STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TRI-COUNTY ELECTRIC COOPERATIVE, INC.,	)	
Complainant,	)	
v.	)	Case No. 05-0767
ILLINOIS POWER COMPANY, d/b/a AMEREN IP,	)	
Respondent.	)	

RESPONSIVE BRIEF OF CITATION OIL & GAS CORP.

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NOW COMES Citation Oil & Gas Corp. ("Citation"), by its attorneys, Loewenstein, Hagen & Smith, P.C., and hereby files its Response Brief in opposition to Tri-County Electric Cooperative, Inc.'s ("TCEC") initial brief, and states as follows:

I. INTRODUCTION.

TCEC's 24 page statement of "facts" does not contain facts fairly and accurately stated without argument or comment that are necessary for an understanding of the case. Instead, TCEC's statement of facts contain numerous legal arguments and legal conclusions. These assertions are not facts.

The outcome of this case is governed by Citation's right to choose its electric supplier under the Electric Service Customer Choice and Rate Relief Act of 1997 ("CCL"). Throughout the argument portion of its brief, TCEC attempts to create ambiguities in Service Area Agreement ("SAA") where none exists, and it repeatedly distorts the plain meaning of "point of delivery" in the SAA. TCEC's modification agreement is contrary to the terms of TCEC's Stipulation with Citation and must be rejected. Finally, TCEC has waived its modification

argument and application for service argument, neither of which was alleged in the Second Amended Complaint.

II. TCEC'S FLAWED ASSERTIONS ARE NOT FACTS.

TCEC's "factual statement" heavily relies upon the ill-conceived notion that transformers are "points of delivery" within the meaning of the SAA. For example, in par. 5 of the Statement of Facts (Br. @4), TCEC asserts that the "electric service connection point" to each compressor and the gas plant is the transformer at each location (Br. par. 5). Whether Citation's transformers are service connection points under the SAA is not a fact.[1] The plain meaning of "service connection point" is the place where the customer receives the electric service from the electric service provider. In this case, Citation receives its electric service for the Salem Unit at the Texas substation from Ameren Energy Marketing ("AEM"), an Alternative Retail Electric Provider ("ARES"). Illinois Power Company ("IP") provides only a delivery service to the Texas substation. Citation does not obtain electric service from any electric provider at any of the transformers in the Salem Unit and, accordingly, they are not and cannot be "service connection points".

Essentially, TCEC acknowledges the reality of this situation stating that the compressors and the gas plant, "receive electric service by means of the IP Texas Substation from which electricity is taken by Citation . . ." (Br. par. 7 @ 5). By this statement, TCEC concedes that Citation *receives electric service* at the Texas Substation, but by artifice and hyperbole TCEC attempts to redefine the service connection point downstream at Citation's privately owned transformers.

TCEC asserts in par. 8 of its flawed statement of facts that Citation "requested" service for the gas plant (Br. @ 5 - 6).[2] TCEC is wrong. The record reflects the numerous communications and ongoing meetings between IP, TCEC, and Citation from March to June

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[1] TCEC describes one of the "issues" in the case as whether the transformers constitute new points of delivery within the meaning of the SAA (TCEC Br. 29-30).

[2] This new theory is not alleged in the original Complaint or the Amended Complaint and is waived (see XI below).

2005, and the very existence of those negotiations involving both IP and TCEC over several months indicates that Citation did not place an order for service from TCEC or IP to construct electric service to the gas plant.

Citation's simple request for cost estimates and rates is not tantamount to a request for service. Inquiries about service are not the equivalent of an application for service under the SAA and TCEC didn't take any action to implement service to the gas plant. Although Marsha Scott considers discussions with her staff as a request for service (TCEC Ex. A @ 6), her conclusion is more hope than reality. There is no evidence that Citation committed to take service either TCEC or IP at the gas plant.

In par. 9 (Br. @ 6 - 7), TCEC mischaracterizes and distorts Mr. Tadlock's testimony. TCEC asserts that Mr. Finch requested a new point of delivery from IP that consisted of a step-down transformer. That is not what the testimony at Tr. 1207-1212 reflects. Although Mr. Tadlock testified about a transformer in response to numerous questions on cross-examination, those questions were premised upon IP building a new independent distribution line to the gas plant (Tr. 1214) and under those circumstances Mr. Tadlock explicitly testified that he understood that a new point of delivery would be through a meter at the gas plant (Tr. 1210). Mr. Tadlock did <u>not</u> testify that Citation's own transformer was a new point of delivery. Likewise, pars. 10 - 15, 23 (Br. @ 7 - 8, 11 - 12) involve the hypothetical situation of IP constructing its own supply line from outside of TCEC's service area up to the gas plant. No one is arguing that IP could have constructed a new line to the gas plant from outside the TCEC service area. Since IP did not construct a new service line, TCEC's arguments contained in pars. 10 - 15, 23 (Br. @ 7 - 9, 11) are irrelevant.

TCEC rests much of its transformer argument on the confusion surrounding IP's employees misinterpretation of the SAA. IP's employees mistakenly interpreted the SAA as purely a border agreement without any consideration of the exceptions to the boundaries set forth in Sec. 3(b), a mistake perpetuated by TCEC in the present case. Those errors and discussions, of course, do not change the meaning of the SAA.

