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January 19, 2001

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Re: City of Rolla, Missouri
Case No. EA-2000-308

Dear Mr. Roberts:
Enclosed for filing in the above-referenced case please find the original and eight copies of **Initial Brief of the Office of the Public Counsel.** Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

M. Ruth O'Neill
Assistant Public Counsel

MRO:jb

cc: Counsel of Record

FILED[3]
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Missouri Public Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of the	)	
City of Rolla, Missouri, for an Order	)	
Assigning Exclusive Service Territories	)	
And for Determination of Fair and	)	**Case No. EA-2000-308**
Reasonable Compensation pursuant to	)	
Section 386.800 RSMo 1994	)	

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

M. Ruth O'Neill (#49456)
Assistant Legal Counsel

January 19, 2001

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I. INTRODUCTION

The City of Rolla provides electric service to residents within its city limits, through Rolla Municipal Utilities (RMU). On June 7, 1998, the City of Rolla formally expanded its city limits by annexing an area known as the "Southside Annex." The Southside Annex consists primarily of residential and small business structures. Prior to annexation, and continuing to the present time, the residents of the Southside Annex receive electrical service from Intercounty Electric Co-op Association (Intercounty), a rural electric co-op.

On July 13, 1998, The City of Rolla notified Intercounty and the Missouri Public Service Commission (the Commission) by letter, stating that "the City desires to extend its municipal electric utility service area to include [the annexed area] and all structures within that area." ("Application For Order Assigning Exclusive Service Territory and for Determination of Fair and Reasonable Compensation", Appendix E and Appendix F.)

On or about October 29, 1999, RMU filed its Application with the Commission to be assigned the Southside Annex as its exclusive territory for the purpose of providing electrical service. Intercounty opposes that application, as does an Intervenor group identified as "Southside Neighbors." The Southside Neighbors consists of several residents of the Southside Annex who were opposed to annexation, and who oppose RMU's application. While the Intervenor group does not include all residents of the annexed area, members of the Intervenor group and other residents of the annexed area have voiced their opposition to having their electric service provider changed. The Commission received testimony regarding the positions of approximately 17 customers who receive electric service in the Southside Annex at the local public hearing, which

was held on October 24, 2000, in Rolla, Missouri. At the evidentiary hearing on December 4, 2000, the Commission received Exhibits 16, 17 and 18 into evidence, which consisted of letters sent to the Office of Public Counsel (Public Counsel) and the Staff of the Missouri Public Service Commission (Staff) during while RMU's application was pending before the Commission. Public Counsel also submitted a late-filed exhibit consisting of letters not previously presented to the Commission on December 19, 2000. All of the residents of the Southside Annex who have commented about the proposed switch in electrical providers have been opposed to the switch. The testimony from the local public hearing and the letters introduced as exhibits are evidence in this case, and should be considered by the Commission in determining what best suits the public interest.

This initial brief discusses various provisions of Section 386.800 RSMo. First the brief will address the appropriate legal standard the Commission should use in deciding whether granting RMU's application would "best serve the public interest", as required by Section 386.800.6 RSMo and distinguish this standard from the "not detrimental to the public interest" standard used by the Commission in merger/acquisition cases, as set forth in Rule 4 CSR 240-2.060.8(D) and sale or transfer of asset cases, as set forth in Rule 4 CSR 240-2.060.7(D). Second, this brief will offer guidance to the Commission regarding the interpretation of Section 386.800 RSMo in order to answer questions posed by the Commission and the Regulatory Law Judge at the time of the hearing. Specifically, the brief will address the Commission's authority to assign part or all of the service territory at issue to Intercounty, and whether, in such an event, Intercounty would be able to serve new structures. The brief will also address the implications 90-day deadline for transfer

of assets and compensation, which is found in the last clause of Section 386.800.6 RSMo. Finally, this brief will discuss whether RMU comply with the Commission's decision if the Commission grants RMU's application, but sets a price for the Intercounty assets in excess of that proposes by RMU.

