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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 FACT WITNESSES

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 Witnesses, Marcia K. Scott, Dennis Ivers, and Bradley Dale Grubb, states as follows:

INTRODUCTION:

IP requests in footnote 2 at page 9 of its Memorandum that the ALJ strike all the prepared written testimony of Marcia K. Scott, Dennis Ivers, and Bradley Dale Grubb for which IP initially filed its Motion to Strike. Yet IP has presented argument in its Memorandum in support of its Motion to Strike only with respect to specifically identified and quoted portions of Scott's, Iver's and Grubb's prepared testimony. In reply, Tri-County will deal with all of the objections raised by IP relative to the prepared testimony of Scott, Ivers and Grubb that are specifically identified and quoted in IP's Memorandum. The balance of IP's Motion to Strike portions of the written testimony of Scott, Ivers and Grubb which IP does not specifically identify in its Memorandum or does not present arguments in support of should be deemed points raised but

not argued and therefore waived. 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; (1st Dist 1st Div 2007).

I. THE PREPARED TESTIMONY OF MARCIA K. SCOTT, DENNIS IVERS, AND BRADLEY DALE GRUBB DOES NOT IMPROPERLY PROVIDE INTERPRETATION OF THE SERVICE AREA AGREEMENT.

A. THE FOLLOWING HIGHLIGHTED PREPARED TESTIMONY OF MARCIA SCOTT DOES NOT IMPROPERLY INTERPRET THE SERVICE AREA AGREEMENT ¹

1. Scott's Prepared Direct Testimony Tri-County Exhibit A, Page 11, Lines 2-15

Exhibit A, Page 10, Lines 21 through 22 and Page 11, Line 1

Q: Why have you determined that Tri-County has the right to provide all of the electric service to the Citation gas plant and the gas compressor sites used to provide gas to the gas plant?

(a) Exhibit A, Page 11, Lines 2 through 15 (Portion of testimony objected to in IP's Motion to Strike)

A: The gas plant and each of the gas compressor sites are new facilities constructed by Citation which have never existed before and did not exist on the date of the Tri-County and IP Service Area Agreement dated March 18, 1968. **Further, in order to deliver electric service to the gas plant and each of the gas compressor sites, Citation had to install a step down transformer and other connecting devices to reduce the voltage at the point of delivery from 12,470 volts to a voltage that can be used by the motors and other equipment to operate the gas plant and each gas compressor site. Such an electric service connection point meets the meaning of an electric service "delivery point" as understood and applied by Tri-County in its electric supplier operations and in its**

¹ 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.

dealings with its member-consumers. **Since the service connection points were not energized on March 18, 1968, Citation's request for electric service at these new "points of delivery" is a request by Citation for new service under Section 1(c) and (d) of the Tri-County/IP Service Area Agreement for the gas plant and gas compressor sites** which are all located, except for one gas compressor site, in Tri-County's exclusive service territory.

(b) Page 10, Lines 16 through 20

A: During the time that I have been General Manager of Tri-County, Tri-County has always, pursuant to its engineering practice, considered a **"new point of delivery"** of electric service to be that point **where electric service is taken from a distribution line and the voltage is reduced from the distribution voltage with the use of a transformer to a voltage acceptable for use by the customer's motors and equipment on the customer's premises.**

Exhibit A, Page 6, Lines 14 through 15

Q: What was your reaction to these discussions with Citation representatives regarding electric service for the Citation gas plant?

(c) Exhibit A, Page 6, Lines 16 through 18 (Portion of testimony objected to in IP's

Motion to Strike)

A: I considered these discussions as **a request for electric service for a facility that had not been in existence prior to the date of the discussion and to which there had not been any electric service energized or provided prior to that date.**

(d) Exhibit A, Page 10, Lines 21 through 22 and page 11, Line 1

Q: Why have you determined that Tri-County has the right to provide all of the electric service to the Citation gas plant and the gas compressor sites used to provide gas to the gas plant?

