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Missouri Public Service Commission

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

Dear Judge Roberts:

Enclosed for filing in the referenced matter please find the original and eight copies of Intercounty Electric Cooperative Association's Reply Brief.

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
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

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| 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 REPLY BRIEF

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**INTERCOUNTY ELECTRIC COOPERATIVE ASSOCIATION'S REPLY BRIEF**

## I. REPLY TO THE CITY OF ROLLA

A. Intention of the Statute

On page 2 of its brief, RMU contends that if the Commission does not order a transfer in this case, it will perpetuate problems which the General Assembly wishes to avoid. It is not so clear whether the General Assembly enacted Section 386.800[1] to eliminate problems. In fact, the application of the statute has demanding economic consequences as RMU's brief amply demonstrates. Presuming a low figure of fair and reasonable compensation at $1,500,000 as set out on page 15 of RMU's reply brief, RMU will pay $5,244.75 per customer.[2] RMU notes that when this price is compared to "per customer" prices paid in other recent acquisitions and mergers approved by the Commission, $5,244.75 is a "very rich price."[3] Instead of eliminating the problems RMU suggests, Intercounty submits that the General Assembly exacts this level of compensation

[1] As in Intercounty's Initial Brief, statutory citations herein shall be to RSMo. 1994, unless otherwise indicated.

[2] The total figure of $1,500,000 was used by RMU for illustration purposes only. It is far below what the statutory formula would insist upon.

[3] This case cannot be fairly compared to the sale of West Elm Place or the Utilicorp United/St. Joseph Light & Power merger, both of which were approved by the Commission.. Both cases concerned arms length transactions between a willing buyer and (unlike this case) willing sellers. Neither concerned a statutory formula by which compensation or consideration would be calculated, including the element of costs to reintegrate Intercounty's system.

from the annexing municipality to discourage applications like the present one. The General Assembly can be credited with knowing that when an electric supplier's customers and the assets serving them are not for sale, any payment exchanged would always be too low. Clearly, §386.800 is a means to protect Intercounty and other cooperatives from municipal take over of cooperative customers without fair payment. Intercounty submits that RMU's description of the intention of the statute is hardly as clear and obvious as it contends.

B. Consequences of Denying RMU's Application.

On page 4, and again on page 13, of its initial brief, RMU lists a series of consequences it contends would benefit the public if its application is approved in this case. Intercounty takes issue with several on grounds that they are not supported by the evidence in this matter, nor can it be successfully argued that those effects can be inferred from the evidence. Intercounty will not separately set out each one it contests but submits the following rebuttal:

✓ There is no evidence that all residents in the Southside Area will have two sets of overhead electric distribution lines in their front and back yard if this application is denied.

✓ There is no evidence that utility poles in the Area, or those that might be constructed in the future if this application is denied, are a hazard to the driving public.

✓ There is no evidence that overhead lines present now, or those which may be extended in the future if this application is denied, pose an unreasonable risk of serious injury or death to the public or the workmen who must maintain those lines.

✓ There will be113 Intercounty customers who will not pay a PILOT to RMU whether the application is granted or not. Granting the application will not change that.

C. Rate Differences

At several places in its initial brief, RMU trumpets that the residents in the Area will receive a reduction in their rates for service of 25%. On page 17, RMU emphasizes in bold print, that the customers in the Area will see "an immediate reduction in their electric rates of twenty five percent." As expected, RMU has cited the testimony of its witnesses that rates for service will remain stable into the future. RMU also points out that no party offered evidence to support contrary allegations and labels any assertions that rates will rise unsubstantiated. (RMU Initial Brief at 17). Intercounty has two responses.

First, the Commission should remember the testimony of Staff witness, James Ketter, who included a comparison of the rates of Intercounty and RMU. Based upon his comparison, he concluded that a rate differential due to a change of supplier was not an issue in this case. (Ex. 13, Ketter Rebuttal, page 15). Nothing in the evidence gives reason to change his conclusion. Nothing in the existing rates charged by the utilities concerns the public interest consideration. As to RMU's arguments that there is a difference between RMU's rates and Intercounty's, rates are but one factor in determining whether the public interest would be served by the transfer requested in this case. Mr. Watkins testified that "if you can buy the same octane gasoline for $1.50 per gallon at one station, and $1.40 at a station across the street, why wouldn't you buy it at the more reasonable price?" (Ex. 5, Watkins Direct, page 18-19) On cross-examination he agreed though that price alone does not govern a consumer's choices of suppliers, and that the quality of service of a provider could be a factor. (Tr. 250-251). The Commission should consider no less. The Commission should give great weight to the testimony of those who appeared at the local public hearing. Not one witness was willing to set aside their negative opinion about RMU in exchange for purported lower rates.

Second, there should be no wonder that the record is short on evidence contradicting RMU's

assertions that its rates will remain stable in the future and not be influenced by this transaction. As Intercounty has argued repeatedly, the documents from which such evidence could be discovered were not disclosed to Intercounty voluntarily or by compulsion of Commission order. As a result, RMU is in an enviable position. RMU can claim that its rates will not rise in the future without any challenge, and then argue that its opponents could muster no evidence to the contrary, thus having unsubstantiated claims. At a minimum, the discovery rules were designed to prevent such a result.

