

No. SC 83633

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IN THE MISSOURI SUPREME COURT

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FARMERS' ELECTRIC COOPERATIVE, INC.,

Respondent

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Appellant

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Appeal from the Circuit Court of Cole County, Missouri,  
The Honorable Thomas J. Brown, III, Circuit Judge

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SUBSTITUTE BRIEF OF RESPONDENT  
FARMERS' ELECTRIC COOPERATIVE, INC.

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a judgment on damages only after remand from this Court. *See Farmers' Elec. Coop., Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266 (Mo. banc 1998) (holding Department of Corrections liable for breach of contract); § 512.020, RSMo., 2000. After the Missouri Court of Appeals, Western District, affirmed the judgment, this Court transferred the appeal. Therefore, this Court has jurisdiction. *See* Mo. Const. Art. V, § 10 (amended 1976); Rule 83.04.

## STATEMENT OF FACTS

Respondent, adopts the Appellant's Statement of Facts and adds the following:

### **Contract Term and Rates**

The Contract between Farmers' and the Department of Corrections, provides in Section IV General, Paragraph 2 MEMBERSHIP: "The consumer shall become a member of the seller, shall pay the membership fee and be bound by such rules and regulations as may from time to time be adopted by the seller. (L.F. 9.) As required by the contract the Department of Corrections executed an application for membership with Farmers' Electric Cooperative. (L.F. 11.) The application specifically provides at paragraph 2: "The applicant will, when electric service becomes available, purchase electric energy used on the premises described below and will pay therefor monthly at rates to be determined from time to time in accordance with the bylaws of the Cooperative." (L.F. 11.) Section 5 of the application states: "The applicant will comply with and be bound by the provisions of the Certificate of Incorporation and bylaws of the Cooperative, and such rules and regulations as may from time to time be adopted by the Cooperative." (L.F. 11.) The second last paragraph of the application provides: "The acceptance of the application by the Cooperative shall constitute an agreement between the applicant and the Cooperative, and the contract for electric service shall continued in force from the date electric service is made available from the Cooperative to the applicant and thereupon until canceled by notice given by either party to the other." (L.F. 11.)

The bylaws of Farmers' further provides at Article I, Section 1.02 that:

“Application for class one membership – wherein the applicant shall agree to purchase electric power and energy from the Cooperative and to be bound by and to comply with all of the other provisions of the Cooperative’s Articles of Incorporation and Bylaws, and all the rules, regulations and rate schedules established pursuant thereto, as all the same then exist or may thereafter be duly adopted or amended (the obligations embraced by such agreement being hereinafter called “membership obligations”) – shall be made in writing or in such form as is provided therefor by the Cooperative. (L.F. 13. )

At Article I, Section 1.08 **Purchase of Electric Power and Energy; Power Production by Members; Application of Payments to All Accounts**, provides: “The Cooperative shall use reasonable diligence to furnish its members with adequate and dependable electric service, ... and each member for so long as such premises are owned for directly occupied or used by him, shall purchase from the Cooperative all central station electric power and energy purchased for use on all premises to which electric service has been furnished by the Cooperative pursuant to his membership, .... and shall pay therefor at the times and according to the rules, regulations, and rate schedules (including any monthly minimum amount that may be charged without regard to the amount of electric power and energy actually used) established by the Board of Directors and, in effect, and in accordance with the provisions of any supplemental contract that may have been entered into as provided for in Section 1.02 and 1.03.). (L.F. 15.)

#### **Projection Of Electric Usage For Crossroads**

Farmers’ expert witness, Lou Toth, specifically testified that he projected the electric usage of Crossroads for 1998-2006 based on an analysis of the Western Missouri

Correctional Center and statements made by the Department of Corrections that it would be adding to the Crossroads complex over time and would use more power. (Tr. 127.) In addition Mr. Toth testified that he froze the growth rate for Crossroads after 2008, because he did not have similar data to model his economic analysis. (Tr. 128). Mr. Toth specifically stated that it “should be noted that the last year, the usage, again, grew for Western Correctional Facility, so – but we – to be fair to all parties and to have a fair analysis, we stopped growth at ten years.” (Tr. 128.)

### **Life of Prisons.**

In addition to Farmers’ presentation that the life to the prison was anticipated to be 50 years based on the Bureau of Justice statistics, additional evidence was presented from the Department of Corrections through its answer to interrogatories as to the age of Missouri Prisons. (Tr. 147.) Counsel for Farmers’ offered and had admitted into evidence Plaintiff’s Exhibit 20. In addition to having such exhibit marked and admitted, the Court was informed that “And for the court’s information, these are interrogatory answers I received from the Department, and they attached a table to those interrogatories showing the initial construction date and the occupation date and the close date of the facility. For the Court’s information, they don’t show any close date. (Tr. 147.) Plaintiff’s Exhibit 20 was admitted with no objection from the Department of Corrections. (Tr. 147.)

