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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)**  
**REPLY TO THE ILLINOIS POWER COMPANY dba AMERENIP (IP)**  
**MEMORANDUM IN SUPPORT OF IP'S MOTION TO STRIKE PORTIONS OF THE**  
**TESTIMONY OF TRI-COUNTY'S WITNESS ROBERT C. DEW, JR. P.E.**

Tri-County Electric Cooperative, Inc., Complainant, (Tri-County) for its reply to the ILLINOIS POWER COMPANY d/b/a AMERENIP, Memorandum in support of IP's Motion to Strike Portions of the Testimony of Tri-County's Witness, Robert C Dew, Jr. P.E., states as follows:

I. IP HAS IMPROPERLY ADDED NEW REASONS FOR IP'S OBJECTIONS TO THE PREPARED TESTIMONY OF ROBERT C. DEW, JR. P.E.

IP in its Motion to Strike the prepared written testimony of Robert C. Dew, Jr. P.E. gave the following reasons for its objections to portions of Dew's testimony:

(1) Inappropriate legal conclusions concerning interpretation of the parties' Service Area Agreement at issue in this docket.

(2) Inappropriate comments on the legal effect of statements by IP employees.

(3) Inappropriate legal opinion.

However, in IP's Memorandum, it raises new reasons as a basis for striking portions of Dew's testimony which are:

(a) Offering legal argument and advocacy in the guise of testimony;

(b) Instructing the Administrative law Judge or Commission how to interpret the Service Area Agreement;

(c) Opining as to the actual “understanding” or subjective intent of the negotiating parties in 1968.

(d) Arguing that modifications of a substation increased capacity and, therefore, the modifications added “phases” within the meaning of that phrase in the Service Area Agreement.

None of the points in (a), (b), (c), or (d) were raised by IP in its Motion to Strike as a basis for objecting to the testimony of Robert C. Dew, Jr. P.E. An objection to evidence on a specific ground constitutes a waiver of the right to object to the evidence on other grounds Central Steel & Wire Co vs Coating Research Corp. 53 Ill App 3d 943; 369 NE2d 140; 11 Ill Dec 686, 689 (1<sup>st</sup> Dist 5th Div 1977); People v Blackmon 97 Ill App 2d 438, 240 NE 2d 255, 257 (1<sup>st</sup> Dist 3<sup>rd</sup> Div 1968). IP waited to file its objections to testimony until after all of Dew’s testimony was offered in evidence and even then, IP failed to state all the grounds for its objection and raised new objections in IP’s memorandum. This procedure, given the use of prepared written testimony served on all parties long before Tri-County’s witnesses took the witness stand, denies Tri-County the opportunity to provide corrective testimony. Thus, because of the lack of IP’s timeliness in objecting to certain testimony of Dew and the raising of additional reasons in IP’s Memorandum for striking Dew’s testimony, IP’s additional objections listed in (a)-(d) should be deemed waived.

## II. IP’S OBJECTIONS TO DEW’S ENGINEERING REPORT PAGES ONE THROUGH THREE

IP has not presented argument in its Memorandum in support of its Motion to Strike with respect to any specifically identified portions of Dew’s Engineering Report at pages 1 through 3. Yet, IP in its conclusion claims to be objecting to pages 1 through 3 of Dew’s Engineering

Report. No argument or citation to authority has been provided by IP nor has IP identified any specific sentence contained within pages 1 through 3 of Dew's Engineering Report that should be stricken for any of the reasons stated in IP's Motion to Strike. Therefore, IP's Motion to Strike any part of pages 1 through 3 of Dew's Engineering Report should be denied, Supreme Court Rule 341(h)(7); In re Marriage of Shaeb and Khazal 377 Ill App 3d 615; 880 NE2d 537; 316 Ill Dec 801, 807 (1<sup>st</sup> Dist 1<sup>st</sup> Div 2007). See Tri-County's Memorandum filed June 8, 2011 responding to IP's Motion to Strike Portions of Tri-County Testimony by Robert C. Dew, Jr. P.E., pages 5 and 6.