II. JURISDICTION

This Commission has jurisdiction over this matter pursuant to Section 386.800 RSMo (1994).[1] This is the first contested matter to come before the Commission pursuant to this statute.

III. ARGUMENTS

A. In deciding this case and assigning the service territory under dispute, the Commission must determine what solution best serves the public interest.

Section 386.800.6 RSMo provides, in part, that when a city asks the Commission to assign service territories between it and another electric supplier, the Commission shall hold evidentiary hearings to "assign service territory between electric suppliers" and "to determine the amount of compensation due any affected electric supplier." This sub-section further states that the Commission "**shall make such determinations based upon findings of what best serves the public interest**" (emphasis added). This standard differs from the standard used when the Commission is reviewing applications for merger or the transfer of assets, where it need only be shown that the transaction is not "detrimental" to the public interest.

For example, in an application to allow a merger or acquisition between utilities, the applicant need only show that the proposed merger is "not detrimental to the public interest." Rule 4 CSR 240-2.060.8(D). In merger applications, the Commission "may not

[1] All references are to RSMo 1994 unless otherwise indicated.

withhold its approval of [a] proposed merger unless the merger is detrimental to the public interest." In the Matter of the Application of Kansas Power and Light, 1 Mo. PSC 3d 150, 153 (1991). The Commission has allowed mergers and acquisitions of regulated utilities to take place where it has found that no compelling public interest would be served by allowing the merger. See, In the Matter of Missouri-American Water Company's Tariff Revisions, 4 Mo. PSC 3d 205, 216 (1995).

Likewise, where the issue is the transfer of common stock or assets, of a regulated utility, the Commission is limited to approving transactions as long as they are "not detrimental to the public interest." Rule 4 CSR 240-2.060(7)(D).

There is a good reason for applying a different standard to mergers and voluntary asset transfers than is applied to involuntary transfers such as the one possible in this case. As the Missouri Supreme Court stated in State ex rel. City of St. Louis v. Public Service Commission, 73 S.W.2d 393 (Mo. banc 1934), the right to sell one's property is "an incident important to ownership of property.... a property owner should be allowed to sell his property unless it would be detrimental to the public." 73 S.W.2d, at 400.

The purpose of the provisions requiring Commission approval of transfers is "to ensure continuation of adequate service to the public served by the utility." State ex rel. Fee Fee Trunk Sewer v. Litz, 596 S.W.2d 466, 468 (Mo. App. E. D. 1980).

Similarly, had the parties successfully negotiated a territorial agreement pursuant to Section 394.312 RSMo, as contemplated in Section 386.800.4 RSMo, and then brought the agreement before this Commission, the Commission could have approved the resulting territorial agreement after using the "not detrimental to the public interest" standard. Section 394.312.4 RSMo.

In matters such as the one in the instant case, there is a good reason for imposing a different, higher standard for an applicant to meet before the Commission will agree to an assignment of service territories. The reason is simply that, in this case, the parties have not agreed to the transfer. The parties have not agreed on how to divide the disputed territory. Intercounty is completely opposed to the transfer of its existing customers to RMU and has asked the Commission to assign the Southside Annex territory to Intercounty. RMU has asked the Commission to assign the Southside Annex territory to RMU, to the exclusion of Intercounty. The residents of the Southside Annex whose letters and testimony the Commission has before it have asked, at least, that they be allowed to remain customers of Intercounty. It is reasonable to conclude that the reason that the legislature used different language in Section 394.312.4 RSMo from that used in Section 386.800 RSMo is that the standard the Commission is to apply is a different standard.

In determining what "best serves the public interest" the Commission should consider whether there is a solution which will work to the public interest, not merely whether the solution proposed by RMU avoids working to the public detriment.

B. The Commission has the statutory authority to Issue an Order in this Case which assigns part or all of the annexed territory as the exclusive service territory of Intercounty, and if such an Order issues, Intercounty could be allowed to serve new structures in the exclusive service territory.

