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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

REPLY BRIEF BY TRI-COUNTY ELECTRIC COOPERATIVE, INC. TO THE INITIAL BRIEF OF CITATION GAS & OIL CORP

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REPLY BRIEF BY TRI-COUNTY ELECTRIC COOPERATIVE, INC. TO THE INITIAL BRIEF OF CITATION GAS & OIL CORP

TRI-COUNTY ELECTRIC COOPERATIVE, INC. (Tri-County) by it attorneys, GROSBOLL, BECKER, TICE, TIPPEY& BARR, files herewith its Reply to the Initial Brief of Respondent, CITATION OIL & GAS CORP. (Citation) as follows:

I. REPLY TO CITATION'S INTRODUCTION

A. REPLY TO CITATION'S COMMENTS ON THE PLEADINGS

Citation claims at page 2 of its Initial Brief that Tri-County alleged in its Amended Complaint, paragraph 7, Count I, that the "gas plant" was a "new customer" and in paragraph 12, Count II, that each of the new gas compressor sites is a "new customer" under Section 1(c) of the Tri-County/IP Service Area Agreement. Citation then states in footnote 2 and 3 at pages 2 and 3 that the gas plant and gas compressors are not a person, corporation and entity and cannot be a "new customer." In making such comments, Citation misrepresents the factual testimony presented by Tri-County in this docket. Tri-County's Scott testified in her direct testimony, page 10, lines 21 through 22 and page 11, lines 1 through 15, Tri-County Exhibit A as follows:

"Q: Why have you determined that Tri-County has the right to provide all of the

electric service to the Citation gas plant and the gas compressor sites used to provide gas to the gas plant?

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

Robert C. Dew, Jr., Tri-County's electrical engineer testified in his direct testimony, page 3, line 23, and page 4, lines 1 through 13, Tri-County Exhibit D as follows:

"Q: Based upon your experience in the electric utility industry, do you have knowledge as to what the electric utility industry considers a "point of delivery" when an electric supplier provides electric service to a customer?

A: Yes. Generally, the electric utility industry considers a "point of delivery" as the connection between a distribution line and a transformer or series of step down transformers used to reduce the distribution line voltage to a level that can be used by motors and equipment of a customer at the customer's premises. In the instant case, step down transformers with cutouts, fuse protection, mounting brackets on utility poles as well as appropriate service conductors have been installed at the Citation gas plant and at each of the Citation compressor sites. The purpose of the transformers in each instance in this case is to reduce the distribution line voltage of 12,470 volts to 277/480 volts at each of the compressor sites and to 277/480 volts at the gas plant which is the voltage level required for operation of the motors and equipment at each of the compressor sites and gas plant respectively."

Additionally, Dew's Engineering Report starting at the bottom of page 1 through the first two paragraphs on page 2, Tri-County Exhibit D-2, made clear that Tri-County claimed the step down transfer, service conductors, and connecting apparatus located adjacent to the gas plant and

each of the gas compressor site, did not exist on March 18, 1968 and thus, were new "points of delivery" as used in the Tri-County/IP Service Area Agreement.

It does not appear that Citation is objecting to the pleadings or making any argument that the pleadings do not conform to the evidence. The Commission rules require Citation to accept the status of the record at the time of intervention (82 Ill Adm Code 200.200(e)). The record at the time of Citation's intervention included Tri-County's Amended Complaint and IP's Answer. IP answered the Amended Complaint and did not file any motions with respect to Tri-County's Amended Complaint. Any divergence between the Amended Complaint and the proof at trial regarding whether the gas plant site and the gas compressor sites or Citation become the "new customer" under the Tri-County/IP Service Area Agreement by reason of the new "service connection points" or new "point of deliveries" for the gas plant and each of the gas compressor sites was cured by the proof at trial Reed vs Hoffman 48 Ill App 3d 815; 363 NE2d 140; 6 Ill Dec 611, 616 (5th Dist 1977). Therefore, Citation is barred from claiming Tri-County's Amended Complaint does not state a cause of action or is otherwise defective. However, to the extent Citation is making an argument that Tri-County's pleadings do not conform to the evidence, Tri-County files with its Reply Brief a Motion to Amend paragraph 7 of Count I and paragraph 12 of Count II to conform to the evidence submitted at trial as authorized by 735 ILCS 5/2-616(c) and the Rules of the Commission (83 Ill Adm Code 300.140).

B. RESPONSE TO CITATION'S STATEMENT OF FACTS

1. In the first paragraph at page 4 of Citation's Initial Brief, Citation states "...A unit operator has the legal obligation to produce oil and gas for the benefit of the owners..." citing Herr's Cross Examination at Transcript 4/27/11, page 1777. A review of that passage shows such statement by Citation to be incorrect. Herr testified that the State of Illinois has a statute

permitting the formation of units which allows owners and operators to recover oil they may not otherwise recover which benefits both owners and operators (Tr 4/27/11 p 1777).

2. In the third paragraph at page 5 of Citation's Initial Brief, Citation notes that Citation entered into contracts to purchase power first from Sempra Energy Solutions, LLC and then with Ameren Energy Marketing. However, Mark D. Bing, Central Region Manager for Citation, testified that at the time Citation entered into those contracts, he was aware of the contracts and of the litigation in this docket and that Tri-County was seeking the right to provide the electricity to the gas plant and the gas compressor sites located in Tri-County's service territory (Bing Cross Exam Tr 4/27/11, p 1744-1746).

II. CITATION HAS NO LEGAL RIGHT TO CIRCUMVENT THE TRI-COUNTY/ILLINOIS POWER SERVICE AREA AGREEMENT BY USE OF ITS CUSTOMER OWNED 12,470 VOLT DISTRIBUTION LINE

A. THE COMMISSION CANNOT OVERRIDE THE CLEAR PROVISIONS OF THE ELECTRIC SERVICE CUSTOMER CHOICE AND RATE RELIEF ACT OF 1997 THAT EXCLUDE RURAL ELECTRIC COOPERATIVES AND MUNICIPAL ELECTRIC SYSTEMS FROM THE ACT.

Citation refers to only those provisions of the Electric Service Customer Choice and Rate Relief Act of 1997 (Deregulation Act) that are applicable to public utilities such as Illinois Power to support its argument that the Deregulation Act gives Citation an absolute right to choose its electric supplier in this docket. Citation ignores the sections of the Deregulation Act that govern rural electric cooperatives and municipal electric systems. As noted in Tri-County's Initial Brief, pages 45-49, electric cooperatives as defined by the Electric Supplier Act (220 ILCS 30/3.4) are specifically excluded from the definition of an ARES (220 ILCS 5/16-107(ii)). Section 5/16-102 of the Act defines "electric utilities" as a "public utility" as defined in 200 ILCS 5/3-105(b)(3) which in turn excludes electric cooperatives as defined in the Electric

Supplier Act (220 ILCS 5/3-105(b)(3); 5/3-119, and 220 ILCS 30/3.4). Not only are electric cooperatives excluded from the Act (220 ILCS 15/17-100), the Act specifically states it shall not be construed to conflict with the rights of an electric cooperative as declared in the Electric Supplier Act (1220 ILCS 5/17-600).

At pages 7-9 of Citation's Initial Brief, Citation states the Deregulation Act defines a "retail customer" as a "single entity" using electric power at a "single premises", defines "service area" as a geographic area in which an "electric utility" is entitled to provide electric power to retail customers, (220 ILCS 16-102), and defines "delivery services" as those services provided by an "electric utility" (220 ILCS 5/16-104(a)) and have to be provided to all non-residential customers by December 31, 2000. Yet, Tri-County is not by definition an "electric utility" under the Deregulation Act. Further, the definition of "service area" as defined in the Deregulation Act is not applicable to the docket. In the first place, the "service area" at issue in this docket is set forth in the Tri-County/IP Service Area Agreement. The Illinois Supreme Court long ago held that when there is a Commission approved service area agreement, that agreement controls the territory issues in dispute Rural Electric Convenience Cooperative Co vs Illinois Commerce Commission 75 Ill 2d 142; 387 NE2d 670; 25 Ill Dec 794, 796 (1979). Accordingly, definitions from the Deregulation Act are not applicable to this docket because Tri-County is not an electric utility as defined by the Deregulation Act and because phrases such as "retail customer", "single entity", "single premise", and "service area" are not phrases at issue under the Tri-County/IP Service Area Agreement. Further, the Commission has already held the Service Area Agreement at issue in this docket does not assign service rights between Tri-County and IP on the basis of a "premise" MJM Electric Cooperative vs Illinois power Company Ill Com Comn Docket No. 93-

0150 (May 10, 2000)(MJM).[1] Thus, the provisions of the Deregulation Act cited by Citation as support for its argument that Citation can choose its electric supplier, Tri-County or IP, without regard for the Commission approved Tri-County/IP Service Area Agreement, are simply not applicable to Tri-County.

B. NEITHER THE UNITIZATION OF THE SALEM OIL FIELD NOR CITATION'S ELECTRIC SERVICE CONTRACTS WITH IP HAVE ANY BEARING ON THE SERVICE ISSUES IN THIS DOCKET.

Citation, at pages 8 and 9 of Citation's Initial Brief, claims the Salem Oil Field has been unitized to enhance recovery of the oil and Citation is a single customer at a single premise. Yet, IP's own witness testified that the unitization of the oil field has no relationship to the electric distribution system for the oil field and in fact, unitization could occur even if there were multiple electric suppliers for the Salem Oil Field (Herr Cross Ex Tr 4/27/11 p 1781). Likewise, the Tri-County/IP Service Area Agreement mentions nothing about service rights to "premises" or "units" and therefore, the dispute between Tri-County and IP over service to the gas plant and the gas compressor sites cannot be resolved by determining whether or not the Salem Oil Field is a "unit" or a "single premise". Neither, can the issue in this docket be resolved based on Citation's power contracts with Sempra and Ameren Energy Marketing which is a subsidiary of Ameren just as is Ameren Illinois dba Ameren Illinois Power fka Illinois Power Company dba AmerenIP and the Respondent in this docket.[2] Citation's ARES contracts were entered into after Citation knew about the dispute in this docket and that Tri-County was seeking the right to serve

[1] A copy of this Order in Docket No. 93-0150 is included in the Appendix to this Reply Brief.

