

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

CASE NO. 05-0767

CHIEF CLERK'S OFFICE  
2008 NOV - 8 1 P 4  
ILLINOIS  
COMMERCE COMMISSION

**RESPONSE OF TRI-COUNTY ELECTRIC COOPERATIVE, INC. TO THE MOTION BY ILLINOIS POWER COMPANY d/b/a AMEREN IP TO ADMIT THE DEPOSITION OF DON FORNEY IN THE RECORD OF THIS DOCKET OR ALTERNATIVELY TO FILE WRITTEN TESTIMONY OF DON FORNEY**

Tri-County Electric Cooperative, Inc., (Complainant) (Tri-County) in response to the motion by Illinois Power Company d/b/a AmerenIP, (Respondent) (IP) to admit the transcript of the deposition of Don Forney into the record or in the alternative to file written testimony of Don Forney, states as follows:

1. On January 22, 2008, IP gave notice that it intended to take a discovery deposition of Don Forney, a retired employee of Citation Oil & Gas Corp. (Citation), pursuant to the Illinois Commerce Commission Rules (83 Illinois Administrative Code Sec. 200.360) and the applicable Illinois Supreme Court Rules (Supreme Court Rule 201 et seq). On January 24, 2008, at 1:30 p.m. at the offices of Brown, Hay and Stephens, LLP, Springfield, Illinois, which attorneys were at that time representing IP in this docket, the discovery deposition of Don Forney was taken by IP at the time and place designated in the Notice (See copy of Notice of Deposition attached).

2. The Illinois Commerce Commission Rules provide that parties may utilize discovery depositions in the same way as they may be utilized in civil actions in the circuit courts of the State of Illinois and in the manner contemplated by the Rules of the Supreme Court of Illinois (83 Ill. Administrative Code 200.335).

3. At the commencement of the deposition, the parties stipulated, among other things, as follows:

A. That all objections are hereby reserved except as to the form of the question which is waived unless specifically noted.

B. That the deposition or any part thereof may be used for any purpose for which discovery depositions are competent by any of the parties hereto without foundation proof.

4. Supreme Court Rule 212 permits the use of discovery depositions in the circuit courts of the State of Illinois in the following situations:

A. For impeaching the testimony of the deponent as a witness to the same extent as any inconsistent statement made by a witness;

B. As an admission made by a party or by an officer or agent of the party in the same manner and to the same extent as any other admission made by that person;

C. As an exception to the hearsay rule;

D. For any purpose for which an affidavit may be used;

E. As evidence at a trial or hearing against a party who appeared at the deposition if the deponent's evidence deposition has not been taken and the deponent is unable to attend or testify because of death or infirmity and it is found that such evidence will do substantial justice between or among the parties.

5. IP utilized the discovery deposition transcript of Don Forney as an affidavit in support of IP's Motion for Summary Judgment filed in this matter. Otherwise, the Don Forney discovery deposition transcript has not been filed of record in this docket as prepared testimony nor been heretofore utilized by IP in this docket for any purpose including evidence at trial. IP contends in its Motion that in verbal discussions on March 22, April 5, and April 9, 2010 with the

undersigned as attorney for Tri-County, that the undersigned did not object to and agreed that the discovery deposition of Don Forney could “come in” the record. However those discussions were general in nature regarding the use of the Don Forney discovery deposition and no specific stipulation as to the manner of the use of the Don Forney discovery deposition or how it would be submitted into the trial docket of this case or which witness would present such discovery deposition was put in place between counsel. (See attached affidavit of Homer J. Tice). While generally oral agreements between counsel regarding procedure in a case are enforceable, they will not be enforced unless there is a precise understanding as to the terms of the agreement for which enforcement is sought Chicago v Angelos 21 Ill App 2d 458, 459; 158 NE2d 641 (1959). To the same effect is Scott v Dreis & Krump Manufacturing Co. 26 Ill App 3d 971; 326 NE2d 74, 86 (1<sup>st</sup> Dist 2nd Div 1975) where the court refused to enforce an alleged oral agreement to introduce certain evidence because the evidence in question would be cumulative and it had not been clear from the oral statements what the evidence was intended to be used for. In the instant case, there was no precise agreement between counsel regarding the use of the Forney discovery deposition transcript or the method for placing it in the record and certainly no agreement for inserting it in the record as evidence at this late date.

6. On April 9, 2010, at the status conference in this case, the only agreement in the record between counsel for Tri-County and counsel for IP was that IP would be allowed to submit additional written testimony on or before April 23, 2010 and that a new status hearing would be set for May 4, 2010 at which time Tri-County would inform the Administrative Law Judge (ALJ) of any additional rebuttal testimony Tri-County intended to file.

