ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF THE CITY OF LEBANON, INDIANA, BY ITS MUNICIPALLY OWNED ELECTRIC UTILITY FOR CHANGES IN ITS ASSIGNED SERVICE AREA BOUNDARIES ON U.S.G.S. FACET M-15 TO INCORPORATE AN ADJACENT ANNEXED AREA IN BOONE COUNTY, INDIANA PURSUANT TO IC 8-1-2.3-6(1)	)	**CAUSE NO. 43857**
	)	**APPROVED:** SEP 2 9 2010
BOONE COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,	)	
RESPONDENT	)	

BY THE COMMISSION:
David E. Ziegner, Commissioner
David E. Veleta, Administrative Law Judge

On February 10, 2010, the City of Lebanon, Indiana by its municipally owned electric utility ("Petitioner" or the "City") filed a Verified Petition with the Indiana Utility Regulatory Commission ("Commission") seeking, as provided in Indiana Code § 8-1-2.3-6(1), to change its assigned service area boundaries to include an area annexed pursuant to Ordinance No. 2008-05 located beyond its assigned service area. The annexed area consists of approximately 3,670 acres, all of which is located within the assigned service area of Boone County Rural Electric Membership Corporation ("Respondent" or "Boone REMC"). The Verified Petition indicated that Respondent currently serves approximately 270 customers within the annexed area.

On February 12, 2010, Boone REMC filed an Appearance by Counsel for Respondent and Request for Establishing a Procedural Schedule, stating: "Respondent believes the facts will show that the annexation referenced by the City's petition was given effect by the City and took effect no later than December 31, 2008; thus, its petition is not timely and should be dismissed."

On February 19, 2010, Petitioner filed a Response to Request for Establishing a Procedural Schedule, stating: "the City's (or any other party's) actions cannot cause an annexation to take effect at a date earlier than as prescribed by Indiana law" and requesting that the Commission modify the assigned service area boundaries as requested in the Verified Petition.

On March 1, 2010, the Commission issued a Docket Entry converting the March 23, 2010 prehearing conference into an attorneys' conference. The Docket Entry directed the parties to come prepared to discuss the legal authority for their respective positions and whether the following case is relevant to this Cause: *Hancock County Rural Electric Membership*

Corporation d/b/a Central Indiana Power v. *City of Greenfield, Indiana,* 768 N.E.2d 909 (Ind. Ct. App. 2002).

On March 23, 2010, Petitioner, Respondent and the Indiana Office of Utility Consumer Counselor appeared and participated in the scheduled attorneys' conference. Based on discussions at the attorneys' conference, the Commission established a briefing schedule. In accordance with the established briefing schedule, Respondent filed a Motion for Summary Judgment or for Dismissal ("Motion") on April 20, 2010. Respondent simultaneously filed its Designation of Matters Upon Which Respondent Boone County Rural Electric Membership Corporation Relies for Purposes of its Motion for Summary Judgment or for Dismissal (the "Designation"). On May 20, 2010, Petitioner filed its Response in Opposition to Boone County Rural Electric Membership Corporation's Motion for Summary Judgment or for Dismissal. Boone REMC filed a Reply in Support of Respondent's Motion for Summary Judgment or for Dismissal on May 27, 2010. No party filed a motion requesting a hearing on the Motion under Indiana Trial Rule 56(C) and we determine that under the facts and circumstances a hearing is not necessary.

Based upon the pleadings, the undisputed material facts, and the applicable law, the Commission now finds as follows:

1. Commission Jurisdiction. Petitioner, City of Lebanon, is a municipality duly organized and existing under the laws of the State of Indiana located in Boone County, Indiana. The City of Lebanon owns and operates Lebanon Utilities which includes an electric utility furnishing retail electric service to approximately 8,320 residential, commercial, industrial and other customers within its assigned service area, and has the legal authority to do so. Petitioner is a "municipally-owned utility" as defined in Indiana Code § 8-1-2-1(h) and an "electricity supplier" within the meaning of Indiana Code § 8-1-2.3-2(b).

