

FILED<sup>3</sup>

NOV 14 2000

Missouri Public  
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE 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

**SUGGESTIONS IN SUPPORT**  
**OF INTERCOUNTY ELECTRIC COOPERATIVE ASSOCIATION'S**  
**MOTION TO COMPEL RESPONSES TO DATA REQUESTS**

- A. The Public Service Commission is not classified as the "public" and, in pursuit of its authority and duties, can direct disclosure of information labeled "closed" under the statute.

The City of Rolla has cited §610.021(18) RSMo.Cum Supp. 1999 as the basis for its principal objection to the data requests. This provision provides in pertinent part:

Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:

\* \* \*

(18) In preparation for an 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.

It is Intercounty's position that the law otherwise requires disclosure of the information sought in the data requests. The Commission will notice that the data requests concern "trailer mounted generation equipment," their acquisition by the City, the purposes of the same, and their cost and cost-effectiveness. This information is fully discoverable before this body and objections based on the "closed records" exception above have no merit.

In *State ex rel. Jackson County Grand Jury v. Shinn*, 835 S.W.2d 347 (Mo.App. W.D. 1992) the Kansas City Police Department sought to protect certain personnel records from a grand jury

41

subpoena by asserting the closed records exception of § 610.021, RSMo. Cum. Supp. 1999. The Missouri Court of Appeals for the Western District held that the term “public,” as it is used in the Missouri disclosure statutes, does not include traditional governmental bodies such as grand juries, courts, and district attorneys. *Id.* at 348. The court noted that information that is closed to members of the general public under § 610.021, is not necessarily closed to bodies that are not considered the “public.” *Id.* at 349. The court’s conclusion is apposite here.

The Public Service Commission is a governmental body, established by statute, and performs an investigatory and administrative function much like that of a court. Because the Public Service Commission is like a court, and is clearly not a member of the “public,” records pertinent to a matter before it should be discoverable, regardless of the provisions of § 610.021, RSMo. Cum. Supp. 1999.

Furthermore, the Public Service Commission is vested by the legislature with “all the powers necessary or proper to enable it to carry out fully and effectually all the purposes” for which the Commission was organized. § 386.040, RSMo. 1994. In the exercise of those powers, the Commission may use compulsory process for the production of documents, and has promulgated rules by which parties may obtain a prehearing review of discoverable matter. Intercounty submits that despite Rolla’s classification of the requested documents as “closed records,” their disclosure is “otherwise required by law,” specifically the lawfully promulgated rules of discovery before this Commission.

- B. The Public Service Commission is authorized to consider any information that will bear on future service, rates, and costs as part of its public interest analysis. § 386.800(7) and (8), RSMo. Because the information requested would affect the public interest as defined by the statute, it is relevant and the Commission has the power to order disclosure.

Pursuant to § 386.800(6), RSMo, the Public Service Commission has the power to hold

evidentiary hearings to determine the amount of compensation due any affected electric supplier which loses territory to a municipal electric utility that is expanding through annexation. In making its decision, the Commission is to consider several factors, including:

(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;

...

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

§ 386.800(7), RSMo (emphasis added).

The issue of whether the customers who may be transferred to Rolla as part of this transaction will experience any increase in their rates and charges is definitely an issue of public interest in this case. Rolla has insisted that it anticipates no increase in service rates in the near future. Answers to the data requests concerning Rolla's proposed purchase and lease of generating equipment will aid in determining the impact that the purchase and lease may have on Rolla's cost of service and rates. In data request 160, Intercounty has asked for a copy of a business plan referred to on page 19, line 7 of the prefiled direct testimony of Rolla witness Dan Watkins. On that page and line in his testimony, Mr. Watkins states:

RMU's rates have been stable since 1988 to the present. 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.

Intercounty deserves an opportunity to review that business plan for itself to ascertain if Mr. Watkins' predictions have any merit.

Information about Rolla's acquisition and use of trailer-mounted equipment, and the cost and possible revenue to be derived from those units are relevant to the Commission's public interest

inquiry in connection with likely future rate increases or effects on Rolla's system operations. The text of the business plan which Mr. Watkins has raised in his direct testimony is equally, if not more, relevant particularly since the witness has cited the business plan as the basis for his opinion.

