**STATE OF MISSOURI**
**PUBLIC SERVICE COMMISSION**
**JEFFERSON CITY**
**December 1, 2000**

**CASE NO: EA-2000-308**

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**Enclosed find certified copy of an ORDER in the above-numbered case(s).**

**Sincerely,**

Dale Hardy Roberts

**Dale Hardy Roberts**
**Secretary/Chief Regulatory Law Judge**

# BEFORE THE PUBLIC SERVICE COMMISSION

# OF THE STATE OF MISSOURI

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| In the Matter of the Application of the City of Rolla, Missouri, for an Order Assigning Exclusive Service Territories and for Determination of Fair and Reasonable Compensation Pursuant to Section 386.800, RSMo 1994. | ) ) ) ) ) | **Case No. EA-2000-308** |

## ORDER REGARDING MOTION TO COMPEL AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL REBUTTAL TESTIMONY

On October 29, 1999, the City of Rolla, Missouri (City or Rolla), filed an application with the Commission seeking an order pursuant to Section 386.800, RSMo 1994,[1] assigning exclusive service territories and determining fair and reasonable compensation. According to its application, the area concerned is a tract containing approximately 1,350 acres, recently annexed by the City, and presently provided electric service by Intercounty Electric Cooperative Association (Intercounty). By its order issued on March 29, 2000, the Commission extended the time for decision herein to March 15, 2001, and set an evidentiary hearing for December 4 through 7, 2000.

## Intercounty's Motions to Compel Discovery:

On November 14, 2000, having fully complied with the Commission's rule, Intercounty filed its Motion to Compel Responses to Data Requests and Supporting Suggestions. On November 17, Intercounty filed its Second Motion to Compel Responses to Data Requests. Rolla responded on

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[1] All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 1994.

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November 21, 2000, and Intercounty replied on November 27. On November 29, Rolla filed a further response to Intercounty's reply.

In its first motion, Intercounty states that it served its data requests (DRs) 82, 84 and 115 on Rolla on May 9, 2000. Rolla objected to these DRs. On June 19, 2000, Intercounty served DR 160 on Rolla; Rolla objected. In its Second Motion, Intercounty states that it served its DRs 181, 183 and 184 on Rolla on November 3; Rolla objected to these DRs as well.

The DRs in question are as follows:

DR 82: Attach to your answers to these data requests a copy of any lease, or contract to purchase the generation equipment.[2]

DR 84: Is the acquisition of the trailer mounted generators part of RMU's long range plan to address future energy demand? If so, attach a copy of the plan to your responses and state when the long range plan was developed and by whom.[3]

DR 115: Will the trailer mounted units be used to generate revenue for RMU? If so:
a. How will the units be contracted?
b. Who will do the contracting?
c. Will any revenue received be used to lower or offset costs to the customers of RMU?
d. What other potential benefits will the customers of RMU realize if the units are placed in service?[4]

DR 160: Provide a copy of the business plan referred to in Mr. Watkins' written testimony on page 19, line 7 and any work papers used in its formulation to date.

DR 181: Have you entered into any wheeling agreement or arrangement with any electric supplier, or authorized broker or agent of an electric supplier? If so, state the terms of the arrangement or attach a copy of the written wheeling agreement(s).

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[2]Rolla produced a copy of the lease as presented to the City Council on April 23, 2000, but objected to producing the final document.

[3]Rolla answered "yes" and then objected to producing the plan.

[4]Rolla answered "yes" and then objected to subparts a through e. The parties have not supplied the text of subpart e.

DR 183: Identify each wholesale and alternative energy supplier with whom you have entered [into] an agreement or other arrangement for purposes of acquiring base load energy/power, back up power or an alternative energy supply. For each supplier identified, attach a copy of your agreement with the supplier or any document which sets out the terms of the arrangement or agreement. If no such document exists, describe the terms of such agreements or arrangements in your response to this data request.

DR 184: Provide copies of any contracts or agreements between the City of Rolla, or RMU, and the Grand River Dam Authority (GRDA), all correspondence between you and GRDA regarding the contracts and agreements, and all your internal correspondence and memoranda concerning the contracts and agreements.