Exhibit A, Page 11, Lines 2 through 15 (Portion of testimony objected to by IP)

A: The gas plant and each of the gas compressor sites are new facilities constructed by Citation which have never existed before and did not exist on the date of the Tri-County and IP Service Area Agreement dated March 18, 1968. Further, in order to deliver electric service to the gas plant and each of the gas compressor sites, Citation had to install a step down transformer and other connecting devices to reduce the voltage at the point of delivery from 12,470 volts to a voltage that can be used by the motors and other equipment to operate the gas plant and each gas compressor site. Such an electric service connection point meets the meaning of an electric service “delivery point” as understood and applied by Tri-County in its electric supplier operations and in its dealings with its member-consumers. Since the service connection points were not energized on March 18, 1968, Citation’s request for electric service at these new “points of delivery” is a request by Citation for new service under Section 1(c) and (d) of the Tri-County/IP Service Area Agreement for the gas plant and gas compressor sites which are all located, except for one gas compressor site, in Tri-County’s exclusive service territory.

ARGUMENT:

IP takes the highlighted portion of Scott’s foregoing testimony out of context and claims the testimony constitutes an interpretation of the Service Area Agreement. Such claim is incorrect for the following reasons:

(1) Scott's answer to the question read as a whole makes it clear that the installation of the step down transformer at the gas plant to reduce the voltage to a level usable by Citation's electric motors at the gas plant site (a fact not disputed by IP) is an electric service connection and a "delivery point" as understood and applied by Tri-County in its electric operations and its dealings with Tri-County customers. Scott, as General Manager of Tri-County, certainly has the qualifications and standing to explain what factors Tri-County considers based on its electric operations and dealings with customers, when determining the location of the electric service connection and "delivery point" for a customer and explain how Tri-County treated Citation's request to Tri-County for electric service at Citation's new gas plant which was a new service that was not in existence on March 16, 1968. (See Tri-County's Memorandum filed June 8, 2011 in Response to IP's Motion to Strike the above testimony at page 11-12).

(2) Scott is qualified to explain how Tri-County conducts its electric operations when determining a customer's electric service point and "point of delivery" within the meaning of the Service Area Agreement. The implication of IP's argument is that these decisions are made by Tri-County and IP without any reference to the Service Area Agreement. Yet, that Agreement is a binding legal document that governs both Tri-County's and IP's actions when dealing with customers requesting electric service. How each of Tri-County and IP apply the Service Area Agreement to the required engineering principles involved in creating a customer's electric service connection and thus a "delivery point" is inherently relevant and Scott's testimony regarding how Tri-County applies the same is a legitimate explanation of Tri-County's application of the Agreement in the real world. However, even if Scott is not deemed qualified in this area, the court has concluded a lay witness may provide an opinion on the ultimate issue because the trier of fact is not required to accept such opinion Richardson v Chapman 175 Ill 2d

98; 675 NE2d 621; 221 Ill Dec 818, 822 (1997). See also Altszyler v Horizon House Condominium Asso. 175 Ill App 3d 93; 529 NE2d 704; 124 Ill Dec 723, 729 (1st Dist 3rd Div 1988), where the court allowed a non-expert to render opinion as to cause of deterioration and tilt of sidewalk that caused plaintiff's injury. In so doing, the court held opinions and inferences based upon perceptions of the witness that helped to understand the witness' testimony and determine a fact in issue is proper.

2. Scott's Prepared Supplemental Rebuttal Testimony

(a) Tri-County Exhibit H, Page 6, Lines 4-15

Q: What, if anything, would you note with respect to those comments by Mr. Tatlock? Exhibit H, Page 6, Lines 4 through 15 (Portion of testimony objected to by IP in it Motion to Strike)

A: I would note that none of the contracts for electric service between IP and Texaco and IP and Citation **include Tri-County as a party to those contracts. Neither do those contracts reference any of the terms of the Service Area Agreement between Tri-County and IP at issue in this case. Likewise, the Service Area Agreement between Tri-County and IP at issue in this case does not reference those existing electric service contracts between IP and the customer in this case, Citation or Texaco. In addition, Mr. Tatlock's reference to the Part 410 of the administrative rules applicable to The Standards of Service for Electric Utilities and Alternative Retail Electric Suppliers fails to include Part 410.20 entitled "Application" which clearly states that the standards of service for electric utility and alternative retail electric suppliers does not apply to any electric cooperative that is operating within its own**

service territory. I attach a copy of Part 410.20 to my Supplemental Rebuttal Testimony as Exhibit G-1.

