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Missouri Public Service Commission

Mr. Dale Hardy Roberts
Executive Secretary
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. EA-2000-308

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of the City of Rolla's Response to Intercounty's Motion for Leave to File Supplemental Rebuttal Testimony.

If you have any questions, please give me a call.

Sincerely yours,

Gary W. Duffy

Enclosures
cc w/encl:
Ruth O'Neill, Office of Public Counsel
Dennis Frey, Office of General Counsel
Mark W. Comley
Michael R. Dunbar
Dan Watkins

BEFORE THE PUBLIC SERVICE COMMISSION
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 reasonable compensation pursuant to section 386.800 RSMo 1994.	))))))	Case No. EA-2000-308

CITY OF ROLLA/ROLLA MUNICIPAL UTILITIES' RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL REBUTTAL TESTIMONY

Comes now the City of Rolla, Missouri, ("the City"), by and through Rolla Municipal Utilities ("RMU") and its counsel, and for its response to Intercounty Electric Cooperative Association's "Motion for Leave to File Supplemental Rebuttal Testimony," respectfully states as follows:

1. On or about November 16, 2000, Intercounty Electric Cooperative Association ("IEC" or "Intercounty") filed a motion seeking permission to file supplemental rebuttal testimony of Vernon Strickland, and attached the testimony. For the reasons set out below, the Commission should deny the motion.

2. The procedural schedule in this case was established by order of the Commission dated March 29, 2000, some eight months ago. It set the date for parties to file rebuttal testimony as July 18, 2000. The parties to the case had previously submitted a proposed procedural schedule on March 8, 2000, in which, *inter alia*, the following dates were proposed for the filing of direct and rebuttal testimony: June 1, 2000 for direct testimony by the City of Rolla, and July 18, 2000 for proposed rebuttal testimony of all other parties. IEC participated in the preparation of the proposed procedural schedule and obviously agreed to the June 1 and July

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18 dates for the filing of direct and rebuttal testimony, which the Commission subsequently ordered.

3. The Order Adopting Procedural Schedule provides (page 2) that "The Commission will require the prefiling of testimony as defined in 4 CSR 240-2.130. All parties shall comply with this rule ... ."

4. In relevant part here, 4 CSR 240-2.130 provides in subsection (7)(C) that "Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case." The rule also provides, in subsection (8), that "No party shall be permitted to supplement prefiled prepared direct, rebuttal or surrebuttal testimony unless ordered by the presiding officer or the commission." In the March 29 Order, the Commission said: "The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing." Order, p. 3.

5. Therefore, the rule and Order obligated Intercounty to present in its rebuttal testimony all of its claims, contentions and evidence as to why it "rejects, disagrees or proposes an alternative to [RMU's] direct case." Neverthless, in its November 16 Motion, IEC claims that it should be allowed to supplement its rebuttal testimony in three areas. Each area will be discussed in turn.

Meeting the Needs of the 286 Customers

6. The first subject is the allegation that IEC needs to supplement its existing rebuttal testimony on the topic of whether RMU will "be able to meet the needs of current members and future growth in the area." Mr. Strickland filed rebuttal testimony on this topic on

July 18, 2000, per the procedural schedule. It says on page 23, starting on line 11: "This is a difficult question to answer for several reasons." He then goes on to say that IEC has not been successful in its attempt to discover certain facts about trailer-mounted generators that he claimed RMU was going to borrow over $6,000,000 to purchase. He talks at line 20 of his rebuttal on page 23 about the prospect of RMU's objections to IEC's data requests being overruled, and how, when that happens he will "supplement my testimony." He apparently couldn't wait for the objections to be overruled and therefore has gone ahead and supplemented his testimony.

