

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

**Interstate Power and Light Company** :  
**and ITC Midwest LLC** :  
 :  
**Joint Petition For Approval Of Sale of** :  
**Utility Assets Pursuant To Section 7-** :  
**102; Transfer of Franchises, Licenses,** :  
**Permits or Rights to Own Pursuant to** : **Docket No. 07- 0246**  
**Section 7-203; Transfer of Certificates** :  
**of Convenience and Necessity** :  
**pursuant to Section 8-406; Approval** :  
**of the Discontinuance of Service** :  
**Pursuant to 8-508; and the Granting** :  
**of All Other Necessary and** :  
**Appropriate Relief.** :

**JOINT PETITIONERS' VERIFIED RESPONSE TO  
THE STAFF OF THE ILLINOIS COMMERCE COMMISSION'S  
MOTION FOR LEAVE TO FILE ICC STAFF EXHIBIT 5.0 INSTANTER AND  
THE MOTION OF JO-CARROLL ENERGY, INC. TO KEEP THE RECORD OPEN**

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Interstate Power and Light Company (“IPL”) and ITC Midwest LLC (“ITC Midwest”) (jointly referred to as “Joint Petitioners”), by and through their respective counsel, pursuant to Part 200.190 of the Rules of Practice of the Illinois Commerce Commission (“ICC”), 83 Ill. Admin. Part 200.190, hereby submit their Verified Response to the Staff of the Illinois Commerce Commission’s (“Staff”) Motion for Leave to File ICC Staff Exhibit 5.0 Instanter (“Staff’s Motion”) and the Motion of Jo-Carroll Energy, Inc. (“Jo-Carroll”) to Keep the Record Open (“Jo-Carroll’s Motion”) (collectively, the Staff’s Motion and the Jo-Carroll’s Motion are referred to herein as the “Motions”).

It is *déjà vu* all over again. Each of the Motions represents another attempt to inject into this proceeding issues that have been ruled improper because they are within the sole

jurisdiction of the Federal Energy Regulatory Commission (“FERC”). Staff’s Motion seeks to inject into the record yet again issues as to the rate structure and financing of ITC Midwest. The Administrative Law Judge’s Ruling on the Joint Petitioners’ Motion in Limine (“ALJ Ruling”) has already determined that these matters are not properly before this Commission. Notwithstanding that ruling, Staff persists in its attempt to invoke Commission jurisdiction over matters that are preempted by Federal law. Staff proposes two alternative conditions, both of which, if adopted, would assert Commission jurisdiction over the capital structure and financing of ITC Holdings, an entity that is not a public utility and not otherwise subject to this Commission’s jurisdiction. This attempt to unlawfully expand the Commission’s jurisdiction is wholly irrelevant to the issue of whether ITC Midwest is capable of financing the proposed Transaction. Notably, Staff’s proffered rebuttal testimony spends little effort in addressing *ITC Midwest’s* capability to finance the proposed Transaction, but instead focuses almost exclusively on *ITC Holdings’* capital structure. Through the Joint Petition and its testimony, ITC Midwest has proven its ability to finance the Transaction; the future capital structure of ITC Midwest’s parent company is irrelevant to the issues in the instant proceeding in determining whether the public is inconvenienced by this Transaction.

Jo-Carroll’s Motion to keep the record open indefinitely fails to explain why it needs further time to submit material in a proceeding that has been pending since April. Jo-Carroll is not a newcomer to the instant proceeding. On the contrary, Jo-Carroll was represented by counsel when the case schedule was agreed upon by all Parties; Jo-Carroll knew it had the opportunity to submit testimony and declined to do so. Jo-Carroll was represented by counsel at every subsequent status hearing and at the evidentiary hearings when further scheduling was discussed. The ALJ ruled at the July 20, 2007 Status Hearing that the Commission would

not tolerate simply leaving the record open indefinitely, as Jo-Carroll waited to determine whether there were issues that it might want to address through post-hearing discovery. (*See* Tr. at 79-80.) Having failed to abide by the schedule to which it agreed, Jo-Carroll now seeks permission to keep the record open for an indefinite time period so that it can have some leverage in its discussions about potential wholesale rates levied by a non-party to this proceeding (Dairyland) that might be affected by a contract that does not exist. Jo-Carroll acknowledges that the wholesale rates are the subject of the FERC proceedings. (Jo-Carroll Motion at ¶¶ 4-5.) Thus, the issues raised in Jo-Carroll's Motion related to wholesale transmission rates are not matters within the purview of this Commission in the instant proceeding – they are, if anything, issues before the FERC.

