

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' REPLY IN FURTHER SUPPORT OF
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 (“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. Code 200.190, hereby respectfully reply in further support of their Motion to Strike (“Motion 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, Joint Petitioners state the following.

Joint Petitioners stand on and reiterate each of the **three** independent reasons that the Jo-Carroll Amended Direct Testimony should be stricken, as set forth in the Motion to Strike. Indeed, Jo-Carroll's Response to the Motion to Strike ("Jo-Carroll Response") confirms that each reason is a valid basis for striking the testimony. **First and foremost**, Jo-Carroll improperly suggests that the Commission's investigation has no limits -- 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. **Second**, Jo-Carroll's actions in the instant proceeding are clearly delinquent, to the extreme prejudice of the Joint Petitioners. **Finally**, the Jo-Carroll Amended Direct Testimony includes material that constitutes classic inadmissible hearsay.

**I. The Jo-Carroll Amended Direct Testimony
Addresses An Entity And Issues That Jo-Carroll Itself
Admits Are Outside Of The Commission's Jurisdictional Authority**

The pertinent facts demonstrating the irrelevance of Jo-Carroll's position to the instant proceeding are now undisputed:

- Jo-Carroll is concerned about its wholesale transmission costs. (*See, e.g.*, Hastings Amended Direct Testimony at lines 214-18.) Wholesale transmission rates are regulated by the Federal Energy Regulatory Commission. (*See* June 22, 2007 ALJ Ruling at 6.) The Commission has no jurisdiction over those rates. (*See id.*) These points are undisputed.
- Jo-Carroll's wholesale transmission provider is Dairyland Power Cooperative ("Dairyland"). Dairyland is not a party to the instant proceeding. Nor is Dairyland subject to the Commission's jurisdiction with respect to its negotiations over transmission rights. These points are undisputed.

- Jo-Carroll itself is a member of the Dairyland Power Cooperative. This point is undisputed.¹
- Jo-Carroll admits that “the Commission may not dictate or set the rates or other terms and conditions under which Jo-Carroll purchases transmission service.”² This point is undisputed.

These facts inexorably lead to the conclusion that Jo-Carroll Amended Direct Testimony is simply irrelevant to the instant proceeding.

What does Jo-Carroll want? The answer is, no change in wholesale transmission rates charged by Dairyland. (*See* Hastings Amended Direct Testimony at lines 257-60.) Nothing that occurs in the instant proceeding can make that happen. It would be a patently illegal and unenforceable attempt to extend jurisdiction into a FERC-regulated matter for the Commission to take any action regarding the wholesale transmission rates that Dairyland charges Jo-Carroll.³ A Commission order restricting wholesale transmission rates assessed Jo-Carroll by Dairyland would be void *ab initio*.⁴ The Commission should not, and cannot,

¹ It is instructive to keep this point in mind when reading some of the rhetoric in Jo-Carroll’s Response, such as the allegation that IPL has “been holding secretive discussions and negotiations with Dairyland [] in connection with the proposed transaction.” (Response at 2.) One might reasonably presume as a member of Dairyland, Jo-Carroll would be privy to Dairyland’s discussions with IPL. To the extent Dairyland has not been providing desired information to Jo-Carroll or its other members, certainly the Joint Petitioners bear no responsibility.

² *See* the Jo-Carroll response to ITC Midwest Data request 1.7(a), attached to the Motion to Strike as Exhibit A.

³ There is a curious irony to Jo-Carroll’s position. In essence, Jo-Carroll is seeking Commission regulation of a non-Commission regulated entity. And, Jo-Carroll itself is largely unregulated by the Commission. Indeed, it is a matter of public record that during the pendency of Commission Docket 05-0835, which resulted in Commission approval of Jo-Carroll’s acquisition of certain IPL electric and natural gas assets, the Illinois General Assembly enacted legislation that clarified that an entity such as Jo-Carroll is not a public utility subject to Commission regulation. (*See* Jan. 3, 2007 Final Order in ICC Docket No. 05-0835 (describing Public Act 94-0738).) Nonetheless, Jo-Carroll seeks to invoke the regulatory power of the Commission on Jo-Carroll’s behalf and for Jo-Carroll’s benefit over an entity that Jo-Carroll admits is not a public utility subject to the Commission’s jurisdiction.

