**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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| **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 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.** | : | **Docket No. 07- 0246** |

**JOINT PETITIONERS' MOTION TO STRIKE THE AMENDED DIRECT TESTIMONY OF JO-CARROLL ENERGY, INC.'S WITNESSES MICHAEL W. HASTINGS AND KYLE J. BUROS**


INTERSTATE POWER AND LIGHT COMPANY
Kent M. Ragsdale
Jennifer S. Moore
Alliant Energy Corporate Services, Inc.
200 First Street S.E.
P.O. Box 351
Cedar Rapids, IA 52406-0351

ITC MIDWEST LLC
Christopher J. Townsend
Joseph E. Donovan
Christopher N. Skey
DLA Piper US LLP
203 North LaSalle Street, Suite 1900
Chicago, Illinois 60601

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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 respectfully move to strike the Amended Direct Testimony of Michael W. Hastings ("Hastings Amended Direct Testimony") and the Amended Direct Testimony of Kyle J. Buros ("Buros Amended Direct Testimony") filed on behalf of intervenor Jo-Carroll Energy, Inc. ("Jo-Carroll") (the Hastings Amended Direct Testimony and Buros Amended Direct Testimony is referred to collectively herein as the "Jo-Carroll Amended Direct Testimony"). In support of this Motion, Joint Petitioners state the following.

Having not actively participated since this proceeding was initiated, Jo-Carroll now seeks to have the Commission consider testimony raising issues Jo-Carroll could have, and

indeed should have, raised when given the opportunity to file testimony in June pursuant to the agreed-upon schedule. Jo-Carroll's attempts to infuse additional issues is untimely and prejudicial and irrelevant to the issues in the instant proceeding.

Even more startling is the fact that Jo-Carroll acknowledges the issues it seeks to raise through its proffered testimony relate to the wholesale rates it pays another cooperative not even a party to this proceeding and not within this Commission's jurisdiction. Jo-Carroll has further admitted that this Commission does not have the jurisdiction to dictate or set the rates, terms or conditions under which Jo-Carroll purchases transmission services. Despite these admissions, Jo-Carroll's proffered testimony seeks to do just that – set Jo-Carroll's wholesale transmission rates by forcing a Commission-ordered continuation of existing contracts that Interstate Power and Light ("IPL") has with a third party. (*See* Hastings Amended Direct Testimony at lines 257-60.) The testimony provides no insight into issues this Commission can address—certainly not at this stage of the proceedings—and, as such, should be stricken in its entirety.[1]

## BACKGROUND FACTS

On April 6, 2007, the Joint Petitioners initiated this proceeding with the filing of the Joint Petition and extensive testimony and supporting exhibits by witnesses for each of the Joint Petitioners. Three days later, on April 9, 2007, Jo-Carroll intervened in the instant proceeding. Jo-Carroll has been apprised of each and every development throughout the course of the instant proceeding, has been served with each document filed with the

[1] Although the arguments presented in the instant Motion focus predominantly on the Hastings Amended Direct Testimony, the Buros Amended Direct Testimony is equally subject to being stricken as irrelevant and untimely. In describing the purpose of his testimony, Mr. Buros makes clear that his testimony is meant merely to provide technical background information to the issues addressed in Mr. Hastings' testimony. (*See* Buros Amended Direct Testimony at lines 24-28.)

Commission and each discovery document exchanged among the parties, and has participated through counsel in all hearings to date. Significantly, Jo-Carroll appeared and participated in a May 23, 2007 status hearing, which included extensive discussion and negotiation among experienced counsel over the scheduling details, and resulted in an agreement by all parties, including Jo-Carroll, to the following schedule:

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| 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. |

Until very recently, Jo-Carroll took no affirmative action to participate in the instant proceeding. For example, Jo-Carroll did not file any testimony in accordance with the agreed-upon case schedule and raised no substantive objection to the proposed Transaction. Nor did Jo-Carroll participate in the briefing of the Joint Petitioners' Motion in Limine in which issues related to this Commission's jurisdiction were fully addressed. Indeed, as recently as July 11, 2007, Jo-Carroll's counsel consented to the cancellation of a status hearing before the presiding Administrative Law Judge ("ALJ") on the basis that there were no disputes or issues that needed attention. Thereafter, Jo-Carroll waived all cross-examination at the evidentiary hearing held on July 26, 2007.