The Commission should reject these tactics, deny both Motions outright, and maintain the current schedule that all parties agreed upon months ago.

## I.

### **INTRODUCTION AND FACTUAL BACKGROUND**

On April 6, 2007, the Joint Petitioners filed the Joint Petition seeking Commission approval of the Transaction, a proposed sale of approximately 125 miles of high voltage transmission lines, under Sections 7-102, 7-203, 8-406, 8-508 of the Illinois Public Utilities Act, 220 ILCS 5/7-102, 7-203, 4-806 and 8-508. The Joint Petition clearly articulates the importance of completing the present proceeding in time to allow the Joint Petitioners to close on the Transaction prior to December 31, 2007. (*See* Joint Petition at ¶¶ 44-48.) Concurrent with filing the Joint Petition, the Joint Petitioners filed extensive and detailed direct testimony and numerous supporting exhibits of five witnesses.<sup>1</sup>

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<sup>1</sup> As explained in the Joint Petition, ITC Holdings is the parent company of ITC Midwest. (Joint Petition at ¶ 1,

At the May 23, 2007 status hearing, after extensive discussion and negotiation among experienced counsel over the details, the parties agreed to the following schedule:

June 28	Staff/Intervener direct testimony
July 11	Status hearing at 1 p.m.
July 18	Joint Petitioners' rebuttal testimony
July 20	Status hearing at 1 p.m.
July 26/27	Evidentiary hearings in Chicago starting at 10 a.m.
August 24	Initial Briefs and draft proposed orders (if necessary)
September 7	Reply Briefs (if necessary)
September 21	ALJ Proposed Order
October 11	Briefs on Exceptions (if necessary)
October 18	Reply Briefs on Exceptions (if necessary)
October 30	Commission deliberation

(*See* Tr. at 54-55.) In agreeing to this schedule, Staff and Jo-Carroll each agreed that it would not file rebuttal testimony.

At the same status hearing, the ALJ ordered the Joint Petitioners to brief two issues: (1) whether the Commission has jurisdiction to review the financing aspects of the Transaction; and, (2) whether Section 7-101 of the Act requires ITC Midwest to file any affiliated interest agreements in this proceeding. In compliance with this determination, the Joint Petitioners filed a Motion in Limine, to which Staff filed a Response Brief. Jo-Carroll failed to file any pleading regarding the Motion in Limine. After the Joint Petitioners filed a Reply in Support of the Motion in Limine, the ALJ entered a Ruling on June 22, 2007. The Ruling reached the following conclusions:

- As a part of the FERC's statutory duties to ensure that transmitting utilities do not charge their customers unjust or unreasonable rates, the FERC regulates securities issuances and other defined indebtednesses. (*See* ALJ Ruling at 7.)
- The Joint Petitioners *are* required under Section 8-406 of the Act to establish that ITC Midwest is capable of financing the proposed acquisition without significant adverse financial consequences for the utility or its customers (*See id.* at 8-9.)

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10.) ITC Holdings is not a public utility in Illinois and is not subject to this Commission's jurisdiction. (*Id.* at ¶ 11.)

- Any issue that Staff may have regarding ITC's capability to finance the acquisition of the asset in question may be pursued in discovery or at trial. (*See id.* at 9.)
- The subject-matter of this docket does not include affiliated interest contracts. However, ITC Midwest is required by law to submit these contracts to the Commission for its approval when they come into existence. (*See id.*)
- Because the FERC has exclusive jurisdiction pursuant to the Federal Power Act over the issuances of securities by firms engaged in transmission of electricity in interstate commerce, ITC Midwest need not seek Commission approval of any debt issuance to consummate the purchase at issue in this docket. (*See id.*)

Pursuant to the agreed-upon schedule, on June 28, 2007, Staff filed the testimony of four witnesses, including Michael McNally (ICC Staff Exhibit 4.0). Mr. McNally testified that he did not have enough information to form an opinion on whether ITC Midwest is capable of financing the proposed Transaction without significant adverse consequences to ITC Midwest or its customers. (*See ICC Staff Exhibit 4.0 at lines 199-204.*) Again given the opportunity to raise issues at this stage, Jo-Carroll did not submit any testimony.