The parties have not provided a copy of any of Rolla's objection letters.[5] Presumably, the objections were all timely made as Intercounty does not complain that any of them were not timely. Intercounty did set out in its motions the text of Rolla's answer or objection to three of the DRs in question and, for the others, a summary of Rolla's objections. The chart below sets out the objections raised to each of the DRs in question in Rolla's initial objection letters, insofar as the pleadings reveal this information:

| Data Request: | Objection: |
|---|---|
| DR 82 | A closed record under Section 610.021(18), RSMo Supp 1999. |
| DR 84 | A closed record under Section 610.021(18), RSMo Supp 1999. |
| DR 115 | A closed record under Section 610.021(18), RSMo Supp 1999. |
| DR 160 | A closed record under Section 610.021(18), RSMo Supp 1999. |
| DR 181 | Irrelevant and a closed record under Section 610.021(18), RSMo Supp 1999. |

[5]Because the DRs were served on three separate days, presumably there were three separate objection letters. Rolla has attached a letter of July 12 to its response, but it is not clear whether this was one of the objection letters required by Commission rule. On balance, it appears that it was not.

DR 183 Irrelevant and a closed record under Section 610.021(18), RSMo Supp 1999.

DR 184 Irrelevant and a closed record under Section 610.021(18), RSMo Supp 1999.

## 1. Discovery in Commission Proceedings:

Discovery is available in cases before the Commission on the same basis as in civil cases in circuit court. 4 CSR 240-2.090(1). The same time limits and sanctions apply. *Id.; and see* St. ex rel. Arkansas Power & Light Co. v. Missouri Public Service Com'n, 736 S.W.2d 457, 460 (Mo. App., W.D. 1987) ("This court holds the PSC may impose sanctions pursuant to Rule 61.01."). Thus, parties may freely make use of depositions, written interrogatories, requests for production, and requests for admissions. *Id.*

In addition to the traditional instruments of civil discovery, parties before the Commission may employ the data request. A data request is "an informal written request for documents or information, which may be transmitted directly between agents or employees of the commission, public counsel or other parties to a proceeding before the commission." 4 CSR 240-2.090(2). Responses to data requests are due within 20 days of receipt of the request, but need not be made under oath nor in any particular format. *Id.* Objections are due within ten days of the receipt of the request. *Id.* Sanctions for noncooperation are the same as those applicable to other forms of discovery. *Id.*

The scope of discovery in proceedings before the Commission is the same as in civil cases generally under Rule 56.01(b)(1), Mo. R. Civ. Pro., which provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and

> location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The various privileges apply to discovery in Commission proceedings just as they do in circuit court. 4 CSR 240-2.130(5). The party raising these defenses has the burden of establishing them. Hutchinson v. Steinke, 353 S.W.2d 137, 144 (Mo. App. 1962).

## 2. Relevance:

Turning to the matter at hand, Rolla contends in its response of November 21, 2000, that it need not produce the documents in question because they are irrelevant. In fact, Rolla raised a relevancy objection only to three of the seven DRs. "Relevant" evidence is that which tends to prove or disprove a fact of consequence to the pending matter. W. Schroeder, 22 Missouri Practice-Missouri Evidence, § 401.1(a) (1992). Relevance must be determined by reference to the pleadings. *See* St. ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 327-28 (Mo. App., E.D. 1985). The discovery of irrelevant information is not permitted. Rule 56.01(b)(1).

Intercounty addressed relevance only with respect to DR 160, noting that one of Rolla's witnesses referred to the business plan in his testimony. Rolla, in its response of November 29, states that it will delete the sentence in question when it offers the prefiled testimony at the hearing. However, DR 160 is not one of the three DRs to which Rolla raised a relevancy objection.

It is not apparent to the Commission, after review of the text of DRs 181, 183 and 184, that the information and documents sought by Intercounty are relevant. As noted, relevance is determined by reference to the pleadings. St. ex rel. Anheuser v. Nolan, *supra*. Rolla's

Application, filed on October 29, 1999, prays that the Commission, pursuant to Section 386.800, assign a recently annexed tract as Rolla's exclusive service territory and, in conjunction therewith, determine the amount of compensation due to the affected supplier, Intercounty. In its responsive pleading, filed on December 3, 1999, Intercounty denied "each and every" allegation contained in Rolla's petition and demanded a hearing on each allegation.

