93-0150

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

M.J.M. Electric Cooperative, Inc.	:	
vs.	:	
Illinois Power Company	:	
	:	**93-0150**
Complaint under the Electric	:	
Supplier Act regarding service in	:	
Macoupin County, Illinois.	:	

ORDER

By the Commission:

PROCEDURAL HISTORY

In this proceeding, M.J.M. Electric Cooperative Inc. ("MJM") filed a complaint against Illinois Power Company ("Illinois Power" or "IP") pursuant to the Electric Supplier Act ("Act" or "ESA"). IP is a public utility within the meaning of the Public Utilities Act. MJM is an electric cooperative within the meaning of the Electric Supplier Act, and both companies are electric suppliers within the meaning of said Act. The complaint seeks a determination that MJM has the exclusive right to provide electrical service to the Veterans of Foreign Wars ("VFW") Post 5790 at Mt. Olive, Illinois, and that IP does not have any right to provide service to VFW Post 5790.

IP filed a motion to dismiss which MJM opposes. This motion, and the issues raised therein, are the subject of this order.

ALLEGATIONS OF COMPLAINT

The complaint alleges, in part, the following:

Pursuant to Section 6 of the Act, MJM and IP entered into a Service Area Agreement ("Agreement" or "SAA") which was approved by the Commission in ESA 138 in an order entered August 4, 1971.

On or about April 30, 1949, Louis C. Odorizzi acquired the following described property:

> Block Two (2) in Carl Mueller's Subdivision on the South Half (S 1/2) of the Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) of Section Three (3), Township Seven North (7 N), Range Six West (6 W) of the Third Principal Meridian as shown by plat recorded in Recorder's Office in Macoupin County, Illinois.

On or about December 5, 1949, Louis C. Odorizzi acquired the following described property:

> Block Three (3) in Carl Mueller's subdivision on the South Half (S 1/2) of the Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) of Section Three (3), Township Seven North (7 N), Range Six West (6 W) of the Third Principal Meridian as shown by plat recorded in Recorder's office in Macoupin County, Illinois.

Thereafter, Louis C. Odorizzi for all relevant times herein was the owner of the "premises" described as follows:

> Blocks Two (2) and Three (3) in Carl Mueller's Subdivision on the South Half (2 1/2) of the Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) of Section Three (3), Township Seven North (7 N), Range Six West (6 W) of the Third Principal Meridian as shown by plat recorded in Recorder's office in Macoupin County, Illinois.

all as is more fully shown by the Warranty Deeds attached to the complaint.

Thereafter, Louis C. Odorizzi established a drive-in theater occupying both of Blocks 2 and 3 of the foregoing described "premises" for use as such drive-in theater. On or about May 3, 1951, MJM provided electrical service to the drive-in premises by construction of an electrical line from the West to a pole located near the center of such drive-in premises. The electrical service provided from such electrical facilities of MJM were utilized throughout the drive-in premises providing electric service to a concession stand and to speakers and lighting systems located on both Blocks 2 and 3 of the described "premises."

On or about 1956, the electrical service to the drive-in premises was upgraded to three phase service and MJM continued to provide continuous electric service thereto from on or about May 3, 1951 until March, 1980.

The three phase service facilities of MJM are at the present time still located on the drive-in premises (Blocks 2 and 3) of the foregoing described "premises."

On or about November 1, 1989, the Veterans of Foreign Wars Post 5790 of Mt. Olive, Illinois, an Illinois not-for-profit corporation, acquired the following described premises:

> Blocks Two (2) and Three (3) and the vacated street lying between said blocks in Carl Mueller's Subdivision on the South Half (S 1/2) of the Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) of Section Three (3), Township Seven North (7 N), Range Six West (6 W) of the Third Principal Meridian in Macoupin County, Illinois.

all as more fully shown by the Warranty Deed attached to the complaint as Exhibit 6. Such described "premises" has been conveyed and treated as a unit since acquisition of the same by Louis C. Odorizzi on April 30, 1949 and December 5, 1949.

Since electric service was first provided to the foregoing described premises by MJM, such electrical service has been utilized on all of such premises until on or about 1980.

The Service Area agreement territorial boundary line transects from North to South the premises at approximately the mid-point thereof all as is more fully shown by the Exhibit 7 attached to the complaint. Exhibit 7 represents a survey prepared by Wild Surveying Company of Carlinville, Illinois and reflects thereon the premises herein; the territorial boundary line of MJM and IP; the MJM electrical service pole from which electrical service was established to the premises in 1951; the former concession stand of the drive-in theater to which electrical service was provided; the building recently constructed by the Veterans of Foreign Wars Post 5790 of Mt. Olive, Illinois (customer); and the newly constructed IP three phase line to provide electric service to the customer's building.