1. The rules of statutory interpretation require that unambiguous statutes be given their clear meaning, and that where interpretation is necessary, a statute should be read so that, where possible, effect can be given to all provisions contained in the statute.

When the language of a statute is clear and unambiguous, there is no need for statutory construction or interpretation. However, "when clearly necessary the strict

letter of the act must yield to the manifest intent of the legislature." Brownstein v. Rhomberg-Haglin & Associates, 824 S.W.2d 13, 16 (Mo. banc 1992).

The goal of statutory interpretation is to "ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." State ex rel. Riordan v. Dierker, 956 S.W.2d 258, 260 (Mo. banc 1997). Words, which are not provided with special statutory meaning, should be given their plain and ordinary meaning. State ex rel. Ashcroft v. Union Electric, 356 S.W.2d 857, 860 (Mo. banc 1962).

Where the plain language requires some construction to determine the intent of the legislature the Commission "is not to assume the legislature intended an absurd result." Budding v. SSM Healthcare System, 19 S.W.3d 678 (Mo. banc 2000).

Where there are multiple statutory provisions relating to the same subject, those statutes "must be read in *pari materia* and, if possible, effect given to each clause and provision." Union Electric v. Jones, 356 S.W.2d, 857, 860 (Mo. banc 1962). (Citation omitted.) Where the statutory provisions can be harmonized and force can be given to each, there is no reason to prefer one statute over the other. State ex rel. C.R.I.&P.R. Co. v. Public Service Commission, 441 S.W.2d 742, 746 (Mo. App. 1969). In addition, "[v]arious sections of a single act should be construed so as to render the act a consistent and homogenous whole." State ex rel. Ashcroft v. Union Electric, 559 S.W.2d 216, at 221.

What the various pronouncements in the case law come down to, in the end, is that statutes "must be given a common sense and practical interpretation." Concord Publishing House v. Director of Revenue, 916 S.W.2d 186, 194 (Mo. banc 1996).

(citations omitted.) These principles provide the basis by which the provisions of Section 386.800 RSMo may be understood and applied in this case.

2. Because Section 386.800.6 RSMo provides that "The commission shall hold evidentiary hearings to assign service territory between the electric suppliers," and does not expressly state that the Commission must grant or deny the application to assign service territory in total, the Commission has the authority to make an assignment which would accomplish the same purpose as a territorial agreement between the parties, as permitted in Section 386.88.4 RSMo. Further, because the Commission must decide whether the proposed assignment is the alternative which "best serves the public interest" the Commission is free to reject the application, or to modify the application as required to attain this goal.

At the time of the hearing, Judge Thompson requested that counsel address in briefs "the scope of the Commission's authority under this section. In particular, can the Commission assign any part or all of the annexed territory as the exclusive service area of Intercounty for the future, and, if so, would Intercounty be able to serve new structures?" (Tr. Evid. Hearing, Dec. 4, 2000, at p. 73.)

To answer these questions, it is necessary to read all of Section 386.800 RSMo together. In doing so, it is important that the various sections of the act in such a way so as to render the act a consistent and homogenous whole." State ex rel. Ashcroft v. Union Electric, 559 S.W.2d, at 221. The goal of RMU in this matter is first addressed in the statute at Section 386.800.3 RSMo. That is, RMU is before this Commission because "it desires to extend its service territory to [all] structures within the newly annexed area which has received permanent service from another supplier..." In this case that other supplier is Intercounty. In support of its desire to serve existing customers, RMU relies on Section 386.600.2 RSMo, which gives RMU permissive statutory authority ("may extend") to establish itself as the electric service provider for new structures within the Southside Annex.

The statute contemplates that, when a municipal utility such as RMU, seeks to serve an annexed territory with pre-existing electric service, it should attempt to negotiate with the other electrical supplier and come to an agreement. In Section 386.800.4 RSMo, the electrical suppliers are given explicit instructions in how to conduct their negotiations. This subsection of the statute contemplates the parties reaching a territorial agreement, and presenting it to the Commission for approval "under the provisions of Section 394.312 RSMo."

