

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Interstate Power Company :
-vs- :
Jo-Carroll Electric Cooperative, :
Inc. :
Complaint under the Electric : 92-0450
Supplier Act regarding service in :
Jo Daviess County, Illinois. :
Consol.
(On Remand)
Interstate Power Company :
-vs- :
Jo-Carroll Electric Cooperative, :
Inc. :
Complaint under the Electric : 93-0030
Supplier Act regarding service in :
Jo Daviess County, Illinois. :

ORDER ON REMAND

By the Commission:

I. BACKGROUND

On December 2, 1992, Interstate Power Company ("Interstate") filed a verified Complaint with the Illinois Commerce Commission ("Commission") against Jo-Carroll Electric Cooperative, Inc. ("Jo-Carroll") under Section 7 of the Electric Supplier Act ("ESA"), 220 ILCS 30/1, et seq., seeking a determination that Interstate has the exclusive right to provide electric service to American/Freezer Services, Inc. ("Freezer Services"), and that Jo-Carroll is not so entitled and should be prohibited from so doing, upon premises ("Subject Premises") located near East Dubuque, Jo Daviess County, Illinois. That Complaint was docketed as 92-0450.

On February 5, 1993, Interstate filed a second verified complaint seeking substantially identical relief against Jo-Carroll. That complaint was docketed as 93-0030. Dockets 92-0450 and 93-0030 have been consolidated, and an amended complaint was filed in these consolidated proceedings on May 30, 1995, pursuant to leave granted Interstate by the Hearing Examiner.

On February 18, 1993, Interstate filed a Motion for temporary authorization to furnish service to the Subject Premises. On February 16, 1993, Jo-Carroll filed a petition for temporary

authority, and to compel joint use of Interstate structures to facilitate construction of a new line to the Subject Premises.

On July 21, 1993, after reviewing the evidence presented by the parties, the Commission issued an Order authorizing Interstate to provide electric service to Freezer Services for all of its requirements upon the Subject Premises. Jo-Carroll sought administrative review of the Order before the Circuit Court of the Fifteenth Judicial District, Jo Daviess County, Illinois. That Court, by Order entered June 27, 1994 and Supplemental Order entered December 20, 1994, remanded the case to the Commission for further proceedings in which all relevant evidence was to be considered by the Commission, after further hearing, to determine which supplier is entitled or should be permitted under the ESA to furnish service on the basis of the entire record.

Pursuant to notice as required by law and the rules and regulations of the Commission, evidentiary hearings on remand were held in Chicago, Illinois on January 23 and 24, and February 22, 1996. Both parties were represented by counsel and presented testimony. At the close of hearing on February 22, 1996, the record was marked "Heard and Taken."

On remand, Interstate presented the following witnesses: William Mitchell; Earl F. Billmeyer; Carl B. Schoenhard, Jr.; Michael Roth; Jeff Woods; Marlin F. Jorgensen; Ralph Tranel; James Benninger; and, Thomas M. Shoemaker. Jo-Carroll presented the following witnesses: Connie Shireman; Jerry Maddox; Terrence H. Leifker; John Sinovich; Merlin Lebakken; and, Dennis D. Wurster.

Briefs, responsive briefs and proposed forms of an Order on Remand were filed by both parties. A copy of the Hearing Examiner's Proposed Order on Remand ("Proposed Order") was duly served on the parties. Exceptions and replies to exceptions were filed by the parties. No substantive changes have been made to the Proposed Order; however, several clarifications to positions taken by the parties have been made.

II. ESA

The ESA, enacted effective July 2, 1965, created four methods by which an electric supplier may establish its right to serve an area. They are: (1) pursuant to ESA Section 5, providing "grandfather" rights which allow an electric supplier to continue to serve customers at locations which it was serving on the effective date of the ESA; (2) pursuant to ESA Section 6, providing for Commission-approved service area agreements between electric suppliers - Section 6 does not govern the resolution of this dispute; (3) pursuant to ESA Section 7, by written notice to an electric supplier which may be adversely affected, unless such

supplier files a complaint with the Commission within 20 days of such notice or within 18 months of extension of service if no notice is given, and (4) pursuant to ESA Section 8, upon a Commission determination of public interest based primarily upon the proximity of existing lines, provided those lines are adequate, and upon four lesser criteria.

