

OFFICIAL FILE
ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ORIGINAL

JMA
ILLINOIS COMMERCE
COMMISSION

TRI-COUNTY ELECTRIC)
COOPERATIVE, INC.,)

Complainant,)

vs)

ILLINOIS POWER COMPANY, d/b/a)
AMEREN IP,)

Respondent.)

2011 NOV 18 P 2: 22

CHIEF CLERK'S OFFICE

Case No. 05-0767

BRIEF BY TRI-COUNTY ELECTRIC COOPERATIVE, INC.
IN SUPPORT OF TRI-COUNTY'S AMENDED COMPLAINT IN THIS DOCKET

GROSBOLL, BECKER, TICE, TIPPEY & BARR
Attorney Jerry Tice
Attorney Kevin Tippey
101 East Douglas Street
Petersburg, Illinois 62675
Telephone: 217/632-2282

INDEX

	Page No.
A. STATUS OF THE CASE	1
B. FACTUAL STATEMENT BY TRI-COUNTY	2
C. TRI-COUNTY'S CLAIM	26
D. IP'S CLAIM	28
E. CITATION'S CLAIM	28
F. ISSUES PRESENTED IN THIS DOCKET	28
ARGUMENT	29
I. THE SERVICE AREA AGREEMENT DATED MARCH 18, 1968 CONTROLS THE ISSUES IN THIS DOCKET	29
II. THE COMMISSION IS ENTITLED TO RECEIVE EXTRINSIC EVIDENCE TO DETERMINE THE MEANING OF "POINT OF DELIVERY" AS USED WITHIN THE SERVICE AREA AGREEMENT	31
III. THE COMMISSION HAS REJECTED THE DEFINITION OF "POINT OF DELIVERY" AS THE PLACE WHERE ELECTRICITY IS HANDED OFF TO THE CUSTOMER OR NEGOTIATED BY THE CUSTOMER AND ELECTRIC SUPPLIER	35
IV. THE USE OF THE CUSTOMER OWNED DISTRIBUTION LINE TO PROVIDE ELECTRIC SERVICE TO CITATION'S GAS PLANT AND GAS COMPRESSOR SITES DEFEATS THE PURPOSE OF THE ELECTRIC SUPPLIER ACT	38
V. ILLINOIS POWER SHOULD NOT BE ALLOWED TO DO INDIRECTLY WHAT IT CANNOT DO DIRECTLY	41
VI. IP HAS MODIFIED ITS TEXAS SUBSTATION SUCH THAT IT CONSTITUTES A NEW POINT OF DELIVERY.	42
VII. CONTRACTS MUST BE CONSTRUED SO AS TO AVOID ABSURD OR UNFAIR RESULTS	44
VIII. CITATION DOES NOT HAVE A UNILATERAL RIGHT TO CHOOSE ITS ELECTRIC SUPPLIER	45

A.	THE ELECTRIC SERVICE CUSTOMER CHOICE AND RATE RELIEF ACT OF 1997 DID NOT ESTABLISH A SWEEPING PUBLIC POLICY ALLOWING UNCHECKED CUSTOMER CHOICE OF ELECTRIC SUPPLIERS	45
B.	ELECTRIC COOPERATIVES HAVE BEEN EXCLUDED FROM THE DEREGULATION ACT.	47
C.	THE LEGISLATURE WHEN ADOPTING THE DEREGULATION ACT DID NOT AMEND OR REPEAL THE ELECTRIC SUPPLIER ACT	48
	CONCLUSION	49
	APPENDIX	i

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

Case No. 05-0767

BRIEF BY TRI-COUNTY ELECTRIC COOPERATIVE, INC.
IN SUPPORT OF TRI-COUNTY'S AMENDED COMPLAINT IN THIS DOCKET

TRI-COUNTY ELECTRIC COOPERATIVE, INC. (Tri-County) by its attorneys,
GROSBOLL, BECKER, TICE, TIPPEY & BARR, files herewith its Brief in Support of
Tri-County's Amended Complaint in the above docket and in support thereof states as follows:

A. STATUS OF THE CASE

1. Tri-County filed its original Complaint against Illinois Power Company dba AmerenIP (IP) December 6, 2005, alleging the right to provide electric service to a gas plant constructed and operated by Citation Oil & Gas Corporation (Citation) on property located in Marion County, Illinois and in Tri-County's territory established by a Service Area Agreement between Tri-County and IP dated March 18, 1968. On February 7, 2007, Tri-County filed its Amended Complaint adding Count II alleging it has the right to provide electric service to not only the gas plant but to seven of eight new gas compressor sites operated by Citation to feed gas to the gas plant because seven of the gas compressor sites are located in Tri-County's service territory. IP filed its answer denying Tri-County's right to provide electric service to the gas plant and seven of eight gas compressor sites. The parties conducted discovery and filed cross motions for summary

judgment on Tri-County's amended complaint and IP's answer thereto. Both motions were denied by order of the Administrative Law Judge (ALJ) on February 20, 2009 primarily because the parties presented differing opinions by professional engineers regarding the meaning of the term "point of delivery" as used in the Service Area Agreement.

On February 29, 2010, Citation filed a petition to intervene which was granted by the ALJ on August 12, 2010. The order denied Citation the right to present testimony or raise new evidentiary issues because Citation's petition to intervene was not timely filed. The ALJ's August 12, 2010 ruling was modified by order entered October 5, 2010 allowing Citation to present testimony limited to Citation's legal argument that it has a statutory right to choose its electric supplier.

Thereafter, evidentiary hearings were conducted on January 12, 13, 14; February 4; and April 26, 27, and 28, all in 2011. Motions to strike testimony regarding Tri-County's witnesses were filed by IP and Citation. The motions were denied by the ALJ in an order entered August 15, 2011 except for two references found at paragraph 5, page 14 and two references in the first full paragraph on page 16 in the engineering report of Tri-County witness Robert C. Dew, Jr. P.E. which references were stricken. Dew's engineering report is Tri-County Exhibit D-T.

On August 18, 2011, a briefing schedule was set and a status hearing was scheduled for December 16, 2011 at 10:00 A.M.

B. FACTUAL STATEMENT BY TRI-COUNTY

1. Tri-County is an Illinois general not-for-profit corporation engaged in the business of the sale and distribution of electrical energy in Jefferson, Marion and Washington Counties, Illinois. IP is an Illinois corporation engaged in the business of generation, distribution, and sale of electrical energy in the State of Illinois. Both are electric suppliers within the meaning of the

Electric Supplier Act, 220 ILCS 30/1 et seq (Act) (Tri-County Amended Complaint).

2. Marcia Scott is the General Manager of Tri-County with direct control and supervision over Tri-County's records, all management and operational functions, and personnel of Tri-County (Scott's Direct Test p 2, Tr 1/12/11 p 498). Dennis Ivers, Director of Engineering for Tri-County, and Bradley Grubb, Superintendent of Operations for Tri-County, report to Scott (Scott Re-Direct Test Tr 1/12/11, p 581-582, 584).

3. Pursuant to the provisions of Section 6 of the Act, Tri-County and IP entered into a Service Area Agreement dated March 18, 1968 (Agreement) and approved by the Commission on July 3, 1968. The Agreement delineates between Tri-County and IP one or more service areas located in Marion County, Illinois. A copy of the Service Area Agreement is attached as Exhibit A-1 to Scott's Direct Testimony (Scott Direct Test p 3; Tri-County Exs A and A-1; Tr 1/12/11 p 498).¹

4. A customer, Citation, constructed a gas plant located in Section 5 and eight gas compressor sites located in Sections 6, 7, and 8 of Township 1 North and Sections 20, 29, 30, 31, and 32 of Township 2 North, Range 2 East of the Third P.M., Marion County, Illinois. The location of the gas plant and compressor sites are shown on the map marked Tri-County Exhibit A-3 (Scott Direct Test p 3-4, Exs A and A-3, Tr 1/12/11 p 498).² The gas plant has a total electric load of 566 KW (Grubb Direct Test p 2-3, Tri-County Ex C, Tr 1/12/11 p 696). Gas compressor site number six is located in IP's service territory and the other seven and the gas plant are located in Tri-County's service territory (Tri-County Ex A-3 and Scott Direct Test p 4-5, Tri-County Ex

¹ A copy of the Service Area Agreement Tri-County Ex A-1 is reproduced in the Appendix to this brief.

² A copy of the colored map Tri-County Exhibit A-3 is reproduced in the Appendix to this brief.

A; Tr 1/12/11 p 498) and are therefore subject to Section 3(a) of the March 18, 1968 Agreement (Dew Oct 2007 Eng Report Tri-County Ex D-2 p 2, Tr 1/13/11 p 745).

5. The electric service connection point to each of the gas compressor sites consists of three 75 KVA overhead transformers mounted on wooden utility poles with brackets, fused cutouts, and the necessary service conductors which reduce the distribution line voltage from 12,470 volts to 277/480 volts for use by Citation's motors at each compressor site. The electric service connection point for the gas plant consists of a pad mounted three phase transformer, cutoffs, fuses and associated equipment which reduces the 12,470 volts received from the distribution line down to 277/480 volts for use by the motors and equipment operating the gas plant. None of the electric service delivery points for the gas plant and the gas compressor sites were in existence or energized on March 18, 1968. Dew rendered his engineering opinion, based upon his engineering training and experience in the electric utility industry since 1972, that the described installations constituted "points of delivery" in accordance with standard accepted engineering practices that had been understood in the electric utility industry for a long time and when Citation installed the transformer and service entrance equipment at the gas plant, it created a new point of delivery (Dew Eng Report p 1-2, 15, Tri-County Ex D-2, Dew Direct Test p 3-5, Tri-County Ex D, Tr 1/13/11 p 745; Dew Cross Ex Tr 1/13/11 p. 888-889).

6. Tri-County has a three-phase electric distribution line identified as a black line on Tri-County's Exhibits A-2 and A-3 maps and located approximately 200-250 feet immediately south of and adjacent to the gas plant facilities (Dew Direct Test Tri-County Ex D p 3, Tr 1/13/11 p 745).³ The three phase line was originally constructed as a single phase line June 17, 1939 and was upgraded to a three-phase line November 30, 1948. On February 28, 1986, Tri-County

³ A copy of the colored map Tri-County Exhibit A-2 is reproduced in the Appendix to this brief.

erected a three-phase line located immediately to the west of the gas plant premises to serve Energy West, Inc., which line was retired in December 1997. Also, Tri-County serves the Citation office complex located immediately northwest of and adjacent to the gas plant premises by a single-phase line connected December 29, 1998 by Tri-County for electric service to Citation's office complex (Scott Direct Test p 3-4, Tri-County Exs A and A-2, Tr 1/12/11 p 498). Jeffrey Lewis, petroleum engineer for Citation and a member from December 1998 to January 2006 of the Citation management group responsible for managing the Salem Oil Field, knew Tri-County provided electricity to the Citation office (Lewis Cross Ex Tr 4/26/11, p 1612). Lewis acknowledged Citation wants a different power supplier to provide electricity to the Citation office at the Salem Oil Field so that when IP's electric power to the oil field is disrupted or an outage occurs, Citation's office will have electricity (Lewis Cross Ex, Tr 4/26/11, p 1647-1648).

7. Each of the new gas compressor sites numbered 1 through 8 and the new gas plant receive electric service by means of the IP Texas Substation from which the electricity is taken by Citation through its private 12,470 volt distribution line to each of the delivery points for the gas compressor sites and the gas plant (Dew Direct Test p 2-3, Tri-County Ex D; Tr 1/13/11 p 745). All of the delivery points, except the delivery point for gas compressor site 6, are situated within the Tri-County designated service territory (Scott Direct Test p 4-5, Tri-County Exs A and A-3, Tr 1/12/11 p 498).

