

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

2010 SEP 10 P 1:14

CASE NO. 05-0767
CLERK'S OFFICE

RESPONSE OF TRI-COUNTY ELECTRIC COOPERATIVE INC.,
TO THE MOTION BY CITATION OIL & GAS CORP
TO MODIFY THE ADMINISTRATIVE LAW JUDGE'S RULING

TI-COUNTY ELECTRIC COOPERATIVE, INC., (Complainant) (Tri-County) in response to the "Motion to Modify Administrative Law Judge's Ruling" filed by Citation Oil & Gas Corp., (Intervener) (Citation) states as follows:

I. THE PROCEDURAL HISTORY FOR THIS CASE IS AS FOLLOWS:

A. Tri-County filed its complaint against Illinois Power Company, d/b/a AmerenIP (IP) on December 8, 2005. Tri-County filed an Amended Complaint on February 7, 2007.

B. After a period of time to allow discovery, a schedule for filing testimony by Tri-County and IP was set with pre-filed testimony to be filed between May 18, 2009 and October 5, 2009.

C. A status hearing for scheduling the trial was set for October 22, 2009 with a proposed trial date of December 16, 2009.

D. IP filed its motion to extend the time for IP to file its prepared testimony and the testimony filing schedule was adjusted and the trial date cancelled with all testimony to be filed on or before February 2, 2010. Tri-County's rebuttal testimony to the IP additional testimony was filed on January 29, 2010.

E. On February 8, 2010 the Administrative Law Judge set a new trial date for March 31 and April 1, 2010, with a status hearing on March 19, 2010, at 10:00 a.m.

F. On March 30, 2010 the trial dates were extended due to difficulties regarding the IP exhibit list filed March 29, 2010.

G. On April 9, 2010 IP requested and was granted leave to file additional direct testimony which was filed on or about April 26, 2010. The additional IP testimony consisted of Direct Testimony of the following witnesses:

1. Supplemental Testimony of Michael Tatlock (an IP employee) (IP, Ex 7)
2. Direct Testimony of Robert C. Herr, a new IP outside expert witness (IP, Ex 8)
3. Supplemental Testimony of Jeffrey Lewis (a Citation employee), who had earlier provided direct testimony on behalf of IP (IP, Ex 9)
4. Direct Testimony of a new witness, Michael Garden (a Citation employee) (IP, Ex10)
5. Direct Testimony of a new witness, Josh Kull (a Citation employee) (IP Ex 11)

H. On April 20, 2010 the Administrative Law Judge set a new trial date for June 15, 16 and 17, 2010.

I. On April 29, 2010 Citation filed its Petition to Intervene in this matter.

J. Because of IP's new supplemental testimony and new additional testimony by new IP witnesses which included current Citation employees, the ALJ granted Tri-County leave to file rebuttal testimony by July 12, 2010, which Tri-County did and the June 15, 16, and 17, 2010 trial dates were cancelled.

K. On August 2, 2010, trial of this matter was set for October 7, 13, 19 and 21, 2010, which are the trial dates presently ordered.

L. After the filing of objections to Citation's Petition to Intervene, arguments by the parties, and briefs, the Administrative Law Judge granted Citation's Petition to Intervene on

August 12, 2010, provided Citation would not be permitted to file or otherwise present testimony or raise new evidentiary issues because the evidentiary hearings had been delayed in this cause to allow IP to file additional testimony and exhibits, with most of such additional witnesses and exhibits being in fact current Citation employees and Citation was required to accept the status of the record as it existed at the time of intervention unless Citation shows good cause why it should not be required to do so, Section 200.200(e) of the Commission's Rules of Practice (83 Ill. Adm. Code 200.200).

II. CITATION DID NOT, IN ITS EXTREMELY TARDY PETITION TO INTERVENE, GIVE NOTICE IT WOULD REQUEST THE RIGHT TO FILE ADDITIONAL TESTIMONY.