## SUMMARY OF ARGUMENT

The Courts below did not misapply the measure of damages incurred by Farmers' as a result of the Department's breach of contract. Damages are determined by the value performance of the contract, that is whatever the net gain not breaching party would have made under the contract **plus any direct and natural consequences of the breach**. Nor was there any error in allowing Farmers' to recover lost margins after 2008. The direct and natural consequences of the Department's breach is Farmers' inability to serve a structure for the life of that structure as permitted in Section 394.315 RSMo. 2000.

Had Farmers' been able to begin supplying service to Crossroads prior to the year 2008, it would have been the only legal provider of electric energy after the year 2008. The Department's broad assertion that absent the breach, Farmers' would not have the exclusive right to provide electricity to Crossroads, is only true if the Department terminated the 1986 contract with Farmers' and Crossroads began receiving permanent electric service after September 2008, unless the area becomes a non-rural area, an issue which is mute due to the fact that the Department has been found to have breached the 1986 contract by requesting a voluntary annexation.

Contrary to the assertion of the Department of Corrections, the contract was not merely for the sale of electric energy at a certain rate and period of time, the contract was an integrated agreement for membership in the Cooperative and an obligation to be bound by the membership terms and conditions as set out in the Cooperatives Articles of Incorporation and bylaws. The contract between Farmers' and the Department contains a special rate for electric service in addition as well as other obligations imposed upon the

department. The special rate for service is authorized pursuant to the Cooperative's bylaws in Articles I, Section 1.02. While the contract could be terminated in 2008, any permanent structure receiving electric service from Farmers' would continue to receive electric service pursuant to the general terms and condition of service as set out in Farmers' rate schedules, as Farmers' would have been the only lawful supplier pursuant to §394.315 RSMo. 2000. A benefit of the contractual bargain Farmers' relied on in agreeing to the terms and conditions of the 1986 contract. If the contract was terminated in 2008 by either party, under the terms of the membership agreement and bylaws, the Department of Corrections would have received service under the general rates and services as set out in the Cooperatives rules, regulations and rate schedules. Therefore, the loss of margins that Farmers' incurred because of the loss of sale of electricity to Corrections clearly extends beyond the year 2008 and is a direct and natural consequence of the Department in breaching the contract by seeking a voluntary annexation. But for the Department's actions, the contract would not have been breached and Farmers' would not have sustained damages for lost margins after 2008.

Regardless of the Department of Correction's assertion that Farmers' would not have had the ability to serve Crossroads had the structure been involuntarily annexed into the city, based upon facts of this case, it is quite clear that the Department of Corrections knew at the time that it decided to purchase electric power from the City of Cameron that it was Farmers' contention that the Department of Corrections was in breach of its contractual obligations. Thus, the Department's argument that Crossroads would have been involuntarily annexed into the City of Cameron is nothing more than mere

speculation. Had the Department of Corrections not sought a voluntarily annexation, Farmers' would have been entitled to serve the new structure under the electric rate provided in the 1986 contract through the date of termination. After 2008, Farmers' would have remained the lawful power provider as the Department would have remained a member of the Cooperative and pursuant to §394.315 RSMo. 1994. Farmers' would have been the only lawful supplier to the Department.

Sufficient evidence was presented by Farmers' expert witness, Mr. Lou Toth, as to the amount of damages sustained by Farmers' beyond the end of the contract period. Mr. Toth opined that by capping the growth rate it was more fair to assume a non-existent growth rate and provide any benefit of the doubt to the Department for the years beyond 2008. Contrary to the Department's position that Farmers' provided no data supporting the assumption of electrical usage, quite the opposite is true. Mr. Toth presented substantial evidence of the electric usage of Crossroads sister facility, Western Missouri Correctional Center, and used such information as a model for Crossroads. The growth rate for Western was then imputed to Crossroads providing sufficient data to support the assumption that electric usage would have increased. The assumption that the usage would remain the same after 2008 actually ignores the evidence which showed continual growth for a ten year period. The Court of Appeals in its decision stated:

In Missouri, the modern emphasis on the requirement that damages be shown with certainty is on the fact of damages and not on the particularized amount. *Gasser v. John Knox Village*, 761 S.W. 2d 728, 731 (Mo.App. 1988). "The proof must be sufficient to provide a rational basis for estimating the amount of loss sustained,"

but "may not be based on speculation or conjecture." Id. At 731-32.

