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CHIEF CLERK'S OFFICE

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

Case No. 05-0767

TRI-COUNTY ELECTRIC COOPERATIVE, INC. (TRI-COUNTY)  
MEMORANDUM IN OPPOSITION TO THE ILLINOIS POWER COMPANY  
dba AMERENIP (IP) AND CITATION OIL & GAS CORP (CITATION) MOTIONS TO  
STRIKE PORTIONS OF TRI-COUNTY PREPARED TESTIMONY BY DENNIS IVERS

TRI-COUNTY ELECTRIC COOPERATIVE, INC. (Tri-County) files herewith its Memorandum in opposition to the Motions by Illinois Power Company dba AmerenIP (IP) and Citation Oil & Gas Corp (Citation) to strike portions of the Dennis Ivers Prepared Testimony filed by Tri-County in this docket and in support thereof states as follows:

- I. IP AND CITATION HAVE MOVED TO STRIKE PORTIONS OF THE PREPARED DIRECT TESTIMONY OF DENNIS R. IVERS FOR THE FOLLOWING REASONS
  - 1. The testimony contains inappropriate legal conclusions regarding interpretation of the parties' Service Area Agreement at issue in the docket.
  - 2. Contains inappropriate comment on the legal effect of statements by IP employees.
  - 3. Contains a legal opinion.

II. GENERAL LEGAL ARGUMENTS REGARDING IP'S AND CITATION'S MOTIONS TO STRIKE EVIDENCE

A. IP'S AND CITATION'S MOTIONS TO STRIKE ARE NOT TIMELY

The procedure followed in this docket for taking evidence required the parties to file prepared written direct and rebuttal testimony with copies of all written testimony and evidentiary exhibits served on opposing counsel at the time of filing. Tri-County filed its written testimony on the following dates:

September 29, 2009 Direct Testimony of all Tri-County witnesses

January 28, 2010 Rebuttal Testimony of all Tri-County witnesses

July 12, 2010 Supplemental Rebuttal Testimony of Tri-County's Marcia K. Scott and Robert C. Dew, Jr. P.E.

IP did not file its objections to any part of the Tri-County written prepared testimony until the first day of the evidentiary hearing in this docket on January 12, 2011 (Tr date 1-12-11 p 493).

Likewise, Citation did not file its objections to Tri-County's prepared testimony until January 19, 2011.

In a proceeding where all testimony is oral, counsel must object to a question or answer he or she considers improper as soon as it is asked, or as soon as the grounds for objection become apparent. Failure to object until the close of the witness' testimony to which the objection is made is not timely. See Sinclair vs Berlin 325 Ill App 3d 458; 758 NE2d 442; 259 Ill Dec 319, 327 (1<sup>st</sup> Dist 4<sup>th</sup> Div 2001) where opposing counsel's objection to witness' testimony at close of other counsel's examination of the witness was untimely and therefore waived; Holder vs Caselton 275 Ill App 3d 950; 657 NE2d 680; 212 Ill Dec 479, 485 (4<sup>th</sup> Dist 1995), where opposing counsel waited to object to witness' testimony until other counsel had completed

examination of the witness. In this docket, both IP and citation waited until the close of Tri-County's direct examination for each of its witnesses before objecting to any of the prepared testimony presented by Tri-County's witnesses (Tr dated 1-12-11 Marcia Scott Tr p 493; Dennis Ivers Tr p 628; Bradley Dale Grubb Tr p 696; Robert C. Dew Jr. P.E. Tr dated 1-13-11, Tr p 741). IP and Citation are required to file their objections to the portion of the prepared written testimony of Tri-County's Scott, Ivers, Grubb and Dew they believe are objectionable as soon as the objectionable question and answer become apparent. In this case, Tri-County's complete written prepared testimony was filed with the Commission and in the hands of IP on July 12, 2010 and Citation at least by September 2010. Yet, IP waited until January 12 and 13, 2011, and Citation waited until January 19, 2011, to object to any part of Tri-County's testimony. By not filing the objections to Tri-County's testimony as soon as it was served on IP and Citation, when the objections raised by IP and Citation would have become apparent, IP and Citation have prevented timely rulings on the evidence objected to and prevented Tri-County from filing corrective testimony, if necessary. Such procedure should not be allowed. Both IP's and Citation's objections to Tri-County's testimony are untimely and therefore waived and should be denied.

