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November 27, 2000

The Honorable Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

Re: Case No. EA-2000-308

FILED<sup>2</sup>  
NOV 27 2000  
Missouri Public  
Service Commission

Dear Judge Roberts:

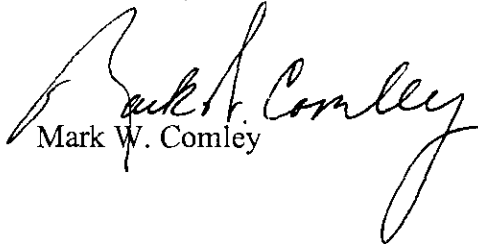
Enclosed for filing in the referenced matter please find the original and eight copies of Intercounty Electric Cooperative Association's Further Suggestions in Support of its Motions to Compel and Reply to the City of Rolla's Response to the Motions to Compel.

Please contact me if you have any questions regarding this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:

  
Mark W. Comley

MWC:ab

Enclosure

cc: Office of Public Counsel  
Denny Frey  
Gary W. Duffy  
Michael R. Dunbar  
Vernon W. Strickland

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>  
NOV 27 2000  
Missouri Public  
Service Commission

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 Reasonable Compensation Pursuant to )  
Section 386.800, RSMo 1994 )

Case No. EA-2000-308

**INTERCOUNTY ELECTRIC COOPERATIVE ASSOCIATION'S**  
**FURTHER SUGGESTIONS IN SUPPORT OF ITS MOTIONS TO COMPEL AND**  
**REPLY TO THE CITY OF ROLLA'S**  
**RESPONSE TO THE MOTIONS TO COMPEL**

In further support of its motions to compel responses to its data request numbers 82, 84, 115, 160, 181, 183 and 184, and in replay to the City of Rolla/Rolla Municipal Utilities (RMU) response to those motions, Intercounty submits the following.

**Timing of Intercounty's Motion.**

Before addressing the merits of Intercounty's motions to compel, RMU first contends that the motions were untimely filed and suggests that the timing of the filing was to obtain some strategic advantage. Intercounty replies that the information sought in the data requests under scrutiny in the motions should have been disclosed by RMU voluntarily, well before Intercounty's rebuttal testimony was due to be filed. Intercounty received supplemental answers to its data requests in October, 2000 but the RMU's objections lingered. What advantage there is has been taken by RMU. The consequences to Intercounty caused by RMU's unjustified delay in disclosing the information cannot be fully measured at this time.

**The requests seek relevant information**

RMU's response to Intercounty's motion to compel does not deny that its witness, Dan Watkins, refers to the business plan, which is the subject of data request 160, in his prefiled written

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testimony. As to the issue of relevance, there should be no argument. After all, RMU's witness has raised the issue of the contents of the business plan in his own words, without any elicitation from Intercounty. If the witness himself considered the business plan worth noting, then RMU should not be allowed to claim that what he said lacks relevance.

**The "closed record" classification is not an absolute privilege.**

RMU's response asks this Commission to believe that the "closed record" classification placed upon certain of the City's records is very nearly an absolute evidentiary privilege established by statute. Claims of privilege present an exception to the usual rules of evidence and are carefully scrutinized. State ex rel. Chandra v. Sprinkle, 678 S.W.2d 804, 807 (Mo. 1984). The "closed record" privilege asserted by RMU should not be an exception to the rule. A privilege can be waived. For instance,

[the physician-patient privilege] may be waived in a variety of ways, and the most common cases involve plaintiffs who voluntarily place their medical condition in issue by filing a petition alleging that they suffered physical or mental injuries. *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407, 409 (Mo. banc 1996). A party may also "impliedly waive the privilege through an act showing a clear, unequivocal purpose to divulge the confidential information." *Cline v. William H. Friedman & Associates, Inc.*, 882 S.W.2d 754, 761 (Mo.App.1994); *State ex rel. Gonzenbach v. Eberwein*, 655 S.W.2d 794, 796 (Mo.App.1983).

Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 63 (Mo.banc 1999). A privilege may be waived while testifying. State v. Evans, 802 S.W.2d 507, 511-512 (Mo. banc 1991)(defense witness waived physician-patient privilege by denying she had a particular illness); Knight v. M.H. Siegfried Real Estate, Inc. 647 S.W.2d 811, 815 (Mo. App., W.D. 1982)(attorney-client privilege can be waived by client testifying regarding privileged communications)

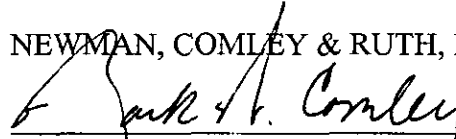
In his prefiled direct testimony at page 19, line 7, Mr. Watkins states that RMU's rates have been stable since 1988 to the present and that the business plan, which Intercounty seeks, will allow

for continued stability and may actually be able to reduce rates in the future. **The witness has placed in issue the rates which RMU may charge in the future**, as well as the business plan upon which those future rates may be based. This was a voluntary and affirmative statement in the testimony of RMU's case in chief. It was not brought about by cross-examination. Having injected these issues into the case, RMU has waived any privilege it could assert to exclude disclosure of the business plan, its wholesale supplier agreement, the wheeling agreements its may have entered, and the other documents which Intercounty seeks by its motions to compel.

Even though the argument is sound that the privilege has been completely waived, and unfettered disclosure of the information would be appropriate, Intercounty will accept delivery of the requested documents under the "highly confidential" classification permitted by the protective order in this case. RMU's concerns about disclosure to a potential competitor should be fully alleviated by the restrictions of the protective order.

RMU's objections to data request numbers 82, 84, 115, 160, 181, 183 and 184 are meritless and should be overruled.

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Attorneys for Intercounty Electric Cooperative  
Association

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent

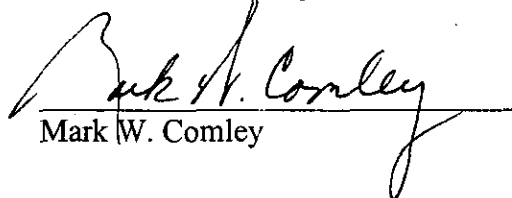
by U.S. Mail, postage prepaid, or hand delivered, on this 27<sup>th</sup> day of November, 2000, to:

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