7. On April 26, 2010, IP filed the following additional testimony in this docket:

A. Prepared supplemental testimony of Jeffrey Lewis, a Citation Oil & Gas Corporation employee which supplemental testimony responded to prepared rebuttal testimony of Tri-County witness Robert C. Dew, Jr., P.E., regarding the initial direct testimony of Jeffrey Lewis which was to the effect that Citation desired only one electric supplier for the Citation Salem Oil Field in order to properly protect Citation's equipment in the event of an electric outage. Previously on or about November 6, 2009, IP had filed the direct testimony of Jeffrey Lewis in which Jeffrey Lewis testified as to the number of active oil wells in the Salem Oil Field at the time Citation acquired the property from Texaco Inc., the purpose for which Citation utilizes the Salem Oil Field, how Citation powers its motors in the new Salem Oil Field, the history of IP's electric power to the Salem Oil Field, how Citation extended electric facilities to provide electric service to the Citation gas plant and compressor sites, and that Citation wanted to have one electric supplier for the Salem Oil Field.

B. Direct Testimony of Josh Kull, a Citation Oil & Gas Corporation employee, which discussed the number and location of oil and gas wells drilled by Texaco Inc. and Citation for the periods from January 1, 1970 to December 31, 2009. Mr. Kull also presented various maps of the Salem Oil Field showing the location of the drilling efforts by Texaco Inc. and Citation within the Salem Oil Field.

C. Direct testimony of Michael Garden, a current employee of Citation Oil & Gas Corporation and Senior Production Foreman for the Salem Oil Field, who testified regarding his work for the last ten years at the Citation Salem Oil field, the oil and gas collection facilities utilized in the Salem Oil Field together with a map depicting the same, and the Citation electric distribution system for the Salem Oil Field together with a map depicting the same.

D. Direct Testimony of Robert C. Herr, a degreed mechanical engineer and former employee of Texaco, Inc. who, during his employment with Texaco, Inc. spent a period of time at the Salem Oil Field. Mr. Herr provided historical testimony about the Salem Oil Field covering the initial start of the field; production quantities, physical size of the field, and current areas of production within the field; methods of oil production used at the field; Texaco's electric distribution system for powering equipment in the field; the type and size of equipment used by Texaco to power oil wells in the field; description of the gas plant facilities at issue in this docket; the number of new wells drilled since 1970 in the field; the general history of the field; and special projects conducted by Texaco at the field.

8. At the time of filing the foregoing supplemental testimony by IP, IP did not present the Don Forney discovery deposition transcript or any witness relative to the same. Accordingly, Tri-County assumed that IP had elected not to submit the Don Forney discovery deposition transcript and Tri-County did not prepare any rebuttal testimony with respect to the information provided by Don Forney in his discovery deposition. Tri-County assumed that the request of IP to use the Don Forney discovery deposition was now moot and Tri-County did not prepare for such eventuality.

9. Notwithstanding the foregoing testimony by three current Citation employees and one former Texaco, Inc. employee, IP at this very late date has requested to submit the transcript of the Don Forney discovery deposition as testimony on behalf of Don Forney without calling Don Forney as a witness and presenting his prepared testimony. Tri-County objects to this procedure for the following reasons:

A. The delay by IP in attempting to file the Don Forney discovery deposition transcript as evidence in this docket without calling Don Forney as a witness comes at a time when all

other prepared direct testimony has been filed, the parties have filed rebuttal testimony thereto, Tri-County has filed additional prepared rebuttal testimony to the additional direct testimony filed in this docket by IP on April 26, 2010, and the case is ready for trial.

B. IP has not shown that a legal basis exists by reason of death or infirmity of Don Forney for presenting the Don Forney discovery deposition transcript without otherwise calling Don Forney as a witness.

C. The Don Forney discovery deposition basically tells the nature of his work from 1971 for Texaco as production foreman at the Salem Oil Field which work ended when he retired in December of 1998; discusses the number of active wells from 1971 through the date of Mr. Forney's retirement as an employee; the use of water injection wells at the Salem Oil Field; the Texaco Electric Service distribution facilities; Don Forney's management of electricians who took care of the electric distribution line; size of electric motors at the Citation/Texaco water plants; handling of the oil that was pumped at the wells by Texaco; handling of the flare gas produced by the wells; and that Texaco owned electric transformers and/or the electric distribution facilities used to distribute electric power to the Salem Oil Field.

D. The Don Forney discovery deposition would do nothing more than present testimony on the same subject matters as that contained in the direct and supplemental testimony of Jeffrey Lewis, direct testimony of Josh Kull, direct testimony of Michael Garden, and the direct testimony of Robert C. Herr. Accordingly, the Don Forney discovery deposition transcript would not provide any new testimony not already presented by previous IP witness who are Citation employees and would therefore be cumulative. As such the Don Forney discovery deposition transcript would not do substantial justice between or among the parties and would raise a serious questions of its relevancy particularly in view of the cumulative nature and the

manner in which IP seeks to present it (By use of the Don Forney discovery deposition transcript). See Yassin v Certified Grocers of Illinois 150 Ill App 3d 1052; 502 NE2d 315; 104 Ill Dec 52, 59 (1<sup>st</sup> Dist 2<sup>nd</sup> Div 1986) and Simmons v City of Chicago 118 Ill App 3d 676; 455 NE2d 232; 74 Ill Dec 202, 208 (1<sup>st</sup> Dist 1<sup>st</sup> Div 1983).

