

JO-CARROLL ENERGY, INC.)
)
 Complainant,)
)
 vs.) No. 02-0593
)
 ALLIAINT d/b/a INTERSTATE POWER)
 AND LIGHT CO.,)
)
 Respondent.)

**REPLY OF JO-CARROLL ENERGY, INC. TO THE RESPONSE FILED BY
ALLIANT d/b/a INTERSTATE POWER AND LIGHT COMPANY
TO JO-CARROLL'S MOTION TO DISMISS**

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 replies to
the response filed by ALLIAINT d/b/a INTERSTATE POWER AND LIGHT CO.
(Respondent)(Interstate) on or about March 3, 2004 to Jo-Carroll's Motion to Dismiss and in
support thereof states as follows:

I. PURPOSE OF JO-CARROLL'S MOTION TO DISMISS

A. THE JAMIE ROWE AFFIDAVIT

1. The purpose of Jo-Carroll's Motion to Dismiss was to strike those portions
of the Jamie Rowe Affidavit that pertained to facts offered by Interstate as
support for Interstate's claim of right to serve the customer, Rowe, which facts
were not relevant to a Section 8 proceeding. For instance:

(a) Interstate claims that the customer will pay a higher service

connection fee for the electric service provided by Jo-Carroll than for the electric service provided by Interstate; and

(b) Interstate claims that its residential electric rates are lower than Jo-Carroll's; and

(c) Interstate claims the customer, if served by Interstate, can under the Electric Service Customer Choice and Rate Relief Law of 1997 (220 ILCS 5/16-101 et seq.), choose a different wholesale power supplier and if served by Jo-Carroll cannot.

2. Jo-Carroll moved to strike the offending paragraphs of the Jamie Rowe Affidavit (Paragraphs 3, 4, and 5) because such facts, while explaining the customer's preference for Interstate, do not separately or collectively form a separate factual basis for granting or denying a claim of right to serve under Section 8 and therefore such facts have no relevancy except to explain the reasons for the customer's stated preference. Since the customer's preference is not disputed, such facts are not relevant. (Eastern Illinois Electric Cooperative v. Central Illinois Light Company Ill. Com. Comm. 89-0259; August 19, 1993, Page 25.)

B. EXHIBITS A, B, E AND G

Jo-Carroll moved to strike Interstate's Exhibit A (map showing proximity); Exhibit B (map showing location of lines); Exhibit E (Work estimates showing line extension charges and cost to customer); Exhibit G (the Menominee plat, Vinegar Hill plat and Dunlieth plat) for failure of Interstate to support such

exhibits with the requisite foundational evidence supporting admission and/or consideration by the trier of fact of such exhibits when considering the Motion for Summary Judgment.

II. INTERSTATE'S RESPONSE TO JO-CARROLL'S MOTION TO DISMISS

A. INTERSTATE'S RESPONSE IS NOT LIMITED TO THE LEGAL ISSUES OF THE MOTION TO DISMISS

Interstate's Response to Jo-Carroll's Motion to Dismiss is not limited to the legal issue of admissibility of the offending paragraphs of the customer's affidavit or the legal issues regarding the need for foundational facts by way of affidavit before the Interstate exhibits can be considered by the trier fact when determining the Motion for Summary Judgment. Instead, Interstate reargues its opposition to Jo-Carroll's Motion for Summary Judgment and as such utilizes its Response to Jo-Carroll's Motion to Dismiss, which raises procedural issues only, as a camouflaged argument in opposition to Jo-Carroll's Motion for Summary Judgment.

B. INTERSTATE'S RESPONSE IS IN REALITY A REPLY TO JO-CARROLL'S SUMMARY JUDGMENT MOTION

For instance, at Page One and Page Two of Interstate's Response, Interstate raises the following points:

1. The docket involves electric service to a single residence (Page One);.
2. The monthly electric bill is \$30 to \$50 (Page One).
3. Interstate's Response to data requests show Interstate had a line

adjacent to the customer's property. It apparently makes no difference to Interstate that the line in question was constructed post-July 2, 1965, and that the law does not consider such line for proximity purposes in a Section 8 case. (Page One).