8. On February 18, 2005, Clyde Finch, Citation's production engineer, contacted Dennis Ivers, Tri-County's Director of Engineering, requesting electric service from Tri-County for the gas plant together with a 1500 KW transformer with delivery voltage of 277/480 volts. On February 18, 2005, Bradley Grubb met with Michael Garden, Citation's electrical supervisor for the Salem Oil field, and then again with Garden and Finch on March 10, 2005 to discuss the

location of the gas plant, the KW connected load for the gas plant and the electrical facilities required, including the need for distribution lines and transformers, to provide electric service to the gas plant (Scott Direct Test p 5-6, Tri-County Ex A, Tr 1/12/11 p 498; Ivers Direct Test Tri-County, Ex B, p 2 Tr 1/12/11 p 630). On February 18, 2005, Garden requested Tri-County provide Citation an estimate of the cost to extend Tri-County electric facilities to the gas plant which Grubb did and mailed to Garden on February 18, 2005 (Grubb Direct Test, Tri-County Ex C p 2-3, Tr 1/12/11 p. 696). Ivers and Grubb reported these activities to Scott. Scott did not have any reason to doubt the accuracy of the information reported by Ivers and Grubb to her (Scott Re-Direct Test Tr 1/13/11 p 582-585). Scott considered these discussions requests by Citation for electric service for the gas plant as a new facility (Scott Direct Test, Tri County Ex A p 6, Tr 1/12/11 p 498).

9. On Monday, March 7, 2005, Finch of Citation contacted IP's electrical engineer, Michael Tatlock, about providing electric service to the gas plant. Finch told Tatlock the gas plant would require a 1500 KW transformer but actual demand would not exceed 750 KW at peak plant operation. Tatlock understood that Citation's Finch was asking for a new point of delivery consisting of a 1500 KW step down transformer located within 200 feet of the gas plant to reduce the distribution line voltage of 12,470 volts to a lower voltage usable by the electric load of the gas plant which was in the 500-700 KW range (Tatlock Cross Ex Tr 1/14/11 p 1207-1217). Tatlock told Finch the gas plant was located in Tri-County's service territory and that IP could not provide the electric service unless Tri-County consented (Scott Direct Test p 7, Tri-County Ex A and IP e-mails Tri-County Ex A-5 Tr 1/12/11 p 498; Tatlock Cross Ex Tr 1/14/11 p 1206-1210). Tatlock told Finch that Citation had to move the gas plant north into IP's service territory to get IP service (Tatlock Cross Ex Tr 1/14/11 p 1245-1246).

10. Tatlock understood the gas plant's new point of delivery would consist of the 1500 KW transformer, the meter, and wiring or conductor from the transformer to the gas plant building. The electricity, after the voltage reduction, would be used to operate the customer's equipment which Tatlock and Siudyla envisioned would be electric motors, lights, and facilities (Tatlock Cross Ex Tr 1/14/11 p 1224-1228; Siudyla Cross Ex Tr 2/4/11 p 1323).

11. Tatlock envisioned IP would serve the gas plant's 1500 KW transformer by building a new 12,470 volt IP distribution line at an estimated cost of \$15,000.00 to \$20,000.00 in a southerly direction from a point located near Citation's gas compressor site number 6 to the gas plant which is located approximately one-quarter mile south of gas compressor site number 6 (Tatlock Cross Ex Tr 1/14/11 p 1214-1215 & 1229-1235).

12. Siudyla explained that KW is an electrical term meaning the peak demand or rate at which Citation's proposed gas plant would use power to operate electric motors, lights and facilities inside the plant. Siudyla understood on March 9, 2005, that Citation's Finch was requesting a 1500 KW step down transformer for the gas plant located at a point near the gas plant to reduce the voltage from the distribution line or transmission line voltage to a voltage level needed by the customer (Siudyla Cross Ex Tr 2/4/11, p 1316-1318, 1323-1326, 1328-1329) which would be a new service and a new point of delivery in Tri-County's territory which IP could not serve (Siudyla Cross Ex Tr 2/4/11, p 1346-1347, 1349-1351), and IP could not extend its distribution line to the gas plant to provide the electric service (Siudyla Re-Direct Ex Tr 2/4/11, p 1375-1377).

13. On April 25, 2005, Tatlock confirmed Citation's gas plant was in Tri-County's service territory and asked IP's Siudyla to inform Citation's Finch that Citation would need to move the gas plant between one-quarter mile and one-half mile north of its existing location in

order for IP to provide the electric service (Scott Direct Test p 7, Tri-County Ex A & A-5, 4/25/05 e-mail, Tr. 1/12/11 p 498). On April 26, 2005, Siudyla communicated with employees of IP, including IP's then regulatory specialist Todd Masten, that Tri-County has the right to serve the Citation gas plant electric load and that if Citation extends its distribution line to the gas plant load, it would violate the Agreement between Tri-County and IP (Scott Direct Test p 7-8, Tr 1/12/11 p 498; Tri-County Ex A-5, 04/26/05 IP e-mail; Siudyla Cross Ex Tr 2/4/11, p 1352-1353). The plant was never relocated in IP's territory (Tatlock Cross Ex Tr 1/14/11 p 1252).

14. Tatlock has held the front line responsibility (Masten Direct Test p 2-3, IP Ex 3; Tr 4/26/11 p 1555; Masten Cross Ex Tr 4/26/11 p 1414-1415) since 1995 for dealing with the Tri-County/Illinois Power Service Area Agreement (Tatlock Cross Ex p 1175-1176; 1181-1182) and used the Tri-County and IP Service Area Agreement as a reference to determine territorial issues between Tri-County and IP several times each year (Tatlock Cross Ex Tr 1/14/11 p 1186-1187). Tatlock normally dealt with Dennis Ivers of Tri-County regarding territorial issues and communicated with his direct supervisor Kelly Bauza and IP's regulatory specialist either by e-mail or in person. If Tatlock determined Tri-County should serve the customer, he would explain to the customer there was an issue and then refer the customer to Dennis Ivers at Tri-County. Tatlock did not work with Todd Masten until early 2005 (Tatlock Cross Ex Tr 1/14/11 p 1188-1193).

15. Because of the Illinois Power and Ameren merger, Masten did not start dealing with the Tri-County and IP Service Area Agreement until early 2005. Prior to that time, Bob Perks was the regulatory specialist dealing with Tri-County regarding territorial issues, but Perks had left the company before the Citation territorial issue arose (Masten Cross Ex Tr 4/26/11 p 1414-1417). Tatlock had dealt with the Tri-County/Illinois Power Service Area Agreement longer than had

Masten (Masten Cross Ex Tr 4/26/11 p 1425).

16. On April 26, 2005 Masten knew Citation intended to build the gas plant with an expected 750 KW electric load and a 1500 KW transformer located in Tri-County service territory. He also knew Citation would have to request electric service for the gas plant from Tri-County (Masten Cross Ex Tr 4/26/11 p 1426-1431) and that Tatlock and Siudyla had told Citation it could not bring electricity from IP's Texas Substation to the gas plant by use of the Citation distribution line (Masten Cross Ex Tr 4/26/11 p 1436-1437).

17. On June 21, 2005, IP employees were still advising Citation that IP could not provide electric service to the Citation gas plant without consent by Tri-County, that Tri-County would consider Citation's request to IP for electric service to the gas plant as a request for a new electric service delivery point (Scott Direct Test p 8, Tri-County Ex A; Tri-County Ex A-5, IP 6/21/05 email, Tr. 1/12/11 p 498), and Citation could not use its own distribution line to bring electricity from the IP Texas Substation to the gas plant in Tri-County's service territory (Siudyla Cross Ex Test Tr 2/4/11 p 1355-1356). Masten also knew on June 21, 2005, that both Tatlock and Siudyla were still telling Citation that IP could not serve Citation's gas plant and that Citation could not use its own distribution line to serve the gas plant (Masten Cross Ex Tr 4/26/11 p 1440-1445). Between March 2005 and June 21, 2005, Masten never told Tatlock or Siudyla that the information they were providing Citation regarding Tri-County's right to provide electric service to the Citation gas plant was incorrect (Masten Cr Ex Tr 4/25/11 p 1445-1446).

18. On June 22, 2005, Tri-County employees Scott, Ivers and Grubb met with Citation's Jeff Lewis and Edward J. Pearson. Citation advised Tri-County that Citation wanted to build its own distribution line to the gas plant. Tri-County did not consent to the Citation request (Scott Direct Test p 8, Tr 1/12/11 p 498).

19. Between December 1998 and January 2006, Lewis was part of the Citation Management Group overseeing the Citation Salem Oil Field and responsible for the oil production and profitability of the oil field (Lewis Direct Test, IP Ex 4 p 2, Tr 4/26/11 p 1591) by minimizing utility rates and seeking reliable electric service (Lewis Cross Ex Tr 4/26/11, p 1594-1598). Lewis was aware that Finch met with Tri-County and that Finch had received cost estimates to connect Tri-County electric to the gas plant (Lewis Cross Ex Tr 4/26/11 p 1603).

20. Lewis testified he and Edward J. Pearson, Citation Production Engineer, met with Scott and others of Tri-County in Tri-County's office in Mt. Vernon in June or July to discuss electric rates, the cost to supply electricity to the gas plant, and to check if Tri-County had enough capacity and the right to supply electricity to the gas plant. Tri-County informed Lewis it did have the right to serve the gas plant and adequate capacity to do so (Lewis Cross Ex Tr 4/26/11 p 1613-1618).

21. When Lewis met with Scott on June 22, 2005, Lewis was aware Citation's gas plant was in Tri-County's service territory and he assumed Tri-County would claim the load (Lewis Cross Ex Tr 4/26/11, p. 1624-1626). Lewis did not recall if he had seen the territorial agreement, but had seen a map of the territorial boundary between Tri-County and IP. He did not recall who provided the map to him nor if he had ever had a meeting with Tri-County prior to the June or July 2005 meeting (Lewis Cross Ex Tr 4/26/11 p 1627-1628). Lewis admitted he had contacted IP in June 2005 about IP providing electric service to the gas plant and that IP's Siudyla told Lewis Citation's gas plant was in Tri-County's territory and that IP could not serve it (Lewis Cross Ex Tr 4/26/11 p 1633-1634, Scott Direct Test Tri County Ex A p 8, Tr 1/12/11, p 498).

22. Although Lewis thought he had talked by phone with Marcia Scott, he did not recall when (Lewis Cross Ex Tr 4/26/11, p 1627-1628). Scott however testified she received a phone

call from Lewis on January 8, 1999, during which Lewis asked if Tri-County could provide electricity to the entire Salem Oil Field which Lewis said Citation had recently purchased. Scott said Tri-County needed more information in writing from Citation. Scott made a note to check the Service Area Agreement and the Tri-County/IP territory boundary. Scott was again contacted in August 1999 by Jack Edwards, Energy Manager for Citation, stating Citation was negotiating with IP regarding electric rates and wanted to know if Tri-County would serve part of the Salem Oil Field. Scott said Tri-County could only serve the portion of the Salem Oil Field in Tri-County's service territory. Lewis called Scott on September 29, 1999 and told Scott that Tri-County's interruptible rate was higher than Citation wanted to pay. Edwards again contacted Scott in June 2001 asking if Tri-County could use an IP built distribution line to serve part of Citation's oil field. Scott told him it depended on where the portion of the oil field Tri-County was being asked to serve was located in relationship to the territory boundary between Tri-County and IP (Scott Rebuttal Test, Tri-County Ex E, p 2-5; Tr 1/13/11, p 498).