*Farmers' Electric Cooperative, Inc. v. Missouri Department of Corrections*, 2001 WL 212917, Page 3, (Mo.App. W.D.).

Based on the evidence presented on remand, the trial court correctly held as a matter of law, that Farmers' was entitled to damages after the year 2008 and accepted as adequate proof the testimony of Farmers' expert witness. The judgment of the trial court should not be reversed and judgment should be entered in favor of Farmers' Electric Cooperative in the amount of \$3,154,296.00.

## POINT RELIED ON

**The trial court did not error by awarding Farmers' Electric Cooperative, Inc. lost margins for 50 years of projected sales of electricity for the Crossroads Correctional Center from 1997 through 2046, rather than for 12 years from 1997 through 2008 as argued by the Department of Corrections, because 1) the trial court properly applied the measure of damages for the Department of Corrections' breach of contract as the damages are the direct and natural consequences of the breach in that Farmers' would have been the lawful supplier to Crossroads once it began supplying permanent electric service even after the contract termination date of 2008, and because 2) there was substantial evidence to support the recovery of lost margins after 2008 in that there was sufficient evidence presented with reasonable certainty through actual facts of present data to show a rational estimate of the lost margins that Farmers' Electric Cooperative, Inc. will sustain over the life of the Crossroads facilities due to the breach of the 1986 contract by the Department of Corrections.**

*Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910, 923 (Mo.App.1994)

*Clay v. M0 Highway and Transp. Com'n*, 951 S.W.2d 617, 629 (Mo.App. W.D. 1997)

*Farmers' Elec. Coop., Inc. v. Mo Dept of Corrections*, 977 S.W. 2d 266 (Mo. Banc 1998)

*Inauen Packaging Equipment Corp. v. Integrated Indus. Services, Inc.*, 970 S.W.2d 360, 368, (Mo.App. W.D. 1998)

Sections 394.080, 394.315, 393.106, 91.025 RSMo. 2000.

## **POINT RELIED ON**

**The trial court did not error by awarding Farmers' Electric Cooperative, Inc. lost margins for 50 years of projected sales of electricity for the Crossroads Correctional Center from 1997 through 2046, rather than for 12 years from 1997 through 2008 as argued by the Department of Corrections, because 1) the trial court properly applied the measure of damages for the Department of Corrections' breach of contract as the damages are the direct and natural consequences of the breach in that Farmers' would have been the lawful supplier to Crossroads once it began supplying permanent electric service even after the contract termination date of 2008, and because 2) there was substantial evidence to support the recovery of lost margins after 2008 in that there was sufficient evidence presented with reasonable certainty through actual facts of present data to show a rational estimate of the lost margins that Farmers' Electric Cooperative, Inc. will sustain over the life of the Crossroads facilities due to the breach of the 1986 contract by the Department of Corrections.**

### **A. Standard of Review**

The standard of review of a court-tried contract case is enunciated in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. Banc 1976). The trial court's judgment will be sustained unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. See *Gee v. Payne*, 939 S.W.2d 383,385 (Mo. App. W.D. 1997).

**B. Farmers' Damages Are a Direct and Natural Consequences of the Department of Corrections' Breach of the 1986 Contract.**

Contrary to the assertion of Appellant Department of Corrections (“Department”), there is no implication in the trial court’s judgment or Farmers’ Electric Cooperative, Inc.’s (“Farmers’ ”) calculation of damages that assumes that the 1986 contract between Farmers’ and the Department is or imposes a perpetual contract upon the Department. As argued to the trial court, Farmers’ asserted that the contract period of twenty years required the Department to buy all of its electric energy from Farmers’ and Farmers’ to sell the electric energy at a special contract rate for a specific tract of land. (Tr. 29). During the contract period, Farmers’ was given the right to serve all of the Department’s electric needs in exchange for this special electric rate. The Department breached its contract with Farmers’ by requesting to be voluntarily annexed into the City of Cameron. This annexation prohibited Farmers’ from serving the electric needs of the new prison, Crossroads Correctional Center (“Crossroads”). See *Farmers’ Elec. Coop., Inc. v. Missouri Department of Corrections*, 977 S.W. 2d 266 (Mo. Banc 1998). (“*Farmers’ I*”) Had Farmers’ been able to provide the electric energy to Crossroads, its right to sell electric energy does not end upon termination of the 1986 contract, but continues under §394.315.2, RSMo. 1994. The contract termination provision only eliminates the Department’s obligation to purchase electric energy from Farmers’ for all new structures on the specific tracts of land set out in the contract. The Department would also lose its special electric rate and be placed on Farmers’ general service rates, as the issue of permanent service has been addressed by the Missouri Legislature.

