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TRI-COUNTY ELECTRIC COOPERATIVE, INC., Complainant,	)	
vs	)	CASE NO. 05-0767
ILLINOIS POWER COMPANY, d/b/a AMEREN IP, Respondent.	)	

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

TI-COUNTY ELECTRIC COOPERATIVE, INC., (TRI-COUNTY) herewith files, as authorized by order of the Administrative Law Judge entered July 2, 2010, its reply to the response by CITATION OIL & GAS CORP., (CITATION), to Tri-County's objection to Citation's Petition to intervene and in support thereof states as follows:

I. INTRODUCTION

The portions of Citation's response to Tri-County's objections, which Tri-County replies to herein, are identified as follows:

A. Citation's argument at Paragraph B entitled the Customer Choice Law, page 2-3.

B. Citation's argument at Paragraph C entitled Citation's Legal Right to Choose, pages 3-4.

C. Citation's argument at Paragraph D entitled The Customer Choice vis a vis The Electric Supplier Act at pages 4-5.

D. Citation's argument at Paragraph E entitled Citation's Due Process Rights, pages 6-8.

II. ARGUMENT

A. THE ELECTRIC SERVICE CUSTOMER CHOICE AND RATE RELIEF ACT OF 1997 DID NOT ESTABLISH A SWEEPING PUBLIC POLICY ALLOWING UNCHECKED CUSTOMER CHOICE OF ELECTRIC SUPPLIERS.

Citation's argument that the Electric Service Customer Choice and Rate Relief Law of 1997 (220 ILCS 5/16-101, et. seq.) (Deregulation Act) established a sweeping public policy allowing unchecked competition among electric power providers paints too broad a characterization of the public policy established by the Legislature in the Deregulation Act. Rather, the Legislature established a public policy that treats for-profit investor owned utilities and their customers differently than customers of rural electric cooperatives and municipal electric systems by allowing customers of for-profit investor owned utilities to choose in a precise regulated manner electric energy providers that are different from the customers' individual electric suppliers providing electric delivery services by means of the electric distribution lines, transformers and other apparatus necessary to bring electricity to the customers' facilities. In doing so the Legislature specifically provided that electric cooperatives, as defined by Section 3.4 of the Electric Supplier Act (220 ILCS 30/3.4) and municipal electric systems are not subject to the Deregulation Act and their customers cannot unilaterally choose a provider of electric energy, that is an alternative retail electric supplier (ARES), which is separate from that of the electric cooperative or municipal electrical system that provides them electric delivery services. (220 ILCS 5/17-100, 17-200).

The Deregulation Act does however authorize the governing boards of electric cooperatives or the legislative bodies of municipalities to make one or more elections allowing one or more of its existing or future customers to take service from an ARES (provider of electric energy only) by filing a notice of such election with the Illinois Commerce Commission.

However, the electric cooperative or municipality, as do the for-profit private utility company, continue to provide all other electric delivery services necessary for delivery of the electric energy purchased by the customer from the ARES (220 ILCS 5/17-200).

Thus the Legislature created a clear public policy regarding customer choice of electric power providers that recognized the inherent differences between the business models of a for-profit owned investor utility on the one hand and not-for-profit rural electric cooperatives and municipal electric systems on the other hand. Those differences have been recognized by the law as a basis for treating rural electric cooperatives and municipal electric systems differently from their for-profit utility brethren and their respective customers. See Fuchs vs Rural Electric Convenience Cooperative, Inc., 672 F. Supp. 1111, 1114-1115 (C.D. Ill., Springfield Div., 1987), wherein the Court found that electric cooperatives are exempt from anti-trust activity under the Sherman Anti-Trust Act when entering into exclusive service territory agreements because rural elective cooperatives are effectively self regulating in that they are completely owned and controlled by their consumer-members, only consumers can become members, each member has a single vote in the affairs of the cooperative, service is essentially limited to members, and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn a profit. The court made it clear that a not-for-profit electric cooperative is analogus to a governmental entity because the members control the affairs and operation of the cooperative. See Fuchs v. Rural Electric Convenience Co-op., Inc, 858 F. 2d 1210, 1217 (1987). See also Salt River Project Agricultural Improvement & Power Dist., v. Federal Power Comm'n, 391 F.2d 470, 473 (D.C. Cir 1968).

