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December 13, 1999

FILED[2]
DEC 13 1999
Missouri Public Service Commission

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

RE: EA-2000-308 - Application of City of Rolla pursuant to § 386.800 RSMo

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and fourteen copies of the Reply to Intercounty's Response and Intercounty's Motions.

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

Sincerely yours,

Gary W. Duffy

Enclosures
cc w/encl:
Office of Public Counsel
Office of the General Counsel
Mark W. Comley
Michael R. Dunbar
Dan Watkins

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 TO INTERCOUNTY'S RESPONSE AND INTERCOUNTY'S MOTIONS

Comes now the City of Rolla, Missouri, ("the City"), by and through Rolla Municipal Utilities ("RMU") and its counsel, pursuant to 4 CSR 240-2.080(12) and for its response to "Intercounty Electric Cooperative Association's Response to Application," which contains a "Motion to Dismiss" and several "Contingent Motions" respectfully states as follows:

RESPONSE TO MOTION TO DISMISS

1. Intercounty Electric Cooperative Association ("Intercounty") presents a Motion to Dismiss on page 1 of its response. Intercounty states that "there is no allegation that a request [to extend the negotiation period] was filed with, and approved by, the Public Service Commission. In the absence of such request, Intercounty submits that the extended negotiating period was invalid under the statute." Intercounty claims that in the absence of such a request, RMU's application was not timely filed.

2. RMU pled in paragraph 15 of its application that "There was a mutually agreed extension of the original 180 day time period to continue the negotiations." Subsection 4 of § 386.800 RSMo provides that "The time period for negotiations allowed under this subsection

may be extended for a period not to exceed one hundred-eighty days by a mutual agreement of the parties and a written request with the public service commission."

3. RMU and Intercounty mutually determined that an extension of their negotiations would be sought. Intercounty delegated the task of filing the request to RMU. Counsel for RMU inquired of the Chief Regulatory Law Judge of the Commission as to what sort of "written request" the Commission desired in this situation and was orally advised that a letter would be appropriate and sufficient. Such a letter, a copy of which is attached as **Appendix A**, was submitted to the Commission on March 3, 1999, as the receipt stamps on **Appendix A** attest. The Commission can also take official notice of its own records that this request was timely filed. The Commission never issued any order denying the request. The statute does not require the Commission to take any formal action. The statute contemplates that the parties will continue to negotiate if they make such a mutual request unless the Commission, for some reason, forbids it. As shown in **Appendix A**, a copy of that letter went to Mr. Strickland, Intercounty's General Manager, and to Mr. Gladden, Intercounty's counsel. Neither registered any objection to the contents of the March 3, 1999 letter or (to the knowledge of RMU) made any filing at the Commission to contest the extension. Instead, Intercounty's representatives continued to meet with representatives of RMU and the City of Rolla after March 7, 1999, on several occasions, and continued to negotiate matters concerning a possible territorial agreement. Intercounty thus represented by the actions and words of its agents and employees that it agreed to extend the negotiating period. RMU relied upon those actions and words in continuing to negotiate and make proposals on its part. As proof that Intercounty represented that it intended to extend the negotiation period, reference can be made to a letter sent to RMU on April 22, 1999, by the General Manager of Intercounty which said "The time line for negotiating an

agreement is rapidly telescoping down." A copy of this letter is attached as **Appendix B.** Therefore, Intercounty is estopped from making any argument here that the negotiation period was not extended by mutual agreement. The General Assembly obviously believed that it was in the public interest to allow sufficient time for the parties to negotiate on these matters. The position of Intercounty on this topic as reflected in its Motion to Dismiss is contrary to its words, deeds and actions and the public interest.

4. The Commission should reject Intercounty's Motion to Dismiss.

RESPONSE TO CONTINGENT MOTION TO EXTEND TIME FOR DECISION AND REQUEST FOR EVIDENTIARY HEARING

5. Intercounty presents on page 2 a motion to extend the 120 day time period set by statute for a proceeding of this nature. Subsection 6 of § 386.800 RSMo provides that "Unless otherwise ordered by the commission for good cause shown, the commission shall rule on such applications not later than one hundred twenty days after the application is properly filed with the secretary of the commission." Intercounty states that it anticipates considerable discovery. Intercounty also requests an evidentiary hearing "on each and every allegation in Rolla's application."

