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February 9, 2001

Mr. Dale Hardy Roberts
Executive Secretary
Public Service Commission
Governor State Office Building
Jefferson City, Missouri

RE: Case No. EA-2000-308
In the Matter of the City of Rolla, Missouri

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of the reply brief of the City of Rolla, Missouri.

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 L. Frey, Office of the General Counsel
Mark W. Comley
Michael R. Dunbar
Dan Watkins

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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

REPLY BRIEF OF

THE CITY OF ROLLA, MISSOURI

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Rolla Municipal Utilities

February 9, 2001

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1. Introduction

This brief is a reply to the initial briefs filed by Intercounty ("IEC"), the Office of the Public Counsel, Southside Neighbors, and the Staff of the Commission.

2. Factual Background

3. Chronology of Events

Where IEC discussed the procedural history, its recitation of the facts appears accurate, so RMU has no reply on that topic. IEC's characterization of certain facts are discussed under the appropriate section heading.

Southside Neighbors included as a statement of fact that "The electric supplier of this area and of Southside is Intercounty." (Southside brief, p. 2) This is not completely accurate. While IEC serves approximately 286 customers in the Southside area, new structures since the annexation in June of 1998 have been served by RMU. (Tr. 198)

4. The 113 Pre-existing IEC Customers

The briefs of the other parties did not discuss the IEC customers located inside Rolla but not in the Southside area, so no reply is necessary.

5. Argument

In briefing this case, RMU has attempted to follow, as much as practical, the list of issues submitted by the parties, but has included issues which were directed by the Regulatory Law Judge to be briefed.

6. Public Interest

RMU is pleased to see the Staff believes the transfer is in the public interest. (Staff brief, pp. 6-8) All of the statements made by the Staff regarding this topic are exactly on point, especially the assertion that when all the factors are considered, the transfer is in the public interest because it eliminates more problems than it creates. The Staff has done an excellent job of briefly summarizing the important public interest aspects of this proceeding on pages 6 through 8 of its brief.

Response to IEC's Brief

As expected, IEC's initial brief attempts to make the case that RMU's application is not in the public interest. In an attempt to prove its thesis, IEC makes several allegations. In the following section, RMU will quote the allegation and then provide a brief response.

A. *IEC is serving the area now and "could continue to serve the Area indefinitely without any compromise in the level of service."* (IEC Brief, p. 6) There is really no dispute about this. The fact that IEC could continue to serve does not prove that service by RMU instead would be against the public interest.

B. *"Denial of RMU's application would serve to preserve the status quo."* (IEC Brief, p. 8) This is not a correct statement if it is intended to mean that things in the Southside area will forever remain the same as they are today. What will happen with a denial of the application is that as the population in the area grows, so will the duplication with the dual systems of IEC and RMU serving the same area. Rather than remaining the same, the situation will become incrementally worse from the standpoint of duplication of electrical facilities.

C. *Congestion from dual suppliers (RMU and IEC) "would not necessarily mean a decline in service quality or in public safety."* (IEC Brief, p. 8) This is also incorrect. It stands to reason that with *two* overhead electric systems *in the same area* instead of one, there is at least twice as much opportunity for injury from contacts with either poles or conductors or both. Also, with two systems in the area, neither of which can be fully utilized, the costs of that uneconomic and inefficient situation are passed on to the ratepayers of both systems.

D. *RMU will be required to construct new redundant facilities such as substations and feeder circuits ... which IEC says will require "substantial" investment. Coupled with the cost of a Commission-ordered transfer, IEC claims RMU will have to raise its rates to "replenish the cash reserve to its former level."* (IEC Brief pp. 10-11) IEC has a false premise in this allegation. RMU will not have to build any "new redundant facilities such as substations." Mr. Bourne testified there would be no redundant facilities and that RMU will not have to construct any new substations if the transfer is ordered as requested. (Ex. 4, pp. 10-11) IEC presented no evidence, other than Mr. Nelson's uninformed speculation, to back up its unfounded claim. Whether the Commission grants RMU's application or not, RMU will be building facilities in the area to serve new structures. The question is whether the Commission will act in the public interest to remove the duplication inherent in the remaining IEC facilities.

E. *If the transfer is approved, there will be significant under-utilization of IEC and Sho-Me Electric Substations.* (IEC Brief, p. 11) Mr. Bourne showed that IEC had no right to expect to serve new load in the Southside area. (Ex. 4, p. 9) IEC has no right to expect to serve new customers inside the city limits after any annexation.

Further, having some incremental capacity in a substation is a good thing. Most electric utilities would want to have some room for growth in a substation rather than having to spend money to increase the capacity. That's the whole concept of "peak-shaving" and conservation measures. You want to get more out of existing facilities and thereby make them last longer. Any temporary under-utilization of IEC's substations as the result of this transfer simply means IEC will get a longer useful life out of them before they have to be replaced for reaching capacity. That appears to be something that is in the public interest, rather than against it.

F. *If the transfer is approved, "sufficient growth outside the Rolla city limit to make up for IEC's loss of load within the area is not expected for many years."* (IEC Brief, p. 13) No citation to any authority is provided by IEC for that allegation, and the record evidence is quite the contrary. IEC admits that its historical growth rate is 732 customers per year in the last three years. (IEC Brief, p. 12) Other evidence shows a growth rate of 718 customers per year over the last five years. (Ex. 5, p. 17) By either measure, the transfer of 286 IEC customers is totally made up for in *four or five months*, rather than "many years" as alleged by IEC. Even if the allegation were true -- which it is not-- it does not prove the transfer is contrary to the public interest. As indicated in RMU's initial brief (pp. 15-16), the amount of compensation ordered by the General Assembly under this transfer procedure is substantially more than arm's length bargaining has produced, on a per-customer basis, in recent years.

G. *RMU pays little attention to its customers' complaints.* (IEC Brief, p. 16) This allegation is an outrageous lie. Characteristically, IEC's brief cites no evidence for this proposition. There was no evidence whatsoever that any customer complaint was

ignored by RMU. The fact that RMU may not keep a "formal complaint file" does not mean it pays "little attention" to customer complaints. It more than likely means there are not enough complaints to even warrant setting up a "system." Mr. Watkins testified that there were no unresolved customer complaints pending and that people can and do take complaints to the Board of Public Works. (Tr. 409) There simply is no evidence to support IEC's claim on this point.

H. *The transfer will "engender collateral litigation."* (IEC Brief, p. 17) The root cause of any such "collateral litigation" that may come to pass will be the intentionally bad business practice of IEC in not obtaining easements in proper form, in not recording them, or both.

As far as RMU can tell from IEC's brief, these eight arguments constitute IEC's attempt to demonstrate why approval of RMU's application is contrary to the public interest. RMU respectfully submits that IEC has failed in its attempt.

Response to Public Counsel's Brief

Unlike the other parties, the Office of the Public Counsel does not take a position in its brief as to whether the Commission should accept or reject RMU's application. OPC did say in opening remarks that "Public Counsel's main consideration is to ensure that customers receive safe, reliable electric service at just and reasonable rates. We believe that at current rates and levels of service, both the City and Intercounty are capable of meeting these requirements." (Tr. 65) Presumably, this means that OPC neither supports nor opposes the transfer.

OPC discusses on pages 3 through 5 of its brief the difference between the standards of several statutes. RMU agrees there are different standards in different statutes. RMU has never contended that a "not detrimental to the public interest" standard applies in this case.

7. Effect if Commission Denies Transfer

See the previous discussion under "Public Interest."

8. Impact of Transfer on RMU

See the previous discussion under "Public Interest."