Interstate contends that it established a right to serve pursuant to ESA Section 7, that it has a "grandfather" right to serve pursuant to ESA Section 5, and that ESA Section 8 criteria compel a determination that Interstate is entitled or should be permitted to serve.

Jo-Carroll claims a "grandfather" right to serve pursuant to ESA Section 5, and that ESA Section 8 criteria favor Jo-Carroll. Both parties dispute each claim of the other.

A. ESA Section 7

ESA Section 7 provides that "written notice be given of an intent to serve. Interstate claims that it gave Jo-Carroll written notice in accordance with ESA Section 7 by handing over certain documents at an October 7, 1992 meeting ("Meeting") with Jo-Carroll. Interstate contends that the documents were written and, while acknowledging that the documents were not labeled "notices," Interstate asserts that ESA Section 7 requires only "written notice," with no technical requirements attached. Interstate maintains that there is no requirement that the written notice be called a notice, refer to the ESA, or be signed. Interstate further claims that even "technical requirements for notice may not be strictly enforced if the parties seeking enforcement had actual notice and could not show prejudice as a result of the opposing party's failure to comply with technical requirements." Prairie Vista, Inc. v. Central Illinois Light Co., 37 Ill. App. 3d 909, 346 N.E. 2d 72, at 74 (1976). On remand, Interstate presented evidence of similar meetings with Jo-Carroll prior to the Meeting. Thus, in this case, Interstate maintains that Jo-Carroll had actual notice and cannot show prejudice as a result of any failure by Interstate to comply with any technical requirement.

Jo-Carroll contends that it did not receive valid written notice pursuant to Section 7 that Interstate intended to provide electric service or extend its lines to the customer in question, or which conforms with the customary procedure for giving such notice previously utilized between Interstate and Jo-Carroll on prior occasions. Jo-Carroll further contends that the Meeting was merely a field meeting between field representatives of the two electric suppliers for the purpose of exchanging information and determining the basis for each of their claims of entitlement to

serve the customer. Jo-Carroll also contends it advised Interstate representatives at the Meeting that Jo-Carroll intended to serve the customer, although Jo-Carroll does not claim to have given any written notice to Interstate and Interstate did not file a complaint with the Commission within 20 days thereafter.

While there is no doubt that Interstate discussed the possibility of extending its lines to serve Freezer Services at the Subject Premises when Interstate met with Jo-Carroll's representatives and provided three written documents at the Meeting, Interstate's actions were insufficient to evince an intent to serve in compliance with the written notice provision of Section 7. Jo-Carroll has not asserted any Section 7 notice rights.

B. ESA Section 5.

For the purposes of this proceeding, Section 5 entitles an electric supplier to "provide service to customers at locations which it is serving on the effective date of this Act." That is, July 2, 1965. The term "location" was held in Coles-Moultrie Electric Coop. v. Illinois Commerce Commission, 76 Ill.App.3d 165, 394 N.E.2d 1068 (1969), to constitute a tract, owned by the same individuals, which is not platted, subdivided, nor "divided by any public road or natural geographic feature"; that Court specifically stated that a "public road" could serve to distinguish a "location". The Commission applies the principle that "a single parcel of land can contain separate locations for Section 5 purposes if the parcel is divided by a public road. (citing Coles-Moultrie, supra.)" Southeastern Illinois Electric Coop., Inc. v. Central Illinois Public Service Co., Docket 89-0153, 1990 Ill. PUC LEXIS 595.

1. Jo-Carroll's Section 5 Claim.

On remand, Jo-Carroll claims that it had a line south of U.S. Highway 20 prior to July 2, 1965 serving the Miller barns. Jo-Carroll notes that it was from this line that service was extended to the Dubuque Sand & Gravel scale house in 1968. Thus, Jo-Carroll contends that the existence of these electric facilities constitute service within the meaning of Section 5, citing Illinois Power Company v. Monroe Electric Cooperative, Inc., Docket 89-0123, Order entered August 7, 1991. Section 5(c) allows an electric supplier not providing service on July 2, 1965 the right to "resume service to any premises to which it had discontinued service in the preceding 12 months and on which are still located the supplier's service facilities." Jo-Carroll contends that Mr. Wurster worked as a lineman and he testified that prior to July 2, 1965, a pole existed south of U.S. 20 at the intersection of the Coyle roadway.

