

SMITH DUNBAR TURLEY

Attorneys At Law

Street Address:

266 Marshall Drive, St. Robert, Missouri 65584

Mailing Address:

Post Office Box 494, Waynesville, Missouri 65583

Telephone: 573/336-5222

Facsimile: 573/336-2282

Tyce S. Smith
Michael R. Dunbar
Mark E. Turley*
Colin P. Long

* Rolla office

Office Administrator:

Carrie B. Williamson

Legal Assistants:

Marilyn M. Smith
Sandra K. Glass
Marilyn Mathews
Leatta Nichols *
Marcy Hardberger

February 9, 2001

Transmitted via: Hand-delivery

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Post Office Box 360
Jefferson City, Missouri 65102-0360

FILED³

FEB 09 2001

Re: Case No. EA-2000-308

Missouri Public
Service Commission

Dear Judge Roberts:

Enclosed for filing in the above referenced matter please find the original and eight copies of the
Reply Brief of Southside Neighbors.

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

Sincerely,



Michael R. Dunbar
/skg

Enclosures: As stated

cc: Gary W. Duffy via first class mail
Mark Comley via first class mail
Office of Public Counsel via first class mail
All Southside Neighbors via first class mail

FEB 09 2001

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURIMissouri 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

REPLY BRIEF OF SOUTHSIDE NEIGHBORS**Introduction**

All parties agree that this is a case at first impression for the Commission. §386.800.3. RSMo provides in part: "The Commission shall make such determinations based on findings of what best serves the public interest and shall issue its decision by report and order."

§386.800.7.(1) RSMo provides in part: "In reaching its decision under subsection 6 of this section, the Commission shall consider the following factors: (1) whether the acquisition or transfer sought by municipally owned electric utility within the annexed area from the affected electric supplier are, in total, in the public interest, including consideration of rate disparities between the competing electric suppliers and issues of unjust rate discrimination among customers of a single electric supplier if the rates to be charged in the annexed areas are lower than those charged to other system customers;..."

The Commission must first decide the following issue: **"Is the City of Rolla's request for an assignment of the exclusive territory and transfer of Intercounty Electric Cooperative Association's (Intercounty) facilities in the public interest?"** Until this issue is resolved, there is no need to determine other questions of cost, time of transfer, or when is the order final. Southside Neighbors suggest that Rolla's request for exclusive territory and transfer of Intercounty's facilities is not in the public interest.

78

I. Reply Argument

In presenting this reply brief, Southside Neighbors will attempt to address those points most directly affecting the public interest question. This brief will attempt to reply to the initial briefs by the City of Rolla, the Staff, Intercounty and the Office of Public Counsel.

§386.800 RSMo does not define “public interest.” The public is certainly the 286 Intercounty customers located within the annexed area.

Public interest can best be defined as “the general welfare of the public that warrants recognition and protection, something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.” *Black’s Law Dictionary, 7th Addition, 1999.*

Rolla’s representation to the public must be considered as an important factor. There is no dispute that Rolla continually changes its position on how it will proceed based upon what benefits Rolla. The public in this case was led to believe that Intercounty’s 286 customers would continue to be serviced by Intercounty. This representation was made at public hearings during the annexation process by the City of Rolla, and in the Plan of Intent.

There can be nothing more sacred than the representations made by a City to the public. Representations by a City to the public are made so that those individuals may rely upon their local government. There is no evidence that the Plan of Intent was conditioned upon a Payment in Lieu of Tax by Intercounty to the City of Rolla. The reason would seem obvious, Rolla did not want to have any issues with regard to electrical services at the time the voters decided the annexation issue.

Each time the Plan of Intent was revised, Rolla represented that: **“the areas within the proposed annexation that are now receiving electric services from a rural electric co-op**

would continue to do so. RMU would not be allowed to serve any of these properties. Any new development within the area would receive electric service from RMU."

The language of the Plan of Intent is clear. The representations to the public were clear. Rolla's intent was that the representations made prior to the vote on the annexation would be relied upon. The Plan of Intent and the ordinances that were passed by Rolla are the official communication upon which the voting public had a right to rely on in making decisions about whether the annexation was appropriate. The Court that heard the declaratory judgment action during the annexation process had a right to rely upon those representations. The Court of Appeals that heard the appeal on the annexation case had a right to rely upon the representations made by Rolla. The public has a right to rely on those representations.