**B. THE IP AND CITATION OBJECTIONS DO NOT STATE SPECIFIC GROUNDS FOR EXCLUDING SPECIFIC STATEMENTS OF TRI-COUNTY'S WITNESSES.**

It is Tri-County's position that should the Administrative Law Judge (ALJ) conclude that IP's and Citation's motions to strike portions of Tri-County's prepared testimony were timely filed, then the motions are not well taken. In the first place, the motions are based on multiple grounds and are not directed to specific questions or specific responses and in many cases are

directed to multiple sentences and/or multiple pages of the witnesses' answers. To be timely, the objection must state the specific ground for excluding the specific evidence (Illinois Rules of Evidence 103(a)(1) effective January 1, 2011). The ALJ is not required to sort through the testimony objected to and determine which reason IP or Citation assigns as the basis for the objection. In such instance, it is proper to deny the objection First National Bank of Hayward, Wisconsin vs Gerry 195 Ill App 513, 520 (1915). In this case, IP and Citation allege three grounds for their objections: (1) legal opinion regarding interpreting the Service Area Agreement; (2) opinion regarding legal effect of IP employee statements; and (3) improper legal opinions. None of the grounds for the objections are assigned to specific questions or statements statements by Tri-County's witnesses. The ALJ and Tri-County are left to guess which ground for objection applies to which question and answer by the witnesses. On that basis alone, the IP and Citation objections should be denied.

C. TRI-COUNTY'S TESTIMONY DOES NOT CONTAIN INAPPROPRIATE LEGAL CONCLUSIONS OR LEGAL OPINIONS OR INTERPRETATIONS OF THE LEGAL EFFECT OF STATEMENTS BY IP EMPLOYEES.

Both lay and expert witnesses may express an opinion even though it may touch upon the ultimate issue in the case (Rule 701 and 704, Illinois Rules of Evidence effective January 1, 2011). The three grounds assigned by IP and Citation to exclude portions of Tri-County's testimony all pertain to legal opinions of the witnesses regarding interpretation of the Service Area Agreement or statements by IP employees. It is assumed these objections are based upon the claim such testimony impermissibly intrudes upon the trier of fact. However, even if the testimony objected to is found to contain opinions of the witness regarding the proper interpretation of the Service Area Agreement or the legal affect of statements by IP employees,

the modern trend allows such testimony, 3 Wigmore, Evidence Section 1920. See Zavala v Powermatic, Inc. 167 Ill 2d 542; 658 NE2d 371; 212 Ill Dec 889, 891 (1995), allowing reconstruction expert to testify as to how an accident happened. Also, In re marriage of Sieck 78 Ill App 3d 204; 396 NE2d 1214; 33 Ill Dec 490, 499 (1<sup>st</sup> Dist 2<sup>nd</sup> Div 1979) where psychologist was permitted to testify in child custody proceeding that child would be better off with the father. See also Richardson vs Chapman 175 Ill 2d 98; 676 NE2d 621; 221 Ill Dec 818, 822 (1997).

III. PORTIONS OF PREPARED DIRECT TESTIMONY OF DENNIS R. IVERS  
OBJECTED TO BY IP

1. Page 2, Lines 18 through 21 (Portion of the testimony objected to by IP)

Q: Was the contact with you by Clyde Finch of Citation regarding a facility of Citation that had not been in existence prior to that date and to which there had not been any electric service energized or provided prior to the date of the request?

A: Yes.

ARGUMENT:

The above question and answer objected to by IP does not contain any information regarding the Tri-County/IP Service Area Agreement nor does it refer to any testimony of IP witnesses nor does it contain a legal opinion of the witness regarding the issues in this docket. Rather, the question asks the witness to speak to the prior existence of a Citation facility and if Clyde Finch of Citation contacted Dennis Ivers regarding a Citation facility that was not then in existence and had not received electric energy prior to the date of the contact. This question is a follow-up to the witness' answer to the immediately preceding question and answer which asked Dennis Ivers if Clyde Finch of Citation contacted him about the new Citation gas plant. The

answer to the objected question relates to whether the gas plant, which the witness talked about in the preceding answer, existed and received electric service prior to the date of Clyde Finch's contact with the witness. It is a proper question and answer, and should not be struck for any of the reasons given by IP. Even if the question and answer is deemed to contain an opinion of the witness, Ivers as the Director of Engineering for Tri-County is qualified to render his opinion of how he interpreted the contact by Clyde Finch regarding the Citation gas plant.