III. IP'S OBJECTIONS TO DEW'S ENGINEERING REPORT PAGES FOURTEEN, FIFTEEN AND SIXTEEN

IP only identifies eight specific sentences or parts of sentences in Dew's Engineering Report at pages 14, 15 and 16 upon which IP presents argument regarding its Motion to Strike. Thus, Tri-County's response will be to those specific sentences mentioned in IP's Memorandum. The parties' Service Area Agreement is a technical Agreement and deals with electrical engineering principles as applied to territorial matters. Dew's Engineering Report at pages 14 and 15 summarizes what Dew found in his investigation in terms of these electrical engineering principles when applied to the Service Area Agreement in this docket.

A. IP specifically identifies the following statements by Dew on page 14 of his Engineering Report as being objectionable because IP claims the statements constitute legal conclusions:

"1. Furthermore, in examining and reading the Service Area Agreement between Illinois Power Company and Tri-County Electric Cooperative, Inc. Dated March 18, 1968, I find the following:"

\* \* \* \* \*

"2. Based upon Section 1(c) a new customer is a customer who needs service at a point of delivery that is idle or not energized..."

“3. Based upon section 3(a) neither party shall serve a new customer within the service areas of the other party.”

“4. ....Therefore, based upon the vast number of modifications, shown in IP drawings of the Texas Substation, many new delivery points were created over time.”

“5. Such action is in violation of Section 3(a) and Section 1(c) ...Illinois Power Company is therefore in violation of the existing agreement ...”

#### ARGUMENT:

The above statements are part of the flow of Dew’s report at page 14 and constitute not his opinions or conclusions but rather what he found in his investigation. They cannot be viewed in the abstract or taken out of context from the rest of Dew’s Report but must be considered in the totality of Dew’s Engineering Report. Even if the phrases objected to by IP touch on the ultimate issue in this case, that does not prohibit Dew’s comments. See Perschall v Metropolitan Life Ins. Co. 113 Ill App 3d 233; 446 NE2d 570; 68 Ill Dec 664, 667,(4<sup>th</sup> Dist 1983) where the doctor in a disability insurance claim could render his opinion that plaintiff was totally disabled in accordance with the definition of disability provided in the insurance policy. It is clear the qualified expert can directly express an opinion on the ultimate issue. Further, such opinion will not constitute a legal conclusion, Perschall, supra at 68 Ill Dec 667. To the same effect is Watson v State Farm and Casualty 122 Ill App 3d 559; 461 NE2d 57; 77 Ill Dec 670, 673 (3<sup>rd</sup> Dist 1984) error to exclude fire insurance company expert testimony whether plaintiff’s fire was accidental; Crump v Universal Safety Equipment Co. 79 Ill App 3d 188; 398 NE 2d 202; 34 Ill Dec 513, 520 (1<sup>st</sup> Dist 5<sup>th</sup> Div 1979) where defendant’s expert rendered opinion whether a grinding machine that was not equipped with a guard created an unreasonably dangerous condition. See also American College of Surgeons v Lumberman’s Mutual Casualty Co. 142 Ill App 3d 680; 491 NE2d 1179; 96 Ill Dec 719, 734-735 (1<sup>st</sup> Dist 2<sup>nd</sup> Div 1986) which held it was

proper for the fire insurance company expert to render an opinion as to the intent of and what an ambiguous insurance contract written in technical language meant so the trier of fact could better understand the contract.

The first statement identified by IP as objectionable is an introductory paragraph in which IP seems to construe the words “I find the following:” as being a legal conclusion. However, IP has taken those words out of context. When considered within the context of the whole paragraph, it is clear such words refer to Dew’s summary of what his investigation disclosed and are not a legal conclusion.

As to paragraphs number 2 and number 3, IP objects to phrases repeated by Dew that come directly from the Service Area Agreement. That hardly can be considered a legal opinion or conclusion by Dew.

As to paragraph number 4, Dew, an expert engineer with over 38 years of experience in the field, renders his engineering opinion whether the many modifications he found IP made to the Texas substation, which IP does not deny, created many new points of delivery. It is proper for Dew, when he reaches such an opinion, to render his opinion even though it is expressed directly on the ultimate issue of what is a “point of delivery” under the service Area Agreement (See American College of Surgeons, supra 96 Ill Dec at p 734-735). IP’s expert, Keith Malmedal, testified in his direct prepared testimony about what a “point of delivery” and “service Point” are in terms of the Service Area Agreement. (See pages 6-10 of Malmedal’s Report attached as IP Ex. 5.1 to his direct testimony IP Ex 5). Thus, IP cannot be prejudiced by reason of Dew’s expert opinion on the same subject. Maggi v RAS Development, Inc. Ill App 1st Dist, WL 2163577 (May 26, 2011).