Given that Section 386.800.4 RSMo specifically refers to Section 394.312 RSMo, the rules of statutory interpretation require that this Commission consider and give effect to both statutes, if possible. Clearly, these provisions can be read in harmony. State ex rel. C.R.I.&P.R. Co. V. Public Service Commission, 441 S.W.2d 742, 746 (Mo. App. 1969).

Had the parties been able to reach a territorial agreement, as provided in Section 394.312 RSMo, this Commission would only be required to decide whether or not to approve the agreement.

In this case, the parties were not able to reach an agreement. That is how this matter arrived before the Commission. In essence, RMU has filed an application with the Commission asking it to accomplish what the parties could not: to decide which supplier should serve the customers in Southside Annex area, and how to fairly and reasonably compensate the supplier who is not assigned the service territory.

The plain language of Section 386.800.6 RSMo sets forth the Commission's authority and duty under the statute. The Commission "shall hold evidentiary hearings" in order to

(1) assign service territory between affected electric suppliers *inside the annexed area* (emphasis added),

(2) determine the amount of compensation due any affected electric supplier,

(3) base its findings on what best serves the public interest, and

(4) shall issue its decision by report and order.

The term "electric supplier" is not expressly defined in the statute at issue, nor is it defined in Section 386.020 RSMo. This term should be given its plain and ordinary meaning. It is clear that, as used in this statute, "electric supplier" includes both the municipal utility and the rural electric co-op. Section 386.800.3 RSMo refers to a pre-existing supplier as "another" supplier. Therefore, even though Section 386.800.4 RSMo describes the non-municipal supplier as the "affected electric supplier" the Commission should not assume that it must grant the application of RMU.

In Section 386.800.6 RSMo, it is clear that the Commission decides how resolve the dispute "between affected electric suppliers." The fact that the plural is used in subsection (6) strongly indicates that the Commission has discretion to decide to assign the territory in the affected area to whichever supplier it believes will best serve the public interest in a particular situation.

There do appear to be some limitations upon the Commission's power to craft what, in essence, will be the territorial agreement the parties could not forge themselves. This means that some options which would have been available to the parties are not available via a Commission decision.

First, it appears that the Commission may only assign territory and determine compensation for service in the annexed area. In testimony, and during the evidentiary

hearing, there was some reference to the negotiations between the parties, which included the possibility of exchanging territory outside the annexed area for territory in the annexed area. (Tr. Dec. 5, at 391). Under the plain language of the statute, it does not appear that the Commission could employ this solution.

Second, while the Commission may assign territory, and may determine compensation due as a result of transfer or assets or lost revenues, the statute does not grant the Commission the authority to order the payment of franchise fees, taxes or payments in lieu of tax (PILOT). The Commission is a creature of statute and may only exercise those powers expressly conferred upon it by statute and those reasonably incidental thereto. Union Electric v. Public Service Commission, 591 S.W.2d 134 (Mo. App. W.D. 1980). Therefore, it is questionable whether the Commission could craft an order which would require Intercounty to pay a franchise fee, tax or PILOT as part of the Commission's decision assigning territory.

Third, the Commission is limited by what course will best serve the public interest, while a territorial agreement could be approved that did not **promote** the public interest, so long as the terms of the agreement were not **detrimental** to the public interest.

Wherefore, it appears that the Commission's authority under Section 386.800.6 RSMo is nearly as broad as the options available to the parties at the time they attempted to negotiate a territorial agreement, but that there are three limitations contained in the statute. These three limitations narrow the authority of the Commission in assigning the service territory.

The Commission may not order the parties to "trade" territory outside the annexed area for territory within the annexed area. The Commission may not order the imposition and payment of franchise fees, taxes or PILOTs. The Commission is constrained to assign the disputed territory in a manner which best serves the public interest.