In 1982, the Missouri Legislature first enacted several statutory provisions that apply to the various electric energy providers, which states that once an electric power provider lawfully commences supplying retail electric energy to a structure through permanent service facilities, it shall have the right to continue serving such structure, and other suppliers of electrical energy shall not have the right to provide service to the structure. See §394.315.2, §393.106.2, and §91.025.2. RSMo. 1994. Section 91.025.2 applies to municipal utilities. Section 393.106 applies to public utilities, while §394.315.2 applies to rural electric cooperatives; it is §394.315.2 that Farmers' relied on for the ability to provide electric service to the Department's facilities beyond the term of the contract. Section 394.315 Definitions--Rural Electric Cooperative Exclusive Right To Serve Structures, Exception--Change Of Suppliers, Procedure, states in part:

“2. Once a rural electric cooperative, or its predecessor in interest, lawfully commences supplying retail electric energy to a structure through permanent service facilities, it shall have the right to continue serving such structure, and other suppliers of electrical energy shall not have the right to provide service to the structure except as might be otherwise permitted in the context of municipal annexation, pursuant to section 386.800, RSMo., and section 394.080, or pursuant to a territorial agreement approved under section 394.312. . . . .”

Sections 393.106.2 and 91.025.2 have identical language that prohibits other electric energy suppliers from providing service to any structure which has received retail electric energy through permanent service facilities. These versions of §§ 394.315.2,

393.106.2 and 91.025 were amended in 1986 to their present form. Originally § 394.315.2 (RSMo. Supp.1982) provided that once an electric cooperative began providing retail electric service to a tract of land that no other provider could provide service to the tract of land. See, *Missouri Public Service Co. v. Platte-Clay Elec. Co-op., Inc.*, 700 S.W.2d 838 (Mo. banc 1985).

After the Supreme Court's decision in *Missouri Public Service Co. v. Platte-Clay Elec. Co-op., Inc.*, 700 S.W.2d 838 (Mo. banc 1985), the Legislature choose to amend §§ 394.315.2, 393.106.2 and 91.025 so to change metering points to permanent facilities. This change was enacted in 1986, prior to the execution of the 1986 contract between Farmers' and the Department. Relying upon this new language of §394.315, Farmers' in exchange for a lower electric rate obtained the ability to serve all of the electric energy needs of the Department for the contract period of 20 years. Once electric service is established through permanent facilities, it is not the contract that dictates the continuation of service to the Department, but it is the statutory provisions of §394.315 RSMo. 1994, that give Farmers' the ability to continue to provide electric service to the Department.

As stated above, the terms of the 1986 contract establish a special electric rate in exchange for Farmers' exclusive right to sell electric energy to the Department on a specific tract of land. A review of the contract, shows that it is silent as to the Department's rights to obtain electric energy from any other electric provider for the facilities that are receiving electric service as of the last day of the contract. (L.F. 6-10). That is because the statutory provisions of §394.315 control who is the lawful electric

service provider to existing structures. The termination of the 1986 contract doesn't terminate Farmers' electric service to the Department, but merely terminates the Department's promise to allow Farmers' to be the sole supplier of electric energy for all of the Department's electric energy needs on the specified tract of land, in exchange for a special rate for the electric energy. As this Court found in *Farmers' I*, the Department breached the 1986 contract by requesting a voluntary annexation and thus denying Farmers' the ability to serve Crossroads. The Department knew of the statutory provisions of §394.315 at the time that the 1986 contract was entered into. Had Farmers' begun to lawfully serve Crossroads, it could have continued to do so after the termination of the 1986 contract. Therefore, the Department's argument that the 1986 contract is a perpetual contract ignores not only the subject matter of the contract, but the statutory authority of Farmers' to continue serving the Department's electric energy needs after the termination of the 1986 contract.

**C. Damages Accruing after 2008 are a Direct Result of the Department's Breach of the 1986 Contract**

There is in no dispute that the contract between Farmers' and the Department can be terminated in the year 2008. What is in dispute is the subject matter of the contract, and Farmers' ability to continue to provide electric service to the Department after the termination of the contract and whether Farmers' is entitled to damages for the loss of revenue that it bargained for in the 1986 contract. There is no dispute that the measure of damages is a question of law. See *Gee v. Payne*, 939 S.W.2d at 385. Nor is there a dispute that; "A party injured by a breach of contract is entitled to the value of the

performance of the contract, that is, the injured party is entitled to the benefit of the bargain, that being whatever net gain he or she would have made under the contract. *Inauen Packaging Equipment Corp. v. Integrated Indus. Services, Inc.*, 970 S.W.2d 360, 368, (Mo. App. W.D. 1998). The Department suggests that Farmers' damages must end upon the termination of the 20 year period covered by the contract. The Department's position ignores Farmers' statutory authority to continue to provide service to the Department after the end of the contract pursuant to §394.315, and as argued above.