[2] Judicial notice may be taken of public records of the Illinois Secretary of State and Missouri Secretary of State regarding corporations (In Re W.S. Jr., A Minor 81 Ill2d 252; 408 NE2d 718; 42 Ill Dec 140, 143, (1980). A copy of the status of Ameren Corporation as shown by the Missouri Secretary of State and a copy of the status of Ameren Energy Marketing Company (AEM) and Ameren Energy Resources Company LLC (AER) as shown by the Illinois Secretary of state are included in the Appendix to this Reply Brief. A copy of the January 13, 2012 Bloomberg Businessweek report explaining the company overview of AEM and AER and the Ameren Corporate structure overview from the Ameren.com website are included in the Appendix to this Reply Brief.

Citation's gas plant and gas compressor sites located in Tri-County's service territory (Bing Cross Exam Tr 4/267/11 p 1744-1746).

C. CONTRARY TO CITATION'S CLAIM, IP IS PROVIDING ELECTRIC SERVICE TO CITATION'S GAS PLANT AND GAS COMPRESSORS

Citation asserts at page 9 of its Initial Brief that IP has not provided any service, constructed any lines, or provided any equipment to Citation beyond the Texas Substation. However, correct or incorrect that may be, the Tri-County/IP Service Area Agreement is the controlling document for resolving the issue presented in this docket. The Service Area Agreement contains a specific statement in Section 3(a) that "...neither party shall serve a new customer within the service area of the other party." The fact is IP is serving Citation through the 69,000 volt Texas Substation where the Citation 12,470 volt distribution line is connected to the low side of the IP substation. Tatlock testified that switches and disconnects are located at that connection point and the purpose of those switches and disconnects is to break that connection. If the switches were thrown or the connection opened the flow of electricity and/or energy to the Citation 12,470 volt distribution line would stop (Tatlock Cross Exam Tr 1/14/11 p 1283-1284, 1286-1287) and Citation's gas plant and gas compressor sites would cease operation for lack of electricity. Thus, for Citation to claim IP is not providing any service to Citation beyond the Texas Substation is disingenuous at best. Citation would have no electricity, but for IP's Texas Substation and whether Citation claims it is bundled service or delivery service as defined in 220 ILCS 5/16-102 it is still service provided by IP in violation of the Tri-County/IP Service Area Agreement. When interpreting the Service Area Agreement, the Commission properly focuses on the place where the electricity is used not where Citation's wires connect to IP, Central Illinois Public Service Company v Illinois Com Comn and Southwestern Electric

Cooperative, Inc. 202 Ill App 3d 567; 560 NE2d 363; 148 Ill Dec 61, 51 (4th Dist 1990). IP has no right to serve, through the use of the Citation owned 12,470 volt distribution line, the Citation gas plant and gas compressor sites located in Tri-County's Commission approved service territory. See Tri-County's argument at Head Note IV, page 38 of its Initial Brief.

D. CITATION HAS NO ABSOLUTE RIGHT TO UNILATERALLY CHOOSE ITS ELECTRIC SUPPLIER.

Citation claims at page 9 of its Initial Brief that Citation has a valid statutory property interest to choose its electric supplier citing 220 ILCS 5/16-104 and 16-101(a) and case law. Yet, 16-104 refers to a delivery services transition plan which requires a public utility to offer "delivery services" to various groups of customers based on a schedule established by the statute. Section 16-101(a) refers to "legislative findings" but establishes no right to a particular service. Citation cites Mathews v Eldridge 424 US 319 (1976) for the proposition that the Commission cannot terminate IP's electric service to citation's gas plant and gas compressor site in Tri-County's service territory and authorize Tri-County to provide the electric service because to do so would prevent Citation from purchasing electric energy from an ARES. Yet, Mathews v Eldridge supra, at page 349 held termination of a social security recipient's benefits without an evidentiary hearing met constitutional due process requirements provided the terminated recipient received a post termination evidentiary hearing under the Social Security Act. In this docket, the Commission rules have allowed Citation to intervene, present testimony regarding its claim of right to purchase electricity from an ARES, cross exam all witness and present its arguments. Even if Citation has a right under the Deregulation Act to receive electricity from an ARES, that right is conditioned by the statue upon IP being the appropriate electric supplier to provide electric service to Citation. The right of IP to continue to provide electric service to the

Citation gas plant and seven of the eight gas compressor sites is dependent upon which of Tri-County or IP has that right under the Electric Supplier Act 220 ILCS 30/1 et seq and the Tri-County/IP Commission approved Service Area Agreement. Citation has been allowed to participate in the evidentiary proceeding pursuant to Commission rules governing Intervention. Thus, there has been no deprivation of Citation's due process rights.

Further, it is questionable whether Citation's claim of right under the Deregulation Act to purchase electricity from an ARES amounts to a property right. Citation's claim to a property interest in the right to purchase electricity from an ARES is based solely on the provisions of the Deregulation Act that govern "public utilities" such as IP. Citation ignores those provisions of the Deregulation Act that govern the right of customers' of electric cooperatives and municipal electric systems to purchase electricity from an ARES. The Deregulation Act is quite clear and precise on what a customer's rights are in that regard (220 ILCS 5/17-100, 17-200, and 17-600). Clearly, the Deregulation Act does not give Citation an absolute right to purchase electricity from an ARES when Citation is a customer of Tri-County, an electric cooperative. Since the Deregulation Act does not provide Citation with such absolute right, Citation cannot claim the Deregulation Act provides Citation with a statutory property interest to purchase electricity from an ARES. Citation's reference to Akmakjian v Dept. of Professional Regulation 287 Ill App 3d 894; 679 NE 2d 783; 223 Ill Dec 332, 335 (1st Dist 2nd Div 1997) is not helpful to Citation. In Akmakjian, the court denied a dentist's claim of a property right to have his records at the Department of Professional Regulation expunged, holding that if a statute does not provide for the claimed right, no protected property interest can exist therein. Likewise, a unilateral expectation of a protected interest cannot give rise to a claim of entitlement. See Groenings v City of St. Charles 215 Ill App 3d 295; 574 NE2d 1316; 158 Ill Dec 923, 931 (2nd Sit 1991)

where the court held property owners affected by a boundary agreement between two non-home rule municipalities adopted pursuant to statutory authority and which boundary agreement reduced the property owners' options for annexation which in turn adversely affected property values, possessed no property interest to base a due process claim on regarding the boundary agreement. The court held that prior to adoption of the boundary agreement, the landowners only possessed a unilateral expectation to an entitlement regarding the choices for annexation. Citation's claim in this case that Citation may have higher electric rates if Tri-County is the appropriate electric supplier for the gas plant and seven of the eight gas compressor sites, is no different than the claim of the property owners in Groenings v City of St. Charles, supra, that their property values will be reduced because of the boundary agreement between the two municipalities. See also Dimensions Medical Center v Elmhurst Outpatient 307 Ill App 3d 781; 718 NE2d 249; 240 Ill Dec 768, 779 (4th Dist 1999).

E. IP'S TARIFFS ARE NOT RELEVANT

Citation argues in the first paragraph at page 10 of its Initial Brief that IP's tariffs have the force of law for the purpose of establishing the meaning of "point of delivery". Yet, IP's tariff only governs the relationship of the public utility and the customer and the terms and conditions under which IP will provide electric service to Citation (220 ILCS 5/9-103; North River Insurance v Jones 275 Ill App 3d 175; 655 NE2d 987; 211 Ill Dec 604, 612 (1st Dist 3rd Div 1995). There is no evidence in this record that IP's tariff governs the relationship between Tri-County and IP regarding territorial issues. That relationship is governed solely by the Tri-County/IP Service Area Agreement dated March 18, 1968 Rural Electric Convenience Cooperative Co vs Illinois Commerce Commission 75 Ill 2d 142; 387 NE2d 670; 25 Ill Dec 794, 796 (1979).

Since that agreement does not define "point of delivery", the Commission must look to extrinsic evidence to help in defining that phrase. All the electrical engineers that testified in this case, with the exception of Malmedal, acknowledged the general understanding in the electric supplier industry is that "point of delivery" is the place where the electric voltage is reduced to a level the customer can use to power electric facilities. Even Malmedal agreed to that meaning of "point of delivery" if IP owned the distribution line bringing the electricity to the gas plant and the gas compressor sites. Dew explained that the reason for defining "point of delivery" in the tariffs as the place where electricity is handed off by the utility to the customer is to define a physical point where liability related to electric energy changes from the utility to the customer. The Illinois court has explained that the underlying purpose for limiting the liability of the utility through use of terms in the tariff is to support reasonably rates established by the tariff for the benefit of all Turner v Northern Illinois Gas Co. 401 Ill App 3d 698; 930 NE2d 418; 341 Ill Dec 208, 213 (2nd Dist 2010).

However, the tariff definition of "point of delivery" takes into account only one purpose of "point of delivery" as used in the electric utility industry (Dew Direct Test p 5-6, Tri-County Ex D; Tr 1/13/11 p 745). Dew pointed out the phrase "point of delivery" as used in the electric utility industry has a broader meaning than just limitation of liability since the "point of delivery' is most generally the place where both the distribution line voltage is reduced to a voltage usable by the customer's electric facilities and the electricity is metered and handed off to the customer. The preponderance of the evidence in this docket is that the general meaning of the phrase "point of delivery" as expressed by Dew is the most probable one intended by the parties when drafting Section 1 of the Tri-County/IP Service Area Agreement. Thus, Citation's attempt to use IP's tariff to control the meaning of "point of delivery" as used in the Tri-County/IP Service Area

Agreement is not supported by either the law or the evidence in this docket.

F. OWNERSHIP OF ELECTRICITY AS BETWEEN IP AND THE CUSTOMER CITATION IS NOT A BASIS FOR DETERMINING SERVICE RIGHTS UNDER THE TRI-COUNTY/IP SERVICE AREA AGREEMENT.

Citation points out at page 10 of its Initial Brief that it becomes the owner of the electricity from the time it is handed off by IP to Citation at the Citation switching station adjacent to IP's Texas Substation. Citation then reasons that electricity is tangible personal property and Citation as owner of the property has complete control over the use of it. However, the issue in this docket is not who owns the electricity or at what point in the electric distribution system the electricity changes hands from the electric supplier to the customer. Rather, the issue is the location of the delivery point where the electric voltage is reduced to a level capable of operating the gas plant and gas compressor sites located in Tri-County's service territory.