On or about March 23, 1993, IP commenced providing three phase electrical service to the customer's building located on the premises by way of a three phase electrical distribution line 3800 feet in length.

MJM was providing electric service to an existing customer on July 2, 1965 being the effective date of the Act, March 18, 1971, being the date of the Service Area Agreement between MJM and IP and on August 4, 1971 being the date of the Order approving such Service Area Agreement in ESA 138. Such existing customer was provided electric service from an existing point of delivery located on the premises and on the MJM side of the territorial boundary line which electric service was thereafter utilized by Louis C. Odorizzi throughout Blocks 2 and 3 and the premises from 1949 until March of 1980.

No other electric service was provided to the premises from March 1980 until IP commenced providing electric service to the customer's building located on the premises on or about March 23, 1993.

IP did not provide any notice pursuant to Section 7 to MJM of the extension of electric service by IP to the premises but merely constructed the 3800 feet of additional new three phase line specifically to provide the electric service to the premises.

The electrical service being provided by IP is provided to the premises which are premises to which MJM was providing electric service to an existing customer from an existing point of delivery which existing point of delivery is still in existence on the date hereof with electric facilities adequate to provide electric service to the customer for use upon the premises.

Count I of the Complaint also alleges:

The Service Area Agreement specifically provides in Section 3 (a) that " . . . each party shall have the exclusive right to serve all customers whose points of delivery are located within its service areas . . . . " The attempt by IP to provide electric service to the premises as such premises existed on July 2, 1965 and March 18, 1971, at a time when MJM had an existing point of delivery as defined in the service area agreement for providing electric service to the premises violates the Service Area Agreement.

The rights of MJM to provide electric service to the premises from an existing point of delivery located in the territory designated to MJM under the Service Area Agreement is grandfathered pursuant to such Service Area Agreement and IP does not have a right to provide electric service to premises which MJM was providing electric service to on July 2, 1965 and March 18, 1971.

The attempt by IP to provide electric service to the premises by way of a new point of delivery established subsequent to July 2, 1965 and March 18, 1971 violates the grandfathered rights of MJM pursuant to the Service Area Agreement to provide electric service to the premises and all customers who utilize electric service thereon.

The attempt by IP to provide electric service to the premises by way of a new three phase line and new point of delivery constructed subsequent to July 2, 1965 and March 18, 1971 creates duplication of facilities and excess capacity as well as inefficient operations contrary to the purposes of the Act and the Service Area Agreement.

The attempt by IP to establish a new point of delivery for a customer on the same premises to which electric service by MJM has been grandfathered by the Service Area Agreement allows a customer to choose its electric supplier contrary to the public policy of the Act.

Count II of the Complaint also alleges:

The attempt by IP to provide electric service to the premises by way of a new point of delivery established subsequent to July 2, 1965 and March 18, 1971 violates the grandfathered rights of MJM pursuant to Section 5 of the Illinois Electric Supplier Act, 220 ILCS 30/5, to provide electric service to the premises and all customers who utilize electric service thereon.

The attempt by IP to provide electric service to the premises by way of a new three phase line and point of delivery constructed subsequent to July 2, 1965 and March 18, 1971 creates duplication of facilities and excess capacity as well as inefficient operations contrary to the purposes of the Act.

The attempt by IP to establish a new point of delivery for a customer on the same premises to which electric service by MJM has been grandfathered by the Act allows a customer to choose its electric supplier contrary to the public policy of the Act.

Both counts request in part that the Commission determine that MJM has the exclusive right to provide electrical service to the VFW Post 5790.

IP'S MOTION TO DISMISS

In its Motion, IP asserts that Count I should be dismissed for failure to state a cause of action for breach of the SAA. IP further asserts that paragraphs 5, 6, 8, 9, 10, 11, 13, 14, 15 and 20 should be stricken because the allegations therein are vague and conclusory with respect to the use of the term "premises" in that the complaint does not define the significance of the term "premises." IP contends that nowhere in the SAA is the word "premises" defined or given any significance. IP also challenges these paragraphs as being factually deficient and argumentative.

With respect to Count II, IP argues that it should be dismissed in its entirety because Count II purports to be a claim based on the ESA and the Illinois Supreme Court has unequivocally ruled that when electric suppliers enter into a service area agreement, the service area agreement controls the rights of the parties to the exclusion of the ESA. IP restated and realleged its specific objections to the numbered paragraphs of the complaint in Count I as and for its objections in Count II.