Regarding paragraph number 5, the sentence IP identifies as objectionable is part of a larger explanation by Dew that based upon electric engineering principles in the electric utility industry IP is considered to be serving the Citation gas plant even though the electricity is delivered by the Citation distribution line. Thus, it was Dew's engineering opinion that service to the gas plant by IP would be subject to the restrictions of Sections 1(c) and 3(a) of the Service Area Agreement. Such testimony is proper for the same reasons as noted above.

B. IP objects to the following words of Dew's "Opinion and Conclusions" at page 15 of his report:

"Additionally, ...the Texas Substation has been modified very extensively ...and is therefore a "modification" per the agreement.

ARGUMENT:

This phrase is taken out of context by IP. Dew refers in this portion of his Engineering report to his opinion that if, as IP contends, the Texas Substation is the "delivery point" under the Service Area Agreement for the Citation gas plant and gas compressor sites than his opinion is that the extensive modifications by IP to the Texas Substation constitute modifications within the engineering meaning of modifications as used in the Service Area Agreement. IP's view of this case is that the engineering experts cannot render opinions regarding the engineering meaning of words or phrases in the Service Area Agreement. Yet, without those engineering opinions, there would be no way to determine the meaning of the words and phrases that are not otherwise defined in the Agreement or within the common knowledge of the trier of fact (See American College of Surgeons supra at p 734-735).

C. IP objects to the following phrases in paragraph 2, page 15 of Dew's Report:

"In my opinion the new gasification plant owned by Citation Oil and its partners is a "new electrical load" ...and therefore should have been served by Tri-County EC ...."

## ARGUMENT

Again, this phrase is taken out of context. IP omits the phrase:

“...that did not exist at the time of the 1968 Service Agreement, and the new plant and new connection point are clearly required for this new electrical load that needs a ‘new delivery point’ and this new electrical load is clearly in Tri-County EC service territory...”.

Dew is qualified to render his engineering opinion regarding whether the Citation gas plant is a new electrical load that did not exist on March 16, 1968. IP in fact has admitted the gas plant is a new electric load located in Tri-County’s territory and until July 14, 2005 admitted that the gas plant required a new delivery point.

D. IP also objects to the following language in the first full paragraph at page 16 of his report claiming:

“In my opinion, AmerenIP is, therefore, in violation of the agreement ... Such behavior violates the spirit and the Letter of the Agreement.”

## ARGUMENT:

This phrase is presented out of context from the whole of Dew’s engineering opinion found at pages 15 and 16 of his Engineering Report in which Dew renders his engineering opinion that the gas plant and gas compressor sites are new points of delivery under the Service Area Agreement. See Perschall supra 68 Ill Dec at 667 where the medical expert was qualified to express his opinion that plaintiff was totally disabled as defined in the disability insurance policy at issue and thus, opine as to the ultimate issue under the disability insurance policy. To the same effect is American College of Surgeons supra 96 Ill Dec at 734 where the expert testified regarding the effect of the parties actions upon the insurance agreement. IP’s engineering expert, Keith Malmedal, referenced in his testimony the parties’ Service Area Agreement when expressing his opinions regarding the meaning of “electric service” and “point

of delivery” (See Malmedal Engineering Study for Citation Feeder Modification, Nov 5, 2009, IP Ex 5.1 pages 6, 10 and 11). Thus, since IP’s own engineering expert testified regarding his interpretation of the “service point”, “delivery point”, and “modifications” to the Texas substation within the context of the Service Area Agreement, IP is not prejudiced by Dew’s engineering opinions on the same matter based upon the use of those terms in the Service Area Agreement.

IV. IP’S OBJECTIONS TO THE PREPARED REBUTTAL TESTIMONY OF ROBERT C. DEW, JR. P.E.<sup>1</sup>

1. Exhibit F, Page 6, Lines 21 through 23

Q: Does Section 1(d) of the Service Area Agreement between IP and Tri-County provide that in such an instance the existing delivery point consisting of a single phase transformer becomes a new delivery point because of the modifications made?