Both Citation and IP claim the "delivery point" for the gas plant and the gas compressor sites is the location where the transfer of liability for use of the electricity occurs between the electric supplier and the customer and because ownership changes at that location, which is the "delivery point". However, Dew testified the more complete meaning of "delivery point" within the electric supplier industry, is the place where the distribution line voltage is reduced to a voltage usable by the customer's electric facilities which in most cases is where the transfer of liability for use of the electricity from the electric supplier to the customer also takes place (Dew Direct Test p 5-6, Tri-County Ex D; Tr 1/13/11 p 745). It is Tri-County's position that the more appropriate meaning to assign to "point of delivery" as used in Sections 1 and 3 of the Tri-County/IP Service Area Agreement is the meaning generally assigned within the electric supplier industry as the location of the step down transformers and associated attachments allowing for the reduction of the distribution line voltage to a level capable of being utilized by the customer's

equipment which in most cases is where the transfer of liability for the electricity occurs. From the point of view of the electrical engineers, the location of the step down transformer and associated equipment is always adjacent to the location of the ultimate usage of the electricity. Both consulting electrical engineers that testified in this docket, Dew for Tri-County and Malmedal for IP, agreed that if the step down transformers and associated attachments were not put in place adjacent to the gas plant and gas compressor sites, the 12,470 volts of electricity would be unusable by the gas plant and gas compressor site electric motors (Dew Redirect Exam Tr 1/13/11 p 989-989); Malmedal Cross Exam Tr 4/28/11 p 1839-1848). Further, Tri-County's definition of "point of delivery" is more appropriate because the Tri-County/IP Service Area Agreement simply does not assign service rights on the basis of ownership of the electricity.

Lastly, Citation in the last paragraph at page 11 of its Initial Brief claims the Deregulation Act gave Citation a property right to buy electricity from an ARES. However, as Tri-County pointed out in part II-D, pages 8-10 of this Reply Brief, the Deregulation Act does not grant Citation a property right to purchase electricity from an ARES and if Tri-County is the proper electric supplier, the most Citation can claim is a unilateral expectation to purchase electricity from an ARES which does not provide Citation any legally recognized property right. Thus, there is no unlawful seizure of Citation's right to choose by awarding Tri-County service rights to the gas plant and gas compressor sites in Tri-County's territory.

G. CITATION CANNOT USE THE DEREGULATION ACT TO AVOID THE COMMISSION'S JURISDICTION TO DETERMINE TERRITORY SERVICE RIGHTS UNDER THE ELECTRIC SUPPLIER ACT

Contrary to Section 5/17-600 of the Deregulation Act, Citation claims at pages 12-15 of its Initial Brief that the Electric Supplier Act cannot be interpreted to deprive Citation of the right to purchase electricity from an ARES. To support this argument, Citation claims Citation has

requested Tri-County to allow Citation to take electric power from an ARES for the Citation office which Tri-County serves and Tri-County has not responded to that request. Therefore, Citation reasons Tri-County would not allow Citation to purchase electricity from an ARES for the gas plant and gas compressor sites if the Commission allows Tri-County to serve those installations. There is no evidence in the record that Citation asked Tri-County if it would allow Citation to purchase energy for the gas plant and gas compressors from an ARES. Thus, Citation's argument on this point is speculation. The issue of who is the appropriate electric supplier for the gas plant and gas compressor has yet to be decided. Not until that is decided can any consideration be given to elections under 220 ILCS 5/17-200 by Tri-County regarding Citation's purchase of power from an ARES. Citation has failed to cite any provision of the Deregulation Act that precludes the Commission from exercising its jurisdiction in this docket.

Citation claims in the second paragraph at page 13 of its Initial Brief that any transfer of electric service for the gas plant and the gas compressors from IP to Tri-County will interrupt Citation's electric service from its current ARES, Ameren Energy Marketing and since IP is not selling power to Citation, IP did not do anything that allows Tri-County to claim the right to serve the gas plant and gas compressor sites. However, Citation bought the Salem Oil Field from Texaco in December 1998(Lewis Direct Test p 2 IP Ex 4). Citation purchased all of its electric services, with the exception of the Citation office, under bundled rates from IP until December 2008 when it first contracted with Sempra Energy Solutions, an ARES, for power which contract ended in February 1, 2011 and then contracted with Ameren Energy Marketing, a different ARES, for power until February 2013 (Bing Direct Test Citation Ex 1 p 3-5 and Supp Test Citation Ex 2 p 1-2). Citation's Lewis knew in June 2005 that IP could not serve the gas plant located in Tri-County's territory (Lewis Cross Exam Tr 4/26/11 p 1627-1628) and that Tri-

County would claim the right to serve the gas plant (Lewis Cross Exam Tr 4/26/11 p 1624-1626). Bing of Citation was aware of the litigation in this docket when Citation entered into the ARES contracts with Sempra in December 2008 and Ameren Energy Marketing in February 2011 (Bing Cross Exam Tr 4/27/11 p 1744-1746). Thus, Citation was well aware of the circumstances of this docket and issues at hand. Despite that knowledge, Citation entered into those contracts with the knowledge the electric service may be switched by the Commission to Tri-County for the gas plant and the gas compressor sites. Thus, Citation has no legal basis to claim its ARES contracts prohibit the Commission from exercising its authority to determine the appropriate electric supplier. Besides, even if Tri-County is ordered to serve the gas plant and gas compressor sites in its territory, there is no claim that such event will void Citation's ARES contract since Citation will still take power under its ARES contract for the rest of the Salem Oil Field.

H. CITATION'S CLAIM THAT THE CITATION OFFICE IS NOT PART OF THE SALEM OIL FIELD IS NOT SUPPORTED BY THE EVIDENCE

Citation claims in the second paragraph on page 12 of its Initial Brief the Citation office is not part of the Salem Oil Field. Despite that claim, Lewis testified the Citation office is physically located in the Salem Oil Field, is owned by Citation, staffed by Citation's employees, contains the office of Michael Garden, Senior Manager of Production at the oil field, contains Citation's records, the administrative functions of the Salem Oil Field are performed from the Citation office, and Citation staff meetings are held at the office (Lewis Cross Exam Tr 4/26/11 p 1648-1650).

Tri-County commenced electric service to the Citation office December 29, 1998 at Citation's request (Scott Direct Test p 3-4, Tri-County Ex A and Ex A-2) and continues that

service today. Citation's Lewis knew Tri-County provided the electric service to Citation's office and testified Citation wanted a second electric supplier for the Citation office so that when IP's power failed, Citation's office would still have electricity (Lewis Cross Exam Tr 4/26/11 p 1647-1648). In fact, Citation's Lewis testified that when IP had the Salem Oil Field on an interruptible rate Citation did not want the Citation office on an interruptible rate (Lewis Cross Exam Tr 4/26/11 p 1650-1651).

I. CITATION'S CLAIM IT CANNOT ACCEPT ELECTRIC SERVICE FROM TWO ELECTRIC SUPPLIERS FOR SAFETY REASONS IS NOT SUPPORTED BY THE EVIDENCE

Citation also claims at page 14 of its Initial Brief, it cannot safely accept electric service at the Salem Oil Field from two electric suppliers because some wells are not on the same circuit as the gas plant and vice versa and if power continues to flow to either the gas plant or gas wells, when power is interrupted to the other equipment, the gas plant or gas wells will be damaged. Citation claims that with two electric suppliers, Citation would have to install additional switches to avoid this problem. Both Michael Garden, Senior Production Foreman for Citation stationed at the Citation Salem Oil Field and Dew, Tri-County's Consulting Electrical Engineer testified that Citation has four separate electric circuits called South Circuit, Texas Circuit, Plant Circuit, and Magnolia Circuit. Garden testified that gas compressor sites No. 1 and No. 5 are on the Magnolia Circuit, gas compressor sites No. 2 and No. 3 are on the Texas Circuit, gas compressor sites No. 4, No. 7, and No. 8 are on the South Circuit and gas compressor site No. 6 and the gas plant are on the Plant Circuit (Garden Cross Exam Test Tr 4/27/11 pages 1685-1690). Garden also testified that Citation experiences electric outages on all four of its circuits from time to time caused by storms, lightning and animals and that the outages may be on just one or more than one of the four circuits at any one time (Garden Cross Exam Tr 4/27/11 pages 1694-1696).

Lewis testified on cross examination that in fact Citation had a mechanism in place to shut down the gas plant or the gas wells if the circuit serving the gas plant or the wells suffers an outage (Lewis Cross Exam Tr 4/16/11 pages 1645-1646). Clearly, Citation already suffers electric outages on all four circuits of its 12,470 volt distribution line and has in place safety mechanisms to protect its equipment when outages occur on a particular circuit shutting down one or more gas wells or the gas plant or vice versa. Citation's argument simply is not supported by the record.

J. CITATION'S REQUESTED RELIEF IS BEYOND THE SCOPE OF THE COMMISSION'S JURISDICTION

At page 15 of its Initial Brief, Citation asks that if the Commission orders a change in the electric supplier for the gas plant and the gas compressor sites in Tri-County's territory that the Commission order Tri-County to:

1. Exercise its election under 220 ILCS 5/17-200 to allow Citation to purchase energy from an ARES;

2. Require Tri-County to reimburse Citation for costs of constructing its own distribution system to the gas plant and compressors;

3. Require Tri-County to pay all of Citation's costs to add switches and other apparatus to its existing distribution system.

None of the above requests for relief by Citation are within the jurisdiction of the Commission to award or order performed even if the evidence supported such an award. The Commission has no general authority to award damages Moenning v Illinois Bell Telephone Co. 139 Ill App 3d 521; 487 NE2d 980; 94 Ill Dec 103, 107 (1st Dist 3rd Div 1985) nor to grant any declaratory relief. As noted in Harrisonville Telephone Co v Commerce Com'n 176 Ill App 3d 389; 531

NE2d 43; 125 Ill Dec 864, 866 (5th Dist 1988) since the Commission is created by statute and has no general or common law powers it is a creature of statute and derives its powers solely from the statute. The Electric Supplier Act does not grant the Commission authority to award damages or grant injunctive relief, 220 ILCS 30/1 et seq. While Commission Rule 83 Illinois Administrative Code 200.220 provides for limited relief in the form of Declaratory Rulings, such relief is limited to the applicability of any statutory provision the Commission is charged with enforcing and whether a person's compliance with a federal rule will be accepted as compliance with a similar Commission Rule. Neither of such conditions is applicable in this docket. Citation has not requested any relief under Section 200.220. Even if it had, the docket is devoid of any evidence to support such relief even if the Commission had authority to grant the same.