D. Intercounty's other 113 Customers in the City Limits

Starting at page 7, RMU commits about four and half pages of its initial brief to the 113 customers whom Intercounty serves within the City of Rolla but who are not located in the Area. This comes at some surprise since Rolla's witnesses testified that the 113 customers have nothing to do with the case. (Ex. 7, Watkins Surrebuttal, pages 36-37). These customers were originally outside the city limits and obtained Intercounty service. As annexations were made, they were absorbed into the city. Although before 1991, some of these customers were at liberty to change their electrical supplier to RMU; Union Electric Co. v. Jackson, 791 SW2d 890 (Mo.App. S.D. 1990); they did not. RMU contends on page 9 of its brief that the evidence is insufficient to conclude why the 113 customers did not change suppliers, or even if they had the opportunity. Even if this is so, the existence of the 113 customers within the city limits and their continued reliance on Intercounty does show that despite its claims of lower rates and reliability of service, RMU has not been able to convince those customers to change suppliers by any means.

On page 11, RMU points out that it does not receive a franchise fee from those 113 customers, and that Intercounty is not making a payment in lieu of taxes with respect to its continued service to those customers. RMU then makes the claim that "this creates an *inequitable* situation

where those customers receive certain city benefits (i.e., police station, recycling center, street lighting ) without having to pay for them." [italics original] The same claim is restated on page 13 of RMU's brief. This argument is unsupportable.

In making this statement, RMU asks the parties and the Commission to assume that the franchise fee or gross receipt tax substitute which RMU pays annually to the City of Rolla covers almost all of the costs and expenses associated with the "police station, recycling center, and street lighting" and that a PILOT paid by Intercounty for the 113 stranded customers would make up the difference. There is no evidence of that in the record. What is shown of record is that the gross receipts tax substitute, and other payments paid by RMU to the city,[4] are used as a "reimbursement for administrative costs including economic development." (Ex. 1, Marmouget Surrebuttal, page 2). There is no evidence of what RMU's most recent gross receipts tax equivalent was, but in 1997 that amount was $560,000. (Ex. 12, Priest Rebuttal, Exhibit/Schedule A, page 16). Intercounty submits that the sum of $560,000 would hardly be enough to handle the budget of the Rolla police department, not considering the recycling center or street lighting.

Furthermore, the city of Rolla assesses a sales tax , the amounts of which are shown in Mr. Priest's testimony. Certainly, the city of Rolla's general sales tax covers much of the operating budget of the city, and if it does not, that is not the fault of the 113 customers. There is no evidence in the record to suggest that Intercounty's 113 customers in the city are exempt from paying city

[4] Up to 1997 at least, RMU has made payments to the city of Rolla in excess of the gross receipts tax equivalent, the purposes for which included a recycling center, a police station and a private factory. The Auditor of the State of Missouri strongly questioned the legitimacy of those payments. These appear to be one time payments and do not address ongoing operations of the police station, recycling center, and any operations of the factory RMU or the city of Rolla may be supporting in the rates. The Auditor recommended that RMU limit its expenditures to only those which are necessary to properly operate the city's utility operations. (Ex. 12, Priest Rebuttal, Exhibit A, pages 17-18).

sales taxes, or any other property taxes assessed by the county which may be distributed to the city for special purposes such as the library or the park. There is no evidence that the 113 customers are not paying their way for city benefits.

E. Impact on Intercounty

On page 14, RMU asserts that there will be no impact on Intercounty as a result of its loss of 286 customers. It reasons that the transfer of 286 customers out of Intercounty's system wide total of 28,700 customers is a loss of only one percent (1%). RMU states that Intercounty's recent historical growth pattern demonstrates that Intercounty will regain 286 customers in just a few months. The Commission should not ignore that these 286 customers are a key 1% of Intercounty's customer base. They are in an area of high density which for Intercounty is atypical. The bulk of Intercounty's customers are located in undeveloped areas. As Brian Nelson, manager of engineering for Intercounty, testified, the current load density of the Area is about 20 services per mile while Intercounty's typical load density is in the range of 5 services per mile. If transferred to RMU, the 286 customers would be lost forever. Loss of those customers would lower the overall load density of Intercounty and raise overall operating and maintenance costs to the remaining Intercounty members. Mr. Nelson further testified:

> Certainly over time Intercounty would grow to replace the members lost within the Area if service were transferred to RMU. However, it is likely that the bulk of this growth would be replaced at a load density more in line with Intercounty's typical load density. This means that Intercounty's construction and maintenance costs would be escalated by a factor of 3 to 4 times its current costs to serve the same number of members.

(Ex. 10, Nelson Rebuttal, page 9-10). Plainly, the loss of these 286 customers would have an adverse impact on Intercounty well into the future that cannot be dismissed.

F. Citizens Survey

On page 18, RMU highlights the results of a citizen's attitude study in which 93% of those surveyed approved of the City's electric department. The Commission should reject those results since they are of questionable validity now. The survey RMU relies upon was done in 1994, which was two years after Mr. Watkins became General Manager. No similar survey has been done since (Tr.264), and the Commission should not expect customer or citizen opinion to remain static for seven years.

The new citizens of Rolla in the Area have a quite different idea about the city and its electric department. On July 27 and 28, 1998, shortly after Intercounty received RMU's notice of intention to seek exclusive territory, Intercounty employees conducted a door to door survey of the residents in the area and asked "do you prefer to continue to receive electrical and other services from Intercounty Electric Cooperative Association." (Ex. 11, Strickland Rebuttal, Exhibit VWS-11) Responses to the question were obtained from 147 of the property owners in the area and 194 of the Intercounty customers in the area. Over 93.2% of the property owners, and 93.8% of the Intercounty members were in favor of keeping Intercounty service.