23. On July 5, 2005, when Tri-County representatives, Scott, Ivers and Grubb met with Citations' Lewis and Pearson and IP's Tatlock and Masten to discuss service to the gas plant, Tatlock and Masten acknowledged the gas plant as then located was in Tri-County's service territory and Tri-County had the right to provide electric service to the gas plant (Scott Direct Test p 8-9, Tri-County Ex A; Ivers Direct Test p 3, Tri-County Ex B; Grubb Direct Test p 3-4, Tri-County Ex 6, Tr 1/12/11 p 498; Tatlock Cross Ex Tr 1/14/11 p 1261). Masten testified he did not have a great recollection of the conversations that took place at the July 5, 2005 meeting with Tri-County, IP, and Citation (Masten Re-Direct Tr 4/26/11, p 1523, 1525). However, Masten testified that during that meeting he did not inform Tri-County that it did not have the right to provide electric service to the Citation gas plant (Masten Cross Ex Tr 4/26/11, p 1446-1447).

Masten further testified his understanding that Citation wanted to take a new connection for electric service at the gas plant was based on the March 9, 2005 e-mail between Tatlock and Siudyla (Masten Re-Direct Tr 4/26/11, p 1520). Masten agreed if IP built the distribution line to the Citation gas plant, it would create a new delivery point between IP and the gas plant (Masten Cross Ex Tr 4/26/11, p 1509-1510).

24. After the July 5, 2005 meeting with Tri-County, Lewis met with IP's Masten and Jon Carls during the afternoon of July 5, 2005, to discuss electric service to the gas plant. Masten made notes of the meeting noting it was Citation's position that the gas plant was an extension of the same service to the oil field (Masten Cross Ex Tr 4/26/11, p 1447-1450; Tri-County Ex O, Tr 4/26/11, p 1449, 1517; Masten Re-Direct Ex Tr 4/26/11, p 1528-1529).

25. Lewis also wrote a letter dated July 8, 2005 to Masten explaining Citation could not have two separate electric suppliers for the Salem Oil Field. Lewis claimed if IP served the gas wells and Tri-County served the gas plant and IP lost power, the gas wells would shut down but the gas plant would continue to operate (Lewis Direct Test p 6, IP Ex 4, Tr 4/26/11 p 1591).

However, Lewis testified Citation has four separate circuits in the Salem Oil Field and the gas plant and the gas wells are not all on the same circuits. He also testified Citation has a mechanism in place to shut down the gas plant or the gas wells if the circuits serving the gas plants or the wells suffer an outage (Lewis Cross Ex Tr 4/16/11, p 1645-1646). Dew and Michael Garden, Senior Production Foreman for Citation, both testified the Citation Oil Field has four electric circuits identified as the South Circuit, Texas Circuit, Plant Circuit, and Magnolia Circuit. Garden identified these circuits on Tri-County Cross Examination, Exhibit G-4 (Tr 1/13/11 p 745)⁴ which was IP Exhibit 10.2 sponsored by Garden (Garden Direct Test, IP Ex 10 and IP Ex 10.2, Tr 4/27/11

⁴ A copy of Tri-County colored map Ex G-4 is reproduced in the Appendix to this brief.

p 1677) (Dew Supp Rebuttal Test p 10-11, Tri-County Ex G, Tr 1/13/11 p 745). Garden testified that gas compressor sites No. 1 and No. 5 are on the Magnolia Circuit, gas compressor sites No. 2 and No. 3 are on the Texas circuit, gas compressor sites No. 4, No. 7, and No. 8 are on the South circuit and gas compressor site No. 6 and the gas plant are on the plant Circuit (Garden Cross Ex Test Tr 4/27/11, p 1685-1690). Garden testified Citation experiences electric outages on its four circuits from time to time caused by storms, lightning and animals. The outages may be on just one or on more than one of the four circuits (Garden Cross Ex Tr 4/27/11, p 1694-1696).

26. Dew rendered his engineering opinion that using two different electric suppliers to provide electricity in Citation's oil field would not cause harm to the equipment if automatic switches were installed so that if power were lost at the gas plant, power to the compressor sites could be cut off or if power were lost to one or more of the gas compressor sites, power could be shut off at the gas plant (Dew Rebuttal Test p 30-31, Tri-County Ex F, Tr 1/13/11 p 745). Dew testified that because the gas plant and gas compressor sites were not all on the same circuit, Citation's facilities were already at risk if Citation lost power on one or more of its circuits unless it had an automatic shut off mechanism in place (Dew Supp Rebuttal Test p 15; Tri-County Ex G, Tr 1/13/11 p 745).

27. Masten did not consider relevant the claim by Lewis that if Tri-County served the gas plant and Tri-County lost power and IP served the gas compressors which would still have electric power, then the gas from the compressor sites would flare in the air (Masten Cross Ex Tr 4/26/11, p 1506). Also, Masten could not point to any specific facts in Lewis' July 8, 2005 letter to Masten that made Masten formulate his decision in Masten's July 15th letter to Lewis stating that IP could serve the gas plant (Masten Cross Ex Tr 4/26/11, p 1484-1486).

28. On July 14, 2005, Masten called Tri-County's Scott and said IP had changed its mind

and intended to provide electric service to the Citation gas plant on the basis of IP's service to the Citation oil field through its Texas Substation (Scott Direct Test p 9, Tri-County Ex A; Tr 1/12/11 p 498; Masten Cross Ex, Tr 4/26/11, p 1452-1453). Masten further testified he did not reach the decision in his July 15, 2005 letter to Lewis on his own (Masten Re-Direct Tr 4/26/11, p 1534, 1536) but that four people participated in the July 5, 2005 IP meeting with Citation (Masten Re-Cross Exam Tr 4/26/11, p 1538). While Masten testified the July 15, 2005 letter was to clarify IP's position (Masten Re-Cross Exam Tr 4/26/11, p 1546), he acknowledged IP's position was clearly expressed in the March 9, 2005 through June 21, 2005 e-mails between IP representatives Tatlock and Siudyla and Masten that IP could only serve the gas plant if Citation moved the gas plant to IP's service territory (Masten Re-Cross Exam Tr 4/26/11, p 1543-1552).

29. IP's Tatlock in his direct testimony rendered his opinion that the term "point of delivery" for electric service is where the electricity is "handed off" to the customer (Tatlock Supplemental Test IP Ex 7; Tatlock 6/20/08 Affidavit, IP Ex 7.2, Par. 19, p 5-6, Tr 1/14/11 p 1167). However, this testimony contradicted his statement on cross examination that the 1500 KW transformer located approximately 200 feet from the gas plant reduced the voltage from 12,470 volts distribution line to a voltage usable by the gas plant and thus constituted a new "delivery point" (Cross Ex Tr 1/14/11, p 1207-1217, 1224-1228) and Tatlock's direct testimony that Citation's request he received from Finch required a new point of delivery for the gas plant which was located in Tri-County's territory (Tatlock Direct Test p 6; IP Ex 1, Tr 1/14/11, p 1167).

30. Dew testified that, based on his engineering experience, the "point of delivery" referred to by Tatlock in his direct testimony relates to the point at which assignment for liability resulting from electric energy is transferred from the electric supplier to the customer and takes into account only one purpose of "point of delivery" and fails to include the complete meaning of

“point of delivery” as used in the electric utility industry. Dew testified that generally the “point of delivery” for purposes of assigning liability is the same location where the distribution line voltage is reduced to a voltage usable by the customer to operate equipment (Dew Direct Test p 5-6; Tri-County Ex D, Tr 1/13/11, p 745).

31. Dew investigated the Texas Substation and noted IP had made extensive modifications since March 18, 1968 which cost IP between \$500,000.00 to \$1,000,000.00 over the years and were made to enable IP to serve existing electric load and new electric load from the Texas Substation. Dew identified the modifications to the Texas Substation which in his engineering opinion constituted modifications which increased the capacity of the Texas Substation to serve additional and/or new loads as follows:

<u>Dates</u>	<u>Modification/Addition</u>
02/24/69	Foundation for and 6,000 KVR capacitor bank installed
1969	3,000 KVAR capacitor bank installed
04/1971	Installed 6,000 KVR (69KV 10,800/6,000 T-KVAR capacitor) to correct excessive voltage crop caused by additional load added to the substation
1972	Added 15 KV oil circuit breaker and vacuum circuit breaker
1973	Added a 15KV oil circuit breaker to protect transformer #2
1974	Added 1,200 amp 14.4KV Allis Chalmers oil circuit breaker
1976	Replaced transformer #2
10/03/78	Added a three phase Westinghouse transformer
1991	Added a 12KV vacuum circuit breaker GE type
1991	Added a 15KV circuit breaker
1992	Added a SCADA system and associated communication additions

which allow IP to maximize the existing capacity carried by the substation thereby allowing IP to serve additional load from the substation.

(Dew Direct Test, Tri-County Ex D p 7-13, Tr 1/13/11 p 745)

Dew rendered his engineering opinion that if the Texas Substation is considered a “delivery point” for the gas plant and gas compressor sites the many modifications to the Texas Substation by IP would in his engineering opinion cause the Texas Substation to be a new “point of delivery” under Section 1(d) of the Service Area Agreement (Dew Oct 2007 Engineering Report, p 14, par 4, Tri-County Ex D-2, Tr 1/14/11, p 745). Dew testified that neither Tatlock or Malmedal contradicted Dew’s opinion that the modifications made by IP to the Texas Substation allowed IP to increase the capacity of the Texas Substation to provide additional electric service to IP customers including Citation (Dew Rebuttal Test, Tri-County Ex F, p 5-6. Tr 1/13/11, p 745).

32. Tatlock however testified that there had been no modifications to the Texas Substation within the meaning of Section 1(d) of the Service Area Agreement because there had been no change in the phases of the electricity at the substation which was originally built as a three phase substation and had always been a three phase substation (Tatlock Supplemental Direct Test, Affidavit IP Ex 7.2, par 13, p 4, Tr 1/14/11, p 1167).

33. Dew testified that if Tatlock’s opinion that the Texas Substation was the “delivery point” for Citation’s gas plant and gas compressor sites and no modification occurred to the Texas Substation as a “delivery point” unless a phase was added or taken away at the substation, then there could never be any modifications to substations under Section 1(d) of the Agreement. He noted that substations are the heart of the electric suppliers’ distribution system with electric power delivered from the generating station at 34.5 KV or 69 KV to the substation where transformers reduce the voltage to 12.47KV for distribution across 12.47KV distribution lines to transformers at

the customer's site which reduce the distribution line voltage to a voltage usable by the customer's motors. Dew testified that the only phases of electricity utilized in the electric utility industry are single phase for residences and small motors, two phase or V phase for larger motors, and three phase for customers who have motors that only operate on three phases of electricity. Thus, all substations of the type used by IP and Tri-County are constructed to handle three phases of electric current because some customers need three phases of electricity (Dew Rebuttal Test, p 3-5, Tri-County Ex F, Tr 1/13/11, p 745). Tatlock's interpretation that the Texas Substation could only be modified by the addition of or removal of a phase led Dew to the engineering conclusion that "delivery point", as utilized in the agreement, does not mean the substation location but means the step down transformers and associated equipment installed to reduce the distribution line voltage to a voltage usable at the location of the customer's motors and equipment. Dew testified his opinion is further supported by the fact that 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 to increase a customer's 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. Dew testified that in such instances, a new delivery point under Section 1(d) of the Service Area Agreement is created because the modifications 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 phase current rather than single phase current to the customer's location. Dew further noted such changes constitute an increase in both the capacity to serve as well as adding additional phases to the delivery point and 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 at a

voltage usable by the customer's motors and equipment (Dew Rebuttal Test p 5-8, Tri-County Ex F, Tr 1/13/11, p 745).