ARGUMENT:

The above testimony by Scott is in reply to Tatlock's prepared supplemental testimony found in his June 20, 2008 affidavit (IP Ex 7.2) (IP Ex 7). In paragraphs 6 and 10 of the June 20, 2008 affidavit, Tatlock refers to and quotes from the January 12, 1950 and October 1, 1991 electric service contracts between IP and Texaco, the Citation December 14, 1999 electric service contract and the IP 1965 tariff regarding the definition of "point of delivery". Tatlock presents these IP documents as extrinsic evidence supporting IP's view regarding the meaning of "point of delivery" in the parties' Service Area Agreement. If these contracts and the IP tariff are relevant at all in this docket, it is certainly proper for Scott as Tri-County's highest ranking officer to point out the obvious, that is that Tri-County is not a signatory to or party to the electric service contracts, is not a party to IP's 1965 tariff and that these contracts and tariffs are not mentioned in the parties' Service Area Agreement. Scott's testimony does not constitute a legal interpretation of the electric service contracts or the 1965 IP tariff or the parties' Service Area Agreement, but if it does it is permissible comment Richardson supra 221 Ill Dec at 822.

(b) Tri-County Exhibit H, Page 6, Lines 16-22 and Page 7, Lines 1-5

Q: Is it your understanding that Tri-County Electric Cooperative, Inc. as an Illinois Rural Electric Cooperative is not by definition considered a "public utility" within the State of Illinois.

A: Yes. It has always been my understanding that rural electric cooperatives are not considered a "public utility" under Illinois law. That is the reason why I have understood that references by Mike W. Tatlock to the definition of a "point of delivery"

that appears in the Illinois Administrative Code Title 83: Public Utilities, Chapter I:
Illinois

Exhibit H, Page 7, Lines 1 through 5 (Portion of testimony objected to by IP)

Commerce Commission, SubChapter C: Electric Utilities, **Part 410** Standards of
Electric Service for Electric Utilities and Alternative Retail Electric Suppliers **does not**
apply to Tri-County as an electric cooperative because Part 410.20 entitled
“Application” clearly states that Part 410 does not apply to rural electric cooperatives
when they are operating within their own service territory.

ARGUMENT:

Tatlock, in paragraph 19 of his June 20, 2008 affidavit (IP Ex 7.2), references the
Illinois Administrative Code Title 83: Public Utilities, Chapter I: Illinois Commerce
Commission, SubChapter C: Electric Utilities, Part 410; Standards of Electric Service for
Electric Utilities and Alternative Retail Electric Suppliers Section 410.10 Definitions stating the
term “point of delivery” is defined therein and attaches a copy of Section 410.10 to his affidavit
as IP Exhibit H. Tatlock, by implication, opines that the Administrative Code Section 410.10
definition of “point of delivery” is applicable to the Service Area Agreement in this docket
(Tatlock 6-20-8 Affidavit par 19, IP Ex 7.2 and IP Ex H). It is therefore proper for Marcia Scott
as Tri-County’s highest ranking corporate officer to testify, based on her knowledge of Tri-
County’s corporate documents and corporate organizational structure, as to her understanding
that since Tri-County is an Illinois Rural Electric Cooperative it is not a “public utility” and that
since Tri-County operates solely within its service territory and has made no election under the
Electric Service Customer Choice and Rate Relief Law of 1997 to operate outside its territory as
designated under the Electric Supplier Act, Tri-County is not subject to Part 410 of the Title 83:

Illinois Administrative Code as noted in Part 410.20 of Title 83. See Richardson, supra 221 Ill Dec at 822 and Altszyler, supra 124 Ill Dec at 729.