Boone REMC is a rural electric membership corporation organized and existing under the laws of the State of Indiana with its principal office in the City of Lebanon, Boone County, Indiana. Boone REMC is engaged in the business of distributing, furnishing and selling retail electric service to the public in several Indiana counties, including Boone County, and has the corporate authority to do so. Boone REMC is an "electricity supplier" within the meaning of Indiana Code § 8-1-2.3-2(b) and is subject to the jurisdiction of the Commission in the manner and to the extent provided by the laws of the State of Indiana. As such, the Commission has jurisdiction over the parties in this Cause.

2. Respondent's Motion for Summary Judgment or for Dismissal. Boone REMC filed a Motion for Summary Judgment or for Dismissal on April 20, 2010, asserting that there was no dispute about the material facts and that, as a matter of law, Ordinance No. 2008-05 became effective on or before December 31, 2008. Thus, the City's February 10, 2010 Petition was filed more than sixty (60) days after the effective date of the annexation Ordinance and, as such, is untimely. Boone REMC requested the Commission grant summary judgment in its favor and dismiss the City's Petition for changes in its assigned service area boundaries. Petitioner filed its response in opposition to the Motion on May 20, 2010. Petitioner argued that Ordinance No. 2008-05 became effective on January 2, 2010 and that its February 10, 2010 Verified

Petition was timely filed pursuant to Indiana Code § 8-1-2.3-6(1). Petitioner requested the Commission deny Boone REMC's Motion, find that Petitioner is entitled to judgment as a matter of law that it timely filed the Verified Petition, and enter an order changing the assigned service area of Petitioner to include the annexed territory in the certified copy of Ordinance No. 2008-05.

3. Background. The date on which an "annexation becomes effective," is established by Indiana Code § 36-4-3-7. Subsection (a) of that statute provides:

> After an ordinance is adopted . . . it must be published in the manner prescribed by IC 5-3-1. Except as provided in subsection (b), (c), or (f), in the absence of remonstrance and appeal . . ., the ordinance takes effect at least ninety (90) days after its publication and upon the filing required by section 22(a) of this chapter.

Indiana Code § 36-4-3-22(a)(1) requires the clerk of the municipality to "file" the annexation ordinance with each of the following governmental offices:

> (A) The county auditor of each county in which the annexed territory is located.
> (B) The circuit court clerk of each county in which the annexed territory is located.
> (C) If a board of registration exists, the registration board of each county in which the annexed territory is located.
> (D) The office of the secretary of state.
> (E) The office of census data established by IC 2-5-1.1-12.2.

Similarly, where there is a remonstrance and a judgment is entered by a court in favor of the proposed annexation, the annexation does not become "effective" until the filings required by Indiana Code § 36-4-3-22(a) are completed. Indiana Code § 36-4-3-15(f).

The City adopted Ordinance No. 2008-05 on September 8, 2008. The Ordinance was published on September 17, 2008. A remonstrance petition was filed and subsequently found to be insufficient by the Boone County Superior Court on December 22, 2008.

An attorney acting on behalf of the Clerk-Treasurer either delivered or mailed by regular mail copies of the Ordinance to: the Auditor of Boone County, the Clerk of the Boone County Circuit and Superior Courts, Boone County Voters Registration, the Indiana Secretary of State, the Boone County and Lebanon Area Plan Commissions and the Indiana Office of Census Data. Specifically, Ordinance No. 2008-05 was mailed via standard first class United States Mail to offices located outside of the City – *i.e.*, the Secretary of State and Office of Census Data. The Ordinance was hand-delivered to the other offices listed in Indiana Code § 36-4-3-22(a). The Office of Census Data stamped Ordinance No. 2008-05 "filed" on January 7, 2009.

Petitioner contends that ordinarily under Indiana Code § 36-4-3-7(a), Ordinance No. 2008-05 would have taken effect on January 7, 2009 – the date on which it was "filed" with the Office of Census Data, the last of the governmental offices to receive a copy of the ordinance.

