

ORIGINAL
ILLINOIS COMMERCE COMMISSION
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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 ILLINOIS POWER COMPANY dba AMERENIP (IP)
AND CITATION & OIL GAS CORP (CITATION) MOTIONS TO STRIKE PORTIONS OF
TRI-COUNTY PREPARED TESTIMONY BY BRADLEY DALE GRUBB

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 Bradley Dale Grubb 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 BRADLEY DALE GRUBB 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 an 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 IS 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 (1st Dist 4th 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; and Holder vs Caselton 275 Ill App 3d 950; 657 NE2d 680; 212 Ill Dec 479, 485 (4th 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, and 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 general in nature 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 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 (1st Dist 2nd 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 BRADLEY DALE GRUBB OBJECTED TO BY IP

i. Page 3, Lines 4 through 8 (Portion of testimony objected to by IP)

Q: Were the meetings you had with Clyde Finch and Michael Garden the result of requests by them on behalf of Citation for electric service from Tri-County for a facility that had not been in existence prior to the meetings 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 testimony objected to by IP does not contain a legal conclusion regarding interpretation of the parties' Service Area Agreement, nor comment on statements of IP witnesses, nor contain a legal opinion. Rather, the question and answer is a follow up to the immediately preceding question and answer in which Bradley Grubb testified about his meetings with Clyde Finch and Michael Garden, both of Citation, regarding the location of Citation's new gas plant. The testimony IP has objected to explains how the witness, Bradley Grubb, understood the information and the actions of Citation employees Clyde Finch and Michael Garden when they met with Bradley Grubb at the site of the planned Citation gas plant. The information provided to Bradley Grubb at the proposed plant site on February 18, 2005 and March 10 2005 consisted of

showing Grubb the proposed site of the plant, a review of the existing electric service at the site, and a determination of the proposed location of the electric facilities to be used for the gas plant including location of distribution lines and location of the transformer required to provide electric service to the plant. At the March 10, 2005 meeting, Clyde Finch handed Bradley Grubb a document showing the estimated kw connected load for the gas plant (Tri-County Ex C-1; Gas Plant Electric Loads – Salem Gas plant 3-10-05). The question and answer objected to by IP refers to whether Bradley Grubb met with Clyde Finch and Michael Garden at the proposed gas plant site because of a request for electric service by Citation to Dennis Ivers, Director of Engineering for Tri-County. Dennis Ivers testified immediately preceding Bradley Grubb and without objection by IP that he was called by Clyde Finch on February 18, 2005 and during the call Clyde Finch requested electric service from Tri-County for the Citation gas plant. Bradley Grubb was sent to the site to meet with Michael Garden on February 18, 2005 and with Clyde Finch and Michael Garden on March 10, 2005. Thus, it is appropriate for Bradley Grubb to testify whether his February 18, 2005 and March 10, 2005 meetings were a result of that request. Additionally and as noted in the Tri-County Electric Cooperative, Inc. Memorandum In Response to Illinois Power Company d/b/a AmerenIP Motion to Strike Portions of Tri-County Prepared Testimony of Dennis Ivers in Part III, objections to Dennis Iver's direct testimony, paragraph 1 at pages 5-6, the gas plant at the time of the February 18, 2005 and March 10, 2005 meetings was only proposed and would be a new facility to which no electric service had been provided by anyone. Thus, the question and answer objected to by IP is proper.

2. Page 3, Lines 16 through 17

Q: Did you have any other contact with Citation representatives and/or IP representatives

regarding electric service to the Citation gas plant?

Page 3, Lines 18 through 22 (The following portion of the testimony has not been objected to).

A: Yes. On June 22, 2005, I attended a meeting at Tri-County headquarters with Marcia Scott, Tri-County General Manager; Jeff Lewis, Citation Area Production Engineer; and Edward J. Pearce (Pearson), Citation Production Engineer. At that meeting, Tri-County denied a request by Citation to allow Citation to extend its own distribution lines to serve the gas plant.

Page 3, Line 22 (Portion of testimony objected to by IP)

On July 5, 2005 I attended a meeting at Tri-County's headquarters Mt.

Page 4, Lines 1 through 7 (Portion of testimony objected to by IP)

Vernon, Illinois between Marcia Scott, Tri-County General Manager; Dennis Ivers, Tri-County Director of Engineering; Jeff Lewis, Citation Production Engineer; Edward J. Pearce (Pearson), Citation Production Engineer; Todd Masten, Ameren Regulatory Specialist; and Michael Tatlock, AmerenIP District Engineer. At that meeting, both Todd Masten and Michael Tatlock concurred with Tri-County that the gas plant was within Tri-County's service territory and Tri-County was authorized to provide 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, Michael 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 Bradley Dale Grubb.

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 8 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 ILLINOIS POWER COMPANY dba AMERENIP (IP) AND CITATION & OIL GAS CORP (CITATION) MOTIONS TO STRIKE PORTIONS OF TRI-COUNTY PREPARED TESTIMONY BY BRADLEY DALE GRUBB attached hereto, addressed to the following persons at the addresses set opposite their names:

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