It was not until after the evidentiary hearings that Jo-Carroll has sought to interject itself actively into the case. In particular, Jo-Carroll sought leave to file testimony and to take discovery in complete disregard for the agreed-upon schedule purportedly because it only

recently became aware of its issues by receipt of a letter from Dairyland Power Cooperative ("Dairyland"). (*See* Jo-Carroll Energy, Inc.'s Motion to Keep Record Open, filed on August 10, 2007, at 3-4.) The ALJ called an emergency status hearing on August 17, 2007, during which counsel for Jo-Carroll admitted that Jo-Carroll was on notice of the issues that it is now seeking to raise no later than June of 2007:

> Judge Sainsot: Let me ask you something, though, Mr. Shay [Jo-Carroll's counsel]. When did Jo-Carroll first know that this transaction or subsequent situations involving Dairyland could place it in a precarious position.
> ***
> Mr. Shay: It goes back to probably – again, subject to check – probably **June**, where there was some reference to the possibility of some asset restructuring or agreement restructuring that could threaten these so-called grandfathered agreements.

(August 17, 2007 Emergency Status Hearing Tr. at 142.) (Emphasis added.)

After additional argument, the ALJ granted Jo-Carroll leave to file testimony and denied Jo-Carroll leave to take discovery. (*See id.* at 146-47.) In making that ruling, the ALJ recognized quite explicitly the delinquency of Jo-Carroll's position, stating:

> …. **Mr. Shay, you've just admitted to me that you or your client has known for a long time that this sale could have an impact on you. And, you know, the letter that is attached to your motion indicates that there has been ongoing discussions between Jo-Carroll and Dairyland, which is also further – it's also indicia that Jo-Carroll has known for a while that – certainly before the trial in this case** – that its relationship with Dairyland could be precarious either as a result of this transaction or in connection with the shifting around a bit that goes on.

(*Id.* at 146.) (Emphasis added.)

On August 20, 2007, Jo-Carroll proceeded to file the Jo-Carroll Direct Testimony. Then, late in the afternoon on August 22, Jo-Carroll filed and served the amended versions of

the Jo-Carroll Direct Testimony (i.e., the Jo-Carroll Amended Direct Testimony) and filed a Motion for Leave to File those amended versions instanter, which motion was granted on August 24, 2007.

The Hastings Amended Direct Testimony suggests that Jo-Carroll was aware of the issues it now seeks to raise even before June, 2007. Mr. Hastings testifies that he became aware of a Dairyland/IPL interconnection agreement sometime after he became president and CEO of Jo-Carroll on May 20, **2005**. (Hastings Amended Direct Testimony at lines 176-78.) Mr. Hastings further testifies that he gained further substantive knowledge of the particulars of the interconnection relationship between Dairyland and IPL on **April 18, 2007**:

> Chuck Callies [a Dairyland executive] first told me on April 18, 2007, how the interconnection agreements worked – that Dairyland and IPL didn't charge each other for using the other company's transmission system.

(*Id*. at lines 199-201.) While the full import of these differing dates is perhaps unclear, it is manifestly clear that Jo-Carroll was aware of the issues it now seeks to raise *before* the June 28, 2007 testimony filing date that it agreed to on May 23, 2007.

For the reasons discussed below, the Jo-Carroll Amended Direct Testimony should be stricken in its entirety.