It is clear that the benefit of Farmers' bargain under the 1986 contract was the ability to be the sole provider of electric energy to the Department once it began serving permanent facilities. The residual benefit of the bargain was that once Farmers' began providing permanent service to the Department, it has the statutory authority to continue to do so even after the end of the contract. What was the benefit of the bargain to the Department in entering into the 1986 contract? Looking at the terms of the contract, the Department received a lower electric rate for all the electric energy it needed upon this specified tract of land for the entire 20 year period of the contract. In accordance with the terms of the contract, the Department could have waited until the end of the contract term to select a different electric provider for any new facilities. But once the Department chooses an electric supplier, that supplier becomes the only electric provider that can serve the facility in accordance with §§ 394.315.2, 393.106.2, and 91.025.2. The ability to continue serving a structure is an inherent part of the bargain Farmers' received from the Department in exchange for the Department receiving a lower rate for electric energy. Thus, the damages after 2008 are the direct and natural consequences which arises from

the Department's breach of the 1986 contract. See *Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. App. E.D. 1982)

The fact that Farmers' was denied the ability to serve Crossroads damaged Farmers' not just through the contract period, but through the entire life expectancy of the prison facilities, as Farmers' statutory right to continue to provide service was also denied Farmers' because of the breach. There is no speculation that the Department might use additional electricity after the actual construction of Crossroads. Had the Department not breached the 1986 contract, Farmers' would have served Crossroads under the terms of the 1986 contract, thus becoming the only lawful supplier to Crossroads after the contract termination in 2008. Therefore, the trial court properly allowed Farmers' damages to extend beyond the termination date of September 2008. Therefore, the trial court did not misapply the measure of damages and allow Farmers' the ability to collect its damages beyond the end of the contract term.

An injured party can recover actual damages for the direct and natural consequences of the breach, or for damages that were within the contemplation of the contracting parties. *Ross v. Holton*, 640 S.W.2d 166, 173, (Mo. App. E.D. 1982); citing *Forsythe v. Starnes*, 554 S.W.2d 100, 109 (Mo.App.1977). The Southern District court in *Birdsong v. Bydalek*, 953 S.W.2d 103 at 116-117 (Mo. App. S.D. 1997), stated that: Turning to 11 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1344 (3d ed. 1968), we find that in contracts, a breaching party is only liable for those consequences that were reasonably foreseeable at the time the parties entered into the contract. The RESTATEMENT (SECOND) OF

CONTRACTS § 351 (1981) provides more insight into the issue of foreseeability, stating:

- (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
- (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
  - (a) in the ordinary course of events, or
  - (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know."

There is little doubt that the direct and natural consequences of the Department's breach of the 1986 contract prohibits Farmers' from initially providing electric service to Crossroads and from the continued service to Crossroads after the expiration of the contract term. Because of the statutory provisions of §394.315 the lost margins from Crossroads, even after 2008 are within the contemplation of the contracting parties, as the current version of §394.315 had been enacted shortly before Farmers' and the Department entered into the 1986 contract. As a general rule, in a breach of contract case, the goal in awarding damages is to put the non-breaching party in as good a position as he or she would have been in if the contract had been performed. *Gee v. Payne*, 939 S.W.2d 383 ,386 (Mo. App. W.D. 1997); citing *Williams v. Hubbard*, 789 S.W.2d 810, 812 (Mo.App.1990). The position Farmers' would have been in, had it not been for the Department's breach is that Farmers' would have been the supplier of electric energy to Crossroads, before and after the expiration of the contract term.