In rebuttal, Interstate contended that a pole located immediately south of the former location of Highway 20 in 1959 would lie north of the location of Highway 20 in 1965, and that Jo-Carroll provided no service from any pole located south of Highway 20 near the Subject Premises before 1968. Interstate provided an eye-witness, Mr. Billmeyer, who testified that the Jo-Carroll pole at that location was newly-installed in 1968.

2. Interstate's Section 5 Claim.

Interstate contends that it provided electric service on July 2, 1965 to light a sign, referred to as the Coyle Motel sign, located south of Highway 20 on an easement across the portion of the Miller land lying south of Highway 20 which includes a portion of the Subject Premises. Interstate presented certain meter records, reflecting service consistent with the 1968 withdrawal of service to the sign, and reflecting the 1966 reinstallation of a line and meter to that sign. Interstate contends that those records show that Interstate provided service to that sign from before May 2, 1964, to, including and subsequent to the July 2, 1965 effective date of the ESA.

On remand, Interstate introduced documentation which it contended not only showed that the land upon which the sign was located was a private roadway easement and not a "public road", but also showed that easement is now owned by Freezer Services as part of the Subject Premises. Interstate contended that the traffic on said roadway was that of the grantors of private easement rights upon the roadway and their customers and invitees, and that the traffic signs were private signs provided by IEI Barge Services, one of the grantors of easement rights. Moreover, Interstate maintains that the deed by which grantors of the easement rights to both IEI Barge Services (formerly Dubuque Sand & Gravel) and Freezer Services acquired such easement, specifically identified it as a private roadway (Ex. MFJ 2, pp. 27 and 43 of 46). Thus, Interstate asserts that whether the sign served by Interstate on July 2, 1965 is deemed to have been located upon the private roadway easement then held by Dorance Coyle who also owned the sign, or upon the underlying fee then held by Millers, it was a "location" served by Interstate on July 2, 1965 upon which the Freezer Services facility is now located, and Interstate is entitled under ESA Section 5 to furnish service to Freezer Services as a customer at a location which Interstate was serving on the effective date of the ESA.

3. Jo-Carroll's Rebuttal

While Jo-Carroll acknowledges that Interstate provided electric service to various sites located around the Subject Premises, it contends that on July 2, 1965, such service sites were separated from the Subject Premises by U.S. 20 to the north, the railroad to the south and the Coyle "public" roadway to the east. Jo-Carroll noted that the deed creating the Coyle easement refers to it as a roadway to be used jointly with others. Moreover, heavy truck traffic uses the roadway to gain access to the several industries in the area and there are no signs marking the roadway as private, or distinguishing it from a public roadway.

Jo-Carroll also disputes whether Interstate was providing electric service to the Coyle Motel sign on July 2, 1965. Jo-Carroll contends that Interstate's Customer Information Card and Electric Service Agreements produced by Interstate only show electric service to Sand & Gravel Industry and makes no mention of the Coyle Motel sign. Jo-Carroll also noted that no Interstate witness was able to state when service commenced to the sign, whether it was ever lit, or even its exact location. Finally, Jo-Carroll asserts that, in 1968, when Interstate exchanged electric service for the Coyle Motel sign with Jo-Carroll in return for electric service to the Dubuque Sand & Gravel scale house, Interstate thereby released its Section 5 rights.

4. Commission Conclusions Regarding Section 5 Claims

The Commission concludes that Interstate has properly asserted its Section 5 "grandfather" rights. Our conclusion is based upon the written documentation provided by Interstate, particularly on remand. Specifically, the Customer Information Card and the two Electric Service Agreements establish that Interstate was providing electric service to the sign between 1964 and 1966. These documents constitute business records kept in the ordinary course of business and are reliable evidence. Also, a review of other documentation provided by Interstate indicates that the roadway is private, not public, as claimed by Jo-Carroll. Freezer Services' easement agreement identified the roadway as a private roadway. The Appellate Court in the Coles-Moultrie case emphasized that in order to constitute a separate location there must be some feature of the area in question to separate it from the surrounding area, such as a "public" road. There is no such separate location in the area east of the Subject Premises as claimed by Jo-Carroll. With the additional evidence provided by Interstate regarding the private, not public roadway to the east of the Subject Premises, the Commission reverses its original determination that Interstate had failed to establish its Section 5 rights to serve Freezer Services. Also, Jo-Carroll's assertion that in 1968 Interstate somehow released or waived its Section 5 rights does not appear to

be based on the language in Section 5, or supported by case law. Under the circumstances herein, Section 5 rights legally attach as of July 2, 1965, and no subsequent action can affect the position of the parties.

