

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

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

**REPLY BRIEF TO TRI-COUNTY ELECTRIC COOPERATIVE, INC.’S  
SECOND BRIEF**

NOW COMES Citation Oil & Gas Corp. (“Citation”), by its attorneys, Loewenstein, Hagen & Smith, P.C., and hereby replies to the second brief of Tri-County Electric Cooperative, Inc. (“TCEC” or “Tri-County”), and states as follows:

**I. Citation has a statutory right to choose its electric supplier notwithstanding the terms of the SAA.**

TCEC asserts that the Electric Service Customer Choice and Rate Relief Act of 1997 (“CCL”) (220 ILCS 5/16-101 *et seq.*) is applicable to public utilities like Illinois Power Company (“IP”), but not to TCEC because TCEC is a cooperative. This misses the point. The focus of the analysis on the applicability of the CCL is not on TCEC, it is on IP and Citation. The operator of the Salem Unit was not a customer of TCEC on the effective date of the CCL. However, the operator of the Salem Unit was a customer of on the effective date of the CCL.

The CCL was triggered by a retail customer receiving or was eligible to receive tariffed services from an electric utility immediately prior to the effective date of the Act (220 ILCS 5/16-102). On the effective date of the CCL, Citation was a customer of IP at the Texas

Substation and, therefore, the CCL applies to Citation's right to choose notwithstanding anything in the SAA or the Electric Supplier Act ("ESA") (220 ILCS 30/1 *et seq.*). While the CCL does not apply to cooperatives like TCEC, it does apply to retail customers like Citation and public utilities like IP as of the effective date, which was October 1, 1999, long before the gas plant or gas compressors were built. The impact of the CCL then, gave Citation the right to choose its electric supplier at the Texas Substation irrespective of TCEC's cooperative status. TCEC has no right to serve a customer of IP on the effective date of the SAA or the CCL. Likewise, TCEC cannot impede the delivery of electricity by IP to the Texas Substation through an ESA claim.

TCEC complains that the "service area", as defined in the CCL at 220 ILCS 5/16-102, does not apply to this case because the term "service area" is "governed" by the SAA. Further, TCEC claims that the SAA controls "territorial" disputes citing the Supreme Court case of *Rural Electric Convenience Coop v. Ill. Comm. Comm.*, 75 Ill.2d 142 (1979). TCEC is asserting a *non sequitur* mixed with ambiguity. In *Rural Electric*, the Supreme Court held that a service area agreement controls *vis a vis* other statutory provisions of the ESA, but in the instant case the SAA and the ESA are trumped by the CCL, a more recent act of the legislature embracing the policy of competition for the purchase of electricity. The definition of "service area" in Sec. 16-102 of the CCL means the location of any retail customer that the electric utility was lawfully providing electric services on the effective date of the CCL. Undisputedly, Citation was lawfully receiving electric services from IP at the Texas Substation on October 1, 1999, the effective date of the CCL and TCEC does not challenge the legality of the business relationships between (1) Citation and IP; or (2) Citation at AEM. Although the CCL does not apply to cooperatives, the CCL does apply to the relationship between Citation and IP. TCEC seems to be under the mistaken belief that the law under the Electric Supplier Act of 1965 was inalterably set in

concrete for perpetuity despite the explicit declarations of the legislature in the CCL to the contrary.

TCEC then makes the mindboggling argument that a Commission decision, *MJM Electric Coop. v. Illinois Power* in 2000, holds that the CCL is inapplicable to this case. In effect, TCEC infers that the Commission can issue an order to supersede the legislature. That argument is preposterous on its face and nothing in the *MJM* Commission decision impacts the legislative's provisions in the CCL.

**II. Citation owns the electricity as its private property free of any claim of TCEC to serve.**

TCEC does not dispute the fact that Citation owns the electricity that travels over its private distribution system and that it takes ownership to that electricity at the Texas Substation from Ameren Energy Marketing (“AEM”). As such, TCEC cannot interfere with Citation's private use of electricity in the Salem Unit because the ESA does not apply to a customer's use of the electricity after the customer owns the power.

**III. The Salem Unit is a single premises.**

TCEC argues that the SAA does not mention service rights to “premises” or “units” and that the dispute in the instance case cannot be resolved by whether or not the Salem Unit is a single unit or single premise. This ignores the obvious language in the SAA. The SAA clearly gave each party the right to continue to serve existing customers and all of its existing points of delivery located within the service area of the other party. The term “existing points of delivery” obviously refers to a place. In the instant case, the only existing point of delivery to the Salem Unit has been at the Texas Substation and Citation has taken service from AEM at that point.