7. Having first said in mid-July of this year that the question was "difficult to answer" IEC now wants the Commission's permission to file supplemental rebuttal testimony which says that the question is "... still difficult to answer... ." (See proposed supplemental rebuttal, p. 1, line 18). Thus, there appears to be little justification for the Commission to go to the extraordinary length of permitting supplemental rebuttal just so Mr. Strickland can give *the same answer.*

8. Aside from the fact that this proposed supplement isn't really a supplement at all because it *reaches the same conclusion*, the effort of Intercounty to file this material at this late date is highly questionable. As the Commission is aware from IEC's Motions to Compel filed November 14 and 17, and RMU's Response filed on November 21, 2000, it is clear that IEC *knew* before it filed its rebuttal testimony on July 18 that RMU was claiming some information was not discoverable due to its status as a "closed record" under Missouri law. (See RMU's November 21, 2000 Response for more detail on this topic.) IEC therefore had the opportunity in early July to seek a motion to compel or an extension of its rebuttal filing date, if it considered this to be a vital point. It chose to proceed with the filing of its rebuttal. It did not file a motion

to compel until *more than four months* later. IEC has waited until two weeks before the hearing, and during the Thanksgiving holiday, to seek a resolution. This delay by Intercounty in bringing the matter to the Commission's attention should not be used to unreasonably serve as a bootstrap for the filing of supplemental rebuttal testimony which is of dubious probative value in the first place.

Alleged Increased Wholesale Costs

9. The second subject is the allegation that Intercounty has just discovered an additional cost to its current members. The motion states in ¶ 4 that these costs "could not have been calculated until after the deadline for rebuttal testimony had passed." That deadline passed on July 18, 2000. Curiously, there is no explanation in either the motion or the proposed supplemental rebuttal testimony which details why this calculation could not have been made by July 18. This "new discovery" is apparently from information which was in the possession of both IEC and its co-operative supplier, Sho-Me Power, all along.

10. The new information Mr. Strickland attempts to inject on pages 3 and 4 of the proposed supplemental rebuttal should be rejected by the Commission because it is hearsay. He purports to represent what "Sho-Me Power Cooperative has determined ... ." This is an out of court statement offered to prove the truth of the assertion, which is classic hearsay.

11. The logic behind Mr. Strickland's proposed supplemental rebuttal is also questionable. He apparently assumes there will be an *un-replaced* loss of 2,500 kW and an un-replaced loss of a revenue source to pay for Sho-Me Power's demand charges which are to be assessed on this 2,500 kW demand that, once having been established, apparently ceases to exist. This un-replaced loss of 2,500 kW in demand is supposed to in turn trigger the unexplained "three year average demand feature." This is a specious claim. As the un-controverted pre-filed

testimony of several witnesses in this case already shows, IEC has been adding an average of 732 new customers per year. Using simple mathematics, if 286 customers, on average, produce a demand of 2,500 kW as IEC claims, then 732 new customers each year would add 6,398 kW in new demand each year. Therefore, even if IEC experiences the loss of the 286 customers in the annexed area, and their concomitant 2,500 kW in electrical demand, as a result of a Commission order in this case, IEC within a year will add *446 additional customers* on top of the 286 that will be replaced. Therefore, those new customers *will more than make up* for the loss of the 286. In addition to setting higher demands in the first year after the transfer, those 446 additional customers would also be paying rates presumably designed to reimburse IEC's supplier for those new demands. This simple discussion makes the accuracy of the IEC assertions in this area of the proposed supplemental rebuttal testimony highly suspect, to say the least.

12. Further, it is wholly unreasonable to make RMU go to extraordinary efforts just before the scheduled hearing in an effort to discover facts about this new allegation when, from all appearances, it was something that could have been included in IEC's rebuttal testimony on July 18, 2000, even if the exact amount may not have been known at that time. This situation created by IEC's tardiness also presents the prospect of RMU having to undertake discovery from a non-party (Sho-Me Power) to verify IEC's allegations. Further, given that a ruling from the Commission is not likely until sometime during the week before the hearing at the earliest, there is no practical time in which RMU could then proceed to undertake discovery regarding these new matters. Coupled with IEC's untimely Motions to Compel, the Commission could conclude from this last-minute flurry of IEC pleadings that it is attempting to delay the long-scheduled hearing for its own advantage.