K. CITATION'S CLAIMED CONTRACTUAL RIGHTS WITH AMEREN ENERGY MARKETING AS AN ARES CAME INTO BEING AFTER ADOPTION OF THE ELECTRIC SUPPLIER ACT AND THE COMMISSION APPROVAL OF TRI-COUNTY/IP SERVICE AREA AGREEMENT.

Citation at pages 15-17 of its Initial Brief argues that pursuant to 220 ILCS 5/16-101(A) and 5/16-104 of the Deregulation Act, Citation entered into an ARES contract with Ameren Energy Marketing and to require Citation to take electric service from Tri-County for the gas plant and gas compressor sites in Tri-County's territory would unconstitutionally impair Citation's ARES contract. However, the Electric Supplier Act was adopted by the Illinois Legislature effective July 1965. The Tri-County/IP Service Area Agreement assigning service territories and service rights between Tri-County and IP was signed March 18, 1968 and approved by the Commission July 3, 1968. Citation purchased the Salem Oil Field December 1998 (Lewis Direct Test p 2; IP Ex 4) and took bundled electric service from IP until December 2008 when it entered into its first ARES contract with Sempra which terminated February 2011

at which time Citation entered into a two year ARES contract with Ameren Energy Marketing (Bing Direct Test, Citation Ex 1 p 3-5 and Supp Test Citation Ex 2 p 1-2; Tr 4/27/11 p 1749, 1742). Citation's Lewis testified he knew in June 2005 that IP could not serve the gas plant because it was located in Tri-County's service territory (Lewis Cross Ex Tr 4/26/11 p 1633-1634) and that Tri-County claimed service rights to the gas plant (Lewis Cross Ex Tr 4/26/11 p 1613-1618). Citation's Bing testified he knew about the dispute in this docket when Citation entered into the ARES contracts in December 2008 and February 2011 (Bing Cross Ex Tr 4/27/11 p 1744-1746). Therefore, the evidence is clear and undisputed that the Citation ARES contracts did not predate the Electric Supplier Act or the Tri-County/IP Service Area Agreement. Further, Citation had direct knowledge of the litigation then in progress in this docket regarding Tri-County's territory claims. Based on Citation's current arguments, it is pretty clear Citation was aware of the impact if any that the decision in this docket would have on Citation's ARES contract. Additionally, the Deregulation Act was adopted in 1997 and by its terms excluded Tri-County as a rural electric cooperative from the Act unless Tri-County's governing board elected otherwise. The Deregulation Act went further and provided that Article XVII, which excludes electric cooperatives from the Deregulation Act, shall not be interpreted to conflict with the rights of an electric cooperative as declared under the Electric Supplier Act (220 ILCS 5/17-100, 17-200, 17-600). Citation is deemed to know the law and certainly had knowledge of the facts.

Notwithstanding the foregoing, Citation knowingly entered into the ARES contracts and now brazenly claims a Commission decision awarding service rights to the gas plant and the gas compressor sites will unconstitutionally impair its ARES contract. As noted above, the contract Citation claims would be unconstitutionally impaired post dates the Electric Supplier Act, the Tri-County/IP Service Area Agreement, and the litigation in this docket. Therefore, the

application of the Electric Supplier Act and the Tri-County/IP Service Area Agreement to the issues in this docket cannot possibly impair Citation's ARES contract because the Electric Supplier Act predates Citation's ARES contract. As noted in Commonwealth Edison v Commerce Com'n 398 Ill App 3d 510, 924 NE2d 1065; 338 Ill Dec 539, 561 (2nd Dist 2009) "...the underlying purpose of the contract clause is to protect the expectations of persons who enter into contracts from the danger of subsequent legislation." Citation points to no legislation which was adopted after December 2008 and which will be applied by the Commission to the issues in this docket.

Further, under the Electric Supplier Act, the Commission is statutorily charged with interpreting the meaning of Sections 1 and 3 of the Tri-County/IP Service Area Agreement. By doing so, the Commission makes no decision that is subject to the constitutional prohibition against any law impairing contractual obligations. That prohibition is directed against the law-making power of the legislative branch of government and not against the action of the Commission in interpreting a contract Phelps v Elgin, J. & E. Ry Co. 28 Ill 2d 275, 280; 191 NE2d 241 (1963). A person simply cannot remove its rights which are subject to regulation by contracting with others about them Commonwealth Edison v Commerce Com'n, supra, 560. The Service Area Agreement the Commission must interpret to resolve the territory issue in this docket was approved by the Commission and remains subject to the jurisdiction of the Commission and is therefore a regulated contract. Therefore, the Commission's interpretation of that contract, whatever it may be, cannot unconstitutionally impair Citation's subsequently entered into ARES contract because the Commission's action is not a legislative action.

Lastly, Citation's case citations on this point are simply inapplicable because they deal with the effect of the legislature's adoption of a state law upon a preexisting contract. The

Commission decision in this docket will not be a legislative act.

L. THERE IS NO CONFLICT BETWEEN THE PROVISIONS OF THE ELECTRIC SUPPLIER ACT AND THE ELECTRIC SERVICE CUSTOMER CHOICE AND RATE RELIEF LAW OF 1997

Citation claims at page 17 of its Initial Brief that the Commission must consider the Deregulation Act when determining the territorial issue presented in this docket. Citation cites no authority for that proposition except to claim that the Electric Supplier Act and the Deregulation Act regulate the same subject matter. They do not. The Electric Supplier Act regulates electric service territories by allowing electric cooperatives and public utilities to enter into contracts delineating their respective service areas, subject to the approval of the Commission (220 ILCS 30/2 and 30/6). The Deregulation Act provides for the purchase of electric energy by establishing a regulatory scheme allowing alternative retail electric suppliers (ARES) to sell electric energy to customers of electric utilities. The Deregulation Act excluded electric cooperatives from the definition of an electric utility 220 ILCS 5/16-102 by defining an electric utility as a "public utility" as defined in Section 3-105 of the Public Utility Act which in turn excludes electric cooperatives as defined in the Electric Supplier Act (220 ILCS 5/3-105(b)(3); 5/3-110; and 220 ILCS 30/3.4.

The Electric Supplier Act does not deal with the sale of electric energy but only with which electric supplier is authorized to serve territories as allocated either by the legislative scheme established by the Act or as allocated by Commission approved agreements delineating service territories. In fact, rates charged for the electricity cannot properly be considered when determining territory disputes except in the limited circumstances authorized by Section 8 and 14, 220 ILCS 30/8 and 30/14. Each of the Electric Supplier Act and the Deregulation Act are designed to meet different needs of the state and do not conflict in meeting those specific needs.

Citation claims in footnote 10 at page 17 of its Initial Brief that the Deregulation Act has overturned Central Illinois Public Service Company v Illinois Commerce Commission and Southwestern Electric Cooperative, Inc 202 Ill App 3d 567, 560 NE 2d 363; 148 Ill Dec 61 (4th Dist 1990) because the Deregulation Act allows a customer to choose their power supplier. However, Citation overstates its case because the Deregulation Act does not allow a retail customer of a rural electric cooperative or of a municipal electric system to choose its power supplier unless an election is first made by the governing board of the electric cooperative or the municipality (220 ILCS 5/17-100 and 5/17-200). Until that election is made the customer is foreclosed from choosing a separate power supplier. The Legislature was quite clear and precise in its exclusion of electric cooperatives from the legislative scheme established by the Deregulation Act. Citation tries to circumvent this reality by refusing to recognize that the Deregulation Act definition of electric utility excludes rural electric cooperatives unless the electric cooperative elects to become an ARES in its own right (220 ILCS 5/17-300).

Citation argues at page 19-21 of its Initial Brief that the Deregulation Act is in such direct conflict with the Electric Supplier Act that the Deregulation Act as the later adopted Act must have been intended by the Legislature to override the Electric Supplier Act and its regulatory rules governing the assignment of territory rights. Nothing in the Deregulation Act governs electric supplier territories. Nothing in the Electric Supplier Act governs electric rates or the charges to be made for electric energy or delivery service rates. The two Acts are designed to regulate two different needs of the state. The Legislature took great care to remove electric cooperatives from coverage of the Deregulation Act and to recognize the inherent differences between public utilities and electric cooperatives. Because the Legislature removed the rural electric cooperatives from coverage of the Deregulation Act, Citation cannot point to any

provision of the Deregulation Act that supports its claim that it has a vested statutory right to choose its power supplier and as such, preempts Tri-County's territorial rights under the Electric Supplier Act (220 ILCS 5/17-100, et seq).

Citation's cases cited to support its claim the Deregulation Act and the Electric Supplier are in direct conflict are not applicable. Even though State v Mikusch 138 Ill 2d 242; 562 NE2d 168; 149 Ill Dec 149 (1990) held the Vehicle Code and Human Rights Act were in conflict with each other because each established different retirement ages for Secretary of State investigators, the court in Eades v Heritage Enterprises Inc. 204 Ill 2d 92; 787 NE2d 771; 272 Ill Dec 585 found the Nursing Home Care Act which authorized claims for injury against nursing homes dealt with a different subject and had a different objective than the Healing Arts Malpractice Act and thus, the requirement of the Healing Arts Malpractice Act that a plaintiff must include with Plaintiff's complaint an affidavit signed by a health care professional stating the plaintiff has a meritorious claim was not a requirement under the Nursing Home Care Act.

Citation alternatively argues in the third paragraph at page 20 of its Initial Brief that a specific statutory provision will control a general statutory provision dealing with the same subject. In support of its position, Citation notes People vs Villarreal 152 Ill 2d 368; 604 NE2d 923; 178 Ill Dec 400 (1992) where the court found that because the statute prohibiting use of force against a police officer and the statute allowing use of force to prevent unlawful entry into one's home both dealt with the common subject of use of force, the statute prohibiting use of force against a police officer controlled and the defendant could not rely on the companion statute sanctioning use of force to prevent unlawful entry into one's home as a defense to the criminal charge that defendant used unlawful force against a police officer entering defendant's home. However, in Knolls Condominium Ass'n v Harms 202 Ill 2d 450; 781 NE2d 261; 269 Ill

Dec 464 (2002), the court found the Forcible Entry and Detainer Act allowed condominiums to bring forcible entry actions against a condominium owner for possession of the unit if the owner failed to pay assessments, notwithstanding the separate Homestead Act provided an exemption of $7,500.00 in value of a condominium unit from attachment, levy or sale to satisfy the owner's debts, since the Forcible Entry and Detainer Act specifically allowed the condominium association to maintain the forcible entry and detainer action for possession of the owner's condominium unit until the unpaid assessment were satisfied. Thus, the court held the two statues created a harmonious statutory scheme.