6. RMU made essentially the same request of the Commission to extend the 120 time period in its application. RMU also believes there will be extensive discovery of issues surrounding the amount of compensation RMU will be directed to pay Intercounty. The Commission will need adequate and detailed factual information about Intercounty's system before it can make such a determination. In a prior similar proceeding, the Commission indicated it would not undertake such discovery on its own. As a result, RMU served Intercounty's then-counsel (Mr. Gladden) with approximately 30 data requests by mail on the

same day this application was filed. Intercounty did not provide RMU with any notice under 4 CSR 240-2.090(2) within ten days that it would not respond to those data requests within 20 days. On November 29, 1999, counsel for RMU sent a message by facsimile to Mr. Gladden, informing him that Intercounty's responses were late and inquiring when responses could be expected. No response was received from Mr. Gladden. Intercounty's current counsel, Mr. Comley, informed RMU's counsel orally on December 6, 1999, that responses should be expected on or before December 23, 1999. Intercounty's counsel has subsequently confirmed that in writing.

7. In view of the extended time that it is taking Intercounty to respond to the initial data requests in this proceeding, the high likelihood that there will be follow-up data requests and other forms of discovery, and the litigation positions being taken by Intercounty in its motions, RMU shares Intercounty's belief that it is unrealistic to expect that this case can be processed adequately by the Commission in a fully litigated setting, and there be time for briefs and adequate Commission deliberation, by February 26, 2000. RMU cannot realistically be expected to present a direct case on how much it believes the facilities of Intercounty it desires to purchase are worth under the terms of the statute until Intercounty responds to discovery requests designed to obtain facts on which RMU can make such determinations. RMU had no means to compel such discovery from Intercounty prior to the commencement of this proceeding.

8. In a situation where both sides to a controversy tell the Commission that more time is needed for the careful consideration of potentially multiple issues in a case of first impression, the Commission should heed that request. That is a basis for the Commission to find there is "good cause" for extending the time period. There may be future cases where the amount of territory and facilities involved is much less, and therefore future cases may be

processed in a shorter time. In this case of first impression, where the parties who are most affected by the time limitation both want it extended, the Commission should proceed with careful deliberation. The General Assembly has allowed the Commission to remove itself from the 120 day stricture if it chooses for good cause shown. Therefore, RMU joins in Intercounty's motion to extend the time for the Commission's consideration of this proceeding. RMU continues to believe that the establishment of an early pre-hearing conference at some point after initial discovery has been conducted is the best that can be accomplished under the circumstances. To that end, RMU suggests that the Commission set an early pre-hearing conference for sometime in early March 2000 and direct the parties to propose a procedural schedule at that time. The parties should be given that opportunity due to the unique nature of this case and the fact that the Commission has never fully processed a case under this statute.

9. A response by RMU to Intercounty's request for an evidentiary hearing is not necessary. The statute mandates that there shall be an evidentiary hearing in a proceeding of this nature. § 386.800.6 RSMo.

RESPONSE TO CONTINGENT MOTION TO ORDER ROLLA TO PREPARE AND FILE A FEASIBILITY STUDY

10. Intercounty presents on page 2 a motion to require Rolla to prepare and file a "feasibility study" on its anticipated means of providing service. The Commission has already ruled that RMU is not required to produce such a study. See ORDERED paragraph 6 of the November 3, 1999 "Order Directing Notice and Adding a Party." That order became effective on November 16, 1999, with no one filing an application for rehearing.

11. As RMU has previously stated, it is inappropriate for a feasibility study to be performed in a situation such as this. The Commission is not given statutory authority in this