Rolla and the Staff are now trying to state that discussions between Intercounty and Rolla concerning a Payment in Lieu of Tax are somehow intertwined with the representations made by Rolla. These discussions between Intercounty and Rolla should have no bearing on the issue of the public interest. The reason is there has been no evidence that the public was included in any of these discussions. The issue of whether a Payment in Lieu of Tax was even ever discussed between Rolla and Intercounty or whether there were any misunderstandings would not seem important to the resolution of the public interest. The public was not included in the discussions, so the discussions should not be considered except that they took place. The public was never informed by way of public hearing, Plan of Intent, letter, or any other method that there were any conditions placed upon reliance that Intercounty customers within the annexed area would continue to be serviced by Intercounty.

The public has a right to rely upon the representations of a city. Rolla should not be allowed to summarily say we now change our mind. The public interest cannot be served by

allowing a municipality to make representations to its citizens and voters during the election process and then summarily change their minds. The public interest can not be served in this matter.

II. Opinion of the Public

The only evidence of the public was that as presented at the public hearing conducted by the Commission, the prepared direct testimony of Don Priest, and the letters that were submitted into evidence by the Public Counsel. The letters that were submitted by the Public Counsel were submitted without objection from any party. The public has a right to express their views in a matter which directly affects them. These letters, which were sponsored as exhibits by the Public Counsel, were simply an expression of the public. There is no evidence that there was any attempt at ex parte communication on the part of Intercounty to inappropriately influence the Commission.

The appropriate place to have raised that objection would have been at the hearing at the time the letters, sponsored by the Public Counsel, were admitted into evidence. There was no objection to the admission of these letters, there has been no preservation of any claim that they should not now be admitted and given consideration. The testimony by those individuals appearing at the public hearing and those who submitted letters carry the same clear message: customers now being served by Intercounty should continue to be served by Intercounty.

III. Electric Rates

The evidence as submitted at the hearing conducted by the Commission is clear. That if the present rates remain in effect, Rolla and Intercounty rates are comparable. The one important difference is that Intercounty customers are given refunds on a routine basis. Electric rates by the City of Rolla also do not include the calculation concerning a potential decision by the

Commission for Rolla to have to pay Intercounty over 4 million dollars. The impact on the rates of Rolla at the present time is uncertain. The cost of taking over the 286 customers by Rolla would certainly be passed on to the citizens in some method.

IV. The Reliability of Service

There is no question that Intercounty customers want to remain Intercounty customers, in large part, due to the reliability of Intercounty. The only evidence presented with regard to outages was that the City of Rolla has had major outages. The experiences of outages within the City of Rolla were well documented by those at the public hearing and through the direct testimony of Mr. Priest.

V. Expenditures of Utility Money

RMU spends money, which is not necessarily for the use and the benefit of utility services. The report by the Office of the State Auditor of Missouri is more than a recommendation. The report by the auditor is very clear and concise. The auditor's comment attached to Don Priest's Prepared Rebuttal Testimony as Schedule A is as follows: "The statutes in Chapter 91, RSMo, cited in the Board of Public Works' response do not support the board's assertions. In addition, these statutes do not apply to the city of Rolla. The Board of Public Works' authority and power is limited to managing municipal utilities. Any expenditures of utility monies for non-utility purposes translates into higher utility rates than necessary to operate and maintain the municipal utilities." RMU was determined by the State Auditor to have spent money on non-utility purposes.

VI. Ownership

The Board of Directors of Intercounty are elected by its members. The policy and philosophy of Intercounty and utility services are under the direct control of the members. There

is no bureaucracy, and there are systems in place with Intercounty to ensure customer satisfaction. Utility services for Rolla are two pronged. One, the public must first deal with RMU and its board and then the public must deal with Rolla, the City Manager and the Counsel. This is the ultimate setting for bureaucracy at work.

VII. Duplication of Services/Safety

Rolla and the Staff, in their briefs, both believe that duplication of services/safety are important considerations. I am sure that the members located within the annexed area and Intercounty also believe that safety is important. All individuals cross-examined at the hearing, are very clear there are codes and regulations in place to ensure the safety of the public and workers of RMU and Intercounty. Rolla originally within its Plan of Intent and what it advised the public was not concerned with either duplication of services or safety. The public was informed that customers presently served by Intercounty in the annexed area would continue to be served by Intercounty. The issue of duplication of services and safety is only now brought to the Commission at this hearing. The duplication of services with the resulting extra lines is a more aesthetic issue than one of safety or duplication.

VIII. The Commissions Authority to Assign the Annexed Area Either to Intercounty or to Rolla.

§386.800.8 RSMo provides as follows: "The Commission is hereby given all necessary jurisdiction over municipally owned electric utilities and rural electric cooperatives to carry out the purposes of this section consistent with other applicable law; provided, however, the Commission shall not have jurisdiction to compel the transfer of customers or structures with a connected load greater than one thousand kilowatts. The Commission shall by rule set appropriate fees to be charged on a case-by-case basis to municipally owned electric utilities and

rural electric cooperatives to cover all necessary costs incurred by the Commission in carrying out its duties under this section.”