A. Citation in its Petition to Intervene and Memorandum in support thereof represented to the Commission that Citation had, pursuant to the Electric Service Customer Choice and Rate Relief Act (220 ILCS 5/16-101 et. seq.) (Deregulation Act), entered into a contract with Sempra Energy Solutions, LLC (Sempra) to provide Citation with electric energy and that the legislature, by adopting the Deregulation Act, had granted electric customers choice of their electric supplier notwithstanding the Electric Supplier Act (220 ILCS 30/1 et. seq.) (Par 4 of Citation's Petition to Intervene). Citation in its Response to Tri-County's Objection to the Petition to Intervene claimed the Deregulation Act and the Electric Supplier Act had to be construed together to require all electric suppliers to allow customers to choose the customer's electric supplier notwithstanding the determination of the appropriate electric supplier for the customer under the Electric Supplier Act. Thus, Citation, in its Petition to Intervene, raised the legal issue of the proper statutory interpretation of the Deregulation Act and the Electric Supplier Act as applied to territorial disputes under the Electric Supplier Act. The statutory interpretation of these statutes is a legal issue to be made by the Commission People v Slover 323 Ill App 3d

620; 753 NE2d 554; 257 Ill Dec 359, 362 (4th Dist. 2001); Matsuda v Cook County Employees' Officers' Annuity and Benefit Fund 178 Ill 2d 360; 687 NE2d 866; 227 Ill Dec 384, 386-387 (1997). Citation raised this legal issue as the sole basis for its Petition to Intervene and the ALJ determined that such issue constituted Citation's interest in this docket and thus the only reason to allow Citation to intervene.

B. Citation did not, in its Petition to Intervene or during arguments and briefing of the same, advise the ALJ or the parties that Citation intended to raise additional factual issues in this docket knowing that with Citation's extremely tardy request to intervene, such a request would not be looked upon favorably (Commission Rules of Procedure Sec. 200.200). Not until after Citation obtained a favorable ruling on its Petition to Intervene did Citation seek to expand the ruling to allow Citation to raise additional factual issues which if allowed will delay the trial of this docket and the determination of the appropriate electric supplier yet again.

C. Intervention is governed by Section 200.200 of the Rules of Practice of the Illinois Commerce Commission (83 Ill. Adm. Code 200.200) and a person seeking to intervene must accept the status of the record of the case as the intervenor finds the same when or if allowed to intervene. Yet, Citation, contrary to the order of the Administrative Law Judge (ALJ), seeks to file pre-filed testimony which raises the following factual issues:

- a) Citation's current electric service contract with Sempra and the effect, if any, of that contract and its interpretation on the territorial issues in this docket.
- b) Evidence regarding the delivery point for delivery of electric service to Citation.
- c) The financial effect upon Citation should it not be able to maintain its ARES contract with Sempra.
- d) Whether Tri-County has refused to allow Citation to take electric service from an ARES for Citation's office building located at the Salem Oil Field and currently served by Tri-County.

Citation did not raise any of above factual issues in its Petition to Intervene. Rather, Citation claimed its sole interest for intervening was to present the legal issue regarding the proper statutory construction of the customer choice rights under the Deregulation Act with the electric supplier territorial issues of the Electric Supplier Act.

III. CITATION SHOULD NOT NOW BE ALLOWED TO EXPAND ITS CLAIM OF INTEREST OR RAISE NEW FACTUAL ISSUES IN THIS DOCKET

A. Citation has no right to present evidence on the following issues:

1. Electric rates charged Citation by Sempra, IP, or Tri-County are not a relevant issue in this docket which involves the issue of the appropriate electric supplier, IP or Tri-County, for the Citation Gas Plant and seven gas compressor sites at issue in this case. See the Electric Supplier Act 220 ILCS 30/1 et seq; and Springfield Independent Television Co., Inc. a/k/a WRSP/TV 55 vs. Menard Electric Cooperative, ESA 233 (1985) where the Commission determined evidence of the difference in electric rates of Menard Electric Cooperative and Illinois Power was not relevant when TV 55 sought, pursuant to Section 9 of the Electric Supplier Act, to switch electric suppliers from Menard Electric Cooperative to Illinois Power Company and the Commission denied the issuance of a subpoena to require an Illinois Power employee to testify regarding such evidence (See pages 14-16 of the transcript with the ALJ's ruling attached for convenience). 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).

2. Mr. Bing's proposed pre-filed testimony commencing with all of page 1 through page 5 and lines 1 and 2 of page 6 along with Citation Exhibits 1.1, 1.2, 1.3, and 1.4 relate to Citations ARES contract with Sempra, why Citation entered into such a contract, and interpretations of the contract. Such evidence is irrelevant and unnecessary. Citation's Petition to Intervene raises

only the legal issue as to the proper interpretation of the Deregulation Act and the Electric Supplier Act as applied to territorial disputes under the Electric Supplier Act. Since that is of necessity a legal issue and not factual, the above testimony of Mr. Bing is not relevant.

