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.	)))))	**FILE NO. EO-2024-0194**

STAFF'S POSITION STATEMENT

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and submits its Position Statement, stating further:

1. On April 24, 2024,[1] the Commission issued its Order Setting Procedural Schedule. That order required parties to file Position Statements/Pre-Hearing Briefs no later than August 23. That order specifically stated:

> 2.D: Each party shall file a simple and concise statement summarizing its position on each disputed issue. Position statements shall track the list of issues. Any position statement shall set forth any order requested, cite any law authorizing that relief, and allege facts relevant under that law with citations to any pre-filed testimony in support.

2. On August 12, the Parties filed a Joint List of Issues, List of Exhibits, and Order of Witnesses, Order of Opening Statements, and Cross Examination. Therein the parties jointly stated:

> Not all parties agree that the listed issues should and/or may be addressed by the Commission in this docket, and by agreeing to the list of issues for this submission, the parties do not waive jurisdictional or other legal arguments. [2]

[1] All date references will be to 2024, unless otherwise stated.
[2] F.N. 2.

STAFF'S POSITION STATEMENT

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?

Staff's Position on Issue #1

Yes. The evidence will show that Liberty is *unable* to extend ordinary electrical service infrastructure (ESI) to the customer at a charge that under the circumstances is just and reasonable. It is Staff's position that if the regulated utility is simply unable to extend its ESI at a just and reasonable charge to the customer, the Commission may allow the customer to obtain service elsewhere notwithstanding the provisions of Section 394.315.2, RSMo. and sections 91.025, 393.106, and 394.080.

Section 393.130, RSMo, states:

1. Every gas corporation, electrical corporation, water corporation, and sewer corporation operating in this state 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 corporation for 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, and every unjust or unreasonable charge made or demanded for 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 and declared to be unlawful.* (Emphasis added)
2. 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.
3. *The commission shall have power to determine any unjust or unreasonable charge for such service, or any service in connection therewith, and to declare and determine any such charge to be unjust or unreasonable.* (Emphasis added)

Section 386.250, RSMo, states:

The Public Service Commission shall:

1. Have general supervision of all public utilities, including those listed in Section 386.020 (which includes gas, electrical, water, and sewer corporations), and shall inquire into the management of the business thereof, and shall keep itself informed as to the manner and method in which the same is conducted.
2. See that the laws affecting public utilities, the commission's rules and regulations, and the orders of the commission are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected.
3. Have power, either through its members or the persons employed by it, to examine the records and the books of account, documents, and papers of any public utility, and to examine under oath any officer, agent, or employee of such public utility in relation to the business and affairs thereof.

The evidence will be that Liberty will charge the customer $88,629.38 to extend its ESI, while White River will make no charge. Further, the evidence will be that Liberty's building out its ESI would be duplicative of White River's ability to provide the service (at a cost to White River of approximately $22,500.00).[3]

For the purpose of Staff's position, Staff here assumes that if $88,629.38 is Liberty's proposed charge for the ESI, then that is also its reasonable cost to Liberty (Staff does not expect Liberty to argue otherwise); and assumes that Liberty, therefore, is simply unable to extend its ESI for less (Again: Staff does not expect Liberty to argue otherwise). But regardless of whether the reasonable ***cost*** to Liberty is $88,629.38, such a ***charge*** for extending the ESI to the customer is unjust and unreasonable when: a) White River will charge the customer nothing; and b) White River can do so without any duplication of service at all. (Explanation: If Liberty has no ESI in place at this time, then White Rivers' incurring a cost of $22,500 to bring its ESI to the customer will duplicate nothing that already exists).

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?

[3] Staff's Official Case File Memorandum, March 12, 2024, p. 6.

Staff's Position on Issue #2

Yes. As formulated, this issue appears to focus on the question of public interest. It is Staff's position that the public interest will be subverted by refusing to allow the customer to obtain service from White River. The role of Ozark's annexation, the applicant's "choice," and a rate differential are not outcome determinative in this analysis. This case turns on the question of whether the amount of the charge for the extension of the ESI, which is not a "rate," and the impact of that charge on the economic usefulness of the property, impact the public interest.

Here are legal citations to Missouri statutes and cases on the public interest in general and, in specific instances, that support the contention that it serves the public interest to prevent unjust and unreasonable charges.