On July 10, 2007, counsel for ITC Midwest contacted counsel for Staff, Jo-Carroll, and the only other intervener (ATC) to ascertain if the July 11, 2007 status hearing was necessary. Counsel for both Staff and Jo-Carroll agreed there were no "outstanding issues that would warrant getting together for a status hearing." (*See email from ITC Midwest Counsel to the ALJ, dated July 10, 2007, attached hereto as Exhibit A.*) Given this additional opportunity to raise any concerns, Jo-Carroll and Staff each failed to do so.

On July 18, 2007, the Joint Petitioners submitted the rebuttal testimony of three witnesses, including Patricia Wenzel (Exhibit PAW 7.0 and attachments). To address Mr. McNally's concerns expressed in his direct testimony, Ms. Wenzel presented substantial evidence of ITC Midwest's capability to finance the Transaction. After all of the testimony was submitted, there remained only one issue in dispute: whether ITC Midwest is capable of financing the proposed Transaction without significant adverse consequences to ITC Midwest

or its customers.

On July 20, 2007, a status hearing was held. At that hearing, just days before the evidentiary hearings were set to begin, Staff again attempted to delay the proceeding by arguing for a postponement of the evidentiary hearing for not less than three weeks so that it could present additional evidence. (*See* Tr. at 79-80.) Despite the fact that Staff had agreed to a schedule specifically not allowing it to file rebuttal testimony, Staff now claimed that additional testimony was required to address the Joint Petitioners' Rebuttal Testimony. The ALJ denied Staff's request to delay the evidentiary hearings, but gave Staff leave until August 10, 2007 to "file a short motion stating that it needs time to cross examine, data request, anything like that, anything that has to do with Mr. McNally's testimony [ICC Staff Exhibit 4.0] or Mr. McNally's questions that he might have of witnesses or that sort of thing." (*Id.* at 76-77.) The ALJ did not grant leave to Staff to file an additional round of rebuttal testimony and made clear that aside from this one exception, discovery issues were to conclude with the evidentiary hearing. (*See* Tr. at 80, lines 7-8, ALJ Sainsot: "[Y]ou can't conduct discovery after trial.")

On July 26, 2007, the ALJ presided over evidentiary hearings wherein all pre-filed testimony and exhibits were submitted into the record. The parties agreed to waive cross examination of the witnesses. Finally, it was acknowledged that Jo-Carroll had the same rights previously granted to Staff to petition the Commission as outlined at the July 20, 2007 status hearing. (Tr. at 99.)

On August 10, 2007, Staff and Jo-Carroll filed their present Motions. Staff explained that it had sent a data request seeking the Joint Petitioners' input with regard to its proposed condition. In a less-than-candid statement, Staff provided only a portion of the Joint

Petitioners' response to that data request. The Joint Petitioners object to Staff's inappropriate use of a select portion of a data request response, as it provided the Commission with only a partial picture of the response, and failed to inform the Commission that the Joint Petitioners objected to the data request on a number of grounds. Such tactics are inappropriate; however, in order to address Staff's lack of full disclosure, and without waiving their objections, the Joint Petitioners have attached to this pleading a full copy of their response to Staff Data Request MGM 4.01 as Exhibit B. The Joint Petitioners reinstate their objections to the admissibility of any evidence from their response to Staff Data Request MGM 4.01, as detailed herein.