4. Interstate argues its investment is only the cost of connecting the customer to the aforementioned post-July 2, 1965 constructed line. In doing so, Interstate ignores the rules for calculating an electric supplier's additional investment required to serve a customer in a Section 8 proceeding. (Page One). Interstate asserts that since the docket involves "extremely modest revenues associated with the customer", the formalities of the Illinois Supreme Court Rules and Code of Civil Procedure are not appropriate (Page Two). While these points can conceivably be construed as responsive to Jo-Carroll's Motion to Dismiss, the argument ignores three basic rules:

a. The Illinois Commerce Commission is subject to rules of evidence commonly followed in the Circuit Courts of this state.

83 Ill. Adm. Code Sec. 200.610(b)

b. As such, Summary Judgment Motions do require formal proof, even though supported by affidavit so that the trier of fact is afforded a reliable basis for determining the facts when considering the Motion for Summary Judgment.

c. Materials furnished in discovery are not admissible in

evidence without the requisite foundational evidence being provided so that the trier of fact knows the basis for such materials or documents.

5. At the bottom of Page Two, Interstate claims all the facts cited in Interstate's Response to Jo-Carroll's Motion for Summary Judgment show there is a bonafide dispute as to Section 8 factors and Summary Judgment is not appropriate for assessing the weight or strength of the evidence. This clearly is an argument for denying Jo-Carroll's Motion for Summary Judgment and is not appropriately made in a response to Jo-Carroll's Motion to Dismiss certain evidence submitted by Interstate in opposition to the Motion for Summary Judgment. Accordingly, such argument should be stricken as inappropriate. Further, with respect to Page One and Page Two of Interstate's Response to Jo-Carroll's Motion to Dismiss only the argument regarding applicability of the Civil Practice Act to the Commission proceedings is responsive to Jo-Carroll's Motion to Dismiss. The rest constitutes an improper attempt by Interstate to reargue its position regarding Jo-Carroll's Motion for Summary Judgment.

C. INTERSTATE'S RESPONSE REGARDING ROWE'S AFFIDAVIT

Interstate's response regarding customer Rowe's affidavit is not responsive to Jo-Carroll's Motion to Dismiss. For instance:

1. Interstate claims that Rowe's statement that Jo-Carroll quoted a

service connection fee of \$11,000 is, in fact, the additional investment Jo-Carroll must incur to serve the customer (First Paragraph, Page Three). That claim ignores the affidavit of Rick Knipfer, Jo-Carroll's Manager of Engineering and Operations, which explained the \$10,500 quote was an initial estimate when facts were tentative and the location of the Rowe residence was unknown. The Knipfer affidavit filed with Jo-Carroll's Motion for Summary Judgment states Jo-Carroll's additional cost to extend service to Rowe, now that all facts are known and the location of the residence is fixed, is \$5,881.32. Interstate does not dispute such fact. Accordingly, that fact stands unrefuted when considering Jo-Carroll's Motion for Summary Judgment.

2. Interstate claims the statement of the customer that Jo-Carroll would charge him \$11,000 (Second Paragraph, Page Three); Interstate's electric rates are lower; and the customer can choose his wholesale power provider if served by Interstate (Last Paragraph, Page Four and First Paragraph, Page Five) as evidence supporting the customer's preference. Yet, the customer's connection charges, electric rates and other factors considered by the customer are only relevant to substantiate the customer's preference and do not provide a basis for a separate factor or factors to be considered by the Commission in determining Section 8 issues. Since the customer's preference is not disputed, the facts in the Rowe affidavit which Interstate claims support the customer's preference

become irrelevant. These are not arguments that Interstate's affidavit and exhibits filed comply with the rules, but rather constitute reargument by Interstate of its position regarding the Motion for Summary Judgment.