## ARGUMENT

The Jo-Carroll Amended Direct Testimony should be stricken for **three** independent reasons. **First**, as the ALJ has recognized on the record at the August 17, 2007 emergency status hearing, Jo-Carroll's actions in the instant proceeding are clearly delinquent, to the extreme prejudice of the Joint Petitioners. **Second**, aside from the unnecessary and prejudicial delay, the Jo-Carroll Amended Direct Testimony plainly falls outside the

Commission's jurisdiction and is, therefore, wholly irrelevant to the issues under consideration in the instant proceeding. Indeed, Jo-Carroll has now admitted that the issues it seeks to raise deal with an entity – Dairyland Power Cooperative – over which the Commission has no jurisdictional authority; and Jo-Carroll admits that the issues in question are themselves not within the Commission's jurisdiction. **Finally**, the Jo-Carroll Amended Direct Testimony includes material that constitutes classic inadmissible hearsay.

## I. <u>The Jo-Carroll Amended Direct Testimony is Untimely</u>

The agreed-to case schedule called for intervenor testimony to be filed on or before June 28, 2007. Jo-Carroll declined to file testimony at that time. Nor did Jo-Carroll file any other paper that even hinted that it might have a desire to file something in the near or not-so-near future. Jo-Carroll has now submitted testimony that it knew "how the interconnection agreements worked" no later than April 18, 2007. (*See* Hastings Amended Direct Testimony at lines 199-201.) That is more than one month before the May 23 status hearing at which Jo-Carroll itself agreed to a June 28 filing date for its testimony, and more than two months before that June 28 filing date.

Even if one could argue that Jo-Carroll did not have sufficient knowledge on April 18 to raise the issues it now seeks to raise, there is now doubt that Jo-Carroll had sufficient knowledge before the June 28 filing date. <u>Jo-Carroll now has admitted on the record that it knew **as early as June** about the issues it now seeks to raise.</u> (*See* August 17, 2007 Emergency Status Hearing Tr. at 142.) Thus, although it may not have been clear before, there is now no doubt that Jo-Carroll's testimony is simply untimely.

Case schedules serve the purpose of fostering orderly and equitable proceedings, providing all parties with a fair opportunity to present evidence and arguments. Of course, the

Commission's Rules of Practice recognize that one of the Commission's guiding goals in administering proceedings is "expedition." (*See* 83 Ill. Admin. Code 200.25(c).) Illinois courts regularly impose sanctions – up to and including dismissal – for failure to comply with scheduling orders. (*See, e.g., Jackson v. Chicago*, 2004 WL 2958771 (N.D. Ill. Nov. 19, 2004) (dismissing case); *Prather v. McGrady*, 261 Ill. App. 3d 880, 634 N.E.2d 299 (4th Dist 1994) (excluding expert witness).) In the instant proceeding, the case schedule was not unilaterally imposed by the ALJ or negotiated without Jo-Carroll's participation and full knowledge. The case schedule was entered on a fully-agreed basis at the May 23, 2007 hearing at which Jo-Carroll appeared and participated. Yet Jo-Carroll now proceeds in a manner that totally ignores that former agreement.

Jo-Carroll's action is highly prejudicial to the Joint Petitioners. From the very beginning of the instant proceeding it has been well known that time is of the essence with respect to the Commission's review and approval of the Transaction. The Joint Petition filed on April 6, 2007 clearly articulated 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.) Thus, concurrent with filing the Joint Petition, the Joint Petitioners filed extensive and detailed direct testimony and numerous supporting exhibits of five witnesses. Now, however, more than five months later, after the agreed-to deadlines for filing testimony have passed and the evidentiary hearing has been held, Jo-Carroll has stepped forward to present direct testimony that itself confirms that Jo-Carroll had substantial knowledge of the very issues it now seeks to raise on April 18, 2007.

Accordingly, the Jo-Carroll Amended Direct Testimony should be stricken as untimely.