type of proceeding to determine "feasibility" in the same way that it does under § 393.170 RSMo where a public utility proposes to enter a new area and construct new facilities. The electrical distribution facilities involved here are already built and in service. RMU is already a proven and reliable electric supplier. Intercounty states that it wants to know "Rolla's own expectations of how it will provide service to the area identified in the application." RMU already has a general idea of how it will accomplish that since it operates its own immediately adjacent electrical distribution system, and has for many years. Intercounty has some transmission-like facilities which traverse the area which are tied to other Intercounty facilities. It may not be necessary for RMU to acquire those, but that determination cannot be made without adequate responses to RMU's discovery. The distribution facilities of Intercounty are not significantly different from those used by RMU. After Intercounty responds to RMU's data requests, and after RMU completes any necessary further discovery, RMU will be in a better position to file direct testimony showing exactly what facilities of Intercounty it intends to acquire, what it believes is the fair and reasonable compensation for those facilities, the manner in which it will integrate those facilities into its existing system, and other pertinent details. The general subject matter of Intercounty's concern expressed in its motion will thus be fully explored in the context of this proceeding, and subject to scrutiny by all interested parties, without a "feasibility study" of the nature described in 4 CSR 240-2.060(2). Intercounty's motion should be rejected as inappropriate, unnecessary under the circumstances, and out of time since the Commission has already ruled that RMU is not required to produce one.

RESPONSE TO CONTINGENT REQUEST FOR LOCAL PUBLIC HEARING

12. Intercounty presents on page 3 a request for the Commission to "convene a local hearing at which affected persons can testify." RMU believes that it is more important that the

potentially affected customers *first* be given an opportunity to understand what is involved, including the immediate rate impact of a **reduction** in electric service rates of **approximately 25 percent** if they are transferred to RMU. To that end, RMU intends to suggest that as a part of the procedural schedule in this case, both Intercounty and RMU host several information sessions in Rolla at which interested persons can attend, ask questions, and receive answers from Intercounty or RMU personnel. RMU believes that while it is important to let people voice their opinions, it is more important to answer their *questions* first, so they can then produce *informed* opinions that are not solely based on emotions or misinformation. RMU understands that the Commission has indicated a preference in territorial agreement cases that the parties hold such information sessions before presenting a territorial agreement to the Commission for consideration. That was not possible in this situation prior to the filing, but it is certainly possible and advisable during this proceeding. RMU believes that after RMU presents direct testimony and Intercounty is given an opportunity to respond to that testimony, information sessions should take place in Rolla. RMU intends to propose these as a part of a comprehensive procedural schedule at an early pre-hearing conference. These sessions should be informal question and answer sessions, as opposed to a more typical "local hearing" on the record, where it is not likely that questions posed by members of the public would receive an immediate answer. The customers to be affected do need to be informed about this proceeding, but it is premature and counterproductive to do that at least until sometime after Intercounty responds to discovery requests and RMU presents its direct case. The parties will then be in a much better posture to provide detailed answers to customers since the issues will presumably be more clearly defined. Holding a "local public hearing" prematurely, where definite answers cannot be provided to interested questioners, is in RMU's opinion, counterproductive, a waste of Commission resources, and not

in the public interest because it will just frustrate participants who do not get answers to questions. It certainly would be possible to hold a "local public hearing" after the information sessions.

13. RMU understands from the "Notice Regarding Petition for Local Public Hearing" issued by the Commission on December 6, 1999, and the Notice of Correction issued on December 7, 1999, that a petition was received by the Commission making a similar request. RMU understands from the Commission order that the Commission does not intend to act on the request but rather to simply place it in the Commission's public file. To the extent that any response from RMU is expected by the Commission to that petition for a "local public hearing," RMU's response immediately above applies.

RESPONSE TO CONTINGENT MOTION TO ADD INDISPENSABLE PARTIES

14. Intercounty presents on page 3 a motion to join "Rural Utility Services" and "National Rural Utilities Cooperative Finance Corporation" (and possibly other unmentioned entities) as parties to this case, arguing they are "indispensable parties" and without their presence, this application should be dismissed. Intercounty's motion is misplaced and should be denied for the numerous reasons set out below.

15. Intercounty makes the "bare allegation" that a transfer of title to its facilities will result in violation of the provisions of mortgages or deeds of trust. The Commission has not been presented with these alleged terms and conditions, or shown that they cannot be waived by a mortgage holder offered cash to release its lien, so the Commission is not in a position to determine the accuracy of Intercounty's allegations. The Commission is empowered to administer a state statute which calls for "the payment of compensation and transfer of title and operation of facilities ... within ninety days after the order ... ." § 386.800.6 RSMo 1994. The

