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ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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TRI-COUNTY ELECTRIC)
COOPERATIVE, INC.,)
)
Complainant,)
vs.)
)
ILLINOIS POWER COMPANY, d/b/a)
AMEREN IP,)
Respondent.)

CASE NO. 05-0767

MOTION TO STRIKE PORTIONS OF THE
RESPONSE BY CITATION OIL & GAS CORP. (CITATION)
OF TRI-COUNTY ELECTRIC COOPERATIVE, INC.'S (TRI-COUNTY)
OBJECTIONS TO THE PETITION TO INTERVENE BY CITATION

Tri-County Electric Cooperative, Inc. (Tri-County) herewith files its Motion to Strike portions of the Response by Citation Oil & Gas Corp. (Citation) to the Objections by Tri-County to Citation's Petition to Intervene and in support thereof states as follows:

1. Citation filed its Petition to Intervene and a Memorandum in this matter on or about April 29, 2010. The Petition to Intervene and the Memorandum raised the following points in support of Citation's Petition to Intervene:

A. Citation claimed that as a retail customer of electricity, it had a right under the Electric Service Customer Choice and Rate Relief Act of 1997 (220 ILCS 5/16-101, et seq (Act) to select its electric power supplier and as a result, Citation entered into a contract with Sempra Energy Solutions LLC for its electric power to the gas processing facility for which electric service is at issue in this docket. (See paragraph 4 of Citation's Petition to Intervene.) Citation did not mention that it continues to receive its electric delivery service from Illinois Power Company d/b/a IP, the Respondent in this docket.

B. The Electric Service Customer Choice and Rate Relief Act of 1997 does not apply to Tri-County, (220 ILC 5/17-100). (See paragraph 5 of Citation's Petition to Intervene.)

C. Citation claimed the outcome of this docket could impair Citation's contract with Sempra Energy Solutions LLC. (See paragraph 6 of Citation's Petition to Intervene.) No authority was cited to support this allegation.

D. Citation alleged that unless it is allowed to intervene, the Commission's decision in this docket will not be binding upon Citation because Citation is a necessary party due to its contractual obligations with Sempra Energy Solutions LLC under the Electric Service Customer Choice and Rate Relief Act of 1997. (See paragraph 8 of Citation's Petition to Intervene and paragraph A, pages 1-2 of Citation's Memorandum). Citation cited two Illinois Appellate Court decisions and one Illinois Circuit Court decision to support this allegation of its interest in the outcome of this docket noting that Citation's interest in this docket was premised upon Citation's choice of an electric energy supplier separate from the supplier of Citation's electric delivery services. (See Citation's Memorandum in Support of Petitioner to Intervene, page 2-4.) No other authority was cited as support for this proposition.

E. Citation advanced the additional argument in its Memorandum in support of the Petition to Intervene that Citation was a third party beneficiary to the Service Area Agreement dated March 16, 1968, between Tri-County and Illinois Power Company, d/b/a AmerenIP (IP) citing one Appellate Court decision advancing Citation's claim of third party beneficiary status under the aforesaid Service Area Agreement. (See paragraph B of Citation's Memorandum in Support of the Petition to Intervene at page 4).

2. In summary, Citation's arguments were:

A. Because of the right to choose its supplier of electric energy separate from the electric supplier providing electric delivery services as provided by the Electric Service Customer Choice and Rate Relief Act of 1997, it had a financial and/or contractual interest which may be impaired by the outcome of this docket.

B. Citation had a third party beneficiary interest in the Commission approved Service Area Agreement between Tri-County and IP which Agreement controls electric service rights to customers.

3. Tri-County filed its objections to the Petition to Intervene by Citation noting the following:

A. Citation's stated interest for intervening in this docket was based upon its financial interest by reason of its contract for electric energy which was separate from its contract with IP for electric delivery services and that such financial interest was insufficient to allow Citation to intervene.

B. Citation did not possess third party beneficiary status under the Service Area Agreement between Tri-County and IP.

In support of these contentions, Tri-County cited the Commission's decision in Rural Electric Convenience Cooperative Co and Soyland Power Cooperative, Inc., vs. Central Illinois Public Service Company (Ameren CIPS) 01-0675 (September 4, 2003) (RECC/Soyland) in which the Commission determined that Soyland had insufficient interest to intervene or claim party status by reason of its acknowledged economic interest or by reason of its claimed third party beneficiary status under the Service Area Agreement between Rural Electric Convenience Co., and CIPS, which allowed one or the other of those two electric suppliers the right to serve

the customer (Freeman) in question. In addition, Tri-County responded to Citation's authority cited in support of its claim that it had sufficient interest in the docket to allow intervention. Tri-County's argument was limited to responding solely to the stated claims and authorities cited by Citation in its Petition to Intervene and the Memorandum in support thereof.