9. Impact of Transfer on IEC

As indicated earlier, IEC claims that some of its investment in facilities will be "stranded" or under-utilized. RMU addressed this on page 4 of this brief. RMU would note in this regard that IEC is attempting to convince the Commission in this case that RMU should pay for greatly increased conductors on the re-integration facilities. IEC is apparently attempting to build even more excess capacity into its system, and make RMU pay for it.

IEC also raises concerns about its load density on page 12. These concerns are moot because the annexation has already occurred and thus cut off IEC's right to serve new structures. This is simply a risk that IEC and any other rural electric cooperative faces when it builds facilities close to a municipal utility. The statute assures that IEC will be adequately compensated for any Commission-ordered transfer.

10. Impact of Transfer on IEC's Customers in the Area

Generally, see the previous discussion under "Public Interest."

Southside Neighbors on page 15 say that the "evidence ... suggest (sic) that the rates of both Intercounty and Rolla would be similar." The evidence (verified by Staff) unequivocally shows the rates are not similar. RMU's published residential rates are more than 25 percent less than the published rates of IEC. (Tr. 371; Ex. 13, p. 15) It was only Mr. Strickland's assertion that if unspecified IEC rebates and discounts are considered, the annual costs would be similar.

11. RMU's New Power Agreement

IEC claims on pages 17-18 of its brief that it was denied the opportunity to discover the new wholesale contract with MoPEP, and therefore the Commission should conclude that Mr. Watkins and Mr. Marmouget both failed to tell the truth[1] when they said it would not operate to raise electric rates in Rolla. IEC is flatly mistaken when it says "RMU has refused to disclose the rates [from that new contract] as a part of this proceeding." (IEC Brief, p. 18) As proof of IEC's wrongful assertion, RMU points to the "City of Rolla/Rolla Municipal Utilities' Response to Motion to Compel" filed on November 21, 2000. On page 3 of that pleading, RMU made the following representations to the Commission:

> 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. (Emphasis supplied)

IEC was provided a copy of the contract.[2] Thus, IEC is flatly wrong in its assertion that it did not get to see the contract. *It was provided a copy prior to November 21, 2000, which was prior to the hearing.* Therefore, IEC's complaint about a denial of due process, and its assertion on page 18 that the Commission can not render an adequate finding as to this case without a review of that contract, is totally without basis in either fact or law.

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[1] IEC says the Commission "can draw a negative inference from RMU's failure to disclose this information, and conclude quite the contrary [i.e., that it will cause future rates to increase]." IEC Brief, p. 18. This is a polite way of saying that RMU's witnesses were not telling the truth under oath.

[2] After RMU said in the November 21, 2000 pleading that it provided a copy of the contract to IEC, IEC never filed any subsequent pleading denying receipt. It was not until its brief that it raised this baseless assertion.

The Commission should have no concerns about relying on the assertions of Mr. Watkins and Mr. Marmouget regarding the absence of a rate increase from the new contract. That is because what they said was implicitly verified by the Staff. Mr. Ketter indicated in prepared testimony that he was aware of the new contract as a result of his data request. (Ex. 14, p. 5) This is consistent with RMU's representation to the Commission on November 21, 2000 that it had provided a copy to both Staff and IEC. The fact that the Staff engineer reviewed the new all-requirements contract, and that he raised absolutely no concerns about its impact on RMU's rates in his testimony, means that instead of the "negative inference" IEC wants the Commission to draw regarding RMU, the Commission should instead seriously question the accuracy of IEC's allegations.

IEC reiterates its alleged concerns on pages 18-19 where it says the Commission cannot render an "adequate finding" concerning public interest until it has also reviewed the new "wheeling arrangement." This is false. This "wheeling arrangement" is really just RMU taking wholesale transmission service from AmerenUE pursuant to a FERC-approved tariff. (Tr. 387, 412) The Commission has been given no reason to doubt the validity of a FERC-approved tariff, or the reliability of service provided thereunder. IEC's arguments on this point must be dismissed as without basis.

12. Trailer-Mounted Generation

IEC claims on pages 19-20 of its brief that the Commission cannot reach an "adequately supported" decision in this case without somehow reviewing all of the details of a lease-purchase plan RMU has regarding some trailer-mounted generation units. The Commission ruled on December 1, 2000 in its "Order Regarding Motion to Compel and Motion for Leave to File

Supplemental Rebuttal Testimony" that IEC's attempt to discover this material would be denied.

Despite the Commission's ruling, IEC still maintains "there is no assurance [it] will have neutral effects on its future operations." (IEC Brief, p. 20) A more accurate statement would be that IEC was allowed to conduct cross examination on this irrelevant topic but that inquiry failed to produce any evidence to support IEC's preconceived notion. (Tr. 255-261)

RMU has explained that this equipment is on a lease which can be abandoned if and when that is deemed appropriate. (Ex. 7, p. 46-47) In other words, it is an expense that can be shed if necessary. As such, it poses no credible threat to the financial stability of RMU's operations. Further, because the new MoPEP agreement is an all-requirements contract, thus assuring an adequate supply of electricity for whatever load RMU's customers put on the system, this additional generation is not essential to serving Rolla's needs. (Ex. 7, p. 47) In short, the Commission should ignore IEC's protests about the trailer-mounted generation because there is no proof that it will negatively affect the public interest.

13. Franchise/Occupation Tax or PILOT

The Staff is correct that the dispute over the manner in which the City would be compensated if IEC remained in the Southside area was one of the major reasons the City and IEC could not produce a territorial agreement during the mandated period of negotiations pursuant to § 386.800.4 RSMo. (Staff brief, p. 8) The Staff also says its projection of the amount of revenue from a PILOT for 286 customers produces a "rather modest" figure ($22,000) in comparison to other matters in dispute in this case. The Staff's conclusion of it being a "rather modest" figure is too simplistic. The Staff is "comparing apples and oranges." All of the figures "in dispute" in this case (e.g., the amount for the IEC facilities and the amount to represent 400%

of gross revenues) represent one-time payments. The amount IEC would have paid under a PILOT would have been an on-going (and considering that cities can have perpetual existence) probably infinitely large number. In making its comment, the Staff is essentially comparing a) the price of a house with b) one year's rent of that house. It is not a valid comparison.

The Staff also opines that the mandated negotiations on a territorial agreement between Rolla and IEC "simply produced some misunderstandings between the parties." (Staff brief, p. 8) The Staff was not present at the negotiations. It is Rolla's belief that the negotiations did not produce "misunderstandings." Rather, each party ended up clearly understanding the position of the other. Those positions were simply incompatible. The Staff implies that RMU has contended that IEC "agreed to the payment of a PILOT." (Staff brief, p. 9) RMU has made no such assertion. RMU's contention is that it was reasonably led to believe, through representations in drafts of agreements and otherwise, that IEC would agree to make payments to the city generally in the same form as a franchise tax. When Rolla pointed out in the § 386.800 negotiations that it could find no statutory authority to impose such a tax on a rural electric cooperative, and requested that IEC do the equivalent through a PILOT, IEC balked.

RMU does agree with the Staff brief on page 9 that the breakdown in negotiations does not impact "the public interest" in this case. Discussion of the topic merely helps explain why this case arose and why the plan of intent contained the language it did.

14. Annexation Plan of Intent

As expected, both IEC and the Southside Neighbors rely heavily on the language from the plan of intent in the prior annexation proceeding to argue that approval of RMU's application is not in the public interest. In contrast, the Staff correctly observes on page 10 of its brief that

"the evidence of any detrimental reliance on the part of residents [on the language in the plan of intent] is virtually nonexistent and therefore cannot outweigh the obvious overall interest of the public in having its electric power provided as efficiently and inexpensively, as safely, and as unobtrusively as possible."