TCEC's flawed factual statement continues in par. 29 (Br. @ 14) when TCEC mischaracterizes Mr. Tadlock's testimony on cross-examination. The references cited, Tr. 1207-1217, 1224-1228, do not support the claim that Mr. Tadlock testified that a transformer constitutes a new delivery point for purposes of the SAA. The questions and answers on those pages involve responses to direct questions about transformers and voltage. The reference on page 1167 regarding Citation's request for cost information is deceptively muddled as a request for service from IP that did not occur and that the transcript reference does not support.

TCEC argues in its pars. 31 - 33 (Br. 15 - 17) that even though the specific language in Sec. 1(d) of the SAA <u>explicitly</u> requires a modification of <u>additional phases</u> of electric current, IP's modifications to the Texas substation from 1969 to 1992 somehow create a new point of delivery.[3] If somehow the Texas substation was a new point of delivery, TCEC concludes that all electric service in the Salem Unit would go to TCEC. The modification argument exceeds the scope of the Second Amended Complaint and it is a bold attempt to take over all electric service to the Salem Unit that TCEC agreed not to seek in the Stipulation filed on e-docket (see Exhibit A attached).

In Sec. 1(d) of the SAA, the definition of "Existing point of delivery" includes, "[a]ny modification of an electric service connection point with an additional phase or phases of electric

[3] This new theory is in violation of the Stipulation and is not alleged in the original Complaint or the Amended Complaint. It is, therefore, waived (see VIII and XI below).

current to the connection shall be deemed to create a new point of delivery". There are no modifications within the meaning of Sec. 1(d) of the SAA unless there have been changes in the phases of electricity and the record is clear and TCEC concedes that the Texas substation was built as a 3 phase substation and has always been a 3 phase substation (Tr. 1167). The claim that IP's maintenance and upgrades to the Texas substation magically creates a new point of delivery *without any change in the phases* of electric current to force Citation to take all electric service for the Salem Unit from TCEC: (1) is in violation of the Stipulation; (2) is contrary to the plain and explicit language in Sec. 1(d); and (3) defeats the manifest intent of the SAA to preserve each electric supplier's service to its existing customers and at existing points of delivery on the effective date of the SAA. TCEC's argument reflects that the real purpose of this proceeding is to seize all electric service to Citation's Salem Unit and make Citation a captive customer of TCEC. All the so-called modifications listed by TCEC (Br. par. 31, p. 15-16) occurred on or <u>before</u> 1992 and they are all way beyond the 10 year statute of limitations for a breach of a written contract. The new and unpled modification theory is, therefore, barred as a matter of law. 735 ILCS 5/13-206.

Mr. Dew's opinion that the modification of phases in Sec. 1(d) does not refer to the Texas substation, but to the transformer locations (Br. @ 17 - 18) is a further distortion of the language in Sec. 1(d) of the SAA. Dew argues that Citation's use of its own electricity, with its own transformers, in its own field, creates a modification and new point of delivery under Sec. 1(d). Even the wildest interpretation of Sec. 1(d) reveals that this argument is preposterous. Citation's private distribution network in the Salem Unit is the equivalent of the wiring network in a house. Just as a house contains numerous transformers for a doorbell, lighting, or for computers, etc. the Salem Oil Unit contain transformers to meet its electrical needs. Just as adding a circuit inside of

a house does not create a new point of delivery under the definition of "existing point of delivery" in Sec. 1(d) of the SAA, neither does Citation's extension of its own lines to its gas plant and compressors.

TCEC's next argument, that changes in *capacity* by the installation of transformers, is equivalent in meaning to changes in phases and thus, creates a new point of delivery is a frivolous revision of the explicit language in the SAA. In effect, TCEC asks the Commission to rewrite its contract with IP in a way that does not remotely exist in the current language of the SAA.

TCEC's transformer argument is predicated on the way Citation uses its privately owned electricity for its own electrical equipment. That is, Citation's use of a transformer to reduce voltage for its motors and equipment is <u>the</u> determining factor for a new point of delivery according to TCEC. The way a customer changes the voltage of electricity it already owns has nothing to do with a delivery point even in the remotest sense. It is the action by the electric supplier and customer that create a new point of delivery, not the customer alone.

TCEC proceeds to misapply certain definitions in the 1965 edition of the NEC and 1961 NESC to reach the illogical conclusion that a transformer is the point of delivery for Citation in the Salem Unit. The 1965 edition of the NEC and 1961 NESC do not support TCEC. In par. 36 (Br. @ 19), TCEC notes the definition of "service" in the 1965 NEC as the conductors and equipment for delivering energy *from the energy supply system* to the wiring system of the *premises served*. In the instant case, the "premises served" is the Salem Unit, not various locations within the Unit, and the "energy from the electric supply system" to the wiring system of the premises occurs at the Texas substation. "Energy from the electric supply system" must

mean electricity from an electric supplier. The electric supply is delivered to Citation at the Texas substation. IP provides only the delivery service and AEM provides the electricity.

Citation cannot be transmuted into an electric supplier to itself simply by installing its own transformer to use its own electricity just as has been done hundreds of times over the last 50 years (Am. Ex. 4 @ 3, Tr. 760, 766). There is no reference in any of the NEC or NESC definitions that rely on the way the customer uses its electricity which is what TCEC relies on and there is nothing in the 1965 NEC and 1961 NESC (which illustrates typical residential service) that makes the transformers in Citation's private distribution system points of delivery under the SAA.