- C. By issuing a protective order in this case on February 24, 2000, the Public Service Commission has taken the steps necessary to protect the City of Rolla from public disclosure of their confidential information and records so that the need to keep these records closed does not exist.

Under Missouri law, the purpose behind allowing a governmental body to close its proceedings and records is to prevent disclosure to the general public. § 610.010(1), RSMo. Cum. Supp. 1999. On February 24, 2000, this Commission issued its standard protective order. The Commission noted in its order adopting the Protective Order that there was a "... need to protect sensitive information, and the issuance of a protective order in this case will allow the parties to provide such information to the Commission and appropriate parties with the assurance that it will be treated according to the terms of the protective order." Order Adopting Protective Order, February 24, 2000.

Certainly Rolla would agree that the information about its trailer mounted generators and its business plan is "sensitive information." The Commission has established a method to severely restrict distribution and disclosure of highly confidential material. Public dissemination of highly confidential information would be a violation of that order. If Rolla is concerned about open disclosure of its sensitive records, Intercounty submits that the Commission Protective Order supplies ample protection, and would agree to delivery of the information under a highly confidential seal. Rolla would not be harmed by the disclosure of this information to Intercounty under those conditions.

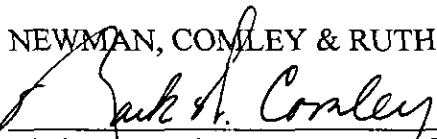
Essentially, Rolla has made the unilateral declaration that its business plan and the matters involving its trailer mounted generation equipment are "closed records." No administrative tribunal or court has reviewed that classification. Behind the invocation of the "closed record" privilege, Rolla has been able to assert that the documentation which it cites in support of its positions cannot be examined by anyone but itself. The Commission should not allow Rolla to conceal from examination the very documents it has extolled to support the opinions and conclusions it sets out in its testimony.

It should be repeated that Mr. Watkins *expressly* refers to the business plan in his testimony as the basis of his statement that RMU's rates will be stable and may go down in the future. Rolla's position begs the credulity of the Commission. Basically, Rolla declares that its rates will be stable and may be reduced according to its own study, but other parties cannot see the study since the City has labeled it a closed record. If Rolla's position prevails, the ability of the Commission and other parties to effectively examine and cross examine Rolla's witnesses on critical points would be severely compromised. Additionally, for a party to state, in effect, that a matter is true and no further questions are permitted, is incongruous with the investigatory duties of the Commission and the rights of cross examination allowed in contested proceedings.

### CONCLUSION

Intercounty submits that the "sunshine law" cannot be used to insulate from discovery documents which are relevant to Commission adjudications. In particular, the "sunshine law" should not be used to insulate from discovery a document which a party expressly refers to as a basis for an opinion or conclusion in testimony. On the basis of the foregoing, Intercounty prays that its Motion to Compel be granted as soon as possible.

NEWMAN, COMLEY & RUTH, P.C.

  
Mark W. Comley #28847  
601 Monroe, Suite 301  
P.O. Box 537  
Jefferson City, MO 65102-0537  
(573) 634-2266  
(573) 636-3306 FAX  
[comleym@ncrpc.com](mailto:comleym@ncrpc.com)

Attorneys for Intercounty Electric Cooperative  
Association

Certificate of Service

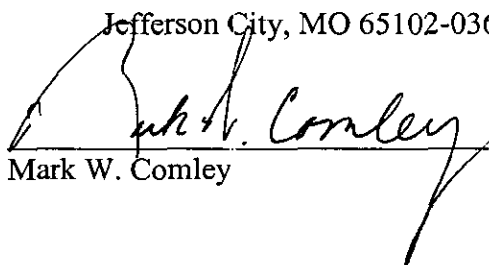
I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand delivered, on this 13<sup>th</sup> day of November July, 2000, to:

Gary W. Duffy  
Brydon, Swearingen & England  
P.O. Box 456  
Jefferson City, MO 65102-0456

Office of Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102

Michael R. Dunbar  
Smith Dunbar Turkey  
P.O. Box 494  
Waynesville, MO 65583

Denny Frey  
Office of General Counsel  
P.O. Box 360  
Jefferson City, MO 65102-0360

  
Mark W. Comley