As pointed out in RMU's initial brief, the Commission should not reject RMU's application on the basis of what was said in the plan of intent. There are several reasons for this, some of which were discussed in RMU's initial brief and others which are explained in more detail below:

✓ It is not the function of the Commission to construe or give effect to language in an annexation plan of intent.

✓ Residents of the annexed area who contend the plan of intent has not been followed have a specific procedure they can follow to seek the remedy of deannexation. The General Assembly has given that role exclusively to the circuit courts.

✓ There is no competent evidence that voters relied upon the specific language in the plan of intent regarding electric service in voting in the annexation election.

The Deannexation Remedy

It is not the function of the Commission to construe or give effect to language in an annexation plan of intent. IEC itself points out on page 3 of its brief that the General Assembly has already provided a *specific* statutory remedy to annexed citizens who believe that the plan of intent was not followed. It is called "deannexation" and is referred to in § 71.015.1(7) RSMo.[3] This is a significant factor in this case because it shows that the General Assembly has already

[3] IEC's brief contains a typographical error in the middle of page 3 where it erroneously refers to the section as "Section 71.105.1(7)."

provided a remedy for the harm claimed by IEC and Southside Neighbors.

The General Assembly has already provided a specific statutory remedy to those citizens who feel aggrieved by a city's performance or lack of performance under a "plan of intent." As IEC has pointed out in its brief, the statutory language says:

> (7) Failure to comply in providing services to the said area or to zone in compliance with the "plan of intent" within three years after the effective date of the annexation, unless compliance is made unreasonable by an act of God, shall give rise to a cause of action for deannexation which may be filed in the circuit court by any resident of the area who was residing in the area at the time the annexation became effective.

Therefore, any person residing in the Southside annexed area has the statutory right to challenge in circuit court the City's compliance with the plan of intent. Some residents of the Southside area have previously demonstrated that they are not bashful about challenging the annexation that is the subject of this case. They mounted a legal challenge reported in ***City of Rolla v. Armaly***, 985 S.W.2d 419 (Mo.App. S.D. 1999). They were unsuccessful. Part of that inquiry involved the very plan of intent under scrutiny here, and specifically the portion regarding the provision of city services. The court said "[t]he proper test ... is whether the city is able to furnish to the area *services which the municipality presently provides its populace"* citing ***City of Jefferson v. Smith***, 543 S.W.2d 547, 552 (Mo.App. 1976) (emphasis original). The court said "All Rolla must show is that it possesses the financial ability to fund or finance its share of the costs." (985 S.W.2d 419 at 427) Therefore, IEC and the Southside Neighbors are attempting to ascribe much more substance and effect to the particular language in the plan of intent regarding electric service than the statute either requires or would support. There is nothing in the annexation statute which indicates the descriptions of the proposed method of providing city services therein contained must be followed forever. Neither does the annexation statute require the plan of intent to explain *how* the services would be provided.

The important point, though, is that if any citizen believes he or she has a claim regarding the language in the plan of intent, the Commission is not the place to take the claim. If any of the Southside residents can convince a circuit court that the City did not properly adhere to the plan of intent, the circuit court has both the power and authority to "deannex" the property under § 71.015.1(7) RSMo. The Commission has no such judicial power.

Since the General Assembly has prescribed this *specific procedure*, and provided this *specific remedy* for the *specific harm* being claimed by IEC and the Southside Neighbors, it is neither necessary nor appropriate for the Commission to consider this issue in the totally different context of a § 386.800 RSMo proceeding where the standard is a much broader "public interest" standard.

Second, the Commission would essentially be attempting to exercise the power of a court if it follows the suggestions of IEC and the Southside Neighbors to deny the application based on the language regarding electric service in the plan of intent. The Commission would be attempting to construe the legal requirements of the annexation statute. The Commission is not a court and has no power to declare or enforce any principle of law or equity. ***American Petroleum Exchange v. Public Service Commission***, 172 S.W.2d 952 (Mo. 1943) As such, the Commission has no jurisdiction to determine what was required to be contained in a plan of intent under § 71.015.1(7) RSMo, whether what was said misrepresented anything, or how "binding" such language is on a city. It is difficult to conceive that such language could be binding and foreclose the city ability to make use of a clearly available statutory process under §386.800 RSMo.

On page 25, IEC implies that what was said in the plan of intent may have been "an innocent mistake." What was said in the plan of intent by the City was an accurate reflection of

existing law. The anti-flip flop statutes (§ 91.025, § 393.106 and § 394.315 RSMo) all provide that one supplier cannot supply electric service to another supplier without an order of the Commission finding otherwise for a public interest reason other than a rate differential. The plan of intent language essentially paraphrases that law. Therefore, it was accurate for the City to state (that under those laws), IEC would continue to serve its existing customers and RMU would serve new customers inside the city. That was also commensurate with the understanding the City had that IEC would make something akin to franchise tax payments if IEC were going to continue serving customers in the annexed area.

But the *existing* law at the time of the plan of intent *also* clearly allowed Rolla to pursue a §386.800 RSMo proceeding after the annexation. The fact that a specific reference was not made in the plan of intent to the *possibility* of a §386.800 RSMo filing after the annexation is not a violation of any law, a "trick" or an evasion. The possibility of such a filing has existed with every municipal annexation in this state involving a municipally-owned utility since 1991. Indeed, we are all conclusively presumed to know the law. ***Missouri Highway and Transportation Commission v. Myers***, 785 S.W.2d 70, 75 (Mo. banc 1990). In that case, the Supreme Court said it "defies credulity" that a state agency represented by counsel could not ascertain the effect of the state statutes. ***Id.*** The ***City of Rolla v. Armaly*** case, *supra*, stands as stark evidence that at least some people in the Southside area had counsel representing them in connection with the annexation election that gave rise to this case. There are probably many other existing state statutes that can have some future bearing on the Southside area that were not mentioned in the plan of intent, either. Therefore, it is insufficient for IEC and the Southside Neighbors to claim they should have been notified differently in the plan of intent.

RMU Is Being Held to a Non-Existent Requirement

IEC makes allusions on page 25 and 26 to the City purposely hiding its intentions from public view or "tricking" the public. This is unfounded. The General Assembly provided *specific* instructions on the form and content of the notices to be made if a city intends to make a § 386.800 RSMo filing. See subsections 3 and 6 of § 386.800 RSMo. It is unquestioned that Rolla complied with those notice requirements.

The statute applicable to this proceeding calls for notices to be made to various parties within specified times, but those times are all after the effective date of the annexation election.[4] The General Assembly has also required certain things to be a matter of public notice before annexation elections in § 71.015 RSMo. Therefore, the General Assembly has carefully chosen the matters it requires to be disclosed both *before* and *after* annexation elections. **If the General Assembly thought that public notice *prior* to the election of a city's intention to make a § 386.800 filing *after* the election was either necessary or in the public interest, it certainly could have so provided in the statute. It did not. Instead, the General Assembly tied all the notice provisions in § 386.800 to the effective date of the annexation, which necessarily comes after the election.** Therefore, the General Assembly believed it was neither necessary nor appropriate to require a city to give notice of its intent to take advantage of § 386.800 prior to the election. Yet that is the cross that IEC and the Southside Neighbors seek to crucify Rolla upon. They are arguing that the Commission should disapprove Rolla's application for failure to

[4] Notice is required in a newspaper of general circulation within 60 days after the effective date of annexation. See subdivision (1) of subsection 3. The requirement for approval to begin negotiations is also within 60 days after the effective date of annexation. See subdivision (2) of subsection 3. There are no requirements in Section 386.800 RSMo for the municipality to provide any notices before the annexation election.

provide a notice that was not required by statute. Clearly, the General Assembly could have required such prior notice, but did not. The point is that the General Assembly has already made the *public interest* determination that notice of a § 386.800 proceeding prior to the election is not a requirement in this state.