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

A: Yes. It clearly does. The modification consisted of a transformer to step the voltage down from the distribution line to a voltage usable by the motors and equipment of the customer along with necessary upgrading of the distribution line to provide three phases of current rather than one phase or single phase current to the customer’s location.

2. Exhibit F, Page 7, Lines 5 through 7

Q: What if any difference is there in the previous example of a change to the customer’s delivery point and the changes and modifications made by IP to the Texas substation in this docket?

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<sup>1</sup> Tri-County has highlighted in bold print the portion of the prepared testimony IP specifically identifies and quotes in its Memorandum. The balance of the above testimony not in bold print was included in IP’s Motion to Strike but IP did not present argument in its Memorandum regarding the same.

Exhibit F, Page 7, Lines 8 through 14 (Portion of testimony objected to by IP)

A: The changes in the immediate preceding example constitute an increase in **both the capacity to serve as well as adding additional phases to the delivery point.**

However, the most important part of the modification is the increase in the capacity of the electric supplier to provide the additional electric energy to the customer. The additional capacity is provided by reason of modifications or changes to the distribution line to ...

3. Exhibit F, Page 4, Lines 21 through 23 and Page 5, Line 1

Q: Is the conclusion put forth by Mr. Tatlock that since the Texas substation has always been three phase, there has been no change or modification in the Texas substation that would cause the Texas substation to become a new point of delivery under the Service Area Agreement between Tri-County and IP correct?

Exhibit F, Page 5, Lines 2 through 13 (Portion of testimony objected to by IP).

A: If, Mr. Tatlock's conclusion is correct and if the substations of Tri-County and IP are intended to be considered as delivery points under the Service Area Agreement for each of their respective customers served through a substation, then any modification or change to that substation to allow the electric supplier to serve additional electric load required by their customers would not constitute a change or modification to the substation delivery point under the Service Area Agreement because substations are initially constructed with the maximum number of phases utilized in our electric utility industry, that is three phases of electric energy. **Using Mr. Tatlock's conclusion, Section 1(d) would have no meaning in the Service Area Agreement and each electric supplier could continue to increase the size of its three phase substation to**

**provide for additional load required of customers in the area without creating a change in the substation sufficient to create a new point of delivery.**

ARGUMENT:

The portion of the foregoing testimony objected to by IP in its Memorandum have been highlighted in bold print. Dew's testimony concerns his opinion regarding the engineering effect of the opinion by IP's Tatlock that the Texas substation is a "delivery point" for the Citation gas plant. Dew is qualified to render his engineering opinion that if the Texas substation is a "delivery point" under the Service Area Agreement, then the effect of the many modifications to it has the same effect as adding additional phases to the substation. On the other hand, if the many modifications to the Texas substation do not have the effect to adding phases of current to the substation, as IP contends, then using the Texas Substation as a "delivery point" would render Section 1(d) of the Service Area Agreement meaningless. This engineering opinion is within the purview of Dew's qualifications even though it points out that IP's interpretation would render part of the Service Are Agreement meaningless. Maggi v RAS Development, Inc. Ill App 1<sup>st</sup> Dist, WL 2163579 at page 23, (May 26, 2011). This is particularly true since Tatlock's opinion that the Texas substation is the "delivery point" for the gas plant implicitly refers to "delivery point" as used in the Service Area Agreement.

4. Exhibit F, Page 5, Lines 20 through 23

Q: Has either Mr. Tatlock or Mr. Malmedal contradicted your conclusion that the modifications and changes to the Texas substation over that period of time allowed IP to serve additional electric load of its customers including Citation from the Texas substation?

Exhibit F, Page 6, Lines 1 through 4 (Portion of testimony objected to by IP)

A: **No. They have not and I take their failure to contest that point as an admission that in fact IP's modifications to the Texas substation over the period of time in question increased the capacity of the substation to provide additional electric service to the IP customers, including Citation, who are served through the Texas substation.**

Exhibit F, Page 27, Lines 15 through 17

Q: Is Mr. Malmedal correct when he asserts in the first four paragraphs on page 11 of his engineering report attached to his Prepared Direct Testimony that adding phases does not equate to adding capacity?