⁴ Under Section 4-101 of the 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.)

consider FERC-jurisdictional issues in determining whether the public would be inconvenienced by the transaction. (See ALJ's June 22 Ruling at 6 "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.")⁵

Viewed in this light, Jo-Carroll's citation to *Illinois Power Company v. Illinois Commerce Commission* is unavailing. Jo-Carroll highlights the fact that in *Illinois Power* it was recognized that the Commission lacked jurisdiction to affirmatively order the consummation of a transaction other than the actual transaction before the Commission. (See Response at 4; 111 Ill. 2d 505, 513, 490 N.E.2d 1255, 1258.)⁶ From this observation, Jo-Carroll extrapolates to the general conclusion that the Commission may consider any matter inside or outside its jurisdiction, in assessing the Transaction in the under consideration in the instant proceeding. *Illinois Power* does not so hold.

On the contrary, *Illinois Power* merely holds that the Commission may consider "alternative proposals" for a transaction over which it actually has jurisdictional authority to approve. (111 Ill. 2d at 513, 490 N.E.2d at 1258.) In other words, the Commission could

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."))

⁵ See also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 309, 108 S. Ct. 1145 (1988) ("FERC's authority to regulate and fix practices affecting rates allows the agency to address directly any unduly leveraged, unduly risky, or unduly capitalized investments.") The Supreme Court held that the state law at issue in *Schneidewind* was an attempt to regulate the rates and facilities of interstate commerce and, as such, was preempted. (*Id.* at 306.)

⁶ Of course that proposition directly supports the Joint Petitioners' point that the Commission cannot order Dairyland to maintain, lower, or raise its wholesale transmission rates.

decide to not approve a sale of assets to Buyer A based on record evidence that there is a competing proposal to sell the same assets to Buyer B that better serves the public interest. Thus, the Supreme Court held in *Illinois Power* only that “the Commission had discretion to consider the alternative proposal.” (*Id.*) Of course, unlike the wholesale rates about which Jo-Carroll complains, the Commission would have had jurisdiction over the approval of the alternative proposal. Nothing in *Illinois Power* suggests that the Commission has *carte blanche* to consider issues and impose conditions that trespass on the exclusive authority of the FERC.

In the instant proceeding, there is no “alternative proposal” at issue. Certainly, Jo-Carroll is not relying on any “alternative proposal” to justify its position; and there is absolutely no record evidence, no discovery information, and nothing in the newly filed testimony of the Staff and Jo-Carroll witnesses having anything to do with an “alternative proposal.” Stated simply, Jo-Carroll’s attempt to transform the “alternative proposal” principle recognized in *Illinois Power* into authorization for the Commission to exercise regulatory authority over a non-party, FERC-regulated wholesale supplier is far-fetched and unpersuasive. Indeed, the ALJ’s June 22 Ruling recognizes that issues that are purely FERC jurisdictional should not, and legally cannot, be addressed in the instant proceeding. (*See* June 22 ALJ Ruling at 6.)

II. The Jo-Carroll Amended Direct Testimony is Untimely

The Jo-Carroll Response to the Motion to Strike is largely premised on trying to rebut the statement that Jo-Carroll “has been lying in the weeds during the earlier portions of this proceeding.” (Jo-Carroll Response at 1.) But, this is a strawman argument that has no relation to the arguments in the Joint Petitioners’ pleadings -- Joint Petitioners have made no

allegation about Jo-Carroll “lying in the weeds.” On the contrary, the Joint Petitioners’ Motion to Strike explained that Jo-Carroll intervened in the instant proceeding just 3 days after the Joint Petition was filed on April 6, 2007 and has been affirmatively represented by counsel at each step along the way, including at the initial status hearing when Jo-Carroll’s counsel agreed to the procedural schedule, each subsequent status hearing and at the evidentiary hearing, when Jo-Carroll’s counsel agreed to waive cross-examination of the witnesses. These facts are confirmed by the record in the instant proceeding and are well known to all parties. The point of the Motion to Strike is not that Jo-Carroll has been lying in the weeds. The point is exactly the opposite – that Jo-Carroll has been involved in the instant proceeding since April 9, 2007 and should not be permitted, through the filing of untimely and wholly irrelevant testimony, from derailing a case schedule that was agreed to on May 23, 2007 by all parties, including Jo-Carroll.⁷

Jo-Carroll’s Response fails entirely to address the now-established relevant chronology:

- **May 20, 2005**

Mr. Hastings became president and CEO of Jo-Carroll and thereafter became aware of the Dairyland/IPL interconnection agreement (*See* Hastings Amended Direct Testimony at lines 176-78.)

- **April 18, 2007**

Mr. Hastings gained additional substantive knowledge of the particulars of the interconnection relationship between Dairyland and IPL. (*Id.* at lines 199-201.)

