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November 21, 2000

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

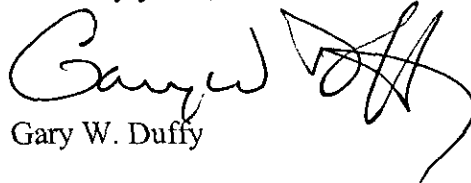
**RE:** Case No. EA-2000-308

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 to Compel responses to data requests.

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

**FILED<sup>3</sup>**  
NOV 21 2000  
Missouri Public  
Service Commission

**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

**FILED<sup>3</sup>**  
NOV 21 2000  
Missouri Public  
Service Commission

**CITY OF ROLLA/ROLLA MUNICIPAL UTILITIES'  
RESPONSE TO MOTION TO COMPEL**

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 to Compel Responses to Data Requests" respectfully states as follows:

1. On November 14, 2000, Intercounty Electric Cooperative Association ("IEC") filed a motion to compel responses to certain of its data requests, and submitted Suggestions in Support of said motion.
2. On November 17, 2000, the Commission issued an order shortening the time for response and directing that RMU file its response to said motion on or before November 21, 2000.
3. According to its motion, IEC seeks an order from the Commission compelling RMU to respond to IEC's data requests numbered 82, 84, 115, and 160. On November 16, 2000, RMU objected to IEC's subsequent data requests numbered 181, 183 and 184. Counsel for IEC informed counsel for RMU that it would seek to compel answers to those data requests also. Counsel for IEC agreed to quickly file another motion to compel regarding 181, 183 and 184, (which apparently was filed November 17, 2000) and in return counsel for RMU agreed to deal

with all of those objections together (“the Motions to Compel”) in this response as the most economical and timely manner of dealing with the dispute.

4. A common theme presented by the Motions to Compel (and reflected in the Suggestions in Support) is the attempt to discover material which is irrelevant to the issues in the case and which is also a “closed record” under Missouri law. As the discussion will show, the Commission has no authority to compel the production of “closed records” and the Motions to Compel should be denied on that basis alone.

#### **Closed Records**

5. The Missouri General Assembly has determined that it is appropriate for a public governmental body to close certain meetings, records and votes, to the extent they relate to 18 different areas specified in § 610.021 RSMo. (The Commission itself utilizes these provisions when it closes certain of its discussions on matters involving litigation or personnel.) Subsection (18) of § 610.021 RSMo states as follows:

(18) In preparation for and implementation of electric restructuring, a municipal electric utility may close that portion of its financial records and business plans which contains information regarding the name of suppliers of services to said utility and the cost of such services, and the records and business plans concerning the municipal electric utility’s future marketing and service expansion areas. ...”

6. RMU is a municipal electric utility. RMU has responded to dozens of IEC data requests in this proceeding, but has objected to some which request items which are closed records. IEC has asked in data request no. 82 for a “copy of any lease or contract to purchase generation equipment.” This clearly comes within the scope of the language in § 610.021.18 RSMo quoted above, because it concerns “information regarding the name of suppliers of services to said utility and the cost of such services.” Although RMU has previously provided to IEC a copy of a draft lease on this topic which was discussed in an open city council session,

RMU has refused to provide the final documents which would contain "the name of suppliers of services to said utility and the cost of such services." IEC has asked in data request no. 115 for RMU to discuss how revenue from these new generation facilities will be used. Although future revenues cannot be predicted with any accuracy because of unknowns such as hours of use and cost of fuel, how RMU may use the facilities and any revenue therefrom is clearly part of RMU's "business plans concerning the municipal electric utility's future marketing." IEC has asked in data request no. 160 for "the business plan." By the plain language of the statute, that is part of RMU's "business plans concerning the municipal electric utility's future marketing." IEC has asked in data request no. 181 for information regarding "any wheeling agreement or arrangement with any electric supplier" and requests a copy. That clearly comes within the language of § 610.021.18 RSMo. in that it concerns "information regarding the name of suppliers of services to said utility and the cost of such services." IEC has asked in data request no. 183 for "each wholesale and alternative energy supplier with whom you have entered an agreement ..." and for copies of such agreements. By the plain language of the statute, that is part of RMU's "business plans concerning the municipal electric utility's future marketing" and it also involves "information regarding the name of suppliers of services to said utility and the cost of such services." Because RMU realizes, however, that the Commission wants assurance that Rolla can provide electricity for the prospective new customers that are a subject of this proceeding, and because Rolla is changing wholesale suppliers as of January 1, 2001, RMU has previously provided a copy of the new wholesale agreement to the Staff (who requested it earlier), and without waiving its objection to data request no. 183, has also provided a copy to IEC. That is an "all-requirements contract" which means the supplier is obligated to deliver all the electricity that RMU may need for the length of the contract. Finally, IEC has asked in data request no. 184