G. Franchise Fees and PILOT.

On page 21, RMU begins its section regarding the Franchise/Occupation tax or PILOT with the statement that

> It is apparent that [Intercounty's] position on the payment of a franchise fee or tax led to the City saying in one of the versions of the Plan of Intent that [Intercounty] would continue to serve the 286 customers.

RMU goes on to argue that it was Intercounty's change in that position which led to the filing of this

case. RMU's brief has misunderstood its own evidence.

According to Mr. Watkins, it was *his* understanding that Intercounty would agree to a franchise tax or fee after annexation, but Mr. Watkins' understanding was based upon a draft territorial agreement proposed for consideration by Mr. Strickland (not a franchise tax agreement or PILOT agreement), in which a paragraph on the payment of a franchise tax was included. (Tr. 238-239). There was no stand alone agreement or representation that Intercounty would agree to a franchise tax without a territorial agreement with RMU in place. Intercounty's position has never wavered. If Mr. Cartwright, who is the manager of member services, not the General Manager, told Mr. Watkins that Intercounty would not agree to a franchise tax, he simply confirmed what Intercounty's position had been from the beginning, when Mr. Strickland sent the proposed agreement to Mr. Watkins in 1994. Obvious from the record is that Mr. Watkins, and the city administration with whom he consulted, changed their understanding of what Intercounty's position really was. Intercounty had nothing to do with it.

On page 25 of its initial brief, RMU adds that the draft territorial agreement "corroborated and bolstered" the city's understanding that Intercounty would agree to a franchise tax or fee after annexation. The draft territorial agreement was originally held up as the basis for the city's understanding. It cannot be the basis of the understanding and its corroboration at the same time. Furthermore, if Mr. Watkins was interested in corroboration or verification of his understanding about Intercounty's intentions following annexation, there were more reliable ways to acquire it than to depend on a draft agreement, which, by the time the Plan of Intent was being drafted, was more

than two years old.[5] What the territorial agreement does corroborate is that the agreement to pay a franchise fee or tax was part and parcel of a comprehensive agreement, and was not offered independently of the other terms. What is still worrisome is that the city's understanding was never publicly disclosed except during this proceeding.

Between pages 22 and 24, RMU supplies a long discussion of the ability of third class cities, like Rolla, to tax occupations and businesses. The analysis concludes with the opinion that Rolla is powerless to tax rural electric cooperatives under any tax statute. Intercounty does not share Rolla's opinion about its limitations, and submits that the city has authority to enter an agreement with Intercounty, which is a non-profit light and power and company, in which the city could assess a franchise tax or fee. Mr. Strickland testified that Intercounty has an agreement with the city of Mountain Grove in which the cooperative has agreed to pay a franchise fee. That agreement was recently renegotiated. (Ex. 11, Strickland Rebuttal, page 17) Intercounty was willing to negotiate toward a franchise fee arrangement with Rolla during the negotiations which followed the city's exercise of its options under §386.800. As for the PILOT, Mr. Strickland explained:

> [I]t is not Intercounty's responsibility to set assessments or taxes - it is the responsibility of the taxing entity. Intercounty would pass through any such charge to the rate payer covered by the tax.
>
> A PILOT arrangement would mean that Intercounty would either have to absorb the cost into the overall cost of operations, thereby requiring all 28,000 members to offset a cost imposed by Rolla, or Intercounty could pass through the cost to the members impacted and be liable if the arrangement was questioned. During the negotiations after annexation Rolla was unwilling to discuss indemnifying Intercounty.

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[5]Mr. Strickland sent the proposed territorial agreement to Elwyn E. Wax, then Mayor of Rolla, on November 4, 1994. (Ex. 11, Strickland Rebuttal, Exhibit VWS-10) The City Council approved an ordinance declaring intent to annex the area on October 7,1996. (RMU Application, Appendix A, p.1) The Plan of Intent was drafted sometime thereafter.

There was no franchise fee or PILOT arrangement in the Plan of Intent by which the members based their decision when they voted on annexation. Intercounty is unwilling to back-door a tax for Rolla. If Rolla were to pass an ordinance requiring the payment of a franchise fee by all providers of electrical services, including RMU, within the city - Intercounty would not have a problem collecting the fee and passing it through.

On page 26, RMU complains that Intercounty's position on a PILOT placed it in a "trick box." In reply, Intercounty submits that RMU is not blameless for the box about which it complains. In an agreement with Intercounty, RMU could have agreed to impose a franchise fee or tax. Since it clung to its legal opinion that it lacked such authority, and would not agree to hold Intercounty harmless if a PILOT were held invalid, negotiations broke down irretrievably it appears.

Also on page 26, RMU indents part of Mr. Strickland's answers to Commissioner Schemenauer's questions at hearing. RMU asserts that his testimony at page 499 of the transcript is corroborative of Mr. Watkins' testimony about the "message he received between April and June 1998 from Mr. Cartwright." Intercounty disagrees. Mr. Strickland testified:

> The discussion -- part of the confusion is, in the course of the discussion on the clearing up the Plan of Intent problem that Intercounty had with Rolla, it was suggested by the City that a franchise fee was possible or that a PILOT might be possible.
>
> At that meeting they were told there was no way we could discuss a PILOT. They were told no way twice that we would discuss it, and we did not discuss a PILOT.