⁷ Jo-Carroll’s Response completely side steps the implications of its untimeliness, yet the cases that Joint Petitioners cited in their Motion to Strike – cases that Jo-Carroll makes no attempt to rebut – confirm the seriousness of failing to observe a case management schedule. (*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).)

- **May 23, 2007**

Jo-Carroll and all other parties agreed to entry of a Case Scheduling Order. (Tr. at 54-57)

- **June 2007**

Jo-Carroll gained further substantive and particular knowledge of the precise issues it now seeks to raise about the interconnection agreement. (Tr. at 142, 146.)⁸

- **June 28, 2007**

Staff and Intervenor direct testimony was due. Jo-Carroll did not file any testimony at that time.

- **July 11, 2007**

Counsel for Jo-Carroll agreed to the cancellation of a scheduled status hearing before the presiding Administrative Law Judge on the basis that there were no disputes or issues that needed any attention.

- **July 26, 2007**

Jo-Carroll waived all cross-examination at the evidentiary hearing.

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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.)

Judge Sainsot: **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.)

This chronology – which Jo-Carroll’s Response makes no attempt to rebut – establishes that, at the latest, Jo-Carroll possessed substantive knowledge of the particulars of the interconnection relationship between Dairyland and IPL more than one month before the May 23 status hearing that set the case schedule and more than two months before that June 28 filing date for intervenor testimony. Further, Jo-Carroll now has admitted on the record that it knew **in June** about the issues it now seeks to raise. (See August 17, 2007 Emergency Status Hearing Tr. at 142.)

Lest there be any mistake created by Jo-Carroll’s Response, Joint Petitioners do not suggest that Jo-Carroll has been lying in the weeds. The chronology of events graphically illustrates Jo-Carroll’s level of engagement in the instant proceeding and level of knowledge about the matters raised in the Jo-Carroll Amended Direct Testimony. Thus, although it may not have been clear before, there is now no doubt that Jo-Carroll’s testimony is simply untimely. Jo-Carroll sat on its rights. It should not be rewarded for doing so by further delaying the progress of the instant proceeding and clouding the record by attempting to address matters that fall outside the Commission’s jurisdiction.⁹

Jo-Carroll’s Response fails to confront the fact – raised in the Motion to Strike – that Jo-Carroll’s action is highly prejudicial to the Joint Petitioners. (See Motion to Strike at 7.) From the moment the instant proceeding was initiated, the Joint Petitioners have emphasized that time is of the essence with respect to the Commission’s review and approval of the

⁹ Jo-Carroll’s Response tries to make rhetorical hay out of the “lying in the weeds” metaphor by suggesting that IPL’s response to Data Request JCE 1.05 was somehow incomplete and thus IPL itself has been “lying in the weeds.” (See Response at 3.) The record is clear that Jo-Carroll never filed a motion to compel with respect to IPL’s response to Data Request JCE 1.05. Thus, Jo-Carroll’s complaint about the response to the Data Request is not well taken and itself should be disregarded and/or stricken. As for the suggestion that IPL has been lying in the weeds, that notion is outrageous, has no basis in fact, and ought to be disregarded outright.

Transaction. (See Joint Petition at ¶¶ 44-48.) 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 testimony that itself confirms that Jo-Carroll had substantial knowledge of the very issues it now seeks to raise months ago.

The Jo-Carroll Amended Direct Testimony should be stricken.

III. Jo-Carroll Seeks to Introduce Inadmissible Hearsay Evidence

Portions of the Jo-Carroll Amended Direct Testimony relating to an April 18, 2007 meeting and an August 6, 2007 letter are plain hearsay. Jo-Carroll's Response does not really deny this, but instead suggests that the hearsay has some level of reliability that should make it admissible. (See Response at 5.) In making this argument, the Response – which is unverified – “testifies” about the bona fides of Mr. Hastings, Mr. Callies, and Mr. Porath (saying they are all “responsible officers”); “testifies” about the location of the hearsay communications (“business meetings”); and “testifies” about the nature of the hearsay communications (“official business”). (Response at 5.) But this puts the evidentiary cart before the horse – a pleading (especially an unverified pleading) cannot “testify” about supposed facts that might make hearsay sufficiently reliable to meet standards of evidence.