B. IP'S CLAIM THAT THE FOLLOWING PREPARED TESTIMONY OF DENNIS IVERS AND BRADLEY DALE GRUBB IMPROPERLY INTERPRETS THE SERVICE AREA AGREEMENT IS WITHOUT MERIT

1. Ivers' Prepared Direct Testimony Tri-County Ex. B, Page 2, Lines 18-21

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.

2. Grubb Prepared Direct Testimony Tri-County Ex. C, Page 3, Lines 4-8

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 questions and answers objected to by IP are follow-ups to the answers by both Ivers and Grubb immediately preceding the questions and answers (Ivers Prepared Direct Test. Tri-County Ex B p 2 lines 10-17 and Grubb Prepared Direct Test. Tri-County Ex C p 2, lines 12-22 and p 3, lines 1-3) which asked Ivers if Clyde Finch of Citation contacted Ivers about the new Citation gas plant and asked Grubb if Clyde Finch and Michael Garden contacted Grubb about the new gas plant. The answers by Ivers and Grubb to the questions objected to relate to whether

the gas plant, which the witnesses talk about in their preceding answers, existed and received electric service prior to the date of Finch's and Garden's contacts with the witnesses and relate what Finch and Garden said Citation needed in terms of the transformer and voltage levels to operate the gas plant and whether these conversations concerned an electric service that had not existed prior to the date of the conversations. Ivers and Grubb tell their understanding of these contacts with Citation's Finch and Garden. The questions and answers are proper and should not be struck for any of the reasons given by IP. Even if the questions and answers are deemed to contain an opinion of the witnesses, Ivers as the Director of Engineering for Tri-County and Grubb as Project Engineer for Tri-County are qualified to render their opinions of how they interpreted the contacts by Finch and Garden regarding the Citation gas plant with reference to Tri-County's electric operations and interaction with electric customers. See Altszyler, supra 124 Ill Dec at 729.

Further, IP witnesses Tatlock and Siudyla independently verified in their testimony that the Citation gas plant was a new facility which had never previously received electric service. See Tri-County's Memorandum in Opposition to IP's Motion to Strike Portions of Dennis Ivers' Prepared Testimony at page 5-6 and Tri-County's Memorandum in Opposition to IP's Motion to Strike Portions of the Prepared Testimony of Bradley Dale Grubb at pages 5-6, each filed June 8, 2011.

II. THE PREPARED TESTIMONY OF MARCIA K. SCOTT, DENNIS IVERS AND BRADLEY DALE GRUBB REGARDING THE LEGAL EFFECT OF IP WITNESS STATEMENTS.

A. IP'S CLAIM THAT THE FOLLOWING PREPARED TESTIMONY OF MARCIA K. SCOTT IMPROPERLY COMMENTS ON IP WITNESS STATEMENTS IS INCORRECT.

1. Scott's Prepared Rebuttal Testimony Tri-County Ex. E, Page 7, Lines 13-15 and

Page 7, Lines 16-21. (Portion of testimony objected to by IP).

Q: Was the interpretation of the Service Area Agreement expressed by Mr. Masten in his November 4, 2005 letter different than the prior representations by IP representatives, including Mr. Masten, to Tri-County with regard to this matter?

A: Yes. IP representatives consisting of Michael Tatlock and Todd Masten had consistently advised Tri-County that the Citation gas plant was located in Tri-County's service territory and that the placement of a new transformer and associated equipment for delivering electric service to the gas plant in Tri-County's service territory constituted a new point of delivery and thus, the gas plant was appropriately Tri-County's electric load to serve under the Service Area Agreement.

2. Exhibit E, Page 7, Line 22 and Page 8, Line 1

Q: Had both Tri-County and IP followed this same interpretation of the Service Area Agreement in prior situations similar to this?