3. Interstate claims there is an issue as to the actual route to be used by the suppliers to serve the customer (Paragraph One, Page Four). This is not responsive to Jo-Carroll's Motion to Dismiss. In fact, it raises an entirely new argument not raised by Interstate in its Response to Jo-Carroll's Motion for Summary Judgment and therefore should be stricken. Even if this argument is allowed to stand, it is nothing more than a re-argument of Interstate's position with regard to the Summary Judgment Motion and is not appropriately included in Interstate's Response to Jo-Carroll's Motion to Dismiss.

D. INTERSTATE'S EXHIBIT A (MAP SHOWING PROXIMITY); EXHIBIT B (MAP SHOWING LOCATION OF LINES); EXHIBIT E (WORK ESTIMATES SHOWING LINE EXTENSION CHARGES AND COST TO CUSTOMER); AND EXHIBIT G (THE MOMINEE PLAT, VINEGAR HILL PLAT, DUNLIETH PLAT).

1. Interstate claims these exhibits, which were generated by Interstate and not by Jo-Carroll, are admissible in evidence and can be considered because they were provided by Interstate to Jo-Carroll in discovery. This is not the rule. As noted earlier, the Commission is subject to the rules of evidence customarily applied in Circuit Courts of this state. Those rules require that supporting affidavits and documents and/or evidence filed in support or opposition to a

Motion for Summary Judgment must be otherwise admissible in evidence before they may be considered by the trier of fact when determining the Motion for Summary Judgment. Interstate's exhibits, without further foundation as to the creation of the same, are inadmissible. It is clear, based upon the foregoing arguments, that Interstate did not even attempt to comply with the rules applied in the Circuit Courts of this state regarding the evidence necessary to oppose Jo-Carroll's Motion for Summary Judgment. Interstate tacitly acknowledges that it has not complied with such rules, but instead argues that because of the minimal financial nature of this case the Commission should ignore its own rules of practice and consider Interstate's maps without requiring supporting foundational evidence by affidavit. Such is not appropriate and should not be allowed.

III. JO-CARROLL HAS THE RIGHT TO OPEN AND CLOSE WITH RESPECT TO ITS MOTION FOR SUMMARY JUDGMENT

The rules commonly provide that the movant has the right to open with respect to its Motion and to close. Jo-Carroll filed the Motion for Summary Judgment, Interstate filed its Response, and Jo-Carroll filed its Reply to that Response in accordance with the rules of Administrative Law Judge in this proceeding. No authorization was sought by or given Interstate to file a second Response to Jo-Carroll's Motion for Summary Judgment. Interstate without seeking leave from the Administrative Law Judge brazenly filed its Response using the veiled argument that it was simply responding to Jo-Carroll's Motion to Dismiss certain statements in the customer's affidavit and certain

exhibits filed by Interstate as a part of its Response, but not properly supported. This tactic should not be allowed and for those reasons the offending parts of Interstate's Response to Jo-Carroll's Motion to Dismiss should be stricken.

WHEREFORE, Jo-Carroll requests the following relief from the Administrative Law Judge and Illinois Commerce Commission:

A. To strike the Second Paragraph of Page One; all of Page Two following the indented paragraph; and the first two sentences of Page Three.

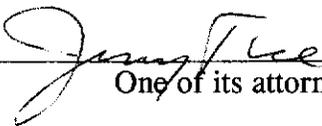
B. To strike Interstate's argument commencing on Page Three entitled "1. Exhibit C - Customer Affidavit" all of Pages 4, 5 and the last paragraph of Page 6.

C. To strike Interstate's argument under the heading "2. Exhibits A, B, E, and G" commencing with the third sentence (last sentence on Page Six) and all of the first paragraph on Page Seven.

D. For such other and further relief as the Administrative Law Judge and Commission deems equitable.

JO-CARROLL ENERGY, INC.,
Complainant,

By: GROSBOLL, BECKER, TICE & REIF

By:  _____
One of its attorneys

PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 16 day of March, 2004,

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 East Capitol
Springfield, IL 62701-1827

Leslie Recht by mail and by Fax
Defrees & Fiske
200 South Michigan Avenue
Suite 100
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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