However, calendar year 2009 was a year "preceding a year in which a federal decennial census [will be] conducted" (*i.e.*, calendar year 2010). Subsection (b) of Indiana Code § 36-4-3-7 provides:

> An [annexation] ordinance . . . may not take effect during the year preceding a year in which a federal decennial census is conducted. An ordinance that would otherwise take effect during the year preceding a year in which a federal decennial census is conducted takes effect January 2 of the year in which a federal decennial census is conducted.

See also, *Hancock County Rural Elec. Membership Corp. v. City of Greenfield*, 768 N.E.2d 909, 912 (Ind. Ct. App. 2002) ("annexation ordinances adopted in the year preceding a federal census may not take effect until January 2 of the year of the census") (hereinafter "*Hancock County*").

Based on the foregoing statutes, the Court of Appeals' holding in *Hancock County*, and the Office of Census Data's file-mark, the Verified Petition in this Cause states that Ordinance No. 2008-05 became effective on January 2, 2010. Verified Petition at ¶ 9. The Verified Petition further states that it was "filed within sixty (60) days after Ordinance No. 2008-05 became effective and the Commission has jurisdiction over the subject matter hereof in accordance with IC 8-1-2.3-6(1)." *Id.* at ¶ 10.

Boone REMC maintains that the Ordinance took effect on either December 30, 2008 or December 31, 2008. In order to support this conclusion, Boone REMC asks the Commission to find Ordinance No. 2008-05 was "filed" with the Office of Census Data, not on January 7, 2009 as evidenced by the file-stamp – but on one of two dates Boone REMC assumes it was deposited in standard first class mail.

4. <u>Undisputed Material Facts</u>. Based on the pleadings and the evidentiary materials submitted by the parties, the following facts are undisputed and material to the issues presented by Respondent's Motion.

(a) On September 8, 2008, the Common Council of the City duly adopted and approved Ordinance No. 2008-05 annexing into the City an adjacent tract of land contiguous to a southeastern corporate boundary line of the City of Lebanon.

(b) On September 11, 2008, Ordinance No. 2008-05 was published according to law in *The Lebanon Reporter*.

(c) A remonstrance petition was filed with the Boone County Superior Court and found by the Court to be insufficient on December 22, 2008.

(d) On December 30, 2008, Ordinance No. 2008-05 was recorded with the Boone County Recorder.

(e) An attorney acting on behalf of the Clerk Treasurer of the City either hand delivered or mailed, by regular U.S. Mail, a copy of the Ordinance to the

respective offices in which it is required to be filed under Indiana Code § 36-4-3-22(a).

(f) The Ordinance was hand delivered to offices with addresses within the City of Lebanon and mailed, by regular U.S. Mail (and not certified mail), to the Office of the Indiana Secretary of State and Indiana Office of Census Data.

(g) The cover letter prepared by the attorney acting on behalf of the Clerk Treasurer and addressed to the offices listed in Indiana Code § 36-4-3-22(a) is dated December 30, 2008. No evidence was introduced as to the postmark on the envelope for any of the mailings.

(h) The Clerk of the Boone Circuit Court, one of the offices to which Ordinance No. 2008-05 was hand-delivered, stamped Ordinance No. 2008-05 "filed" on December 31, 2008.

(i) The Office of Census Data, to which Ordinance No. 2008-05 was mailed, stamped the Ordinance "filed" on January 7, 2009.

(j) Calendar year 2009 was a year preceding a year in which a federal decennial census will be conducted (*i.e.*, calendar year 2010).

5. <u>Motion for Summary Judgment</u>.

A. <u>Standard of Review</u>. While summary judgment is not commonly employed before the Commission, it may be guided generally by the relevant provisions of the Indiana Rules of Trial Procedure, to the extent those rules are consistent with the Commission's Rules of Practice and Procedure. 170 I.A.C. § 1-1.1-26(a). Trial Rule 56 governs summary judgment, and provides in relevant part that "[t]he judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Trial Rule 56 further provides that "[w]hen any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party."