A: No.

Exhibit F, Page 28, Lines 2 through 7 (Portion of answer objected to by IP)

**Simply stated, if the adding of an additional phase or phases of electric current which in turn almost invariably adds capacity to provide electric service to a customer constitutes a modification under Section 1 of the Tri-County/IP Service Area Agreement then by direct analogy the adding of capacity without adding additional phases of current constitutes a modification under Section 1 also.**

Exhibit F, Page 29, Line 23

That is why I concluded that the adding of capacitors to the substation creates

Exhibit F, Page 30, Lines 1 through 3 (Portion of answer objected to by IP)

**additional phases of current making the substation available to serve additional capacity and thus constitutes a modification within the meaning of Section 1 of the Tri-County/IP Service Area Agreement.**

ARGUMENT:

The objected to language highlighted in bold is in response to IP's expert, Keith Malmedal's engineering testimony in which he comments on and disputes Dew's engineering opinion that IP's modifications add phases to the Texas substation and therefore adds capacity. Dew's testimony does not render a legal opinion or legal conclusion regarding the Service Area Agreement. Rather, it renders an engineering opinion concerning the correctness of Malmedal's opinion disputing Dew's testimony that the Texas substation modifications increased its capacity. Dew explains further why he arrived at his engineering opinion that adding capacity equals adding phases to the Texas substation within the engineering meaning of "modifications" as used in the Service Area Agreement. IP cannot claim prejudice since Dew's engineering opinions are responsive to the opinion of IP's expert on the same subject. Further, such opinion explains in engineering language what "modifications" means as used in the agreement American College of Surgeons supra 96 Ill Dec p 735.

5. Exhibit F, Page 8, Line 3

Q: What conclusion does this lead you to?

Exhibit F, Page 8, Lines 4 through 16 (Portion of testimony objected to by IP)

A: It leads me to the conclusion that **the parties did not intend substations to be "delivery points" within the meaning of the Service Area Agreement.** It further leads me to the conclusion that **the parties intended a "delivery point", as utilized in the agreement, to mean the location for the installation of step down transformers,** whether it is a single phase transformer, two phase transformer, or a three phase transformer, and associated equipment that are installed at customers' locations and utilized to reduce the voltage delivered by the distribution line to a voltage usable by the customers at the location where the electricity is actually utilized by the customer's

motors and equipment. Further, adding new transformers where none existed to serve a customer's new or additional electric load or changing a customer's electric service from single phase to two phase or three phase electric service because of a customer's need to increase the quantity or type of electric service are the most common changes in an electric supplier's point of delivery of electric service to a customer.

**ARGUMENT:**

The objected to testimony appearing in bold print is taken out of the context of the whole answer provided by Dew. As noted in Tri-County's initial Memorandum filed June 8, 2011, opposing IP's Motion to Strike, at pages 12-17, this testimony relates to a series of questions and answers in which Dew renders his opinion, based upon electric utility industry engineering principles, that an increase in the transformer phase from a single phase to a three phase transformer constitutes a modification of the "delivery point" from an engineering point of view under Section 1(d) of the Service Area Agreement and increases the capacity of the electric utility to provide electric service to the customer. Dew then renders his opinion regarding what, if any, differences exist between changing the transformer from single phase to three phase on the one hand and adding transformers of the same phase or making similar modifications to the Texas Substation on the other hand in order to increase the ability to serve additional electric load to IP's customers. The answer containing the language objected to by IP relates Dew's opinion that "delivery point" as used in the Service Area Agreement would never include a substation of the parties, because, based upon the opinion of IP's Tatlock, no modifications to the Texas substation would ever make it a "new delivery point" because the only change that would create a new "point of delivery" under the Service Area Agreement is a change in phases of electric current. Nothing in that answer renders a legal conclusion as to the proper interpretation

of the Service Area Agreement. Rather, Dew provides his opinion regarding the engineering meaning of various provisions of the Service Area Agreement which is proper.