34. Dew also testified that if the Texas Substation is the delivery point for the utilization of electricity by Citation in the Salem oil field, then Citation could disconnect its distribution line from IP's Texas Substation and connect it to the Tri-County Salem Substation located nearby which would become the delivery point for the Citation Salem Oil Field resulting in a switch in the electric service used by Citation from IP to Tri-County (Dew Rebuttal Test p 9, Tri-County Ex F, Tr 1/13/11 p 745). Malmedal, IP's outside electrical engineer, agreed that from an engineering standpoint, Citation could disconnect its 12,470 volt distribution line from the switching station at the Texas Substation and reconnect it to the Tri-County Salem Substation and take electricity from Tri-County and power the Citation gas plant, gas compressors and all of the Salem Oil Field or even serve an electric load similar to the gas plant electric load located 20 miles distant (Malmedal Cross Ex, Tr 4/28/11, p 1951-1952).

35. Malmedal rendered his opinion that the delivery point for the gas plant and gas compressor sites was where Citation's 12,470 volt distribution line connects to IP's Texas Substation because that is where the ownership of the electricity changed and where the electricity was handed off by IP to Citation (Malmedal Direct Test, IP Ex 5, Tr 4/28/11, p 1815, Malmedal 11/5/09 Engineering Report, p 6, IP Ex 5.1, Tr 4/28/11, p 1815). Malmedal based his opinion on the 2008 National Electrical Code (NEC) and the 2007 National Electrical Safety Code (NESC) (Malmedal 11/5/09 Engineering Report, p 7, Figure 7, IP Ex 5.1, Tr 4/28/11, p 1815) although Malmedal said the NEC does not apply to Citation or IP or Tri-County but the NESC does apply to IP and Tri-County (Malmedal Cross Ex, Tr 4/28/11 p 1894-1896).

36. Dew explained Malmedal incorrectly relied on the 2008 NEC and the 2007 NESC

because neither defined “delivery point” and neither was in existence when the 1968 Service Area Agreement between Tri-County and IP became effective. Rather, the 1965 edition of the NEC then in effect did not define “delivery point” but did define “service”, “service conductors”, and “service drop” at page 13 of Tri-County Ex F-1 thereof as follows:

Service: “The conductors and equipment for delivering energy from the electricity supply system to the wiring system of the premises served.”

Service Conductors: “The supply conductors which extend from the street main, or from transformers to the service equipment of the premises supplied.

In an overhead distribution system, the service conductors begin at the line pole where connection is made. If a primary line is extended to transformers installed outdoors on private property, the service conductors begin at the secondary terminals of the transformers.

Where the supply is from an underground distribution system, the service conductors begin at the point of connection to the underground mains.

In every case the service conductors terminate at the service equipment.

Service Drop: The overhead service conductors between the last pole or other aerial support and the first point of attachment to the building or other structure.”

Dew also testified that while the 1961 NESC does not define “delivery point”, the 1961 NESC edition, Definition Section, at page 10, Item No. 63 of Tri-County Ex F-3 defines “service” as follows:

“Service means the conductors and equipment for delivering electric energy from the secondary distribution or street main, or other distribution feeder, or from the transformer, to the wiring system of the premises served. For overhead circuits, it includes the conductors from the last line pole to the service switch or fuse. The portion of an overhead service between the pole and building is designated as ‘service drop’.”
(Dew Rebuttal Test P 10-12, Tri-County Ex F, F-1, F-2, and F-3 Tr 1/13/11 p. 745).

37. Dew opined that Malmedal does not properly acknowledge that each of the definitions regarding “service” or “service point” in the NEC and NESC refers to the connection of the medium voltage (12.47KV) electric distribution line with the customer’s place of usage of the electricity. At that point of delivery, there is a step down transformer and associated attachments allowing the reduction of the distribution line voltage to a voltage level capable of being utilized

by the customer's motors and equipment. Thus, one can only properly conclude the definitions of "service-point" or "service" in the NESC publication and the NEC publication refer to the point where the distribution line voltage is stepped down by a transformer to a voltage level capable of being used by the customer's motors and equipment at the location of the end usage of the electric current (Dew Rebuttal Test p 13-14, Tr 1/13/11 p 745). Dew also explained that the NEC is sponsored by the National Fire Protection Association and was first published in 1897 and every three years thereafter as a standard to help guard against loss of life and property. It is not generally applicable to the facilities of an electric utility. The NESC sets forth the standards followed by electric utilities such as Tri-County and IP and it is the Code followed by electric utility engineers (Dew Rebuttal Test, p 10-14, Tri-County Ex F, Tri 1/13/11, p 745).

38. Dew explained that Malmedal's statement, in the first full paragraph on page 7 of his engineering report attached to his Prepared Direct Testimony, that the place where the utility meters the amount of electricity used by the customer is an indicator of the "point of delivery" is not supported by any of the definitions of "service" or "service point" as used in the National Electrical Safety Code or the National Electrical Code that were in effect at the date of the Service Area Agreement. Rather, the location of the meters is determined by which of the electric utility or the customer will assume the line loss that occurs when electricity is transported across distribution lines for delivery to the actual point of use of the electricity. That location is generally negotiated between the customer and the electric utility. However, the common practice in the utility industry is to consider the "point of delivery" of electrical current to the customer as being the point where the electric distribution line voltage is stepped down by a transformer and associated equipment to a voltage usable by the customer's electric motors and equipment and is uniformly the location of the customer's electric motors and equipment (Dew

Rebuttal Test p 15-16, Tri-County Ex F, Tr 1/13/11 p 745).

39. Dew testified that Malmedal's conclusion that the Texas Substation is the delivery point because IP has no ownership in Citation's distribution line ignores the generally understood meaning of "delivery point" within the electric supplier industry which is that the transformer and associated equipment used to reduce the voltage delivered at the place of the end use of the electricity is the general location for the delivery point between the electric supplier and the customer (Dew Rebuttal Test p 9, Tri-County Ex F, Tr 1/13/11 p 745).

40. Malmedal testified he drove most of the line Citation constructed or rebuilt to bring power to the gas plant. He confirmed the line was a 12,470 volt distribution line and the line had to be rebuilt by Citation to serve the gas plant because it was under conducted or too small and lacked capacity to carry the additional current required by the gas plant and if the distribution line had not been rebuilt, it is very likely that at peak load for the distribution system the conductor would have overheated and sagged too close to the ground (Malmedal Cross Ex Tr 4/28/11 p 1820, 1822-1823, 1825-1829, 1831-1833).

41. Malmedal also testified he examined the Citation compressor site depicted in Figure 6 at page 6 in Malmedal's engineering report and also depicted in IP Ex 5.1 and Tri-County's Re-Direct Exam, Exhibit K and he also inspected the 1500 KW pad mounted transformer that fed the gas plant. Malmedal testified the gas compressor site depicted was typical of all eight Citation gas compressor sites (Malmedal Cross Ex Tr 4/28/11, p 1820, 1822, 1836-1838). Malmedal explained the electricity arrives at the gas compressor site and the gas plant on Citation's 12,470 volt distribution line which line connects to the primary or high side of the transformers which reduce the voltage to 277/480 and the electricity leaves the transformers at the secondary or low side and travels by a conductor to a 480 volt 20 to 50 horsepower electric motor to operate the

compressor or to motors in the gas plant. Malmedal testified the electrical design was appropriate for the facilities and if the voltage was not reduced by a transformer at the gas compressor sites and gas plant, the voltage would destroy the electric motors (Malmedal Cross Ex Tr 4/28/11, p 1839-1848).

42. Dew explained that the electricity used to operate the electric motors at the compressor site number 6 depicted in IP Exhibit 5.1, figure 6, comes from the IP Texas Substation by traveling across the 12,470 volt distribution line which line dead ends at the cross arms on the pole in figure 6. The electricity then travels through jumpers and fuses to the high voltage side of the transformer where the voltage is reduced and exits the transformer's low side at 277/480 volts and enters a green colored breaker box. From there the electricity travels by underground service wires to the motor that powers the compressor. The 12,470 volts of electricity entering the high voltage side of the transformer had to be reduced to a voltage of 277/480 volts before Citation's electric motors running the gas compressor could use the electricity. Failure to do so would cause the gas compressor's electric motors to burn up or explode (Dew Redirect Ex Tr 1/13/11, p 987-989). Dew identified the service breaker on the conductor emanating from the low voltage side of the three transformers as the "service point" for the gas compressor pictured in IP Exhibit 5.1 figure 6 and marked the location by writing "Service Point" by the breaker box (IP Ex 5.1, figure 6; Dew Re-Direct Ex, Tri-County Re-Direct Exam Ex K, Tr 1/13/11, p 1003-1006).⁵

43. Malmedal also admitted that if the 12,470 volts of electricity fed from IP's Texas Substation to the Citation switching structure adjacent to the Texas Substation was reduced by Citation at the switching station to a voltage usable by the gas plant and gas compressor motors and then the voltage was distributed at 277/480 volts across the distribution line to the gas plant

⁵ Tri-County Re-Direct Exam colored Ex K is reproduced in the Appendix to this brief.

and gas compressors the distribution line would have to be designed with such a tremendously large conductor size and support structures that it would be too expensive. Malmedal testified the use of a 12,470 volt distribution line from the Citation switching structure and IP Texas Substation to the transformers at the gas plant and each gas compressor site was in accordance with customary electric design for such facilities in the U.S. and is the most economical design (Malmedal Cross Ex Tr 4/28/11, p 1863-1869). Malmedal agreed that if Citation owned the 12,470 volt distribution line, it could build the line 30 miles and serve an electrical load similar to the gas plant and up to 70 miles and serve an electric load similar to the gas compressor sites (Malmedal Cross Ex Tr 4/28/11 p 1902-1904, 1925-1927).

44. Malmedal further testified the “service point” is the point where the electric supply system connects to the premises wiring and the “delivery point” is the point where the power is delivered from seller to buyer (Malmedal Cross Ex, Tr 4/28/11, p 1944-1947) and if in this case IP owned the 12,470 volt distribution line and the transformer, the service point would be at the low side of the transformer and the “delivery point” would be at the meter (Malmedal Cross Ex, Tr 4/28/11, p 1948) which in this case would be located in Tri-County’s territory at the location of the transformer for the gas plant and the transformers for the gas compressors (Malmedal Cross Ex, Tr 4/28/11, p 1886-1887, 1892, 1907-1908).

45. Malmedal agreed the Texas Substation had been built as a three phase substation and it was not customary to build substations with less than three phases. Malmedal agreed that the addition of the Citation gas plant to the electric circuit taking electricity from the Texas Substation would increase the electric load of the substation (Malmedal Cross Ex Tr 4/28/11, p 1934-1940).

46. Citation expended an estimated \$76,335.00 to rebuild 1,161 feet of No. 4 CU three phase line to 2/0 ACSR three phase line and to build 4,119 feet of new 2/0 ACSR three phase

distribution line so that Citation could bring electricity from IP's Texas Substation to serve the gas plant by means of the IP Texas Substation (Dew Direct Test, Tri-County Ex D p 13-14, Tr 1/12/11 p 745); Ivers Direct Test , Tri-County Ex B p 4, Tr 1/12/11 p 630).