about agreements and correspondence with the Grand River Dam Authority. That also comes within the scope of § 610.021.18 RSMo. because it involves “information regarding the name of suppliers of services to said utility and the cost of such services.” Clearly, all of the information IEC is requesting in its Motions to Compel are closed records.

### **The Untimeliness of IEC’s Motion**

7. Before dealing with the substantive issue, the Commission needs to be informed that IEC has waited until the last minute to bring its motion to compel. As IEC’s motion correctly notes, it first began asking questions about trailer-mounted generation units in May of this year. IEC’s motion notes that RMU objected to a data request regarding this topic in June. Indeed, RMU objected to Data Request No. 160 by letter dated June 29, 2000. On July 7, 2000, counsel for IEC sent counsel for RMU a draft “motion to compel” and supporting suggestions regarding the very same issue being presented to the Commission now. The July 7 letter said “Intercounty takes exception to your objections to the data requests we submitted concerning the trailer-mounted generation equipment.” RMU’s counsel timely responded to that letter on July 12, 2000. A copy of that letter is attached at Appendix A. That letter makes clear RMU’s position regarding IEC’s discovery of closed records. Therefore, this is not a freshly-minted controversy being timely submitted to the Commission for resolution. IEC could have sought a resolution of this question at any time after receipt of the July 12, 2000. Instead, apparently for a perceived strategic advantage, it has waited until just before the hearing to force RMU and the Commission to deal with this controversy on short notice. The Commission should take that fact into consideration in its deliberations.

### **Whether the PSC is “the Public” Under Chapter 610 RSMo**

8. IEC’s motion and suggestions under its *Point A* argue that the Commission is not

classified as the “public” and therefore, under the authority of *State ex rel. Jackson County Grand Jury v. Shinn*, 835 S.W.2d 347 (Mo.App. W.D. 1992), the Commission can compel RMU to produce information labeled a “closed record” under Missouri law. This is an incorrect statement of the law and a mis-characterization of the *Jackson County Grand Jury* case.

*Jackson County Grand Jury* is a situation where the Missouri Court of Appeals authorized the production of what were “closed records” as a result of a subpoena duces tecum served by the grand jury on the custodian of records of the Kansas City Police Department. In that case, the Court of Appeals drew a distinction between “the public” and the grand jury. It noted that the grand jury is a “component part of the court, existed at common law, and is recognized in the Constitution” and is further “said to be a necessary adjunct of all courts charged with the enforcement of the criminal law. For this reason, the grand jury is distinguished from the public.” *Id.* at 348. The court also said “There is no provision that such records be closed to the subpoena power of the grand jury.” *Id.*

9. It is significant in this situation that the entity actually seeking the information in the *Jackson County Grand Jury* case was the grand jury itself. By contrast, in the situation now before the Commission, the entity seeking the information is a rural electric cooperative. A rural electric cooperative is not a grand jury or the equivalent thereof. Neither is a rural electric cooperative an adjunct of the courts charged with the enforcement of the criminal law. IEC’s argument is that the “Commission is not classified as the ‘public... .’” The Commission is not the entity that is seeking this protected information through a motion to compel. IEC is the movant. IEC is a part of the general public. Therefore, the holding in *Jackson County Grand Jury* does not mean that IEC is entitled to review “closed records.”