**D. Farmers' Would Have Had the Exclusive Right to Provide Electric Service to Crossroads After 2008, Pursuant to Section 394.315, Had the Department Not Breach Its Contractual Obligations with Farmers'.**

The Department admits that had it not breached the contract and performed its covenant of good faith and fair dealing and not sought voluntary annexation, Farmers' would be entitled to provide electricity for use at Crossroads. The Department is, however, wrong in its position that Farmers' would be entitled to serve Crossroads only so long as the tract of land on which Crossroads was built remained in a rural area. The law is quite clear that rural electric cooperatives can continue to serve in non-rural areas. Thus, if the Department had performed its contractual obligation, Farmers' would have begun serving Crossroads. Even if Crossroads is annexed into the City of Cameron and becomes a non-rural area, just as Farmers' is currently serving Western Missouri Correctional Center, Farmers' could have continued to serve Crossroads. See §394.020, 394.080, 394.315 RSMo. 2000. *Farmers' I*, supra. In search to avoid assuming the responsibility that comes along with the failure to perform its contractual obligations, the Department now attempts to mischaracterize the facts in evidence to suggest that the damages beyond 2008 are unsupported by the fact that Farmers' could not serve Crossroads. In order to support such a position, the Department itself uses the hypothetical that Crossroads would have never received service from Farmers' Electric because of an involuntary annexation. Such a contention is well beyond the facts and evidence and is wholly unsupported by the record on appeal.

To support this argument the Department relies on pure speculation and

mischaracterizes Farmers' position as to its ability to provide electric service to Crossroads after the area becomes a non-rural area. This issue was resolved by this Court in *Farmers' Electric Cooperative v. The Department of Corrections*, 977 S.W.2d at 270-71. The issue on appeal is whether or not Farmers' is entitled to damages after 2008 for the Department's breach of contract. The Department cannot speculate as to the issue of annexation after the fact to justify avoiding the damages inflicted upon Farmers' due to its breach of contract. The evidence presented in *Farmers' I*, supra, and to the trial court on remand, clearly shows that the Department agreed to voluntary annexation. There was no evidence presented during the hearings of this matter to ever suggest that the City of Cameron planned to involuntary annex the area in the event that the Department declined to agree to a voluntary annexation. The evidence and facts of the case indicate that the Department did in fact construct a new building on a tract of land that they contracted to have Farmers' serve. There was a request for voluntary annexation that financially benefited the Department. To now conclude that an involuntary annexation would have occurred to deny Farmers' the ability to serve this new load, is simply an attempt to justify the Department's actions and minimize the amount of damages it inflicted upon Farmers'.

Had there in fact been an involuntary annexation in which the citizens of Cameron voted to annex Crossroads Correctional Center, then the arguments contained within Section D of the Appellant's brief would be a logical interpretation of this Court's opinion interpreting the relevant statutes. However, no such involuntary annexation occurred. The facts are that the Department actually constructed new structures which,

pursuant to the contract, were to be served by Farmers' prior to the expiration of the contract date of 2008. What the facts of this case do show and what was presented at the first case was that the Department of Corrections knew about its contract with Farmers'. That it entered into contract negotiations between the City of Cameron and Farmers' to obtain the best electrical rate for Crossroads. That these contract negotiations began after its voluntary annexation. That once it notified Farmers' that it believed it was required to choose the City of Cameron to serve Crossroads, Farmers' informed them that they were in breach of their contract and that Farmers' would be seeking damages. In spite of all those conversations, the Department of Corrections decided to build Crossroads Correctional Center. Therefore, the Appellant's notion that an involuntary annexation might have occurred therefore thwarting the damages that Farmers' would have incurred after 2008, is nothing more than the Appellant's attempt to mischaracterize the actual thought process, planning, and decision making that occurred to place, locate and construct Crossroads Correctional Center in Cameron, Missouri. Once the Department of Corrections was notified that it was in breach of Farmers' contract it could have relocated the facility at one of the many other locations that it had been scouting prior to the decision to locate Crossroads in Cameron, Missouri.

However, the Department chose not to relocate its facility, but instead chose to take the position that it had not breached the contract by selecting an alternative power supplier. That calculated decision was as this Court found in *Farmers' I*, supra, a breach of the good faith and fair dealing clause of the contract. Such a breach did not allow Farmers' to begin providing service to a new structure. Once Crossroads was

constructed, the Court did not misapply the measure of damages for the lost margins after 2008, because had Farmers' started providing service to Crossroads they would have been entitled to continue providing service in accordance with §394.315 RSMo. after the expiration of the contract. If Farmers' had been able to provide service to Crossroads, pursuant to §394.315 RSMo. 2000, Farmers' would have been the only legal supplier of electric service to that facility after the expiration of the contract in 2008. The terms and conditions of service after 2008, had the contract not been renewed, would have been under the general service rate applied to members of that load size and characteristics. The contract and membership obligation of a member, is to buy all of its power from the Cooperative. The statutory requirement of §394.315 provides that once a supplier begins providing service to a new structure, it shall be the only lawful supplier to that structure. As this Court is fully aware, that §§ 91.025.2 and 393.106 provide the same legal protection to municipal power suppliers and public utilities that rural electric cooperatives enjoy under §394.315. These three provisions, when read in conjunction, clearly show a legislative intent that power suppliers to structures have a statutory right to continue serving those structures without the need of specific written contracts to the contrary. Therefore, any contract between an electric supplier and a member would be for special rates and special terms and services, a condition which go above or below the standard service rates for the various class of customers.