The Commission has not been given the authority by the General Assembly to retroactively impose new or different notice requirements on municipalities filing § 386.800 applications. The General Assembly also did not entrust the Commission with the job of construing and enforcing annexation plans of intent. It specifically gave that function to the circuit courts. Where the clear and unambiguous language of a statute intends to provide a remedy such as deannexation, and the procedure to be followed to secure that remedy, "it must be complied with." ***Springfield Park Central Hospital v. Director of Revenue***, 643 S.W.2d 599 (Mo. 1983).

Voter Intent

On page 25, IEC claims that "votes were cast on the strength of that representation." First, IEC cites no evidence for that assertion. Second, it is too simplistic a statement to command credence. Third, there is no competent evidence in this record regarding how *anyone* voted in the annexation election. In any event, more people voted for annexation than voted against annexation. Annexation occurred and is a *fait accompli*. As the ***Armaly*** case recites, the City "first considered annexing this area in the early 1990's after several citizens groups from the subdivisions expressed an interest in annexation. In part, the prospect of annexation arose due to water, sewer and environmental concerns in the four existing subdivisions." 985 S.W.2d at 423. Therefore, it is equally plausible and possible that people were voting on the basis of sewer or water service representations and were more concerned about that than the identity of the electric

service provider.

15. Area To Be Assigned to RMU

16. Commission Lacks Authority to "Assign" Areas to IEC

RMU addressed this question extensively with citations to applicable law in its initial brief. Every effort will be made to avoid repetition of those points in this reply brief, but some mention is necessary in order to refute positions taken by other parties.

Response to IEC's Brief

As demonstrated by the argument in RMU's initial brief (pp. 31-34), IEC is incorrect in its assertion on page 27 that the Commission can affirmatively grant someone other than a municipality an "exclusive" service territory in an annexed area along with the right to serve new structures. This is not surprising, considering that IEC's one-page discussion of the topic does not even mention the anti-flip flop statutes which must be construed *in pari materia* with § 386.800 RSMo. The cases construing those statutes discussed in RMU's initial brief, and the statutory limitation contained in the rural electric cooperative's own statute[5] that limits its service ability to "rural areas" means that IEC could not serve new customers inside Rolla. Indeed, the Missouri Court of Appeals, Western District, has just handed down another opinion which confirms RMU's assertions that rural electric cooperatives are not allowed to serve new structures after annexation changes an area to non-rural. *See*, ***St. Joseph Light & Power Co. v. United Electric Cooperative and Homestead Cooperative of Maryville, Mo.***, WD 58140 (Opinion filed January 23, 2001; subject to post-hand down motions).

RMU tends to agree with IEC's statement on page 28, however, that the question of the

[5] See § 394.080.1 RSMo.

possible assignment of an exclusive service territory by the Commission to IEC in this case is a moot point. IEC did not request one[6] and there is no record evidence of any boundary lines for the Commission to utilize to create an exclusive territory for IEC. RMU respectfully submits that both it and IEC went through that process as a part of the territorial agreement negotiations mandated by § 386.800.4 RSMo. They are the only parties with the requisite knowledge of their respective systems and the specific area, and the most to gain from eliminating dual facilities. After a full year of negotiations, they could not reach an agreement on how to separate territories. Therefore, this topic is moot.

IEC's veiled request on page 28 that the Commission reopen the record to take additional evidence on how to split territories between RMU and IEC is improper. *See*, 4 CSR 240-2.110(8). For the reasons stated above, it would also be a waste of time and serve no legitimate purpose. Nowhere in § 386.800 is a rural electric cooperative given the authority to seek an exclusive service territory inside a city, and nowhere in the statute is the Commission given the authority to assign an exclusive service territory to a rural electric cooperative.

Response to OPC's Brief

On page 8, OPC says the territorial agreement statute (§ 394.312) and § 386.800 RSMo should be "read in harmony" simply because there is a reference in the latter to the former. RMU seriously doubts how two diametrically opposed statutory procedures can be "read in harmony" to produce any sort of logical result, other than the narrow intention of the General Assembly that the parties in a § 386.800 proceeding at least *attempt* to negotiate a territorial agreement as a

[6] The fact that IEC did not request one is not dispositive since the statute does not authorize IEC to request one.

pre-condition.[7] Section 394.312 is a purely *voluntary* procedure with its own specific set of requirements. In stark contrast, § 386.800 is a *mandatory* procedure where a municipality can attempt to force the transfer of facilities in a specific area from an unwilling electric service provider or providers (a rural electric cooperative or a regulated electrical corporation or both). That section has a totally different set of mandated procedural requirements than the voluntary procedure. Thus, the General Assembly has provided two totally different and distinct paths. They emanate from different starting points and reach totally different results. It is therefore difficult to understand how, or even why, an attempt would be made to harmonize these two disparate procedures. OPC's position on this simply makes no sense.[8] It would be like saying that the voluntary and involuntary annexation statutes should be construed in harmony. See §§ 71.014 and 71.015 RSMo 1994.

RMU generally agrees with OPC's argument on pages 9-11 that there are limitations on the Commission's power under § 386.800 RSMo. This follows from the fact that the Commission has only those powers expressly granted by the General Assembly, and those necessary and proper to carry out the duties delegated to it. ***State ex rel. and to use of Public Service Commission v. Padberg***, 145 S.W.2d 150 (Mo. 1941). It is true, as OPC states on page 9, that the Commission may only assign territory within the annexed area. This is because the municipal utility is only allowed to request a service territory "within the annexed area." § 386.800.6 RSMo. It is also true, as OPC states on page 10, that the Commission has not been

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[7] § 386.800.4 RSMo.

[8] The Staff makes a similar argument on pages 3-4 of its brief comparing the territorial agreement statute and § 386.800. The Staff has the mistaken notion that § 386.800 allows the Commission to accomplish what the negotiating parties could not. The two statutes are incompatible in that regard.

given authority to order the payment of "franchise fees, taxes or Payments in Lieu of Tax." That statute does not give the Commission the authority to force IEC to make such payments to the City of Rolla. RMU believes this fact, however, and the disparity it creates, is one reason why the General Assembly enacted § 386.800 RSMo. Allowing the municipally-owned utility to take over service to the customers served by the rural electric cooperative, who pays no such tax to the city, eliminates this disparity. Finally, on page 10, OPC correctly notes the difference between the standard applicable to a territorial agreement and this case. The OPC apparently concludes from its discussion of these three topics, however, that "there are three limitations contained in the statute." RMU believes it is incorrect to call these topics "limitations" and to conclude there are only those three.

OPC then (at page 11) posits four possible outcomes of this case. The first two are possible. The latter two are not. OPC correctly identifies the first possibility as the Commission granting the application and ordering RMU to pay an amount to IEC as compensation. OPC also correctly identifies the second possibility as the Commission denying the application and IEC continuing to serve its existing customers (structures). This is essentially the "status quo."

The third of OPC's "possibilities" is identified as a) denial of RMU's application, but b) assignment of the annexed area to IEC along with the ability to serve *new* structures, and c) ordering IEC to compensate RMU for "associated lost revenues" for the structures built after annexation and the areas within the annexed area which remain undeveloped. Here, OPC has gone beyond the plain language of the statute. This scenario is <u>not</u> within the Commission's authority for several reasons.