Thus the Legislature made a clear public policy distinction in the Deregulation Act

regarding electric consumers of for-profit private utilities on the one hand and the electric consumers of cooperative and municipal electric systems on the other hand regarding the consumer's right to take electric energy from an ARES. In the former case the consumer's right is restricted only by the legislative timetable established for making such election. In the later case the consumer's right is subject to consent of the elected governing board of the cooperative or municipality. This public policy distinction is clear and precise.

B. CITATION'S RIGHT TO CHOOSE AN ELECTRIC POWER PROVIDER UNDER THE DEREGULATION ACT DEPENDS UPON THE COMMISSION'S DETERMINATION REGARDING CITATION'S APPROPRIATE ELECTRIC SUPPLIER.

Citation's argument regarding its right to choose an electric power provider is premised upon Citation's claim that such right is absolute and without any restrictions. However, as noted above the Deregulation Act specifically requires the member elected governing board of the cooperative or the elected municipal council of the municipal electric systems to first have authorized one or more customers to obtain power from another source other than the cooperative or municipal system, (220 ILCS 5/17-200).

Citation further argues, based upon its erroneous assumption of an absolute right of customer choice, that a conflict exists between the Deregulation Act and the Electric Supplier Act. 220 ILCS 30/1 et seq. However, both acts are quite clear. Nothing in the Deregulation Act diminishes the exclusive right of electric cooperatives to continue to serve customers in their service territory as determined by the Electric Supplier Act or the right of municipal electric systems to continue to serve their customers under the Illinois Municipal Code (220 ILCS 5/17-200). Further, there is nothing in the Deregulation Act that indicates the Legislature intended to alter the policy regarding electric service territories or rights of electric suppliers as set forth in the Electric Supplier Act. (220 ILCS 30/1 et seq.; 220 ILCS 5/17-100 and 17- 200). For instance

Section 5/16-101 of the Deregulation Act states that the Act shall apply to "electric utilities" and "alternative retail electric suppliers" (220 ILCS 5/16-101(a)). Section 5/16-102 defines "alternative retail electric suppliers" as excluding an electric cooperative as defined in the Electric Supplier Act (220 ILCS 30/3.4) which is serving customers in an area it is authorized to serve under the laws in effect on the date the Deregulation Act was adopted (220 ILCS 5/16-102). Further Section 5/16-102 defines "electric utility" as a "public utility" as defined in Section 3-105 which in turn excludes electric cooperatives as defined in the Electric Supplier Act from the definition of a "public utility" (220 ILCS 5/3-105(b)(3); 5/3-119; and 220 ILCS 30/3.4). It is very clear the Legislature did not intend to apply the Deregulation Act and its "customer choice" provisions to consumers of electric cooperatives unless the governing board authorized the same (220 ILCS 5/17-200). Thus no conflict exists between the legislative policy established in the Deregulation Act and the legislative policy established in the Electric Supplier Act regarding customer choice. Each Act deals with two different matters. Further there is no dispute that Tri-County Electric Cooperative, Inc., is an electric cooperative within the meaning of the foregoing statutory definitions (See Marcia K. Scott's Affidavit, attached as Exhibit 1).

Both statutes in this case are perfectly clear as to the conduct they apply to. The rules under the Deregulation Act governing the rights of customers to choose an electric energy provider as compared to the provider of electric delivery services and the service territory rights of electric suppliers governed by the Electric Supplier Act are each clear and distinct. Because there is no conflict there is no need to interpret the statutes in a manner to avoid any inconsistency or to construe one statute with the other, or determine the time sequence of the adoption of the Deregulation Act and the Illinois Electric Supplier Act.