ARGUMENT

III. THE SERVICE AREA AGREEMENT DOES NOT CONTROL THE OUTCOME IN THIS CASE.

Citation has explained how the Electric Service Customer Choice and Rate Relief Act of 1997 (220 ILCS 5/16-10 *et seq.*) ("CCL") is the most recent action of the legislature and, therefore, controls the issues in this case (Citation Br. @ 6 - 10). Putting that aside, the language in the SAA does not support TCEC's claims.

TCEC erroneously argues that the various transformers at each compressor and at the gas plant are the electric service connection points for the delivery of electric service. Initially, TCEC argues that simply because a transformer is required to step down the voltage so it is useable for Citation's electric motors and equipment, the transformer is, *ipso facto*, a point of delivery and service connection point under the SAA. The "point of delivery" under the SAA is focused on the actions of the electric supplier in delivering electricity. The customer's usage of electricity has nothing to do with a delivery point or service connection point. The actual physical delivery to Citation is at the Texas Substation where Citation takes ownership of the electricity. That is its service connection point where Citation takes electricity from an electric supplier.

There is no Illinois Commerce Commission decision or any Illinois case or any other reported decision to support TCEC's overreaching argument that a transformer is the point of delivery. TCEC cites *Interstate Power Company v. Jo-Carroll Electric Cooperative*, Docket 92-0450 and 93-0030 (Cons. on remand) for the principle that a transformer is a normal service connection point. *Interstate* did not declare that all transformers are normal service connection points or points of delivery. *Interstate*, which predated the CCL, was decided under Sec. 5 and Sec. 8 of the Electric Supplier Act ("ESA"). It did not interpret a service area agreement or the

CCL. The present case involves longstanding practices of the parties and the meaning of the SAA as limited by the CCL.

TCEC states that there is no dispute that each "service connection point" at each compressor site and at the gas plant were created after March 18, 1968 (TCEC Br. @ 31). While there is no dispute that the compressor sites and at the gas plant were created after March 18, 1968, there is a vigorous dispute that there is any service connection point from an electric supplier at the compressor sites or gas plant within the meaning of the SAA. A service connection point inherently requires service from an electric provider. Citation's transformers are not taking service from an electrical supplier because the service has been taken at the Texas substation.

TCEC claims that the transformers and the gas plant and compressors are "required" for the reduction of voltage for Citation to operate its motors at each site (Br. @ 30). They are only required in the sense that they are necessary for Citation to use the electricity for the way that Citation has designed its operation to develop the Unit.

In Citation's case, Citation takes electric service that it pays for and owns at the Texas substation transformer, and thereafter, the electricity is transferred over Citation's private distribution network that includes hundreds of oil wells (T. 1601) with transformers. In a typical residence, there is often transformation of the electric current once it enters the home. A doorbell, florescent lighting, computer, and virtually every electronic device in the home includes a transformer to change the voltage (Tr. @ 1861). Florescent lights all have transformers and are very common in homes and that is not a point of delivery.

If a homeowner builds an addition to his home and he extends his electric lines to suit his own purposes, those lines are well past the point of delivery to his home whether that term is

construed to mean the meter or utility transformer. If the homeowner builds an office in his addition and he plugs in his computer, the computer requires a "transformer" within the house, but surely the computer transformer does not create a new point of delivery. Dr. Malmedal explained that a homeowner is free to add new electric equipment inside his house, including transformers and that does not create a new point of delivery (IP Ex. 5.1 @ 8).

Ms. Scott underscores the fallacy of the transformer theory in her testimony. She testified that it was TCEC's position that it did not make any difference who owned the transformer that creates a new point of delivery. She agreed that doorbells typically involve step down transformers within a house (Tr. 576-577) and she agreed that a transformer for a doorbell within a house is not a new point of delivery (Tr. 577). When asked what the difference is between the homeowner's doorbell transformer and Citation's gas plant transformer, she explained that, in her opinion, transforming the voltage from the distribution line that runs down the road through a transformer is a new point of delivery because it transforms that voltage where it can be used by the motors or lights or whatever the end use is (Tr. 577). The contradiction is glaring.

Of course, that is exactly what a door bell transformer does - it reduces the voltage to where it can be used by the doorbell. Other than size, there is no real difference between the homeowner's situation and the Citation distribution system.

In an argument that is best described as fanciful, TCEC then claims that a *plain reading* of the SAA leads to the conclusion that Citation has created a new point of delivery for each of the compressor sites and the gas plant (Br. @ 31-32). Nothing in Sec. 1(3) suggests that all transformers are points of delivery. In fact, the word "transformer" is not in Sec. 1. The fallacy of this outlandish argument, aside from distorting the language in the SAA and eviscerating law

of private property, is that there is no electric service provider delivering electricity at or anywhere near the transformers. Citation is transporting electricity that it owns within its own distribution network to each transformer. A customer, using its own electricity, cannot create a new point of delivery to itself, but that is exactly what TCEC argues.

Recognizing the absurdity of its argument, TCEC then claims that IP is the culprit because IP delivers electricity to the Texas substation and, therefore, IP (which has nothing to do with the configuration of Citation's distribution system or its use of the electricity) is responsible for service to the gas plant and compressors. No plausible reading of Sec. 3(a) of the SAA changes Citation to a new customer of TCEC by virtue of the way Citation uses its own electricity and configures it own network. Nothing in the SAA applies to Citation after the Texas substation and TCEC's private agreement with IP cannot be used to force Citation to take electricity from TCEC.