Once Rolla made its application to the Commission, it submitted itself to the jurisdiction of the Commission. §386.800 RSMo’s primary concern is what is in “the public interest.” The plain language of §386.800 RSMo is that the legislature has given broad powers to the Commission in considering these applications. Rolla cannot now withdraw from the jurisdiction of the Commission if it does not agree with the Commission’s order.

§386.800.6 RSMo provides: “The Commission shall hold an evidentiary hearing to assign service territory between affected electric suppliers inside the annexed area and to determine the amount of compensation due any affected electric supplier for the transfer of plant, facilities or associated lost revenues between electric suppliers in the annexed area.”

Reading §386.800 RSMo, results in a clear interpretation, the Commission is granted broad discretion in determining what is in the public interest. This discretion includes assigning service territories between the affected utility entities, assigning the exclusive service territory to Intercounty or to RMU, to allow the present Intercounty customers located within the annexed area to continue as Intercounty customers or fixing what are the appropriate service territory boundaries.

IX The Plan of Intent

§71.015 RSMo. provides that a city wishing to annex an area must develop a Plan of Intent. A municipality is required to present “the Plan of Intent” at a public hearing and to present that Plan of Intent in an action to be filed in the Circuit Court of the county in which the annexed area is situated. The Plan of Intent is to list the major services presently provided by the City and the proposed time schedule whereby the City will provide such services to the residents

of the proposed area to be annexed within three years from the date the annexation is to become effective.

The Plan of Intent is the official position of the City and is not to be adopted until after a public hearing is held by the City and the public is allowed to comment on the annexation and the Plan of Intent. The evidence is clear that Rolla continued to represent to the public at each step of the process including the public hearing, the amendments to the Plan of Intent, and at the trial concerning the annexation, that those customers being served by Intercounty in the annexed area would continue to be served by Intercounty.

§71.015 RSMo is very clear that the City must develop a Plan of Intent and must present the Plan of Intent at a public hearing and that the public is entitled to rely upon that Plan of Intent. Rolla pointed out in their initial brief, “everyone is presumed to know what the law is, so either IEC nor Southside Neighbors can claim that they were unaware of the existence of §386.800 RSMo” Likewise, Rolla should not be allowed to represent to the public at a time when the public would be voting on an issue and then less than forty days after the annexation became effective, change its mind. To allow a city to make representations and make official comments by passing ordinances, influence voters and citizens and then summarily change its mind, cannot be in the public’s interest.

X. Conclusion

The Commission should deny the application by the City of Rolla. Additionally, the Southside Neighbors would respectively request that the present customers of Intercounty be allowed to continue to be served by Intercounty and the Commission consider making the service

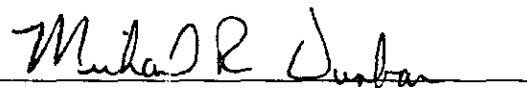
territory that which was annexed by the City of Rolla to be the exclusive territory of Intercounty.

Respectfully submitted,

SMITH DUNBAR TURLEY
266 Marshall Drive - St. Robert
Post Office Box 494
Waynesville, Missouri 65583
Telephone: 573/336-5222
Facsimile: 573/336-2282

Attorneys for Southside Neighbors

By:

A handwritten signature in dark ink, appearing to read "Michael R. Dunbar", written over a horizontal line.

Michael R. Dunbar

#37066

CERTIFICATE OF SERVICE

The undersigned certifies that a true and complete copy of the above and foregoing **Reply Brief of Southside Neighbors** was served by placing the same in an envelope, with first class postage affixed thereto, addressed as set forth below, and by then depositing the same in a U.S. Mail receptacle in Waynesville, Missouri, on the 9th day of February, 2001.

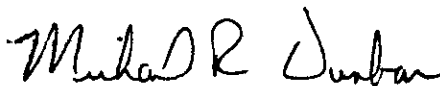
Gary W. Duffy
Brydon, Swearingen & England
Post Office Box 456
Jefferson City, Missouri 65102-0456

Office of Public Counsel
Post Office Box 7800
Jefferson City, Missouri 65102

Mark Comley
Newman, Comley & Ruth, P.C.
Attorneys and Counselors at Law
Post Office Box 537
Jefferson City, Missouri 65102-0537

General Counsel
Missouri Public Service Commission
Post Office Box 360
Jefferson City, Missouri 65102

By:


Michael R. Dunbar #37066