POSITION OF MJM

MJM opposes IP's motion to dismiss the complaint. MJM's position may be summarized in part as follows:

MJM claims that the Service Area Agreement provides in Section 3(a) thereof that ". . . each party shall have the exclusive right to serve all customers whose points of delivery are located within its service areas . . . . " and that the attempt by IP to provide electric service to the Odorizzi property as that property existed on July 2, 1965 and March 18, 1971 at a time when MJM had "an existing point of delivery" as defined in the Service Area Agreement available for providing electric service to the Odorizzi property violates the Service Area Agreement. MJM further contends that while Section 3(a) of the Service Area Agreement prohibits either MJM or IP from serving a "new customer" within the service areas of the other party and in Section 3(b) provides that both MJM and IP shall have the right to continue to serve all of their respective "existing customers" and all of their respective "existing points of delivery" that are located within the service area of the other party on March 18, 1971 (effective date of the agreement), Section 3(a) of the Service Area Agreement exclusively allows a party to serve all "customers" from "points of delivery" that are located on such party's side of the boundary line.

MJM maintains that the Service Area Agreement specifically defines the following terms:

Section 1

(a) "Party" as used herein refers to one of the parties to this agreement.

(b) "Existing customer" as used herein means a customer who is receiving electric service on the effective date hereof.

(c) "New customer" as used herein means any person, corporation, or entity, including an existing customer, who applies for a different electric service classification or electric service at a point of delivery which is idle or not energized on the effective date of this Agreement.

(d) "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.

Section 2

Illinois Power and MJM hereby establish territorial boundary lines delineating the Service Areas (the Service Area or Areas) of each party. The territorial boundary lines and the respective Service Areas are shown on the maps attached hereto and marked Exhibits 1 through 5 and incorporated herein by reference.

Section 3

(a) Except as otherwise provided in or permitted by this Section and Sections 4, 5 and 8 of this Agreement, each party shall have the exclusive right to serve all customers whose points of delivery are located within its Service Areas and neither party shall serve a new customer within the Service Areas of the other party.

(b) Each party shall have the right to continue to serve all of its existing customers and all of its existing points of delivery which are located within a Service Area of the other party on the effective date.

As such, MJM maintains that it was providing service to Odorizzi at the Odorizzi property on all relevant dates and times. Further, MJM maintains that its electric facilities have been maintained on the Odorizzi property on MJM's side of the territorial boundary lines continuously since they were first installed in 1951 and 1956. As such, Section 3(a) of the Agreement controls to the extent that MJM " . . . shall have the exclusive right to serve all customers whose points of delivery are located within its service area . . . . " MJM claims that the word "customers" is not defined in the

Agreement and that because the VFW is neither a "new customer" or an "existing customer" as to MJM, the VFW must become a customer of MJM because they are located on the exact property previously served by MJM.

MJM further contends that Section 3(a) is intended to cover just this sort of situation where property that was being provided electric service by one supplier is sold to another party who then needs electric service on the property. Under those circumstances, MJM claims that to allow the new owner of the property to choose which of two electric suppliers will provide the electric service sanctions customer choice in violation of the Public Policy of the ESA. MJM claims that to avoid that interpretation, Section 3(a) should be interpreted to mean that the word "customer" means those customers who use electric service on property that has continuously been provided electric service previously by MJM. MJM further claims that simply because a new owner now occupies the same property previously served by MJM, the new owner does not have a right to choose IP for electric service. To allow such an interpretation, MJM claims, would make Section 3(a) meaningless.

MJM further contends that the interpretation proposed by IP for Section 3(a) creates an ambiguity. This ambiguity exists because "customer" is not otherwise defined by the Agreement and because the VFW is not a "new customer" or an "existing customer" to MJM but rather a "customer" to MJM for which MJM claims the exclusive right to serve pursuant to Section 3(a). MJM further claims that where a particular definition is not specifically defined in the Service Area Agreement, the Courts have routinely determined that the lack of a definition creates an ambiguity which can only be resolved by a hearing.

MJM further contends that if the Service Area Agreement is interpreted in the manner proposed by IP, then such interpretation would allow customer choice and cause the Agreement to violate Public Policy. As such, MJM claims that the Agreement would then be unenforceable by either party. Consequently, MJM states that because MJM was serving that premises regardless of the identify of the owner or customer utilizing service thereon.