In this docket, Citation cannot point to any provision of the Deregulation Act that authorizes Citation as a customer of Tri-County to unilaterally choose its electric supplier. In fact, the Deregulation Act specifically provides to the contrary unless Tri-County elects to allow its customers to purchase power from an ARES (220 ILCS 5/17-100 and 5/17-200). In so doing the Legislature put in place a statutory scheme that recognized the inherent differences between rural electric cooperatives and municipal electric systems on the one hand and electric utilities on the other hand (See Tri-County's Initial Brief part VIII A page 45-49).

Citation further argues in the last paragraph page 20 of its Initial Brief that by adopting the Deregulation Act, the Legislature expressed a legislative intent that electric customers can choose their electric supplier contrary to the dictates of the Electric Supplier Act and in effect repealed the Electric Supplier Act. Citation relies on Jahn v Troy Fire Protection District 255 Ill App 3d 933; 627 NE2d 1216; 194 Ill Dec 574 (3d Dist 1994) that held the Tort Immunity Act imposing liability for municipal fire departments based upon willful and wanton conduct and the Fire Fighter Liability Act imposing liability on fire protection districts based on negligent conduct both dealt with the question of tort liability and in so doing created an improper

classification between the two governmental bodies by imposing different liability standards for two governmental bodies. Therefore the later adopted Tort Immunity Act imposing liability only for willful and wanton conduct repealed the earlier adopted Fire Fighter Liability Act imposing labiality for negligent acts. Citation though points to no provision of the Deregulation Act that regulates territorial issue between electric suppliers. In fact as to electric cooperatives, the Legislature created an exemption excluding electric cooperatives serving customer in their service territories authorized under the Electric Supplier Act from being automatically required to allow their customers to purchase electric energy from an ARES. Likewise, Citation points to no provision of the Electric Supplier Act that regulates the sale or purchase of electric energy. The subject matter of the Electric Supplier Act deals only with electric supplier service territories and the assigning of rights of electric suppliers to serve customers in those territories. Thus, the two statues which regulate two different subject matters are not in conflict with each other. Each statute establishes regulatory schemes intended to meet separate and distinct governmental needs.

M. THE ILLINOIS COMMERCE COMMISSION HAS THE SPECIFIC POWER UNDER THE ELECTRIC SUPPLIER ACT TO APPROVE AND INTERPRET THE SERVICE AREA AGREEMENT AT ISSUE IN THIS DOCKET.

Citation at part F page 21 of its Initial Brief claims the Commission possesses no power to abrogate Citation's right to choose an ARES under the Deregulation Act. However, that is not the issue in this docket. The issue is which of Tri-County or IP is entitled to serve Citation's gas plant and gas compressor sites in Tri-County's service territory. Because that is the only issue, the Commission has authority and jurisdiction to decide the same (220 ILCS 30/2 and 30/6; Rural Electric Convenience Cooperative Co. vs Illinois Commerce Commission 75 Ill 2d 142; 387 NE2d 670; 25 Ill Dec 794, 796 (1979). Further, should the Commission determine Tri-

County is the appropriate electric supplier; it will not abrogate, as Citation claims, Citation's right to purchase power from an ARES. Rather, Citation's right to purchase power from an ARES under the Deregulation Act will be a matter between Tri-County and Citation and beyond the purview of the Commission. That is the regulatory structure established by the Legislature and the Commission will not be exerting any authority over the subject matter of that transaction (220 ILCS 5/17-500). The authorities cited by Citation deal only with situations where the Administrative Agency renders an order on issues over which it had no jurisdiction. In this docket, the Commission is requested to render an order regarding the appropriate electric supplier not whether Citation can choose its power provider under the Deregulation Act.

III. THE ISSUE IN THIS DOCKET IS WHAT DOES "POINT OF DELIVERY" MEAN AS USED IN THE TRI-COUNTY/IP SERVICE AREA AGREEMENT.

A. CITATION'S PROPOSED DEFINITION OF "POINT OF DELIVERY" IS NOT SUPPORTED BY THE EVIDENCE.

Citation argues at page 21-24 of its Initial Brief that the issue in this docket is not a territorial issue. Citation does not explain how it arrives at that conclusion. Frankly, it cannot because the only subject matter of the Service Area Agreement is the assigning of service rights between Tri-County and IP established by the Commission approved Service Area Agreement. In doing so, the Commission must determine the meaning of "point of delivery" as used in Sections 1 and 3 of the Agreement. Because "point of delivery" is not defined by the Agreement, extrinsive evidence can be considered by the Commission on that point. The ALJ set the stage for that determination in finding a dispute existed among the engineers as to the meaning of "point of delivery" when issuing the summary judgment order in this docket.

Citation claims "point of delivery" can be defined from within the Agreement itself and declares that nothing in the Service Area Agreement defines "point of delivery" as the location

of the step down transformer or the location where the voltage is reduced to a voltage usable by the customer occurs. On the other hand, nothing in the Agreement defines "point of delivery" as being the location of the hand off of electricity to the customer. Citation's reasoning on this point is faulty in view of the Commission's and the Court's decision in Central Illinois Public Service Company vs Illinois Commerce Commission and Spoon River Electric Cooperative, Inc. 219 Ill App 3d 291; 579 NE2d 1200; 162 Ill Dec 386, 390 (4th Dist 1990) (Spoon River) holding the failure to define "locations" in a Service Area Agreement created an ambiguity authorizing the Commission to consider parole evidence as to the meaning of the term. Citation apparently concedes the applicability of the Spoon River decision because Citation asserts the Commission should consider extrinsive evidence and apply the definition of "point of delivery" found in 83 Ill Adm Cod 410.10 as being the place where distribution facilities connect to the facilities of the customer without regard to ownership of transformers, substations, or meters. However, Citation admits in the last paragraph on page 22 of its Initial Brief that electric cooperatives, such as Tri-County, are excluded from the provisions of Section 410.10 by Section 410.20. Further, Citation claims no one is seeking to apply the definition of "point of delivery" found in Section 410.10 to Tri-County's operations. If that is the case, then why is Citation suggesting the Section 410.10 definition of "point of delivery" be applied to the phrase "point of delivery" as used in the Service Area Agreement? Citation's argument ignores the fact that a Commission decision in this docket assigning service rights directly affects Tri-County's operations. Because Section 410.20 excludes Tri-County, as an electric cooperative, from the application of Part 410 of the Administrative Rules including Section 410.10, the Commission has no authority to apply the definition of "point of delivery" found in Section 410.10 to the phrase 'point of delivery" as used in the Service Area Agreement.

Citation claims at page 23-24 that equating "point of delivery" as used in the Service Area Agreement with "transformers" would render the word "delivery" meaningless. However, the issue is the meaning of the complete phrase "point of delivery" as used in the Agreement not the word "delivery". All the electrical engineers agreed the step down transformer and associated connectors were required to be placed adjacent to (within 200 feet) of the gas plant and each of the gas compressor sites to reduce the Citation distribution line voltage from 12,470 volts to a voltage usable by Citation's electric motors at those facilities and if that was not done, the electricity would destroy Citation's electric motors. Dew, Tatlock and Siudyla all agreed the configuration constituted a "point of delivery" as is generally understood in the electric supplier industry and as had been understood by Ti-County and IP in their past dealings with the Service Area Agreement. Tatlock understood Citation was asking for a new "point of delivery" for the gas plant with the establishment of a 1500 KV step down transformer and associated equipment adjacent to the gas plant. No engineering witness in this docket, except IP's outside electrical engineer Keith Malmedal, stated the "point of delivery" is at any other location than the location of the step down transformer. However, Malmedal based his understanding of the meaning of "point of delivery" solely on whether the customer or the electric supplier owned the distribution facilities and he acknowledged that if IP owned the 12,470 volt distribution line the "point of delivery" as understood in the electric supplier industry would be the location where the distribution line connected to the step down transformer and associated equipment adjacent to the gas plant and gas compressor sites. If the Commission were to accept Malmedal's understanding of the meaning of "point of delivery" as being dependent on who owned the 12,470 volte distribution line as applicable to the Service Area Agreement in this docket, the Commission would create the minefield of problems identified by the Commission as reason for

refusing such a definition of "point of delivery" in Central Illinois Public service Company vs Spoon River Electric Cooperative, Inc. ESA 249 (October 4, 1989). [3] Therefore Citation's proposed definition of "point of delivery" should be rejected.

B. THE DETERMINATION OF "POINT OF DELIVERY" AS USED IN THE SERVICE AREA AGREEMENT IS NOT CONDITIONED UPON THE OWNERSHIP OF THE EQUIPMENT COMPRISING THE "POINT OF DELIVERY"

Citation, at pages 24-31 of its Initial Brief, paraphrases testimony of Marcia Scott, Robert C. Dew, Jr. and Keith Malmedal and in doing so inaccurately presents some of each witness's testimony. Tri-County hereinafter notes what it considers Citation's inaccurate representations of each of Scott, Dew, and Malmedal.

Marcia Scott

1. Citation's statement at the bottom of page 24 and top of page 25 that Tri-County has no policies or documents defining new "point of delivery" omits IP's counsel's cross exam of Scott that through 30 years of experience she has learned the "point of delivery" is the location of the step down transformer (Scott Cross Exam Tr 1/12/11 p 540).

2. Citation's statement at page 25 that between 1968 and 2005, Tri-County never supplied electricity to the Salem Unit or any oil wells omits Scott's testimony on cross exam by IP's counsel in which Scott was asked if there had in the past been discussions about who would have the right to serve newly drilled oil wells and Scott testified there had been no questions. We have a territorial agreement (Scott Cross Exam Tr 1/12/11 p 543).

3. Citation's statement at the bottom of page 25 that Citation never applied for service

[3] A copy of the Order in ESA 249 is reproduced in the Appendix to Tri-County's Initial Brief and the full context of the Commission's concern in allowing customers to circumvent the Service Area Agreement by use of a "delivery point" negotiated between the customer and electric supplier are set forth in Tri-County's Initial Brief at pages 35-37.

omits Scott's cross exam by IP's counsel in which Scott stated Citation never completed a Request for Service Form for the gas plant on Tri-County's written form but Tri-County received other information from Citation in other avenues as Tri-County frequently does (Scott Cross Exam by IP Tr 1/12/11 p 539). The other information Scott referred to that appears on the Request for Service Form and which Tri-County received from Citation was location of service for the gas plant (Scott Cross Exam by IP Tr 1/12/11 p 537-538). Tri-County already had Citation's mailing address and billing information because Tri-County served Citation's office and Citation was a member of Tri-County.