Statutes:

1. Missouri Revised Statutes, Section 393.130:
    - This statute requires that all charges made by public utilities be just and reasonable and that the services provided be safe, adequate, and in all respects just and reasonable. It directly ties the regulation of utilities to the public interest by ensuring that utilities serve the public in a fair and equitable manner.
    - Citation: RSMo § 393.130
2. Missouri Revised Statutes, Section 386.250:
    - This statute grants the Public Service Commission (PSC) the authority to supervise and regulate public utilities. The PSC is tasked with ensuring that utility practices are consistent with the public interest.
    - Citation: RSMo § 386.250
3. Missouri Revised Statutes, Section 393.170:
    - This statute governs the issuance of Certificates of Convenience and Necessity by the PSC, requiring the commission to consider whether the proposed utility service is necessary or convenient for the public service, which is inherently a consideration of the public interest.
    - Citation: RSMo § 393.170

Cases:

1. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979):
    - In this case, the Missouri Supreme Court emphasized that the Public Service Commission's duty is to ensure that utility rates and services align with the public interest, particularly in terms of fairness, adequacy, and reasonableness.

These sources collectively underscore the role of the Public Service Commission in safeguarding the public interest when regulating utility rates, services, and practices in Missouri.

It is Staff's position that it is certainly predictable that if because of the charge insisted upon by Liberty, the customer is forced to forego service, then the property value will be diminished and even, as usable property, destroyed. Thus, the conundrum would be that by removing the property from a rural area and placing it within a municipality and the scope of Liberty's CCN, the property has been, effectively, condemned by "inverse condemnation." Virtually any meaningful "improvement" to a piece of property involves the need for utilities, and if an owner cannot procure a utility service at an economically feasible cost, then a meaningful use of the property is rendered "economically unfeasible." The destruction of the value of property is not in the public interest.

Issue #3

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

Staff's Position on Issue #3

Yes. This test was developed for "change of supplier" cases. It is Staff's position, however, that regardless of whether this is a change of supplier case, the application of the 10-factor test serves the public interest because the factors, in fact, are also relevant to the question of whether Liberty's charges are unreasonable or unjust and whether granting the application will serve the public interest.

Staff has prepared an Official Case file Memorandum. That memorandum sets out fully and in detail Staff's application of the 10-factor test. On page 7 of that report, Staff sets out fully and in detail its investigation and conclusions as to the duplication of services which will result from the denial of the application. Staff contends that denying the application would entail an unreasonable duplication of services, and the fact that Liberty will charge the customer $88,000 to duplicate services which the customer can get for no charge and which it will cost White River $22,000 to provide multiplies the degree to which the charge is unjust and unreasonable.

Staff contends that the 10-factor test should be applied, not because it is necessarily relevant in the usual sense in a change of supplier question, but because the analysis provides a good tool for looking at the "circumstances" and determining whether the charges are just and reasonable under the "circumstances."

Staff's Position on Issue #4

No. Staff does not believe that the decision tree in this case should rely upon that route. A decision favorable to the applicant, if based solely on that question, would not be legally well-supported. Nor would be a decision unfavorable to the applicant. The 2021 amendments to Missouri law, specifically Section 394.080 of the

Revised Statutes of Missouri, addressed the issue of a municipality's annexation of property within the jurisdiction of a rural electric cooperative. These amendments were aimed at protecting the rights of customers who receive service from a rural electric cooperative in areas that are annexed by a municipality.

Key Changes and Customer Rights:

1. Continuation of Service:
    - The amendments allow customers who are served by a rural electric cooperative at the time of annexation to continue receiving service from that cooperative, even after the annexation by a municipality. This means that customers do not lose their right to continue being served by the cooperative, despite the change in jurisdiction.
2. Right to Choose:
    - Customers in the annexed area who were receiving service from a rural electric cooperative are granted the right to continue receiving that service or to switch to the municipality's electric service provider. This gives customers a choice between staying with their current provider (the rural cooperative) or switching to the municipality's service.
3. Grandfathering Clause:
    - The law essentially "grandfathers" the existing service arrangement, allowing the cooperative to continue providing service to its customers without being forced out by the annexation.
4. Legal Framework for Compensation:
    - If a customer decides to switch to the municipality's service provider, the rural electric cooperative may be entitled to compensation from the municipality. The amendments outline a process for determining this compensation, ensuring that the cooperative is fairly compensated for the loss of the customer.

The 2021 amendments to Missouri law, particularly Section 394.080(4), RSMo, set forth specific procedural requirements and deadlines that a customer must meet to continue receiving service from a rural electric cooperative after the annexation of their property by a municipality. Here are the key procedural steps and deadlines:

Procedural Requirements:

1. Customer's Decision to Continue Service:
    - A customer who wishes to continue receiving service from the rural electric cooperative must notify the cooperative and the municipality of their decision.
2. Written Notification:
    - The customer must provide written notice to both the rural electric cooperative and the municipality's electric utility. This notice is the formal way for the customer to express their intent to continue receiving service from the cooperative.

Deadlines:

1. Notification Deadline:
    - The customer must submit the written notice within 60 days after the effective date of the annexation. This 60-day window is critical; if the customer fails to provide notice within this timeframe, they may lose the right to continue service with the rural electric cooperative.
2. Acknowledgment of Notification:
    - Upon receiving the customer's notice, the rural electric cooperative must acknowledge the receipt of the notice. There isn't a specific deadline for this acknowledgment, but it must happen promptly to confirm that the customer's intent to continue service has been registered.