## II. **The Jo-Carroll Amended Direct Testimony Addresses An Entity and Issues that Jo-Carroll Itself Admits Are Outside Of The Commission's Jurisdictional Authority**

It is now obvious that the Jo-Carroll Amended Direct Testimony is untimely. Further, even Jo-Carroll now admits that the issues that Jo-Carroll seeks to raise deal with wholesale transmission rates over which the Commission has no jurisdiction purchased from a non-party cooperative – Dairyland – that is not under the Commission's jurisdiction. In discovery, Jo-Carroll has admitted that "the Commission may not dictate or set the rates or other terms and conditions under which Jo-Carroll purchases transmission service."[2]

In addition, Dairyland is not a party to this proceeding; and the Commission has no jurisdiction over negotiations Dairyland conducts regarding transmission rights. Jo-Carroll has admitted as much in discovery responses wherein it stated it was unaware of what jurisdiction the Commission has over Dairyland. Thus, even if the Jo-Carroll Direct Testimony were timely – which it clearly is not – the testimony would need to be stricken as completely irrelevant and immaterial to the instant proceeding. (*See* 83 Ill. Admin. Code 200.190 (permitting a motion to strike for "irrelevant" and "immaterial" matter).)

In addition to its admissions in discovery, the Jo-Carroll Amended Direct Testimony confirms that Jo-Carroll's only motivation at this stage is to avoid a possible increase in "transmission costs." (*See, e.g.*, Hastings Amended Direct Testimony at lines 214-18.) But, again, as the ALJ has already ruled in her June 22 Ruling on the Joint Petitioners' Motion in Limine:

[2] *See* the Jo-Carroll response to ITC Midwest Data request 1.7(a), attached as Exhibit A. In its response, Jo-Carroll failed to include the request to which it is responding. Thus, included as page 1 to Exhibit A is the actual ITC Midwest Data Request 1.7, with the Jo-Carroll response following on pages identified as "10" and "11"..

> **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)).

(June 22 Ruling at 6.) (emphasis added.) The law of the case is clear that the issue of transmission costs is solely and exclusively within the jurisdiction of the FERC pursuant to the Federal Power Act. (*Id*.) Thus, regardless of what Jo-Carroll might try to establish regarding its concerns over transmission costs through the submission of its untimely testimony, the fact remains that the issue of transmission costs is beyond this Commission's jurisdiction.

The rulings to date in the instant proceeding appropriately observe the limitations on Commission jurisdiction and respect the jurisdiction of the FERC on matters that are legally regulated by the Federal Power Act. (*See, e.g.*, June 22, 2007 Ruling at 6-9; comments of the ALJ at the August 17, 2007 emergency status hearing, Tr. at 159-161.) Jo-Carroll's proposed testimony disregards these rulings, and addresses FERC-regulated issues with a FERC-regulated entity. Even if the Commission agreed with the points raised in Jo-Carroll's proposed testimony, this Commission does not have jurisdiction to grant the relief requested. The Jo-Carroll Amended Direct Testimony should be stricken in its entirety because it addresses issues that are irrelevant to the instant proceeding.

## III. <u>Jo-Carroll Seeks to Introduce Inadmissible Hearsay Evidence</u>

Portions of the Jo-Carroll Amended Direct Testimony are obviously hearsay that is inadmissible. As such, even if the testimony is not stricken completely for the reasons stated above, certain portions of the testimony should be stricken on hearsay grounds.

First, Mr. Hastings repeatedly refers to his April 18, 2007 conversation with Mr. Callies of Dairyland with respect to the existence of and operation of the "interconnection agreements" between Dairyland and IPL. (*See* Hastings Amended Direct Testimony at lines 178-81, 199-204.) Such testimony is classic hearsay – an out of court statement offered for the truth of the matter asserted. (*See generally* M. Graham, Handbook of Illinois Evidence § 801.1 (8th ed. 2004).)