6. Exhibit F, Page 27, Lines 4 through 14(Portion of answer objected to by IP)

A. To the extent “point of delivery” or “existing point of delivery” as referred to in Section 1 of the Service Area Agreement between Tri-County and IP is intended to include the Texas substation as a “point of delivery”, then it is **simply unrealistic not to take into account** such changes or additions to the Texas substation when determining if the Texas substation has been modified within the meaning of Section 1 of the Tri-County/IP Service Area Agreement. To the extent Section 1 of the Tri-County/IP Service Area Agreement is not intended to apply to utility substations like the Texas substations, but only to the delivery point where electricity is actually delivered for use by the customer’s motors and equipment such as at the gas plant and eight compressor sites, **then** in that instance, **the modifications to the Texas substation by IP would have no bearing on this case.**

ARGUMENT:

Regarding the above objected to testimony (bold print) IP has picked phrases from Dew’s testimony in order to spin Dew’s testimony as constituting improper expert opinion evidence. Yet, Dew’s testimony when read as a whole is within the bounds allowed. IP’s case is based on the fact IP has determined under the Service Area Agreement, the Texas substation is the “point of delivery” for the Citation gas plant and gas compressor sites and that nothing has changed at that “point of delivery” since March 16, 1968. IP’s Malmedal renders his opinion regarding the meaning of “point of delivery”, “electric service”, and “modifications” of the Texas substation as used in the Service Area Agreement (Malmedal’s Engineering Study for Citation Feeder Modification IP Ex. 5.1 page 6-10 and 10-12). It is proper for Dew to render his opinion based

on his engineering experience and qualifications regarding the engineering effect on the Service Area Agreement of utilizing the Texas substation as a “point of delivery”.

7. Exhibit F, Page 16, Lines 12 through 17.

Q: Is Mr. Malmedal correct in his conclusion that the “point of delivery” as between Citation and IP can only be at the connection of the Citation 12.47 kV distribution line to the IP Texas substation because Citation rather than IP owns the 12.47 kV distribution line and the step down transformers and associated equipment used to reduce the distribution line voltage to a voltage usable by the gas plant, motors and equipment and the compressor site motors and equipment?

Exhibit F, Page 16 lines 18 through 23 (Portion of testimony objected to by IP)

A: **No. Neither the National Electrical Safety Code nor the National Electrical Code definitions of “service” or “service point” depend upon ownership of the facilities because ownership of the facilities can vary depending upon the negotiated arrangements between the electric utility and the customer.** Further, if the “point of delivery” depended upon which of the customer or electric utility owned the facilities necessary to distribute the electric current to the customer’s point of usage and reduce the voltage so it could be

Exhibit F, Page 17, Lines 1 through 7 (Portion of testimony objected to by IP)

used by the customer’s equipment, then the customer could always dictate who its electric provider would be under the Tri-County/IP Service Area Agreement since those service rights are dependent upon where the “delivery point” is situated in reference to the territorial boundary lines negotiated between Tri-County and IP. **Such a definition for “point of delivery” would be subject to manipulation by the customer and/or**

**utility without regard to the rights of either electric supplier under the service area agreement in question or the territorial boundaries established by the service area agreement.**

ARGUMENT:

IP's objects to Dew's testimony highlighted in bold because IP claims Dew is rejecting IP's position that ownership of facilities establishes "point of delivery". Yet, IP never raised that point in its Motion to Strike. IP's original objection claimed the above testimony constituted a legal conclusion. But Dew is testifying about the applicability of the NEC and NESC in determining "point of delivery". The use of the NESC and NEC as a basis for defining "point of delivery" as used in the Service Area Agreement was first testified to by Malmedal. The above testimony is Dew's opinion regarding the engineering meaning of "service" and "service point" in the NESC and NEC and the effect of Malmedal's opinion regarding "point of delivery" on the parties Service Area Agreement. It is proper opinion testimony in reply to the opinion testimony by IP's Malmedal. See Maggi v RAS Development, Inc. Ill App 1<sup>st</sup> Dist WL 2163577 at page 23 (May 26, 2011).

8. IP objects to Dew's Rebuttal Testimony. Ex F, Page 10, Lines 12-16; Page 15, Lines 19-23; Page 16, Lines 1-11; Page 17, Lines 19-21; Page 21, Lines 16-23; Page 22, Lines 1-3 and Lines 9-23; Page 23, Lines 9-23; Page 24, Lines 1-2; and Page 24, Lines 9-12.