4. Citation's statement at the bottom of page 25 that Citation only explored costs, rates and pricing options ignores the testimony of Citation's Jeff Lewis on cross examination by Tri-County's counsel that at the June 2005 meeting with Tri-County, Citation asked if Tri-County could hook up the plant (Lewis Cross Exam Tr 4/26/11 p 1615).

5. At the bottom of page 25 and top of page 26, Citation states a new "point of delivery" was not discussed during the July 5, 2005 meeting between Tri-County's Scott, Ivers and Grubb, Citation's Lewis and Pearson, and IP's Tatlock and Masten. However, Citation omits Scott testimony on IP's cross exam that throughout the process from March 2005 through the July 5, 2005 meeting and until the July 14, 2005 phone call from IP's Masten, all the conversations with IP regarding electric service to the gas plant were 100% that the gas plant is in Tri-County's territory and it is Tri-County's load to serve (Scott Cross Exam by IP Tr 1/12/11 p 545-546).

Citation lists four reasons at the top of page 26 of its Initial Brief to support Citation's statement that the transformer cannot be a new point of delivery:

1. IP is delivering electricity to the Texas Substation in the same manner as it did in 1967. Citation incorrectly assumes ownership of the electric facilities and/or electricity is an

element to be considered when determining service rights under the Tri-County/IP Agreement.

2. IP is not delivering electricity to the gas plant and gas compressors because Citation installed the transformers. However, Citation ignores the fact that the Service Area Agreement assigns service rights without consideration of ownership of the facilities used to deliver electricity.

3. The Texas Substation was three phase and still is.

4. Inaccurate statements of IP employees (presumably Tatlock, Siudyla and Masten) regarding the meaning of the Service Area Agreement. This statement ignores the testimony of Tatlock and Siudyla that when Citation asked for the 1500 KV step down transformers and associated connecting apparatus located adjacent to the gas plant, they understood that request to be one for a new "point of delivery" located in Tri-County's territory (Tatlock Cross Exam Tr 1/14/11, p 1207-1217; Siudyla Cross Exam Tr 2/4/11 p 1316-1318; 1323-1326; 1329-1329, 1346-1347, 1349-1351, 1375-1377, and Scott's testimony that in the past, Tri-County and IP working with Tatlock considered the meaning of "delivery point" as used in the Service Area Agreement to be the location of the step down transformer and connecting apparatus to provide electricity at a voltage the customer could use for electric facilities at that location (Scott Rebuttal Test, Tri-County Ex E, page 7-8; Scott direct Test, Tri-County Ex A, p 9).

Robert C. Dew, Jr.

Citation at pages 26-29 paraphrases various parts of Dew's testimony which in essence is that a "point of delivery" as understood in the electric supplier industry is the location of step down transformers and associated connecting apparatus used to reduce in this case the 12,470 volts of electricity from Citation's distribution line to a voltage usable by the customer's electric facilities at that location. Citation criticizes this opinion claiming it (1) ignores the law of

property (ownership of the electricity); (2) ignores the meaning of delivery; (3) is an amorphous definition which is unworkable and impractical; and (4) apparently ignores Citation's ownership of the 12,470 volt distribution line, transformers and apparatus at the gas plant and gas compressor sites. In criticizing Dew's opinion, Citation pays no heed to the fact the Service Area Agreement does not assign service rights to Tri-County and IP on the basis of ownership of the electricity or of the electric distribution facilities. Dew's opinion makes perfect sense when you consider the mischief that would be created with the Tri-County/IP service Area Agreement if customer owned distribution lines could be used to serve electricity to new customer facilities located up to 20-30 miles distant from the IP Texas Substation or for that matter, the Tri-County Substation located virtually adjacent to IP's Texas Substation. IP's electrical engineer Keith Malmedal testified Citation could use its 12,470 volt distribution line and take electricity handed off to it from either the IP Texas Substation or the Tri-County Salem Substation and serve an electric load the size of the gas plant 30 miles distant (Malmedal Cross Exam Tr 4/27/11 p 1951-1952; 1902-1904; 1925-1927). If the Commission accepts Citation's meaning of "point of delivery", then any customer of either Tri-County or IP with financial ability to construct its own distribution line could do just as Citation has done. To adopt Citation's definition of "point of delivery" would bring to life the concerns expressed by Commission in the Spoon River Docket ESA 249. Citation's proposed definition is neither practical, workable, nor legal.

Keith Malmedal

Citation paraphrases Malmedal's testimony as in essence stating the electricity was handed off by IP to Citation at 12,470 volts at the Texas Substation and since all the distribution facilities from the Texas Substation downstream are owned by Citation, the creation by Citation of the new gas plant and gas compressor sites with step down transformers and other connecting

devices used to reduce the distribution line voltage to a voltage usable by the electric motors do not constitute delivery points. Malmedal's opinion was based solely on the fact IP did not own the 12,470 volt distribution line from the Texas Substation to the gas plant and gas compressors or the step down transformers or the meter. Malmedal's opinion changed and he concurred with Dew's, Tatlock's, and Siudyla's opinions that if IP owned the 12,470 volt distribution line and the transformers at the gas plant and gas compressor sites, the service point would be at the low side of the transformer and the delivery point would be at the meter, all located at the gas plant and the gas compressor sites (Malmedal Cross Exam Tr 4/28/11 p 1886-1887, 1892, 1907-1908). Thus, the only difference in the engineering opinions is the question of ownership and as noted in Spoon River ESA 249 neither ownership or the point where the customer and electric supplier agree the electricity is to be handed off has been accepted by the Commission as the meaning of "point of delivery" when deciding service area agreement disputes. The reasons are obvious.

IV. CITATION'S RELIANCE ON THE COMMISSION'S OLD BEN AND FREEMAN MINE CASES IS NOT APPROPRIATE.

Citation argues at pages 31-37 that the Commission decision in Old Ben 89-0420 and Freeman United decision 01-0675 reject Tri-County's claim in this docket because those decisions allowed the electric supplier, to follow the customer's electrical needs through use of the customer-owned electric distribution system into the electric cooperative's service territory as delineated by a service area agreement. Neither the Old Ben decision nor the Freeman United Mine decisions are applicable to this docket. The Commission decision in SouthEastern Illinois Electric Cooperative, Inc. vs Illinois Commerce Commission Ill Com Comn Docket 89-0420 (April 11, 1990) (Old Ben)[4] allowed the electric supplier CIPS which held the service rights to a

[4] A copy of the Order in Docket No. 89-0420 is reproduced in the Appendix to this Reply Brief.

coal mine to serve subsequent service connection points established in SouthEastern's service territory. Citation's reliance on Old Ben is misplaced because in Old Ben (1) CIPS possessed a pre-July 2, 1965 electric service agreement by which CIPS contracted to furnish all electric power required by Old Ben in the operation of its coal mines; (2) Southeastern and CIPS entered into a June 26, 1973 Commission approved Partial Service Area Agreement designating service territories for each and allowing each to construct lines in the territory of the other provided no service be extended to consumers unless the constructing electric supplier was "otherwise entitled to serve" the consumer situated in the other supplier's territory; (3) CIPS served all of Old Ben's electric service requirements through service connection points all in CIPS' partial service area agreement territory; (4) CIPS claimed it was entitled to serve Old Ben's new service connection point in SouthEastern's territory because of the Partial Service Area Agreement "otherwise entitled to serve" language incorporated, by reason of Section 5(b) of the Electric Supplier Act, CIPS' pre-July 2, 1965 Old Ben electric service agreement service rights. The Commission held the Partial Service Area Agreement's "otherwise entitled to serve" language incorporated CIPS' grandfathered contractual service rights under Section 5(b) of the Electric Supplier Act to furnish all electric power required by Old Ben in the operation of its coal mine. While the Commission decision was expressed in terms of what the parties intended with respect to the Partial Service Area Agreement "otherwise entitled to serve" language, the legal basis for the Commission decision was CIPS' Section 5(b) grandfathered contractual rights as authorized by the Electric Supplier Act.

In this docket, IP does not possess grandfathered contractual service entitlements for any part of the Salem Oil Field because the Service Area Agreement at issue in this docket does not assign service rights on the basis of grandfathered rights or on the basis of premises and does not

incorporate into the Agreement the grandfathering provisions of Section 5 of the Electric Supplier Act. See MJM Electric Cooperative v Illinois Power Company Ill Com Comn Docket No. 93-0150 (May 10, 2000) (MJM) where the Commission said:

> "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 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 right of the parties ... to the exclusion of the Act, except insofar as the agreement incorporates the Act.'" [5] [6]

Likewise, in the Freeman United Mine docket ESA 187, the service area agreement provided that:[7]

> "...Whenever the electrical load of a prospective consumer in any area outside of incorporated areas is such that its anticipated load during the first year of normal operation will require, as determined in accordance with accepted engineering practices, that the load be supplied through a connection to and/or extension of an existing as of July 2, 1965, line having a voltage of 34.5 KV or higher, the supplier shall be determined under the Electric Supplier Act as approved July 2, 1965."

The Commission determined the Service Area Agreement required service rights to be determined under the Electric Supplier Act (ESA) and since neither CIPS or RECC had Section 5 grandfathered rights under the ESA to serve the mine, service rights would be determined under Section 8 of the ESA based upon the proximity of adequate 1965 existing lines to the proposed customer. The Commission determined CIPS had a 34.5 KV line which was required to serve the mine, in closer proximity to the mine than did RECC. Thus, the Commission

[5] A copy of the Order in Docket No. 93-0150 is reproduced in the Appendix to this Reply Brief.
[6] A copy of the Service Area Agreement at issue in Docket No. 93-0150 is reproduced in the Appendix of this Reply Brief.
[7] A copy of the Order in ESA 187 is reproduced in the Appendix to this Reply Brief.

awarded service rights to the mine to CIPS. Later, Freeman extended its mine into RECC's service territory under the Service Area Agreement and when RECC claimed the right to serve the new mine borehole, the Commission found in Docket 01-0675 that service rights had already been determined for the mine in ESA 187 and on summary judgment dismissed RECC's claim on the basis of res judicata. The Freeman United Mine case is not applicable to this docket for the following reasons:

1. The Freeman decision in ESA 187 was determined on the basis of the Electric Supplier Act and Section 8 proximity of adequate 1965 lines to the customer. The decision in Docket 01-0675 was based solely on the decision in ESA 187 and the principal of res judicata.