It is quite clear that as a direct result of the Department of Corrections' breach of the contract, Farmers' was damaged beyond the year 2008. Therefore, in the absence of breach, Farmers' would have been the exclusive provider of electricity to Crossroads

under the 1986 contract entered into by the Department of Corrections.

**E. There Was Substantial Evidence of Lost Margins after 2008.**

It has been held by this Court that a right to recover for lost future profits is not easily shown. *Clay v. Missouri Highway and Transp. Com'n*, 951 S.W.2d 617, 629 (Mo. App. W.D. 1997). In most cases, the courts hold that anticipated profits of a yet-to-be established commercial business are too remote, speculative, and dependent upon changing circumstances to warrant recovery. *Id.* citing *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910, 923 (Mo.App.1994). They are recoverable "only when they are made reasonably certain by proof of actual facts which present data for a rational estimate of such profits." *Id.*; citing *Anuhco*.

This Court in *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910, 923 (Mo. App. W.D. 1994) provided a comprehensive analysis of the recovery of lost profits. The Court stated:

"Proof of lost profits is exacting. Speculation as to probable or expected lost business profits is spurned, and proof of lost profits must be substantial. *Coonis v. Rogers*, 429 S.W.2d 709, 713-14 (Mo.1968). The court in *Coonis* said: 'The general rule as to recovery of anticipated profits of a commercial business is that they are too remote, speculative, and too dependent upon changing circumstances to warrant a judgment for their recovery. They may be recovered only when they are made reasonably certain by proof of actual facts, with present data for a rational estimate of their amount; and when this is made to appear, they may be recoverable.' (Citations omitted). *Id.* at 714. Recovery for anticipated profits of a

commercial business are generally "too uncertain and dependent upon changing circumstances to warrant a judgment for their recovery." *Brown v. McIBS, Inc.*, 722 S.W.2d 337, 341 (Mo.App.1986). While lost profits may be recoverable when they are shown to have been the natural and probable consequences of an act or omission, they must be shown by reasonable certainty. *Southern Missouri Bank v. Fogle*, 738 S.W.2d 153, 158 (Mo.App.1987). Lost anticipated profits are recoverable only when they are made reasonably certain by proof of actual facts which present data for a rational estimate of such profits. *Brown*, 722 S.W.2d at 341. Recovery for lost profits is not permitted when uncertainty and speculation exist as to whether lost profits would have occurred or whether lost profits emanated from the wrong. *Fogle*, 738 S.W.2d at 158."

*Anuhco*, 883 S.W.2d at, 923.

In this action, Farmers' presented the testimony of Mr. Trent Gann, the Vice President of Finance and Administration for Farmers' Electric Cooperative. Mr. Gann provided significant testimony regarding the financial operations of the cooperative including testimony and an explanation of the Department's Western Missouri Correctional Center's electric bills. (See Tr. 42-106). Farmers' next witness was Mr. Louis S. Toth of Ledbetter, Toth & Associates Consulting Engineers. The parties stipulated to the expert qualifications of Mr. Toth. Mr. Toth presented significant testimony and explanations for how he prepared his report and the methodology used in calculating Farmers' lost margins. (See Tr. 123-147 and Appendix R-1, Mr. Toth's expert report). Mr. Toth

specifically testified that; “The situation with not having forward looking or future numbers, because none of us sit upstairs, is a challenge. However, Farmers’ Electric has another facility on the property that we used as a model for this facility, and the growth rates of that facility were utilized herein. Now, you’ll notice that on the adjacent facility, we had ten years’ worth of data.” (Tr. 127, lines 13-22). Mr. Toth further testified that; he stopped “the growth analysis at ten years because there wasn’t any more data from Western Correctional facility to model Crossroads by. But we would note that in the last year, the usage again, grew for Western Correctional facility, so --- but we - - to be fair to all parties and have a fair analysis, we stopped growth at ten years.” (Tr. 128, lines 2-9).

