

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the application of
Martin J. Sinclair for change of
electric supplier.

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CASE NO. EO-95-165

REPORT AND ORDER

Issue Date: September 5, 1995

Effective Date: September 15, 1995

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the application of)
Martin J. Sinclair for change of) CASE NO. EO-95-165
electric supplier.)

APPEARANCES

Martin J. Sinclair, 235 Schaefer Drive, Branson, Missouri
65616, Pro se.

Gary W. Duffy, Attorney at Law, and **Dean L. Cooper**,
Attorney at Law, Brydon, Swearingen & England, P.C.,
P. O. Box 456, Jefferson City, Missouri 65102-0456,
For: The Empire District Electric Company.

Rodric A. Widger, Attorney at Law, Andereck, Evans, Milne,
Peace & Baumhoer, 111 South Glenstone, P. O. Box 4929,
Springfield, Missouri 65808, For: White River Valley
Electric Cooperative.

Lewis R. Mills, Jr., Deputy Public Counsel, P. O. Box 7800,
Jefferson City, Missouri 65102, For: Office of the Public
Counsel and the Public.

John M. Himmelberg, Jr., Assistant General Counsel, P. O. Box 360,
Jefferson City, Missouri 65102, For: Staff of the Missouri
Public Service Commission.

Administrative Law Judge: **Elaine E. Bensavage**

REPORT AND ORDER

Procedural History

On November 16, 1994, Martin J. Sinclair (Mr. Sinclair or Applicant) filed an application for a change of electric suppliers at his business located at 205 Schaefer Drive in Branson, Missouri. Mr. Sinclair is seeking authority to switch electric service from White River Valley Electric Cooperative, Inc. (White River) to The Empire District Electric

Company (Empire). On November 2, 1994, the Commission issued an Order And Notice notifying both electric suppliers of Mr. Sinclair's application and ordering the suppliers to file their response thereto. On December 22, 1994, both White River and Empire filed a response to Mr. Sinclair's application. On February 24, 1995, Mr. Sinclair's answers to White River's interrogatories were filed with the Commission. The Staff of the Commission (Staff) filed a Motion to Establish Prehearing Conference on March 15, 1995, and on March 17, 1995, the Commission issued an Order Setting Prehearing Conference for April 5, 1995.

On April 3, 1995, White River filed a Motion to Dismiss. A prehearing conference was held as scheduled on April 5, 1995, at which time the parties were given an opportunity to orally argue White River's motion, and were instructed to propose a procedural schedule. Staff also filed a written response to White River's motion on April 7, 1995. On April 17, 1995, the Commission issued an Order Setting Procedural Schedule. Prefiled testimony was filed as directed, and a Hearing Memorandum was filed on July 11, 1995. On July 17, 1995, a hearing was held on Mr. Sinclair's application for change of electric suppliers. At the hearing, testimony was presented on behalf of Mr. Sinclair, Staff, and White River. The parties presented oral arguments in lieu of briefs at the close of the hearing.

Findings of Fact

The Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

Mr. Sinclair owns two motels on a four acre lot on Schaefer Drive in Branson. The first motel, Twelve Oaks Inn, consists of three buildings, while the second motel, Spinning Wheel Inn, consists of one

building. The buildings were constructed at different times. The two original buildings are served by White River. When Mr. Sinclair decided to expand in 1990 and constructed the two additional buildings, he was informed by the City of Branson that the new buildings would have to be serviced by Empire, as the location was now within the city limits of the City of Branson. Consequently as the area around Applicant's property developed, the new structures were served by Empire.

In addition, some of Applicant's neighbors switched their supplier from White River to Empire in the mid 1980's, at a time when they were statutorily permitted to do so by foregoing retail electric energy for a period of 60 days. As a result, Applicant is mostly surrounded by other motels which receive service from Empire. When there is a power outage which affects White River but not Empire, Applicant's customers become irate and upset, believing that the outage is somehow the fault of Applicant's motel, as they can see all of the lights on in the surrounding buildings served by Empire. Applicant's customers do not understand that there are two suppliers in the area, and that one supplier may be affected by an outage while the other supplier remains untouched. In addition, since there are nearby motels with lights on, the customers are aware that they can improve their situation by leaving Applicant's motel. The effect of this problem has been exacerbated by the overbuilding of the hotel business in Branson.

Mr. Sinclair testified that he relies heavily on repeat customers and referrals from previously satisfied customers. Historically 70 to 80 percent of his customers are repeat customers. Mr. Sinclair also testified that he has had customers demand a refund on two occasions; that some customers have told him they would never stay at his motel again; and he has had four customers which he transferred from the motel without power

to the motel which had power. Mr. Sinclair calculated his direct economic impact at well less than \$500. However, the total economic impact on his business cannot be properly quantified, as some people will simply leave and not return or not give referrals. The motels have a total of 116 units, and approximately 20,000 customers stay in the motels in a year's time. The occupancy rate has been approximately 80 percent for a five-year period.