2. There has been no prior Commission decision assigning service rights to the Salem Oil Field as there was in the Freeman United Mine case.

3. The Service Area Agreement in this docket controls the assignment of service rights in this docket.

4. The Service Area Agreement in this docket does not assign service rights on the basis of premises or grandfathered rights or on the provisions of the Electric Supplier Act except Sections 2 and 6 of the Act which authorize Service Area Agreements.

5. The Service Area Agreement in this docket assigns service rights on the basis of a customer's "point of delivery" in relation to the designated service territory boundary.

6. Tri-County and IP have historically interpreted "point of delivery" as used in this Service Area Agreement as the place where the customer's step down transformer and other connecting apparatus is located to reduce distribution line voltage to a level usable by the customer's facilities adjacent to the point of delivery.

7. IP has previously successfully persuaded this Commission to hold that the same

Service Area Agreement provisions which are at issue in this docket do not assign service rights on the basis of grandfathered rights or premises but on the basis of point of delivery and its location in relation to the territory boundary MJM Ill Com Comn Docket No. 93-0150 (May 10, 2000).

Therefore, Citation's reliance on the Commission decisions in Old Ben and Freeman United Mine is misplaced.

V. WHETHER OR NOT THE SALEM UNIT IS A PREMISE IS NOT A RELEVANT FACTOR FOR ASSIGNING SERVICE RIGHTS UNDER THE TRI-COUNTY/IP SERVICE AREA AGREEMENT.

Citation at pages 35-37 claims the Salem Unit is a premise and that service rights should be assigned on that basis citing the definition of "premise" in the Electric Supplier Act 220 ILCS 30/3.12 and the Commission decision in Freeman United Mine ESA 187 and No. 01-0675. However, as noted throughout this Reply Brief, the Service Area Agreement between Tri-County and IP is the controlling instrument and as the Commission has already determined, the parties agreed not to assign service rights under the agreement on the basis of either premises or grandfathered rights. Therefore, the definition of premises in the Electric Supplier Act is not relevant to the decision herein nor are the Commission decisions in Freeman United Mine ESA 187 which assigned CIPS initial service rights based on Section 8 proximity of adequate 1965 lines and Docket No. 01-0675 which granted CIPS service rights to Freeman's new borehole on the basis of the order in ESA 187 and res judicata. To the extent the Commission's order considered the Freeman mine a premise or unit in Docket No. 01-0675, such would not make that order relevant to this docket because the parties have agreed by their Service Area Agreement in this docket not to assign service rights on the basis of a premises MJM Docket No. 93-0150 (May 10, 2000).

VI. ONE OF THE PURPOSES OF THE ELECTRIC SUPPLIER ACT IS TO PREVENT DUPLICATION OF FACILITIES.

Citation argues at page 37 of its Initial Brief that duplication of facilities is not a basis to require Citation to take electric service from Tri-County for the gas plant and gas compressors in Tri-County's territory. As support for this argument, citation cites Section 2 of the Electric Supplier Act (220 ILCS 30/2), pointing out the statutory provision refers to avoiding duplication of facilities between electric suppliers but not between electric suppliers and customers and noting all the new electric facilities required to bring electric service to the gas plant and the gas compressor sites were constructed by Citation and not IP. Citation then reasons that the Electric supplier Act does not prohibit Citation from duplicating facilities citing Central Illinois Public Service Company v Commerce Comm'n and Spoon River Electric Cooperative 219 Ill App 3 291; 579 NE2d 1200; 162 Ill Dec 386, 391-392 (4th Dist 1991) (Spoon River) which is the Appellate Court decision affirming the Commission decision in Spoon River ESA 249. The court in the Spoon River decision did note the issue of duplication of facilities dealt with the facilities of the two electric suppliers, Spoon River and CIPS, and stated the Service Area Agreement does not explicitly preclude duplication of facilities as between the two electric suppliers. However, the Court went on to note that it assumed when the Service Area Agreement was signed, the parties had full understanding of what present and contemplated service facilities they each had in the service area allocated to them and that each party intended to comply with the Service Area Agreement.

The important element in both the Commission Order in Spoon River ESA 249 and the Appellate Court decision affirming ESA 249 is that the Service Area Agreement assigned service rights on the basis of the terms of the Agreement and the Commission and the court expected the

parties to abide by those terms. All of IP's electrical engineers who testified acknowledged if IP owned the 12,470 volt distribution line used to bring electric service to the "point of delivery" for the gas plant and gas compressor sites, IP would be deemed to be serving the same (Tatlock Cross Exam Tr 1/14/11 p 1206-1217; 1224-1228; 1229-1235; Siudyla Cross Exam Tr 2/4/11 p 1316-1318, 3123-1326; 1328-1329; 1346-1347; 1349-1351; Malmedal Cross Exam Tr 4/28/11 p 1948; 1886-1887; 1892; 1907-1908). Even Masten, IP's Regulatory Specialist agreed if IP built the distribution line to the gas plant, it would create a new "delivery point" between IP and Citation (Masten Cross Exam Tr 4/26/11 p 1509-1510) Obviously, then if IP owned the distribution line, it could not provide the electric service at issue in this docket.

Even though Citation undertook to build and own the necessary facilities in an attempt to circumvent the Service Area Agreement, under the Service Area Agreement it makes no difference whether Citation or IP own the facilities in question. Once the "delivery point" is established in Tri-County's territory and IP provides the electricity through its Texas Substation, IP violates the Agreement. To hold otherwise creates all the problems the Commission warned against in its Spoon River Order ESA 249 at page 5-6 of the Order. Certainly to that extent, the Commission should be reluctant to allow duplication of facilities by a customer in order to circumvent a valid Commission approved Service Area Agreement.

VII. CITATION'S CLAIM THAT CITATION IS NOT A MEMBER OF TRI-COUNTY

Citation argues at page 41 of its Initial Brief that the Citation Membership Agreement with Tri-County is unenforceable by reason of Section 80/1 of the Illinois Frauds Act (Statute of Frauds) 750 ILCS 80/1. Citation's claim is not well taken. In the first place, Section 80/1 would only be applicable if Tri-County were seeking to enforce "the membership agreement" against

Citation. Tri-County has made no claim against Citation in this docket to enforce the membership agreement. Tri-County's only claim in this docket is to enforce the Tri-County/IP Service Area Agreement. Secondly, even if Tri-County were attempting to enforce the membership agreement against Citation, the Commission most likely would not have jurisdiction to hear such a claim since the Commission's jurisdiction is limited to hearing disputes between electric suppliers regarding territorial issues or disputes arising from Commission approved service area agreements.

Lastly, Citation's claim that Citation's membership agreement is unenforceable because it is not signed by Tri-County, fails because the Statute of Frauds only requires that the person against whom the contract is being enforced must have signed the agreement or memorandum of the agreement (740 ILCS 80/1; Nassau Terrace Condo v Silverstein 182 Ill App 3d 221; 537 NE2d 998; 130 Ill Dec 669, 673 (1st Dist 3rd Div 1989). Here Citation claims Scott could not identify the signature on the membership agreement (Tri-County Ex A-4) noting only it was not the signature of anyone from Tri-County. However, Citation omits the next question by Citation's counsel and Scott's answer:

> "Q: Is it your understanding then that that's not a signature of someone at Tri-County?
> A: That is correct. That is a signature by someone at Citation."

(Scott Cross Exam by Citation's counsel Tr 1/12/11 p 563)

Citation also omits the same questions by IP's counsel and Scott's answer:

> "Q: Have you seen Exhibit A-4 before?
> A: Yes.
> Q: And is this the application of membership and agreement for purchase of electric service?
> A: Yes.
>
> * * *
>
> Q: And this was signed by Citation?

A: Yes.
Q: And this was for electric service just to the office complex?
A: Yes."

(Scott Cross Exam by IP's counsel Tr 1/12/11 p 507-508). The testimony by Scott that the signature on the Membership Application and Agreement (Tri-County Ex A-4) is someone from Citation was not contradicted or rebutted. Thus, the evidence in the record is that Citation did sign the Membership Application and Agreement and Citation cannot raise the Statute of Frauds as a defense to a claim by Tri-County on this Agreement.

Citation at the bottom of page 41 of its Initial Brief claims the unsigned membership agreement violates the Statue of Frauds with respect to easements. The evidence in this record is that Citation did sign the Membership Application and Agreement. Thus, how the membership agreement violates the Statute of Frauds is not further explained by Citation. Neither does Citation explain what issue there is in this docket regarding easements. Is Citation hinting that it has not signed an easement and will not sign an easement to allow Tri-County to extend electric service to the gas plant and/or gas compressor sites should the Commission award those service rights to Tri-County? Is Citation claiming the lack of easements is a factor in assigning service rights under the Service Area Agreement? Whatever Citation's motive is, the raising of such issues is of little assistance to Citation because should the Commission determine Tri-County is the appropriate electric supplier for the gas plant and gas compressor sites in Tri-County's territory, the Commission has the authority to enforce its order and to require the customer to allow the appropriate electric supplier to connect its lines to the customer's facilities Central Illinois Public Service Co. v Illinois Com Com'n and Southwestern Electric Cooperative, Inc. 202 Ill App 3d 567; 560 NE2d 363; 148 Ill Dec 61; 66-67 (4th Dist 1990).

VIII. CITATION'S WAVIER AND LATCHES CLAIMS

A. CITATION'S WAIVER AND LACHES CLAIMS ARE AFFIRMATIVE MATTERS THAT CITATION IS PROHIBITED FROM RAISING AT THIS LATE DATE.

Citation's entry into this docket was so late that the ALJ determined it was not timely filed (ALJ August 12, 2010 Order issued on Citation's Petition to Intervene). Consequently, Citation was restricted to presenting testimony limited to its argument that it has a statutory right to choose its electric supplier. Citation filed no pleadings except the Petition to Intervene. In Citation's Petition to Intervene, it raised only two issues, that being Citation's legal right to choose it own electric supplier and Citation was a necessary party.

