Determination and Dismissing Application*, *In the Matter of the Application of Wasatch Investments for Change of Electric Supplier*, Case No. EO-2008-0031 (May 29, 2009), citing *Union Elec. Co. v. Platte-Clay Elec. Coop*, 814 S.W.2d 643 (Mo. App. W.D. 1991). Staff accurately observes herein as follows (Staff Recommendation, p. 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. . . . 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.

Issue 2: Is the public interest better served by allowing White River Electric to provide permanent service to the Property considering its annexation into the City of Ozark and Applicant's "choice" for White River's permanent service that is based on reasons other than a rate differential?

Issue 3: Should the Commission's 10-factor test guide its analysis on the public interest determinations in this case?

Liberty's Position Statement and Argument on Issues 2 and 3: The "public interest" is first set by the statutes enacted by the Missouri General Assembly, and the Commission is a "body of limited jurisdiction, created by statute" with "only such powers as are expressly conferred upon it by the statutes and reasonably incidental thereto. . . . Accordingly, we must find the power conferred by statute if it exists at all." *State ex rel. Kansas City Transit, Inc. v. MoPSC*, 406 S.W.2d 5, p. 8 (Mo. banc 1966).

The referenced 10-factor test is used by the Commission when making a public interest determination under Missouri's anti-flip flop statutes (RSMo. §§393.106 and §394.315). First, as explained above, there is no statutory basis for a "change of supplier" to be requested regarding the subject property – there is no applicability of the anti-flip flop statutes to the instant docket. Additionally, even when these statutes are applicable, the Commission may consider if a change

of supplier is in the public interest only when it is "for a reason other than a rate differential." RSMo. §§393.106 and 394.315. The initiating application in this docket clearly provides that the change of supplier request is due to "(t)he cost to provide service to the requested property." For these two bases, there is no purpose for the application of the 10-factor test herein.

Issue 4: Does Missouri law support White River's permanent service to the Property under the 2021 Amendments which promote more consumer "choice" because the Applicant in this case desires White River to serve the Property and the 10-factor test for public interest determinations weighs in favor of White River's supply?

Liberty's Position Statement and Argument on Issue 4: As explained above, there is no statutory basis for the "change of supplier" requested in this case and no purpose for the application of the 10-factor test. Effective August 28, 2021, RSMo. §394.315.3 (the anti-flip flop statute applicable to rural electric cooperatives like WRVE) was amended to add the following provision (emphasis added):

> Notwithstanding the provisions of this section and sections 91.025, 393.106, and 394.080 to the contrary, in the event that a retail electric supplier <u>is providing service to a structure</u> located within a city, town, or village that has ceased to be a rural area, and such structure is demolished and replaced by a new structure, such retail electric service supplier may provide permanent service to the new structure upon the request of the owner of the new structure.

This new customer choice provision is inapplicable here, as it broadened the law regarding a replacement structure and only applies where a cooperative is providing service to a structure on the subject property at the time of annexation. WRVE was not providing service to this location at the time of annexation and has not provided service to any structure at this location for 30 years. Section 394.315.3 has no import in this case.

Issue 5: Is the Applicant's request to have White River Electric serve the Property, on balance, in the public interest because it makes the best and most efficient, effective use of existing facilities at the least cost to the Applicant, and prevents an otherwise duplication of facilities should Liberty Utilities provide such service?

Liberty's Position Statement and Argument on Issue 5: It is pursuant to RSMo. §393.106 or §394.315 that the Commission may decide if a change of supplier is in the public interest. As noted above, there is no statutory basis for a "change of supplier" to be requested regarding the subject property. Also as noted above, the Commission is a "body of limited jurisdiction, created by statute" with "only such powers as are expressly conferred upon it by the statutes and reasonably incidental thereto. . . . Accordingly, we must find the power conferred by statute if it exists at all." *State ex rel. Kansas City Transit, Inc. v. MoPSC*, 406 S.W.2d 5, p. 8 (Mo. banc 1966).

The Commission may not decide to step in, without statutory authority, and make a public interest determination. The Commission has no authority to order that service be provided by WRVE where WRVE has no statutory authority to provide electric service. As such, the application must be dismissed or denied.