10. The *Jackson County Grand Jury* case discusses another case which is closer to

the situation presented here. It notes that in *Wolfskill v. Henderson*, 823 S.W.2d 112 (Mo.App. 1991), it was “held that records of the internal investigation unit of the Lee’s Summit Police Department were closed records. In that case a member of the public sought access to the files and this court properly held that such records were closed to a member of the public.” *Jackson County Grand Jury, supra*, at 349 (emphasis supplied). Therefore, a member of the general public, such as IEC, is clearly not entitled to the production of closed records.

11. Another case of even more relevance and significance here is *State ex rel. State Board of Pharmacy v. Otto*, 866 S.W.2d 480 (Mo.App. W.D. 1993). In that case, the Court of Appeals held that the Administrative Hearing Commission exceeded its jurisdiction when it required the State Board of Pharmacy “to disclose information which is privileged ... and to produce closed files” in a disciplinary proceeding. *Id.* at 485. In that case, a person named Drake was the subject of a disciplinary hearing before the Board. Drake’s attorney made a request for production of documents which included the personnel file and licensure files of some other people. The Board objected to this request on the ground those files were closed records under Chapter 610 RSMo. *Id.* at 482. The court said “under the plain provisions of that section, the licensure records are closed records which may not be made available to Drake or his attorney.” *Id.* at 484. Therefore, in *Board of Pharmacy, supra*, we have a case where a member of the public requested information which was a “closed record” under Chapter 610 RSMo. This is an exact parallel to the situation here. There, a state agency was ruled as *exceeding its jurisdiction* by the Court of Appeals in ordering the production of closed records. Given the holding in *Board of Pharmacy, supra*, and IEC’s failure to cite any case in which a member of the public such as a rural electric cooperative has been successful in obtaining a “closed record” in this state, the Commission should dismiss IEC’s motion to compel. It is clear that the granting

of IEC's motion by the Commission would be in excess of the jurisdiction of the Commission, and not justified under any circumstances.

### **Production of Closed Records Due to "Public Interest"**

12. Having failed to cite a single case which clearly supports its argument, IEC turns in its *Point B* to an argument that the Commission is authorized to consider any information that may bear on the future service, rates and costs as a part of its public interest analysis. IEC alleges that because the information it seeks about trailer-mounted generation "would affect the public interest," it argues such information is relevant and the Commission nevertheless has the power to order disclosure. IEC's argument is without merit. As is clear from the decision in *Board of Pharmacy*, supra, whether the information is arguably relevant or not, the Commission has no jurisdiction to order disclosure of a closed record.

13. The information IEC seeks in the subject data requests regarding trailer-mounted generation is not relevant to the question of RMU's ability to continue to provide electric service to its current 7,800 customers and the 286 that are sought to be added by this case. As Mr. Watkins has said in prepared surrebuttal testimony (pp. 46-47) filed in this case on October 18, 2000:

- Q. On page 20 at line 16 Mr. Strickland talks about RMU acquiring additional generation facilities, "assuming an additional debt load of approximately \$6,000,000" and having "no firm wholesale power contract in place after the end of this year [2000]. Do you have any comments on that?
- A. Yes. Generally I would observe that Mr. Strickland is making conclusions without benefit of facts. First of all, our acquisition of generating facilities has nothing to do with this case. Second, contrary to his belief, we have an all-requirements contract in place after the end of this year. That means, in simple terms, that whether RMU owns any new generation facilities or not, we have a contractual right to receive power sufficient to meet all of our customers' needs – and that includes the 286 customers in the annexed area. So there is no question that we have the means to provide service to these new customers. Third, Mr. Strickland is wrong when he says that RMU will assume an additional debt load



of \$6,000,000. We are leasing the new generation equipment. With a lease, we can stop making payments, return the equipment, and walk away without incurring long term debt.

Q. Mr. Strickland says he asked a lot of data requests about the generation. Is that true?

A. Yes. And we originally objected to them because not only are they irrelevant to any issues in this case, information about our generating plans is not subject to disclosure because of a state law that says they are closed business plans and not public records. We have since provided him some information about them that is public information. Basically, Mr. Strickland is going off on a wild goose chase about this generation when it doesn't have anything to do with whether we can serve the 286 customers or not. As I said, we have an all-requirements contract in place. What we do with this additional generation does not and can not adversely affect that contract. The only legitimate question is whether we will have sufficient power to supply these new customers. With the new all-requirements contract replacing the previous one that expires at the end of 2000, we clearly do.