Count II is alleged to establish the grandfather claims of MJM pursuant to Section 5 of the ESA. MJM says Count II of the complaint is filed in the alternative. Should the Commission determine that the position taken by IP as to its right to serve the VFW pursuant to the agreement is valid and that IP has the right to establish a new point of delivery located on IP's side of the line to provide service to the Odorizzi property, then there is a basis for the claim of MJM that such interpretation allows the customer to choose its electric supplier in violation of the public policy of the ESA. As such, MJM argues, the agreement would be unenforceable as to either IP or MJM. O'Hara v. Ahlgren, Blumenfeld and Kempster, 127 Ill. 2d 333; 537 N.E. 2d 730; 130 Ill. Dec. 401, 405 (1989); City of DeKalb v. Local 1236, 182 Ill. App. 3d 367; 538 N.E. 2d 867; 131 Ill. Dec. 492, 495 (1989). Consequently, the dispute would have to be determined in accordance with the Electric Supplier Act. MJM has pled Count II on the basis that MJM is entitled to provide electric service to the Odorizzi property by virtue of

the grandfather provisions of Section 5 of the ESA. The facts alleged in Count II sustain a claim for grandfather rights under Section 5 of the ESA, according to MJM. Consequently, MJM argues that the Motion to Dismiss as to Count II should be denied.

POSITION OF IP

Illinois Power's arguments in support of its position may be summarized in part as follows:

IP asserts that the operative sections of the SAA are Sections 1 and 3. The relevant portion of these sections are set forth above. IP concludes that the SAA is not ambiguous. Under the plain meaning of the words in Section 1 and 3 of the SAA and the facts alleged in the Complaint, IP says it has the exclusive right to serve the VFW's building. IP says MJM admits that the VFW is not its "existing customer." While Odorizzi occupied the premises from 1949 until 1980 and MJM provided service to Odorizzi over the entire premises, the SAA does not grant any service rights based upon occupancy of a premises or historical service thereto. Therefore, the status of the VFW under the SAA is determinative.

In March of 1993, IP began providing three phase electric service to the VFW's building located entirely on IP's side of the service territory line. The point of delivery for the VFW is located on the side of its building as shown in Exhibit 7 to the Complaint. The VFW's point of delivery is located on IP's side of the boundary line and is new. Under the plain meaning of the SAA, therefore, the VFW was a "new customer" located in IP's service territory with a new point of delivery in IP's service territory.

Under Section 3(a) of the SAA, IP is granted the exclusive right to serve all customers whose points of delivery are located within its service area. The VFW is a customer whose point of delivery is located in IP's service area. Section 3(a) of the SAA further prohibits MJM from serving a new customer within the service area of IP. The VFW is a new customer within the service area of IP and, therefore, MJM would be prohibited from providing service to the VFW, under the facts alleged in the Complaint. Consequently, the Complaint does not allege a breach of the SAA by IP, but rather demonstrates that IP has the exclusive right to serve the VFW under the SAA.

According to IP, the Complaint unequivocally alleges the fact that the VFW has not become a customer of MJM at any time and did not become a customer of IP until March 23, 1993. IP argues that since MJM never provided service to the VFW, the VFW cannot possibly be MJM's customer, under the ordinary and plain meaning of that word. IP argues that the only conclusion that can be reached is that the VFW is a new customer whose point of delivery is located in IP's service territory.

With respect to Count II, IP cites Rural Electric Convenience Cooperative v. Illinois Commerce Commission, 75 Ill. 2d 142, 387 N.E. 2d 670 (1979), for the proposition that the Illinois Supreme Court has unequivocally held that if the parties have entered into a service area agreement approved by the Commission, that

agreement controls the rights of the parties to the exclusion of the ESA. Therefore, IP argues that since the parties have entered into a service area agreement, the agreement controls to the exclusion of the ESA and no cause of action may be maintained under the ESA.

Finally, IP contends that the decisions cited by MJM are distinguishable and do not apply to this case. In the O'Hara case, the court refused to enforce a contract as against public policy that called for payment of percentage fees earned by a law firm as a result of the purchase of the practice from an attorney's widow. That fee arrangement violated the Code of Professional Responsibility. In the City of Dekalb case, at issue was whether or not the city could provide supplemental retirement or annuity benefits to firefighters contrary to Section 4-142 of the Pension Code. Neither decision involved a service area agreement or the ESA. In the instant case, MJM has, throughout these proceedings, totally ignored the Illinois Supreme Court's decision in Rural Electric, supra, wherein the court made it absolutely clear that service area agreements apply to the exclusion of the ESA. Rural Electric cannot be distinguished and is controlling.