Citation now raises for the first time in its Initial Brief the issues of waiver and laches. Both are affirmative matters which Citation must raise in its pleadings (735 ILCS 5/2-613(d). The rules of the Commission require an intervenor to include in the petition to intervene any affirmative relief being sought, 83 Ill Adm Code 200.200(a)(4) and answers must contain a concise statement of the nature of the intervenor's defense 83 Ill Adm Code 200.180(b). Citation made no attempt to raise the affirmative defenses of waiver and laches in its petition to intervene. An affirmative defense is one which gives color to the opposing party's claim and then asserts new matters which may defeat the claim. See Worner Agency, Inc v Doyle 121 Ill App 3d 219; 459 NE2d 633; 76 Ill Dec 718, 720 (4th Dist 1984) where the court held that the Defendant's claim there was a failure of consideration for a contract was an affirmative defense because if true, it would defeat plaintiff's contract claim. Matters constituting a defense to a plaintiff's complaint must be plainly set forth in the answer. See Kermeen v City of Peoria 65 Ill App 3d 969; 382 NE2d 1374; 22 Ill Dec 619, 622 (3d Dist 1978) where the City's defense to plaintiff's mandamus action for a building permit was that plaintiff's plans for the site did not meet

drainage and fire protection standards constituted an affirmative defense which the City had not pled and plaintiff did not have notice of. Any affirmative defense not expressly stated in the pleadings which would take the opposite party by surprise must be plainly set forth in the answer even though it may appear to be within the evidence. See International Ass'n of Firefighters v City of East St. Louis 213 Ill App 3d 91; 571 NE2d 1198; 157 Ill Dec 179, 183 (5th Dist 1991) where the City was precluded from arguing that plaintiff's contract claim was required to be arbitrated because it was an affirmative defense the City failed to include in any pleading. In addition, waiver is an affirmative act Western Casualty & Surety Co. v Brochu 105 Ill 2d 486; 475 NE2d 872; 86 Ill Dec 493, 499 (1985) and must be pled as an affirmative defense.

Citation has known of the dispute over the service rights at issue in this docket since March 7, 2005. Jeff Lewis, a principal manager for Citation's Salem Oil Field, has known since at least June 22, 2005 Tri-County would not release its service rights at issue in this case. Yet, Citation filed only one pleading on April 29, 2010, that being its Petition to Intervene, and still did not allege the affirmative claims of wavier or laches by Tri-County. IP has not filed any pleadings alleging wavier or laches on the part of Tri-County regarding the exercise of its rights under the Service Area Agreement. As a result, no evidence exists in the record regarding the issues of waiver and laches. Thus, Citation's attempt to raise and argue waiver and laches comes too late and should be denied.

B. THE DOCKET CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT CITATION'S CLAIM OF WAIVER AND LACHES.

In the alternative and without waiving its objections to Citation's failure to timely raise or properly plead the affirmative defenses of waiver and laches, Tri-County responds substantively herein to Citation's waiver and laches arguments. Tri-County raises only the issue of its service

rights to serve the new "point of delivery" established in Tri-County's service territory for the gas plant and the gas compressor sites located in Tri-County's service territory. The "delivery points" for these facilities were established some time after July 14, 2005. Tri-County filed its complaint December 6, 2005 which was within 6 months of IP's July 14, 2005 notice to Tri-County that IP had changed its position regarding Tri-County's right to serve the gas plant. Tri-County had no knowledge of the creation by Citation of the gas compressor sites until 14 months into the litigation at which time Tri-County promptly filed its amended complaint to include a claim of right to serve the gas compressor sites in Tri-County's territory. Citation can hardly claim Tri-County showed a lack of diligence in pressing its claim. Tri-County's claims as to these new "points of delivery" are timely filed. Tri-County has made no claim for the right to serve any other "delivery points" in the Salem Oil Field and no party filed any prepared testimony on the issues of wavier and laches because neither IP nor Citation raised the issues in any of their pleadings. This resulted in a dearth of evidence even remotely germane to the legal elements of waiver and laches.

Citation claims at the bottom of page 38 that Tri-County had never before requested the right to provide service to the oil wells in the Salem Oil Field citing Scott's Cross Exam by IP's counsel at Transcript 1/13/11 page 543. However, Scott's testimony was in response to a question by IP whether there had ever been any discussions about electric service to any newly drilled oil well. Scott's reply was no because we had a territorial agreement. Likewise, Citation claims Tri-County was aware of numerous oil wells in the Salem Oil Field and had not since 1968 claimed the right to serve any of them citing Dew's cross examination by IP's counsel at Transcript 1/13/11 page 759 and Citation's Garden's cross examination Transcript 4/27/11 pages 1702 to 1703. However, Dew's testimony at page 759 refers only to the fact Tri-County has

numerous distribution lines throughout the Salem Oil Field. Garden's testimony at Transcript pages 1702-1703 states that Tri-County has numerous distribution lines in the Salem Oil Field and there are private residences in the Salem Oil Field. Garden did not even know how many oil wells were in the Salem Oil Filed (Tr 4/27/11 p 1703). Tri-County's Ivers, during cross examination by IP's counsel about Tri-County's position prior to this dispute regarding electric service to new wells in the Salem Oil Field, testified Tri-County was not aware of any new wells (Ivers Cross Exam by IP's counsel Tr 1/12/11 p 666).

None of the testimony referred to by Citation supports its claims that Tri-County has rested on its rights for 35 years. Waiver can only arise if there is an affirmative act by which one intentionally relinquishes a known right. See Western Casualty & Surety Company 105 Ill 22 486; 475 NE2d 872; 86 Ill Dec 493, 499-500 (1985) where the court held an insurer did not waive its right to deny coverage to the insured even though the insurance company initially told the insured the insurance company would undertake the defense but was reserving its rights under two policy exclusions. Citation refers to no evidence in the record that either Citation or IP told Tri-County when new oil wells were established in the Salem Oil Field. Without such knowledge Tri-County could not make a knowing, intentional and conscious decision to forego a claim for service rights under the Service Area Agreement to the new well. Citation's reliance on Illinois Valley Electric Co-Operative, Inc. vs Princeton 229 Ill App 3d 631; 594 NE2d 347; 171 Ill Dec 495 (3d Dist 1992) is misplaced because the court only agreed that waiver or estoppel applied to Illinois Valley's claim because there was evidence of an agreement between Illinois Valley and Princeton that Princeton could provide the electric service to customers in Illinois Valley's service area in return for Princeton allowing Illinois Valley to provide electric service to its headquarters located in Princeton. There is no evidence in the record in this docket

of such an agreement. The only evidence in this record of a contract regarding service rights is the Service Area Agreement between Tri-County and IP upon which Tri-County has based its claim for service rights to the gas plant and gas compressor sites in Tri-County's territory.

On the other hand, Citation knew there was a dispute over service rights to the gas plant at least by June 21, 2005 when Lewis met with Scott. Before that date, Lewis of Citation knew IP could not serve the gas plant. Yet, Citation never did anything even though its employees filed testimony on behalf of IP November 6, 2009 and April 26, 2010. Not until April 29, 2010 did Citation start proceedings to intervene. Citation hardly has clean hands in this matter having failed to timely raise its wavier and laches claims even though Citation has been aware of this dispute since at least June 22, 2005.

Citation claims it will lose its investment. Yet, there is not a cent of evidence regarding the amount of investment by Citation in the Salem Oil Field let alone how much if any Citation would lose should Tri-County be determined to be the proper electric supplier for the gas plant and gas compressor site in Tri-County's territory. Citation has failed to prove Tri-County is guilty of laches. Citation has intervened although in an untimely manner which is the fault of Citation and no one else. For Citation to claim Tri-County should be held accountable for Citation's untimely request to intervene is at best a spurious argument and should be denied.

X. CITATION IS NOT A NECESSARY PARTY.

Citation claims at pages 39-40 of its Initial Brief that it is a necessary party to the territory dispute between Tri-County and IP. In support of its position it cites cases dealing with the issue of necessary parties in litigation taking place in courts of this state with general jurisdiction having general and common law powers. However, the Commission is not a court having general jurisdiction and the Commission does not have common law powers. Instead, the

Commission being a creature of statute has only jurisdiction over matters specifically authorized by a statute.

Citation argued in Part II paragraph F of its Initial Brief at page 21 that the Commission had only those powers authorized by statute and therefore had no authority to terminate Citation's right to choose its electric supplier. Yet Citation ignores its claim that the Commission is a statutorily created body with limited jurisdiction when making its argument that it is a necessary party in the territorial dispute under the Electric Supplier Act. The Commission's jurisdiction in this docket is limited to that authority granted in the Electric Supplier Act, 220 ILCS 30/1 et seq. As such, the Commission has determined that the customer is not a proper party under Sections 5 and 6 of the Electric Supplier Act (220 ILCS 30/5 and 30/6; Illinois Rural Electric Co., vs Central Illinois Public Service Company, Ill Com Comn No. 91-0133 October 11, 1991 pages 1-2 of the order)[8] and the Commission does not have authority over a customer except with regard to enforcement of an order regarding the appropriate electric supplier to the customer, Central Illinois Public Service Co. vs. Illinois Commerce Commission and Southwestern Electric Cooperative, Inc. 202 Ill App 3d 567; 560 NE2d 363; 148 Ill Dec 61, 66-67 (4th Dist 1990)(Southwestern).

Citation can point to no law, rule or case that states Citation must be made a party to a territorial docket before the Commission pursuant to the Electric Supplier Act. In fact, when a customer is made a party against its will, the Commission will dismiss the customer at the customer's request. See Southwestern Electric Cooperative, Inc. vs Central Illinois Public Service Co. and Exxon Company U.S.A. ESA 243 where the customer Exxon was made a party

[8] A copy of the Order entered in No. 91-0133 is reproduced in the Appendix to this Reply Brief.

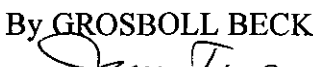
by Southwestern and upon motion by Exxon, the ALJ entered an order dismissing Exxon. [9]

CONCLUSION

Citation's claim to a unilateral right to choose its electric supplier is without foundation either in law or fact. Accordingly, Tri-County requests the Illinois Commerce Commission to determine that Tri-County is the appropriate electric supplier to the gas plant and seven gas compressor sties situated in Tri-County's Service Area Agreement designated territory.

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

By GROSBOLL BECKER TICE, TIPPEY & BARR



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[9] A copy of the Commission's Order in ESA 243 and a copy of the ALJ's Order in ESA 243 dismissing Exxon as the customer is included in the Appendix to this brief for convenience.

PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 13th day of February, 2012, I e-mailed a copy of the attached "Reply Brief by Tri-County Electric Cooperative, Inc. In to the Initial Brief of Citation Gas & Oil Corp" addressed to the following persons at the e-mail addresses set opposite their names:

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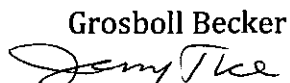

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