3. Citation's proposed pre-filed testimony at page 6, lines 3 through line 19, which deals with Citation's view of the delivery point for its electric service with IP and Sempra, has already been extensively covered by the testimony of IP witnesses and does nothing more than repeat the IP testimony and the testimony of Citation employees already filed by IP in this docket.

4. Citation's proposed pre-filed testimony at page 6, lines 20 through 22, and page 7, lines 1 through 3, raises factual issues regarding access to Citation facilities for Tri-County electric distribution lines. This testimony, while lacking any foundation for Mr. Bing to even offer the same, would interject a new factual issue in this case requiring discovery and which would, if allowed, delay the trial of this matter yet again contrary to the rules of practice of the Illinois Commerce Commission Sec. 200.200. Further, whether Tri-County will need additional easements to extend electric service to Citation's gas plant or to any of the seven Citation gas compressor sites is not relevant. What Citation ignores, and now asks this Commission, Tri-County and IP to ignore, is that the Citation gas plant and seven gas compressor sites are all in the Tri-County service territory per the Commission approved Tri-County and IP Service Area Agreement. That Agreement and the terms thereof control the issues of this docket Rural Electric Convenience Cooperative Co. v Illinois Commerce Commission 75 Ill 2d 142; 387 NE2d 670; 25 Ill Dec 794, 796 (1979). Additionally, Citation was told by IP's witness Michael Tatlock as early as March 9, 2005 and by Tri-County personnel that its gas plant as proposed would be located in Tri-County's service territory (Tri-County Ex A-5 pre-filed with Marcia Scott's Direct Testimony, Tri-County Ex A). Further Tri-County has electric distribution lines

that are located throughout the Citation Salem oil field and which have been in existence as long as or longer than the Salem Oil field (Tri-County map Ex. B-2 sponsored by Dennis Ivers Direct and Rebuttal testimony, Tri-County Ex. B and Ex I respectively). For Citation to raise the access issue on the eve of trial when Citation was aware of the issues more than five years ago violates the rules of the Commission (83 Illinois Adm. Code, Sec 200.200).

5. Citation's proposed pre-filed testimony commencing at page 7, lines 4 through line 23, and page 78, lines 1 through 23, introduce testimony regarding Citation's recent request to Tri-County to allow Citation to purchase its electric power from an ARES for use at the Citation office located in the Salem oil field which Tri-County has served with electricity at Citation's request since December 29, 1998 (See Tri-County Ex A, Marcia Scott pre-filed Direct Testimony at page 5, lines 5-12). This testimony deals with electric rates which are not relevant in this docket. Further such evidence presumes the Commission will determine that Tri-County is the appropriate electric supplier for the Citation Gas Plant and seven compressor sites. Not until that occurs does the question of service by an ARES even enter the picture. The issue before the Commission in this docket is solely that of determining which of either Tri-County or IP is the appropriate electric supplier, under the Electric Supplier Act and the Commission approved Service Territory Agreement between Tri-County and IP, to provide electric service to the Citation Gas Plant and seven gas compressor sites. One has to ask what Citation's motive is for raising this factual issue at this time in this docket when Citation has been satisfied with bundled electric service provided by Tri-County for over 11 years since December 1998 and for over 1-1/2 years since Citation obtained unbundled electric service for the Salem oil field in December 2008.

6. Citation's proposed pre-filed testimony at page 9, lines 1 through 22, deal with Citation's electric service contract with Sempra, and the operational effects of that contract together with why Citation has chosen to purchase its electric power from an ARES. Again, such testimony is not relevant in this docket because it deals with electric rates paid by the customer. The sole issue in this docket is the determination of the appropriate electric supplier for the Citation Gas Plant and seven compressor sites pursuant to the Electric Supplier Act and the Service Area Agreement between Tri-County and IP as approved by the Illinois Commerce Commission. The Commission is not authorized to consider electric rates of either IP, Tri-County or an ARES when making a decision in this docket about the appropriate electric supplier. The customer's electric rates are not a condition of the service area agreement because the Commission, when interpreting a service area agreement, has long followed the axiom that the terms of the service area agreement control the dispute. Rural Electric Convenience Cooperative Co. v. Illinois Commerce Commission 75 Ill 2d 142; 387 NE 2d 670; 25 Ill Dec 794 (1979); Southeastern Illinois Electric Cooperative, Inc. v. Central Illinois Public Service Company Ill Com Comm 89-0420; page 3 of the order (April 11, 1990) (Southeastern).