IV. "POINT OF DELIVERY" IN THE SAA IS NOT AMBIGUOUS.

The phrase "point of delivery" in Sec. 1(c) and (d) of the SAA is not ambiguous. A term is ambiguous if it is capable of two or more reasonable interpretations, *Thompson v. Gordon*, 241 Ill.2d 428, 443 (2011). A term is not ambiguous simply because the parties disagree about its meaning. *Johnstowne Centre Partnership v. Chin*, 99 Ill.2d 284, 288 (1983). A contract's meaning must be determined from the words or language used and the court cannot place a construction on a contract which is contrary to the plain and obvious meaning of the language. *Brown v. Miller*, 45 Ill.App.3d 970, 972 (1977). The phrase "point of delivery" is not ambiguous and in this case it is capable of only one meaning, *i.e.*, the Texas substation. It is clear that the parties to the SAA did not intend for the term "point of delivery" to mean each transformer in the Salem Unit. There is no suggestion anywhere in the SAA to that effect nor has TCEC ever asserted that claim from 1968 to 2005.

Notwithstanding Mr. Dew's tortuous theories, a "point of delivery" has to be at one location where the electric supplier is delivering the electricity. A court will not interpret a contract in a manner that would nullify or render provisions meaningless or in a way that is contrary to the plain and obvious meaning of the language used. *Fidelity National Title Ins. v. Westhaven Properties Partnership*, 386 Ill.App.3d 201, 214 (2007). Delivery requires a change of possession but TCEC ignores that critical element. If an individual takes a package and hands it off, *i.e.*, transfers possession of it to his next door neighbor, he has *delivered* the package, but if that same individual takes a package out of the backseat of his car and puts it into his trunk, he hasn't delivered anything, nor has he changed possession. It is the latter example that TCEC is using to concoct a nonexistent ambiguity on the meaning of "point of delivery" in the SAA. The only location where IP provides delivery services (within the meaning of the CCL) and where

AEM delivers possession of the electricity to Citation is at the Texas substation. No rational basis exists for equating the transformers at the compressors and at the gas plant with "points of delivery" under the SAA.

TCEC's imaginary definition of "point of delivery", *i.e.*, where a transformer is "located adjacent to where the site where the customer intends to use the electricity" (Br. @ 33) fails in this case because a customer's use and intent cannot be the basis for defining a "point of delivery" from an electrical supplier to a customer. Point of delivery is an objective standard where the electric provider changes possession to the customer; it is not based on customer intent.

TCEC challenges Dr. Malmedal's explanation that a point of delivery to Citation's gas plant would occur if IP constructed a distribution line to the gas plant to supply power as "illusionary" [sic] arguing that any such arrangement ignores the SAA between TCEC and IP (Br. @ 34-35). Of course, an arrangement that does not exist, *i.e.*, where IP did not construct a distribution line to the gas plant ignores the SAA as it should. For a new service to occur at the gas plant, the electric supplier would have to provide all of the electric equipment, including the distribution lines, transformers, fuses, etc., up to the gas plant. Clearly, this is not the case and no new service has been created at the gas plant (IP Ex. 5.1 @ 8-9). Continuing, TCEC then argues that the SAA makes no reference to ownership of the distribution line. TCEC is wrong.

Conductors are required to deliver electricity and ownership of a distribution line is necessary for an electric supplier to deliver electricity to a customer. Any interpretation of the SAA that does not consider an electric supplier's distribution line would be bizarre and contrary to the plain meaning of "point of delivery" in the SAA. For the same reason, the transformers at the gas plant and compressors cannot be points of delivery since IP has no distribution lines to

the gas plant or to the compressors. Therefore, it is impossible under the facts of this case for IP or AEM to "deliver" to Citation's transformers.

Next, TCEC argues that its service to Citation's office complex somehow clarifies the parties intent under the SAA to make a transformer a point of delivery, and TCEC also claims that IP "agreed" that Tri-County was authorized to serve Citation's office. There is no evidence in the record that IP ever made an agreement relating to the office. Citation simply obtained service directly from TCEC to keep it separated from the Salem Unit operations. TCEC service to the office in 1998 does not shed any light on the meaning of "point of delivery" for the Salem Unit because the Salem Unit is separate from the office and the Unit predated the office. Citing *Rural Electric Convenience Coop v. Ill. Comm. Comm.*, 75 Ill.2d 142 (1979) (Br. @ 35), TCEC asserts that service area agreements control the disputes between electric suppliers. That principal is correct and the SAA in this case establishes that since 1968 the "point of delivery" for the Salem Unit has been the Texas substation.

Amazingly, TCEC then argues that the intention of the parties is best illustrated by the interpretation they have placed on the agreement themselves and that subsequent actions of the parties may be considered to determine their intent. Br. @36. This principle soundly defeats all arguments of TCEC's Amended Complaint. TCEC relies on the discussions between the parties from February 18, 2005, through July 13, 2005, as some indication that the parties interpreted the SAA in a way that would make a transformer a point of delivery.[4] The transformers at the gas plant and compressors comprise the same electric configuration that has existed in the Salem Unit at thousands of oil wells since 1952 (Tr. 757, 766, 1601). Time and again, hundreds of transformers were placed in service at these wells with TCEC's knowledge (T. 543, 759, 1702-

[4] Citation never offered such an interpretation.