Exhibit E, Page 8, Lines 2 through 21 (Portion of testimony objected to by IP)

A: Yes. In the past IP had consistently interpreted the Service Area Agreement to mean that where there is the installation of a step down transformer, such as in this case at the gas plant location, in order to reduce the voltage from the distribution line to a usable voltage by the gas plant equipment, a new delivery point for electric service is created and if the delivery point is located in Tri-County's service territory, it becomes Tri-County's electric load to serve. For instance, when Citation chose to construct a new office and request electric service for that office, Tri-County provided the electric service because the office is located in Tri-County's service territory and because a new step down transformer had to be installed in order to provide electric

service at an appropriate voltage to operate the equipment located at the Citation office. Tri-County was entitled to and did in fact provide electric service and continues to provide electric service at the present time to the Citation office. In this case, it is clear IP changed its position which had been that Tri-County was the appropriate electric provider for the gas plant because the gas plant was a new electric delivery point located in Tri-County's service area to the position that the gas plant did not constitute a new delivery point and therefore IP was entitled to serve the gas plant through the use of the Citation customer owned 12.47 kV distribution line. **This change in position by IP is made quite clear by the July 14, 2005 IP note from Conrad Siudyla to Todd Masten, Jon Carls, and Michael Tatlock** which states IP is now changing its position regarding service rights to the gas plant and that the change is contrary to how similar situations have been handled in the past. A copy of the July 14, 2005 note provided to Tri-County by IP in discovery in this docket is attached to my Rebuttal Testimony as Exhibit E-3 and is a true and accurate copy of the same as provided by IP in response to Tri-County's discovery request in this docket.

ARGUMENT:

IP argues that Scott's Prepared Rebuttal Testimony constitutes comment by Scott on the legal effect of the statements by both Masten and Tatlock regarding the right of Tri-County to provide electric service to the Citation gas plant and such statement by Tatlock and Masten are inadmissible legal conclusions. IP's position is not correct. First, IP did not, in its Motion to Strike, object to the question asked of Marcia Scott found at Page 7, Lines 13 through 15 of Scott's Prepared Rebuttal Testimony, Tri-County Exhibit E. Therefore IP has waived its right to object to the question. IP only objected to Scott's answer. Scott's answer states that Michael

Tatlock and Todd Masten told Tri-County "...that the placement of a new transformer and associated equipment for delivering electric service to the gas plant in Tri-County's service territory constituted a new point of delivery..." and it was Tri-County's right to serve the gas plant. This testimony relates to conversations held between Scott on the one hand and IP representatives Tatlock and Masten and references conversations between IP representatives Tatlock, Siudyla and Masten regarding the request for electric service by Citation to the gas plant which information IP provided Tri-County in discovery and is offered by Tri-County since the service rights at issue in this docket depend on whether a "new point of delivery" was created when Citation built the new gas plant and installed the new transformer, all in Tri-County's service territory. Because "point of delivery" is not defined in the Service Area Agreement, the parties have presented evidence as to what that phrase, among other phrases in the Service Area Agreement, means. When extrinsic evidence is relied upon to discern the meaning of "point of delivery", it is proper for Tri-County's Scott to testify about the historical interpretation and the then current interpretation placed on the Service Area Agreement by Tri-County and IP when dealing with territorial matters. Berry vs. Blackard Construction Co, 13 Ill. Ap. 3d 768; 300 NE 2d 627, 630 (4th Dist. 1973); where the court in construing a disputed construction contract relied upon extrinsic evidence consisting of engineer pay estimates; Occidental Chemical Co. vs Agri Profit Systems Inc., 37 Ill App. 3d 599; 346 NE 2d 482, 484 (2nd Dist. 1975); where the court relied upon extrinsic evidence consisting of monthly statements and payment records in construing ambiguous provisions of a contract regarding the time period for calculating interest on past due balances; Mendelson vs Flaxman, 32 Ill. App. 3d 644; 336 NE 2d 316, 319-320 (1st Dist. 4th Div. 1975) where the court relied upon extrinsic evidence of the parties' actions regarding enforcement of a loan agreement when construing ambiguous interest provisions. See