There have been approximately four outages in the past two years which affected Mr. Sinclair's motels, several of which were quite lengthy. However, none of the outages were the fault of White River. Mr. Sinclair does not contend that White River's service is inferior to Empire's, but rather that the contrast when White River has an outage and the surrounding buildings serviced by Empire still have power causes his customers to be angry and confused. Mr. Sinclair also stated that he understood no electric company can guarantee there will never be power outages.

White River's witness, Mr. Hammond, testified that there are other areas in the White River system where businesses exist side by side with competing power suppliers, also due to annexation. In addition, Mr. Hammond stated that suppliers serving side by side also occurs as the result of territorial agreements, and also noted that different buildings having power on and off can occur even in places where only one supplier operates, depending on what feeder gets knocked out. The witness opined that if the Commission granted a change of supplier on the basis put forth by Mr. Sinclair, White River would expect additional applications to switch from White River to Empire, as there are other areas in White River's system where White River customers are surrounded by Empire customers due to growth and annexation. At the hearing Mr. Hammond stated that he had

been approached the previous week by someone with the same kind of situation.

White River also presented evidence that it had offered an alternative solution to Mr. Sinclair's problem. White River suggested that Mr. Sinclair convert to the interruptible rate service. White River would install a standby generator unit on Mr. Sinclair's property, with the cost of the generator financed for a period of five years through the rebate which would be given to Mr. Sinclair for his participation in the interruptible service. At the end of the five-year period the generator would be paid for, and would belong to Mr. Sinclair. In offering this program, White River asks its customers to sign a ten-year agreement with them so that they will at least profit from their capacity installation.

The interruptible service with backup generation program was further explained by White River as follows: the customer agrees to have its service interrupted for a maximum of 200 hours during a year, for no more than any four-hour period in a twelve hour period. White River will give its customer twelve hours notice prior to an interruption. This program would help in a situation such as the one faced by Mr. Sinclair, since the generating package that is installed has a monitoring device which monitors all three phases of the three-phase power. If the voltage gets out of the band width, then the generator will automatically start up and switch from the power supply to the backup. Thus having the generator installed would solve the problem of power outages. However, White River admitted that there are some problems attendant to the use of the backup generator. The generator is a diesel generator, and there is significant noise associated with its use. If the generator was started at two or three o'clock in the morning, it would sound like a diesel bus running outside the motel. In addition, the generator takes up some parking space.

Mr. Washburn testified for the Staff that in his opinion it would not be in the public interest to grant a change of suppliers in the present case. He testified that the point of delivery from Empire to the motel units currently served by White River is approximately 300 feet, and a new extension would be required from Empire's adjacent facilities. In addition, White River would have approximately 800 feet of unused three-phase underground conductor, which will remain unused since White River cannot serve any new customers within the city limits of Branson. In effect, this would represent a stranded investment for White River. Mr. Washburn also testified that he was told that the cost for this would be less than \$100,000.

The facts as presented concerning Mr. Sinclair's request for a change of electric supplier present the Commission with a close case. The Commission, however, finds that the evidence is insufficient to grant a change in electric suppliers. Mr. Sinclair did present evidence of a negative economic impact which could reasonably be assumed to be in excess of \$500. However, the Commission finds that the cumulative effect of several other factors weighs in favor of a denial of Mr. Sinclair's application. Mr. Sinclair is not the only business owner whose business is surrounded by other businesses receiving service from a different electric supplier. This is an unfortunate but unavoidable result of the rapid expansion of growth into formerly rural areas, as original development is allowed to stay with the original supplier, given the capital-intensive nature of the business, while new development is serviced by the municipality's franchise provider. It is also foreseeable that if the Commission were to grant a change of suppliers on the basis requested by Mr. Sinclair, other businesses would be likely to request a change of supplier for the same reasons, which would have a disproportionately

negative impact on White River. The Commission finds that this would not be in the public interest.

The grant of a change of suppliers in this case is also not in the public interest on its own merits. White River has not had a disproportionate number of outages, and thus the situation Mr. Sinclair fears will not occur very often. In contrast, Empire will have to extend its facilities in order to serve Mr. Sinclair, and White River will be left with a stranded investment of approximately 800 feet of unused three-phase underground conductor. The cost of the stranded investment is some amount less than \$100,000, and the economic effect of the stranded investment on White River is significant.

Mr. Sinclair, on the other hand, has been given a reasonable alternative to solve his problem, namely the interruptible rate service program with the installation of a standby generator. The Commission recognizes that this is not a perfect solution, and that Mr. Sinclair's concern regarding the noise is a valid one. Nevertheless, Mr. Sinclair would be given 12 hours notice of a scheduled interruption, which would not last for more than four hours. Although the Commission is sympathetic to Mr. Sinclair's plight, it concludes that based upon the evidence a change of suppliers is not in the public interest.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law:

The burden of proof in change of electric supplier cases is on the applicant. *Re Cominco American, Inc.*, 29 Mo. P.S.C. (N.S.) 399, 407 (1988). The Commission utilizes a case-by-case analysis in determining

whether an application for change of electric suppliers should be granted. **Cominco** at 405.