First, as discussed at length in RMU's initial brief (but never mentioned in OPC's brief) the law of this state is abundantly clear that IEC cannot serve new customers inside a city greater

than 1,500 in population. ***Farmers' Electric Cooperative v. Missouri Dept. of Corrections***, 977 S.W.2d 266 (Mo. banc 1998). Bolstering that principle is the clear language of subsection 2 of § 386.800 RSMo which says the municipally owned utility may – *without* the permission of the Commission — serve *new structures* in the annexed area. Therefore, the case law from the anti-flip flop laws and the statute under consideration here both clearly say that **new structures in the annexed area are to be served by the municipal utility**.[9] The Commission has not been given any statutory authority to overrule any of those statutes or case law and allow a rural electric cooperative to serve new structures inside a city greater than 1,500 in population, and it is incorrect to suggest any such power exists by implication since the law does not favor repeal by implication.

Second, OPC claims that § 386.800 RSMo authorizes the Commission to order IEC to pay RMU for "associated lost revenue." When it is read in complete context, that is not what § 386.800 RSMo means. The payment of compensation in § 386.800 *only* goes ***from*** the municipally owned utility ***to*** "the affected electric supplier" for the transfer of title and operation of facilities. § 386.800.7(2) RSMo. This is evidenced by the fact that the "municipally owned electric utility" is always referred to by that specific term in the statute, and the "affected electric supplier" is always referred to generally, since it could be either a rural electric cooperative or a regulated electrical corporation or both if both were present in the annexed area.[10] There is no provision in § 386.800 where the "affected electric supplier" pays the "municipally owned

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[9] Unlike § 394.312 RSMo and § 386.800 RSMo, this is a situation where the statutes can and should be construed in harmony.

[10] Further evidence of this is the fact that only municipally owned utilities are authorized to make the application, and the application is to proceed as with a certificate of public convenience and necessity, as discussed in RMU's initial brief (p. 32).

electric utility" for anything. This also means, as RMU explained in its initial brief, that § 386.800 does not allow the Commission, by implication, to grant an exclusive service territory to IEC. There is no provision in § 386.800 RSMo for IEC to pay anything to the City of Rolla as compensation.

If the General Assembly had intended to grant authority to the Commission to confer an exclusive service area on a rural electric cooperative in a § 386.800 proceeding it would at least have a) mentioned rural electric cooperatives in the portion of the statute describing who can make applications, b) provided some specific reference to the Commission's authority to grant an exclusive service territory to someone other than a municipal utility, and c) included specific language to indicate how the municipally owned electric utility would be compensated for losing the statutory right it has to serve the new structures in the annexed area. The General Assembly did not do any of that. It should therefore be clear that the third of OPC's "possibilities" is not within the authority of the Commission and that § 386.800 RSMo is a remedy for municipally owned utilities *only*.

The fourth possibility mentioned by OPC on page 11 of its brief is simply "some other method of assigning the service territory... ." That description is too vague to allow formulation of a precise response.

Response to Staff's Brief

As with OPC, the Staff concludes that the Commission can assign an exclusive service territory to IEC in this case. For essentially the same reasons discussed above regarding OPC's position, which will not be repeated here, the Staff's argument is without merit. RMU will respond, however, to some of the unique arguments made by Staff.

On page 3 of its brief, Staff looks at the word "territories" and concludes that it means the

Commission can grant a territory to IEC. That is not what the statute means and, when the entire statute is examined in context, it is clear that is not what the General Assembly intended. As noted by Staff, the phrase "for an order assigning exclusive service *territories* within the annexed area" appears in the sentence which gives *only* municipally owned electric utilities the right to apply to the Commission. Therefore, the plain meaning of that sentence is that *the municipally owned electric utility*, if it wishes, can seek *several* exclusive service *territories* within the annexed area. This could come about because the municipal utility only wants to serve some of the areas within the overall annexed area and is content to allow the remainder to be served by a rural electric cooperative or a regulated electrical corporation.[11] Therefore, it should be clear that the General Assembly, in using the word "territories," was merely allowing latitude to the municipally owned electric utility to seek something less than the entire annexed area if it wished, including a request for multiple separate parcels within the annexed area. The single word "territories" does not represent an implied grant of authority to the Commission to *grant* exclusive service territories to anyone other than a municipally owned electric utility.

The fact that there might be more than one "affected electric supplier" within the annexed area (i.e., two rural electric cooperatives, two electrical corporations, or some combination of cooperatives and electrical corporations) also justifies the General Assembly's use of the phrase "assign service territory between affected electrical suppliers inside the annexed area" in subsection 6. Again, this does not empower the Commission to *grant* an *exclusive* service

[11] As has been indicated elsewhere, municipalities generally have the authority to levy license and occupation taxes on "power and light companies" and therefore a municipality might be content to allow the electrical corporation to continue to operate under a franchise. Alternatively, the annexed area might include an area already subject to a territorial agreement between the municipality and the affected supplier, so the municipality would not want to breach that agreement by seeking a transfer.

territory to a rural electric cooperative or an electrical corporation. The General Assembly gave the right to apply for that *only* to a municipally owned electric utility. Indeed, the statute in subsection 6 does not use the words "grant" or "exclusive" in the sentence where it requires the Commission to hold an evidentiary hearing to "assign service territory between affected electric suppliers." It uses the word "assign" instead. This provision was written broadly to encompass multiple factual situations, including one where a municipal utility seeks less than the full area or where there is more than one affected electrical supplier. The language merely attempts to describe the result that could occur where, since the municipally owned utility did not seek a particular area within the annexed area, by default it would be "assigned" by the Commission to the affected electric supplier.

The Staff is also incorrect on page 3 where it concludes the Commission may grant all of the recently annexed area to IEC. This conclusion flies in the face of the plain language of the statute. Neither rural electric cooperatives nor electrical corporations have been given authority by the General Assembly in § 386.800 RSMo to apply to the Commission for an exclusive service area inside a municipality with a municipally owned electric utility. There is no clear language in § 386.800 RSMo, and certainly none cited by the Staff in its brief, that gives the Commission the right to grant an exclusive service territory to a rural electric cooperative. As previously discussed regarding OPC's position, neither OPC nor Staff point to any statutory provision where the municipality receives compensation for being deprived by the Commission of the right to serve the new structures it is *otherwise* allowed to serve under the clear language of subsection 2. *The statute must be read in context.* The context clearly shows the municipality is the *only* entity authorized to apply in the first place under subsection 6, and the municipality is the *only* entity that makes a payment for the transfer of title and operation of the facilities. See,

subdivision (2) of subsection 7. Therefore, the municipality is the only entity entitled to be *granted* an *exclusive* service territory by the Commission under the statute. Other affected electric suppliers may end up with a service territory in an annexed area *by default* as the result of either Commission approval or disapproval of a municipality's application, but it is not by affirmative grant by the Commission, and the territory may not be "exclusive" due to the statutory and case law discussed in ***Farmers'*** and present in § 386.800.2 RSMo.

The Staff is incorrect on page 6 where it says this case is analogous to "binding arbitration." There is absolutely nothing in § 386.800 RSMo which indicates the General Assembly had that in mind. It certainly *could* have given such a role to the Commission in this instance, as it *specifically* did in the type of situation described in § 386.230 RSMo. But this is not a "controversy" where all the parties "agree in writing to submit such controversy to the commission" for binding arbitration. This is a contested case proceeding, not an arbitration. Even suggesting this case is analogous to "binding arbitration" brings about a wholly different and unnecessary set of problems and complications, such as whether the arbitrator can only pick from the choices presented by the parties or is free to fashion a remedy of its own choosing. While the Staff may have had good intentions in making this argument, it does not reasonably advance the inquiry.

The Staff, as with OPC, also reaches the erroneous conclusion that the Commission can somehow authorize IEC to serve "new structures" inside an exclusive service territory. As demonstrated extensively both in this reply brief and the initial brief, this is not the law in this state. The Staff never even mentions the anti-flip flop statutes or subsection 2 of § 386.800 RSMo. Apparently, Staff and OPC overlooked this area of the law in reaching their conclusions.