Summary judgment is a procedure for applying the law to the facts when no factual controversy exists. *See, Lee v. Weston,* 402 N.E.2d 23 (Ind. App. 1980). The Commission must accept the facts as provided by the parties' proffered evidentiary materials. The Commission's task is to determine which facts that arise from the evidentiary materials are both undisputed and material. Facts that arise by inference may be considered only when the inference from which they arise is either (i) the only reasonable inference, or (ii) an inference in favor of the non-moving party. If the application of the law to the material facts requires judgment for either the moving party, or any other party on the issues raised in the motion for summary judgment, the Commission must enter that judgment. Otherwise, the Commission must deny the motion for summary judgment.

B. Effective Date of Ordinance. The sole issue before the Commission is the date on which Ordinance No. 2008-05 became effective. If Ordinance No. 2008-05 became effective on January 2, 2010, as Petitioner states in its Verified Petition, the Verified Petition was timely filed and the Commission is required under Indiana Code § 8-1-2.3-6(1) to "promptly enter an order changing the assigned service area facet maps of the municipally owned electric utility and incumbent electricity suppliers to include the annexed area within the assigned service area of the municipally owned electric utility and giving the right to serve and immediate possession to the municipally owned electric utility." If, on the other hand, Ordinance No. 2008-05 took effect on December 30 or 31, 2008 as Respondent contends, the Verified Petition was not filed within the statutory time period and the Commission lacks subject matter jurisdiction to modify the assigned service area boundaries as requested therein.

Boone REMC argues that Indiana statutes and administrative rules vary as to when a document sent by mail is deemed "filed" and that there are "several rules that provide a basis for finding the annexation ordinance was effectively filed when it was mailed." Motion at 10. In particular, Boone REMC argues that under Indiana Code § 6-8.1-6-3, documents sent to the Indiana Department of Revenue are deemed filed on the "date of the post office cancellation mark" – *i.e.*, the same rule applicable to federal tax returns and other documents sent to the Internal Revenue Service. Motion at 10; fn. 3.

For the reasons set forth below, we find that the "rules" applied by the various State offices discussed in Boone REMC's Motion do not provide a sufficient basis for holding that Ordinance No. 2008-05 was "filed" in accordance with Indiana Code § 36-4-3-22(a) on any date earlier than the date of the official file stamp, January 7, 2009. First, we note that, none of the rules cited by Boone REMC applies to the filing of documents by a municipality with the Office of Census Data. Instead, each applies to other State offices.

Second, most of the State offices listed in Boone REMC's Motion deem a document "filed" upon either receipt by the office, or upon mailing by certified or registered mail. Ordinance No. 2008-05 was not mailed by certified or registered mail to the Office of Census Data. While a few offices deem documents filed on the date of the "post office cancellation mark," no evidence was offered concerning the "postmark date" that Ordinance No. 2008-05 was deposited in the mail. Although the letter mailed along with the Ordinance to each of offices listed in Indiana Code § 36-4-3-22(a) is dated December 30, 2008, this is not the equivalent of a "postmark date" as required by the statutes and regulations identified by Boone REMC. Consequently, we find the best evidence of when a document was "filed" with the Office of Census Data is the date on which Ordinance No. 2008-05 was file-stamped by that office.

Boone REMC also contends that "Indiana case law supports the conclusion that, in the absence of any statute or regulation defining the method of filing, a document may be 'filed' by regular first class mail and that such document should be deemed 'filed' when it is deposited in the mail." Motion at 13. As support for this contention, Boone REMC argues that *State Bd. of Tax Comm'rs v. LeSea Broadcasting Corp.,* 511 N.E.2d 1009 (Ind. 1987), supports its assertion that where a statute is silent about what constitutes a filing, a document will be deemed filed on the date it was mailed in regular first class mail. However, in *State ex rel. Goodman v. Review Bd. of Ind. Dep't of Employment and Training,* 536 N.E.2d 1023 (Ind. 1989), the Indiana