7. Citation's proposed pre-filed testimony by Mr. Bing also calls for pure speculation by Mr. Bing regarding Tri-County's intentions with regard to Citation's May 25, 2010 request to be allowed to purchase electric energy from an ARES for its office electric service. At page 8, lines 14-15, Mr. Bing is asked to "interpret" the lack of a response by Tri-County to Mr. Bing's May 25, 2010 letter. The question and answer is designed to allow Mr. Bing to speculate on what the witness believes Tri-County will do with respect to Citation's request without eliciting any actual knowledge upon which to base the witness's belief. In the first place such testimony is not admissible even if Citation is allowed to file testimony in this docket, because it deals with rates.

Secondly it consists purely of conjecture or guess on the part of Mr. Bing as to what decision Tri-County will make regarding Citation's request to allow Citation's Salem oil field office to be served by an ARES. See Cleary and Graham's Handbook on Illinois Evidence; Sixth Edition Section 611.25.

B. Granting citation's request will lead to unnecessary delay of this docket.

Despite Citation's claims to the contrary, if Citation is allowed to file the testimony of Mr. Bing it will of necessity lead to additional discovery and rebuttal testimony in order for Tri-County to adequately protect its interest. For example:

1. What are the terms of Citation's ARES contract with Sempra and can it be terminated?
2. What is Citation's motive in delaying so long before filing its Petition to Intervene when it knew as early as March 9, 2005, before the gas plant was constructed, that it would be located in Tri-County's service territory? Citation was also told at that time by IP that Tri-County would consider the connection of electric service to the gas plant as a new service connection located in Tri-County's service territory and that Citation would need Tri-County's permission to allow IP to provide electricity to the gas plant.
3. Why did Citation simply not move the location of the gas plant north one-fourth (1/4) mile to IP's service territory?
4. Why did Citation sign an ARES contract for electric energy in December 2008 after this dispute had been pending for over 3 years? Citation knew there was a material question regarding which of Tri-County or IP was the appropriate electric supplier for the service at issue in this docket. Further Citation knew that Tri-County was not required to allow Citation to buy

electric energy from an ARES under the Deregulation Act unless some agreement was reached between Tri-County and Citation (320 ILCS 5/17-200).

5. Why would Citation raise the factual issue regarding access by Tri-County to serve the gas plant or the compressor sites when Citation had clear knowledge of the location of Tri-County's electric distribution lines in the area? Does Citation plan to block or impede Tri-County's right to serve if the Commission determines Tri-County is the appropriate electric supplier at a time when Citation has already granted Tri-County access for the electric service to the Citation office?

6. Is the attempt by Citation to now raise these factual issues, which are not relevant to the issues in the docket, an attempt to further delay the ultimate decision?

C. The ALJ has already determined that Citation's Petition to Intervene was untimely. This finding is particularly true given the fact Citation was well aware of the dispute in March 2005 well before the gas plant was constructed and in fact engaged in discussions between March and July 2005 with Tri-County and IP to resolve the matter (Marcia Scott Direct Testimony, Tri-County Ex. A, page 8, lines 14 through 22 and page 9, lines 1 through 5). Citation was well aware of the dispute and the potential outcome prior to December 2008 when Citation entered into the ARES contract with Sempra. Frankly Citation entered into its ARES contract with knowledge of the pending dispute and possible outcome and thus knowingly undertook the risk involved.

D. Citation has never explained its delay of over five years in filing its Petition to Intervene. Mr. Bing's explanation at page 9, line 11 of his pre-filed testimony stating Citation was "... surprised that this proceeding has gone this far." hardly suffices as an explanation. Simply stated, Citation's Petition to Intervene was untimely. A finding to that effect has been

rendered. It is now the law of this case. Citation must therefore take the status of this case as it finds it, which is with all the pre-filed testimony filed including testimony by Citation employees and the case set for trial. Any further testimony by Citation would delay the case further. Any testimony by Mr. Bing, a Citation employee, which Citation now wishes to submit and which is different than that previously offered by IP or Citation's earlier witness comes too late.

IV. THE COMMISSION CANNOT BASE ITS DECISION ON MATTERS WHICH THE COMMISSION HAS NO AUTHORITY TO CONSIDER

Citation candidly admits in the last paragraph of page 2 of its Memorandum that Citation's Petition to Intervene essentially raised a legal argument. Yet, despite that candid admission, Citation now seeks to improperly expand the factual dispute in this docket. For example:

A. Citation is asking the Commission to consider its ARES contract and the terms and conditions of the same as well as its presumably favorable electric rates compared to those of Tri-County or even IP for that matter. Rates, as noted above, are not a relevant consideration in this docket.