## II.

### **NEITHER MOTION PRESENTS A RATIONALE THAT IS BASED UPON ISSUES RELEVANT TO THE SCOPE OF THIS PROCEEDING**

As noted in the ALJ Ruling, the issue facing this Commission's review of the proposed Transaction is whether ITC Midwest has the "capability to finance the acquisition of the asset in question" and that "ITC Midwest need not seek Commission approval of any debt issuance to consummate the purchase at issue." (ALJ Ruling at 10.) Notwithstanding this clear finding, both Jo-Carroll and Staff persist in their attempts to infuse arguments and disputes that are wholly irrelevant to these issues and wholly outside the scope of this proceeding and the Commission's jurisdiction. As such, both Motions should be denied.

#### **A. Both Motions Seek To Address Irrelevant Issues That Are Beyond The Commission's Jurisdiction**

By its very terms, the testimony that Staff's Motion seeks to submit relates not the ITC Midwest's ability to finance the Transaction, but rather to ITC Holdings' capital structure and ability to finance the ongoing operations of ITC Midwest after the Transaction is closed. In

no less than ten (10) occasions in the proposed six-pages of testimony, Mr. McNally states his concerns over **ITC Holdings**' financial capabilities. (*See, e.g.*, Staff's proposed Exhibit 5.0 at lines 25-26 ("**ITC Holdings** is, and would remain, highly leveraged and has a Moody's credit rating of only one notch above junk status."); at lines 80-82 ("One would expect that a financially strong company [**ITC Holdings**] would be willing to accept this condition of approval with absolutely no apprehension."); and at lines 124-26 ("I believe the imposition of one of the conditions discussed previously reduces the risk resulting from the marginal financial strength of **ITC Holdings**.")) (Emphases added.) (*See also id.* at lines 62-67, 84-87, 91-92 and 95-98.)

Staff's single-minded fixation on ITC Holdings is obvious; but ITC Holdings is not the entity that is before this Commission seeking approval of the Transaction. Mr. McNally's proposed additional testimony goes beyond the question of whether ITC Midwest is financially capable of financing the proposed Transaction. As such, it is irrelevant to the issues facing this Commission and should be rejected.<sup>2</sup>

Similarly, the premise of Jo-Carroll's Motion has nothing to do with whether ITC Midwest is capable of financing the proposed Transaction. Rather, Jo-Carroll's request to leave the record open is based on "a letter Jo-Carroll received from Dairyland Power Cooperative ("Dairyland")...." (Jo-Carroll Motion at ¶ 2.) Dairyland is not a party to the instant proceeding; and the Commission has no jurisdiction over negotiations Dairyland

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<sup>2</sup> As the ALJ has already noted, to the extent that ITC Midwest does rely on ITC Holdings for purposes of financing the proposed Transaction, such an issue is directly related to the issuance of securities and indebtedness, which are ratemaking in nature. (*See* ALJ Ruling at 6-9.) As such, the issue is exclusively and squarely before the FERC. (*See id.*) The Joint Petitioners note that the Commission has intervened in the FERC proceedings. To the extent the Commission determines it appropriate to question the nature of ITC Midwest's reliance on ITC Holdings to finance this Transaction or the ongoing operations of the Company after the Transaction closes, the appropriate forum to do so is at the FERC.

conducts regarding transmission rights. Jo-Carroll is a member of the Dairyland cooperative (Jo-Carroll Motion, Exhibit JCE-1), but is apparently unable to facilitate discussions with Dairyland to address its concerns related to the wholesale transmission rates Dairyland may assess it if the grandfathered Cost Sharing Agreement expires.

According to the Jo-Carroll Motion, “further data and information is needed to clarify and answer **the transmission-related questions**, indeed confusion, that Jo-Carroll and other have identified and raised.” (Jo-Carroll Motion at ¶ 7.) (Emphasis added.) The only bit of confusion that the Jo-Carroll Motion points to in support of this “confusion” is the possibility that it may face higher wholesale transmission rates, not as a result of the Transaction, but because of Dairyland’s possible switch to network transmission service under federal tariffs. (Jo-Carroll Motion at ¶ 6.) By its own admission, then, Jo-Carroll’s sole purpose for keeping the present record open is to address its “transmission-related questions” related to wholesale transmission rates of a non-party. As the ALJ has already ruled, transmission-related issues, especially those related to rates, are not within the scope of this Commission’s jurisdiction:

The Federal Power Act governs the transmission of electrical energy in interstate commerce when, as is the case here, it is transmitted into interstate commerce for wholesale consumption. (16 U.S.C. Sec. 824 *et seq.*). That Act requires wholesale electrical transmitters to charge just and reasonable rates. (16 U.S.C. Sec. 824d(a)). It also requires the FERC to fix rates and charges. (16 U.S.C. Sec. 824(a)).