Supreme Court distinguished *LeSea*. The Court held that for non-tax cases where the statute is silent as to the method of filing, Trial Rule 5(E)(2) applies. Trial Rule 5(E)(2) is now Trial Rule 5(F)(3), and provides that a "document may be filed by registered, certified or express mail, return receipt requested and is complete upon mailing or deposit." The case at hand is not a tax case like *LeSea*, so the holding in that case does not apply. Furthermore, the Petitioner deposited the ordinance in the regular mail; it was not registered, certified or express mail, or with a return receipt requested. Therefore *Goodman* does not apply. The file stamped date provides evidence that the date of filing with the Office of Census Data was January 7, 2009, and the Respondent, Boone REMC, did not provide evidence to the contrary

Finally, Boone REMC asserts that Petitioner should be "estopped from now claiming that [the annexation] was not effective based on a filing technicality that is not even required by statute." Motion at 17. Boone REMC does not allege any particular theory of estoppel, but instead merely notes that certain City officials proceeded in some instances as if Ordinance No. 2008-05 became effective in 2009. However, other actions taken by City officials are consistent with a January 2, 2010 effective date. We are unaware of any authority that would allow the Commission to find the actions of certain representatives of the City would cause an annexation ordinance to take effect at a date earlier than prescribed by Indiana law, and therefore, decline to do so.

Therefore, based on the evidence presented, we find that Ordinance No. 2008-05 was "filed" with all the required offices on January 7, 2009. Neither the regulations cited by Boone REMC nor Indiana case law support the conclusion that the word "filed" in Indiana Code § 36-4-3-22(a) means deposited in the [regular] mail. Accordingly, we find that pursuant to Indiana Code § 36-4-3-7(b), Ordinance No. 2008-05 became effective on January 2, 2010 and the Verified Petition in this Cause was timely filed.

6. <u>Approval of Requested Change to Assigned Service Area</u>. Indiana Code § 8-1-2.3-6(1)(A) provides:

> After the filing of a petition under this subdivision, the commission shall promptly enter an order changing the assigned service area facet maps of the municipally owned electric utility and incumbent electricity suppliers to include the annexed area within the assigned service area of the municipally owned electric utility and giving the right to serve and immediate possession to the municipally owned electric utility.

Petitioner has annexed the entire 3,670 acres described in the Annexation Ordinance No. 2008-05 included in Petitioner's Verified Petition filed on February 10, 2010. The proposed service boundaries described by Exhibit 5 is attached to the Verified Petition. Accordingly, the Commission finds that Petitioner's assigned service area should be changed to include the areas described in Exhibit 5, attached to the Verified Petition.

7. Payments To Be Made by a Municipally Owned Electric Utility To an Incumbent Electricity Supplier.

A. Payment of the Value of the Incumbent Electricity Supplier's Electric Utility Property Devoted to Furnishing Retail Electric Service Within the Additional Assigned Service Area.

Indiana Code § 8-1-2.3-6(1)(B) provides:

> Not later than thirty (30) days after filing a petition under this subdivision, the municipally owned electric utility shall determine for each affected incumbent electricity supplier and pay to that supplier an amount not less than the value of all the electric utility property of the incumbent electricity supplier that is devoted to furnishing retail electric service within the additional assigned service area at its then reproduction cost new depreciated value.

The Verified Petition indicated Petitioner would pay Boone REMC the reproduction cost new depreciated value of Boone REMC's property devoted to providing retail electric service within the area annexed pursuant to Ordinance No. 2008-05. Pursuant to Indiana Code § 8-1-2.3-6(1)(B), we find that within thirty (30) days of the date of this Order, Petitioner should determine and pay Boone REMC the reproduction cost new depreciated value of all electric utility property devoted to retail electric service within the annexed area.

B. Payment of Severance Damages.

In addition to the payment required above in paragraph 7A, Indiana Code § 8-1-2.3-6(1)(B) provides:

> In addition, the municipally owned electric utility shall pay the incumbent electricity supplier severance damages in an amount equal to:
>
> (i) the value of the incumbent electricity supplier's distribution and substation facilities dedicated to and located within the annexed area or relocated by reason of the annexation or an amount equal to two and one-half (2½) times the incumbent electricity supplier's gross revenues from electricity sales in the annexed area during the twelve (12) month period immediately preceding the date the annexation ordinance became effective, whichever is greater; plus
>
> (ii) if additional permanent service locations or service accounts are established in the annexed area during the five (5) year period beginning on the effective date of the annexation ordinance, one-tenth of one cent ($0.001) for each kilowatt hour of electricity sold to each of those permanent service locations or service accounts for sales that occur during a five (5) year period beginning on the date each service location or service account is established, up to a maximum of one hundred seventy thousand (170,000) kilowatt

hours per service account or service location for each monthly billing period.