B. Citation is asking the Commission, in making its decision regarding the appropriate electric supplier, to consider access issues. This is not a relevant factor. The territory maps and the Commission approved Service Area Agreement control the territory dispute. Whether an electric supplier has easements in place to serve is not relevant in this docket.

C. Citation is asking the Commission, in making its decision regarding the appropriate electric supplier, to consider the reasons why Citation elected to purchase its electric energy from Sempra and the effect upon Citation if it cannot do so. Such issues go beyond the Service Area Agreement and territory boundaries approved by the Commission

D. Citation is asking the Commission to consider, when determining the appropriate electric supplier, whether or not Tri-County's Board of Directors will allow Citation to purchase electric energy from an ARES. Likewise such issue goes beyond the Service Area Agreement and territory boundaries approved by the Commission.

E. Citation cites Citizens United for Responsible Energy Development, Inc. vs Illinois Commerce Commission 285 Ill App 3d 82; 673 NE2d 1159; 220 Ill Dec 738 (5th Dist. 1996) as requiring the Commission to consider the factual issues Citation now seeks to raise. Yet in Citizens the issue the Commission was required to determine in deciding to issue a certificate of public convenience and necessity to construct a transmission line was evidence regarding the least-cost means for doing so and the court found the Commission did not investigate all the evidence regarding the least-cost method. Citizens is not applicable to this docket because the factual issue regarding least-cost means of construction was a lawful issue the Commission had statutory authority to consider. However, the factual issues Citation wants the Commission to consider in this docket cannot be properly considered by the Commission. Accordingly, it cannot be an abuse of discretion for the Commission to refuse Citation's proffered testimony by Mr. Bing.

F. Citation claims that if Citation cannot present Mr. Bing's testimony that Citation's claim will be impaired. Yet, as Citation claimed in its Petition to Intervene, its claim is essentially a legal issue regarding proper interpretation of the Deregulation Act and the Electric Supplier Act with respect to territorial disputes under the Electric Supplier Act and whether the Deregulation Act repealed or otherwise amended the Electric Supplier Act to allow customer choice of an ARES. That is a purely legal issue to be decided by the Commission.

G. Citation further claims it cannot adopt IP's evidence in this case but does not cite any authority for such claim. There is no Commission Rule that prohibits Citation from adopting IP's testimony presented in this case. In fact, one can assume from such an argument by Citation that Citation must believe IP's testimony in this docket is incorrect.

H. Finally, Citation claims in the last paragraph on page 5 of its Memorandum that Citation is a necessary party in this Electric Supplier docket. Yet, such argument ignores the Electric Supplier Act itself as well as established authority holding the customer cannot be made a party to a proceeding under the Electric Supplier Act and that the Commission has only limited jurisdiction over the customer. See Illinois Rural Electric Co., vs. Central Illinois Public Service Company Ill Comm No. 91-0133, October 11, 1991 page 1-2 of the order where the Commission 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 and Central Illinois Public Service Co., vs. Illinois Commerce Commission and Southwestern Electric Cooperative, Inc., 202 Ill App 3d 567; 560 NE2d 363; 148 Ill Dec 61, 66-67 (4th Dist 1990) (Southwestern) where the court found 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.

V. CONCLUSION

Citation is required by the rules of the Commission to accept the status of the case at the time of Citation's intervention. Yet, Citation is refusing to do so and is attempting to present factual issues which go beyond the jurisdiction of the Commission. Citation should not be allowed to do so and thereby delay this proceeding further.

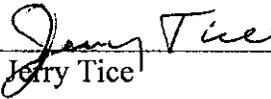
WHEREFORE, Tri-County Electric Cooperative, Inc. requests the Illinois Commerce Commission for the following relief:

A. To deny Citation Oil & Gas Corp's request to modify the Administrative Law Judge's August 12, 2010 ruling and to deny Citation's request to submit the proposed pre-filed testimony of Mark D. Bing;

B. For such other relief as deemed just and equitable.

Respectfully submitted,

TRI-COUNTY ELECTRIC COOPERATIVE, INC.
BY GROSBOLL, BECKER, TICE, TIPPEY & BARR

By  _____
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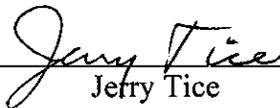
PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 9 day of Sept., 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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