Plan of Intent

13. The third subject is the allegation that Intercounty needs to respond to something Mr. Watkins said in surrebuttal concerning the Plan of Intent. The motion (¶ 5) claims this is a "new matter which was raised for the first time in the filed surrebuttal testimony of City of Rolla Witness Dan Watkins." It cites to Mr. Watkins' prepared surrebuttal on page 15, lines 14-18. This controversy apparently concerns whether there was an "understanding" between the City and IEC regarding the payment of franchise fees. Mr. Watkins did make a comment in his surrebuttal, *in response to the issue being raised in the rebuttal testimony of Mr. Priest* at that line and page reference. Therefore, Mr. Watkins was not raising a "new issue." He was following the Commission's directive in 4 CSR 240-2.130(7)(D) to make comments which were "responsive to matters raised in another party's rebuttal testimony."

14. In any event, the material contained in Mr. Strickland's proposed rebuttal testimony on this point can be handled through cross-examination, or in briefs, or both. There will be no manifest injustice if the material is not considered as supplemental rebuttal. The Commission should not allow this additional rebuttal testimony to be filed because there has been no good cause shown to justify it.

The Never-Ending Story

15. If the Commission, despite these objections of RMU, nevertheless allows the filing of the supplemental rebuttal testimony by Mr. Strickland, it must afford the opportunity to RMU to respond. RMU is the applicant in this proceeding. It filed the opening testimony and it has the burden of proof. As such, it is entitled to the "last word" in testimony. It previously had said the "last word" in its prepared surrebuttal testimony filed October 18, 2000. If the Commission allows the rebuttal testimony of IEC to be supplemented, then it must allow RMU

the opportunity to respond to that supplemented material. Given the time remaining between when a ruling on this matter can be expected from the Commission and the opening of the hearing, the best than can be accomplished is to allow RMU to respond orally at the hearing.

Conclusion

16. For the numerous reasons cited above, and the lack of any good cause on the part of IEC, the Commission should deny the motion to allow the filing of supplemental rebuttal testimony. In brief, supplemental testimony on the first area should be denied because IEC has sat on its rights for more than four months and the offered "supplement" reaches the same conclusion already in the filed rebuttal testimony. Supplemental testimony on the second area should be denied because there has been no showing that it could not have been filed earlier, at least in general form. It introduces a totally new issue into the proceeding, supposedly worth $400,000, on which no rebuttal testimony was filed. It represents objectionable hearsay. It severely disadvantages RMU, who after a ruling admitting same, would be required to engage in last-minute discovery from non-parties in an attempt to verify the allegations. Supplemental testimony on the third area should be denied because it does not inject a "new issue" into the proceeding. There is extensive discussion of the negotiations between IEC and the City in the already-filed prepared testimony. The testimony that it supposedly responds to was itself a response to pre-filed rebuttal testimony. Further, this matter can be handled either in cross-examination of RMU's witness to explore the extent of the "understanding," or in briefs, or both. It is not essential that any of this proffered supplemental rebuttal testimony be allowed and no manifest injustice will result if it is denied. If it is allowed, it creates even further complications because RMU must be afforded a reasonable opportunity to respond to it.

WHEREFORE, the City of Rolla/RMU prays that the Commission deny the Motion for

Leave to File Supplemental Rebuttal Testimony. If the Commission nevertheless grants the motion, RMU requests the opportunity to respond to the testimony with supplemental surrebuttal at the hearing.

Respectfully submitted,

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ATTORNEYS FOR
THE CITY OF ROLLA, MISSOURI

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was mailed or hand-delivered on November 22, 2000, to counsel for all parties of record as shown below.

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