Section 386.800 authorizes a municipally owned electric utility to apply to the Commission for "an order assigning exclusive service territories within the annexed area and a determination of the fair and reasonable compensation amount to be paid to the affected electric supplier under subsection 5 of this section." Section 386.800.6. The Commission "shall hold evidentiary hearings to assign service territory [sic] between affected electric suppliers inside the annexed area and to determine the amount of compensation due any affected electric supplier for the transfer of plant, facilities or associated lost revenues between electric suppliers in the annexed area. The commission shall make such determinations based on findings of what best serves the public interest and shall issue its decision by report and order." *Id.* In reaching its decision, the statute directs the Commission to consider the following factors:

> (1) Whether the acquisition or transfers sought by the municipally owned electric utility within the annexed area from the affected electric supplier are, in total, in the public interest, including consideration of rate disparities between the competing electric suppliers and issues of unjust rate discrimination among customers of a single electric supplier if the rates to be charged in the annexed areas are lower than those charged to other system customers; and
>
> (2) The fair and reasonable compensation to be paid by the municipally owned electric utility, to the affected electric supplier with existing system operations within the annexed area, for any proposed acquisitions or transfers; and

(3) Any effect on system operation, including, but not limited to, loss of load and loss of revenue; and

(4) Any other issues upon which the municipally owned electric utility and the affected electric supplier might otherwise agree, including, but not limited to, the valuation formulas and factors contained in subsections 4, 5 and 6, of this section, even if the parties could not voluntarily reach an agreement thereon under those subsections.

Section 386.800.7.

The information and documents sought by Intercounty in DRs 181, 183 and 184 do not appear to be relevant either to the pleadings herein or to any issue within the scope of the Commission's authority under Section 386.800. Intercounty has not pleaded any allegations regarding wheeling arrangements, wholesale or alternative energy suppliers, or the Grand River Dam Authority. In its Statement of Position, filed on November 21, 2000, Intercounty suggests only that the information and documents sought by these DRs might reveal "negative effects on customer rates and service reliability in the [annexed] Area." This is too remote a possibility to support the discovery sought by Intercounty.

Rolla's relevancy objection to DRs 181, 183 and 184 will be sustained.

### 3. Closed Records under Section 610.021(18), RSMo Supp. 1999:

With respect to the four remaining DRs at issue, Rolla contends that the information and documents sought are undiscoverable because they are closed records pursuant to Section 610.021(18), RSMo Supp. 1999, which provides:

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 the 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. However, this exception shall not be construed to limit access to other

> records of a municipal electric utility, including but not limited to the names and addresses of its business and residential customers, its financial reports, including but not limited to its budget, annual reports and other financial statements prepared in the course of business, and other records maintained in the course of doing business as a municipal electric utility. This exception shall become null and void if the state of Missouri fails to implement by December 31, 2001, electric restructuring through the adoption of statutes permitting the same in this state.

Intercounty makes a three-point argument in support of its discovery. First, that the Public Service Commission is not the public and has the authority to require disclosure of records closed under Section 610, RSMo. St. ex rel. Jackson County Grand Jury v. Shinn, 835 S.W.2d 347 (Mo. App., W.D. 1992). Second, that Section 386.800, at .7 and .8, specifically authorizes the Commission "to consider any information that will bear on future service, rates and costs[.]"[6] Third, that the Commission has issued a protective order in this case to protect sensitive information from public disclosure and that "the need to keep these records closed does not exist [any longer]."

Rolla, in response to Intercounty's three points, argues that Intercounty misunderstands the holding of Jackson County Grand Jury, *supra*. Rolla suggests that better guidance is found in St. ex rel. State Board of Pharmacy v. Otto, 866 S.W.2d 480, 484-85 (Mo. App., W.D. 1993), in which the Administrative Hearing Commission was held to have exceeded its authority in ordering the Board of Pharmacy to divulge closed records to the respondent in a license discipline proceeding. Next, Rolla contends that the grant of authority to the Commission in Section 386.800, does not

[6]The quotation is from Intercounty's response of November 14, 2000, and not from the statute therein cited.

extend to requiring Rolla to divulge closed records. However, Rolla cites no authority for this proposition. Finally, Rolla points out that Intercounty's third point is without merit because Chapter 610, RSMo, does not include any exception for proceedings with protective orders in place. *See* St. ex rel. State Board of Pharmacy v. Otto, *supra*.