Next, the Response argues that the August 6 Dairyland letter is a declaration against interest. (See Response at 6.) The alleged rationale here is that “it is not in Dairyland's and Mr. Porath's interests to have transmission charges to Jo-Carroll increase, as that could result in less power and energy purchased by Jo-Carroll customers and, therefore, less revenue to Dairyland.” (*Id.*) This is a rather remarkable, indeed preposterous, assertion as the basis for a hearsay exception. The letter itself states:

Dairyland believes the current proposal on the table between DPC and IPL **will provide significant long-term financial benefit to DPC and all of its Class A Member Cooperatives.**

(Emphasis added.) Obviously, Dairyland had no concern that it was making a declaration against its pecuniary interests in issuing the letter – the language highlights the “financial benefit” that Dairyland thinks it may reap.

Aside from the plain language of the letter itself, Jo-Carroll’s argument ignores fundamental principles of economics. One need only have spent the first day of class in Economics 101 to know that free market economics is grounded on the concept – articulated by Adam Smith in *Wealth of Nations* in 1776 -- that persons and companies act, first and foremost, in their own best interest. (*See Yankee Atomic Elec. Co. v. United States*, Nuclear Reg. Rep. p. 20,670 at *299 n.46 (Fed. Cl. 2006) (“First proclaimed by Adam Smith, the ‘invisible hand’ theory ‘holds that in selfishly pursuing only his or her personal good, every individual is led, as if by an invisible hand, to achieve the best good for all.’”); *Chock Full O’Nuts Corp. v. Finkelstein*, 548 F. Supp. 212, 218 (S.D.N.Y. 1982) (“Every individual endeavors to employ his capital so that its produce may be of greatest value. . . . He intends only his own security, only his own gain.”).) The declaration against interest exception has no application to the Dairyland letter.¹⁰

Jo-Carroll’s last argument is that the hearsay statements may nonetheless be admitted to show notice. (*See* Response at 6.) To the extent that Jo-Carroll is arguing that the hearsay statements may be admissible for the sole purpose of showing notice and are not admissible

¹⁰ In discussing the declaration against interest issue, the Jo-Carroll’s Response suggests that Jo-Carroll will be attempting to have heretofore undisclosed witnesses who have not submitted pre-filed testimony appear and testify at the evidentiary hearing. (*See* Response at 6.) The Joint Petitioners object to any such eleventh-hour maneuver, which is plainly at odds with the Commission’s Rules of Practice.

for any other purpose, the Joint Petitioners have no objection – indeed, the Joint Petitioners are willing to stipulate that each hearsay statement put Jo-Carroll on notice about its alleged concerns. Thus, the Joint Petitioners will stipulate that Jo-Carroll was put on notice no later than April 18, 2007 – the date of the hearsay conversation between Mr. Hastings and Mr. Callies.

CONCLUSION

Contrary to Jo-Carroll’s assertions, there are limits regarding the issues that this Commission can consider in the instant proceeding. For the reasons stated herein and in the Joint Petitioners’ Motion to Strike, the Jo-Carroll Amended Direct Testimony, which is irrelevant and immaterial to the issues under consideration in the instant proceeding as well as prejudicially untimely, should be stricken entirely.

Even if not stricken entirely, the hearsay portions of the Jo-Carroll Amended Direct should be stricken. If not stricken, those hearsay portions should only be permitted to show notice.

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,

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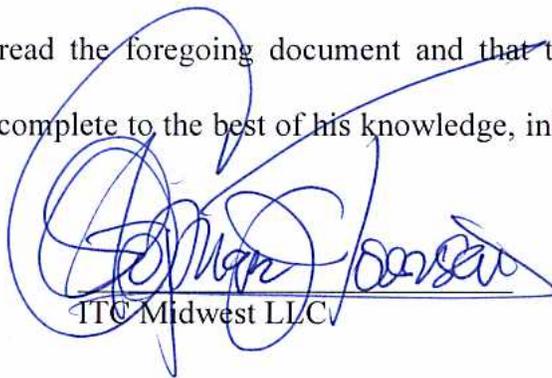
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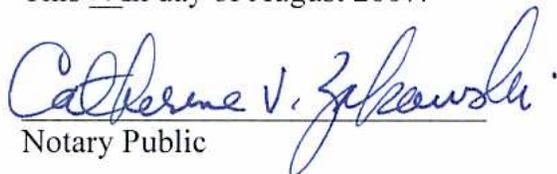
VERIFICATION

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 document 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 31~~st~~ day of August 2007.


Notary Public



VERIFICATION

STATE OF IOWA)
COUNTY OF LINN) ss:

Jennifer M. Moore, being first duly sworn, deposes and says that she is counsel for Interstate Power and Light Company; that she has read the foregoing document and that the statements contained therein are true, correct and complete to the best of her knowledge, information and belief.



Interstate Power and Light Company

Subscribed and sworn to before me
This 31th day of August 2007.



Notary Public