Summary of Key Steps:

1. Customer Receives Notice of Annexation: After the annexation takes effect, the customer must decide whether to continue with the rural electric cooperative.
2. Customer Provides Written Notice: The customer has 60 days from the effective date of the annexation to notify both the cooperative and the municipality in writing of their decision to continue service with the cooperative.
3. Rural Cooperative Acknowledges Receipt: The cooperative should acknowledge receipt of the notice to confirm the arrangement.

Importance of Compliance:

Meeting these procedural requirements and deadlines is essential for customers who wish to continue receiving service from their rural electric cooperative after annexation. Failure to comply could result in the customer being automatically transferred to the municipality's electric service provider. These provisions aim to protect the rights of customers while ensuring that rural electric cooperatives can continue to serve their existing customer base, even after municipal boundaries change.

Staff contends that based on the facts of this case, this statute clearly does not aid the customer. But Staff also contends that on the facts of this case, this statute clearly does not aid the regulated utility either. To reiterate Staff's other arguments: Although this statute may not aid the customer, this statute does not, by default, somehow create a "dead zone" where the utility may charge unjust and unreasonable charges to extend service, where the facilities involved duplication of the services available from the rural cooperative and where the expenditure, in essence, is "unneeded" and wasteful.

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?

Staff's Position on Issue #5

Yes. Staff gives that, however, as a qualified answer. As explained elsewhere, this issue branches, in the decision tree, ultimately into the question of whether Liberty's ESI charge is just and reasonable. The answer to the latter question is, ultimately, outcome determinative. Put differently, Staff is not prepared say that the Commission could grant the application on the basis of Issue #5 standing alone. Staff supports the applicant's request to have White River Electric serve the property. Staff's argument is that there is no dead zone where a regulated utility can charge unjust or unreasonable ESI charges.

Turning specifically to the questions of "duplication" and "public interest" embedded in the statement of the issue:

First, as Staff has explained elsewhere, under the totality of the circumstances, a duplication of services is relevant to the question of whether charges are unjust and unreasonable. Allowing the customer to obtain service from White River duplicates no service because no other service exists. Allowing Liberty to provide the service, however, does constitute a duplication of service—and at a very substantial cost to the customer.

Second, as Staff has explained elsewhere, it is against the public interest to deprive a customer of his ability to use his property in a meaningfully economic way for the sole purpose of protecting the utility's right to do business.

Issue #6

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?

Staff's Position on Issue #6

Section 394.315, is actually Missouri's anti flip-flop statute.

Change of electric service provider, when prohibited — limitation on construction of lines — cost of line relocation.

1. No customer shall be permitted to change electric service providers solely due to a difference in the rates charged by the respective electric service providers.
2. No electric supplier shall be required to furnish electric service at a point of delivery to a structure which is nearer to the electric distribution line of another electric supplier than it is to the electric distribution line of such electric supplier, except as provided in sections 394.312 to 394.325.
3. No electric service shall be furnished to any new structure by any electric supplier other than the electric supplier already furnishing electric service to the structure, except as provided in sections 394.312 to 394.325.
4. When electric distribution lines are required to be relocated or removed by any governmental authority, the cost of relocation or removal shall be paid by the electric supplier furnishing service.

Section 393.106, RSMo concerns changes of service providers in the context of annexations:

Change of electric service provider, retail electric service — limitations — definitions.

1. No municipality shall, as a result of annexation, require a change of electric service provider for any structure, if construction of such structure has commenced prior to the date of the annexation. The owner of any such structure may choose to continue to receive electric service from the service provider serving the property on the date of the annexation.
2. The provisions of subsection 1 of this section shall apply only to the first transfer of ownership of the structure following annexation. After the first transfer of ownership, the municipality may require the new owner to receive electric service from the electric provider serving the municipality.
3. The electric service provider serving the annexed area shall not extend service to a new structure, not served on the date of the annexation, except for the first transfer of ownership as provided in subsection 2 of this section.
4. For the purposes of this section, "structure" shall mean a building or other fixture that is capable of receiving electric service.
5. The public service commission shall have the power to promulgate rules to implement and administer the provisions of this section. Any rule or portion of a rule, as that term is defined in section 536.010, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536 and, if applicable, section 536.028. This section and chapter 536 are non-severable, and if any of the powers vested with the general assembly pursuant to chapter 536 to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2005, shall be invalid and void.

In response to the question raised by the issue: Yes. These statutes have "legal important." It is Staff's position that the Commission should consider the statutes. It is Staff's position that the ESI charge is not a "rate" as contemplated in the anti-flip flop

statute. While the company's tariff may permit ESI charges, the economic and accounting *factors* affecting those charges at any time and place were not considered in any "rate" case. Specific permissible charges for ESI extension were not set per the accounting procedures used to set ordinary periodically billed "rates."