(Tr. 499). This testimony does nothing to confirm or establish that Mr. Cartwright advised Mr. Watkins regarding Intercounty's position on a PILOT sometime between the annexation election in April and the annexation's effective date in June. It does confirm that it was after the annexation

when the parties raised the issue of a PILOT.[6] That corroborates Mr. Strickland's testimony that previous to the annexation election, there had never been any resolution between the parties about a franchise tax or payment in lieu of tax.[7] (Tr. 488).

H. The Plan of Intent.

On page 27-30 of its brief, RMU addresses the city of Rolla's Plan of Intent regarding the Southside Annexation. Through a series of citations RMU weaves the argument that the representation made in the Plan of Intent regarding the continuing electric supplier is "surplusage," and if RMU's or the city's stated intention regarding the continuing electric supplier is not followed, no material deviation of the Plan of Intent will occur. The Commission must reject these arguments.

In essence, RMU argues that this part of the Plan of Intent, perhaps other parts, had no efficacy and could have been omitted. Therefore, it was not obliged to follow it. What is telling is that the representation was not omitted. The Plan of Intent was prepared with the assistance of professional consultants. At the time the Plan was prepared, the city determined that the statement about who would continue to serve the electric needs in the Area was not surplus, but significant enough to include. Likewise, an argument now that deviating from the plan on this particular subject is not a material deviation, utterly disregards that the statement of intention was material enough to insert when the Plan was released to the public. No matter what the niceties of the law regarding the preparation and filing of plans of intent, the Commission should not allow RMU to excuse itself so easily from compliance with its own. If the Commission were to do so in this case, then it will

[6]Although this may already be clear, Intercounty adds that the meeting referred to in Mr. Strickland's testimony at page 499 of the transcript was one of the meetings between the parties following Rolla's issuance of its notice to seek exclusive territory. It was not a meeting that preceded the annexation.

[7]The statute defining "PILOT" was not enacted until July, 1998.

effectively render meaningless future plans of intent which precede applications like the present one.

RMU also argues that the Commission cannot estop the city from deviating from the Plan. Regarding the existence of the elements of equitable estoppel, Intercounty reminds the Commission of the issue it has been asked to resolve, which is: Should the City's Plan of Intent be considered with respect to the interest of the public in this case. Assuming *arguendo* that an equitable estoppel is not supported by the record, the issue of the effect on the public remains. Much was written in Intercounty's Initial Brief about the public, and how it has perceived the Plan of Intent. That will not be repeated here. Based upon what is in the foregoing, and in Intercounty's Initial Brief, Intercounty contends that the relief the Commission enters in this case must take into account that even though the city and RMU may have made an innocent mistake in telling the public that Intercounty service would continue in the Area, the residents of that Area suspect duplicity on the part of their new government. Intercounty asserts that the only relief which could be entered after such a consideration is a denial of RMU's application. The public interest would be best served by that result.

I. Commission's Authority to Assign Exclusive Territory between the Suppliers.

On pages 31-36 RMU argues that the Commission lacks the statutory authority to award an exclusive territory to Intercounty in this case. In support of its arguments it cites cases in which statutes have been construed and in which rules of statutory construction were relied upon. In a footnote it also claims that the procedural rules of the Commission which prescribe the method of filing applications supports it view.[8] RMU assumes that the rules of statutory construction are

[8]In footnote 12 of its brief, RMU argues that under the Commission rules, cases on applications for certificates of public convenience and necessity do not result in some other party besides the applicant acquiring a certificate. The Commission's rule on the filing of applications is procedural only, and cannot amend the substantive provisions of

necessary to interpret the meaning of §386.800. The process of judicial interpretation of statutes was described in Preston v. State, 2000 WL 1526244 (Mo.App. W.D. 2000)[9]:

> The issue presented in this point necessarily requires us to interpret the statutes implicated. In interpreting statutes, our purpose is to ascertain the intent of the legislature. *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997). In doing so, we look to the language used, giving it its plain and ordinary meaning. *Id.* When a word used in a statute is not defined therein, it is appropriate to derive its plain and ordinary meaning from a dictionary. *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999). The courts are without authority to read into a statute a legislative intent which is contrary to the intent made evident by giving the language employed in the statute its plain and ordinary meaning. *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). **When the legislative intent cannot be ascertained from the language of the statute, by giving it its plain and ordinary meaning, the statute is considered ambiguous and only then can the rules of statutory construction be applied.** *Bosworth v. Sewell*, 918 S.W.2d 773, 777 (Mo. banc 1996). [emphasis supplied].

It is Intercounty's position that the language of §386.800 is plain enough, and the intention of the statute can be distilled without resort to any rule of construction. The statute allows municipalities to apply to this Commission for an order "assigning exclusive territories within the annexed area." §386.800.6. That cannot be any more plain. The statute envisions that more than one service provider can have an exclusive territory in the annexed area. Moreover, the form of action set forth in §386.800.6 is *sui generis* and is governed by its own procedures.[10] This is a unique form of action and it is unique unto itself. The provisions of statutes governing relationships between competing electric suppliers generally, and the cases which interpret those statutes, cannot

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§386.800, which must be paramount in this analysis. The statute must govern the allowable relief, otherwise any amendment to the Commission's procedural rules in turn changes the meaning of the statute.

[9]This case has not yet been reported.

[10]Intercounty has previously argued that the procedures of §386.800.5 -.6 shares attributes with condemnation. Condemnation proceedings are *sui generis*. Conduit Industrial Redevelopment Corp. v. Luebke, 397 S.W.2d 671 (Mo.1965).

supply a retreat for RMU.