Further, IP witnesses Tatlock and Siudyla have independently verified in their own testimony the Citation gas plant was a new facility which had never previously received electric service. In this regard, see Tri-County Exhibit A-5 consisting of the March 9, 2005 Tatlock e-mail (refers to a new gas processing plant); April 19, 2005, 2:07 p.m. Tatlock e-mail (refers to Citation's new gas plant and new load); April 25, 2005 Tatlock e-mail (refers to citation new gas plant); April 26, 2005 Siudyla e-mail (refers to proposed 800 kw load in Tri-County territory); and June 21, 2005 Siudyla e-mail (refers to Citation plans to build new 750 kVa gas plant). Additionally, IP witness Jeffrey Lewis, a Citation engineering manager for Citation to whom Clyde Finch reported, confirmed in his cross examination that Clyde Finch contacted Tri-County regarding the cost to hook up Tri-County to provide electric service to the gas plant (Tr date 04-26-11 Tr p 1602-1063). Accordingly, the testimony IP objects to regarding whether the gas plant was a new facility and whether the gas plant had received electricity prior to the conversation between Clyde Finch and Dennis Ivers is already in the record from IP's witnesses.

2. Page 2, Lines 22 and Page 3, Line 1

Q: Did you attend any subsequent meetings with Citation representatives and/or IP representatives regarding electric service for Citation's gas plant?

Page 3, Lines 2 through 8 (Portions of the testimony objected to by IP)

A: Yes. On July 5, 2005, I attended a meeting at Tri-County's headquarters attended by Marcia Scott, General Manager; Bradley Grubb, then Project Engineer; and myself, all of Tri-County, with Jeff Lewis, Area Production Engineer and Edward J. Pearce (Pearson), Production Engineer, both of Citation, and Todd Masten, Ameren Regulatory Specialist, and Michael Tatlock, AmerenIP District Engineer. At that meeting, both Todd Masten and Michael Tatlock of IP stated that the Citation gas plant was in Tri-County's service territory and Tri-County was authorized to provide the electric service to the gas plant.

ARGUMENT:

The foregoing question and answer objected to by IP does not contain any information regarding the Tri-County/IP Service Area Agreement nor does it refer to any testimony of IP witnesses or comment on the legal effect of statements by IP employees nor render legal opinions. The testimony merely reports what the witness heard Michael Tatlock, IP's district engineer, and Todd Masten, IP's regulatory specialist, tell Tri-County at the July 5, 2005 meeting between Tri-County, IP and Citation regarding the providing of electric service by Tri-County to the Citation gas plant. Statements by Tatlock and Masten that Tri-County has the right to serve the Citation gas plant are admissions of IP (Illinois Rules of Evidence 801(d)(2)(D)). Further, Mike Tatlock, IP's engineering witness, acknowledged in cross examination that he told Marcia Scott, Dennis Ivers, and Brad Grubb of Tri-County at the July 5, 2005 meeting between Tri-County, IP and Citation that the gas plant was Tri-County's to serve (Tr date 1-14-11 Tr p 1261). Accordingly, the testimony is proper.

CONCLUSION

For the foregoing reasons Tri-County Electric Cooperative, Inc. requests the Administrative Law Judge to deny the Motion by Illinois Power Company dba AmerenIP to strike the foregoing testimony of Dennis Ivers.

TRI-COUNTY ELECTRIC  
COOPERATIVE, INC.

By GROSBOLL BECKER TICE TIPPEY & BARR

By \_\_\_\_\_

A handwritten signature in cursive script, appearing to read "Jerry Tice", is written over a horizontal line.

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**PROOF OF SERVICE**

I, JERRY TICE, hereby certify that on the 8th day of June, 2011, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the TRI-COUNTY ELECTRIC COOPERATIVE, INC. (TRI-COUNTY) MEMORANDUM IN OPPOSITION TO THE ILLINOIS POWER COMPANY dba AMERENIP (IP) AND CITATION OIL & GAS CORP (CITATION) MOTIONS TO STRIKE PORTIONS OF TRI-COUNTY PREPARED TESTIMONY BY DENNIS IVERS attached hereto, addressed to the following persons at the addresses set opposite their names:

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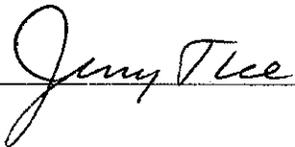
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