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JO-CARROLL ENERGY, INC.)

2003 DEC 19 1 P 2: 34

Complainant,)

CHIEF CLERK'S OFFICE

vs)

No. 02-0593

ALLIANT d/b/a INTERSTATE POWER)
AND LIGHT CO.)

Respondent.)

MOTION BY JO-CARROLL ENERGY, INC. FOR SUMMARY JUDGMENT

JO-CARROLL ENERGY, INC., Complainant (Jo-Carroll), by GROSBOLL, BECKER, TICE & REIF, Jerry Tice of counsel, pursuant to the rules of practice of the Illinois Commerce Commission, 83 Illinois Administrative Code, Section 200.190 herewith files its motion for partial summary judgment with respect to Count I and in support thereof, states as follows:

I. NATURE OF THE CASE

Jo-Carroll filed a one count complaint on September 11, 2002 claiming the right to serve the customer at issue in this docket, Jamie Rowe, pursuant to Section 8 (proximity) of the Illinois Electric Supplier Act, 220 ILCS 30/8 (2002 State Bar Edition) (ESA). On January 21, 2003, Jo-Carroll filed an amended complaint again claiming the right to serve the customer pursuant to Section 8 of the ESA and adding Count II seeking approval by the Illinois Commerce Commission (Commission) of a proposed Service Area Agreement between Jo-Carroll and Alliant d/b/a Interstate Power and Light Co. (Respondent) (Interstate) and

requesting the Commission to award Jo-Carroll service rights to the customer's premises which are located in Jo-Carroll's service territory as designated by the proposed Agreement.

Interstate, on February 21, 2003, filed its answer to Count I and Count II of the amended complaint and also filed a motion to strike Count II. Jo-Carroll responded to Interstate's motion to strike Count II on or about March 21, 2003 and on or about April 4, 2003 Interstate filed its reply thereto. On May 13, 2003, Administrative Law Judge Michael Wallace determined that Interstate's motion to strike Count II would be taken with the case and ordered Interstate to file an answer to Count II of the amended complaint which Interstate filed on or about June 16, 2003.

II. STATUS OF THE CASE

This case is now at issue, Interstate having filed an answer to Count I and Count II of the complaint. Discovery has not been completed and is still being conducted by the parties. Jo-Carroll brings this Motion for Summary Judgment with respect to Count I only and to that extent the motion is for partial summary judgment.

III. FACTS OF THE CASE

This case involves a service dispute to the customer, Jamie Rowe, whose property is described as the East 70 acres of the North Half of Section 26, Township 29 North, Range 2 West, Menominee Township, Jo Daviess County, Illinois (customer premises). The customer has constructed a residence on the premises. Jo-Carroll possesses single phase electric distribution lines which were in existence on July 2, 1965 and which are presently 1642 feet east of the customer's residence and electric meter located on the customer's premises, all as more fully shown by the maps attached as Exhibit 1 and 5 to the affidavit of Rick M. Knipfer,

Engineering and Operations Manager of Jo-Carroll, which affidavit is marked Exhibit A and by reference incorporated herein. In addition, the customer's residence which requires single phase electric distribution service and Jo-Carroll's single phase electric distribution facilities near the customer's residence are adequate to provide the electric service. (See Knipfer Affidavit; Exhibit A).

Jo-Carroll has a single phase electric distribution line running east and west south of the customer's residence which existed on July 2, 1965. In addition, Jo-Carroll constructed two single phase distribution line extensions in a northerly direction along Indian Ridge Road. These extensions connect to the aforesaid east/west electric distribution line. The first electric distribution line extension was constructed on or about November 14, 1996 at a total cost to Jo-Carroll of \$1,819.14. The second extension of such single phase electric distribution facilities was constructed by Jo-Carroll north along Indian Ridge Road on or about March 6, 1998 at a cost to Jo-Carroll of \$2,099.53 (See Knipfer Affidavit; Exhibit A/Exhibit 1, Exhibit 3, Exhibit 4). As a result of those line extensions, Jo-Carroll's post July 2, 1965 single phase electric facilities located south and west of the customer's residence is situated 856 feet south of the point where the customer's service line taps the Interstate post July 2, 1965 single phase line extension south along Indian Ridge Road (Knipfer Affidavit; Exhibit A/Exhibit 5). In addition Jo-Carroll serves 14 customers in the area around the premises/residence of Jamie Rowe and has provided electric service in the area since 1939 (Knipfer Affidavit Exhibit A/Exhibit 2).