4. Citation filed its Response to Tri-County's Objections to the Petition to Intervene by Citation and in doing so, Citation did not limit its Response to the points argued by Tri-County or the authority cited in support thereof. Instead, Citation went well beyond the rules governing such responses in one or more of the following ways:

A. At paragraphs B, C and D of Citation's Argument, pages 2-5, Citation advanced the argument that the Customer Choice and Rate Relief Act of 1997, 220 ILCS 5/16-101 et seq, has changed the public policy of the State of Illinois as set forth in the Illinois Electric Supplier Act 220 ILCS 30-1 et seq, such that a customer of an electric supplier now has a choice as to which of two or more electric suppliers will serve the customer. This argument was never advanced by Citation in its Petition to Intervene or in its initial Memorandum. In advancing this argument, Citation ignores the provisions of the Illinois Electric Supplier Act and the multitude of Commission and Illinois court decisions which either prohibit or severely limit the right of a customer to choose its electric supplier. Thus, Citation advanced, for the first time, arguments regarding the public policy of the State of Illinois and the intent of the Legislature in adopting the Electric Supplier Act and the Customer Choice and Rate Relief Act of 1997.

B. In paragraph E, at page 6 and the first three paragraphs of page 7, Citation advanced a constitutional due process argument citing numerous case authority to support such claim and further claiming that Citation's right to choose its electric provider is a property interest protected by the due process clause of the Constitution. While Citation does not indicate

whether its claim is based on the Illinois Constitution or the U.S. Constitution, the attempted claim of a Constitutional right seems clear even though Citation failed to raise such argument in its Petition to Intervene or its initial Memorandum in support thereof.

5. Moving parties must present of all their claims or arguments in their initial pleading or brief. The responding party then has a right to reply and present its arguments to the claims presented by the moving party. The responding party is required to limit its reply to those arguments and authority raised by the moving party. Any response by the moving party must then be strictly limited to the arguments made and the authority cited in response to the defending party's reply. (Supreme Court Rule 341g; 83 Illinois Administrative Code Sec 200.800(c)). See also Stephens v Industrial Commission 284 Ill App 3d 269; 671 NE2d 763; 219 Ill Dec 596, 601 (1st Dist 1996), where the Appellant was not allowed to raise an equal protection and due process argument for the first time in her reply brief; In Re K.D. 279 Ill App 3d 1020; 666 NE2d 29; 216 Ill Dec 861, 864 (2nd Dist 1996), where it was improper for Appellant to raise for the first time in the reply brief the argument that the Department of Professional regulation had the power to obtain information regarding Appellant without resorting to viewing juvenile court records; Miller v Miller 268 Ill App 3d 132; 643 NE 2d 288; 205 Ill Dec 337, 341-342 (4th Dist 1994), holding it is improper for Appellant to raise for the first time in its reply brief an argument that a place of employment is not a business address for purposes of the Illinois Supreme Court Rules; The Department of Public Works & Buildings v An Association of Franciscan Fathers 3 Ill App 3d 503; 278 NE2d 111, 113-114 (2nd Dist 1972), where Defendant Appellant improperly raised arguments for the first time in its reply brief that had been originally raised by Defendant Appellant in its Traverse and Motion to Dismiss the Plaintiff's condemnation proceeding, but omitted from Appellant's initial brief; and the Estate of

Woodshank 27 Ill App 3d 444; 325 NE2d 686, 690 (3rd Dist 1975), where in a proceeding to sell real estate, which invoked the issue whether a joint tenancy is severed by a divorce decree, the court refused to consider Appellant's argument made for the first time in its reply brief, that the joint tenancy was severed because the Plaintiff Appellee had earlier filed a complaint for partition of the real estate.

Citation has violated the Commission's Rules of Procedure, Section 200.800 (c), by enlarging its argument that was made initially to support the Citation Petition to Intervene to include other arguments and authority which in turn places Tri-County, who is opposing Citation's Petition to Intervene, at a disadvantage unless the Administrative Law Judge and the Commission strike the offending portions of Citation's Response or allows Tri-County sufficient time within which to respond.

WHEREFORE, Tri-County requests the Illinois Commerce Commission and the Administrative Law Judge grant the following relief:

A. To strike the portions of Citation's Response to Tri-County's objections to Citation's Petition to Intervene at pages 2-5 and as identified as Paragraph B, Paragraph C, Paragraph D, and that portion of Paragraph E, commencing with pages 6 through 7, excluding the last two lines of page 7 and excluding the first paragraph on page 9 up to the paragraph commencing with the word "WHEREFORE"; or

B. In the alternative, to allow Tri-County sufficient time to respond to the new arguments raised in Citation's Response to Tri-County's Objection to Citation's Petition to Intervene;

C. For such other and further relief as the Commission and Administrative Law Judge deem appropriate.

TRI-COUNTY ELECTRIC COOPERATIVE, INC.

By GROSBOLL BECKER TICE TIPPEY & BARR

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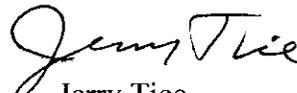
PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 21st day of May, 2010, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the attached hereto, addressed to the following persons at the addresses set opposite their names:

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