(ALJ Ruling at 6.) The requests to incorporate into this proceeding any issues associated with Jo-Carroll’s relationship with Dairyland and its wholesale transmission rates are well beyond this Commission’s authority.

The Motions amount to nothing more than improper attempts to expand this Commission’s jurisdiction over (1) the wholesale transmission rates governed by federal law; and (2) the capital structure and indebtedness of ITC Holdings, which is not a public utility in

the State of Illinois. This Commission has no jurisdiction over either of these issues. As such, both Motions should be denied.

**B. Both Motions Raise Irrelevant Issues That Are Outside The Scope Of The Instant Proceeding**

Staff previously, and unsuccessfully, has attempted to assert that the Commission has jurisdiction over ITC Midwest's rates and indebtedness. Having lost that battle, Staff now seeks to assert jurisdiction over ITC Holdings' capital structure and indebtedness. Similarly, Jo-Carroll's Motion only seeks to allow Jo-Carroll the opportunity to use this litigation as leverage in its discussions with Dairyland over wholesale transmission rates that are not subject to this Commission's jurisdiction.

The ALJ's Ruling clearly and unambiguously acknowledged the limited the scope of this Commission's review of the financial aspects of the Transaction to whether ITC Midwest "has the capability to finance the acquisition of the asset in question" without significant adverse financial consequences for the utility or its customers. (ALJ Ruling at 8-9.) Clearly, Jo-Carroll's attempts to hold up the Commission's consideration of the Joint Petition to address issues that are squarely federal in nature is improper and contrary to the ALJ's Ruling. Simply put, the issues raised in Jo-Carroll's Motion are not relevant to the issues facing this Commission.

Similarly, Staff's attempts to assert jurisdiction over ITC Holdings is clearly outside the scope of this proceeding. The capital structure and indebtedness of ITC Holdings is not at issue herein, nor can it be as this Commission has no jurisdiction over ITC Holdings since it is not a public utility in this State.<sup>3</sup> (See 220 ILCS 5/4-101, 3-105.)

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<sup>3</sup> If the Commission were to enter an order addressing issues associated with wholesale transmission rates assessed Jo-Carroll by Dairyland, that order would be void *ab initio*. Under Section 4-101 of the

The sole financial issue remaining in the instant proceeding is whether ITC Midwest can finance the acquisition in question. The overwhelming evidence demonstrates that ITC Midwest is fully capable of financing this Transaction. (See ITC Midwest Exhibit PAW 7.0 and attached Exhibits PAW 7.1 through 7.9.) Even if allowed, Staff’s proposed Rebuttal Testimony adds nothing to the question of whether ITC Midwest is capable of financing the Transaction – and presents no evidence to challenge the existing investment-grade rating of ITC Holdings; instead, the testimony merely expresses repeatedly that Mr. McNally has concerns over potential changes to ITC Holdings’ future capital structure and indebtedness that might at some in the future impact its current investment-grade rating.<sup>4</sup> Again, ITC Holdings is not a Petitioner in this proceeding or even a public utility in Illinois; any attempt to assert jurisdiction on it through conditions or otherwise is beyond the scope of this proceeding, and not relevant to the merits of the Commission’s review of the Joint Petition.