3). Not until 2005, when TCEC filed its complaint, did TCEC ever express the novel theory that a transformer is the equivalent of a new point of delivery. However, the parties consistently interpreted the SAA since 1968 in a way that is completely contrary to TCEC's claims in the instant case. The meaning that the parties repeatedly placed on the SAA for decades is that a transformer is <u>not</u> a new point of delivery, and that Citation is the same customer of IP at the Texas substation that it has been since the SAA went into effect. At no point from 1968 to 2005 did TCEC claim that a transformer was a new point of delivery under the SAA (Tr. 543). These actions, not the discussions in 2005, reflect a long pattern of behavior and the true interpretation of the parties about the meaning of the SAA.

V. THE *SPOON RIVER* CASE IS INAPPLICABLE.

Citing *Central Illinois Public Service Co. v. Ill. Comm. Comm.*, 219 Ill.App.3d 291 (1991) (*Spoon River*), TCEC argues that the Commission has previously refused to define a "point of delivery" as the place where the customer elects to connect *its distribution system* to the facilities of the electric supplier. *Spoon River* is inapplicable to the facts of this case and it provides no support for TCEC's position because Citation is not electing to make a new *connection of its distribution system* to an electric supplier. Citation's distribution system connects at the Texas substation as it has since before the SAA.

Unlike *Spoon River*, the Texas substation and the connection of the Salem Unit to the Texas substation was in existence on the date the SAA went into effect. The instant case does not involve a situation where Citation is connecting its distribution system to an electric supplier. TCEC's argument is not found at the connection point of the distribution system to the electric supplier, TCEC is erroneously focused at the usage end where the transformer is located. The transformer is not where the distribution system connects to the electric supplier.

By the very terms of Sec. 3(b) of the SAA, IP had a right to continue to serve all of its existing points of delivery (Texas substation) within the service area of the other party (TCEC) on the effective date. Unlike *Spoon River*, this is not a territorial dispute case because the explicit exception in Sec. 3(b) applies.

VI. THERE IS NOTHING UNLAWFUL ABOUT CITATION USING ITS OWN DISTRIBUTION LINES IN THE SALEM OIL UNIT.

Citing 220 ILCS 30/2, TCEC argues that its 3 phase distribution line is closer in proximity to the gas plant and compressor sites than any electric service lines of IP. With a leap of verbal gymnastics, TCEC maintains that there is a duplication of facilities for service to the gas plant in violation of Sec. 2 of the ESA. This argument is preposterous.

The prohibition against duplication of facilities in the ESA applies only to electric suppliers. 220 ILCS 30/2. Since Citation is not an "electric supplier" as defined in Sec. 3.5 of the ESA[5], there is no duplication of facilities concern. TCEC distorts the facts when it argues that IP is providing electric service to Citation through Citation's own facilities. IP has no facilities in the Salem Unit beyond the Texas substation. Citation owns the distribution system in the Salem Unit and does all of the maintenance and repairs to the system. IP has no responsibility for the lines in the Salem Unit. IP provides no service over Citation's facilities since Citation takes ownership of the electricity at the Texas substation.

Next, TCEC argues that a customer does not have a right to choose its electric supplier citing *CIPS v. Ill. Comm. Comm.*, 202 Ill.App.3d 567 (1990) (*Southwestern* case). The CCL has changed the comments in *Southwestern*. CIPS and Southwestern Coop entered into a service area agreement. Exxon was a customer of the cooperative on the cooperative side of the border. Exxon strung its own distribution lines over the service area boundary to take electricity from CIPS, an investor utility. The Commission and the Appellate Court enforced the agreement and prohibited Exxon running its distribution line across the service area border to obtain service from CIPS at what was then a new point of delivery.

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[5]"'Electric Supplier' or 'Supplier' means an electric cooperative or a public utility which furnishes electric service." 220 ILCS 30/3.5.

In the present case, Citation is not constructing its lines over the SAA border to obtain service from IP. The Texas substation is located in TCEC's service area and the SAA explicitly included language in Sec. 3(b) allowing IP's existing lines over the SAA border to the Texas substation to continue to deliver electricity to Citation at the Texas substation. From there Citation has used its own distribution lines for the Salem Unit both before and after the SAA. Unlike *Southwestern*, Citation has not attempted to cross the boundary to obtain electricity from a new electric supplier.

In *Southwestern*, CIPS argued that it was in the public interest to allow consumers to elect to be served by an electric supplier of their choice. The court then stated:

> Whatever merit there may be to this argument, we are the wrong forum to which it should be addressed. To the extent possible, the legislature, not the judiciary, should be deciding questions of public policy. We hold that the public policy behind the Act, its legislative declaration, and the cases interpreting it, are clearly contrary to the argument of CIPS. *Southwestern* @ 574.

Later the court quoted from Commissioner Mansio's dissent supporting the customer's ability to choose its electric supplier. In response, the court stated:

> Consistent with the legislative declaration set forth in section 2 of the Act [citations] we hold that consumers have been legislatively foreclosed from seeking electrical service from a supplier beyond their service territory. If this policy is to be reexamined, that reexamination will have to be undertaken by the General Assembly, not by this court, the circuit court, or the Commission. 202 Ill.App.3d @ 574.

In fact, the legislature resoundingly did reexamine that policy and specifically gave consumers, especially large industrial consumers, the right to choose their electric suppliers when it enacted the CCL in 1997. The *Southwestern* case is not applicable here and customer choice is now the law.