On the other hand, Jo-Carroll's Section 5 claim should be denied. The evidence shows that while the Miller house north of Route 20 was served by Jo-Carroll from its line north of the house, any service to the barn was provided by the Millers, not Jo-Carroll. See Tr. 821-822R. Moreover, the line to the Miller barn was a single-phase line and it would not be adequate to serve the Subject Premises. The Commission concludes that Jo-Carroll has not provided any evidence indicating that it provided service south of Highway 20 on July 2, 1965, or service prior to that date which was resumed to be in accord with Section 5 (c).

C. ESA Section 8

Recognizing that Interstate has established its Section 5 rights to provide service to the Subject Premises, but with the realization that this Order on Remand will be appealed, we now turn to a discussion of the criteria established in Section 8 to determine which supplier should provide permanent service. The Commission's has reviewed the 1993 record, the record on remand, and this entire record provides a sufficient basis to make a Section 8 determination.

1. Principal Section 8 Criteria - Proximity and Adequacy

ESA Section 8 provides that in making its determination under Section 8, "the Commission shall act in the public interest and shall give substantial weight to the consideration as to which supplier had existing lines in proximity to the premises proposed to be served, provided such lines are adequate."

a. Existing Lines

"Existing Lines" are defined in ESA Section 3.6 as any line of any electric supplier in existence on the effective date of the ESA, July 2, 1965. Consistent with the Court's Order of June 27, 1994 and Supplemental Order of December 20, 1994, the Commission, in determining proximity of lines under Section 8 of the ESA, takes measurements from lines in existence on July 2, 1965 whether they still exist or not. Both parties agree that: "Existing lines" for purposes of determining proximity are to be considered by application of an objective standard of whether they existed on July 2, 1965, irrespective of the route by which service is actually proposed to be provided.

On July 2, 1965, Interstate had an existing line along the south side of a railroad right-of-way adjoining the southerly boundary of the Subject Premises. That line, which still exists, was extended in past years to serve other customers to the east of the Subject Premises. Also, on July 2, 1965, Jo-Carroll had an existing line running along the ridge of hills lying to the north of Highway 20 and providing service to the Miller farm residence. The Commission will consider the lines as "existing lines" on July 2, 1965.

b. Adequacy

Section 8 directs the Commission to consider the proximity of "existing lines", "provided such lines are adequate." "Adequate" line and facilities are defined in ESA Section 3.1 as those having sufficient capacity to meet the maximum estimated service requirements of the customer to be served, and of the actual customers to be served therefore, during the year following commencement of permanent service. Facilities and lines are "adequate" even though the electric supplier "must increase their capacity", if the supplier will undertake to do so, and "can reasonably do so", in time to meet the customers' requirements.

Interstate contends that its 1965 line lying to the south of the Subject Premises exists and is adequate to serve the operation of the Freezer Services facility. The only action required of Interstate as to its facilities, to "increase their capacity" to assure that line would meet the maximum estimated service requirements of Freezer Services and of Interstate's other actual customers, was to transfer part of the load from Interstate's Frenress Lake substation to its East Dubuque substation, a procedure which took less than an hour at minimum expense.

Jo-Carroll's 1965 existing line along the ridge of hilltop serving the Miller farm via a drop line provided by Miller north of Highway 20 was removed in 1969, and no longer exists beyond its point of interconnection at the Pioneer Acres substation, approximately 1.1 miles from the Subject Premises. Jo-Carroll took action required to "increase their capacity" as to its facilities at the substation, by installing a new 5,000 kV transformer, to assure that a new 1.1 mile line from that point would meet the estimated service requirements of Freezer Services and of Jo-Carroll's other customers. In order to "increase their capacity" as to facilities which no longer exist at the location of its former 1965 line along the ridge of hills, Jo-Carroll would have to construct a new line. It is not necessary for the Commission to determine whether the term "increase their capacity" within the ESA Section 3.1 definition of "(a)dequate" lines or facilities encompasses the construction of a new line, because Jo-Carroll has not offered or shown that it will "undertake" to do