Interstate's July 2, 1965 electric distribution service consisted of a single phase distribution line, the closest point of which is located 2557 feet from the customer's

meter/residence location (Knipfer Affidavit; Exhibit A/Exhibit 5). On or about 1980, Interstate extended its July 2, 1965 existing single phase line south along Indian Ridge Road some 3,690 feet. Interstate then extended underground electric service to the customer at issue in this docket by tapping the 1980 Indian Ridge Road extension at a location 2990 feet south of Interstate's July 2, 1965 existing line and 860 feet west of the customer's meter/residence (Exhibit B; Interstate's map provided in response to Jo-Carroll's Interrogatories No. 15, 16, and 27). The cost to Interstate for overhead, materials, and labor to extend electric service 860 feet from the Interstate post July 2, 1965 Indian Ridge Road extension to the customer's meter/residence was \$5,676.34 (Interstate Response to Jo-Carroll Interrogatory No. 25 attached as Exhibit C). Interstate has refused to provide the cost of the 1980 extension of its electric distribution facilities south along Indian Ridge Road (See Interstate's response to Jo-Carroll's Interrogatories No. 18c; No. 20; and No. 22, attached as Exhibit C). Neither has Interstate provided any evidence as to when it first provided electric service in the area of the customer's meter/premises, the number and location of customers in the area, and the dates of service other than to say that it installed the electric facilities in 1980 (Interstate answer to Jo-Carroll Interrogatory No. 27, attached as Exhibit C).

IV. ARGUMENT

A. THE LAW AS IT PERTAINS TO A SECTION 8 PROXIMITY CLAIM TO PROVIDE ELECTRIC SERVICE TO A CUSTOMER

This case comes before the Commission via Count I of the Amended Complaint on the basis of Section 8 (proximity) of the ESA. Neither Jo-Carroll or Interstate claim Section 5 rights to serve the customer and Jo-Carroll and Interstate cannot agree on the validity of the

service area agreement at issue in Count II of the Amended Complaint. Thus, the Commission is required to decide the service rights pursuant to Section 8 of the ESA. Coles Moultrie Electric Cooperative v Illinois Commerce Commission 73 Ill App 3d 165; 394 NE2d 1068; 31 Ill Dec 750 (4th Dist 1979).

When determining the issue of proximity, Section 8 provides:

“In making this determination, the Commission shall act in the public interest and shall give substantial weight to the consideration as to which supplier had existing lines in proximity to the premises proposed to be served, provided such lines are adequate. In addition, the Commission may consider, but with lesser weight, (a) the customer’s preference as to which supplier should furnish the proposed service, (b) which supplier was first furnishing service in the area, (c) the extent to which each supplier assisted in creating the demand for the proposed service, and (d) which supplier can furnish the proposed service with the smaller amount of additional investment. The Commission, however, shall give no weight or consideration to the fact that any supplier has or has not been issued a certificate of public convenience and necessity in the area proposed to be served.”

Additionally, the Federal Circuit Court of Appeals for the Seventh Judicial Circuit in Fuchs v Rural Electric Convenience Cooperative, Inc. 858 F2d 1210, 1212 (7th Cir 1988) determined the Act effectively froze the status quo of Illinois electric service even in the absence of an Agreement between suppliers. In effect, the ESA is interpreted to mean a “snap shot” is taken of the electric facilities effective July 2, 1965 and the area in question is thereafter frozen in time for purposes of determining rights of competing electric suppliers to serve a particular customer that later locates in the area.