**IV. IP is not providing any service or electricity to the gas plant or compressor.**

TCEC makes the ludicrous argument that IP is providing electric service to Citation's gas plant and compressors because disconnecting service *at the Texas Substation* would cause the gas plant and compressors to cease operation. Disconnecting service at the Texas Substation would also stop electricity from flowing to hundreds of oil and gas wells and other facilities throughout the Salem Unit. Disconnecting service *at the Texas Substation* is not the same as providing electric service *to* the gas plant and compressors, but that is the analogy that TCEC makes. IP has absolutely no facilities beyond the Texas Substation and it is not providing any service beyond that point. The electricity that flows from the Texas Substation through Citation's distribution system is electricity that is owned entirely by Citation and notwithstanding TCEC's argument, IP is not providing electricity to Citation that it does not possess over facilities that it neither owns, controls, nor maintains.

**V. Citation has a right to choose its electric supplier under the CCL.**

The CCL grants Citation the statutory right to unilaterally choose its electric supplier by virtue of the provisions of the CCL. TCEC erroneously claims that Citation's right to receive electricity from an ARES under the CCL is conditioned upon IP being the appropriate electric supplier under the ESA. This interpretation is fundamentally false. IP provides only a *delivery* service to the Texas Substation and the CCL allows Citation to purchase from an ARES and Citation now buys electricity from AEM. Furthermore, IP's statutory obligation to continue to provide a delivery service to Citation is not dependent upon anything in the ESA. The CCL specifically provides that a utility like IP must provide delivery service (220 ILCS 5/16-103) and a customer receiving service from a utility on the effective date of the CCL has the right to choose its supplier. Citation was a customer of IP taking service at the Texas Substation on the effective date of the CCL and thus, Citation has the right to choose its electric supplier to furnish

electricity at the Texas Substation for Citation's use in the Salem Unit. While the CCL in Sec. 17-100 allows electric cooperatives to maintain customers as captive customers with no right to choose, TCEC was not providing service to the Salem Unit on the effective date of the CCL so the exclusion that TCEC refers to has no application to the present case. Clearly under the terms of the CCL, Citation has a statutory property interest to purchase electricity from an ARES and IP has a legal obligation to provide delivery service to the Texas Substation.

TCEC repeatedly argues that the present case is a territorial issue, but that contradicts the explicit terms of the SAA which allows IP to continue to serve existing customers at existing points of delivery notwithstanding the territorial boundaries. This is not a territorial case.

**VI. The meaning of “point of delivery” under the SAA is contrary to the claims of TCEC.**

Next, TCEC makes its “point of delivery” argument that the terms in IP's tariffs (and, by inference, the AEM contract with Citation) is not limited in meaning to the place where the electricity is handed off by the utility to define a physical point where liability for the electricity changes. Obviously, the meaning of “point of delivery” is exactly the location where the electricity is handed off to the customer and the evidence in the instant case clearly establishes that point of delivery is the Texas Substation because that is the location where the ownership of the electricity changes, and where the liability for the use of the electricity shifts to Citation. TCEC's expansive and imaginative redefinition of “point of delivery” has no application in this case because it leads to absurd results that the parties could not have intended in Sec. 3 of the SAA.

**VII. Ownership of the electricity is determinative of the location of the point of delivery.**

TCEC argues that ownership of the electricity is not important, rather the issue is where the electric voltage is reduced to a level capable of being used by the customer. TCEC couldn't be any more incorrect. Ownership of the electricity by the customer is dispositive of this case. How Citation uses its own power with its own transformer is beyond the jurisdiction of the Commission and is irrelevant to the case. Nothing in the ESA or the SAA applies once the customer has taken ownership of the electricity. There is an obvious reason for that and that is that by the time the customer owns the electricity, the customer has *received delivery* of the electricity. The receipt of electricity must occur at the point of delivery. Therefore, despite TCEC's twisted and tangled redefinition of "point of delivery", the essential issue of the case has been decided by the point at which the customer owns the electricity which, in this case, occurs at the Texas Substation. To ascribe any other meaning to "point of delivery" leads to absurd and illogical results that is easily illustrated by the convoluted nature of TCEC's arguments in this case.

TCEC's definition of the transformer as the "point of delivery" places great weight on the reduced voltage to a level that is usable by the customer's equipment, but not only does Citation own the distribution network, it also owns the transformers that TCEC relies upon. Privately owned transformers used to step down privately owned electricity cannot be used as a regulatory delivery point under either the ESA or SAA because neither of those acts applies to Citation's use of its own property. Any such ruling would not only be beyond the Commission's jurisdiction, it would deprive Citation of its property without due process of law.