so, or that it "can reasonably do so"; in fact, the only evidence in that respect is that doing so would be more difficult and costly than constructing the new 1.1 mile line which Jo-Carroll built in 1993 and that doing so would be an unreasonable undertaking. Accordingly, the Commission concludes that Interstate's line south of the Subject Premises is "adequate", and that Jo-Carroll's 1965 line is not "adequate" east of its point of interconnection at the Pioneer Acres substation. By the same reasoning, the Commission concludes that Interstate's 1965 service lines to the railroad signal and the Coyle Motel sign are "adequate," while the Jo-Carroll line north of Highway 20 is not "adequate."

c. Shortest Distance

ESA Section 3.13 defines "proximity" as "that distance which is shortest" between a proposed "normal service connection point" and a point on an electric supplier's line, determined "in accordance with accepted engineering practices" by the "shortest direct route" between such points which is "practicable" to provide service. ESA Section 3.10 defines "normal service connection point" as that point on a customer's premises where an electric connection to serve such premises would be made "in accordance with accepted engineering practices". Both the "normal service connection point", and the "shortest direct route" which is "practicable" to provide service to that point from an "existing line", are to be established for purpose of determining proximity by application of an objective "accepted engineering practices" standard, irrespective of non-engineering (business or personal factors, or the route actually used to provide service. Illinois Power Co. v. Egyptian Electric Coop. Assn., ESA 176, dated September 7, 1977.

(i) Normal Service Connection Point.

During the 1993 hearings, Interstate contended, on the basis of the testimony of its engineering, witnesses Mr. Mitchell and Mr. Shoemaker contend that the normal service connection point in accordance with "accepted engineering practices" would be closest to the electric power facility on the south side of the Freezer Services plant, approximately 105 feet from Interstate's existing line. During the 1996 hearings on remand, on the basis of an accurate survey depicting the Freezer Services building as constructed, and the measured distance of Interstate's existing

line, and allowing room for a railroad siding, Interstate contended that the normal service connection point upon the Subject Premises was 153 feet from Interstate's existing line.

Jo-Carroll contends that the "normal service connection point" can only be located on the north side of the Freezer Services facility, where the transformer pad and point of connection are actually installed. Jo-Carroll's contention is based upon Freezer Services' desire for a service connection on the north side of its building to meet its building design requirements. Jo-Carroll's witness, Mr. Sinovich, an independent engineering consultant in the employ of Freezer Services, provided the engineering bases why the transformer pads were located on the north side of the Freezer Services' building.

Our review of all the evidence presented, particularly the fact that all of Freezer Services' required electric facilities are located on the north side of its facility, leads us to conclude that the normal service connection point where an electric connection to serve the Subject Premises would be made in accordance with accepted engineering practices would be at the existing transformer pads on the north side of the facility.

(ii) Shortest Direct Route

Interstate witnesses testified that the shortest direct route between that normal service connection point on the south side of the Freezer Services facility, and a point on Interstate's existing 1965 line, is a straight line across the railroad right-of-way, and down to a transformer pad, a distance of 153 feet. Interstate contends that if this route was taken, there would be no need to extend the line underneath the Freezer Services facility. These witnesses also contended that service from Interstate's existing 1965 line could be run underground directly to the transformer pad location on the north side of the Freezer Services facility.

Jo-Carroll witnesses testified that Freezer Services objected to a line running under its building in 1993 and continue to do so. Jo-Carroll contends that all of the examples where electric service was placed under an industrial building posited by Interstate were with the building owner's consent. It is clear from the evidence presented that Freezer Services' objection is based upon concerns that placing the line under the building might damage certain service structures, and cause unnecessary expense and unnecessary interference with the operation of the plant itself.

Jo-Carroll contends that the shortest distance from Interstate's existing 1965 line to the transformer pads is 800 feet. Such a route would place the line immediately east of the existing building. However, Jo-Carroll maintains that since

Freezer Services proposes to expand its plant, it would not allow Interstate to place the line immediately east of its existing facility. Thus, Jo-Carroll contends that based upon the customer's requirement for routing electric service, Interstate would have to place its line from the existing right-of-way north then east to the area of the Dubuque Sand & Gravel scale house then west to the transformer pad. The distance for such a line is approximately 1200 feet.