**C. The Provisions of Section 7-103 Of The Act Are Not Relevant To The Issues In The Instant Proceeding**

In a odd maneuver, Staff attempts to inject a condition on the approval of this Transaction that is based on Section 7-103 of the Act, 220 ILCS 5/7-103, “in an effort to provide the Commission with an alternative to the problem posed by ITC Holdings marginal financial strength.” (ICC Staff Proposed Exhibit 5.0 at lines 88-119.) This is odd as the Joint

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Act, the Commission’s jurisdiction is limited to regulation of “public utilities” in the State of Illinois, as defined in Section 3-105 of the Act. (See 220 ILCS 5/4-101, 3-105.) Commission orders issued in the absence of statutory jurisdiction are void *ab initio*. (See *Illinois Municipal Electric Agency v. Illinois Commerce Commission*, 247 Ill. App. 3d 857, 860 (4th Dist. 1993) (“An administrative agency such as the Commerce Commission derives its power to act solely from the statute by which it was created and agency action which exceeds its authority is void.”); *Orrway Motor Serv., Inc. v. Illinois Commerce Commission*, 40 Ill. App. 3d 869, 872-73 (1st Dist. 1976) (“It is fundamental that if the Commission does not have jurisdiction of the subject matter and of the parties, the Commission’s order is void and may be attacked at any time.”).)

<sup>4</sup> Ironically, the only evidence Mr. McNally mentions of any future event that could impair the investment-grade rating of ITC Holdings is the imposition of the condition proposed by Staff

Petition seeks no relief from the Commission pursuant to Section 7-103. It is also odd as, in order for Section 7-103 to even come into play, there must first be a Commission finding that the capital of the utility (not the parent) has become impaired. No such finding exists, nor has ITC Midwest even raised the specter that a dividend is in the offing after the closing of the Transaction. Section 7-103 reads, in part (emphasis added):

**Whenever the Commission finds that the capital of any public utility has become impaired**, or will be impaired by the payment of a dividend, the Commission shall have power to order said public utility to cease and desist the declaration and payment of any dividend upon its common and preferred stock, and no such public utility shall pay any dividend upon its common and preferred stock until such impairment shall have been made good.

(220 ILCS 5/7-103(1).) (Emphasis added.) The Commission has never made any finding that ITC Midwest's capital has become impaired. Staff's proposal to inject a condition under Section 7-103 is without merit, based purely on the speculation of Staff, and certainly beyond the scope of the proceeding. As such, it is not relevant to the Commission's review of the Joint Petition's merits.

Further, Staff's sole asserted rationale for proposing to preclude ITC Midwest from issuing dividends is related to apparent concerns regarding some unspecified future event that might occur due to "ITC Holdings' marginal financial strength."<sup>5</sup> (ICC Staff Proposed Exhibit 5.0 at line 92.) Issuing dividends is part and parcel of ITC Midwest's ability to exercise control over its rates and indebtedness. The ALJ already has held that, as an

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<sup>5</sup> Staff's asserted concerns of ITC Holdings' financial strength are emblematic of Staff's overreaching. ITC Holdings has an investment grade rating. (See Exhibits PAW 7.6, 7.7, and 7.8.) Staff has presented no evidence in the instant record or in its Motion and proposed testimony that would suggest otherwise. Further, the evidence demonstrates that ITC Holdings and its affiliates, including ITC Midwest, intend to retain their investment-grade rating. Moreover, the only event that has been identified that could call into question that rating is the imposition of the condition that Staff has proposed. (See ICC Staff Proposed Exhibit 5.0 at 68-76.) As Staff has no jurisdiction over ITC Holdings, it attempts to assert jurisdiction by way of precluding ITC Midwest from managing its indebtedness. This back-door attempt to regulate ITC Holdings should be rejected.

interstate transmission company, ITC Midwest's ability to control its rates and indebtedness is federal in nature and subject to the jurisdiction of the FERC, not this Commission:

The *Schneidwind* Court ruled, essentially, that, as a part of the FERC's exercise over rates, it oversees securities issuances and other types of indebtednesses. (*See, Schneidwind*, 485 U.S. 303-05). In other words, as a part of the FERC's statutory duties to ensure that transmitting utilities do not charge their customers unjust or unreasonable rates, the FERC regulates securities issuances and other defined indebtednesses.