However, with these limitations in mind, the Commission may:

(1) grant the application of RMU to assign it the annexed territory, and make a fair and reasonable determination of the compensation to be paid to Intercounty by applying the provisions of Section 386.800.5 RSMo; or

(2) deny the application of RMU and allow Intercounty to continue to serve existing customer and structures; or

(3) deny the application of RMU and allow Intercounty to continue to serve the annexed territory, assign the annexed area to Intercounty - including the ability to serve new structures - and order Intercounty to pay an amount of compensation to RMU for "associated lost revenues" for those structures which were built after annexation, and the areas within the annexed area which remain undeveloped; or

(4) some other method of assigning the service territory within the annexed area, if that is necessary for the Commission to issue an order which best serves the public interest.

C. The plain language of the statute allows the Commission to expressly alter the provision, which requires that payment of compensation and transfer of title and operation of the facilities within ninety (90) days.

At the close of the evidentiary hearing in this case, Judge Thompson directed counsel to address the meaning of the last sentence of subsection 6 of Section 386.800 RSMo. (Tr. Dec. 5, 2000, p. 553.) The complete sentence reads "The payment of

compensation and transfer of title and operation of the facilities shall occur within ninety days after the order and any appeal therefrom becomes final unless the order provides otherwise." Public Counsel agrees that this run-on sentence appears confusing at first glance. In keeping with the general rules of statutory construction set forth in III.B.1, *supra*, it is Public Counsel's belief that the sentence should be construed as if it were written as follows:

> "The payment of compensation and transfer of title and operation of the facilities shall occur within ninety days after the order[,] and any appeal therefrom[,] becomes final[,] unless the order provides otherwise."

If the last sentence of Section 386.800.6 RSMo is read with this understanding, it is clear that the Commission may specify, in the Order issuing its decision in the case, a different period in which to complete the transfer than the 90 days stated in the statute. Public Counsel arrives at this decision based on the following statutory analysis.

The phrase "and any appeal therefrom" should be considered to be a dependent clause which modifies "order".

The final clause of the sentence is "unless the order provides otherwise." The plain and ordinary meaning of the word "unless" should be employed. Therefore, this sentence of Section 386.800.6 RSMo should be read to mean that, generally, any transfer and payment ordered by the Commission shall be completed within ninety (90) days of the order becoming final. The period before which the order would be considered to be final includes any appeal from the order. However, the Commission has the discretion to order the transaction to be executed in another way.

Wherefore, all transfers and payments ordered by the Commission pursuant to Section 386.800.6 RSMo shall be completed within 90 days of the order becoming final. If there is an appeal, the transaction shall be completed within 90 days of the appeal late decision becoming final. However, the Commission has the discretion to include, in its order, a different timetable for the transaction.

D. By submitted this matter to the jurisdiction of the Commission, RMU has bound itself to accepting, or appealing, the terms of any order by the Commission regarding compensation to be paid in the event that some or all of the service territory in the annexed area is assigned to RMU.

On December 5, 2000, during the evidentiary hearing in this matter, witness Watkins testified that he believed that, should the Commission assign the annexed area as RMU's service territory and set a level of compensation to be paid to Intercounty, that the City of Rolla might not consummate the transaction if the Commission sets a price higher than the price proposed by RMU. (Tr. Dec. 5, at pp. 388-389.) In light of that testimony, Judge Thompson asked counsel to address, in this brief, "whether or not the City has, in fact, lost that discretion by bringing this matter to the Commission." (Tr. Dec. 5, at p. 401.)

It is Public Counsel's position that, once the Commission enters its decision and order in this case, RMU is faced with two options: to accept the decision and order of the Commission, or to appeal the order pursuant to Sections 386.500 to 386.550 RSMo.