also Chapman v Checker Taxi Co. Inc. et al 43 Ill App 3d 699; 357 NE2d 111; 2 Ill Dec 134, 148 (1st Dist 4th Div 1976) where the court relied upon testimony of the engineer in charge of the construction contract for the City of Chicago, which was involved in a wrongful death claim arising at the construction site, to provide extrinsic evidence consisting of the engineer's opinion on final acceptance of the contract, the manner in which work was to be performed, and responsibility for its performance. See also New York Central Development Corp. v Byczynski, 95 Ill App 2d 474; 238 NE2d 414, 416-417 (3rd Dist 1968) where the court in an ambiguous real estate exchange agreement turned to extrinsic testimony regarding the actions taken by the parties in searching for replacement property to determine if that requirement was intended to be a condition of the exchange agreement. Further the statements by IP, to which Scott testifies about and which IP now moves to strike, are admissions against the interest of IP regarding how "point of delivery" was applied in the past and in this current case by IP employees who worked in the past and currently work with the Tri-County regarding electric service issues under the Service Area Agreement. Such admissions even though damaging to IP are admissible. See Halleck vs Coastal Bldg. Maintenance, Co., 269 Ill. App. 3d 887; 647 NE 2d 618; 207 Ill. Dec. 387, 392-393 (2d Dist 1995) in which an employee's damaging statement evidencing fault was treated as his employer's party admission. IP has not objected to the statements by Tatlock and Masten testified to by Scott on the basis that they are not admissions or that Tatlock and Masten had no authority to make such statements. Thus, any objection on that basis would be waived by IP.

IP's only objection is that Scott's testimony regarding such statements by IP's Tatlock and Masten concerns the legal effect of such statements. IP cites Village of Oak Lawn v Faber 378 Ill App 3d 458; NE2d 659; 316 Ill Dec 923 (1st Dist 6th Div 2007) where a former village

manager's statement, in an employment contract dispute, that his employment term extended beyond a date certain, was a non binding legal conclusion; Avery v State Farm Mutual Auto Insurance Co. 216 Ill 2d 100; 835 NE2d 801; 296 Ill Dec 448 (2005) holding extrinsic evidence not admissible regarding unambiguous contract. Charter Bank & Trust of Ill v Edward Hines Lumber 233 Ill App 3d 574; 599 NE2d 458; 174 Ill Dec 674 (2nd Dist 1992), where the issue was priority of a mechanic's lien over a mortgage and in which the court excluded testimony regarding a statement by the holder of the mechanics lien that the mechanic's lien was subordinate to the mortgage and Ferry v Checker Taxi Co. Inc. 165 Ill App 3d 754; 520 NE2d 740; 117 Ill Dec 382 (1st Dist 1st Div 1987) where in an accident case the court excluded testimony offered by the defendant taxi company that the plaintiff, who was the injured taxi passenger, said the accident was caused by a third car. The statements against interest in the authority cited by IP were made by lay persons on the ultimate issue to be determined by the trier of fact. However, in this case, the statements by IP witnesses that the gas plant is in Tri-County's territory and the installation of a step down transformer in Tri-County's territory to serve the gas plant creates a "new point of delivery" are not admissions or statements as to a conclusion of law, but are admissions or statements as to material facts identifying how IP witnesses were at the time interpreting the Service Area Agreement. See Lowe v Kang 167 Ill App 3d 772; 521 NE2d 1245; 118 Ill Dec 552, 555-557 (2nd Dist 1988) where counsel's statement in closing argument of a negligence case that his client was somewhat at fault was treated as a judicial admission of his client's liability. Further, even if the admissions by Tatlock and Siudyla, both of whom are IP electrical engineers, regarding "point of delivery" for the Citation gas plant and that Tri-County has the right to serve the gas plant are deemed a legal conclusion or an opinion as to the ultimate issue, Tatlock and Siudyla, being offered as