However, the municipally owned electric utility is not required to pay severance damages under item (ii) if, at the time each annual payment otherwise would accrue, it is purchasing all of its requirements for electric power and energy, except for generation directly provided by the municipally owned electric utility or by a customer, from the incumbent electricity supplier. Severance damages must be paid not later than thirty (30) days after the end of each calendar year in which severance damages have accrued. The municipally owned electric utility and incumbent electricity suppliers shall cooperate to calculate the amount of any severance damages and shall furnish to each other all information and records reasonably necessary for the determination and verification of severance damages. If the municipally owned electric utility and incumbent electricity suppliers cannot agree on the amount of severance damages the municipally owned electric utility is to pay, the commission shall determine the amount and order payment in accordance with this clause. Not later than twenty (20) days after making a payment, the municipally owned electric utility shall certify to the commission and to any affected incumbent electricity supplier that it has paid the amounts required under this clause.

In accordance with Indiana Code § 8-1-2.3-6(1)(B)(i), we find that Petitioner should pay Respondent an amount equal to the value of Respondent's distribution and substation facilities dedicated to and located within the annexed area or relocated by reason of the annexation or an amount equal to two and one-half (2½) times Respondent's gross revenues from electricity sales in the annexed area during the twelve (12) month period immediately preceding January 2, 2010, whichever is greater.

Pursuant to Indiana Code § 8-1-2.3-6(1)(B)(ii), we find that if new permanent service locations or service accounts are established in the annexed area during the five (5) year period beginning on the effective date of the annexation ordinance, Petitioner should pay Respondent severance damages of one-tenth of one cent ($0.001) for each kilowatt hour of electricity sold to each of those permanent service locations or service accounts for sales that occur during a five (5) year period beginning on the date each service location or service account is established, up to a maximum of one hundred seventy thousand (170,000) kilowatt hours per service account or service location for each monthly billing period. However, severance damages pursuant to Indiana Code § 8-1-2.3-6(1)(B)(ii) shall not be payable by Petitioner to Respondent if, at the time each annual payment otherwise would accrue, Petitioner is purchasing all of its requirements for electric power and energy, except for generation directly provided by the municipally owned electric utility or by a customer, from Respondent.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. Respondent, Boone REMC's "Motion for Summary Judgment or for Dismissal" is hereby denied and summary judgment is hereby entered in favor of Petitioner.

2. The Petition filed in this Cause to change the assigned service area of the City of Lebanon's municipally owned electric utility to include the annexed territory described in the certified copy of the annexation Ordinance filed herein is approved, and said municipally owned electric utility shall have the right to serve and immediate possession of said annexed area.

3. Petitioner shall pay Respondent the amounts as described above in Finding Paragraph Nos. 7A and 7B of this Order.

3. Within thirty (30) days of the date this Order is approved, Petitioner shall coordinate with the Commission's Electricity Division to update the service territory mapping system to reflect the modified service area boundaries approved by this Order.

4. In accordance with Ind. Code § 8-1-2-70, the Petitioner shall pay within twenty (20) days from the date of this Order into the Treasury of the State of Indiana, through the Secretary of this Commission, the following itemized charges, as well as any additional charges which were or may be incurred in connection with this Cause:

Commission Charges:	$ 302.92
OUCC Charges:	$ 61.00
Legal Advertising Charges:	$ 107.58
Total:	$ 471.50

5. This Order shall be effective on and after the date of its approval.

HARDY, ATTERHOLT, LANDIS AND ZIEGNER CONCUR; MAYS ABSENT:

APPROVED: SEP 29 2010

I hereby certify that the above is a true and correct copy of the Order as approved.

Brenda A. Howe

Brenda A. Howe
Secretary to the Commission