The principles required to be followed in determining proximity under Section 8 of the ESA are:

1. Proximity is determined from an electric supplier’s “existing line” as it existed on July 2, 1965. (220 ILCS 30/3.6; Jo-Carroll v Ill Com. Comm. & Interstate, Case No. 93-MR-

39, Jo-Davies Circuit Court June 27, 1994 on Adm. Rev. of Commission Order in Interstate Power Company v Jo-Carroll Electric Cooperative, Inc. Ill. Com. Comm. 92-0450 and 93-0030 consolidated July 21, 1993.)

2. The route for proximity purposes is the shortest direct route between the July 2, 1965 line and the “normal service connection point” of the customer determined in accordance with accepted engineering practices 220 ILCS 30/3.13.

3. The “normal service connection point” is the point on the premise of the customer where an electric connection to serve the premise would be made in accordance with accepted engineering practices. 220 ILCS 30/3.10.

4. Such line is used for proximity whether or not it is adequate to provide electric service because the supplier has the right at its own expense to upgrade the line and make it adequate to provide electric service to the customer 220 ILCS 30/3.1.

5. The electric supplier has the right to serve the customer by a method and/or line different than the line used to determine proximity. Coles-Moultrie Electric Cooperative v Central Illinois Public Service Company, Ill Com. Comm ESA 195 (August 26, 1981); Illinois Power Company v Egyptian Electric Cooperative Association Ill. Com. Comm. ESA 176 (September 7, 1977).

B. JO-CARROLL’S 1965 EXISTING LINE IS IN CLOSER PROXIMITY TO THE CUSTOMER’S METER PEDESTAL/RESIDENCE.

There is no dispute regarding the proximity evidence in this docket. Jo-Carroll’s 1965 existing single phase distribution line located to the east of the customer’s residence is 1642 feet from the customer’s residence/meter pedestal. Interstate’s 1965 line, at its closest point to

the customer's residence, is 2557 feet to the north and west thereof. The magnitude of the difference in proximity between Jo-Carroll's 1965 distribution line and Interstate's existing 1965 line is sufficiently great enough to eliminate any potential dispute as to the facts for determining proximity.

"Proximity" is defined by Section 3.13 of the ESA to mean:

"'Proximity' means that distance which is shortest between a proposed normal service connection point and a point on an electric supplier's line, which is determined in accordance with accepted engineering practices by the shortest direct route between such points which is practicable to provide the proposed service".

As shown by Exhibit 5 attached to Rick Knipfer's Affidavit (Exhibit A) the proximity for each of Jo-Carroll (1642') and Interstate (2557') has been determined by a direct route from the closest point on their respective 1965 distribution lines to the location of the customer's residence/meter pedestal. While the direct line may not be the actual route utilized by either supplier to provide the electric service (in fact Interstate utilized a different route, as shown by Jo-Carroll's Exhibit B, attached to this Motion for Summary Judgment), proximity has been determined and compared for both suppliers as if a direct route were utilized.

Section 8 of the ESA requires that the Commission "...shall give substantial weight to the consideration as to which supplier had existing lines in proximity to the premises proposed to be served, provided such lines are adequate". There is no dispute that Jo-Carroll's 1965 existing lines are adequate to provide the electric service to the customer in question. There likewise is no dispute that Jo-Carroll's July 2, 1965 existing line is closer in proximity by more 915 feet. Accordingly, the Section 8 factor of "proximity", to which the Commission must give substantial weight in making its determination of the service dispute, must be decided in

Jo-Carroll's favor since there is no disputed material issue of fact regarding Jo-Carroll's and Interstate's respective 1965 distribution lines. Thus, the Commission can, by summary judgment, determine the substantial weight factor of proximity in Jo-Carroll's favor.