Liberty's tariff, P.S.C. Mo. No. 6 Sec. 5, Original Sheet No. 17c, attached hereto as ATTACHMENT A, is in play here. This sheet allows, indeed—arguably even requires—that the customer be charged for the extension of the electrical distribution system. Staff does not quarrel with that proposition. That fact, however, does not make the charge a "rate" for the purposes of the anti flip-flop statute.

Statutory construction is involved here, and the statutes should be construed in *pari materia*. See *State ex rel. White v. City of Columbia,* 397 S.W.2d 25 (Mo. 1965). Particularly in light of the fact that an ESI extension cost on any given day will be wholly idiosyncratic to the vagaries of the economy on that day and to the specific circumstances of the customer's situation at a particular place, the Commission should construe Sections 393.130, 386.250, and 394.315, RSMo, such that the term "rate" in Section 394.315, RSMo, does not include an ESI extension charge.

A look at the tariff reinforces that statutory construction. It reveals nothing about how the charges will be calculated, leaving the clear inference that they will be dictated entirely by the open market, i.e., without any regulatory control from the Public Service Commission. ***That is exactly what "rates" are not.*** Rates, qua rates, are set ***by the Public Service Commission***, not the open market, taking into consideration the interests of the public, etc. In no instance does a rate get set based solely upon the open market ***with no review or regulatory process and approval whatsover from the Commission***. No charge made outside of the regulatory process can possibly be a "rate" within the meaning of that term in the anti flip-flop statute. The fact that a charge for extending the electrical service is covered in the tariff does not make the charge a "rate."

Conclusion: (a)The charge falls outside the rubric of rates; but (b) the charge is still a "charge" and remains under the prohibition against unjust and unreasonable charges.

In summary: It is Staff's position that the anti flip-flop statute does not apply and that in any event, no statute empowers a utility to charge a customer unjust or unreasonable charges or prevents the Commission from fashioning a way to prohibit such conduct.

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?

Staff's Position on Issue #7

Yes. Staff restates and incorporates by reference its positions on Issues 1-6.

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?

Staff's Position on Issue #8

No. Staff restates and incorporates by reference its positions on Issues 1-6.

Respectively Submitted,

/s/ *Paul T. Graham*

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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 23rd day of August, 2024.

/s/ Paul T. Graham

B. ELECTRIC DISTRIBUTION POLICY, (Continued)

The developer will make full payment of the estimated charges, in excess of one years estimated revenue for the project, in advance of any construction by the Company. When construction is completed, if the actual costs of the extension are less than the estimated costs, the portion of the customer contribution above the actual costs will be refunded to the customer. If actual costs are higher than the estimated costs the customer will not be required to pay more than the estimate.

Upon request, the Company shall install underground services to each mobile home site from an overhead distribution system in accordance with the terms and provisions of Section B.2.c of the Company's filed Rules and Regulations for electric service. A meter pedestal will be located at each mobile home location. The meter pedestal will be furnished, installed, owned and maintained by the Company for a fee.

e 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.

If the Company is unable to project estimated revenues, the customer shall be required to pay the entire cost of construction. All contributions in aid of construction may be required before construction is commenced.

When construction is completed, if the actual costs of the extension are less than the estimated costs, the portion of the customer contribution above the actual costs shall be refunded to the customer. If actual costs are higher than estimated costs, the customer shall not be required to pay more than the estimate. At the end of three (3) years, the portion of the construction cost justified by the actual revenue shall be refunded to the customer. Refund totals shall not exceed the original contribution by the customer.

The Company will not be required to obligate funds to secure private right-of-way for the purpose of making extension of distribution pole lines or other facilities to premises of prospective customers.

2. Distribution Services:
The Company's standard construction will be overhead. However, where feasible from engineering, operational, and economic considerations, new electric service to residential and commercial customers may be installed underground. Installation of facilities shall be made in accordance with the following provisions

a. Temporary Distribution and Service Lines:

The Company shall not be required to provide service to temporary locations, such as for mobile homes, construction sites, etc., even though the line facilities are already in place, unless such customer advances the sum stated in Schedule CA, Credit Action Fees, as a construction payment for the cost of installation and removal of the meter, service, and other necessary facilities. The title to such property shall be and remain in the Company. Should the customer utilize electric service at this location for a period of twelve consecutive months from the date of initial service, the above payment, plus interest as designated by State Law or Commission order, will be refunded to the customer by the Company.

The Company shall not be required to provide electric service to temporary customers at locations that require the extension of the Company's lines unless the full cost of erection and removal, including indirect costs of construction, of the extension be contributed by the customer.

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ATTACHMENT A