Obviously, IP argues, the SAA does not have to be in harmony with the ESA. IP, cites Central Illinois Public Service Company v. Illinois Commerce Commission, 219 Ill. App. 3d 291, 579, N.E. 2d 1200 (1991) wherein the court rejected CIPS' "public policy" argument that service by the cooperative would result in duplication of facilities contrary to the public policy of the ESA. The court upheld the sanctity of the service area agreement and stated that the duplication of facilities was "of no consequence in determining service rights" under CIPS' service area agreement.

COMMISSION CONCLUSIONS, FINDINGS AND ORDERING PARAGRAPHS

Summary of Positions

The arguments of the parties are well articulated in their pleadings and are summarized above, and will not be repeated in detail here.

In its complaint, MJM alleges, with respect to Count I, that the electrical service being provided by IP is provided to the premises which are premises to which MJM was providing electric service to an existing customer from an existing point of delivery which existing point of delivery is still in existence on the date hereof with electric facilities adequate to provide electric service to the customer for use upon the premises; that the Agreement specifically provides in Section 3 (a) that " . . . each party shall have the exclusive right to serve all customers whose points of delivery are located within its service areas . . . . "; and that the attempt by IP to provide electric service to the premises as such premises existed on July 2, 1965 and March 18, 1971, at a time when MJM has existing point of delivery as defined in the service area agreement for providing electric service to the premises violates the Agreement.

The complaint also alleges that the attempt by IP to provide electric service to the premises by way of a new point of delivery established subsequent to July 2, 1965

and March 18, 1971 violates the grandfathered rights of MJM pursuant to the Agreement to provide electric service to the premises and all customers who utilize electric service thereon; that the attempt by IP to provide electric service to the premises by way of a new three phase line and new point of delivery constructed subsequent to July 2, 1965 and March 18, 1971 creates duplication of facilities and excess capacity as well as inefficient operations contrary to the purposes of the Act and the Agreement; and that the attempt by IP to establish a new point of delivery for a customer on the same premises to which electric service by MJM has been grandfathered by the Agreement allows a customer to choose its electric supplier contrary to the public policy of the Act.

MJM also claims that the word "customers" is not defined in the Agreement and that because the VFW is neither a "new customer" or an "existing customer" as to MJM, the VFW must become a customer of MJM because they are located on the exact property previously served by MJM.

MJM further contends that the interpretation proposed by IP for Section 3(a) creates an ambiguity. This ambiguity exists because "customer" is not otherwise defined by the Agreement and because the VFW is not a "new customer" or an "existing customer" to MJM but rather a "customer" to MJM for which MJM claims the exclusive right to serve pursuant to Section 3(a).

Regarding Count II of the complaint, MJM argues that if the Commission interprets the Agreement in the manner proposed by IP, then such an interpretation allows the customer to choose its electric supplier in violation of the public policy of the ESA, and as such would be unenforceable as to either IP or MJM. Thus, the matter would be decided under the ESA.

IP concludes that the SAA is not ambiguous, and that under the plain meaning of the words in Section 1 and 3 of the SAA and the facts alleged in the Complaint, IP has the exclusive right to serve the VFW's building. IP says MJM admits that the VFW is not its "existing customer." IP contends that while Odorizzi occupied the premises from 1949 until 1980 and MJM provided service to Odorizzi over the entire premises, the SAA does not grant any service rights based upon occupancy of a premises or historical service thereto. Therefore, IP argues, the status of the VFW under the SAA is determinative.

IP also argues that under Section 3(a) of the SAA, IP is granted the exclusive right to serve all customers whose points of delivery are located within its service area. The VFW is a customer whose point of delivery is located in IP's service area. Section 3(a) of the SAA further prohibits MJM from serving a new customer within the service area of IP. The VFW is a new customer within the service area of IP and, therefore, MJM would be prohibited from providing service to the VFW, under the facts alleged in the Complaint.

With respect to Count II, IP cites Rural Electric Convenience Cooperative v. Illinois Commerce Commission, 75 Ill. 2d 142, 387 N.E. 2d 670 (1979), for the proposition that the Illinois Supreme Court has unequivocally held that if the parties have entered into a service area agreement approved by the Commission, that agreement controls the rights of the parties to the exclusion of the ESA. Therefore, IP argues that since the parties have entered into a service area agreement, that agreement controls to the exclusion of the ESA and no cause of action may be maintained under the ESA.