(ALJ Ruling at 7.) Indeed, if this Commission were to accept Staff's proposed condition to limit ITC Midwest's ability to issue dividends, it is possible that this Commission's Order would require ITC Midwest to exceed the level of equity target that is approved by the FERC. For the same reasons the ALJ held that Staff's attempts to assert jurisdiction over ITC Midwest's issuance of securities and other indebtedness related to financing the Transaction are preempted, so too should the ALJ reject Staff's attempts to inject jurisdiction over ITC Midwest's issuance of indebtedness in the form of dividends.

### III.

#### **BOTH MOTIONS ARE BARRED BY THE DOCTRINE OF THE LAW OF THE CASE, AS EACH SEEKS TO RE-LITIGATE AN ISSUE ALREADY ADDRESSED IN THE ALJ RULING**

The ALJ previously has addressed the jurisdiction of this Commission with respect to regulating the rates and indebtedness of ITC Midwest as an interstate transmission provider. The ALJ Ruling clearly held that such matters are within the sole province of the FERC. Notwithstanding and in direct contrast to the ALJ Ruling, both Staff and Jo-Carroll attempt to revitalize the Commission's jurisdiction on these issues. These arguments are barred by the law of the case doctrine.

Whereas the doctrines of *res judicata* and collateral estoppel are designed to preclude

re-litigation of issues and facts that were already decided in another proceeding, the law of the case doctrine precludes re-litigation of issues that have already been decided in a case. The Commission compared and analyzed these doctrines in its Order in *South Austin Community Coalition Council v. Commonwealth Edison Company, Complaint as to closing of service office at Austin Bank Center in Chicago, Illinois*, ICC Docket No. 02-0706 (Order dated January 11, 2005) (“*South Austin*”). In *South Austin*, the Commission described the Doctrine of the law of the case as follows:

The “law of the case” doctrine provides that once a court renders a decision in a case, later decisions in that same case are closed to reconsideration, except by a court of review. (*Relph*, 84 Ill.2d at 443). This doctrine does not make rulings in one case applicable to bar rulings in other cases, like the doctrines of collateral estoppel and *res judicata*. (*Id.*; *People v. Tenner*, 206 Ill.2d 381, 395-96, 794 N.E.2d 238 (2002)). The “law of the case” doctrine is not a limitation on a tribunal’s powers, rather, it is an expression of the practice by tribunals to refuse to re-litigate that which has already been decided in a case. (*People v. Patterson*, 154 Ill.2d 414,468, 610 N.E.2d 16 (1992)). This doctrine has been applied to orders made by adjudicatory bodies of original jurisdiction (as opposed to appellate jurisdiction). However, it applies to final judgments. (*Id.*). Of course, the “law of the case” doctrine only applies to rulings made by courts of competent jurisdiction. (*Erickson*, 289 Ill. App. 3d at 168).

(*South Austin* at 8.) Because the ALJ Ruling addressed claims of jurisdiction over ITC Midwest’s rates, securities and other indebtedness, and held those to be federally regulated issues, Staff’s Motion and Jo-Carroll’s Motion are barred. The law of the case doctrine dictates that the ALJ should deny both Motions on this basis.

#### IV.

#### **EACH MOTION FAILS TO ADDRESS THE IMPACT IT WOULD HAVE UPON THE AGREED UPON SCHEDULE CURRENTLY IN PLACE**

As demonstrated above, the ALJ should deny both Motions and continue with the briefing schedule already in place. However, in the event the ALJ considers granting either Motion, the Joint Petitioners urge the ALJ to set an extremely tight schedule. As the ALJ has

noted on the record, it is important that this proceeding be concluded with enough time to allow the parties to close the Transaction by the end of this year. (Tr. at 49-50.)

Jo-Carroll would have the record remain open for an indeterminate period of time until it can leverage some sort of concession in the context of this proceeding for issues that (1) do not relate to Jo-Carroll's relationship with either IPL or ITC Midwest; and (2) are outside the scope of either this Commission's jurisdiction or this proceeding. The Joint Petitioners respectfully suggest that Jo-Carroll should address its concerns related to the manner in which Dairyland may adjust its rates to Jo-Carroll directly with Dairyland. To the extent there are issues in Jo-Carroll's concerns related to the wholesale transmission rates it pays, it is clear that those issues are outside this Commission's jurisdiction. Those issues may be pursued in the parallel FERC proceedings, but are off-limits in the instant proceeding. It is wholly improper for Jo-Carroll to attempt to redirect this state proceeding in order to leverage negotiating power in discussions of federal issues with an entity that is not a party to the instant proceeding.