ARGUMENT:

IP fails to identify any particular testimony therein that is a legal opinion, legal conclusion or improper comment on testimony or statements of IP witnesses. IP's only comment is that all the above testimony by Dew concludes that if "point of delivery" is defined as being where ownership of facilities changes, that definition would render the Service Area

Agreement meaningless. That opinion by Dew, who is eminently qualified based on his years of experience as an electrical engineer working with the electric utility industry, is proper. The above testimony by Dew refers to his opinion whether the NESC and NEC, both electrical codes used by electrical engineers in their work, utilize the element of ownership in defining “service” or “service point”. Dew’s expertise and experience qualify him to render his engineering opinion on such matter. See Maggi vs RAS Development, Inc. Ill App 1<sup>st</sup> Dist WL 2163577 at page 23 (May 26, 2011) which found plaintiff’s expert in construction safety could properly render an opinion that a particular interpretation placed on a construction contract would render portions of the contract dealing with safety matters pointless.

V. IP’S OBJECTIONS TO THE PREPARED SUPPLEMENTAL REBUTTAL TESTIMONY OF ROBERT C. DEW, JR. P.E.

1. Exhibit G, Page 6, Lines 5 through 22

Q: Is this conclusion by you, that IP is trying to be the electric service provider for the Citation gas plant located in Tri-County service territory by indirect methods through use of the Citation private distribution line, supported by any other testimony in this docket? Exhibit G, Page 6, Lines 8 through 22

A: Yes. I have reviewed the deposition of Keith Malmedal, PHD., P.E. who presented direct testimony on behalf of IP in this docket as IP Ameren Exhibit 5. In that deposition taken on December 2, 2009 commencing at line 24 of page 39 through page 43, Mr. Malmedal specifically stated that if IP owned the 12.47 kV distribution line used to deliver the IP electricity from the Texas substation to the Citation gas plant and the service connection point for the gas plant, then the step down transformers, cut outs, fuses, electrical service conductors, switches and associated equipment would be the service connection point for the gas plant all of which are located in Tri-County service territory. A copy of pages 39-

43 of Mr. Malmedal's deposition is attached to my Supplemental Rebuttal Testimony as Exhibit G-2. **Thus, it is very clear that Citation representatives and IP representatives met and determined that they believed they could circumvent the rules of the Service Area Agreement between Tri-County and IP by having Citation construct a new distribution line and upgrade an older existing distribution line in order to deliver IP electricity from the IP Texas substation to the Citation gas plant situated in Tri-County's service territory.**

2. IP also lists the following parts of Dew's prepared Supplemental Rebuttal Testimony as being objectionable: Ex G, Page 4, Lines 5-23; Page 5, lines 1-8; Page 5, Lines 12-23; Page 6, Lines 1-4, but without identifying specific sentences IP found objectionable except to say Dew's testimony rested on his assumptions regarding weight to be given to a witnesses testimony.

#### ARGUMENT:

IP's own Engineering experts, Malmedal and Tatlock agreed that IP could not serve the gas plant or the seven gas compressor sites if IP owned that distribution line. In IP e-mails between March 9, 2005 and July 14, 2005, IP's engineering experts Tatlock and Siudyla were both of the opinion that Citation could not even serve the gas plant by use of Citation's own distribution line because of the engineering need to install a "new delivery point" at the Citation gas plant located in Tri-County's service territory. IP relies on Grant v Petroff 291 Ill App 3d 795; 684 NE2d 1020; 226 Ill Dec 24 (5<sup>th</sup> Dist 1997). But, in that case the court concluded, regarding the issue of whether the patient gave informed consent, that defendant's expert doctor had sufficient expertise to render an opinion whether the patient's oral consent was sufficient to meet the applicable standard of care. IP also relies on Coyne v Robert H.

Anderson & Assoc. 215 Ill App 3d 104; 574 NE2d 863; 158 Ill Dec 750 (2d Dist 1991). But that decision is not applicable because the court found the engineering expert did not have any greater knowledge in the area of his testimony than a lay person. Given the above statements by IP's experts, Tatlock and Malmedal, Dew is qualified to render his opinion, based upon his reasonable perception of IP's change in its position regarding Tri-County's right to serve the gas plant, as to the engineering effect upon the Service Area Agreement of Citation's use of its own distribution line to bring electric service from the Texas Substation to the gas plant "delivery point" and the delivery points for the seven gas compressor sites located in Tri-County's service territory Altszyler v Horizon House Condominium Asso. 175 Ill App 3d 93; 529 NE2d 704; 124 Ill Dec 723, 729 (1<sup>st</sup> Dist 3<sup>rd</sup> Div 1988); Maggi v RAS Development, Inc. Ill App 1 Dist WL 2163577, at page 23, (May 26, 2011).