IEC's motion and suggestions claim that whether there will be any increase in rates and charges as a result of this new equipment is an issue of public interest. RMU has already filed prepared testimony from two witnesses on this issue saying those facilities will not cause a rate increase. RMU has also responded to specific data requests about the nature of the trailer-mounted generation that do not involve material that would be a closed record. RMU's witnesses will be subject to cross-examination, and thus IEC will have the ability to explore the irrelevant question it has posed without the need to refer to the closed records. Further, this is not an issue about whether some past assertion is accurate or not, with the contents of a closed record holding the key. IEC's witness is claiming that RMU will have to raise its rates at some indefinite point in the future, and RMU is saying it will not have to as a result of the trailer-mounted generation. Both positions are essentially predictions of the future, and neither position is necessarily going to be validated by the examination of some document, since it takes the legislative action of the Rolla Board of Public Works to effectuate a rate increase. In addition, the Commission needs to remember that IEC is likely to be a strong competitor of RMU if electric restructuring occurs.

The disclosure of RMU's marketing and business plans, and its cost structure, to a potential competitor can do irreparable damage. This fact has clearly been recognized in the past in other cases by the Commission itself. It has now been expressly recognized by the General Assembly by the enactment of § 610.021.18 RSMo to prevent that very thing from happening.

**The Existence of a Protective Order  
Does Not Compel Production of a Closed Record**

14. In *Point C* of its Suggestions, IEC argues that because there is a protective order in this proceeding, disclosure of the closed records under the terms of the protective order is adequate protection for Rolla and that RMU would not be harmed as a result of such protected disclosure. This argument misses the point. The point is that § 610.021 RSMo does not say that the 18 different categories of information listed there are discoverable under a proper protective order. It says they are "closed records." In the same sense that communications between an attorney and its client are absolutely privileged and not subject to discovery -- even under a protective order -- the type of material that is the subject of IEC's motion to compel is not subject to discovery even under the terms of a protective order. The ***Board of Pharmacy*** case clearly holds that it would be beyond the Commission's jurisdiction to compel disclosure of closed records.

**Conclusion**

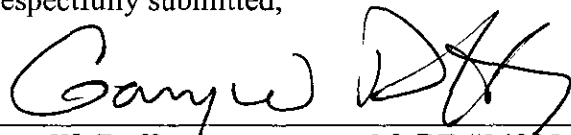
15. RMU has attempted to be very careful about closed records in the context of this proceeding. On the one hand, it has attempted to be frank and forthcoming in responses to data requests in this case, as is evidenced by the fact that although it has received approximately 200 data requests from various parties in a proceeding in which three sets of prepared testimony has already been filed, this is the first motion to compel which has surfaced. It has provided a copy

of a draft lease concerning truck-mounted generation equipment to IEC even though it firmly believes that the topic is irrelevant to this case. It has provided a copy of its new all-requirements contract to the Staff and IEC, even though it is a closed record, because RMU realizes that the timing of Rolla's upcoming change of wholesale supplier at least presents a question as to Rolla's ability to continuing serving its customers. It has produced that contract to provide assurances that it will be able to continue to provide electric service to its present and future customers. But it has to draw a line when the adversarial and competitive interests of IEC cause IEC to seek, for strategic reasons, additional information which, at best, is only tenuously relevant.

16. The Commission should take into consideration the adversarial and competitive interests of IEC, the untimeliness of IEC's motion, the fact that RMU has made voluntarily disclosure of certain records, and the expressed intent of the General Assembly that these specific types of records are not to be disclosed except under the strictest of circumstances (which are not applicable here) in denying IEC's Motions to Compel.

WHEREFORE, the City of Rolla/RMU prays that the Commission deny the Motions to Compel.

Respectfully submitted,

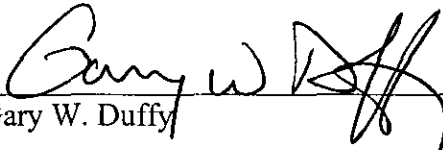


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ATTORNEYS FOR  
THE CITY OF ROLLA, MISSOURI

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was mailed or hand-delivered on November 21, 2000, to counsel for all parties of record as shown below.