RMU has had the option, and will continue to have the option until the Commission decides this case, whether continue in its quest to provide service to pre-existing structures in the Southside Annex for some time. RMU notified the commission and Intercounty of its intent to pursue negotiations with Intercounty in order to assume

control over the Southside Annex service territory as required by Section 386.800.3 RSMo. RMU negotiated with Intercounty as required by Section 386.800.4 RSMo. RMU filed its application before the Commission, pursuant to Section 386.800.6 RSMo after failing to come to terms with Intercounty in its negotiations for a territorial agreement.

After explicitly requesting that the Commission decide this issue, RMU should be required to deal with the consequences of that decision. Clearly, by asking the Commission to intervene in this matter, RMU was agreeing to abide by any lawful order the Commission made, under the standards which the Commission must follow, which is that the assignment be based on what best serves the public interest. Should RMU have legal grounds for disputing the Commission's order in this case, the statute specifically directs the parties to the statutes governing appeals of commission orders. Section 386.800.6 RSMo provides, in pertinent part, "Review of such commission decisions **shall** be governed by sections 386.500 to 386.550." (Emphasis added.)

As set forth above, where the language of a statute should be given its plain and ordinary meaning, where that is possible. The plain language of the statute provides that review of commission decisions pursuant to this statute **shall** be in the same manner all Commission orders are reviewed. The next sentence of the subsection, which has already been discussed at length, above, states that any payment and transfer ordered by the Commission "**shall** occur within ninety days" subject to a contrary provision in the order itself. (Emphasis added.) The use of the word "shall" is generally indicates that an action is mandatory. See, Casper v. Casper, 792 S.W.2d 676 (Mo. App. W.D. 1990).

There is no provision in the statute for the municipal utility who makes the application to reject the decision of the Commission. There is no language in the statute,

which states that the Commission's decision is merely advisory. As the Missouri Court of Appeals, Western District, stated, the general rule that "shall" indicates a mandatory duty "is particularly true where, as here, 'shall' is contrasted with the use of 'may' in describing another procedure in the same statutory section." Citizens for Rural Preservation v. Robinett, 648 S.W.2d 117, 132 (Mo. App. W.D. 1982).

The first sentence of Section 386.800.6 RSMo provides that the municipal utility "**may** apply to the commission for an order." (emphasis added.) A comparison of these terms clearly indicates that, while the decision to come before the Commission was discretionary, once the Commission's jurisdiction has been invoked, the Commission's order shall be appealed or implemented.

RMU exercised the discretion provided to it in the statute in notifying the commission and Intercounty of its desire to serve the annexed area. (Section 386.800.3 RSMo.) RMU exercised its discretion in negotiating with Intercounty. (Section 386.800.4 RSMo.) RMU exercised its discretion by applying to the Commission and asking the Commission to exercise its jurisdiction over this matter. (Section 386.800.6.) Once the Commission issues its decision and order in exercise of that discretion, RMU must either comply with the order or appeal the order.

IV. CONCLUSION

The Commission accepted jurisdiction over this case at the request of RMU. In deciding how to assign the Southside Annex service territory, the Commission must determine which option best serves the public interest. The Commission has considerable discretion in deciding how the service territory shall be assigned and in how to compensate any affected supplier for transfer or plant or facilities, or associated with

lost revenue. The Commission must confine its decision to the territory within the annexed area, and may not impose requirements, which are beyond its statutory authority.

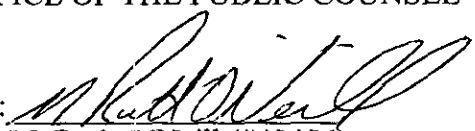
Once the Commission issues its decision and order in this case, that order must be implemented within 90 days of the order becoming final, unless the Commission specifically states otherwise. That 90 days shall be calculated from the time the order becomes final, including all time necessary for any appeal that may be filed.

Having invoked the jurisdiction of the Commission, the parties must either accept the decision of the Commission, or appeal the decision pursuant to Secs. 386.500 to 386.550 RSMo.

Wherefore, it is respectfully requested that the Commission consider the forgoing brief, and render its decision based upon what will best serve the public interest in this case.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

BY: 

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 19th day of January 2001:

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