Section 386.800.6 grants the Commission the right to assign exclusive territories between the electric suppliers within the annexed area. Staff, Office of Public Counsel and Southside Neighbors agree with this conclusion.

J. Present-Day Reproduction Cost New (PDRCN)

On page 40 of its brief, and several pages thereafter, RMU discusses the valuation technique employed by §386.800 which is present day reproduction cost, new-- essentially, what it would cost to build the facilities subject to transfer today. Like RMU, Intercounty understands that "market value" is not part of the statutory formula. Like RMU, Intercounty understands that valuing all of Intercounty's facilities in the Area at today's reproduction cost would include the improvements and replacements to that system over time. Intercounty has not disputed this method of evaluation of its property within this case contrary to what RMU indicates in its brief at page 42. What Intercounty opposes is a depreciation method which ignores the age of its improvements and replacements to the facilities in the Area (Tr. 55), and RMU has proposed such a method. More will be discussed later on the issue of depreciation.

Regarding the PDRCN of Intercounty's facilities, RMU offered the testimony of Rodney Bourne. Mr. Bourne has been a professional engineer since 1994 (Tr. 150). He has been the staff engineer for RMU since 1998. (Ex. 3, Bourne Direct, page 1) During the two or more years he has held that position, the extent of his estimating experience has been limited. He sometimes prepares estimates for RMU projects but there are times when he does not. (Tr. 151) He does not have consistent experience in estimating the cost of electrical utility projects in Rolla or elsewhere. Dan Watkins is the general manager of RMU but he does not hold a professional license and does not

consider himself an engineer. (Tr. 244) Mr. Watkins knew of recent RMU line extensions known as the South Rolla and Highway 72 extensions, and even though those lines may already be listed on RMU's property inventory, he was unable to state the cost of constructing those lines. (Tr. 325-326)

Given their lack of qualifications, neither Mr. Bourne nor Mr. Watkins can refute the estimate of the present day reproduction cost, new of Intercounty's facilities rendered by Mr. Ledbetter. Neither can credibly criticize Mr. Ledbetter's choice of comparable pricing from a project in the vicinity of the Lake of the Ozarks. No expert has been qualified to render the opinion that prices in the Lake area are different from those in Rolla. Only one consulting engineer testified in the case. He has over 30 years of experience. That engineer was Mr. Ledbetter.

On page 44, RMU asks the Commission to be suspicious of Mr. Ledbetter's estimate of PDRCN since it includes a $304,000 adjustment that was derived from sources other than Intercounty. Apparently, RMU believes that the value Intercounty placed on its facilities was also the cost of its reproduction. That is not the case. The costs of facilities provided by Intercounty to RMU were based on the RMU's Data Request nos. 3 through 14. Those data requests were for the material and labor cost directly associated with Intercounty's system inventory of the annexed area. The Data Requests did not ask for Intercounty's cost to reproduce these facilities. (Ex. 10, Nelson Rebuttal, page 12-13) Mr. Ledbetter was retained to confirm not only the value of the facilities involved in this case, but also to estimate the cost of reproducing them Mr. Ledbetter thoroughly explained the basis for his estimate of reproduction costs in his testimony:

A. My calculation of the costs is higher. The estimates differ for three reasons:

- I arrived at a slightly different inventory from Intercounty's staking sheets. Intercounty Electric omitted a few items from the final tabulation that are on the staking sheets.

- Intercounty Electric's unit costs are derived from data for their average costs and includes data for mostly rural lines and understates the costs to build a project in a more congested area. I have access to a much larger data base and have selected unit costs from areas more representative of this area.

- I have added reasonable cost of engineering, right-of-way acquisition and clearing that would be necessary and are traditionally capitalized as part of the facilities.

(Ex. 9, Ledbetter Rebuttal, pages 3-4). His PDRCN figure of $1,046,115.06, which does not include the cost for Intercounty's district office, is well supported by the evidence and is certainly beyond suspicion.

K. Intercounty's District Office Building.

On page 45 of its brief, RMU states that Intercounty's district office building on Bishop Avenue should not be included in the facilities transferred and argues that the statute does not require transfer. Since the building is not a "facility" that can be "detached," RMU reasons that it cannot qualify as a facility under the statute. RMU's argument has no merit. Intercounty is not so much concerned about whether the building is transferred, just so long as it is evaluated in the calculation of fair and reasonable compensation to be paid. RMU has overlooked part of the statute. The statute provides that the PDRCN "of the ***properties*** and facilities serving the annexed areas," is the top line of the formula. §386.800.5(1). No party has contested the fact that Intercounty's district office is a ***property*** within and serving the annexed area. It qualifies for evaluation under and inclusion in the "fair and reasonable compensation" formula on that basis.

L. Depreciation Approach

On page 47, RMU commences a lengthy discussion of the depreciation approach it advocates as the deduction to PDRCN. Intercounty has serious opposition to this approach and its Initial Brief contains the basis for that opposition. In this reply, Intercounty devotes attention to two assertions made by RMU's on this topic. First, on page 50, RMU states that Intercounty's approach does not use straight line depreciation. Intercounty submits that the system wide depreciation rate necessarily finds its genesis in Intercounty's use of straight line depreciation in the valuation of its assets.[11] Intercounty uses a 2.8% depreciation rate for its distribution assets. (Tr. 131). It also keeps its records in accord with the regulations of Rural Utilities Services (RUS) and National Rural Utilities Cooperative Finance Corporation (CFC). Intercounty's records and accounting are typical of almost all of the Rural Electric Cooperatives, (Ex. 9, Ledbetter Rebuttal, page 5) and are therefore maintained in accord with an industry standard. In computing the age of the facilities in this proceeding, the application of Intercounty's system wide deprecation rate rises above all the depreciation methods sponsored by the other parties.