C. THE LESSER WEIGHT CRITERIA.

Section 8 provides that the Commission may, but is not required to, consider certain lesser weight criteria which are:

- (a) Which supplier was first furnishing service in the area.
- (b) The extent to which each supplier assisted in creating the demand for the proposed service.
- (c) Which supplier can furnish the proposed service with the smaller amount of additional investment.
- (d) The customer's preference as to which supplier should furnish the proposed service.

1. JO-CARROLL WAS FIRST TO FURNISH SERVICE IN THE AREA.

Jo-Carroll has provided electric service in the immediate area surrounding the customer's premises continuously since 1939 to the present time. In fact Jo-Carroll is currently providing electric service to 14 customers located along its existing July 2, 1965 line running north and south on the east side of the customer's premises, and along the post July 2, 1965 line extensions that runs northerly along Indian Ridge Road. These customers were connected at various times between 1939 and the present time. It is clear that Jo-Carroll's electric service in the area of the customer's residence is extensive, has been long standing, and Jo-Carroll has been a principal electric service provider in the area for a considerable

length of time.

On the other hand Interstate has shown on its map provided in response to Jo-Carroll's discovery (Jo-Carroll Exhibit B) that Interstate had at best three customers in the area of the customer's premise at issue in this docket. Interstate did not provide any evidence in response to Jo-Carroll's discovery requests regarding the date electric service commenced to those customers except to note that one customer was connected in 1980 after Interstate built its 3690 foot post 1965 line extension south along Indian Ridge Road and added another customer on that extension in 1988. Interstate provided no information regarding the dates of connection of its electric service to the other three customers noted on its map located to the north and west of the customer's premises. At best the immediate area of the customer's residence indicates that Interstate has only five customers of which three were connected sometime prior to July 2, 1965 and two were connected post July 2, 1965.

It is clear that as between Jo-Carroll and Interstate, Jo-Carroll has by far the more extensive electric service presence in the area. Thus, there is no material factual issue in dispute with regard to which of Jo-Carroll or Interstate was first to furnish service in the area.

2. THE EXTENT TO WHICH EACH SUPPLIER ASSISTED IN CREATING THE DEMAND FOR THE SERVICE.

The customer requested electric service from Jo-Carroll. This is indicative of the fact that Jo-Carroll has by far the more extensive electric service in the area. In addition the number of customers served by Jo-Carroll in the area as well as the extensive electric distribution facilities of Jo-Carroll in the area provide clear evidence that Jo-Carroll has had a long involvement in providing electric service in the general area surrounding the customer's

premises. There is no evidence in the record about the extent of service by Interstate in the general area except the map it provided in response to Jo-Carroll's discovery requests which show no more than five customers in the general area of the customer's premises. Further no evidence has been provided by Interstate as to when Interstate connected its first customer in the area. Accordingly, there is no material issue of fact that this lesser weight criteria favors Jo-Carroll.

3. WHICH SUPPLIER CAN FURNISH THE PROPOSED SERVICE WITH THE SMALLER AMOUNT OF ADDITIONAL INVESTMENT.

Jo-Carroll's cost of providing electric service to the customer from its July 2, 1965 line to the east of the customer's premises is \$8,872.00. However, Jo-Carroll has elected to provide service by extending its existing post July 2, 1965 line along Indian Ridge Road further north to a point where it connects with the junction box located on Interstate's 1980 extension built south along Indian Ridge Road and from which Interstate commenced its extension for electric service to the customer's premises. The length of that extension by Jo-Carroll is 856 feet and will cost Jo-Carroll \$4,149.00. At that point Jo-Carroll can easily connect to the existing extension installed by Interstate of some 860 feet in length to provide the electric service to the customer's residence.

