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March 23, 2001

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Missouri Public
Service Commission

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

RE: Case No. EA-2000-308

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of the City of Rolla's Application for Rehearing and Motion to Modify Report and Order.

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

Sincerely yours,

Gary W. Duffy

Enclosures
cc w/encl:
Office of Public Counsel (John Coffman)
Office of the General Counsel (Denny Frey)
Mark W. Comley
Michael R. Dunbar

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

APPLICATION FOR REHEARING AND MOTION TO MODIFY REPORT AND ORDER

Comes now the City of Rolla, Missouri, ("the City"), by and through Rolla Municipal Utilities ("RMU") and its counsel, for its application for rehearing pursuant to § 386.500 RSMo 2000, and its Motion to Modify Report and Order, and respectfully states the manner in which the Commission's March 15, 2000 Report and Order is unlawful, unjust and unreasonable:

1. By this Application for Rehearing and Motion to Modify, RMU seeks the removal of two paragraphs of text from the Report and Order. These paragraphs purport to "assign" service "territories" inside the corporate limits of the City, despite the fact that the Commission has denied RMU's application (the only application before the Commission) for assignment of an exclusive service territory. As explained below, these two paragraphs are not essential to the result the Commission reaches in the case, and thus can be treated as surplus which can be removed without damaging or altering the result the Commission reaches. If these paragraphs are removed as RMU requests here, RMU states to the Commission that it has no intention of pursuing any appellate review of the Commission's decision. It will let the Commission's decision stand unchallenged. If the Commission does not remove these paragraphs, RMU will have to consider appellate review.

2. RMU commenced this proceeding with the full understanding that the Commission possesses the authority, within the exercise of its discretion, to either grant or deny an application for an order assigning an exclusive service territory. RMU disagrees with the reasoning process and the result reached by the Commission, but nevertheless respects and acknowledges the Commission's authority to deny the application. RMU does not, by this filing, seek to change the *result* of the Commission's decision. RMU only seeks the removal of two paragraphs containing language which is a) of highly questionable legal basis, b) is not essential to the holding, c) could lead to an otherwise unnecessary appeal of the decision, and d) could lead to unnecessary collateral litigation.

3. RMU was fully aware when it filed its application that, if the Commission denied the application, the Missouri statutes governing the rights of electric service suppliers would continue to control the situation. In other words, RMU was aware that if the Commission denied the application, the statutes controlling the authority of rural electric cooperatives such as §394.315 RSMo 2000, meant that Intercounty could continue to serve the customers it was serving on the effective date of the annexation, but that Intercounty also would be prohibited from serving new customers inside the corporate limits of Rolla because that is not a "rural area." As RMU pointed out in its briefs to the Commission, it has been the law in this state for decades that rural electric cooperatives cannot serve new customers inside cities of greater than 1,500 population following an annexation. See, e.g., ***Missouri Public Service Company v. Platte-Clay Electric Cooperative, Inc.***, 407 S.W.2d 883 (Mo. 1966) (***"MoPub I"***); ***Farmers' Electric Cooperative v. Missouri Dept. of Corrections***, 977 S.W.2d 266 (Mo. banc 1998); ***St. Joseph Light & Power Co. v. United Electric Cooperative and Homestead Cooperative of Maryville, Mo.***, WD 58140 (Opinion filed January 23, 2001; ruling pending on post-hand down motion).

There are numerous other appellate cases reaching the same result. Nothing in § 386.800 RSMo 2000 indicates any intention by the General Assembly to repeal that law by implication.

4. On the other hand, if the Commission had granted RMU's application, that decision presumably would have changed the rights of Intercounty to provide service inside the City. That would occur because the Commission is given the authority by § 386.800 RSMo to force a transfer of facilities and customers. But by *denying* RMU's application, the Commission has essentially maintained the *status quo, which is established by statutes other than* § 386.800 RSMo. By analogy, if a regulated utility sought a certificate of convenience and necessity to serve a new defined area, and the Commission *denied* the application, the Commission would merely issue an order denying the application. In such cases, the Commission does not go a step further and purport to grant authority to non-applicants, or non-regulated suppliers, who already had authority to serve and who did not seek additional authority from the Commission in the first place. The denial of an application by the Commission in such an example has the direct consequence of maintaining the status quo. Contrary to what one would expect from such an example, the Commission in this case took a totally unnecessary further step and purports to "assign" service territories to both RMU and Intercounty in Ordered paragraph no. 6.

5. Both Intercounty and RMU were fully cognizant of the status quo when they were participating in the required negotiations for a territorial agreement. Since the Southside Annexation, Intercounty has not sought to serve new customers in the annexed area. Similarly, since the Southside Annexation, RMU has not attempted (other than through the denied application at the Commission) to take any customers away from Intercounty. Since the Southside Annexation, RMU has provided service to new customers/structures in the Southside Annexation area. Intercounty has not challenged RMU's authority to do that. This course of

conduct by RMU and Intercounty clearly demonstrates that both RMU and Intercounty have a clear understanding of how the cooperative authority statutes and the anti-flip flop statutes work. They work by curtailing the rights of the cooperative to serve new structures inside a city upon annexation. They allow the cooperative to continue to serve structures it was lawfully serving. § 394.315.2 RSMo 2000. Another part of this legal framework is contained in subsection 2 of § 386.800 RSMo, which provides as follows:

> 2. Any municipally owned electric utility may extend, pursuant to lawful annexation, its service territory to include any structure located within a newly annexed area which has not received permanent service from another supplier within ninety days prior to the effective date of the annexation.

