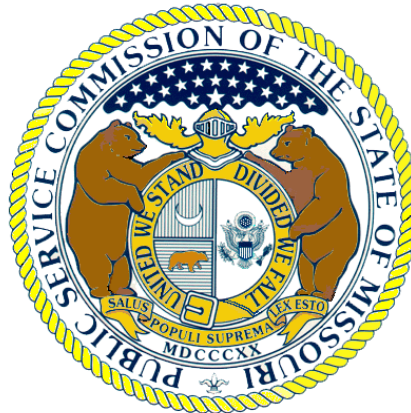


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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

File No. EO-2017-0277

REPORT AND ORDER

Issue Date: December 20, 2017

Effective Date: January 19, 2018

**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)

File No. EO-2017-0277

APPEARANCES

Brandon Jessip, 11728 Palm Road, Neosho, Missouri, on behalf of himself as a pro se applicant.

Appearing for **The Empire District Electric Company:**

Diana C. Carter, Brydon, Swearingen & England P.C., 312 East Capitol Avenue, PO Box 456, Jefferson City, Missouri 65102-0456.

Appearing for **New-Mac Electric Cooperative, Inc.:**

Megan E. Ray, Andereck, Evans, Widger, Lewis & Figg, L.L.C., 3816 S. Greystone Ct., Suite B, Springfield, Missouri 65804.

Appearing for the **STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

Nathan Williams, Deputy Staff Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

SENIOR REGULATORY LAW JUDGE: Michael Bushmann

REPORT AND ORDER

I. Procedural History

On April 20, 2017, Brandon Jessip filed an application with the Missouri Public Service Commission (“Commission”) requesting that his electric supplier be changed from The Empire District Electric Company (“Empire”) to New-Mac Electric Cooperative, Inc. (“New-Mac”). The Commission issued notice of the application and made both Empire and New-Mac parties to this proceeding. Empire filed a response to the application, stating that Empire has the right under Section 393.106, RSMo 2016¹ to continue as the electric service provider for Mr. Jessip’s property and denying that a change of supplier would be in the public interest. New-Mac responded that it takes no position on whether Mr. Jessip has demonstrated that a change of supplier would be appropriate, but that if the application is approved, New-Mac has sufficient ability to become Mr. Jessip’s electric supplier.

The Commission’s Staff filed a motion to dismiss the application, requesting that Mr. Jessip be permitted to choose an electric provider without further order from the Commission, or in the alternative, to grant the application. That motion was denied. Because there were material facts in dispute, the Commission held an evidentiary hearing on October 10, 2017, in Jefferson City, Missouri, to address Mr. Jessip’s application.² During the evidentiary hearing, the parties presented evidence relating to the following unresolved issues previously identified by the parties:

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

¹ All statutory references are to the Revised Statutes of Missouri as codified in 2016, unless otherwise stated.

² Transcript, Volume 2 (hereinafter, “Tr.”). In total, the Commission admitted the testimony of 3 witnesses and received 19 exhibits into evidence. Post-hearing reply briefs were filed on November 15, 2017, and the case was deemed submitted for the Commission’s decision on that date when the Commission closed the record. “The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument.” Commission Rule 4 CSR 240-2.150(1).

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?

II. Findings of Fact

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

1. Brandon Jessip currently resides at 11728 Palm Road, Neosho, Missouri and was, during certain times relevant hereto, a customer of Empire for electric service.³

2. Empire is a Kansas corporation with its principal place of business at 602 South Joplin Avenue, Joplin, Missouri 64801. Empire is engaged in the business of providing electric service in Missouri to customers in its service areas.

3. Empire is an "electrical corporation" and a "public utility" as those terms are defined in Section 386.020, RSMo 2016, and is subject to the jurisdiction and supervision of the Commission as provided by law.

4. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."⁴ Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."⁵ The Public Counsel did not participate in the evidentiary hearing in this matter.

³ Ex. 1, Jessip Direct; Tr. p. 28, 36-38.

⁴ Section 386.710(2), RSMo 2016; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

⁵ Section 386.710(3), RSMo 2016; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

5. The Staff of the Missouri Public Service Commission (“Staff”) is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.⁶ Staff participated as a party in this matter.