An electric supplier has a right to serve the customer by a method and/or line different than the line used to determine proximity. See Coles-Moultrie Electric Cooperative v. Central Illinois Public Service Company, Ill. Com. Comm. ESA 195 (August 26, 1981), where CIPS constructed a 12.5 KV under built line on an existing transmission line to serve the customer which was more practical for CIPS' needs instead of using the shortest route; and Illinois

Power Company v. Egyptian Electric Cooperative Association, Ill. Com. Comm. ESA 176, (September 7, 19877) where Egyptian found it more practical to meet it's service requirements by constructing three miles of new 12.5 KV line, a new substation, and seven miles of 69 KV transmission line to serve a new customer instead of extending its 1965 line. In this instance, Jo-Carroll has experienced residential development along the southerly portion of Indian Ridge Road for which Jo-Carroll made its post July 2, 1965 line extensions. The record shows that Jo-Carroll connected at least six residences along that extension. It is reasonable to assume that Jo-Carroll finds it advantageous from a management standpoint to connect the customer in this docket from the electric services it has installed along Indian Ridge Road because that appears to be where the growth is occurring and thus Jo-Carroll can minimize the cost of adding additional services along Indian Ridge Road from that extension. Illinois Power Company v Egyptian Electric Cooperative Association Ill. Com. Comm. ESA 196 (Sept. 7, 1977).

On the other hand, Interstate disclosed in discovery that the cost to serve the customer was \$5,676.34. Interstate did so by an 860 foot line which was connected to its 1980 extension south along Indian Ridge Road. Interstate did not produce any evidence as to the cost of its 1980 line extension south along Indian Ridge Road. In fact Interstate took the position that it did not have to produce that information, apparently on the assumption that the cost of the post July 2, 1965 line extension of Interstate's 1965 existing line was not relevant in determining the additional cost to Interstate for providing the service to the customer in this docket. As noted by Jo-Carroll's Rick Knipfer in his Affidavit, the cost to Jo-Carroll of extending service northerly 856 feet from the northerly termination point of Jo-Carroll's post

July 2, 1965 line extension along Indian Ridge Road to a point where it could connect to the customer's service line is \$4,149.00. This is less than the cost to Interstate of \$5,676.34 to extend its line 860 feet east to the customer's residence from a point on Interstate's 1980 line extension along Indian Ridge Road. As a practical matter, in the event the Commission agrees with Jo-Carroll on the proximity issue, Jo-Carroll will need to only incur additional costs of \$4,149.00 to connect the customer. Accordingly, there seems to be little basis for a determination as to which electric supplier can provide the additional service with the least amount of cost. Eastern Illini Electric Cooperative v Central Illinois Light Company Ill. Com. Comm. 89-0259 (August 18, 1993, page 24).

4. THE CUSTOMERS PREFERENCE AS TO WHICH SUPPLIER SHALL FURNISH THE PROPOSED SERVICE.

The customer contacted Jo-Carroll with respect to service. At that time, the customer had not yet constructed his residence and the exact location of the same was not known. Thereafter, Interstate extended the service even though Interstate had full knowledge that Jo-Carroll's July 2, 1965 existing lines were closer in "proximity" to the customer's then proposed residence location. Such action by Interstate was in complete disregard to the Electric Supplier Act. Accordingly, in view of the fact that the customer contacted Jo-Carroll for electric service and that Interstate then extended the actual service, the evidence is inconclusive on this lesser weight criteria. Under such circumstances, the commission is not required to make a finding with regard to the lesser weight criteria of customer preference. Eastern Illini Electric Cooperative v Central Illinois Light Company Ill. Com. Comm. 89-0259 (August 18, 1993, pages 23, 24 and 25).

D. SUMMARY.

In summary, the commission must decide Section 8 disputes upon the primary factor of "proximity" of the customer's residence to the 1965 existing lines of Jo-Carroll and Interstate. There is no material issue of fact as to which of Jo-Carroll's or Interstate's July 2, 1965 lines are closer to the customer's residence. Thus that issue must be decided in Jo-Carroll's favor.