The Commission concludes that Rolla is correct that this case is controlled by the holding of St. ex rel. State Board of Pharmacy v. Otto, *supra*, and two of Intercounty's three points are thereby resolved. Jackson County Grand Jury, *supra*, relied upon by Intercounty, holds only that closed records are accessible to a grand jury. The present case is more like Otto than Jackson County Grand Jury. Here, as in Otto, a party litigant seeks to obtain closed records through discovery for its own private purposes. In Jackson County Grand Jury, on the other hand, a governmental body sought the closed records for governmental purposes. The cases are readily distinguishable and Otto controls the present situation. The Commission concludes that its discovery power does not authorize parties litigant to obtain records closed pursuant to Section 610.021(18), RSMo Supp. 1999, whether or not a protective order has been adopted to prevent further disclosure of those records.

Intercounty also argues that the Commission's authority to hear and determine this controversy under Section 386.800 includes the authority to require Rolla to divulge records closed under Section 610.021(18), RSMo Supp. 1999. Rolla opposes this argument; however, neither party cites any helpful authority.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent, if possible, and to consider the words used in their plain and ordinary meaning. Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31

(Mo. banc 1988). Likewise, it is a rule of construction that the legislature is presumed to know the state of the law when enacting a statute. Scoggins v. Timmerman, 886 S.W.2d 135, 137 (Mo. App., W.D. 1994). Subsection (18) of Section 610.021 was created by the legislature in 1995. 1995 Mo. Laws, H.B. No. 1095. Section 386.800, on the other hand, was enacted in 1991. 1991 Mo. Laws, S.B. No. 221. Thus, the legislature must be presumed to have enacted subsection (18) with Section 386.800 in mind. Given that the subject matter of subsection (18) makes it likely that it would be raised in proceedings before the Commission under Section 386.800, the legislature's failure to include a specific exception for such proceedings suggests rather strongly that the legislature intended such records to be closed for the purpose of such Commission proceedings. The Commission concludes that Section 386.800 does not authorize the Commission to require Rolla to divulge the closed records herein at issue.

## 4. Waiver:

In its reply filed November 27, 2000, Intercounty argues that the privilege created by Section 610.021(18), RSMo Supp. 1999, is not absolute and may be waived; and further, that Rolla did waive it as to its business plan, sought by DR 160, by the reference to it made by Rolla's witness, Watkins, at page 19 of his prefiled direct testimony. Rolla responds, in its response of November 29, 2000, that testimonial waiver does not apply to records closed under Section 610.021(18), RSMo Supp. 1999, and that, as the testimony in question has not yet been either offered or received, that it will simply strike the reference in question when it offers Watkins' testimony at the hearing.

Although Rolla criticizes Intercounty for failing to support by citation to authority its argument that the privilege created by Section 610.021(18), RSMo Supp. 1999, can be waived, Rolla itself fails to

cite any authority supporting its contrary contention. One respected commentator is not certain whether records closed pursuant to Section 610.021, RSMo Supp. 1999, are privileged at all:

> Many kinds of records are excluded from the so-called "sunshine law" and may be "closed." However, such records "shall be available * * * to courts, administrative agencies, law enforcement agencies, and federal agencies for purposes of prosecution, sentencing, parole consideration, criminal justice employment, child care employment, nursing home employment, and to federal agencies for such investigative purposes as [are] [sic] authorized by law * * *." It is not clear whether any privilege exists as to uses not among those specified.

W. Schroeder, 22 Missouri Practice--Missouri Evidence, § 508.2. Unlike Professor Schroeder, the Commission is certain that records closed under Section 610.021(18), RSMo Supp. 1999, at least, are privileged. *See* Otto, *supra*. However, the Commission also agrees with Intercounty that this privilege may be waived by its holder. *See* Schroeder, *supra*, § 501.1; *and see* Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 63-64 (Mo. banc 1999) (physician-patient privilege may be waived in a variety of ways by the patient); State v. Booth, 11 S.W.3d 887, 894 (Mo. App., S.D. 2000) (constitutional privilege against self-incrimination may be waived by defendant); State v. Timmons, 956 S.W.2d 277, 285 (Mo. App., W.D. 1997) (attorney-client privilege may be waived by client).