Although *CIPS v. Ill. Comm. Comm.*, 223 Ill.App.3d 718 (1992) also contains language that prohibits a customer's right to choose its electric supplier in a different service territory that

language, too, has been overturned by the adoption of the CCL. If anything, the *CIPS v. Ill. Comm. Comm.* case supports IP because the court in that case specifically recognized the right of CIPS to continue to provide service to Mobile in the New Harmony oil field south of Route 14 because the service area agreement contained an exception that allowed CIPS to continue to service existing customers even though the New Harmony field was placed within the exclusive service territory of *Wayne-White*.

Likewise, the case of *IP v. Illinois Valley Elec. Coop.*, Docket 88-0276 (1989) suffers from the same defects. Before the adoption of a service area agreement, Unimin was a customer of IP. When a service area was adopted, Unimin's processing plant and various strip mines were located in IP's service area. Unimin then opened a *new* strip mine, but that strip mine was located on the *Illinois Valley* side of the service territory. IP requested authority to supply electricity to the new strip mine and the Commission enforced the territorial boundaries of the service area agreement.

In the present case, IP has not "attempted" to serve the gas plant or gas compressors with its own distribution lines. IP has no function at the gas plant or compressors. IP is simply providing the same service to the Texas substation as it has since 1952. Unlike *Illinois Valley*, the Salem Unit was served by a private distribution line from the IP Texas substation at the time of the SAA. The point of delivery remains the same and neither IP nor Citation has constructed a service line across the service area boundary. *Illinois Valley* does not support TCEC's transformer claims.

VII. ILLINOIS POWER HAS NO CONTROL OVER CITATION'S DISTRIBUTION SYSTEM IN THE SALEM UNIT.

At this point, TCEC essentially argues that there is no difference between IP installing its own distribution lines to the Citation gas plant and compressors compared to Citation installing its own distribution lines from the Texas substation to the gas plant and compressors. The failure to appreciate the distinction is bewildering.

Citation owns the distribution network in the Salem Unit and it bears all the cost of maintenance and repair to its system. IP has no interest or responsibility for Citation's private distribution system. IP's responsibility ends at the Texas substation. If IP constructed its own distribution line to the gas plant or compressors, it would be delivering electricity to that point.

TCEC argues that IP is using Citation's distribution system to subvert the intent of the SAA. If TCEC actually felt that way, it should have negotiated for different terms in the service area agreement in 1968. Where the terms of a contract are clear and unambiguous, they must be enforced as written and no court can rewrite a contract to provide a better bargain to suit one of the parties. *Berryman Transfer and Storage Co. Inc., v. New Prime, Inc.,* 345 Ill.App.3d 859, 863 (2004). Since 1968, the parties have proceeded under the interpretation that the Texas substation was the existing delivery point on the effective date of the SAA and that Citation could continue to take the electricity at the Texas substation and from there over its private distribution system in the Salem Unit.

TCEC argues that "such action" by IP and Citation does not conform with the intent of the legislature, but TCEC cannot describe any "action" by IP because there is none. IP is continuing to deliver to the Texas substation as it always has. The SAA in the instant case specifically allows IP to deliver to the Texas substation and an existing point of delivery. The current arrangement is consistent with the intent of the legislature allowing the parties to draft

their own terms in a service area agreement. TCEC's failure to describe what activity it wants IP to stop engaging in is readily apparent because IP is not violating the SAA.

TCEC then drifts to describe the cross-examination testimony of Dr. Malmedal about how far as a matter of physics a distribution line could carry a load needed for the gas plant and the compressors. Whatever this argument is supposed to mean, the physical limits about the maximum distance that electricity can be transmitted has nothing to do with any issue in this case.

VIII. THERE ARE NO MODIFICATIONS TO THE TEXAS SUBSTATION UNDER THE TERMS OF THE SAA.

Mr. Dew described what he characterized as modifications to the Texas substation from 1969 through 1992 (TCEC Ex. D @ 7 - 13; Tr. 745). TCEC argues that those modifications made the Texas substation a new point of delivery, thus making TCEC entitled to serve all of Citation's Salem Unit. This argument is in violation of the Stipulation and must be soundly rejected.

TCEC's brazen attempt to overtake the entire Salem Unit through its modification argument far exceeds the scope of any allegations in the Amended Complaint and TCEC explicitly abandoned the modification argument when it entered into a written Stipulation with Citation limiting the scope of its claims in this docket. In the Stipulation filed on e-docket on June 2, 2010, copy attached as Exhibit A, TCEC stipulated and agreed that it would not assert any right or claim in this case to provide electric service in the Salem Unit for any oil wells, injector wells, compressors (except the 7 set forth in the Amended Complaint), or any electric service to production and injection plants more than 10 years prior to June 3, 2010. It is inconsistent to argue that somehow the Texas substation has been modified in a way that creates a new point of delivery that would mandate that TCEC provide all of the electricity to the entire Salem Unit and also stipulate that TCEC will not serve important and larger loads in the Salem Unit. TCEC shamelessly reneged on its agreement and boldly asserted a spurious modification argument in an unfounded attempt to make Citation its captive customer in spite of its binding agreement with Citation. The Commission must enforce the Stipulation and summarily reject TCEC's modification claim.

In construing a contract, the primary objective is to give effect to the intention of the parties. *Gallagher v. Lenart*, 226 Ill.2d 208, 232 (2007). A court will look to the language of the

contract itself to determine the parties intent. *Gallagher* @ 233. Furthermore, a court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used. *Fidelity National Title Ins. v. Westhaven Properties*, 386 Ill.App.3d 201, 214 (2007). Sec. 1(d) of the SAA defines "existing point of delivery" as follows:

> "Existing point of delivery" as used herein means an electric service connection which is in existence and energized on the effective date hereof. Any modification of such electric service connection after the effective date hereof by which an additional phase or phases of electric current are added to the connection, shall be deemed to create a new point of delivery.