On page 51, RMU states that Mr. Ledbetter has grossly inflated the depreciation percentage by considering property which is not subject to transfer in this case, and has a much shorter useful life than the relevant property. As to the consideration of property that has a much shorter useful life, that should be to RMU's benefit in the depreciation method Mr. Ledbetter has used. Shorter useful life means higher rate of depreciation, which in turn means a higher rate of overall depreciation on a system wide basis. As to the other concern, that the depreciation percentage takes into account property which is not subject to transfer, that is unavoidable under the regulations which

[11]Andrew Marmouget showed an illustration of how a straight line depreciation rate combines with Mr. Ledbetter's numbers to arrive at an average age of the facilities. (Ex. 1, Marmouget Surrebuttal, page 5)

Intercounty follows. However, it would be wrong to label Mr. Ledbetter's depreciation percentage a grossly inflated figure. Intercounty's distribution assets represent more than 90% of its total assets. (See RUS Form 7 attached to Ex. 9, Ledbetter Rebuttal) Inclusion of the remaining 10% of Intercounty's property into a calculation of a system wide depreciation rate has negligible effect on the overall percentage.

Of all the parties in this case, Intercounty is the only one that possesses commanding knowledge about its system, the distribution assets which energize it, and the times and costs of useful life extending replacements and additions. It is the only party that has proposed a method of aging its facilities that corresponds with an industry standard. The method utilized by Intercounty is not a contrived means of calculating a depreciation rate but rather the normal means by which it is required to by the Cooperative's mortgage holders. The calculation of the percentage is just the next step in the use of straight line depreciation, and is the best and most accurate approach submitted in this case.

M. 400% of Gross Revenues

Intercounty will restrict its reply to that portion of RMU's brief which requests that 27% of the gross revenue figure[12] should be deducted to account for discounts and patronage before multiplying by 4. Through a series of weak assumptions, and on the basis of a questionably

[12]It apparently required more effort than what RMU wanted to expend in determining Intercounty's gross revenues for the twelve month period. At the bottom of page 56, RMU claims it was confused by Intercounty's organization of materials it supplied in responses to RMU's data requests, and it thought there were numerous errors in Intercounty's responses. Of course, Intercounty could have simply advised RMU to visit Intercounty's offices to review the revenue records under supervision. It did not do so, but instead sent the records to RMU, which is regarded as a convenience by most parties. By Commission rule, responses to data requests need not be in any particular format. 4 CSR 240-2.090 (2) Intercounty was under no duty to organize the data request responses in any particular way and was not required to provide an interpreter or guide to assist RMU in comprehending the meaning of the records that were delivered. If RMU can be confused by simple customer records, its confusion about how to apply and interpret §386.800 is readily explainable.

admissible source document, Mr. Watkins opined that 27% of Intercounty's rates were composed of discounts and patronage. Hence, RMU's contention that Intercounty's gross revenues based on those rates are overstated. First, the 27% figure used as the deduction is unsupported by the evidence. Last, and conclusively, the statute makes no provision for deductions from the gross revenue figure. The statute is clear. This element of "fair and reasonable compensation" is four hundred percent of **gross revenues** less gross receipts taxes **received** by the affected electric supplier during the applicable twelve month period. §386.800.5(3). Mr. Ledbetter testified that for the twelve month period, Intercounty received $387,073.74 in gross revenue. (Ex. 9, Ledbetter Rebuttal, JEL-1). Like the Staff, Intercounty submits that the Commission should reject RMU's claim for a discount and patronage deduction from the gross revenue figure.

N. Easements

On page 63, RMU offers citations to legal encyclopedia and several cases which lay out the reasons for recording easements. Based upon these references RMU concludes that failure to record an easement is a bad business practice. The Commission will observe that none of the citations make the conclusion that failure to follow the recording rules is a bad business practice.

On page 64, RMU complains that Intercounty has done nothing to correct the problems RMU foresees. This presupposes that Intercounty has the duty to change it policies during the course of this action, or that Intercounty has policies which must change. RMU has the burden of proof in this matter. There is no evidence that the interests in land utilized by Intercounty for delivery of electricity are anything but cost efficient and reliable. As such they are valuable assets to Intercounty. (Ex. 10, Nelson Rebuttal, p.19-20)

O. Use of the Summary by Mr. Bourne.

On page 74-75, RMU supplies suggestions in opposition to Intercounty's objection at trial to Mr. Bourne's unsubstantiated summary of records at the Phelps County Assessor's offices. Intercounty reasserts its objection and the Commission should sustain it.

The general rule on the admissibility of summaries is set out in Sigrist By and Through Sigrist v. Clarke, 935 S.W.2d 350, 356 (Mo. App. S.D) as follows:

> Generally, a summary of records is admissible where the records upon which the summary is based are voluminous, are admissible and are available to the opposing party for inspection. *Ahrens & McCarron, Inc. v. Mullenix Corp.*, 793 S.W.2d 534, 539-40 (Mo.App.1990).

Stated in another way,

> [w]hen the competency of the underlying records has been established and they are made available to the opposite party for cross-examination, the summary prepared by an expert of voluminous records is admissible. *State v. Cone*, 338 S.W.2d 22, 26 (Mo.1960).