10. Unless the Administrative Law Judge modifies the rulings with respect to the Citation request for filing prepared testimony, there appears to be no need to file any additional testimony in this matter on behalf of Tri-County. However, that may well change should the transcript of the Don Forney discovery deposition be allowed in evidence as general testimony or IP be allowed to provide prepared testimony by Don Forney. Most certainly Tri-County would be required to prepare and file written objections to those portions of the Don Forney discovery deposition transcript which were otherwise reserved by written stipulation of the parties at the commencement of the deposition.

WHEREFORE Tri-County requests the following relief from the Administrative Law Judge:

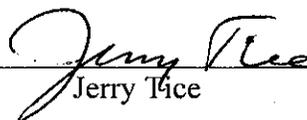
A. To deny the request by IP to submit the Don Forney discovery deposition transcript or prepared written testimony of Don Forney in this docket.

B. For such other and further relief as the Illinois Commerce Commission and the Administrative Law Judge deem equitable.

Respectfully submitted,

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

BY

  
Jerry Tice

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STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

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

**AFFIDAVIT IN SUPPORT OF THE RESPONSE OF TRI-COUNTY ELECTRIC  
COOPERATIVE, INC., TO THE MOTION BY ILLINOIS POWER COMPANY d/b/a  
AMERENIP TO ADMIT THE DON FORNEY  
DISCOVERY DEPOSITION TRANSCRIPT OR ALTERNATIVELY TO FILE  
WRITTEN TESTIMONY OF DON FORNEY IN THIS DOCKET**

HOMER J. TICE, on oath first duly sworn states as follow:

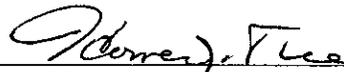
1. The undersigned is an adult under no disability and if sworn as a witness could competently testify to the following matters.
2. The undersigned is the attorney for Tri-County Electric Cooperative, Inc., (Tri-County) in this docket.
3. The undersigned had discussions with Scott C. Helmholz, Attorney for Illinois Power Company d/b/a AmerenIP (IP) in this docket regarding the use of the transcript of the Don Forney discovery deposition in this matter which discussion occurred in late March and early April 2010 at a time when IP was requesting the right to file supplemental testimony in the docket in support of IP's positions in this case. The undersigned further recalls discussing the possibility of filing the Don Forney discovery deposition transcript. However, no agreement was reached with respect to the manner or form in which the Don Forney discovery deposition would be utilized in this docket. The discussion generally centered around the request by IP to have the

right to file additional supplemental testimony in support of IP's position in this docket to which the undersigned as Attorney for Tri-County Electric Cooperative Inc., agreed to allow.

4. The foregoing discussions carried over to the April 9, 2010 status conference in this matter at which time IP was granted leave to file additional supplemental prepared testimony in this docket by April 23, 2010 and a new status conference date was set for May 4, 2010 to discuss a schedule for Tri-County to file rebuttal testimony to the IP additional supplemental direct testimony. The IP supplemental and additional direct testimony was filed on or about April 26, 2010.

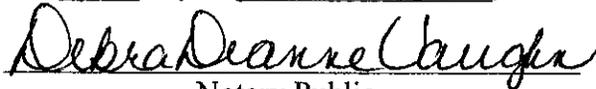
5. Don Forney's discovery deposition transcript was not made a part of the additional and supplemental IP written testimony filed on April 26, 2010 and IP did not file any prepared testimony sponsored by Don Forney. Accordingly the undersigned as Attorney for Tri-County assumed that such request by IP to use the Don Forney discovery deposition was no longer necessary particularly since IP had filed direct testimony of several Citation employees and others to present testimony regarding the Salem Oil Field and the operation of the same by both Texaco and Citation.

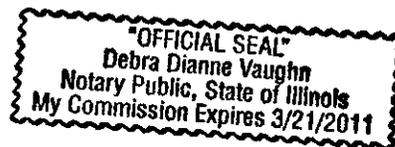
Further affiant sayeth not.



Homer J. Tice

Subscribed and sworn to before me  
this 8 day of November, 2010.

  
Notary Public



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**PROOF OF SERVICE**

I, JERRY TICE, hereby certify that on the 8th day of November 2010, I served a copy of the Affidavit attached hereto to the following persons at the e-mail addresses as shown below:

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Jerry Tice