TCEC and Mr. Dew agree that the Texas substation was 3 phases in 1968 on the effective date of the SAA and it is a 3 phase facility today (TR. 939 - 40, 964-5, Am. Ex. 1 @ 4). When the parties insert language into a contract, it is presumed it was done purposefully so that the language employed is to be given affect. *Fidelity National* @ 215. The clear and unambiguous language of Sec. 1(d) provides that the only modification that creates a new point of delivery is a modification that results in a change of phase or phases. Mere maintenance or even changes in capacity do not trigger a new point of delivery because the parties intended to preserve the service to their existing customers and points of delivery irrespective of the service area boundary lines. The language in Sec. 1(d) that triggers a new point of delivery is limited to an increase in phases only.

TCEC then argues that the SAA should be interpreted to create a new point of delivery downstream with changes in the *customer's* electrical phases. Nothing in the SAA remotely hints at any such farfetched interpretation. Sec. 1(d) involves an increase in phases added by the electric supplier. It does not involve changes by the customer after the point of delivery. The agreement is clear. A modification occurs only with a change in phases by the electric supplier

notwithstanding TCEC's desperate attempts to the contrary. Sec. 3(b) preserves the continuation of service to all existing customers and all existing points of delivery located in the service area of the other party. TCEC's desperate and futile attempts to twist and contort the SAA to serve its expansive business goals is defeated by the plain language in Secs. 1(d) and 3(b).

If the Texas substation is a point of delivery, argues TCEC, transformers at the gas plant and compressors must be delivery points. As explained earlier, the fallacy of this nonsense is that no delivery from an electric supplier occurs when a customer moves its own electricity from one location of its premises to another. That is exactly what the Citation distribution system does well after Citation has taken ownership of the electricity.

For some strange reason, TCEC argues that although it is possible from an engineering standpoint to switch Citation's connection lines from the Texas substation to Tri-County's substation, that the mere existence of that possibility means that service should be moved. This is a meaningless *non sequitur* and, again, violates the Stipulation TCEC agreed to. Citation is not arguing nor is IP seeking to have Citation change the point of delivery at the Texas substation nor does Citation seek to change the way electricity has been distributed through the development of the Salem Unit since 1968.

IX. <u>CONTRACTS MUST BE CONSTRUED TO AVOID ABSENT RESULTS</u>.

Relying on the implied covenant of good faith and fair dealing, *Martindale v. Lake Shore National Bank*, 15 Ill.2d 272, 286 (1958), TCEC has the audacity to argue that interpreting "point of delivery" in the SAA to mean something other than a transformer is an absurd construction of the SAA and, in part, bad faith on the part of IP. This twisted argument is a perversion of the very principles that TCEC cites.

The evidence in this case indicates that IP served Texaco Salem Unit at the Texas substation for many years prior to the SAA. Since the SAA went into effect, Citation has continued to develop oil wells in the Salem Unit and those oil wells required transformers. Meanwhile, TCEC, with full knowledge of the presence of the oil wells, stood by and watched Citation operate the Unit without any objection from TCEC (TCEC Ex. E @ 2-5; Tr. 498). TCEC cannot now complain that the use of transformers somehow gives it the right to serve the Salem Unit while this practice has occurred for over 50 years. If anything, it is bad faith to assert this spurious claim after such a long time.

X. CITATION HAS THE STATUTORY RIGHT TO CHOOSE ITS ELECTRIC SUPPLIER NOTWITHSTANDING THE TERMS OF THE SAA.

TCEC declares that the Customer Choice Law ("CCL") does not allow "unchecked" customer choice of electric suppliers. It is unclear what TCEC means by the term "unchecked" because that term is not found anywhere in the CCL. Nevertheless, as TCEC notes, the CCL applies to for profit investor owned utilities [*and their customers*], but the CCL does not apply to customers of electric cooperatives.

Critical to the analysis is the fact that Citation was not a customer of TCEC in the Salem Unit on the effective date of the CCL. [6] However, it is indisputable that Citation was a customer of IP on the effective date of the CCL and many years before TCEC filed its complaint in this case. As a lawful customer of IP, the CCL gives Citation a choice in suppliers and although the legislature excluded electric cooperatives them from the CCL, that is irrelevant because Citation was a customer of a for profit investor owned utility, IP, on the effective date of the CCL and that customer status vested Citation with the right to choose its electric supplier no matter what TCEC's rights may be under the ESA.

TCEC next claims that no conflict exists between CCL and the ESA. To support this argument, TCEC notes that nothing in the CCL diminishes the exclusive right of electric cooperatives to continue to serve *customers* in their service territory. Of course, TCEC's argument misses the point and policy of the CCL. The Salem Unit is not a customer of TCEC or any other cooperative. There cannot be any continuation to serve because Citation has always been a customer of IP at the Texas substation. Citation's right to choose is paramount and the SAA should not be interpreted in a way that interferes with that right. Therefore, "point of delivery" cannot be interpreted in a way that makes Citation a customer of TCEC.

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[6] Citation's office is not part of the Salem Unit.