The Missouri Legislature enacted four statutes, commonly referred to as the "anti-flip-flop" laws, which assure electric suppliers the right to continue supplying retail electric energy to structures through permanent service facilities once service has commenced, except for certain limited circumstances under which the Commission may authorize a change of supplier. Section 91.025.2, RSMo 1994, relates to applications for change of supplier made by customers currently receiving service from a municipally owned or operated electrical system, while Section 393.106.2, RSMo 1994, concerns applications for change of supplier by customers currently receiving service from an electrical corporation or joint municipal utility commission. The two remaining statutes deal with a situation such as the one in the present case, where the customer seeking a change of supplier is currently receiving service from a rural electric cooperative. The two statutes state as follows:

Notwithstanding the provisions of subsection 2 of this section, after a public hearing upon a complaint, the public service commission may order that service be provided by another supplier if it finds that service from another supplier of electricity is in the public interest for a reason other than rate differential. Nothing in this section shall be construed as conferring upon the public service commission jurisdiction over the rates, financing, accounting or management of any electric cooperative.

Section 394.080.5, RSMo 1994

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, and the commission is hereby given jurisdiction over rural electric cooperatives to accomplish the purpose of this section. 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.

Section 394.315.2, RSMo 1994.

In many cases involving change of electric suppliers, the issue arises in the context of a dispute between electric suppliers over which supplier has authority to serve a particular customer. In contrast, cases which have been commenced at the behest of a customer have been rare, but are increasing in frequency. The *Cominco* case, cited above, *Re the application of Thomas J. and Barbara A. Bakie*, Case No. EO-93-170, Report and Order, issued August 6, 1993, and *Re the application of Carol June Tyndall, et al.*, Case No. EO-93-295, Report and Order, issued May 27, 1994, appear to be the leading cases on customer-initiated applications for change of electric suppliers, and provide a substantial amount of guidance regarding the standards to be applied in determining when a change of electric suppliers is appropriate. The factors addressed in the *Cominco* and *Bakie* decisions may be recapitulated as follows:

1. Whether the customer's needs cannot be adequately be met by the present supplier with respect either the amount or quality of power;
2. Whether there are health or safety issues involving the amount or quality of power;
3. What alternatives the customer has considered, including alternatives with the present supplier;
4. Whether the customer's equipment has been damaged or destroyed as a result of a problem with the electric supply;
5. The effect the loss of the customer would have on the present supplier;

6. Whether a change in supplier would result in a duplication of service or facilities, especially in comparison with alternatives available from the present supplier, a comparison of which could include: (a) the distance involved and cost of any new extension, including the burden on others -- for example the need to procure private property easements, and (b) the burden on the customer relating to the cost or time involved, not including the cost of the electricity itself;

7. 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 6(b) above;

8. What efforts have been made by the present supplier to solve or mitigate the problems;

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

10. 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.

On several occasions throughout this proceeding, the parties, in referencing the **Bakie** decision, have placed a disproportionate emphasis on the potential economic loss to the Bakies' kiln production. The Commission's decision to grant a change of electric suppliers in the Bakie case was based on the cumulative effect of several factors including the fact that the Bakies had originally sought service from Empire but were prevented from obtaining service due to an uncooperative neighbor, that the Bakies had experienced serious problems with their electric supply over a long period of time, that White River had failed to adequately respond to

the repeated problems experienced by the Bakies over a period of years, and that Empire now had an extension within a short distance of the Bakie property such that little additional expenditure would occur if the Bakies changed electric suppliers. All of these factors were considered in addition to the potential impact on the Bakies' kiln business.

In the present case, on the other hand, while the Commission acknowledges that Mr. Sinclair has shown a negative economic impact on his business, the cumulative effect of the facts in this case weigh against the grant of a change of electric suppliers. The "public interest" referenced in the applicable statutes is not defined by the legislature, but would seem to include the individual applicant, other members of the cooperative, and the public at large. In the present case a change of suppliers would result in a disproportionate impact on other members of the cooperative, as White River will be required to absorb its stranded investment, while the benefit to Mr. Sinclair is relatively minimal. Such a change is therefore not in the public interest, especially given that a reasonable alternative exists to ameliorate the problem experienced by Mr. Sinclair. The Commission concludes that Mr. Sinclair's request to change his electric supplier is not in the public interest, and the Commission will therefore deny the request.

IT IS THEREFORE ORDERED:

1. That the application for change of supplier filed by Applicant Martin J. Sinclair is hereby denied.

2. That this Report And Order shall become effective on September 15, 1995.

BY THE COMMISSION

A handwritten signature in cursive script that reads "David L. Rauch".

David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Kincheloe,
Crumpton and Drainer, CC., Concur
and certify compliance with the
provisions of Section 536.080, RSMo 1994.

Dated at Jefferson City, Missouri,
on this 5th day of September, 1995.