Response to Brief of Southside Neighbors

The brief of Southside Neighbors is notable in that it at least mentioned some of the other statutes (e.g. § 394.315 RSMo) that must be considered in determining the right of a rural electric cooperative to provide service. The Southside Neighbors are incorrect, however, in concluding on page 8 that ***Farmers' Electric Cooperative***, *supra*, "is not applicable as the current proceedings is (sic) under the jurisdiction of the Public Service Commission." As explained previously, ***Farmers'*** is one of several cases which clearly hold that a rural electric cooperative has no right to supply electric service to new structures in non-rural areas. The even more recent case of ***St. Joseph Light & Power Co. v. United Electric Cooperative and Homestead Cooperative of Maryville, Mo.***, *supra*, is completely consistent with the principles enunciated in ***Farmers'***. Therefore, they must be construed in harmony with the provisions of § 386.800 RSMo.

Southside Neighbors reach some of the same conclusions as OPC and Staff regarding IEC serving "new customers" or drawing different boundary lines, even though they do not explain the basis of their conclusion. (SSN brief, p. 10) These topics have already been addressed by RMU previously and will not be repeated here.

17. Entire Annexation Area Should be Assigned to RMU

The entire annexed area should be assigned to RMU because there is no evidence in the record that would support any other different or smaller defined area being assigned to RMU.

18. Fair and Reasonable Compensation

IEC claims on page 28 that it is entitled to $4,888,353.40 in compensation. It says this includes costs contained in proffered testimony which was expressly rejected by the

Commission. The Commission should not consider material that it has previously rejected.

19. Present Day Reproduction Cost New

On page 30, IEC claims that Mr. Ledbetter was "the only consulting engineer to testify at the hearing." The operative word in that assertion is apparently "consulting" since Mr. Bourne, who testified for RMU, is a Registered Professional Engineer (Ex. 3, p. 1), and so is Mr. Ketter with the Staff. (Ex. 13, p. 1) Mr. Bourne previously was a "consulting" engineer given his prior experience with Black & Veatch in Kansas City, a consulting engineering firm. (Ex. 3, p.1) Therefore, the appellation of "consulting" that IEC bestows on Mr. Ledbetter confers upon him no greater credibility than that of any other engineer.

IEC makes a further attempt on page 31 to portray Mr. Ledbetter as superior to Mr. Bourne or Mr. Ketter by saying neither of the latter "claim to have the depth of experience Mr. Ledbetter has with respect to the estimating of construction and material costs." The personal ability to estimate costs is not the issue before the Commission. The issue is whether the estimated costs Mr. Ledbetter produced for IEC are superior to the estimated costs IEC *itself* provided in discovery. It is significant that nowhere in the evidence did IEC ever say that the estimates of replacement cost that it provided in response to data requests to RMU were incorrect. Instead, after providing those estimates, it sought to change the result by having Mr. Ledbetter apply costs from some project at the Lake of the Ozarks that has nothing to do with IEC or Rolla.

IEC claims on page 32 that Mr. Ledbetter's "superior experience and education" entitles his estimate to greater weight. On paper, Mr. Ledbetter has the same level of education (master's

degree) as Mr. Ketter, who believes as RMU does that Mr. Ledbetter's estimates are misplaced.[12] This issue is not about who has the greater number of college hours. It is about what is the most realistic estimate. The facts are that the estimate that IEC originally provided on replacement cost for its own items, added to the estimate of engineering and right-of-way costs, is the one that the Commission should utilize. That total is $742,131. This is also the position of the Staff. (Staff brief, p. 12)

20. IEC's Office Building

RMU agrees completely with the Staff's position (Staff brief, p. 12-13) on this issue.

IEC's brief merely states that the office building is a "facility within the Area" and was "built on the basis of the plan of intent." (IEC Brief, p. 33) RMU adequately demonstrates in its initial brief (pp. 45-47) why the office building is not subject to transfer in this proceeding. Even if the district office building was built "on the basis of the plan of intent," it really proves nothing of significance in this case.

21. Depreciation Approach

IEC states on page 33 that it does not use an internal accounting or depreciation method designed with § 386.800 RSMo "in mind." That is irrelevant, and it certainly does not give IEC permission to ignore the valuation method specifically dictated by § 386.800 RSMo. Neither does it justify IEC's strange approach to depreciation that was substantially criticized by Mr. Marmouget, a CPA, and discussed in RMU's initial brief (pp. 50-51).

On page 34, IEC says that RMU's depreciation approach should be rejected because "the

[12] Mr. Ledbetter also did not attempt to audit or verify the usage figures supplied to him by IEC. He "only went by the data they gave me." (Tr. 426, 441-442)

approach fails to account for additions or upgrades to the facilities since installation." The Staff makes a similar assertion on page 15 of its brief. That accusation is false. Mr. Bourne used the statutorily-prescribed "reproduction cost new" approach to valuing the facilities. As explained by Mr. Marmouget, a CPA trained in depreciation methods, this approach *compensates* for the improvements. (Tr. 122) Therefore, by taking "today's cost" of the facility, it necessarily includes the "additions or upgrades" IEC and the Staff complain about. See the more detailed discussion in RMU's initial brief at pages 40-43.

22. Depreciation Calculation

For the most part, there is nothing in IEC's brief on this point that was not adequately addressed in RMU's initial brief. The Commission should reject the notions that the age of transformers alone, or the age of the facilities in IEC's entire system over ten counties, are more accurate gauges of the age of the facilities in the Southside area than the unquestioned government data presented by RMU. That data demonstrates when structures in the Southside area were first placed on the tax rolls and thus began receiving electric service from IEC facilities. The tax records for the specific structures in the area pertinent to this case provide the most accurate picture of the age of IEC's facilities in the specific area, since IEC had no better records.

While RMU shares the Staff's concerns with the inappropriateness of IEC's approach, the Staff's brief (p. 14) contains the assertion that RMU's method "not surprisingly" suggests "the most advanced age for the facilities." This implies RMU *intentionally* picked a method designed to produce the *lowest* result. There is no evidence of such intent, and RMU disputes the implication. First, the overall "method" is straight line depreciation which is mandated by the

statute rather than being selected by RMU. Second, when it became apparent that IEC possessed little, if any, relevant information, and could only suggest that RMU search for date brands on the utility poles to determine the age of IEC's facilities to perform a straight line depreciation calculation, RMU sought the most objective and reliable information available. It went to government records showing when subdivisions were platted in the annexed area. When that approach was criticized, RMU went to government records showing when individual structures in the Southside area were placed on the tax rolls. No one has challenged the accuracy of those government records and they still represent the best indication of when IEC first installed its facilities for each structure in the Southside area. There was no manipulation of those records by RMU. Therefore, it is inappropriate for the Staff to suggest RMU's approach somehow lacks credibility because it produces the lowest number, and consequently that the Staff's has greater credibility because it produces a "middle of the road" number. The Commission should examine the integrity, accuracy, and scope of the approach rather than the number it produces. When a transformer was installed does not tell you when a transmission or distribution line was installed.

23. Detachment and Re-integration Costs

There is nothing in IEC's brief on this point that was not adequately addressed in RMU's initial brief.

RMU views the Staff's recommended alternative (Staff brief p. 10) of "competitive bidding" as a possibility, but one that carries the risk of unnecessary complications the Commission can avoid by simply choosing a number supported by the record evidence. Ordering the parties to engage in a competitive bidding process could produce squabbles over the bid specifications and, when received, which is the lowest and best bid. It can also produce

unnecessary delay as the details of the bidding process are negotiated. As evidenced by the disputes which were briefed, if IEC is required to construct new lines, IEC wants to take the opportunity to substantially upgrade the capacity of its electrical conductors from those presently existing in the area, but it wants RMU to pay for that upgrade. (RMU initial brief, p. 55) Simply saying that the matter should be let for bids does not resolve that issue.