The Commission may, but is not required to, consider other lesser weight criteria enunciated by Section 8 of the ESA as it chooses and based upon such facts available to the Commission. In the instant docket there is no question that the facts favor Jo-Carroll as to which of Jo-Carroll or Interstate was first to furnish service in the area. Jo-Carroll started furnishing service in 1939 and continues to do so today to numerous homes in the area surrounding the customer's residence. The same determination can be made with respect to which of Jo-Carroll or Interstate did more to assist in creating the demand for the proposed service. It is obvious that Jo-Carroll has long had an electric service presence in the area for an extensive period so that Jo-Carroll is the principal electric service provider in the area. The same cannot be said for Interstate who serves at best five (5) customers in the general area and no evidence has been provided as to when Interstate first commenced providing service in the area.

As to the lesser weight criteria of which supplier can furnish the service with the least amount of cost, the actual cost to Jo-Carroll to extend its existing facilities to a point where it can provide service to the customer is \$4,149.00, which is less than the actual cost expended by Interstate to extend electric service to the customer from its 1980 line. Both of those extensions commence at a point on the respective post July 2, 1965 lines of each supplier.

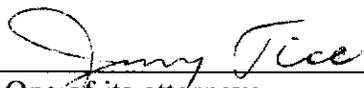
Interstate has not provided any information as to the construction cost of its post 1980 line extension along Indian Ridge Road. Therefore, the Commission should not add to Jo-Carroll's proposed cost of extending service, the cost of Jo-Carroll's post July 2, 1965 line extension north along Indian Ridge Road. All in all there is insufficient evidence to make a conclusive determination as to this lesser weight criteria.

As to the final lesser weight criteria concerning customer preference, the customer requested service from Jo-Carroll and Interstate actually extended service. This evidence is insufficient to allow a determination as to this lesser weight criteria. The Commission does not have to make a determination as to all the lesser weight criteria but certainly there is no material issue of fact that two of the lesser weight criteria's favor Jo-Carroll. (Eastern Illini Electric Cooperative v. Central Illinois Light Company Ill. Com. Comm. 89-0259 (August 18, 1993, page 23, 24 & 25)). When considering that the substantial weight criteria of "proximity" must be determined in Jo-Carroll's favor and two of the lesser weight criteria favor Jo-Carroll, there should be little doubt that Jo-Carroll is the proper electric supplier for the customer in dispute.

Respectfully submitted,

JO-CARROLL ENERGY, INC.
Complainant,

By: GROSBOLL, BECKER, TICE & REIF

By: 
One of its attorneys

APPENDIX

Jo-Carroll Electric Cooperative Inc. v Illinois Commerce Commission and Interstate Power Company Jo-Daviess Circuit Court No. 93-MR-39 Order

Eastern Illini Electric Cooperative v Central Illinois Light Company Ill. Com. Comm 89-0259

Illinois Power Company v Egyptian Electric Cooperative Association Ill. Com. Comm. ESA 176 Order

Coles-Moultrie Electric Cooperative v Central Illinois Public Service Company ESA 195 Order

Exhibit A

- with Exhibit 1 attached
- with Exhibit 2 attached
- with Exhibit 3 attached
- with Exhibit 4 attached
- with Exhibit 5 attached
- with Exhibit 6 attached
- with Exhibit 7 attached

Exhibit B

Exhibit C

PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 19 day of December, 2003, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the document attached hereto and incorporated herein, addressed to the following persons at the addresses set opposite their names:

Michael Wallace
Administrative Law Judge
Illinois Commerce Commission
527 E. Capitol
Springfield, IL 62701-1827

Leslie Recht
Defrees & Fiske
200 S. Michigan Ave.
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Chicago, IL 60604

A handwritten signature in cursive script, reading "Jerry Tice", is written over a horizontal line.

GROSBOLL, BECKER, TICE & REIF
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