purpose of the statute is to remove a rural electric cooperative's facilities from an area which has ceased to be rural due to annexation, as it has in this instance. The General Assembly determines where rural electric cooperatives are lawfully allowed to operate in this state. The annexation itself has already curtailed the operations of Intercounty, since it cannot lawfully serve new structures within the annexed area. Because its facilities in the area are now of limited future use, the General Assembly has made a policy decision that rural electric cooperatives should transfer their facilities to a municipally-owned and operated electrical utility in an orderly manner, under the supervision of the Commission, upon an annexation and compliance with the provisions of § 386.800 RSMo. In this fashion, the municipally-owned utility can make better use of those facilities because they can be used by the municipality to serve both existing and future customers, and avoid the need to construct separate facilities just for the purpose of serving new structures in the annexed area. The state statute does not require the joinder of mortgage holders of the rural electric cooperative in this process. The General Assembly could reasonably determine that with compensation to be paid to the rural electric cooperative in excess of four times the annual revenue it receives from those customers, and the payment for its existing facilities and associated costs, there is no lasting harm to the rural electric cooperative from such a transfer and the transfer is in the public interest. To the extent there may be some provision in an Intercounty mortgage document which on its face frustrates the Commission in carrying out the provisions of that state statute and state policy, the contract provision must fall as being contrary to public policy.

16. Second, even if the Commission were presented with these contractual terms and conditions, the Commission is not a court and therefore has no power to construe mortgages or deeds of trust and make legal pronouncements about the legal effect of such terms. ***American***

Petroleum Exchange v. Public Service Commission, 173 S.W.2d 952, transferred 176 S.W.2d 533 (Mo. 1943).

17. Third, if Intercounty believes it will really be exposed to liability for breach, it should have made its concerns known to "Rural Utility Services" and "National Rural Utilities Cooperative Finance Corporation" and any other mortgage holders it did not list (since in the first sentence of its motion Intercounty indicates there may be unnamed others). If Intercounty had timely informed them of this case, those entities could have filed an application to intervene and stated their reasons for wishing to be joined, their interest in the case, and the Commission could rule on such applications. Intercounty is silent as to whether it took such reasonable steps.

18. Fourth, the concept of "indispensable party" raised by Intercounty is one from civil litigation and foreign to Commission practice. See Mo.R.Civ.Proc. 52.04(a). The Commission's rule governing involuntary dismissal, 4 CSR 240-2.116(2), discusses only dismissals for lack of prosecution. All hearings before the Commission are to be governed by rules adopted by the Commission. § 386.410 RSMo. The Commission has no rule which discusses the concept of "indispensable party." The civil rule describes determinations to be made by the court, including "to what extent a *judgment* rendered in the person's absence might be prejudicial to that person or those already parties." Mo.R.Civ.Proc. 52.04(b). The Commission is not a court and it does not render judgments. ***American Petroleum Exchange***, supra. Therefore, the civil rule applies only to courts.

19. Fifth, Intercounty makes no allegation as to whether the Commission has any basis for jurisdiction over these entities which Intercounty seeks to compel as parties. The Commission is a creature of much more limited jurisdiction than a circuit court. It has subject matter jurisdiction over this case due to the explicit provisions of § 386.800 RSMo, which also

specifically states that the Commission has "all necessary jurisdiction over municipally owned electric utilities and rural electric cooperatives to carry out the purposes of this section... ." Section 386.800 RSMo makes no mention of the concept of "indispensable parties." The Commission does have a statute, however, which addresses the concept of non-joinder, which appears to be the same thing. Subsection 2 of § 386.390 RSMo says that in complaint cases before the Commission, "no motion shall be entertained against a complainant for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties; and in any review by the courts of orders or decisions of the commission the same rule shall apply with regard to the joinder of causes and parties as herein provided." This strongly indicates that the General Assembly did not wish the Commission to entertain a motion to dismiss for the non-joinder of an alleged indispensable party.

20. Finally, if the Commission has no jurisdiction or is unable to obtain jurisdiction over the parties Intercounty claims are indispensable, and the Commission dismisses this case because of that, then the Commission will have read a provision into a statute that does not exist and will, as a result, completely frustrate the legislative intent that the Commission process an application such as this and make a determination of the amount of fair and reasonable compensation to be paid to establish the exclusive service area. The General Assembly did not intend such a result when it enacted § 386.800 RSMo.