RMU's perception is that it would be much simpler for the Commission to determine an exact amount from the record evidence and order that to be paid by RMU to IEC. Essentially, that amount was estimated by IEC in the first place with only a few revisions proposed by RMU.

24. 400 % of Gross Revenues

On page 42, IEC says that it "normalized" the actual revenue for the 12 month period "to represent normal revenue for that period." That is not correct. Mr. Ledbetter *arbitrarily* increased the actual usage to assume 100 percent occupancy of the properties 100 percent of the time. (See RMU's initial brief, p. 60) In other words, there are no vacant apartments or rental properties in the IEC calculation. This is not "normal." The Commission has never adopted such an approach in a rate case for any regulated electric or gas utility. RMU shares the Staff's concern that this attempt at "normalization" by IEC actually produces a "distortion of the normal situation." (Staff brief, p. 17)

On page 42, IEC says § 386.800 RSMo makes "no exception for customers or structures who (or which) may have disappeared, combusted, or gone bankrupt." This is incorrect. The General Assembly specifically directs the Commission in subdivision (3) of subsection 5 to consider a "normalized" amount of revenue which produces a "representative usage." If the General Assembly had intended for the Commission to put blinders on and use only the actual

revenue from the specified period, it would have said that and omitted the normalization requirement.

25. City's Ability to Withhold Payment

IEC failed to address this issue in its initial brief, saying it would address it in the reply brief. (IEC brief, p. 47) Its failure to brief the issue should be treated as abandonment of the issue. ***Glidewell v. S.C. Management, Inc.***, 923 S.W.2d 940, 956[25] (Mo.App. 1996). Any comments it makes in its reply brief on the issue should therefore be disregarded by the Commission.

OPC says at page 13 that by submitting itself to the jurisdiction of the Commission by making the application, RMU has two options when faced with the Commission's order: to accept it or to appeal. Given RMU's position on this point in its initial brief, RMU and the City of Rolla are generally in agreement with OPC on this issue.

Southside Neighbors discuss the Commission's dismissal rule on pages 10-11. The topic under consideration was not really a "dismissal" by Rolla of its application. Mr. Watkins was instead apparently relaying his concerns on the *hypothetical* question of whether the City, as a legislative body like the General Assembly, could be compelled to pass an ordinance authorizing payment for something it deemed unreasonable. As indicated in RMU's initial brief, the City's position is that it will abide by a lawful order of the Commission, so the topic is essentially moot. There certainly is no basis for Southside Neighbors' off-hand statement on page 11 that the application should be dismissed because Mr. Watkins responded to a question with his own thoughts on the subject.

26. Offset for Easement Problems

On pages 16 and 17 of its brief, IEC argues that the transfer should not be approved because there is the possibility that the condition of IEC's easements "will engender collateral litigation against Intercounty members." It is important to examine why that "collateral litigation" (meaning condemnation) might take place.

First, litigation is a possibility solely because IEC did such a poor job of obtaining and then failing to record its easements in the first place. IEC faces the liability right now. Second, the litigation will only come to pass if it is forced on RMU by a landowner's assertion of a claim against RMU. The claim would be that RMU has electrical facilities on the land without a proper easement, which constitutes a trespass. Well, the *only* reason there is not a proper easement is because IEC did not obtain one in the first place. IEC members who were annexed against their wishes may see this as a way to get back at the City and, in fact, some of the residents were motivated enough to challenge the successful annexation in court. *See*, ***City of Rolla v. Armaly***, *supra*. Therefore, the threat is real.

In the footnote on page 17 of its brief, IEC claims that there is no evidence in the record that IEC's policy has been anything other than "successful and efficient." The record evidence – which was never denied by IEC -- was that its easements in the Southside area, to the extent they even exist, were either un-recorded or un-recordable. Applying those facts to the law in its initial brief at pages 61-65, RMU clearly demonstrated why this was a bad business practice for IEC or anyone needing easement rights.

IEC's stance on the easement issue is quite the opposite to what it claims on other issues. It says in the footnote on page 17 of its brief that there is nothing in § 386.800 RSMo requiring a

supplier to conform to any particular land acquisition practices. While that is true, the Commission should note that IEC repeatedly stresses that it conforms to RUS regulations on such things as documenting customer complaints or keeping certain accounting records, or cites those regulations as to the required width of easements. Yet it is strangely silent about conforming with nationally-recognized legal procedures on the acquisition of an easement or the simple ministerial act of recording it.

IEC presents an analogy regarding the easements on page 43 of its brief. IEC says that RMU is the equivalent of the state highway department telling someone whose house is to be condemned that he must pay for moving or demolishing the house so the road bed is smooth. IEC's attempt at an analogy does not quite apply. In IEC's analogy, the homeowner has done nothing affirmatively to create a problem. That does not fit the facts here, where IEC maintained a bad business practice for decades by either failing to obtain easements where it placed facilities, failing to obtain recordable easements, or failing to record easements it did obtain. Therefore, a more appropriate analogy, using the same general approach, is if the highway department seeks to condemn a private road owned by the homeowner, but discovers the homeowner has intentionally placed several land mines in the roadway. While the homeowner may be able to drive around these mines because he knows where they are, they still present a future danger to subsequent drivers. RMU is saying that since there appears to be no practical method to force the landowner to remove the land mines under § 386.800 and guarantee safe passage to those using the road in the future, the landowner should pay now for the estimated cost of damages and repairs when those mines explode in the future.

IEC attempts to mix apples and oranges in a discussion on pages 43-44. IEC claims that the net payment to IEC for the assets themselves (which does not include the 400 percent of

gross revenues) would be only $66,792, which IEC implies is absurdly low. It goes on to claim that the $400,000 offset to deal with the easement problems would result in IEC compensating RMU to take over the IEC facilities in the area. The math may be correct but the logic is not. These are two separate issues. RMU has no qualms about paying the $742,131 which is the statutorily prescribed PDRCN[13] amount for the facilities themselves, less straight line depreciation of $675,339. That is what produces the $66,792 number. Obviously, it is the age of the facilities in the area that has the biggest impact on the valuation of the assets themselves. What RMU objects to is having also to assume the liability for these bad or non-existent easements that are the sole creation of IEC's management practices. RMU has conservatively estimated the liability at $400,000. That amount is an offset to the entire amount of "fair and reasonable" compensation RMU would be required to pay to IEC in this case, not just the amount attributable to the assets alone. If IEC had followed nationally-recognized practices in obtaining and recording easements in the first place, this issue would not even exist. The previous analogy about the road thus highlights the situation. Would a court in a condemnation case force the highway department to pay a premium price for a road full of land mines? Not likely.[14]

The road analogy can be taken one step further. IEC complains on page 17 of its brief that the "collateral litigation" to be "engendered" by the transfer should be taken into account by

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[13] Present day reproduction cost new.

[14] IEC says on page 44 that there is nothing in the statute that permits a reduction in the calculation of "fair and reasonable compensation." RMU submits that while there is no section which specifically permits a deduction or offset, it is inherent in the concept of "fair and reasonable compensation." Forcing a municipality to accept these liabilities without compensation when it merely seeks to exercise a statutory right to acquire assets within its corporate boundaries is neither fair nor reasonable.

the Commission in its public interest determination. Using the road analogy, this is the land owner who placed the land mines in the roadway saying that because there will be explosions and lawsuits when people hit them in the future, the highway department should not be allowed to condemn his roadway.