engineering experts by IP, can directly express an opinion on the ultimate issue and it will not constitute a legal conclusion. Perschall v Metropolitan Life Ins. Co. 113 Ill App 3d 233; 446 NE2d 570; 68 Ill Dec 664, 667 (4th Dist 1983); To the same effect is Watson v State Farm and Casualty 122 Ill App 3d 559; 461 NE2d 57; 77 Ill Dec 670, 673 (3rd Dist 1984).; Crump v Universal Safety Equipment Co. 79 Ill App 3d 188; 398 NE 2d 202; 34 Ill Dec 513, 520 (1st Dist 5th Div 1979). 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 (1st Dist 2nd 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. Accepting IP's argument would render inadmissible all expert opinions of the nature rendered in Perschall, supra 68 Ill Dec at 667 (doctor permitted to testify plaintiff totally disabled as defined in insurance policy; Watson, supra 77 Ill Dec at 673 (error to exclude fire insurance company expert testimony whether plaintiff's fire was accidental), and Crump supra 34 Ill Dec at 520 (defendant's expert permitted to render opinion whether a grinding machine that was not equipped with a guard created an unreasonably dangerous condition).

Scott does not testify about the legal effect of these statements. Rather Scott testifies that the statements were made in the instant case and that historically Tatlock had interpreted IP's Service Area Agreement when dealing with Tri-County in the same manner as he was doing so in the instant case regarding Tri-County's right to provide electric service at the new gas plant. Accordingly, the testimony is proper.

3. Scott's Prepared Supplemental Rebuttal Testimony Tri-County Ex. H, Page 4, Line 22 and Page 5, Lines 1-13.

Exhibit H, Page 4, Line 19 through 21

Q: What if anything does the comment by Mr. Tatlock in his April 7, 2008 Affidavit at paragraph 18, page 4, wherein he states that Citation ultimately decided to extend its own distribution system to provide electric energy to the gas plant, indicate?

Exhibit H, Page 4, Line 22 (Portion of testimony objected to by IP)

A: **This clearly indicates that IP and Citation were attempting to avoid the terms of the**

Exhibit H, Page 5, Lines 1 through 13 (Portion of testimony objected to by IP)

Service Area Agreement at issue in this case by allowing Citation to use its privately owned distribution system to take IP electricity from the Texas substation into the new service connection point established by Citation for the Citation gas plant and located in the Tri-County service territory. It is also important to remember that Citation had to construct 4,119 feet of new 2/O ACSR three phase lines and rebuild 1,161 feet of #4 CU three phase line to 2/O ACSR three phase line in order to be able to distribute IP's electric energy from the Texas substation to the service connection point for the gas plant located in Tri-County's service territory. It certainly appears from Mr. Tatlock's April 7, 2008 Affidavit that IP and Citation concluded they could avoid the requirements of the IP/Tri-County Service Area Agreement if IP did not construct a distribution line, but allowed Citation to construct a new distribution line and rebuild older, inadequate distribution lines to deliver IP's electricity to the new gas plant located in Tri-County's service territory allowing IP to do indirectly what it could not do directly.

ARGUMENT:

The testimony of Marcia Scott objected to by IP (bold print) explains her understanding, as the General Manager of Tri-County, what the effect is when Citation serves the new gas plant with the Citation owned 12,470 volt distribution line when placed in the context of the historical interpretation of the Service Area Agreement by Tri-County and IP regarding service to new electrical connections. The testimony of both Tatlock and Siudyla in their respective prepared testimonies make it clear IP told both Tri-County and Citation that the gas plant electric service was Tri-County's to serve, that IP could not serve the gas plant with an IP owned distribution line, and that Citation could not serve the gas plant by Citation's own 12,470 volt distribution line. Thus, when IP does serve the Citation gas plant by use of Citation's distribution line, the inference is obvious. There simply is no doubt. Additionally, the Tri-County direct testimony regarding Citation's new construction of 4,119 feet of 2/O ASCR three phase line and Citation's rebuilding of 1,161 feet of existing three phase line in order to bring IP electric energy from the Texas substation to the gas plant is not specifically identified by IP as being objected to by IP. Further, it would be unreasonable for IP to object to such testimony since it is not contradicted (Cross examination of Jeff Lewis Tr date 4-26-11 Tr p 1608, 1630, 1631). IP cites People vs McCarter 385 Ill App 3d 919; 897 NE2d 265; 325 Ill Dec 17, 31 (1st Dist, 6th Div 2008). Yet, the court there noted a lay witness could render a conclusion on what a defendant meant by a certain statement if it was obvious from the facts. Given the facts in this case, it is obvious what IP has decided it can do under the Service Area Agreement. Further, Scott can render her opinion that is rationally based on her perception of the fact that IP had changed its position regarding Tri-County's right to serve, Altszyler, supra 124 Ill Dec at 720. Thus, the evidence objected to by IP is a proper explanation by Tri-County's Scott of her understanding why IP's Masten called her on July 14, 2005 to tell her IP had changed its position and the effect of IP's change in