In Suzuki, *supra*, the Missouri Supreme Court discussed how a waiver may be accomplished. One way is by "'an act showing a clear, unequivocal purpose to divulge the confidential information.'" Suzuki, 996 S.W.2d at 63, *quoting* Cline v. William H. Friedman & Associates, Inc., 882 S.W.2d 754, 761 (Mo. App., W.D. 1994). Another is to put the confidential matter at issue, either in the pleadings or otherwise. Suzuki, *supra*. In the testimony in question, Rolla's witness Dan A. Watkins stated:

> Even though the particulars are confidential, I can attest to the fact that the Board has been negotiating

> for power supply and formulating a business plan that will allow for continued stability for the next several years, and may actually be able to reduce rates in the future.

Prefiled Direct Testimony of Dan A. Watkins, p. 19, lines 5-8. Watkins' testimony is hardly an act that shows a "clear and unequivocal purpose" to divulge the confidential information; indeed, it appears to have been inadvertent. Nonetheless, Watkins placed the business plan at issue by testifying that its contents, if known, would support Rolla's application before this Commission. Watkins is the General Manager of Rolla Municipal Utilities (RMU) and Rolla's counsel presumably was aware of the contents of Watkins' testimony when he filed it. They are able to waive the privilege on behalf of Rolla. The Commission concludes that Rolla has, in fact, waived the privilege created by Section 610.021(18), RSMo Supp. 1999, with respect to the business plan that is the subject of DR 160. By relying on the business plan to support its position, Rolla has placed it in issue. Fundamental fairness requires that Intercounty be given a reasonable opportunity to examine the plan to determine whether or not it actually supports Rolla's application.

This conclusion is not the end of the analysis, however. Rolla points out that Watkins' testimony has never yet been offered and received into the record of this matter and now avers that it will not offer the language in question. If the business plan reference never becomes part of the record of this matter, Intercounty would seem to have no need to refute it and, thus, no need to examine the plan in order to prepare to refute it. The Commission concludes that, under the circumstances, Rolla need not produce the business plan.

For the reasons discussed above, Intercounty's motions to compel are denied.

## Intercounty's Motion for leave to file Supplemental Rebuttal Testimony:

On November 16, 2000, Intercounty moved for leave to file a supplement to the Rebuttal Testimony of its witness, Vernon Strickland. Intercounty averred that the new testimony concerned matters which Mr. Strickland could not address at the time he filed his original testimony. On November 22, 2000, Rolla replied in opposition to Intercounty's motion. Rolla questions Intercounty's assertion that the matter contained in the proposed supplemental testimony could not have been filed sooner. Rolla suggests that, by this eleventh hour filing, Intercounty is improperly attempting to delay the scheduled hearing in this case. Rolla further complains that, if Intercounty's motion is granted, it will have no opportunity to conduct discovery to refute the new material. Rolla suggests that the proposed supplementary information may be dealt with during cross examination or in the briefs.

After consideration of the arguments raised by both parties, the Commission will deny Intercounty's motion. As Rolla points out, if Intercounty's motion were granted, then Rolla must be accorded an opportunity to respond. The present procedural schedule makes that unfeasible. Intercounty may move to preserve the proposed supplemental testimony as an offer of proof if it so desires.

**IT IS THEREFORE ORDERED:**

1. That the Motions to Compel Responses to Data Requests filed herein by Intercounty Electric Cooperative Association are denied.

2. That the Motion for Leave to file Supplemental Rebuttal Testimony filed herein by Intercounty Electric Cooperative Association is denied.

3. That this order shall become effective on December 10, 2000.

**BY THE COMMISSION**

**Dale Hardy Roberts**
**Secretary/Chief Regulatory Law Judge**

( S E A L )

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge by delegation
of authority pursuant to Section 386.240,
RSMo 1994.

Dated at Jefferson City, Missouri,
on this 1st day of December, 2000.

FYI: To Be Issued By Dele ion

ALJ/Sec'y: Thompson / Pape

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CASE NO.

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Murray, Commissioner

Schemenauer, Commissioner

Simmons, Commissioner

Please

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**STATE OF MISSOURI**
**OFFICE OF THE PUBLIC SERVICE COMMISSION**

**I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.**

**WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 1st day of December 2000.**

Dale Hardy Roberts

**Dale Hardy Roberts**
**Secretary/Chief Regulatory Law Judge**