VI. TRI-COUNTY'S ENGINEERING EXPERT IS QUALIFIED TO RENDER OPINIONS EVEN IF THEY TOUCH DIRECTLY ON THE ULTIMATE ISSUE

IP seems to attack the engineering qualifications of Robert C. Dew, Jr. P.E. Yet, Dew's qualifications to render electrical engineering opinions regarding the subject matter of this docket are extensive. He earned a B.S. degree in electrical engineering from Purdue University in 1971. His work as a consulting engineer in the electric utility industry has been primarily for rural electric cooperatives for over 38 years regarding design of overhead and underground electric utility facilities, substations, electric transmission facilities, rate and cost of service studies, and providing consulting and expert witness testimony regarding rural electric cooperative territorial disputes. Dew's many years of experience qualify him to render his engineering opinions in this docket. In Maggi vs RAS Develop, Inc. Ill App 1<sup>st</sup> Dist, WL 2163577 at page 23 (May 26, 2011), the court found plaintiff's expert on construction safety had 17 years work experience as a safety officer for OSHA and 11 years in private practice and

thus, had extensive experience in the field of construction safety to draw on in formulating his opinions. Thus the court permitted plaintiff's expert to render his opinion that the effect of Defendant's view of the construction contract safety issues would render the general conditions of the contract meaningless. Dew, in rendering his engineering opinion that the current view of IP and Citation with regard to the use of Citation's privately owned distribution line would render the Service Area Agreement meaningless, is proper and does not decide the ultimate issue. He is stating his opinion of the engineering effect of IP's and Citation's position upon the Service Area Agreement which is proper.

#### VII THE PREPARED TESTIMONY OF ROBERT C. DEW, JR. P.E. DOES NOT CONSTITUTE A LEGAL BRIEF

Illinois has now codified the Illinois law of evidence which has in the past been applied by the Illinois Courts (Illinois Rules of Evidence Section 1101 et. seq. effective January 1, 2011). A review of those Rules discloses that striking testimony because it constitutes a legal brief is not recognized by Illinois as a basis for striking testimony. Further, a brief consists of the position of the party, a statement of facts, and the applicable law, 83 Ill Adm Code Section 200.800(a) and (b). The testimony objected to by IP consists of statements by Tri-County's Dew of the facts as he understood them and his expert opinions regarding the issues in this docket. No testimony has been presented by Dew citing the law or applying the law to the facts as Dew understood the facts. Thus, there is no basis for granting IP's motion to strike the testimony of Dew because it constitutes a brief.

Further, IP fails to identify the specific statements contained within the testimony of Dew which IP believes constitutes briefing. By failing to identify the specific testimony IP believes constitutes briefing, IP effectively prevents Tri-County from responding except in a general way.

It also requires the ALJ to search Dew's prepared testimony in order to determine if IP's objection is well taken or not. The ALJ is not required to do that.

## CONCLUSION

In IP's Conclusion, it lists all the pages and lines of Dew's prepared testimony that IP objects to, but fails to identify the specific sentences or provide argument in support of its objections except as noted above. The failure of IP to identify with any specificity the sentences it objects to or present any argument regarding the same constitutes a waiver of the objections, In re Marriage of Shaeb and Khazal, supra 316 Ill Dec at 807.

For the above stated reasons, IP's objections to Tri-County's prepared testimony by Dew should be denied.

TRI-COUNTY ELECTRIC  
COOPERATIVE, INC.

By  \_\_\_\_\_  
One of Their Attorneys

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**PROOF OF SERVICE**

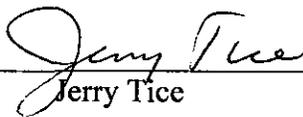
I, JERRY TICE, hereby certify that on the 30th day of June, 2011, I served a copy of the Affidavit attached hereto to the following persons at the e-mail addresses as shown below:

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