The Staff allies itself with IEC on this issue and makes some of the same arguments IEC does. (Staff brief, pp. 20-21) The Staff, however, claims "the statute does not seek to compensate Intercounty for the value, whatever that may be, of any of its existing easements." RMU disagrees with that legal conclusion and notes that Staff's assertion is also contrary to the evidence. First, the statute clearly allows IEC to claim a value for its easements.[15] The statute says the Commission is to determine the value of the "properties and facilities serving the annexed areas." § 386.800.5(1) RSMo. Second, in its responses to RMU's data requests concerning the PDRCN calculation, IEC made no assertion of the value of easements. However, IEC *added* $195,000 through the rebuttal testimony of Mr. Ledbetter for that and other right of way costs. (See RMU initial brief, p. 44) In general, RMU did not challenge that addition. Therefore, the $195,000 and IEC's original estimate of $547,131 make up the $742,131 number being advocated by Staff and RMU for PDRCN. Therefore, IEC has claimed a PDRCN value for the easements in the annexed area as a part of the $195,000 amount sponsored by Mr. Ledbetter, which has not been challenged. RMU has not objected to the $195,000 figure, so *RMU will be paying the value IEC has assigned to those easements* if the Commission orders a payment utilizing at least the $742,131 number as the PDRCN.

Therefore, the Staff is incorrect when it claims on page 20 that because IEC could not

[15] As in its initial brief, RMU uses this term generically because it could not locate any valid easement that IEC obtained in the Southside area.

assert a value for them, RMU cannot claim an offset for something "never valued in the first place." IEC was responsible for placing a value on the easements "in the first place." It did not value them in data requests, but it did value them in its rebuttal testimony. RMU is paying for the easements, and is certainly entitled to claim an offset for the identified problems. RMU would also note that IEC has claimed costs for easements in its re-integration cost estimates.

The Staff claims there is no certainty any of the estimated costs will materialize. (Staff brief, p. 20) RMU has to agree with that assertion because that is the very essence of an estimate. It does not logically follow, however, that just because the cost is estimated, there is little or no possibility the event will occur. Although the Commission naturally prefers to deal with actual numbers, it has to deal with estimates, and base rates on estimates, as a normal part of its official functions. For example, no one really knows how much it will cost to decommission a nuclear power plant, but the Commission allows rates to be charged for that based on estimates. See § 393.292 RSMo.

27. Testing of IEC Equipment for PCBs

There is nothing in either IEC's brief or Staff's brief on this point that was not adequately addressed in RMU's initial brief.

28. Joint Use Fees

There is nothing in IEC's brief on this point that was not adequately addressed in RMU's initial brief. RMU agrees with Staff that there was no evidence presented on this issue and therefore no amount should be included. The Staff's attempt to explain what these fees are and how they are set (Staff brief p. 22) is extra-record and therefore should be disregarded by the Commission.

29. Equity Owed to IEC Members ("Patronage")

There is nothing in IEC's brief on this point that was not adequately addressed in RMU's initial brief. RMU agrees with the Staff's position. (Staff brief, p. 22-23)

30. IEC Wholesale Power Costs

IEC has inappropriately taken the opportunity in its brief on page 47 to cite to material which was specifically rejected by the Commission as evidence in this proceeding. See, "Order Regarding Motion to Compel and Motion for Leave to File Supplemental Rebuttal Testimony" issued December 1, 2000. The Commission should not tolerate this and should disregard IEC's argument on this issue.

31. Other Issues

32. Issues Raised by Southside Neighbors/Letters

Public Counsel's brief on page 2 claims that the testimony from the local hearing and letters introduced as evidence should be considered by the Commission "in determining what best suits the public interest." IEC and the Southside Neighbors take the same position. RMU respectfully submits that the testimony and letters more accurately reflect the private interests of those individuals[16], rather than "the public interest." Only the 286 IEC customers in the Southside area received a mailed notice of the local hearing. Attendance at the local hearing also reflected a concerted and planned effort by IEC. The testimony and letters reflect opinions of people who were likely opposed to the annexation in the first place. Many of the witnesses at the public hearing did not seem to understand that they would experience a 25 % rate reduction on

[16] RMU notes there is duplication present here. Some individuals even made their opinions known three times (letters, local public hearing, Southside intervenors).

RMU's system. Many had never been customers of RMU and therefore really had no objective basis on which to reach a conclusion as to the service quality. Hardly any focused on the larger issues of dual overhead electric lines in neighborhoods or the cost inefficiency associated with that. In short, the letters and testimony generally reflect only short-term, personal preferences. As explained in the "Public Interest" section of this brief, and as pointed out by the Staff, the "public interest" encompasses much more than just private, short-term interests.

33. Transfer Within 90 Days

IEC failed to address this issue in its initial brief, saying it would address it in the reply brief. (IEC brief, p. 47) Its failure to brief the issue should be treated as abandonment of the issue. ***Glidewell v. S.C. Management, Inc.***, 923 S.W.2d 940, 956[25] (Mo.App. 1996). Any comment IEC makes in its reply brief on the issue should therefore be disregarded by the Commission.

Southside Neighbors offer an opinion on the subject with no explanation of their rationale. (SSN brief, p. 12) Their opinion is contrary to the plain language of the statute, as discussed in RMU's initial brief on p. 71.

Although the discussion is not exactly lucid, RMU generally agrees with the conclusions expressed by OPC on pages 11 and 12 of its brief to the extent OPC is saying the Commission is not required to order the transfer of the facilities to be completed within 90 days. It appears that OPC believes, as does RMU, that the Commission is given latitude by the statute to order the transfer to take place over a longer period of time if the circumstances warrant, as they would in this case. RMU does not understand the position taken by OPC in its brief with regard to when the order would "become final" for purposes of appeal. RMU believes "finality" of Commission

orders is a legal concept and not something to be determined by the Commission itself, so it has no comment on OPC's position on that aspect.

The Staff opines on page 5 of its brief that the Commission could simply "authorize" but not "order" the transfer, and therefore Rolla "would be free to decide whether or not to go forward with it." Although it doesn't say so, the Staff is apparently drawing on its experience with Commission orders in financing cases where instead of "ordering" an electrical corporation to issue common stock, for instance, the Commission "authorizes" the company (but does not compel it) to do what was sought in the application. RMU observes that the situation here is different. This is not a situation in which the applicant simply needs the Commission's "permission" to do something. This is a situation in which the Commission, if the underlying conditions are met, should affirmatively order the transfer of the facilities. In that fashion, there would be an order of the Commission specifically directing the transfer. That order can then be subject to the enforcement mechanisms applicable to any other Commission order.[17]

34. Objection to Use of Summary

RMU has not located any place in the briefs of other parties where they addressed this issue, so RMU has no reply.

35. Violation of Undue Influence Rule

RMU has not located any place in the briefs of other parties where they addressed this issue, so RMU has no reply.

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[17] As indicated in RMU's initial brief (p. 9), there was an enforcement problem with the General Assembly's earlier statutory attempt to allow municipalities to take over rural electric cooperative facilities after annexations. ***Missouri Public Service Company v. Platte-Clay Electric Co-op Inc.***, 407 S.W.2d 883,891 (Mo. 1966).

36. Conclusion

The Commission should approve the application of Rolla Municipal Utilities and order the transfer of the facilities in accordance with the revised feasibility study presented by the City and the positions of RMU as expressed herein. RMU has demonstrated why this is in the public interest. IEC has not demonstrated any valid reason why the transfer would be contrary to the *public* interest.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was served upon the following counsel of record in this proceeding this 9th day of February, 2001, by either hand delivery or placement with the U.S. Postal Service, first class postage prepaid:

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