Interstate's testimony and cross-examination of Jo-Carroll witnesses indicate that underground cables, in conduits, would be placed eight feet below the floor level of the plant, a spare conduit would be capped to prevent any ice build-up, and the underground service complies with the National Electric Code. Jo-Carroll's witness Sinovich indicated that Freezer Services has experienced damage to conduits and has been unable to use the spare conduit due to ice build-up.

Interstate introduced a survey, Ex. CBS 1, which showed the distance of the shortest direct route as testified to by Interstate's engineering witness from Interstate's existing 1965 line to a normal service connection point on the south side of the Freezer Services building as 153 feet, and to the transformer pad on the north side of the Freezer Services building as 523 feet.

Interstate contends that, even the 523 foot distance, is a shorter than the distance of any route from any Jo-Carroll line which existed on July 2, 1965. The shortest distance from the Jo-Carroll line north of Highway 20, as testified to by Jo-Carroll's witness is 760 feet. Jo-Carroll has contended that its "proximity" should be determined from the house which it served in 1965. Interstate's engineering witnesses have established that providing service to a major facility such as Freezer Services from a single-family residence would be contrary to accepted engineering practices. Jo-Carroll's engineering witness, Mr. LeBakken, used only the location of Jo-Carroll's former July 2, 1965 single-phase line running north of Highway 20 for purposes of measuring proximity.

The Commission believes that in order to comply with the ESA, the appropriate point to begin measuring the shortest distance from Jo-Carroll's line on the ridge north of the Miller residence. Based upon this record we determine that the shortest direct route to the Freezer Services' transformer pad from Jo-Carroll's 1965 line north of the Miller residence is 760 feet. It would be inappropriate to measure the distance from the Miller residence because the drop line to the residence would not be adequate to serve Freezer Services and could not be upgraded to do so. We also reject Interstate's proposal to measure the distance from the Pioneer Acres substation 1.1 miles away as the closest point on

that line which still exists and is adequate to serve. This would be contrary to the ESA.

In determining what is the shortest direct route for Interstate to provide the service, we must first consider what are "accepted engineering practices" which are part of the ESA, but not defined therein. Neither party to this proceeding has defined this term; however, on remand, both parties provided witnesses arguing, in particular, why it is, or is not, an acceptable engineering practice to place Interstate's lines under Freezer Services' facility. While it is clear that Freezer Services would not permit Interstate's lines to be placed under its facility, acceptable engineering practices would allow the placement of such lines with adequate protectors beneath the Freezer Services' plant. Thus, the shortest distance for the Interstate 1965 existing line to traverse to the transformer pad is 523 feet.

Accordingly, the Commission concludes that Interstate is the electric supplier that had existing lines in closer proximity to the Subject Premises proposed to be served, and that such lines are adequate. The principal Section 8 criteria favor Interstate and Interstate should be granted the permanent authority to provide electric service to Freezer Services.

2. Lesser Section 8 Criteria.

ESA Section 8 provides four additional criteria which the Commission may consider, but with lesser weight:

a. Customer preference

Freezer Services' President, Mr. Barry Smith, expressed an unconditional preference for Jo-Carroll service during the 1993 hearings. No additional evidence was presented on remand.

b. First serving in area

Jo-Carroll has been serving in the East Dubuque area since 1940. Interstate and its wholly-owned predecessor subsidiary have been providing service in the East Dubuque area for 14 years longer than Jo-Carroll has been in existence. Additional evidence on remand regarding the criteria of which electric supplier was first furnishing service in the area showed that Freezer Services, and all other customers of both Interstate and Jo-Carroll in the immediate vicinity of the Subject Premises, used East Dubuque addresses. On remand, long-term resident and property owner, Mr. Tranel, a grantor of the Subject Premises, identified them as in the East Dubuque area.

c. Assistance in creating the demand for service

While Jo-Carroll provided Freezer Services with \$500,000 in economic development loans, only \$100,000 of which had to be repaid, Interstate is the only electric supplier to have actually assisted in creating a demand for service to Freezer Services. Although both suppliers had been providing economic development assistance in their service area including East Dubuque for many years prior to 1992, Interstate took Freezer Services' president to greater Dubuque area plant sites and otherwise communicated with Freezer Services beginning in 1991, and agreed to provide a \$50,000 economic development grant to Freezer Services in 1992. Freezer Services had never even heard of Jo-Carroll before October 16, 1992, by which time Freezer Services had committed to locating its facility on the Subject Premises, and anticipated service from Interstate.