47. Tri-County's Salem Substation and Tri-County's three phase line emanating therefrom located adjacent to the Citation gas plant are adequate to serve the Citation gas plant. The estimated cost for Tri-County to extend its electric service from that three phase line to the gas plant is \$28,051.00 (Ivers Direct Test p 3, Tri-County Ex B, Tr 1/12/11 p 630).

48. Mark D. Bing, Central Region Manager for Citation, testified Citation first purchased electric energy from an alternative retail energy supplier (ARES) for the Salem Oil Field in December 2008 when it contracted with Sempra Energy Solutions for a term ending February 1, 2011. He testified that Citation entered into a second two year contract with Ameren Energy Marketing Company, an ARES, for electric power for the Salem Oil Field commencing February 1, 2011 (Bing Direct Test, Citation Ex 1, p 3-5 and Supplemental Test, Citation Ex 2, p 1-2, Tr 4/27/11, p 1740, 1742). Bing testified that at the time Citation entered into the ARES contracts with Sempra in December 2008 and with Ameren Marketing in February 2011, he was aware of the contracts and aware of the litigation in this docket and that Tri-County was seeking the right to provide the electricity to the gas plant and seven of the eight gas compressors located in Tri-County's service territory (Bing Cross Ex, Tr 4/27/11, p 1744-1746).

49. Lewis testified that when Citation bought the Salem Oil Field in 1998, there were 296 producing wells and at the time of his testimony on April 26, 2011, the producing wells had increased slightly to 310 wells (Lewis Cross E Tr 4/26/11 p 1601). Josh Kull, Developmental Geologist for Citation, testified that since 1978, 98 wells had been drilled of which 64 are currently producing wells (Kull Cross Ex Tr 4/26/11 p 1567-1568; IP Ex 11.1 and 11.2, Tr 4/26/11 p 1559;

Tri-County Ex J, Tr 4/26/11 p 1572-1573, 1588).

50. IP's witness Robert C. Herr, a petroleum consulting engineer, testified regarding the history of well drilling in the Salem Oil Field from 1969, when he started as an employee for Texaco, Inc., through 1978 when he left Texaco's employment. Herr testified there were currently approximately 310 producing wells in the Salem Oil Field. He testified regarding the components of producing wells in the Salem Oil Field and the techniques for producing oil at the field (Herr Direct Test IP Ex 8 p 2-3, Tr 4/27/11 p 1754-1755). Herr testified all the producing oil wells require pumping equipment either at the surface or by a submersible pump powered by electric motors between 5 and 50 horsepower depending on the amount of fluid produced by a given well (Herr Direct Test IP Ex 8 p 4; Tr 4/27/11 p 1754-1755) and receiving electricity through distribution or step down transformers located next to where the electricity is used. He noted the transformers are necessary to operate the oil field (Herr Cross Ex Tr 4/27/11 p 1778-1781).

51. While Herr testified Texaco originally chose to operate its own electric distribution system in the Salem Oil Field, Ivers testified that Tri-County has many miles of electric distribution lines located throughout the Salem Oil Field from which Tri-County can provide electric service to Citation's gas compressors and gas plant (Ivers Direct Test, Tri County Ex B, p 5-6, Tri-County Ex B-2, Tr 1/12/11 p 630).⁶ Dew testified that Tri-County's electric distribution facilities are constructed and maintained to higher standards than the Citation electric distribution facilities which Dew observed during his June 3, 2010 inspection trip (Dew Supp Rebuttal Test Tri-County Ex G p 17-18, Tr 1/13/11 p 745).

52. Dew also testified that based on his June 3, 2010 inspection of the Citation Salem Oil Field, he determined that most oil wells were operated by 25 horsepower electric motors which do

⁶ Tri-County colored map Ex B-2 is reproduced in the Appendix to this brief.

not create a large electric load. Dew noted that while Herr testified that Texaco as the prior owner of the Salem Oil Field had projects utilizing large electric motors, Dew's June 3, 2010 inspection of the Salem Oil Field disclosed only one water pumping station with a large electric load (Dew Suppl Rebuttal Test Tri-County Ex G p 18, Tr 1/13/11 p 745).

53. Herr testified the unitization of the oil field maximized oil production from the field to benefit both the mineral interest owners and the operators (Herr Cross Ex Tr 4/27/11 p 1777) but there is no real relationship between the electric distribution system that distributes electricity to the various wells and other electrically operated facilities in the Salem Oil Field and the unitization of the oil field. Herr further testified you could have unitization of the mineral interests in the Salem Oil Field even if you had multiple electric suppliers to the oil field (Herr Cross Ex Tr 4/27/11 p 1781).

C. TRI-COUNTY'S CLAIM

1. Tri-County claims the electric load for the Citation gas plant and seven of the eight Citation gas compressor sites are electric loads with less than 1500 KW that did not exist on March 18, 1968 and are "points of delivery" located in the Tri-County's territory and are Tri-County's to serve pursuant to Section 3(a) of the Service Area Agreement. Even though Citation or its predecessor was an "existing customer" to IP as defined by Section 1(b) of the Agreement, Citation becomes a "new customer" under Section 1(c) of the Agreement when Citation as an "existing customer" "...applies for ...electric service at a point of delivery which is ...not energized on the effective date of this (the) Agreement."

2. In this case, the electric distribution lines deliver electricity at 12,470 volts to transformers at each of the eight compressor sites and the gas plant which in turn reduce the voltage to 277/480 volts for use by the electric motors at each compressor site and the gas plant.

Accordingly, each of the points where electricity is delivered to the gas compressor sites numbered 1 through 5 and 7 through 8 and the Citation gas plant constitute a separate delivery point of electric service as generally understood in the electric utility industry.

3. IP recognized that the Citation gas plant and the 1500 KW step down transformer located adjacent to the gas plant was located in Tri-County's designated service territory and when Citation requested electric service from IP, advised Citation that IP could not provide the electric service without the consent of Tri-County since the delivery point was located in Tri-County's service territory.

4. Tri-County further claims that IP's electric service to the gas plant and the gas compressor sites violates the intent of the Agreement by allowing IP to serve delivery points in Tri-County's territory that were not in existence on March 18, 1968 and create duplicate facilities and investment for providing electric service within Tri-County's territory.

5. Tri-County further claims that even if the electric service delivery point for the gas plant and the eight compressor sites is the IP Texas Substation, IP has modified that substation subsequent to the date of the Agreement to increase its capacity to provide for additional electric service in the area. Thus, those modifications to the IP Texas Substation created a new delivery point of the Texas Substation subsequent to the Agreement date and within the meaning of Section 1(d) of the Agreement. Further, even if the IP Texas Substation is determined to be an IP delivery point under the Service Area Agreement, there were created new and additional electric delivery points as understood and utilized in the electric utility industry at the Citation gas plant and each of the gas compressor sites downstream from the Texas Substation which are located in Tri-County's service territory and are Tri-County's to serve.

D. IP'S CLAIM

1. IP claims that it only delivers electric service to Citation at IP's Texas Substation which has been in existence and utilized by IP for many years to serve Citation and its predecessors by means of a customer owned distribution line running from the IP Texas Substation to numerous oil wells. IP further claims the Texas Substation is the delivery point and it is the customer who has taken the IP electric service from the IP Texas Substation through the customer owned distribution line to serve each of the gas plant and the gas compressor sites located in Tri-County's service territory.

2. IP further claims the IP Texas Substation has not been modified within the meaning of Section 1(d) of the Agreement.

E. CITATION'S CLAIM

1. Citation, as the owner of the Salem Oil Field, claims it started taking electric energy from an Alternative Retail Electric Supplier (ARES) in December 2008 pursuant to the Electric Service Customer Choice and Rate Relief Act of 1997 (220 ILCS 5/16-101 et seq) (Deregulation Act). Citation claims that by adopting the Deregulation Act, the Legislature has given Citation, as a customer of an electric supplier, the right to choose its electric supplier even though the Electric Supplier Act 220 ILCS 30/1 et seq does not generally allow customers the right to do so.

F. ISSUES PRESENTED BY THIS DOCKET

1. Do each of the step down transformers and associated apparatus located adjacent to the Citation gas plant and each of the gas compressor sites which are used to reduce the 12,470 volts on the Citation owned distribution line to 277/480 volts for use by the electric facilities at the gas plant and gas compressor sites constitute new "delivery points" within the meaning of the March 18, 1968 Service Area Agreement?

2. Did the adoption of the Electric Service Customer Choice and Rate Relief Act of 1997 grant an electric customer the right to unilaterally choose an electric supplier in derogation of the Electric Supplier Act?

ARGUMENT

I. THE SERVICE AREA AGREEMENT DATED MARCH 18, 1968 CONTROLS THE ISSUES IN THIS DOCKET

Citation established a gas plant and eight compressor sites that are used to feed gas to the gas plant. The gas plant and seven of the compressor sites are located in Tri-County's territory. The electric load for each is less than 1500 KW. Each site requires a transformer capable of stepping down the distribution line voltage from 12,470 volts to 277/480 to operate the electric facilities at each site. All the engineers agreed that without the step down transformers and the associated electrical apparatus needed for the same, the distribution line voltage would be unusable at each of the sites. Robert C. Dew, Jr., engineer for Tri-County opined that the apparatus installed for stepping down the voltage from the distribution line to a usable voltage for the compressor sites and the gas plant represents a typical delivery point as accepted for engineering purposes in the electric utility industry. Further, the Commission has determined that a "normal service connection point" for delivery of electric service is deemed to be where the transformers are located that are used to reduce the voltage to the level usable by the customer Interstate Power Company v. Jo-Carroll Electric Cooperative, Inc. Ill Com Comn 92-0450 and 93-0030 Consolidated on Remand, page 10 of the Order (October 9, 1996).⁷

The applicable provisions of the Service Area Agreement between Tri-County and IP are:

(a) An "existing customer" is one which is receiving electric service from either Tri-County

⁷ A copy of the Order in Docket No. 920450 and 93-0030 is reproduced in the Appendix to this brief.

or IP on the date of the Agreement, to wit: March 18, 1968 (Section 1(b) of the Agreement).

(b) A "new customer" is any person, corporation or entity who applies for electric service at a "point of delivery" which was not energized on the effective date of the Agreement, to wit: March 18, 1968 (Section 1(c) of the Agreement).

(c) An "existing point of delivery" is an electric service connection which is in existence and energized on the date of the Agreement, to wit: March 18, 1968 (Section 1(d) of the Agreement).

(d) An "existing customer" becomes a "new customer" if the customer applies for electric service at a "point of delivery" which was not energized or in existence on March 18, 1968 (Section 1(b) and (c) of the Agreement).

(e) When the demand for electric service at the new service connection point does not exceed 1500 KW, the right to serve the new service connection point is controlled by the territory boundary lines established by the Service Area Agreement and Section 3(a) of the Agreement (Section 3(a) and (d) and Section 2 of the Agreement).

There is no dispute that each of the service connection points identified by Tri-County's engineer at each of the eight compressor sites and the gas plant were created by Citation, the customer, after March 18, 1968 and require step down transformers and associated equipment for the purpose of reducing distribution line voltage at 12,470 volts to a voltage usable by the appropriate electric motors and equipment operated by Citation at each of the compressor sites and the gas plant. A plain reading of the Agreement leads one to the conclusion that Citation has in fact created a new point of delivery as customarily defined in the electric utility industry, for each of the eight compressor sites and the gas plant. Consequently, Citation, as an "existing customer" of IP, becomes a "new customer" by reason of establishing the new electric points of delivery that

did not exist on March 18, 1968.