The Department argues that there is no substantial evidence supporting a recovery of lost margins from the projected sale of electricity for use at the Crossroads after 2008, because there is no evidence of electric usage at the Western Missouri Correctional Center after a 10 year period. (Appellants Substitute Brief page 35). This position, however, lacks legal support. Nothing in either *Anuhco*, supra or *Clay*, supra requires that there be equal evidence of past usage to compute or model future usage. The long standing general rule regarding recovery of anticipated profits of a commercial business is that they are too remote, speculative, and too dependent upon changing circumstances to warrant a judgment for their recovery. *Coonis v. Rogers*, 429 S.W.2d 709, 713-14 (Mo.1968). Future damages may be recovered only when they are made reasonably certain by proof of actual facts, with present data for a rational estimate of their amount; and when this is made to appear, they may be recoverable. *Coonis*, 429 S.W.2d 713 (Mo.1968). The evidence presented by Farmers’ was based on actual facts of electric

usage of a similar size correctional center and 18 months of actual usage.

Not only did Farmers' present evidence of actual facts of current usage, with present data for a rational estimate of the amount of damages. Farmers' expert, Mr. Toth also used the actual usage information of Western Missouri Correctional Center for a 10 year period. During this 10 year period, the Department's usage at Western continually increased. Mr. Toth used the ten year growth pattern from Western to calculate the amount of usage for Crossroads, thus calculating the amount of damages sustained by Farmers'. After applying the ten years of data, Mr. Toth froze the growth rate. Despite having an enormous amount of data to forecast the future usage of Crossroads, Mr. Toth believed it was fair to all parties, and a fair analysis to freeze the growth rate. Thus, the benefit of doubt was given to the Department as to the future usage.

There was substantial evidence presented to the trial court to show that Farmers' future damages were reasonably certain to occur. Farmers' is not a new business and the sale of electricity is not a yet-to-be established commercial business. Every segment of our society uses some amount of electricity on a daily basis. It is only reasonable to assume that had the Department not breached the 1986 contract, that Farmers' would have been the electric energy provider to Crossroads, and in accordance with §394.315, Farmers' would have continued to sell electric energy to the Department for Crossroads even after the expiration of the 1986 contract. After hearing Farmers' evidence, the trial court made the determination that Farmers' was entitled to receive damages after 2008. (See TR. 41, lines 1-97).

The next question to be answered is for how many years after 2008 should

Farmers' be entitled to recover for (Tr. 41, lines 7-9). Farmers' presented uncontroverted evidence that through certain Bureau of Justice Statistics showing the age of the nations correctional facilities. These statistics show that there have been very few correctional facilities closing between 1984 and 1995. (Tr. 145). Mr. Toth testified that in 1984 there were 162 correctional facilities in operation that were between 50 years old and 99 years old, and that in 1995 there were 310 correctional facilities between the ages of 50 and 99 in operation. (Tr. 146). Mr. Toth opined that based on these statistics it was reasonable to use 50 years to forecast Farmers' damages. Farmers' presented the interrogatory answers of the Department showing the initial construction date, the occupation date and the closure date for each of Missouri's correctional centers, which did not list any closure dates (Tr. 147). The trial court had substantial evidence presented to it to support its ruling that 50 years was a reasonable time period for Farmers' to receive damages for the Department's breach.

Based on the substantial evidence Farmers' presented at trial, the trial court found that it was reasonable to allow Farmers' to recover for the future damages it will sustain which are the natural and probable of the Department's breach for a fifty year period which the trial court found to be a reasonable time period for the life expectancy of Crossroads.

### **CONCLUSION:**

The trial Court's judgment in this case is supported by substantial evidence, is not against the weight of the evidence, nor does it erroneously declare or apply the law. The Department breached the 1986 contract thus entitling Farmers' to the lost margins/profits

it would have made from serving the Crossroads Correctional Center, even after the expiration of the 1986 contract. The trial court properly ruled that Farmers' damages went beyond the term of the contract, as Farmers' has a statutory right to continue to provide electric service to structures even after the expiration or termination of the 1986 contract. Farmers' future damages were not shown to be speculative, but were proved and made reasonably certain by actual facts of electric usage, which presented data for Farmers' expert witness to form a rational estimate of the damages to be sustained by Farmers'.

Therefore, the Judgment of the trial court awarding Farmers' damages should be sustained.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, U. S. Mail, postage pre-paid, this 31st day of August 2001, to: Gary L. Gardner, Assistant Attorney General, P. O. Box 899 Jefferson City, MO 65102

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Victor S. Scott

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief includes the information required by Rule 55.03, complies with the limitations of Rule 84.06(b) and Special Rule No. 1(b), and contains 8,869 words and that the diskettes provided this Court and counsel have been scanned for viruses and are virus free.

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Victor S. Scott