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 REPLY BRIEF

Introduction:

To prevail, Empire must establish each of the following elements:

(1) That it is an electrical corporation;

(2) That lawfully commenced supplying retail electric energy;

(3) To the structures in question;

(4) Through permanent service facilities.

The statute defines "structure" or "structures" as "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**" (emphasis added).

It is Staff's position that Empire has failed to prove elements (2) and (3) from the list above.

A.

Empire has not shown that it ever lawfully commenced supplying retail electrical energy to the farm house, barn and wellhouse in question and so element (2) must fail.

In their respective briefs both Empire and New-Mac indulge in the presumption that, because Empire provided electricity to the tract (more particularly the house, barn

and wellhouse) in the past, it has the statutory right to serve the house, absent a Commission order permitting New-Mac to serve it instead. As Staff pointed out in its initial brief, since exclusivity of service is in derogation of the common law promotion of free markets, it should be viewed narrowly, *i.e.*, statutes such as § 393.106, RSMo. 2016, should be interpreted to minimize their restraint of free markets consistent with their plain meaning. Under the common law adopted in Missouri, monopolies are not favored.[1] By statute the Legislature has expressly stated a policy in favor of free trade and against monopolies in the Missouri Antitrust Law,[2] which, in part, provides:

> 1. Every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.
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> 2. It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state.
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> 3. It is unlawful for any person* engaged in trade or commerce in this state, in the course of such trade or commerce, to lease or make a sale or contract for sale of any commodity, whether patented or unpatented, for use, consumption, or resale within this state, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in this state.

In light of this longstanding strong preference for free markets, statutes that reduce or eliminate consumer choice should be construed narrowly to minimize their

[1] Cyclopedia of the law of Private Corporations, Fletcher, Volume V, Chapter 54, § 3380-86, pp. 5409-33, Chicago, Callaghan and Company 1918; ***Christie v. Missouri Pac. Ry. Co.*,** 94 Mo. 453; 7 S.W. 567, 568-70 (1888) (rail carrier must offer tariff discounts non-discriminatorily); ***Town of Kirkwood v. Meramec Highlands Co.*,** 94 Mo.App. 637; 68 S.W. 761, 763-64 (1902) (town could not give exclusive water franchise); ***Curtice v. Schmidt*,** 202 Mo. 703; 101 S.W. 61, 67-68 (1907) (city cannot lawfully restrict paving materials supplier).

[2] § 416.011, RSMo. 2016, *et seq*.

circumscribing impacts on the free market. The first sentence of § 393.106.2, RSMo. 2016, is a statute that limits consumer choice: "Once an electrical corporation . . . 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."

There is no evidence that Empire "***lawfully*** commence[d] supplying retail electric energy to [the house or the barn]" at any time as required by § 393.106.2, RSMo. 2016. Had the legislature intended that it be assumed the commencement of supplying retail electric energy was lawful unless shown otherwise, it could have readily done so by including the following changes to the statute: 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, *unless shown that it did so unlawfully,* 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.

Empire and New-Mac's presumption that Empire has the exclusive right to provide retail electric service to the house is wrong because there is no evidence that

Empire lawfully commenced service as required by §§ 393.106.2 and 393.106.1(2), RSMo. 2016.

As to the weight to be given to Empire's business records, because Empire failed to lay a proper foundation, the Commission should give them little weight.

The legislature has established the criteria for the admission of business records in Chapter 490, RSMo. 2016. The relevant parts of the applicable statutes follow:

> **490.680. Records, competent evidence, when. —** A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.
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> **490.692. Business records or copies admissible as evidence on affidavit of custodian, when — filing procedure — notice and copies of records to be served on all parties, when — form of affidavit. —** 1. Any records or copies of records reproduced in the ordinary course of business by any photographic, photostatic, microfilm, microcard, miniature photographic, optical disk imaging, or other process which accurately reproduces or forms a durable medium for so reproducing the original that would be admissible under sections 490.660 to 490.690 shall be admissible as a business record, subject to other substantive or procedural objections, in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of sections 490.660 to 490.690, that the records attached to the affidavit were kept as required by section 490.680.
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> 2. No party shall be permitted to offer such business records into evidence pursuant to this section unless all other parties to the action have been served with copies of such records and such affidavit at least seven days prior to the day upon which trial of the cause commences.

Empire's witness Mulvaney satisfied none of the criteria: identification; mode of preparation; and made in the regular course of business, at or near the time of the act, condition or event. Further, although Ms. Mulvaney testified that Empire began

providing service to the tract on January 1, 1980,[3] Empire's attorney stated in her opening, "Empire's records go back to 1980, January 1 of 1980. Empire knows that it has been serving the property as of January 1, 1980. Because the records do not go back prior to that, Empire does not have documentation of exactly when service started, but Empire knows that service was being provided as of January 1, 1980, and continued through 2010 to the home that is on this property."[4] Empire's witness Ms. Mulvaney's testimony that Empire began providing service to the tract on January 1, 1980, is inconsistent with Empire's attorney's opening statement that "Because the records do not go back prior to that [January 1, 1980], Empire does not have documentation of exactly when service started" making it clear that, at best, Ms. Mulvaney's testimony about Empire's records is questionable and an example of why the legislature established the criteria it did for admissibility.

B.

Empire has not shown that the farm house, barn and wellhouse in question are structures within the intendments of § 393.106.1(2), RSMo., because Empire has not shown that service was delivered to any of these buildings "through a metering device which is located on or adjacent to the structure and connected to the lines of an electrical supplier" and so element (3) must fail.

As Staff related in its initial brief, both "structure" and "permanent service" are terms defined in § 393.106.1, RSMo. 2016, as follows:

[3] Ex. 200, Empire witness Mulvany, p. 2, Tr. 75 (sometime in 1980).

[4] Tr. 2:24-25

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 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.

As Staff explained in its initial brief, because the word "structure" is used in the statutory definition of "structure," the most logical meaning for the word "structure" in the definition is common usage, and the most applicable dictionary definition of "structure" is, "something built or constructed, as a building, bridge, or dam."[5] With this definition, the house, barn and wellhouse are all "structures," but they are only "structures" within the statutory meaning of § 393.106.1(2), RSMo. 2016, if "retail electric energy" [was] delivered [to them] through a metering device which is located on or adjacent to the structure and connected to the lines of an electrical supplier."

The evidence in this case shows, at best, that the barn and house are more than 50 feet apart, and the pole with Empire's meter was located somewhere undisclosed between them. Empire and New-Mac's presumption that Empire has the exclusive right

[5] Dictionary.com "structure," in *Dictionary.com Unabridged*. Source location: Random House, Inc. http://www.dictionary.com/browse/structure. Available: http://www.dictionary.com/. Accessed: October 13, 2017.

to provide retail electric service to the house is wrong, because there is no evidence that Empire's meter was "located on or adjacent" to the house as required by §§ 393.106.2 and 393.106.1(2), RSMo. 2016.

Conclusion

As Staff recommended in its initial brief and this one, the Commission should determine that the evidence does not show that Empire has the exclusive right to serve the house on the tract and, if the Commission determines otherwise, then the Commission should determine that it is in the public interest for a reason other than a rate differential for New-Mac to serve the house and other existing structures on the tract in the circumstances of this case, which include that Mr. Jessip intends to build a second house on the tract which no one disputes New-Mac may serve, that both Empire and New-Mac have facilities from which they can readily serve the existing structures and no one has provided electric service to the structures, except the wellhouse, since before the Jessips acquired the tract on January 2, 2014.

Respectfully submitted,

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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 15th day of November, 2017.

/s/ Nathan Williams