It is further clear that the electricity is generated by IP or by a third party and then transmitted across IP's transmission line at 69,000 volts to the IP Texas Substation. There it is reduced from 69,000 volts to 12,470 volts and carried by the Citation distribution line to the distribution transformers at the gas plant and each gas compressor site. Thus, IP becomes the provider of the electricity used by Citation to serve the gas plant and eight compressor sites through the new delivery points for each. Section 3(a) of the Agreement states "...neither party shall serve a new customer within the service area of the other party." Yet, compressor sites 1 through 5 and 7 through 8 as well as the gas plant are all located within the exclusive service territory of Tri-County.

II. THE COMMISSION IS ENTITLED TO RECEIVE EXTRINSIC EVIDENCE TO DETERMINE THE MEANING OF "POINT OF DELIVERY" AS USED WITHIN THE SERVICE AREA AGREEMENT

The phrase "point of delivery" as used within Section 1(c) and (d) of the Service Area Agreement is not defined within the Agreement itself. The ALJ found, when issuing the summary judgment order, a dispute existed among the engineers as to the meaning of "point of delivery" as used in the Service Area Agreement. Likewise, the court in Central Illinois Public Service Company vs Illinois Commerce Commission and Spoon River Electric Cooperative, Inc. 219 Ill App 3d 291; 579 NE2d 1200; 162 Ill Dec 386, 390 (4th Dist 1991)(Spoon River) held that the failure to define the word "locations" in a Service Area Agreement between Central Illinois Public Service Company and Spoon River Electric Cooperative, Inc. created an ambiguity in the Agreement authorizing the Commission to consider parole evidence as to the meaning of the term "locations." Because the phrase "point of delivery" as used in Section 1(c) and (d) is not otherwise defined within the Agreement, the term is ambiguous allowing parole evidence to be

considered when interpreting and applying the Service Area Agreement.

Both Tri-County and IP have offered testimony by their respective electrical engineers regarding the meaning of "point of delivery" within the electric utility industry and as used within the Service Area Agreement at issue in this docket. It is fair to say that electrical engineers, Dew, Tatlock and Siudyla, understand that a "point of delivery" as customarily used within the electric utility industry normally consists of a step down or distribution transformer located adjacent to the site where the customer intends to utilize the electricity so that the electricity received from the 12,470 volt distribution line can be reduced to a voltage usable by the customer's facilities at the site. Even Michael Tatlock, IP's electrical engineer in charge of applying the service area agreement to territorial disputes, understood Citation was asking for a new point of delivery when Citation's Clyde Finch told him Citation was building the gas plant and that a 1500KW transformer located no more than 200 feet from the gas plant would be necessary to reduce the voltage from the 12,470 volt distribution line to voltage usable by the electric motors and facilities located at the gas plant (Tatlock Cross Ex Tr 1/14/11 p 1207-1217, 1228). Further, Conrad Siudyla, a second IP electrical engineer, understood Citation's request for electric service for the gas plant constituted a new point of delivery of electricity (Siudyla Cross Ex Tr 2/4/11 p 1316-1318, 1323-1325, 1328-1329). Keith Malmedal, IP's outside electrical engineer, also agreed that the 1500 KW pad mounted transformer adjacent to the gas plant and the transformers adjacent to each of the gas compressor sites were necessary to reduce the 12,470 volts of electricity from the distribution line to 277/480 volts at the secondary or low side of the transformer for use by the electric motors at each site. He acknowledged the electrical design at the gas plant and each gas compressor site was appropriate and in accordance with the standard design for similar facilities in the U.S. (Malmedal Cross Ex Tr 4/28/11 p 1839-1848).

Further, all electrical engineers, with the exception of Malmedal, agreed that the electrical design for delivery of electric services to the gas plant and gas compressor sites constituted “delivery points” created after March 18, 1968 and since the delivery points were physically located in Tri-County’s service territory, electricity could not be delivered from the IP Texas Substation by either an IP distribution line or the Citation owned distribution line. Only Malmedal opined that because the Texas Substation constituted the “delivery point” of electricity, IP could provide electricity from its Texas Substation to the Citation owned distribution line for use at Citation’s gas plant and gas compressor sites. Yet Malmedal agreed that if IP owned the 12,470 volt distribution line used to deliver electricity to the transformers at the gas plant and gas compressor sites, then the “point of delivery” would shift from the Texas Substation to the location of the step down transformers at the gas plant and the gas compressor sites. The only reason Malmedal could give for this distinction was that IP was the owner of the 12,470 volt distribution line instead of Citation.

All the electrical engineers, including Malmedal, agreed the physical and mechanical requirements and the electrical design for the gas plant and gas compressor sites are the same whether IP or Tri-County or Citation owns the 12,470 volt distribution line. Thus it is hard to rationalize Malmedal’s use of ownership of the distribution line as the sole basis for determining the meaning of “delivery point” in this docket. Malmedal’s definition of “point of delivery” is dependent upon what the customer and the electric supplier negotiate. However, that makes “point of delivery” illusionary and ignores the fact that the Agreement at issue is between Tri-County and IP. The Agreement makes no reference to ownership of the distribution line or the location IP and Citation may negotiate for the hand off of electricity as defining “delivery point”. Further, Tri-County did not agree IP could provide the electric service by using Citation’s distribution line.

Tri-County believes the Service Area Agreement clearly establishes Tri-County's right to serve in this case. However, even if there is a question as to the intent of the parties under the Agreement, the course of conduct of both Tri-County and IP in applying the Service Area Agreement provides convincing evidence supporting Tri-County's position. In December 1998, Citation requested and Tri-County provided electric service to Citation's office complex by use of an electric service connection point, consisting of a transformer and associated apparatus customary for electric service connection points, which is located in Tri-County's territory and did not exist on March 18, 1968. IP agreed that Tri-County was authorized to serve Citation's new electric service connection point for the office complex even though IP was providing electricity to Citation at the IP Texas Substation. Similarly, IP's engineers applied the same interpretation to the Agreement in the present case and advised Citation that the gas plant was located in Tri-County service territory and IP could not serve the gas plant without Tri-County's consent. When Citation stated its intent to take the IP electric service at the IP Texas Substation and distribute the electricity through the Citation owned distribution line to the gas plant and the eight compressor sites ignoring Tri-County's service rights, IP's engineers advised Citation that IP could not allow that to happen without the consent of Tri-County. Tri-County did not acquiesce to such service.

The Commission in interpreting service area agreements has long followed the axiom that the Service Area Agreement will control the dispute Rural Electric Convenience Cooperative Co. vs Illinois Commerce Commission 75 Ill 2d 142; 387 NE2d 670; 25 Ill Dec 794, 796 (1979). Thus, IP's separate electric service agreements with Texaco and Citation or IP's separate tariffs, none of which Tri-County is a party to, do not control the meaning of "delivery point." It is also clear that the intent of the parties as expressed by the Agreement controls and there is no better evidence of the intention of the parties than the interpretation they themselves place on the Agreement Berry v.

Blackard Construction Co 13 Ill App 3d 768; 300 NE2d 627, 630 (4th Dist 1973). Actions by the parties contemporaneously with or subsequent to the Agreement evidencing the practical construction placed upon the Agreement by the parties may be considered to determine the intent of the parties regarding the Agreement Occidental Chemical Co. v Agri Profit Systems, Inc. 37 Ill App 3d 599; 346 NE2d 482, 484 (2nd Dist 1975). See also Mendelson v Flaxman 32 Ill App 3d 644; 336 NE 316, 319-320 (1st Dist 4th Div 1975) where the court held that the interpretation placed on a contract by the parties as represented by their actions evidences the intention of the parties under the Agreement.

From February 18, 2005 through July 13, 2005, IP's interpretation of the relevant provisions of the Service Area Agreement coincided with Tri-County's interpretation and in accordance with the plain meaning of the Agreement. That interpretation remained intact until IP's July 15, 2005 letter in which IP changed its interpretation of the Agreement and claimed the IP Texas Substation is the delivery point for the newly established electric service connection points for the gas plant and seven of the eight gas compressor sites located in Tri-County service territory because the 12,470 volt distribution line is owned by Citation instead of IP. This latter IP interpretation of the Service Area Agreement does not conform to IP's and Tri-County's prior interpretation of the Agreement.

III. THE COMMISSION HAS REJECTED THE DEFINITION OF "POINT OF DELIVERY" AS THE PLACE WHERE ELECTRICITY IS HANDED OFF TO THE CUSTOMER OR NEGOTIATED BY THE CUSTOMER AND ELECTRIC SUPPLIER

The Commission has previously refused to define "point of service" or "point of delivery" to mean the place where the customer elects to connect its distribution system to the facilities of the electric supplier. Central Illinois Public Service Company vs Spoon River Electric

Cooperative, Inc. ESA 249 (October 4, 1989),⁸ affirmed on Appeal in Central Illinois Public Service Company vs Illinois Commerce Commission and Spoon River Electric Cooperative, Inc. 219 Ill App 3d 291; 579 NE2d 1200; 162 Ill Dec 386 (4th Dist 1991)(Spoon River). In Spoon River, CIPS and Spoon River were contesting electric service to the Canton Prison site. Both CIPS and Spoon River had entered into a Service Area Agreement that provided each was entitled to serve territories divided by boundaries and in addition were entitled to serve premises in the other party's territory which they were serving on July 2, 1965 which were otherwise grandfathered by the Service Area Agreement. Both Spoon River and CIPS were grandfathered to serve locations included within the Canton Prison site. In addition, the Canton Prison site included territories that each of CIPS and Spoon River were entitled to serve based upon their territorial boundary lines. Accordingly, CIPS maintained that since both had equal grandfathered rights under the Service Area Agreement, the territorial dispute should be determined by the point where the customer elected to connect its distribution system to CIPS' facilities to accept delivery of electric service from CIPS. That point was located on CIPS' side of the territorial boundary line. Spoon River on the other hand maintained that the disputed territorial issue should be determined by where the electricity was being utilized and since most of the electricity was being utilized within Spoon River's designated territory, then Spoon River should be the electric supplier for the prison. The Commission determined that "point of service" or "point of delivery" as proposed by CIPS should be rejected for the following reasons:

(1) It would frustrate the purposes of the Act in that it would destroy the integrity of territorial boundary lines under service area agreements adopted pursuant to the Act and would encourage disputes between electric suppliers resulting from the location of a "point of service".

⁸ A copy of the Order in ESA 249 is reproduced in the Appendix to this brief

(2) It could result in the development of unregulated private electrical distribution lines in this State, contrary to Section 2 of the Act in which the Illinois Legislature declared it to be in the public interest to avoid duplication of electric facilities;

(3) It could result in discrimination against small residential and small commercial customers who do not have the financial ability to construct and maintain their own private electric distribution system;

(4) It would allow customers along the territorial boundary lines of two electric suppliers to choose the electric supplier that they wanted to use based upon the short term goals of the customer rather than the long term legislative purposes of the Act; and

(5) It would encourage the demise of relative boundary certainty under service area agreements adopted by electric suppliers pursuant to the Act, in direct contravention of the expressed purpose of the Act.