Conclusions

As the parties have indicated, the relevant portions of Sections 1 and 3 of the Agreement provide as follows:

> Section 1. (a) "Party" as used herein refers to one of the parties to this Agreement.
>
> (b) "Existing customer" as used herein means a customer who is receiving electric service on the effective date hereof.
>
> (c) "New customer" as used herein means any person, corporation, or entity, including an existing customer, who applies for a different electric service classification or electric service at a point of delivery which is idle or not energized on the effective date of this Agreement.
>
> (d) "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.
>
> Section 3. (a) Except as otherwise provided in or permitted by this Section and Sections 4, 5 and 8 of this Agreement, each party shall have the exclusive right to serve all customers whose points of delivery are located within its Service Areas and neither party shall serve a new customer within the Service Areas of the other party.
>
> (b) Each party shall have the right to continue to serve all of its existing customers and all of its existing points of delivery which are located within a Service Area of the other party on the effective date.

For the reasons set forth below, the Commission finds that under the terms of the Service Area Agreement, the supplier with the right to serve the VFW building is IP, not MJM.

As noted above, IP began providing service to the recently constructed VFW building in March of 1993. This building is located entirely on IP's side of the boundary line established in the Agreement, and the facilities used to deliver electricity to the building are located on IP's side of the boundary line. MJM has never provided electric service to the VFW building.

After reviewing the pleadings and the arguments of the parties, the Commission finds, first of all. that MJM does not have a claim to serve the VFW building as an "existing customer" under Section 3(b) of the Agreement because the VFW simply does not fall within the definition of an "existing customer" in Section 1(b).

Based on its review of the factual assertions in the complaint and the provisions of the Agreement, the Commission further determines that the VFW is an entity which applied for electric service at a point of delivery or electric service connection point which was not energized on the effective date of the Agreement, and as such is a "new customer" within the meaning of Sections 1(c) and 3(a). With regard to MJM's Section 3(a) argument, even assuming a "customer" could mean something other that a "new customer" or an "existing customer", Section 3(a) does not support MJM's conclusion because the VFW's point of delivery (i.e. electric service connection) is not in MJM's service territory. In the Commission's view, no ambiguity exists.

With respect to MJM's position, the Commission further observes that although MJM distanced itself from the term "premises" in its post-Complaint pleadings, a close review of MJM's Complaint and subsequent pleadings supports IP's contention that Count I of the Complaint is essentially based upon or closely linked to MJM's alleged right to serve the Odorizzi "premises."

While a supplier's grandfather rights to serve certain "premises" are addressed in Section 5 of the Act and in caselaw interpreting Section 5 and the definitions used therein, the parties' Agreement does not assign service rights based on a right to serve "premises," but instead bases such rights on terms like "existing customer," "new customer," or "existing point of delivery." As argued by IP, and made clear by the courts, it is the provisions of the Agreement, once approved, and not the provisions of the Act, which are controlling. As explained by the Illinois Supreme Court in Rural Electric, "These two section [Sections 2 and 6 of the ESA] make clear that once properly approved by the Commission, such . . . agreements control the rights of the parties . . . to the exclusion of the Act, except insofar as the agreement incorporates the Act."

For similar reasons, MJM's policy arguments that IP's actions would create duplication of facilities; that IP's interpretation of the Agreement of the would somehow permit customer choice; that MJM's interpretation of terms should be accepted so as to

avoid customer choice; or that an ambiguity should be found to exist, are not availing. Whether the outcome here would be different if there were no Agreement, or if the Agreement incorporated the terms and criteria from Section 5 (or other sections) of the Electric Supplier Act, is a question the Commission does not reach in this docket.

Accordingly, the Commission finds that under the Agreement, the supplier with the right to serve the VFW building is IP, not MJM, and that both counts of the Complaint should be dismissed.

The Commission, having reviewed the complaint and other pleadings herein, is of the opinion and finds that:

(1) the subject matter and parties are within the scope of the Commission's jurisdictional authority;

(2) the facts recited and conclusions reached in the prefatory portion of this Order above are hereby adopted as findings of fact;

(3) the Complaint filed by MJM should be dismissed as set forth below.

IT IS THEREFORE ORDERED that the Complaint filed by MJM in this proceeding is hereby dismissed with prejudice as to both counts.

IT IS FURTHER ORDERED that this Order is final and it is subject to the Administrative Review Law.

By order of the Commission this 10th day of May, 2000,

(SIGNED) RICHARD L. MATHIAS

Chairman

(S E A L)