Ironically, the policy of the CCL is to bring competition to the electric marketplace, but in this case, TCEC is trying to force Citation to be a captive customer of TCEC throughout the Salem Unit. Nothing could be anymore anti-competitive and anti-business than to shackle a private enterprise with operational constraints that eliminates its competitive choice of electricity, increases its costs, and provides it with absolutely no benefit, but that is what TCEC is attempting to do to Citation in this case.

While TCEC argues that there is no "suggestion" in the CCL that it is in conflict with the ESA, the conflict exists by the virtue of TCEC's argument that the SAA overrides Citation's ability to choose under the CCL. Clearly, the non-competitive bundled service that existed in 1965 at the time the ESA was adopted has given way to the unbundled policy of competition. The radical interpretations offered by TCEC in this case are not only contrary to the CCL and the policy of Illinois today, but they are grossly disruptive and inimical to the normal business operations in place since 1952 when the Texas substation was built.

In its Conclusion (Br. @ 51), TCEC admits that Citation was an existing customer of IP on the effective date of the SAA, but TCEC argues that whenever an existing customer creates a new service connection point, it becomes a new point of delivery. This premise is accurate, but TCEC misapplies the law to the facts in this case. No new service connection point to Citation exists. A customer cannot create a new service connection point by conducting electricity to itself. A new service connection point must be created by one of the electric suppliers to the agreement for the SAA to apply. Sec. 3(b) to the SAA provides that each party shall have the right to continue to serve all of "its" existing points of delivery located within the service area of the other party. The word "its" refers to both IP and TCEC and IP has not changed its delivery

to Citation in any way. In fact, IP is *only* providing a delivery service to Citation as a matter of law. 220 ILCS 5/16-104(a).

XI. TCEC WAIVED ITS ARGUMENTS THAT: (A) CITATION APPLIED FOR A NEW SERVICE AND (B) THAT THERE WAS A MODIFICATION OF THE TEXAS SUBSTATION BY IP THAT CREATED A NEW POINT OF DELIVERY.

TCEC's initial brief is titled "Brief by Tri-County Electric Cooperative, Inc., in support of Tri-County's Amended Complaint in this Docket". However, TCEC's brief raises matters well outside the scope of the Amended Complaint and those arguments (Statement of Facts, pars. 8, 17, 31; page 26 part C (1) and page 26 part C (5); Argument VII pages 43-45) should all be stricken from TCEC's brief.

In the instant case, TCEC filed an Amended Complaint on February 17, 2007. TCEC's two count amended complaint is based on a breach of contract theory and it does not contain any allegation of a breach of the SAA relating to: (1) modifications made to the Texas substation; or (2) that Citation made an application for service.

Waiver is a voluntary and intention relinquishment of a known right. *In Re: Nitz*, 317 Ill.App.3d 119, 130 (2000). Parties to a contract have the power to waive provisions in the contract for their benefit, and such a waiver may be established by conduct. *Nitz* @ 130. TCEC waived its modification argument by entering into the Stipulation with Citation and by not alleging modification as a breach of contract in the Amended Complaint. Although the evidence does not support the claim particularly because there have been no change in phases of electric current at the Texas substation, even if there was such a modification, all the changes occurred beyond the statute of limitations so TCEC cannot replead a modification claim. 735 ILCS 5/13-206.

Similarly, TCEC did not plead a breach of contract based on some theory that Citation applied for service from either TCEC or IP. If there had actually been such an application, TCEC undoubtedly would have asserted that claim in its initial Complaint. However, TCEC did

not plead such a theory in the Amended Complaint either and it has waived any right to argue this theory now. The foregoing TCEC portions of its initial brief should be stricken.

CONCLUSION

For the foregoing reasons, the Commission must deny TCEC's claims in the Amended Complaint, and preserve Citation's right to choose an ARES, and for such other and further relief as deemed just.

Respectfully submitted,
LOEWENSTEIN, HAGEN & SMITH, P.C.

/s/ Gary L. Smith
Gary L. Smith

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause at their address as follows:

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/s/ Gary L. Smith
Gary L. Smith

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TRI-COUNTY ELECTRIC COOPERATIVE, INC.,	)	
Complainant,	)	
v.	)	Case No. 05-0767
ILLINOIS POWER COMPANY, d/b/a AMEREN IP,	)	
Respondent.	)	

STIPULATION

Tri-County Electric Cooperative, Inc. ("Tri-County") and ILLINOIS POWER COMPANY, d/b/a AMEREN IP, and CITATION OIL & GAS CORP. ("Citation"), by their respective counsel, stipulate and agree as follows:

1. Tri-County will not assert any right or claim to provide electric service in Citation Oil & Gas Corp's Salem Unit Oil Field to include any of the following:

(a) Electric service to oil wells, injection wells, and compressors (except the 7 compressors presently identified in Tri-County's Amended Complaint);

(b) Electric service installed to production and injection plants more than 10 years prior to June 3, 2010.

2. Furthermore, nothing in this Stipulation shall invalidate any claim or right of Tri-County to provide electric service to Citation's Salem Unit Oil Field except as set forth above.

3. Notwithstanding anything to the contrary herein, Tri-County preserves all claims asserted in its Amended Complaint in Docket 05-0767.

EXHIBIT
A

TRI-COUNTY ELECTRIC COOPERATIVE

By: Grosboll, Becker, Tice, Tippey & Barr

JERRY TICE, One of its Attorneys

CITATION OIL & GAS CORP.

By: Loewenstein, Hagen & Smith, P.C.

GARY L. SMITH, One of its Attorneys