d. Smaller additional investment

Interstate's actual additional investment to furnish service to Freezer Services was established on remand as \$47,562.47, including the cost of a service transformer. That amount is Interstate's cost of extending service to Freezer Services from the line from which Interstate serves the scale house located east of the Subject Premises. Testimony of Mr. Mitchell on remand shows that Interstate would not need any additional investment to serve a proposed "Phase II" expansion of the Freezer Services facility.

Jo-Carroll's own cost figures for extending service from the Pioneer Acres substation to Freezer Services by the 1.1 mile line which it constructed in 1993 were given during the 1993 hearing as \$105,750, not including the cost of service transformers. Jo-Carroll allocated one-third of that cost to "Phase I" of Freezer Services and one-third to "Phase II" of Freezer Services, with one-third allocated to Jo-Carroll's future load growth. Using these figures and allocations, Jo-Carroll's additional investment in its 1.1 mile line alone to serve "Phase I" is \$35,250. On remand, Jo-Carroll contends that its transformer cost is \$18,520, and its total cost is \$54,040. Based on the foregoing, Jo-Carroll's investment to serve the Subject Premises is greater than Interstate's investment. Jo-Carroll asserts, however, that it can provide the service at a cost of \$28,084 from the line originally used to serve the Dubuque Sand & Gravel scale house, or at a cost of \$26,398 from the three-phase line north of Route 20. These latter lower cost assertions are contrary to the way Jo-Carroll proposed to serve the Subject Premises in 1993. A major purpose for building the 1.1-mile line was to serve the Subject Premises. Jo-Carroll, in fact, would not make either of these lower cost additional investments after constructing the 1993 line and so we do not deem these costs appropriate for consideration herein.

Therefore, Interstate requires a smaller additional investment to serve the Subject Premises.

III. Findings and Ordering Paragraphs.

The Commission, having considered the entire record before it, and being fully advised in the premises, is of the opinion and finds that:

- (1) Interstate Power Company is a corporation providing electric service in Illinois, and as such is an electric utility within the meaning of the Illinois Public Utilities Act; and is an electric supplier within the meaning of the ESA;
- (2) Jo-Carroll is an electric cooperative and is an electric supplier within the meaning of the ESA;
- (3) the Commission has jurisdiction over the parties hereto and of the subject matter hereof;
- (4) the statements of fact and law set forth in the prefatory portions of this Order are supported by the evidence, and the record, and are hereby adopted as findings of fact and law;
- (5) on October 7, 1992, Interstate failed to give Jo-Carroll legally sufficient written notice of its intention to serve under ESA Section 7;
- (6) Interstate established that it was serving at the location of the Subject Premises on the July 2, 1965 effective date of the ESA, and is therefore entitled to furnish service to Freezer Services as a customer at that location under ESA Section 5; Jo-Carroll did not meet its burden of proving that it is entitled to serve the Subject Premises under ESA Section 5;
- (7) the public interest requires a determination that Interstate is entitled and should be permitted to furnish the proposed service, giving substantial weight to the fact that only Interstate had existing lines in proximity to the Subject Premises and that those lines are adequate, and lesser weight to the fact that three of the other criteria of Section 8 of the ESA favor Interstate;
- (8) Interstate is the only electric supplier lawfully entitled to provide service to Freezer Services upon the Subject Premises;

- (9) any petitions, motions and objections made in this proceeding that remain undisposed of should be disposed of in a manner consistent with the conclusions contained herein.

IT IS THEREFORE ORDERED that Interstate Power Company be, and it is hereby, granted authority to provide electric service to American/Freezer Services, Inc, for all of its requirements upon the Subject Premises in Jo Daviess County, Illinois.

IT IS FURTHER ORDERED that any petitions, motions, and objections made in the proceeding that remain undisposed of shall be disposed of in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880 and 200.890, this Order is final; it is subject to the Administrative Review Law.

By Order of the Commission this 9th day of October, 1996.

(SIGNED) DAN MILLER

Chairman

(S E A L)