6. At the evidentiary hearing, Empire presented the testimony of Patsy J. Mulvaney, who testified credibly regarding Empire’s provision of electric service to the property located at 7082 Nighthawk Road, Neosho, Missouri (“Property”) and Empire’s documents and records pertaining to Mr. Jessip’s account for electric service.⁷

7. The Property is located within Empire’s certificated service area, and Empire began providing electric service to the Property on or before January 1, 1980. At that time, a house and barn were located on the Property.⁸

8. Empire provided permanent electric service to the Property from January 1, 1980 until August 25, 2010, when the resident at the time requested that service be turned off.⁹

9. Mr. Jessip and his wife purchased the Property on January 2, 2014. The Property purchased by the Jessips consisted of approximately 29.79 acres with a well, barn, and house which was unoccupied and uninhabitable.¹⁰

10. Mr. Jessip requested and began receiving electric service to the Property from Empire in September 2014.¹¹ Empire provided electric service through permanent electric facilities consisting of a transformer and a service line to the Jessip property from a distribution line in the Empire easement running along Nighthawk Road. The service line

⁶ Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

⁷ Ex. 200, Mulvaney Rebuttal; Tr. p. 71-77.

⁸ Ex. 200, Mulvaney Rebuttal, p. 2; Tr. p. 75.

⁹ Ex. 200, Mulvaney Rebuttal, p. 2; Tr. p. 66, 73-74.

¹⁰ Ex. 1, Jessip Direct.

¹¹ Ex. 1, Jessip Direct; Tr. p. 37-38, 75-76.

connected to an electric meter mounted on a pole located between the house and barn on the Property. The meter was connected to the house, barn and well for electric service.¹²

11. Mr. Jessip used electricity from Empire at the Property to operate the well pump in order to provide water to livestock. Mr. Jessip did not receive electric service from Empire to perform temporary construction work.¹³

12. Empire provided electric service to the Property until January 12, 2015, when service was discontinued at the request of Mr. Jessip because he was unhappy about the amount of some of the bills for service during the period of time from September 2014 to January 2015.¹⁴ Mr. Jessip paid those bills and did not have any issues with Empire's service during that period of time.¹⁵

13. Mr. Jessip was billed for electric service pursuant to Empire's filed and approved tariffs, and he was not overcharged.¹⁶

14. At the time he discontinued service, Mr. Jessip also requested that Empire remove all its electric facilities from his Property.¹⁷ Prior to discontinuing service, Mr. Jessip did not contact Empire regarding any electric charges, but his wife called Empire to ask about the amounts charged on a bill.¹⁸ The Property is not currently receiving electric service from any electric provider.¹⁹

¹² Tr. p. 36, 43, 49-50, 66; Ex. 208.

¹³ Tr. p. 50.

¹⁴ Ex. 200, Mulvaney Rebuttal, p. 3-5; Ex. 1, Jessip Direct; Tr. p. 42.

¹⁵ Tr. p. 41.

¹⁶ Ex. 200, Mulvaney Rebuttal, p. 4.

¹⁷ Ex. 1, Jessip Direct; Ex. 200, Mulvaney Rebuttal, p. 3.

¹⁸ Ex. 200, Mulvaney Rebuttal, p. 4-5.

¹⁹ Ex. 100, Beck Rebuttal, p. 6.

15. Mr. Jessip had intended to demolish the existing house on the Property, but changed his mind and began remodeling the house at the beginning of 2017 by repairing the existing walls of the house.²⁰

16. Mr. Jessip requested a release from Empire so that New-Mac could provide electric service to his remodeled house on the Property, but Empire refused.²¹

17. New-Mac has an easement on the Property, and it has an electric line that runs through the center of the Property.²²

18. Empire's electric line is approximately 50-75 feet closer to the house on the Property than New-Mac's electric line.²³ In order to resume service to the Property, Empire would only need to hang a transformer and run about 70 feet of overhead service line.²⁴

19. Mr. Jessip filed his application to request a change of electric supplier because he was unhappy with the amount of Empire's bills for service in 2014; he was frustrated when Empire opposed his request to change his supplier to New-Mac; and he intends to build a new house on the Property which would be served by New-Mac, and it would be more convenient for him to have a single service provider for the Property.²⁵

20. Empire serves approximately 202 customers within a two-mile radius of Mr. Jessip's Property.²⁶

21. When Empire loses a customer, its remaining customers are negatively impacted because Empire's total cost to provide electric service to the public is shared by

²⁰ Ex. 1, Jessip Direct; Tr. p. 45-47.

²¹ Ex. 1, Jessip Direct.

²² Ex. 1, Jessip Direct; Tr. p. 37.