Chicago & Northwestern Transp. Co. v. Barclay-Moore Co., 688 S.W.2d 805, 808 (Mo.App. W.D. 1985). The voluminous records that are summarized must be available to opposing counsel for their examination and use in cross-examination of witnesses **during the trial**. Id. at 807.

Under these cited authorities, RMU was under a duty to have the records which were summarized by Mr. Bourne available at hearing. Under the rule, the person against whom the summary is offered has no obligation to seek inspection of those records before hand. The fact that a party does not seek pretrial discovery of the records it suspects may be used in a summary, does not relieve the proponent of the summary from making the voluminous records available. The rule does not admit the summary upon the default of the opposing party to request the voluminous records by pretrial production or production pursuant to subpoena. The proponent of the summary

is responsible for laying the proper foundation of the records and for their availability in court.

RMU has also cited §536.070(11) in support of its use of Mr. Bourne's summary. The records Mr. Bourne sought to summarize were records pertaining to the ownership and value of 197 separate parcels of real property on file at the county assessor's office. (Ex. 4, Bourne Surrebuttal, page 23). These were not records of business activity at RMU or records related to engineering. They were records which were kept and maintained pursuant to the duties of the elected assessor. Mr. Bourne openly admitted that he needed the help of the assessor in gathering this information. (Ex. 4, Bourne Surrebuttal, page 23). He was not independently qualified to do the task himself.

A summary offered pursuant to §536.070(11) will be admissible if it appears from the evidence that the "witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it." A basic qualification for a witness sponsoring the records of the county assessor would be experience in or election to the office. Another basic qualification for that witness would be knowledge of the manner in which each of the property records was kept and maintained.

RMU states Intercounty did not suggest Mr. Bourne was unqualified to make the summary. Again, it is not Intercounty which is offering the evidence. If RMU is relying on §536.070(11) in offering the summary, RMU needed to qualify Mr. Bourne before the summary was admissible. RMU qualified Mr. Bourne as an expert in the field of engineering. He was not qualified in the art of other trades or elected offices. Intercounty's objection to the use of the summary should be sustained.

P. 4 CSR 240-4.020(4)

RMU maintains that Intercounty violated 4 CSR 240-4.020(4) which provides:

> It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commisison, its staff or the presiding officer assigned to the proceeding.

The violation, RMU contends, was in an advertisement Intercounty placed in a local newspaper. The specific language of the ad, which RMU dislikes, was:

> Intercounty will continue to work with our members in resolving this issue and encourages members in the area to contact the Missouri Public Service Commission or the Office of the Public Counsel and express their concerns. As a member-owned, member-operated cooperative, this is truly grassroots membership in action. You may contact the Missouri Public Service Commission and the Office of the Public Counsel at the phone numbers and addresses below.

(Ex. 26). RMU has asked that the Commission to consider Intercounty's actions as it deliberates on this case. Intercounty submits that no violation of this rule has occurred.

First, there is no evidence that Intercounty contacted a Commissioner. There is no evidence that any Commissioner was contacted by an Intercounty member as a result of this ad. Second, the ad did not suggest to Intercounty members that they try to pressure the Commission into a specific decision, or threaten the Commission into an action favorable to Intercounty. Intercounty invited its membership to "express their concerns." Third, the members were advised to contact the Commission, and not any specific Commissioner, staff member or the regulatory law judge. Last, the Office of Public Counsel introduced into evidence Exhibits 16, 17 and 18, which were letters sent to the Office of Public Counsel and the Staff of the Commission, without objection from RMU. These letters purportedly were mailed as a result of the ad and were made part of the hearing process.

Mr. Strickland testified that the ad was placed in response to an outpouring of questions by members regarding this case. Members were steadily inquiring of its progress. The ad was placed to make sure Intercounty members were informed about what had happened at the public hearing

in October and to have a point of contact where they could call and ask questions. (Tr.511) It was not placed in an attempt to unfairly influence the Commission. (Tr. 511-512) It was not intended as a means of swaying the Commission's judgment one way or the other.

Finally, Intercounty submits that the rule does not prohibit the kind of contact which was suggested in the ad. The Commission maintains an information office and consumer services section which is equipped to handle calls and correspondence from the public who have questions about pending cases. Those offices can address contacts of this nature, which contacts appear to be anticipated by the Commission, and dispose of them without any hint of pressure or heavy bearing on the Commissioners themselves. That is apparently what ensued here. A violation of this rule should require more than a party's suggestion to its customers that they express any concerns to the Commission and Public Counsel.

## II REPLY TO STAFF

### A. Public Interest

Staff has taken the position that the acquisition by RMU of the entire annexed area and Intercounty's facilities therein is in the public interest. For brevity's sake, Intercounty responds by stating that it vigorously opposes this view for reasons that were explained in its Initial Brief and in its foregoing reply to RMU's brief. The evidence is sufficient for the Commission to conclude that RMU has failed in its burden to show that the assignment of the exclusive territory and transfer of facilities it has applied for are in the public interest. Several other points should be made.

On page 7 of Staff's brief, Staff observes that as a result of the annexation, Intercounty is now frozen to the structures it serves and that denial of RMU's application would cause an unnecessary duplication of facilities. What the Commission should understand is that the party which will engage

in the unnecessary duplication of facilities will be RMU. Intercounty already has in place facilities with sufficient capacity to handle existing demand and the anticipated demand in the future.