As for the impact of Staff's Motion on the schedule, Staff never even acknowledges that a briefing schedule or December 2007 deadline exist. After agreeing to the present schedule in May, Staff repeatedly has attempted to undermine the schedule. Staff has argued for unreasonable delays in filings, unwarranted extensions, rescheduled evidentiary hearings, and now argues for modifying the briefing schedule so that it can insert extra-jurisdictional claims that are wholly unrelated to the specific finance-related issue facing this Commission (i.e., whether ITC Midwest is capable of financing the proposed transaction). For the reasons the ALJ has already noted after Staff's previous attacks on the scheduling order, it is imperative that the October 30, 2007 deadline remain intact.

Thus, only in the event the Commission determines it appropriate to grant either of the Motions and allow for additional evidence, the Joint Petitioners suggest the following expedited schedule to allow for timely completion of the instant proceeding:

August 17	Joint Petitioners Surrebuttal Testimony
August 24	Evidentiary Hearings*
September 7	Initial Briefs and Proposed Orders
September 17	Reply Briefs
September 27	ALJ Proposed Order
October 5	Briefs on Exceptions
October 12	Reply Briefs on Exceptions
October 30	Commission consideration

\* witnesses allowed to appear telephonically

## V.

### CONCLUSION

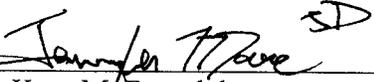
The scope of the instant proceeding and the appropriate schedule for moving forward have been addressed repeatedly in the instant proceeding. No legitimate reason has been offered that would justify keeping the evidentiary record open.

Accordingly, for the reasons stated herein and in their prior filings and testimony, the Joint Petitioners respectfully request the ALJ require Replies to the instant Response be filed on an expedited basis, and enter a Ruling:

- 1) Denying Staff's Motion for Leave to File ICC Staff Exhibit 5.0 Instanter;
- 2) Denying Jo-Carroll's Motion to Keep the Record Open;
- 3) Marking the evidentiary record "Heard and Taken"; and
- 4) Granting any and all other relief as the ALJ deems appropriate.

Respectfully submitted,

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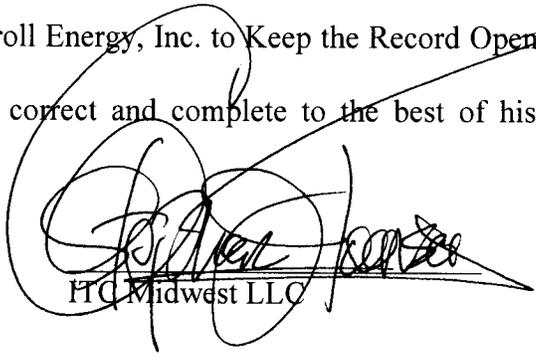
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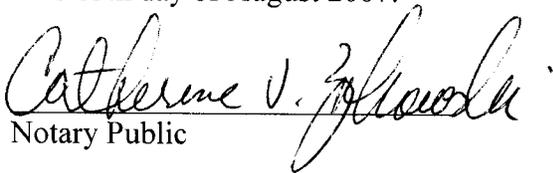
VERIFICATION

STATE OF ILLINOIS        )  
COUNTY OF COOK        )        ss:

Christopher J. Townsend, being first duly sworn, deposes and says that he is counsel for ITC Midwest LLC.; that he has read the foregoing Joint Petitioners' Verified Response to the Staff of the Illinois Commerce Commission's Motion for Leave to File ICC Staff Exhibit 5.0 Instanter and the Motion of Jo-Carroll Energy, Inc. to Keep the Record Open and that the statements contained therein are true, correct and complete to the best of his knowledge, information and belief.

  
ITC Midwest LLC

Subscribed and sworn to before me  
This 13th day of August 2007.

  
Notary Public