²³ Tr. p. 55; Ex. 208 and 209.

²⁴ Ex. 200, Mulvaney Rebuttal, p. 6.

²⁵ Tr. p. 57-61.

²⁶ Ex. 200, Mulvaney Rebuttal, p. 5.

all customers. Losing a customer hurts other customers because Empire is not using its system to its greatest capacity.²⁷

III. Conclusions of Law

Although Mr. Jessip is not a person or an entity regulated by the Commission, he submitted himself to the Commission's jurisdiction when he filed his application pursuant to Section 393.106, RSMo 2016. Empire provides electric service to customers throughout the service area certificated to it by the Commission. Empire is an "electrical corporation" and "public utility" as those terms are defined by Section 386.020, RSMo 2016, and is subject to the Commission's jurisdiction, supervision, control and regulation as provided in Chapters 386 and 393, RSMo 2016.

Since Mr. Jessip brought the change of supplier application, he bears the burden of proof.²⁸ The burden of proof is the preponderance of the evidence standard.²⁹ In order to meet this standard, Mr. Jessip must convince the Commission it is "more likely than not" that his application should be granted.³⁰ Change of supplier cases for electrical corporations are governed by Section 393.106, RSMo 2016, (commonly referred to as the anti-flip flop law) which states, in part:

1. As used in this section, the following terms mean:
(1) "**Permanent service**", electrical service provided through facilities which have been permanently installed on a structure and which are designed to provide electric service for the structure's anticipated needs for the indefinite future, as contrasted with facilities installed temporarily to provide electrical

²⁷ Ex. 200, Mulvaney Rebuttal, p. 8.

²⁸ The Commission has determined in previous change of supplier cases that the burden of proof is on the applicant. See, Order Denying Joint Motion to Dismiss, *Richard D. Smith v. Union Electric Company d/b/a AmerenUE*, December 5, 2006, File No. EC-2007-0106; Report and Order, *In the Matter of Cominco American, Inc. for Authority to Change Electrical Suppliers*, 29 Mo. P.S.C. (N.S.) 399,405-407 (1988), Case No. EO-88-196.

²⁹ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

³⁰ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999).

service during construction. Service provided temporarily shall be at the risk of the electrical supplier and shall not be determinative of the rights of the provider or recipient of permanent service;

(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. 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.

3. 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... (emphasis added)

IV. Decision

A. 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?

The evidence demonstrated that all the elements of Section 393.106 have been satisfied, which provides Empire the exclusive right to continue to serve the structures on the Jessip’s Property. That right was triggered when Empire lawfully commenced supplying retail electric energy to structures on the Property through permanent service facilities by at least 1980. In the past, Empire has provided permanent service to the house, which is the same one that Mr. Jessip is now remodeling, as well as to the barn and well. The house on the Property meets the statutory definition of a “structure”, as it is a residential building at

which retail electric energy was being delivered through a metering device located adjacent to the house. There is no language in the current statute that would support Staff's position that a service disruption and the passage of time would render the anti-flip flop provision inapplicable. Also, the two exemptions in that statute regarding municipal annexation and territorial agreements do not apply in this case. Therefore, the Commission concludes that Empire has the right to continue to serve structures on the Property unless the Commission determines that the requested change would be in the public interest for a reason other than a rate differential.

B. 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?

The Commission does not use a single factor test when determining whether an application for a change of electric suppliers should be granted, and has stated that customer preference does not suffice as the only basis for ordering a change in supplier.³¹ In previous cases the Commission has conducted a case-by-case analysis applying a ten-factor balancing test to analyze the meaning of "public interest" for a change of supplier. Those ten factors are:

- (A) Whether the customer's needs cannot adequately be met by the present supplier with respect to either the amount or quality of power;
- (B) Whether there are health or safety issues involving the amount or quality of power;
- (C) What alternatives a customer has considered, including alternatives with the present supplier;
- (D) Whether the customer's equipment has been damaged or destroyed as a result of a problem with the electric supply;

³¹ *In the Matter of Cominco American, Inc. for Authority to Change Electrical Suppliers*, 29 Mo. P.S.C. (N.S.) 399,405-407 (1988), Case No. EO-88-196.