Also on page 7, Staff contends that absent the requested transfer, Intercounty would, in effect, be left to provide service to an area with reduced efficiency, as the Cooperative finds itself unable to fully utilize the facilities stranded within the city limits. Staff has forgotten, or decided to disregard, that if RMU's application is granted, Intercounty will be faced with stranded capacity in its nearby substations which have been sized and installed in anticipation of the expected future demand in the Area. Inefficient use of those assets, as well as the loss of the 286 customers in this area of high load density, are significant impacts to Intercounty if RMU's application is granted.

In sum, the Commission should not adopt Staff's position.

B. Present-Day Reproduction Cost, New and Depreciation

Staff has in error used a PDRCN of the facilities that is lower than that testified to by Mr. Ledbetter. As previously argued in this brief, Mr. Ledbetter's credentials and his opinions were not impeached. Of the witnesses who testified on this issue, Mr. Ledbetter was the only one undeniably qualified to render an opinion on the estimate of reproduction cost.

Regarding depreciation, Intercounty looks favorably upon Staff's approach in that, although in an incorrect percentage, it makes the effort to assign an average age to Intercounty's facilities for purposes of computing and deducting depreciation. Intercounty believes it deserves repeating that Intercounty's proposed system wide depreciation rate emerges from a record keeping and accounting system that is mandated by duly promulgated regulations of Intercounty's lenders, one an agency of the federal government (RUS) and the other a nationally recognized and approved lending agency (CFC). The system employed is typical of most rural electric cooperatives. The average age and

physical state of Intercounty's facilities is best represented by use of the system wide depreciation rate. Even though Staff's theory of how depreciation should be calculated is in harmony with Intercounty's, its average age for the facilities involved is not, and therefore should not be accepted by the Commission.

C. Detachment of Facilities and Reintegration of Intercounty's Electric System.

Staff has proposed that these costs be determined based on a competitive bidding process among outside contractors. At the outset, Intercounty reasserts that it is entitled to the estimate of those reintegration costs testified to by Mr. Ledbetter. However, if the Commission were to accept Staff's proposal, Intercounty suggests that it will not work productively unless the Commission declares the procedures on qualifications of eligible bidders, and how requests for bids will be taken, evaluated and awarded all of which must meet the RUS guidelines and approval. Intercounty envisions that the Commission will need to retain supervision over the process of awarding the bid and other issues.

## III. COMMISSION ISSUES

In its Initial Brief, Intercounty deferred to this reply brief its discussion of the following issues which the Commission requested the parties to brief.

**A. If the Commission assigns exclusive territory to RMU and orders payment of compensation to Intercounty, may the city of Rolla, at its option, decide not to close the transaction.**

Section 386.800.6 provides in part that the review of the Commission's decision in this case will be governed by §§ 386.500 to 386.550. Section 386.500 describes the process by which a party may seek a rehearing before the Commission regarding its report and order. Section 386.500.3

provides:

> An application for a rehearing shall not excuse any corporation or person or public utility from complying with or obeying any order or decision or any requirement of an order or decision of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct.

Judged by the text of this provision, the Commission order rendered in this matter shall be immediately enforceable in accordance with its terms. Even if an application for rehearing is filed, the order is effective between the parties and they are required to follow it. Section 386.520.1 discusses the effect of a writ of review upon the enforceability of the Commission's report and order:

> The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ, the circuit court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order or decision.

§386.520.1. If an application for rehearing is denied by the Commission, the order is still valid and enforceable between the parties unless it is stayed or suspended pursuant to the procedures of this section.

Intercounty contends that by submitting itself to the jurisdiction of the Commission and asking for relief under §386.800, the City of Rolla, acting through RMU, is governed by the above provisions. Consequently, it does not have the option of ignoring the report and order of the Commission if it finds it objectionable in any way. The order will be immediately enforceable in accordance with its terms, and obedience will be required unless it is stayed pursuant to §386.520.

**B. The Last Sentence of §386.800.6**

The last sentence of §386.800.6 states that:

> [t]he 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 Commission concludes that an exclusive territory should be assigned and facilities transferred, the Commission may set its own timeline for the closing of the transaction. If it does not set any other time for the transfer of title and payment of compensation, then by operation of this section, those events shall occur within 90 days of the report and order and any appeal therefrom becomes final. Intercounty submits that if the Commission is inclined to grant RMU's application, in part or in whole, that the order delineate a precise schedule under which assets are transferred and fair and reasonable compensation exchanged. That schedule should insist that payment of compensation due be an early milestone in the process.

**CONCLUSION**

The evidence is sufficient for the Commission to conclude that the assignment of the exclusive territory and transfers of Intercounty facilities requested by RMU are not, in total, in the public interest and therefore its application should be denied. If the Commission does so order, then it should assign the annexed areas to Intercounty as its exclusive territory, which is one of four forms of relief the Office of Public Counsel suggested in its brief. Alternatively, the Commission may consider establishing exclusive territories within the annexed area between RMU and Intercounty, another action which Public Counsel listed. Of Public Counsel's four suggestions, these two are best aligned with the public interest. If the Commission elects to establish exclusive territories between RMU and Intercounty within the Area, Intercounty asserts that the record will need supplementation. In the event the Commission is inclined to grant RMU's request for exclusive territory and the transfer of the facilities, the Commission should direct RMU to pay Intercounty the sum of

$4,517,253.40 as fair and reasonable compensation under the statute, or the alternative, including the wholesale power demand costs, a total of $4,892,353.40.

Respectfully submitted,

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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 9th day of February, 2001, to:

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