The foregoing reasons stated by the Commission in the Spoon River case for rejecting CIPS' proposed definition for "point of delivery" aptly apply as a basis for the Commission rejecting IP's proposed definition of "point of delivery" as used in the subject Service Area Agreement as being the place where Citation elects to connect its distribution line to IP's facilities. There is ample testimony in this record that both Tri-County and IP interpreted "point of delivery" as used in the Service Area Agreement as the place where the distribution line voltage is reduced by a transformer to a voltage level usable by the customer at that particular site. Additionally, the evidence in this docket illustrates in dramatic fashion the accuracy of the Commission's stated reasons in the Spoon River case for rejecting the definition for "point of delivery" that IP seeks in this docket. Substantial weight should be accorded the Commission's long standing interpretation of "point of delivery" Radio Relay Corp. v. Illinois Commerce Commission 69 Ill 2d

95; 370 NE2d 528; 12 Ill Dec 724, 727 (1977). Certainly, IP has not provided any logical reason for now discarding the Spoon River definition for "point of delivery".

IV. THE USE OF THE CUSTOMER OWNED DISTRIBUTION LINE TO PROVIDE ELECTRIC SERVICE TO CITATION'S GAS PLANT AND GAS COMPRESSOR SITES DEFEATS THE PURPOSE OF THE ELECTRIC SUPPLIER ACT

The parties entered into the Service Area Agreement pursuant to Section 30/6 of the Electric Supplier Act, 220 ILCS 30/6 designating their respective exclusive service territories in order to prevent duplication of facilities. The Agreement was in furtherance of the Legislative Declaration upon which the Electric Supplier Act was prefaced and as expressed in 220 ILCS 30/2 as follows:

"The General Assembly declares it to be in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electric service to the public, any 2 or more electric suppliers may contract, subject to the approval of the Illinois Commerce commission, as to the respective areas in which each supplier is to provide service."

Tri-County Exhibit A-2 shows that Tri-County has a three phase distribution line located immediately south of and adjacent to the Citation gas plant which was constructed in 1939 as a single phase line and upgraded in 1949 to a three phase line. Citation requested Tri-County to provide electric service by way of a single phase line to the Citation office complex which lies to the north and west of and adjacent to the gas plant. Tri-County continues to provide this electric service and Citation desires electric service for its office from an electric supplier different than IP in the event IP service is disrupted. Thus, Tri-County has facilities within a few hundred feet of the gas plant which are adequate for and could be used to supply the electric service to the gas plant. No electric service lines of IP exist near the gas plant or the eight compressor sites. Rather, Citation expended over \$76,000 to upgrade its own distribution line and construct over

4,100 feet of a new 12,470 volt distribution line to allow IP to provide electric service to the gas plant and gas compressor sites. At the same time, the cost to Tri-County to extend electric service to the gas plant was \$28,051.00 and Tri-County already has an extensive network of 12,470 volt distribution lines in the Salem Oil Field adjacent to the gas compressor sites as shown by the Tri-County map Exhibit B-2.⁹ Thus, the providing of electric service by IP whether through its own facilities or those of Citation's facilities constitutes a duplication of facilities for providing electric service to the gas plant in violation of the expressed Legislative declaration regarding service area agreements and the intended purpose of the Tri-County/IP Service Area Agreement designating specific service territories in general.

Further, the Commission has long held that the customer does not have a right to choose its electric provider except in limited circumstances, none of which apply in this case. See "Central Illinois Public Service Company v. Illinois Commerce Commission and Southwestern Electric Cooperative, Inc. 202 Ill App 3d 567; 560 NE2d 363; 148 Ill Dec 61, 66 (4th Dist 1990) where the court prohibited use of a customer owned distribution line to change suppliers and held that consumers have been legislatively foreclosed from seeking electric service from a supplier beyond their service territory. To the same effect is Central Illinois Public Service Company v. Illinois Commerce Commission and Wayne-White Counties Electric Cooperative, Inc. 223 Ill App 3d 718; 585 NE2d 1302; 166 Ill Dec 280, 282 (5th Dist 1992)(Wayne-White).

Illinois Power Company v Illinois Valley Electric Cooperative Ill Com Comn 88-0276 (June 21, 1989)(Uniman)¹⁰ presented an identical issue to the one in this case. The customer, Unimin, was served by Illinois Power under a Service Area Agreement, in which Sections 1 and 3

⁹ Tri-County colored map Ex B-2 is reproduced in the Appendix to this brief.

¹⁰ A copy of Docket No. 88-0276 is reproduced in the Appendix to this brief.

are very similar to Sections 1 and 3 of the Service Area Agreement in this case. Unimin operated a silica sand mine consisting of a processing plant and adjoining strip mines. IP served the processing plant. Unimin took electric service provided to it by IP at its processing plant and distributed it by means of the Unimin owned distribution system to various strip mines located in IP's designated service territory. When Unimin opened a new strip mine located in Illinois Valley's service territory, IP requested authority from the Commission to move electricity supplied by IP at the processing plant to the new mining location by means of the Unimin owned distribution facilities. At the new strip mine operation, a new service delivery point was required, including transformers and other associated apparatus. The new delivery point as well as the new strip mine were both located in Illinois Valley's designated service territory under the Service Area Agreement. The Commission determined the new strip mine and delivery point were both located in Illinois Valley's designated service territory and therefore, only Illinois Valley was authorized to serve the new delivery point. While the Commission decision dealt with temporary service authority, the Commission Order effectively terminated the dispute denying Illinois Power the authority to serve the new electric service connection point for the new strip mining operation by means of the customer owned distribution system and found that Illinois Valley Electric Cooperative was the appropriate electric supplier for the new electric service delivery point.

IP seeks the same authorization in the instant case to serve the new Citation delivery points for the new gas plant and gas compressor sites located in Tri-County's designated service territory by use of the customer owned distribution line. Nothing in the Agreement allows IP to do this and the Commission decision in Uniman confirms that point. Generally, Commission decisions are entitled to great deference because they are the judgment of a tribunal appointed by law and possess expertise born of informed experience, Sunset Trails Water Company v. Illinois

Commerce Commission 7 Ill App 3d 449; 287 N.E. 2d 736, 740 (3rd Dist 1972). The Commission should be consistent and again prohibit IP's claim of right.

The attempt by IP to serve the gas plant and gas compressors in Tri-County's territory defeats the very purpose of the Service Area Agreement and the rules established by the Commission and the courts of this State, prohibiting customers in this setting from choosing their own electric supplier in defiance of the Commission's jurisdiction to regulate service territories

V. ILLINOIS POWER SHOULD NOT BE ALLOWED TO DO INDIRECTLY WHAT IT CANNOT DO DIRECTLY

IP's engineers and even Todd Masten, IP's regulatory specialist, testified Illinois Power cannot utilize its own electric distribution lines to take electric service from the Texas Substation to the Citation gas plant or to the seven gas compressor sites located in Tri-County's service territory. Likewise, IP should not be allowed to do so through the Citation owned distribution system because it subverts the intent of the Service Area Agreement as exemplified by the course of conduct of Tri-County and IP in interpreting the Service Area Agreement. If such action is allowed by the Commission, it will license customers through the use of customer owned distribution facilities, to ignore valid binding obligations established between electric suppliers under service area agreements approved by the Commission, and create duplication of facilities for providing electric service rendering it impossible for electric suppliers to have the ability to provide efficient electric service to their customers. Such action by IP and the customer does not conform with the intent of the Legislature in adopting the Electric Supplier Act and should not be allowed. For instance, IP's electrical engineer Malmedal testified that Citation could extend its own 12,470 volt distribution line 30 miles and serve a load the size of the Citation gas plant and could even extend the distribution line 70 miles and serve an electrical load similar to the gas

compressor sites (Malmedal Cross Ex Tr 4/28/11, p 1902-1904, 1925, 1927). There is no way to know in whose territory the electric service would be used. Citation has historically shown its propensity to seek electric service from either Tri-County or IP, whichever seems at the time to satisfy its corporate purposes irrespective of the terms of the Tri-County and IP Service Area Agreement (Scott Rebuttal Test Tri-County Ex E p 2-5). Thus, to allow such action in derogation of the valid Service Area Agreement between Tri-County and IP grants permission to any customer who is financially able to provide its own electric distribution system to violate public policy as established by the Legislature and the Commission under the Electric Supplier Act Central Illinois Public Service Company v Spoon River Electric Cooperative, Inc. ESA 249 (Oct 4, 1989).

VI. IP HAS MODIFIED ITS TEXAS SUBSTATION SUCH THAT IT CONSTITUTES A NEW POINT OF DELIVERY.

IP maintains that it has not established a new service connection point for the gas plant and the eight compressor sites and has simply continued to provide its electric power to Citation at the Texas Substation. However, Dew testified there have been numerous modifications to the IP Texas Substation since the 1968 Service Area Agreement which have enabled IP to serve additional electric loads for customers through the Texas Substation. Dew opined that each time IP modifies its Texas Substation so that it can serve additional load, whether for an existing customer or a new customer, it creates a "new point of delivery" or a "new service connection point" at the Texas Substation within the engineering meaning of Section 1(d) of the Service Area Agreement. The failure to interpret the Agreement in that manner would allow IP, by reason of its existing Texas Substation, to continually add to the Texas Substation additional load of existing customers through changes in the customer's electrical phases and new load of new customers

with new transformers and serve customers located in territory designated by the Service Area Agreement to be served by Tri-County through a customer owned distribution line.

To allow IP to designate the Texas Substation as the service connection point for the Citation gas plant and the eight compressor sites allows IP to circumvent its own Agreement with Tri-County and to simply follow distribution lines to customers situated in Tri-County's designated service territory and serve such customers with impunity out of the reach of the regulatory authority of the Commission. Such action frustrates the intent of the parties as expressed by the Agreement and violates the very heart of the Agreement as expressed in Section 3(a) that "...neither party shall serve a new customer within the service areas of the other party."

Further, even if the Texas Substation is a "point of delivery" under the Service Area Agreement at issue in this docket, it is a delivery point that reduces the voltage from 69,000 volts to 12,470 volts. However, that is not the voltage usable by Citation's motors at the gas plant and gas compressor sites. Additional reduction of 12,470 volts to 277/480 volts is required at the physical location for the gas plant and the gas compressor sites. Tri-County's electrical engineer described the physical arrangement of electric facilities at each of the gas plant and gas compressor sites as being the commonly understood meaning of "delivery point" in the electric industry. IP's two electrical engineers understood such arrangements to be "delivery points" of electricity. IP's outside electrical engineer, Keith Malmedal, acknowledged the physical arrangement of electric facilities bringing electricity from the IP Texas Substation to the step down transformers and electric facilities at the gas plant and gas compressor sites conformed to the standard and accepted design for such facilities in the United States and agreed the electricity received by Citation at the Texas Substation could not be utilized by Citation at the gas plant and gas compressor sites without the use of the step down transformers at the respective sites. Thus, even if the Texas Substation is

deemed a “delivery point” for purposes of the Agreement, so must the step down transformers and associated equipment at the gas plant and gas compressor sites be considered “delivery points” for purposes of the Agreement and those locations are the final delivery points in this case. Since the final “point of delivery” and the use of the electricity in this case are both in Tri-County’s service territory, Tri-County is the appropriate electric supplier. Finally, we know that if a substation is a “delivery point” under the Agreement, Citation can, from an engineering standpoint, switch the connection of its distribution line from IP’s substation to Tri-County’s substation allowing the customer to unilaterally change from one supplier to another with impunity contrary to the public policy of the Electric Supplier Act.