Even if there were a need to construe the two statutes together or determine the sequence of the adoptions of the two Acts, the Legislature's statement in the Deregulation Act that the provisions of the Electric Supplier Act continue to grant electric cooperatives the exclusive right to provide exclusive electric distribution services to all existing or future customers the cooperative is entitled to service under the Electric Supplier Act makes it clear the Legislature did not intend to abrogate the Electric Supplier Act (220 ILCS 5/17-200). Further the Legislature painstakingly defined "electric utilities" for purposes of the Deregulation Act and meticulously excluded "electric cooperatives" as defined in the Electric Supplier Act and further specified the exclusion of electric cooperatives with respect to retail customers then being served by the cooperatives in areas authorized to served by the cooperatives by the law then in effect, to wit: the Electric Supplier Act, at the time the Deregulation Act was adopted. The Legislature's insertion of these provisions in the Deregulation Act makes quite clear the state's policy established by the Electric Supplier Act is not changed by the Deregulation Act and requires the Illinois Commerce Commission to first determine which of Tri-County or IP has the right to serve Citation. If the Commission determines that Tri-County has the right to serve Citation, then Citation must deal with Tri-County to determine the rights of Citation to continue to receive electric power from a separate energy provider or ARES compared to the electric delivery services provided by Tri-County. To that extent there has been no change in the requirement that the Commission must first determine the appropriate electric supplier for Citation for the electric facilities at issue in this docket. That decision must be made in accordance with the Electric Supplier Act and those decisions of the Commission and of the Courts construing that Act.

As noted by the Supreme Court in Eades v Heritage Enterprises, Inc., 204 Ill 2d 92; 787 N.E. 2d 771; 272 Ill. Dec. 585, 591 (2003), cited by Citation, the objects and purposes of both

statutes must be considered and where the purposes of each are different they are to be construed so as to meet the purposes each was designed to meet. All the other cases cited by Citation involve a direct conflict between two statutes which is not the situation in this case. Further, Citation's reasoning that the Deregulation Act preempts the Electric Supplier Act would have the effect of destroying the Legislature's remedy for the problems the legislature sought to correct with the Electric Supplier Act. Such was not the intent of the legislature. As noted by the Court in People vs. Woods, 193 Ill 2d 483; 739 N.E. 2d 493; 250 Ill. Dec. 730, 732 (2000) the court must consider the reasons and necessities of the statutes being construed and the problems the legislature sought to remedy.

C. CITATION'S DUE PROCESS RIGHTS ARE ADEQUATELY PROTECTED BY THE INTERVENTION PROCEEDURE ESTABLISHED BY THE COMMISION.

Citation cites the following cases to support the proposition that the limited right of Citation to elect customer choice as to its electric power provider rises to a constitutionally protected property interest when determining the appropriate electric supplier for Citation under the Illinois Electric Supplier Act:

(a) Abrahamson vs. Ill. Dept. of Prof. Reg. 153 Ill. 2d 76; 606 N.E. 2d 1111; 180 Ill. Dec. 34, 42 (1992), pertained to due process for a doctor appearing before an administrative agency that licensed the doctor. Citation claims no license issued by the Illinois Commerce Commission and therefore holds no property interest in the decision to be made by the Commission in this case;

(b) Balmoral Racing Club Inc., vs. Illinois Racing Board, 151 Ill.. 2d 367; 603 N.E. 2d 489; 177 Ill. Dec. 419 involved an administrative hearing in which the agency had regulatory power over the Racing Club for purposes of setting racing dates;

(c) Akmakjian vs. Dept. of Prof. Reg., 287 Ill. App. 3rd 894; 679 N.E. 2d 783; 223 Ill. Dec. 332 (1st Dist., 2nd Div. 1997), involved a dentist subject to regulation by the agency;

(d) People ex. rel. Ill. Commerce Commission vs. Operator Communication, Inc., 281 Ill. App. 3d 297; 666 N.E. 2d 830; 217 Ill. Dec. 161 (1st Dist, 4th Div. 1996) involved an agency hearing regarding an entity over which the agency had statutory jurisdiction;

(e) Lakeland Construction Co., vs. Dept. of Revenue, 62 Ill App 3d 1036; 379 N.E. 2d 859; 20 Ill. Dec. 26 (2nd Dist. 1978) involved a taxpayer subject to motor fuel tax assessments by the Illinois Department of Revenue.

(f) Piotrowski vs. State Police Merit Board, 85 Ill. App 3d 369; 406 N.E. 2d 863; 40 Ill. Dec. 660 (5th Dist. 1980) involved a State Trooper subject to the jurisdiction of the Board;

(g) Quantum Pipeline Co. vs. Ill. Comm. Comm., 304 Ill. App. 3d 310; 709 N.E. 2d 950; 237 Ill. Dec. 481 (3rd Dist. 1999) involved due process rights for a pipeline company which held a certificate of authority for construction issued by the Illinois Commerce Commission and over which the Commerce Commission had jurisdiction.