Second, the Hastings Amended Direct Testimony references the so-called "Dairyland Letter" sent to Mr. Hastings by Dairyland. (*See* Hastings Amended Direct Testimony at lines 186-91; 204-07.) Such a letter is also classic inadmissible hearsay under the Illinois Rules of Evidence.[3] (*See, e.g., Paul H. Schwendener, Inc. v. Jupiter Electric Co.*, 358 Ill. App. 3d 65, 79, 829 N.E.2d 818, 831-32 (1st Dist. 2005); *Moran v. Erickson*, 297 Ill. App. 3d 342, 359-60, 696 N.E.2d 780, 791-92 (1st Dist. 1998).) This Commission has often refused both testimony and documentation evidence based upon its hearsay nature, consistent with the Illinois Rules of Evidence. (*See e.g.* Order, *Illinois Commerce Commission v. Northern Illinois Gas Company*, ICC Docket No. 02-0170, 2003 WL 23101065 (Ill.C.C.) at *11 (August 6, 2003) (denying the admissibility of proffered document based upon hearsay); Order, *In re MidAmerican Energy Company*, ICC Docket No. 01-0444, 2002 WL 1306035 (Ill.C.C.) at *16 (March 27, 2002) (rejecting evidence based upon hearsay objection to an out-of-court conversation between the witness and third parties who did not testify. "We need not rely on such vague hearsay statements, irrespective of whether objections were raised to their validity or legality.").)

Therefore, even if the Jo-Carroll Amended Direct Testimony is not stricken entirely,

[3] In contested proceedings before the Commission, the Illinois Rules of Evidence applied in civil cases shall be followed. 83 Ill. Admin. Code Part 200.610.

the portions of the testimony that contain inadmissible hearsay should be stricken: Lines 178-181, 186-191, 199-207, and the Dairyland Letter as attached to the Hastings' Direct Testimony as JCE Ex. MWH 1.5. A redline copy of the testimony is attached as Exhibit B for the Commission's convenience.

## CONCLUSION

At this stage of the proceeding, it is clear that the Jo-Carroll Amended Direct Testimony concerns irrelevant and immaterial matters that were known to Jo-Carroll well before the agreed-to due date for the filing of testimony by intervenors. The delay is highly prejudicial to the Joint Petitioners. The delay is also completely unnecessary, because the issues raised in the Jo-Carroll Amended Direct Testimony have no bearing on the contested issues before the Commission. Indeed, it is manifestly clear that Jo-Carroll's "issues" involve only Dairyland – a non-party subject to FERC regulation. It is equally clear that those issues involve only FERC-regulated matters – *i.e.*, transmission costs. Thus, the testimony is completely irrelevant and immaterial and should be stricken entirely.

Even if not stricken entirely, portions of the Jo-Carroll Amended Direct Testimony constitute classic inadmissible hearsay that should be stricken.

WHEREFORE, the Joint Petitioners respectfully request an order:

1) Striking the Jo-Carroll Amended Direct Testimony in its entirety; or, alternatively

2) Striking the following portions of the Hastings Amended Direct Testimony:

- Lines 178-181;
- Lines 186-191;
- Lines 199-207; and
- the Dairyland Letter as attached to the Hastings' Direct Testimony as JCE Ex. MWH 1.5.

3) Granting such further relief as the ALJ deems just and appropriate.

Respectfully submitted,

INTERSTATE POWER AND LIGHT COMPANY

By_____

Kent M. Ragsdale
Jennifer S. Moore
Attorneys for Interstate Power and Light Company
Alliant Energy Corporate Services, Inc.
200 First Street S.E.
P.O. Box 351
Cedar Rapids, IA 52406-0351
(319) 786-4219
KentRagsdale@alliantenergy.com
JenniferMoore@alliantenergy.com

ITC MIDWEST LLC

By_____

Attorneys for ITC MIDWEST LLC
Christopher J. Townsend
Joseph E. Donovan
Christopher N. Skey
DLA Piper US LLP
203 North LaSalle Street, Suite 1900
Chicago, Illinois 60601
(312) 368-4000
christopher.townsend@dlapiper.com
joseph.donovan@dlapiper.com
christopher.skey@dlapiper.com