position upon the historical interpretation of the Service Area Agreement when a customer requires a new electric service connection.

B. IP'S CLAIM THAT THE FOLLOWING PREPARED TESTIMONY OF DENNIS IVERS AND BRADLEY DALE GRUBB IMPROPERLY COMMENTS ON THE LEGAL OF STATEMENTS BY IP WITNESSES

1. Iver's Prepared Testimony Tri-County Ex. B Page 2, Line 22 and Page 3, Lines 2 through 8.

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

Exhibit B, 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.**

2. Grubb's Prepared Direct Testimony Tri-County Exhibit C, Page 3, Lines 16 through 22 and Page 4, Lines 1 through 7.

Q: Did you have any other contact with Citation representatives and/or IP representatives regarding electric service to the Citation gas plant?

Exhibit C, Page 3, Lines 18 through 22 (The following portion of the testimony has not been objected to in its Motion to Strike).

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.

Exhibit C, 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.

Exhibit D, 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:

IP's Memorandum specifically identifies only a portion of Ivers' and Grubb's testimony which IP originally identified in IP's Motion to Strike. Thus, the portion of Ivers' and Grubb's testimony which IP originally objected to but does not now present argument on should be deemed waived. As to Ivers' and Grubb's testimony which IP now specifically identifies should be stricken (bold print), Tri-County notes that the testimony merely reports what the witnesses 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). See also Tri-County's ARGUMENT herein at pages 12-16 regarding similar testimony by Marcia K. Scott. Accordingly, the testimony is proper.

III. THE PREPARED TESTIMONY OF MARCIA K. SCOTT, DENNIS IVERS AND BRADLEY DALE GRUBB DOES NOT CONSTITUTE A LEGAL BRIEF.

A. IP'S IDENTIFIED GROUNDS FOR STRIKING THE PREPARED TESTIMONY OF SCOTT, IVERS AND GRUBB IS NOT A PROPER BASIS FOR STRIKING TESTIMONY

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 a recognized basis for striking testimony. A brief consists of the position of the party, a statement of facts and applicable law, and an argument, 83 Ill Adm Code, Section 200.800(a) and (b). The testimony objected to by IP consists of statements by Tri-County's witnesses of the facts as they understood them regarding the issues in this docket. No testimony has been presented by a Tri-County witness citing the law or applying the law to the facts as the witnesses understood the facts. Thus, there is no basis for granting IP's motion to strike for the reasons specified.

Further, IP fails to identify the specific statements contained within the testimonies of Scott, Ivers and Grubb 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 all of the Tri-County prepared

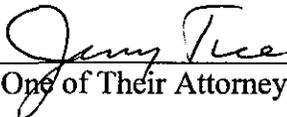
testimony in order to determine if IP's objection is well taken or not. The ALJ is not required to do that.

IV. CONCLUSION

In IP's Conclusion, it lists all the pages and lines of Scott's, Ivers, and Grubb'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.

Therefore, IP's objection to Tri-County's prepared testimony by Scott, Ivers and Grubb should be denied.

TRI-COUNTY ELECTRIC
COOPERATIVE, INC.

By 
One of Their Attorneys

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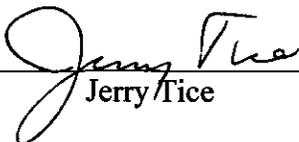
I, JERRY TICE, hereby certify that on the 30 day of June 2011, I served a copy of the Affidavit attached hereto to the following persons at the e-mail addresses as shown below:

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