  
\_\_\_\_\_  
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July 12, 2000

Mr. Mark W. Comley  
Newman, Comley & Ruth, P.C.  
601 Monroe Street, Suite 301  
Jefferson City, MO 65102-0537

**RE:** MoPSC Case No. EA-2000-308

Dear Mark:

This is in response to your letter of July 7, received July 10, and the enclosed draft motion to compel and suggestions. Thank you for providing your position in a clear fashion so that we could prepare a response. I will respond to what I consider the essence of your arguments in the following fashion. Failure to mention any particular argument you made should not be construed as agreeing with it.

1. **Closed Records.**

We researched the case law of "closed records" carefully before we made the objection.

6/0 We still firmly believe there is no basis for Intercounty (IEC) to have access to anything covered by §621.021(18) RSMo. We were aware of the grand jury case you cited, but it does not apply in this situation since your client is not a grand jury or a unit of government investigating an alleged crime. Further, there are subsequent cases where the "grand jury" exception appears to be further limited and disclosure was not required. To us, a "closed record" means it is a closed record. We have found no reported case which clearly holds that a private litigant is entitled to obtain 6/0 information which is classified as a "closed record." Further, we are not aware of any case under Chapter 621 RSMo which sanctions the use of a protective order to transform a "closed record" into a "partially open" record. I am aware of no law which says that a protective order issued by the Public Service Commission takes precedence over a specific statute which says something is a closed record.

2. **Previous Disclosure in City Council Session.**

You are correct that the trailer-mounted generation was discussed in summary fashion in an open portion of a city council meeting. Therefore, we believe that any documents produced for council review and any statements made by RMU in that open session are discoverable by you. We disagree, however, that any partial discussion in open session necessary to a

APPENDIX A p. 1 of 2

preliminary approval by the City Council waives anything that is expressly covered by §621.021(18) as a closed record or any subsequent actions or documents.

3. **Relevance of the trailer-mounted generation to this proceeding.**

Your client is pursuing something that is irrelevant to this case. Information regarding the possibility of RMU obtaining trailer-mounted generation has absolutely no bearing on the issues in the pending case. The issue in the case before the Commission regarding generation is simply whether RMU will have adequate capacity and energy for the foreseeable future to serve the new customers it would obtain from IEC if the Commission grants the application. We have previously informed you that RMU is currently operating under an all-requirements contract which expires on December 31, 2000.

As you know, "all-requirements" means just that. It means that the supplier agrees to provide all the power and energy necessary for the City's needs. Recently, the City has signed a replacement contract for the one that will expire on December 31, 2000. It is also an all-requirements contract. Therefore, the City will have a contract in place on January 1, 2001 capable of serving all of the needs of the present and future customers of the City, *whether or not the City chooses to pursue any trailer-mounted generation.*

At the root of this controversy remains the fact that the City, at the present time, *has not obligated itself* to purchase any trailer-mounted generation, so your client's pursuit of information about something that has not happened is just a fishing expedition. It is totally without merit because it is irrelevant and immaterial. If and when the City makes a decision to commit to any trailer-mounted generation, we will review the outstanding data requests to determine if any previous response we have made will thereupon become incorrect because of those subsequent events. Even if that occurs, however, any generation owned by the City would be irrelevant because of the existence of the all-requirements contract. It would simply make the City an even more qualified provider of electricity (in the sense of reserve or backup capacity) than it is today, which makes it even more qualified to serve the IEC customers within the annexed area.

4. **Data Request No. 156.**

Without waiving any objection to your data request no. 156, I would simply refer you to §91.010 RSMo which allows any city in this state to erect, own, maintain and operate a power plant. If your data request, which is still difficult to comprehend, is simply: "What authority does Rolla have to own electric generation?" then I trust that your review of that statute will answer your question. If the question is more complex than that, then I invite you to rephrase the question.

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

Sincerely yours,

Gary W. Duffy

cc: Dan Watkins