(E) The effect the loss of the customer would have on the present supplier;

(F) 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;

(G) 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 (F)(ii) above;

(H) What efforts have been made by the present supplier to solve or mitigate the problems;

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

(J) 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.³²

Even if in the public interest, for Mr. Jessip to prevail the Commission must also determine that the reason Mr. Jessip wishes to change suppliers is for a reason other than a rate differential. Rates are defined as what a customer pays for a unit of service.³³

A primary policy reason for the anti-flip flop law is to provide some assurance to electric utilities that if they spend money to build facilities to provide service to a customer, they will be able to keep that customer absent some compelling reason to allow a change of supplier. In this case, Empire provided electric service to the Property in the past and would still have facilities in place to provide that service now had not Mr. Jessip requested

³² Report and Order, *In the Matter of the Application of Thomas L. Chaney for Change of Elec. Supplier*, 22 Mo. P.S.C. 3d 339, 342-343, File No. EO-2011-0391 (Dec. 12, 2012); Order Denying Joint Motion to Dismiss, *Richard D. Smith v. Union Electric Company d/b/a AmerenUE*, December 5, 2006, File No. EC-2007-0106; Report and Order, *In the Matter of Cominco American, Inc. for Authority to Change Electrical Suppliers*, 29 Mo. P.S.C. (N.S.) 399,405-407 (1988), Case No. EO-88-196.

³³ Report and Order, *In the Matter of the Application of Thomas L. Chaney for Change of Elec. Supplier*, 22 Mo. P.S.C. 3d 339, 344, File No. EO-2011-0391 (Dec. 12, 2012).

that those facilities be removed. Permitting a customer to change an electric supplier according to his or her preference by requesting the removal of electric facilities would be contrary to that public policy, as it would increase the risk of unnecessary duplication of those facilities.

Mr. Jessip has not presented any evidence demonstrating that Empire is unable to meet his needs regarding the amount or quality of power; that power supplied by Empire presents a health or safety issue; that Empire's power supply damaged his equipment; that Empire's provision of electric service to the Property would negatively impact economic development in the area; or that Empire's electric service creates any burden on Mr. Jessip not related to the cost of electricity itself. The evidence did show that Mr. Jessip did not make reasonable attempts to resolve or mitigate his concerns relating to the amount of his electric bills. Also, while both Empire and New-Mac provide electric service in the area where the Property is located, Empire's electric line is closer to the Property than the New-Mac electric line. After considering all the factors described above, the Commission concludes that granting Mr. Jessip's request for a change of electric supplier would not be in the public interest. In addition, one of the primary reasons why Mr. Jessip requested a change in supplier was the amount of electric bills for electric service provided by Empire. Basing a change of supplier request on the difference in amounts charged by electric providers is prohibited by Section 393.106, so Mr. Jessip's reason is not an appropriate ground for granting such a request.

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission concludes that the substantial and competent evidence in the record supports the conclusion that Mr. Jessip has failed to meet, by a preponderance of the

evidence, his burden of proof to demonstrate that a change of electric supplier should be granted. Therefore, Mr. Jessip's application will be denied.

THE COMMISSION ORDERS THAT:

1. Brandon Jessip's application for a change of electric supplier is denied.
2. This Report and Order shall become effective on January 19, 2018.
3. This file shall close on January 20, 2018.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Hall, Chm., Stoll, Kenney, and Coleman, CC., concur,
Rupp, C., dissents;
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 20th day of December, 2017.

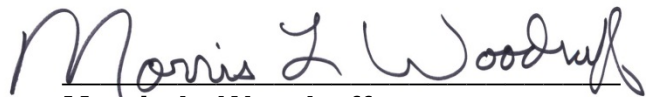
STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 20th day of December 2017.




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

December 20, 2017

File/Case No. EO-2017-0277

**Missouri Public Service
Commission**

Staff Counsel Department
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounsel@psc.mo.gov

Office of the Public Counsel

Hampton Williams
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opc@psc.mo.gov

Brandon Jessip

Brandon Jessip
11728 Palm Road
Neosho, MO 64850
brandonljessip@gmail.com

**Empire District Electric
Company, The**

Diana C Carter
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
DCarter@brydonlaw.com

**Empire District Electric
Company, The**

Jon S Dermott
602 S. Joplin Avenue
P.O. Box 127
Joplin, MO 64802-0127
sdermott@empiredistrict.com

**Missouri Public Service
Commission**

Nicole Mers
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
nicole.mers@psc.mo.gov

**New-Mac Electric Cooperative,
Inc.**

Megan E Ray
3816 S Greystone Ct., Suite B
Springfield, MO 65804
mray@lawofficemo.com

Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.