Issue 7: Must the Commission's order in this case take into consideration its duties to enforce the Section 393.130, RSMo, "just and reasonable" mandates and prohibitions by recognizing the costs that will be incurred by Liberty Utilities (and charges to the Applicant) to bring electric service to the Property, upholding the legal mandate that Liberty Utilities must provide safe and adequate service at just and reasonable rates and cannot charge unjust or unreasonable rates, in the Commission's determination establishing which utility should serve the Property with permanent electric service?

Issue 8: May the Commission deny the application consistent with the Commission's duty to ensure that every public utility is required to furnish and provide instrumentalities and facilities at charges that are just and reasonable?

Liberty's Position Statement and Argument on Issues 7 and 8: The only conclusion supported by the facts and applicable law is that the rate to be charged by Liberty is just and reasonable. Staff alleges otherwise and attempts to perform its own analysis of "just and reasonable" rates:

> 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.

(Staff Recommendation, p. 14). The rate that Staff attempts to assess is that found in Liberty's Tariff, P.S.C. 6, Section 5, Original Sheet No. 17c, which states:

> 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.

(Staff Recommendation, p. 7). Staff correctly anticipated Liberty's response to this position when it stated that:

> Liberty's argument would be that if the reasonable utility cost to Liberty of providing the service is $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.

(Staff Recommendation, p. 14-15).

First, it is important to note that Staff misstates the cost to the applicant. As indicated above, Liberty's charge is offset by "revenue from three (3) years of electric service." The $88,629.38 cited by Staff is the "estimate of providing the requested electric service to Southway Storage." (Staff Recommendation, Memorandum Sched. AJB-1).[3] The figure cited by Staff contains no offset for revenues, nor could it at this time. Without a facility in place, or detailed plans for a facility, it is impossible to estimate what the ultimate cost to Southway Storage may be.

Whatever the cost – if that cost is calculated pursuant to Liberty's tariff, that cost is just and reasonable based on case law and statute. RSMo. §386.270 provides (emphasis added):

> All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services

[3] *See also* Liberty's Response to White River Data Request 10 (attached as Appendix B).

> prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

The Courts have stated that a "tariff is a document which lists a public utility services and the rates for those services. A tariff has the same force and effect as a statute, and it becomes state law." We are required to deem a tariff lawful unless a lawsuit has been filed whose purpose is to challenge the tariff. *State ex rel. Mo. Pipeline Co., L.L.C. v. Mo. Pub. Serv. Comm'n'n*, 307 S.W.3d 162, 178 (Mo. Ct. App. 2009) citing *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 337 (Mo. App. W.D. 2006) (internal citation omitted).

Thus, "[w]here no lawsuit has been filed challenging a tariff, '[t]he General Assembly . . . has mandated that we deem the rates, tolls, charges, schedules and joint rates fixed by the commission to be lawful and reasonable.'" *State ex rel. Mo. Pipeline Co., L.L.C. v. Mo. Pub. Serv. Comm'n'n*, 307 S.W.3d 162, 178 (Mo. Ct. App. 2009) citing *A.C. Jacobs & Co. v. Union Elec. Co.*, 17 S.W.3d 579, 583 (Mo. App. W.D. 2000) (internal quotations omitted).

A change of supplier application is not the forum to analyze the just and reasonable nature of a Commission-approved tariff provision. Such a question would involve policy determinations as to whether, and to want extent, the Commission believes it is appropriate for existing customers to subsidize system expansion across all of Liberty's electric service territory. The existing tariff provision sets a balance. Given that WRVE is reported as being willing to provide service at "no charge" to the applicant, in spite of the fact that it is reported that the cost to WRVE will be about $22,000, but nothing to the applicant, WRVE has perhaps reached a different conclusion in regard to subsidization by existing customers. (*See* Staff Recommendation, p. 7).

However, regardless of WRVE's approach to pricing, Missouri statutes and case law establish that Liberty's charge in this case can be nothing other than the just and reasonable charge

calculated pursuant to Liberty's Commission-approved tariff. The fact that WRVE elects to impose a lower charge does not and cannot render Liberty's tariffed charge unreasonable or unlawful.

WHEREFORE, Liberty submits this Statement of Positions and Pre-Hearing Brief and requests that the Commission dismiss or deny Southway Storage's Application for Change of Electric Service Provider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 23rd day of August, 2024, to all counsel of record.

/s/ Diana C. Carter