CONCLUSION

21. For the foregoing reasons, Intercounty's motions should be denied, with the exception of the motion to extend the statutory 120 day time period.

Respectfully submitted,

Gary W. Duffy MoBE #24905
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ATTORNEYS FOR
THE CITY OF ROLLA, MISSOURI

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was mailed or hand-delivered on December 13, 1999, to counsel for all parties of record as indicated below.

Gary W. Duffy

ROL386resptomots/gdmydocs/wpw

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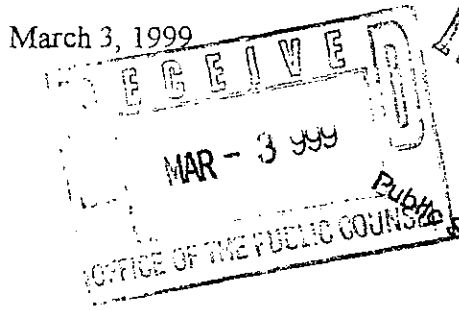
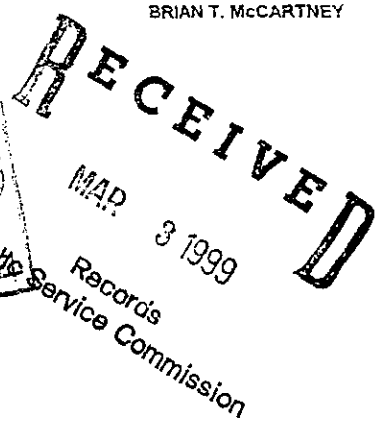
RECEIPT COPY

March 3, 1999





Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: City of Rolla / Rolla Municipal Utilities and Intercounty Electric Cooperative Association

Dear Mr. Roberts:

Subsection 4 of §386.800 RSMo 1994 provides a 180 day time frame for a municipality and an affected electric supplier to meet and negotiate the terms of a territorial agreement and other matters. The City of Rolla has previously notified the Commission of its desire to extend its service area pursuant to that section. I am not aware of any docket being created as a result of that notification.

This letter is to notify the Commission that representatives of the City of Rolla, Missouri and Intercounty Electric Cooperative Association have been holding such meetings. The end of the initial 180 day period will occur on March 7, 1999.

The statute also provides that "The time period for negotiations allowed under this subsection may be extended for a period not to exceed one hundred-eighty days by a mutual agreement of the parties and a written request with the public service commission."

This letter is to confirm that the City of Rolla and Intercounty Electric Cooperative Association have reached a mutual agreement to extend the initial period for the maximum additional period of 180 days. Please treat this letter as a "written request" for same as the statute requires. Therefore, the expiration of the statutory period will now become September 3, 1999.

If there are any questions about this, please let me know.

Sincerely yours,

Gary W. Duffy

cc: Vernon Strickland
Bill Gladden
Dan Watkins

APPENDIX A

Intercounty Electric Cooperative Association

P.O. BOX 209, LICKING, MISSOURI 65542-0209 / (573) 674-2211 / FAX (573) 674-2888

April 22, 1999

Post-it® Fax Note 7671

To Larry Duffy
Co./Dept. Brydon, Eze.
Phone #
Fax # (573)635-0427

Date 4/23/99 # of pages 17
From Dan Watkins
Co. RMU
Phone # (573)364-1572
Fax # (573)364-1540

Mr. Dan A Watkins, General Manager
Rolla Municipal Utilities
P.O. Box 767
Rolla, Missouri 65402-0767

RE: Service Territory Agreement

Dear Mr. Watkins:

The time-line for negotiating an agreement is rapidly telescoping down. In order to continue to build on the progress made during the IECA/RMU committee meeting of February 25, 1999, I have taken the liberty of enclosing another draft of the proposed agreement. This draft should cover some of the concerns expressed in your memorandum/letter of March 15, 1999 and your comments during the meeting on March 25, 1999.

I am also enclosing a updated copy of the proposed territorial map showing the areas Intercounty would be willing to discuss. If you have any questions or if I can be of assistance, please feel free to contact me.

Sincerely,

V. W. Strickland

Vernon W. Strickland
General Manager

cc: Intercounty/RMU Committee
Mayor J. Morgan
Mr. John Butz, City Administrator

APPENDIX B