VII. CONTRACTS MUST BE CONSTRUED SO AS TO AVOID ABSURD OR UNFAIR RESULTS

To construe the Service Area Agreement as IP proposes so that IP can utilize a customer owned distribution system to serve new electric service delivery points located in Tri-County's designated exclusive service territory is a grossly unfair interpretation of the Agreement. Every contract contains the implied covenant of good faith and fair dealing between the parties to the Agreement. Where a contract or portion thereof is susceptible to two conflicting constructions, one of which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted. Carrico v. Delp 141 Ill App 3d 684; 490 NE2d 972; 95 Ill Dec 880, 884 (4th Dist. 1986); DeWitt County Public Bldg. Com'n v. DeWitt County 128 Ill App 3d 11; 469 NE2d 689; 83 Ill Dec 82, 88 (4th Dist 1984); Martindell v. Lake Shore National Bank 15 Ill 2d 272, 286 (1958).

It would be an absurd construction of the Agreement and would imply bad faith on the part of IP to interpret “point of delivery” as used in the Agreement to mean a different location than the

site where the electricity is transformed down to a voltage usable by the customer's facilities at that site or to interpret the agreement to allow IP to deliver electricity not by an IP distribution line but by the customer owned distribution system to new service connection points located in Tri-County's service territory. IP's proposed interpretation of the agreement reflects bad faith and unfair dealing on the part of IP and should not be adopted.

VIII. CITATION DOES NOT HAVE A UNILATERAL RIGHT TO CHOOSE ITS ELECTRIC SUPPLIER

A. THE ELECTRIC SERVICE CUSTOMER CHOICE AND RATE RELIEF ACT OF 1997 DOES NOT ALLOW UNCHECKED CUSTOMER CHOICE OF ELECTRIC SUPPLIERS.

The Electric Service Customer Choice and Rate Relief Law of 1997 (220 ILCS 5/16-101, et seq) (Deregulation Act) established a public policy that treats for-profit investor owned utilities and their customers differently than customers of rural electric cooperatives and municipal electric systems. The Deregulation Act allows customers of for-profit investor owned utilities to choose in a precise regulated manner electric energy providers that are different from the customers' individual electric suppliers providing electric delivery services by means of the electric distribution lines, transformers and other apparatus necessary to bring electricity to the customers' facilities. However, the Legislature specifically provided that electric cooperatives, as defined by Section 3.4 of the Electric Supplier Act (220 ILCS 30/3.4) and municipal electric systems are not subject to the Deregulation Act and their customers cannot unilaterally choose a provider of electric energy, that is an alternative retail electric supplier (ARES), which is separate from that of the electric cooperative or municipal electrical system unless the governing boards of electric cooperatives or the legislative bodies of municipalities make one or more elections allowing one or more of its existing or future customers to take service from an ARES (provider of electric energy

only) and filing a notice of such election with the Illinois Commerce Commission (220 ILCS 5/17-200).

The Legislature recognized the inherent differences between the business models of for-profit investor owned utilities on the one hand and not-for-profit rural electric cooperatives and municipal electric systems on the other hand. Those differences have been recognized by the courts as a basis for treating rural electric cooperatives and municipal electric systems differently from their for-profit utility brethren and their respective customers. See Fuchs vs Rural Electric Convenience Cooperative, Inc., 672 F Supp 1111, 1114-1115 (CD Ill Springfield Div 1987), wherein the Court found that electric cooperatives are exempt from anti-trust activity under the Sherman Anti-Trust Act when entering into exclusive service territory agreements because rural electric cooperatives are effectively self regulating in that they are completely owned and controlled by their consumer-members, only consumers can become members, each member has a single vote in the affairs of the cooperative, service is essentially limited to members, and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn a profit. The court made it clear that a not-for-profit electric cooperative is analogous to a governmental entity because the members control the affairs and operation of the cooperative. See Fuchs v. Rural Electric Convenience Co-op., Inc., 858 F 2d 1210, 1217 (1987). See also Salt River Project Agricultural Improvement & Power Dist., v Federal Power Comm'n, 391 F2d 470, 473 (DC Cir 1968).

Thus, the Legislature made a clear public policy distinction in the Deregulation Act regarding electric consumers of for-profit private utilities on the one hand and the electric consumers of cooperative and municipal electric systems on the other hand regarding the consumer's right to take electric energy from an ARES. In the former case the consumer's right is

restricted only by the legislative timetable and procedures established for making such election. In the later case the consumer's right is subject to consent of the elected governing board of the cooperative or municipality. This public policy distinction is clear and precise.

B. ELECTRIC COOPERATIVES HAVE BEEN EXCLUDED FROM THE DEREGULATION ACT

No conflict exists between the Deregulation Act and the Electric Supplier Act, (220 ILCS 30/1 et seq). Both acts are quite clear. The Legislature painstakingly defined "electric utilities and "electric cooperatives" and meticulously excluded electric cooperatives from the Deregulation Act (220 ILCS 15/17-100). Nothing in the Deregulation Act diminishes the exclusive right of electric cooperatives to continue to serve customers in their service territory as determined by the Electric Supplier Act (220 ILCS 5/17-200). Further, there is nothing in the Deregulation Act that indicates the Legislature intended to alter the policy regarding electric service territories or rights of electric suppliers as set forth in the Electric Supplier Act (220 ILCS 30/1 et seq.; 220 ILCS 5/17-100 and 17- 200). For instance Section 5/16-101 of the Deregulation Act states that the Act shall apply to "electric utilities" and "alternative retail electric suppliers" (220 ILCS 5/16-101(a)). In Section 5/16-102, the definition of "alternative retail electric suppliers" excludes an electric cooperative as defined in the Electric Supplier Act (220 ILCS 30/3.4) which is serving customers in an area it is authorized to serve under the laws in effect on the date the Deregulation Act was adopted (220 ILCS 5/16-102 (ii)). Further, Section 5/16-102 defines "electric utility" as a "public utility" as defined in Section 3-105 of the Public Utility Act which in turn excludes electric cooperatives as defined in the Electric Supplier Act (220 ILCS 5/3-105(b)(3); 5/3-119; and 220 ILCS 30/3.4). It is very clear the Legislature did not intend to apply the Deregulation Act and its "customer choice" provisions to consumers of electric cooperatives unless the governing board of

the electric cooperative authorized the same (220 ILCS 5/17-200) and it is clear Tri-County Electric Cooperative, Inc. as an electric cooperative has not made that election (Scott Supplemental Rebuttal Test Tri-County Ex H p 6-8, Tr 1/12/11 p 498). Each Act deals with two different matters and no conflict exists between the Deregulation Act and the Illinois Electric Supplier Act.

C. THE LEGISLATURE WHEN ADOPTING THE DEREGULATION ACT DID NOT AMEND OR REPEAL THE ELECTRIC SUPPLIER ACT

Even if there is a need to construe the Deregulation Act and the Electric Supplier Act together, the Supreme Court in Eades v Heritage Enterprises, Inc., 204 Ill 2d 92; 787 NE2d 771; 272 Ill Dec 585, 591 (2003), noted the objects and purposes of both statutes must be considered and where the purposes of each are different they are to be construed so as to meet the purposes each was designed to meet. Further, the Deregulation Act is not so repugnant to the Electric Supplier Act that it repeals or preempts the Electric Supplier Act. In Ralston Purina Company v Killiam 10 Ill App 3d 397; 293 NE2d 750, 754 (5th Dist 1973), the court was called upon to interpret the Landlord and Tenant Act adopted 1941 and the Uniform Principal and Income Act adopted 1961 when deciding which was applicable for apportioning land rents consisting of growing crops between the deceased life tenant's estate and the remaindermen. Even though both statutes dealt with rent apportionment, the court found the Principal and Income Act adopted in 1961 was not repugnant to the Landlord and Tenant Act adopted 1941 because there was no suggestion by the Legislature that the later adopted act was in conflict with the earlier adopted act.

Likewise, there is no suggestion in the Deregulation Act that it is in conflict with the Electric Supplier Act. Rather, the Deregulation Act specifically refers to the Electric Supplier Act and exempts electric cooperatives from the provisions of the Deregulation Act unless the

electric cooperative has affirmatively elected to participate which Tri-County has not done (220 ILCS 5/17-200). Further, by painstakingly defining “electric utilities” for purposes of the Deregulation Act and meticulously excluding “electric cooperatives” serving retail customers in areas authorized under the Electric Supplier Act, the Legislature made it quite clear the state’s policy established by the Electric Supplier Act was not changed by the Deregulation Act. As noted by the Court in People vs. Woods, 193 Ill 2d 483; 739 NE2d 493; 250 Ill Dec 730, 732 (2000) the court must consider the reasons and necessities of the statutes being construed and the problems the legislature sought to remedy. If the Commission adopts Citation’s reasoning in this docket, it will in effect destroy the Legislature’s remedy for the problems the Legislature sought to correct with the Electric Supplier Act. Such was not the intent of the Legislature.

CONCLUSION

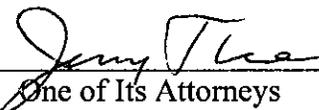
Citation constructed electric delivery points for the gas plant and each of eight gas compressors, seven of which along with the gas plant are located in Tri-County’s designated service territory, which constitute delivery points in accordance with accepted engineering practices within the electric utility industry. None of the delivery points for the gas plant and the gas compressor sites existed on March 18, 1968, the date of the Service Area Agreement, and are therefore new delivery points as the term “delivery point” is customarily used in the electric utility industry and as Tri-County and IP have historically interpreted the term when applying the Service Area Agreement. Even though Citation was an existing customer of IP, whenever an existing customer creates a new service connection point it becomes a new point of delivery to be served by the electric supplier in whose designated service territory the new point of delivery exists.

Accordingly, the proper interpretation of the Service Area Agreement as applied to these facts requires the determination that Tri-County is the appropriate electric supplier to the Citation

gas plant and to the gas compressor sites numbers 1 through 5 and 7 through 8.

Respectfully submitted,
TRI-COUNTY ELECTRIC COOPERATIVE, INC.
Complainant,

By GROSBOLL BECKER TICE, TIPPEY & BARR

By: 
One of Its Attorneys

GROSBOLL, BECKER, TICE, TIPPEY & BARR
Attorney Jerry Tice
Attorney Kevin Tippey
101 East Douglas Street
Petersburg, Illinois 62675
Telephone: 217/632-2282

Tricountybriefinsupportofamendedcomplaint/jtelec

APPENDIX

Interstate Power Company v Jo-Carroll Electric Cooperative, Inc. Ill Com Comn 92-0450 and 93-0039 Consolidated on Remand

Illinois Power Company v Illinois Valley Electric Cooperative Ill Com Comn 88-0276 (June 21, 1989)

Central Illinois Public Service Company vs Spoon River Electric Cooperative, Inc. ESA 249 (October 4, 1989)

Tri-County Exhibit A-1

Tri-County Exhibit A-2

Tri-County Exhibit A-3

Tri-County Cross Examination, Exhibit G-4

Tri-County Re-Direct Exam Exhibit K

Tri-County Exhibit B-2

PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 18 day of November 2011, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the attached "Brief by Tri-County Electric Cooperative, Inc. In Support of Tri-County's Amended Complaint in This Docket" addressed to the following persons at the addresses set opposite their names:

Larry Jones
Administrative Law Judge
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
ljones@icc.illinois.gov

Scott C. Helmholz
Bailey & Glasser LLP's
Suite 520
One North Old State Capitol Plaza
Springfield, IL 62701
Shelmholz@baileyglasser.com

Jeffrey R. Baron
Bailey & Glasser LLP's
Suite 520
One North Old State Capitol Plaza
Springfield, IL 62701
jbaron@baileyglasser.com

Citation Oil & Gas Corp.
%Gary Smith
Lowenstein, Hagen, & Smith
1204 S. 4th Street
Springfield, IL 62703
lexsmith@lhoslaw.com