This statute makes it crystal clear that a municipally owned utility such as RMU can *unilaterally* extend its service territory into an annexed area to serve new structures without any further requirements; in other words, there is no requirement for an "assignment" of "territory" by the Commission. Because it already has direct statutory authority to do so, a municipal utility does not have to receive the Commission's permission to serve *new* structures in the annexed area, as the Commission purports to grant the City in the Report and Order. The implication of the Report and Order is that somehow RMU might not have authority to serve the new structures and Intercounty might not have authority to continue to serve the structures it is serving without the Commission's permission, and that the Commission will somehow have continuing jurisdiction over these "territories" it has "assigned." Subsection 2 of § 386.800 RSMo clearly shows the City needs no such permission. That means the Commission's language is superfluous and is a nullity. The same is true with regard to the "territory" the Commission purports to assign to Intercounty. Intercounty already possesses all the authority it needs to continue serving its customers by the clear language of § 394.315.2. This means the Commission's language

objected to in this pleading is at best mere surplus and, at worst, a direct conflict with the statutes and the assertion of the Commission over matters for which it has no jurisdiction.

6. Notwithstanding those statutes, in Ordered paragraph no. 6 of the March 15 Report and Order, the Commission purports to "assign" service "territories" to both RMU and Intercounty. This purported "assignment" of "territories" is nothing more than the *status quo* which is mandated by the previously discussed Missouri statutes. All the Report and Order accomplishes in Ordered paragraph no. 6 is to say that Intercounty can continue to serve the structures it was serving prior to annexation, and RMU can serve any new structures built after the annexation. As explained previously, that situation is the direct result of the Commission *denying* the application and the operation of § 394.315.2 and § 386.800.2 RSMo. It was *totally unnecessary* for the Commission to "assign" such "territories" to accomplish the result it sought. That result occurred automatically when the Commission denied the application.

7. Because it does more than merely restating the automatic legal effect of the denial of the application, since it implies a different result could have obtained if the Commission had not "assigned" such "territories" in the Report and Order, Ordered paragraph no. 6 of the Report and Order, and the accompanying first paragraph of discussion under the heading "Assignment of Service Areas in the Annexed Area" on page 33 of the Report and Order where the Commission says it "will assign service areas," constitute language which a) is not essential to the result sought to be achieved by the Commission, and b) is beyond the jurisdiction and statutory authority of the Commission. This language should be removed by the Commission in an Order Modifying Report and Order. Put another way, the removal of the one text paragraph and Ordered Paragraph 6 will not change the result of the Commission's decision in any respect. Intercounty will continue to serve its customers in the Southside Annexation area pursuant to §

394.315.2, and RMU will continue to provide service to all new structures in the area pursuant to § 386.800.2. What will be removed will be the uncertainty created by the effect of the surplus language, which implies Commission authority and jurisdiction where none exists.

9. Aside from the aforementioned deficiencies, Ordered paragraph 6 does not even establish any sort of recognizable "territory" for either Intercounty or RMU because it contains no discernable boundaries. Section 386.800.6 RSMo strongly indicates that applications such as the one filed by RMU are to be made pursuant to the Commission's rules governing applications for certificates of convenience and necessity. The Commission even required RMU to file a "feasibility study" pursuant to those rules. Those rules require a *map* and a *legal description* of the territory sought by an applicant. The Commission routinely requires a successful applicant to file a tariff sheet with a map and a legal description of the new territory. The manner in which the Commission has chosen to "assign" service "territories" in Ordered paragraph 6 is in stark contrast to those requirements. There are no defined boundaries in Ordered paragraph 6. Creation of a map or legal description to follow the Commission-assigned "territories" would be foolish and needless since the statutes already establish such authority. It would also be highly impractical due to the tremendous expense to hire a surveyor to graphically depict and describe the "territories" the Commission purports to assign, and the uncertainty as to where those lines would actually be drawn.

10. In summary, the Commission should issue a modification of its Report and Order in which it removes Ordered paragraph no. 6 of the Report and Order, and the related first paragraph of discussion under the heading "Assignment of Service Areas in the Annexed Area" on page 33 of the Report and Order where the Commission says it "will assign service areas." By denying RMU's application, the Commission gained no statutory authority to assign such

territories since RMU and Intercounty both possess *independent* authority to serve those structures or areas by virtue of § 394.315.2 and § 386.800.2 RSMo *without* any order from the Commission. There is no justifiable reason for the Commission to retain this language in a Report and Order where it has denied the only application before it, and the mere act of denial produces the same result the Commission purports to create in Ordered paragraph 6. Retention of the language will only lead to future unnecessary litigation in this or future cases under § 386.800 RSMo. If the Commission acts responsibly and removes this objectionable language, RMU states that it has no intention of challenging the Commission's modified Report and Order by means of a writ of review.

WHEREFORE, the City moves that the Commission issue a modification to its Report and Order which removes Ordered paragraph no. 6 of the Report and Order, and the related first paragraph of discussion under the heading "Assignment of Service Areas in the Annexed Area" on page 33 of the Report and Order where the Commission says it "will assign service areas."

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was mailed or hand-delivered on March 23, 2001, to counsel for all parties of record as shown below.

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