All of the foregoing cases cited by Citation as support for the proposition that Citation must be afforded due process before the Illinois Commerce Commission pertain to persons over which the agency involved held regulatory authority. Citation points to no regulatory authority by the Illinois Commerce Commission with regard to Citation's choice of electric power provider. Further, Citation is not required to be a party to the Commerce Commission proceeding under the Electric Supplier Act, cannot against its own will be made a party to the pending Electric Supplier Act proceeding before the Commission and has no recognized property interest in the proceeding now pending before the Commission to determine the appropriate Electric Suppler for Citation at the gas plant and gas compressor sites.

Citation claims a right to intervene solely because of its economic interest in maintaining its customer choice preference for the electric power provider of its choice. Simply stated, Citation's only interest in this case is economic and that economic interest is limited strictly to electric rates. The Commission has previously decided that an economic interest based on the electric rate paid by Citation is generally not a basis for determining the appropriate electric supplier in a dispute between electric suppliers under the Electric Supplier Act. See Springfield Independent Television Co., Inc. a/k/a WRSP/TV 55 vs. Menard Electric Cooperative, ESA 232 (1985) where TV 55 sought, pursuant to Section 9 of the Electric Supplier Act, to switch electric suppliers from Menard Electric Cooperative to Illinois Power Company based on the difference in electric rates. In ruling on a request by TV 55 for the issuance of a subpoena to require an Illinois Power employee to testify regarding evidence of the difference in the electric rates of the two electric suppliers the Commission determined such evidence was not authorized by Section 9 of the Electric Supplier Act. Further customer choice as to an electric supplier is only relevant when determining service disputes between electric suppliers on the basis of proximity of July 2, 1965 existing lines to a customer's facility (220 ILCS 30/8). The Commission has also determined that the customer is not a proper party under sections 5 and 6 of the Electric Supplier Act (220 ILCS 30/5 and 30/6; Illinois Rural Electric Co., vs. Central Illinois Public Service Company, Ill. Comm. No. 91-0133, October 11, 1991 pages 1-2 of the order) and the Commission does not have authority over a customer except with regard to enforcement of an order regarding the appropriate electric supplier to the customer, Central Illinois Public Service Co., vs. Illinois Commerce Commission and Southwestern Electric Cooperative, Inc., 202 Ill App 3d 567; 560 NE 2d 363; 148 Ill Dec 61, 66-67 (4th Dist. 1990) (Southwestern). Finally, the commission has determined that a purely economic interest in the outcome of the docket is

insufficient to confer standing either as a party or to intervene Rural Electric Convenience Cooperative Co., and Soyland Power Cooperative, Inc., vs. Central Illinois Public Service Company (AmerenCIPS) No. 01-0675 (September 4, 2003) (RECC/Soyland). Citation simply has failed to raise a claim as to an interest which is sufficient to warrant protection as a property interest.

Citation can point to no constitutional authority that requires the Commission to grant Citation the right to participate in the foregoing proceeding. The only right Citation has to participate in this docket is by way of intervention pursuant to the Commission's rules (83 Ill. Adm. Code Sec 200.200) which right to intervene is dependent upon Citation having sufficient interest in the outcome of the proceeding to entitle it to participate. The Commission rule allowing Citation to file its petition for intervention and being granted a hearing on it has by its very nature satisfied Citation's argument that it must be accorded due process. Constitutional due process does not mean Citation must be allowed to intervene. Citation must still meet the requirements for intervention. Further, Citation's claim that it must be allowed to intervene because it has the right to usurp a clear policy mandate by the Illinois Legislature regulating the right of customers as to their choice of electric power providers under the Deregulation Act and the Electric Supplier Act, is in direct conflict with the stated public policies of the Legislature and provides no legal basis for Citation's request to intervene.

Wherefore, Tri-County Electric Cooperative, Inc., respectfully requests the Illinois Commerce Commission for the following relief:

A. To deny the Petition to Intervene by Citation Oil & Gas Corp.

B. For such other and further relief as the Illinois Commerce Commission deems appropriate.

Respectfully submitted,

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 13 day of July, 2010, I served a copy of the Reply of Tri-County Electric Cooperative, Inc. (Tri-County) To The Response By Citation Oil & Gas Corp. (Citation) To Objections By Tri-County To Citation's Petition to Intervene, attached hereto to the following persons at the e-mail addresses as shown below:

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