#### **VIII. The Commission cannot interfere with Citation's contract with AEM.**

Citation is currently under contract with AEM to purchase all of its electric supply for the Salem Unit (COG Ex. 2 @ 3, Ex. 2.1). TCEC repeatedly states that Citation was aware of this

case at the time Citation signed a contract with AEM. The significance of this statement is unclear. Citation's awareness of this case at the time it signed a power supply contract with AEM doesn't affect its right to obtain electricity from an ARES. Citation has a right to run its business in the most advantageous way the law allows and Citation can't be expected to wait during the 7 years this case has been pending to enter into electric supply contracts with ARES pursuant to the CCL.

Whether or not Citation knew or not about IP's claim to serve the gas plant at the time Citation signed the power supply contract with AEM is irrelevant. Citation has the statutory right under the CCL to choose its electric supplier and it did so. It, therefore, became contractually bound with AEM and any change of electric supply to the gas plant or compressors will be inconsistent with the supply terms of the AEM contract. On the other hand, TCEC has given no indication that it would ever allow Citation to purchase power from an ARES leading to the conclusion that TCEC fully intends to make Citation a captive customer with non-competitive bundled rates.

**IX. Citation's administrative office is not the Salem Unit customer under the SAA.**

Next, TCEC argues that the Citation office is located "in" the Salem Oil field because the office is staffed by Citation employees and contains the company's records. None of the activities described by TCEC makes the office part of the Salem Unit producing oil and gas. As noted by TCEC, Citation wanted a separate electric provider to supply the Citation office because the Salem Oil Unit was on an interruptible rate that Citation did not want interruptible power to affect the office. Citation's administrative office, built after the effective date of the

SAA, is not part of the oil and gas field operation and does not give TCEC any claim to serve the gas plant and compressors that are part of the Salem Unit.

In support of its claim, TCEC argues that two electric suppliers could *possibly* serve the Salem Oil Unit if the circuits were reconfigured with new switches for safety purposes. Citation has no reason or incentive to install additional equipment for TCEC's convenience at Citation's expense. As Jeff Lewis explained, it is much easier and safer for the supplier of electricity to the gas plant to be the same supplier that provides electricity to the wells (Am. Ex. 4 @ 6). Safety should be a concern of TCEC as well.

**X. Any relief granted to TCEC must be conditional.**

While Citation believes that the Commission has no authority to order Citation to take electricity from TCEC at the gas plant and compressors, the Commission must recognize the realities of implementing such service and Citation's rights under the CCL. Accordingly, Citation outlined certain conditions that, at a minimum, the Commission would have to include for a change of service including: (1) Citation's right to choose an AREA and, thus, TCEC waiving its exemption under Sec. 17-100; (2) reimbursement to Citation of the cost of constructing its own distribution line to the gas plant and compressors; (3) transferring service in a way that does not disrupt service to Citation; and (4) TCEC's payment to Citation of all the costs to Citation to install the necessary switches and equipment for a second supplier to the existing circuits of the Salem Oil Unit.

TCEC objects claiming that none of the conditions are within the jurisdiction of the Commission. This simply underscores the point made by Citation earlier that the ESA and the Commission's jurisdiction does not extend to Citation's private distribution system with a privately owned transformer conducting privately owned electricity.

**XI. The Commission cannot impair the obligation of Citation's contract with AEM.**

TCEC argues that the relief it is seeking would not unconstitutionally impair Citation's ARES contract with AEM. Essentially, TCEC argues that Citation had knowledge of the litigation in this case when it entered into the contract with AEM and that the AEM supply contract did not predate the 1965 ESA. TCEC makes no claim that Citation's contract with AEM for electricity at the Texas Substation is unlawful or in violation of the SAA. In fact, since Citation's intervention, TCEC knew that Citation was buying power from AEM. Nevertheless, TCEC did not seek an injunction or make any demand to prohibit or prevent Citation from purchasing power on a competitive basis. There is an obvious reason that TCEC did not make such a claim - it had no lawful basis to do so, just as it has no lawful basis to claim the right to serve the gas plant and compressors. Instead, TCEC stood by and allowed Citation to exercise its rights under the CCL to purchase power competitively and now TCEC seeks to disrupt those contractual rights through a Commission order, but the Commission cannot impair the obligation of contracts.

Citation, as a matter of law, is not purchasing power from IP. IP only provides a delivery service. AEM is selling the power to Citation for the Salem Unit and the SAA does not apply to AEM. While the Commission may have the authority under the ESA to interpret the meaning of the SAA, it must do so in light of the legislature's passage of the CCL and in doing so, the Commission cannot make any decision that would unconstitutionally impair current contractual obligations.

**XII. The CCL does conflict with the terms of the ESA in both policy and substance.**

At this juncture, TCEC reiterates that the CCL does not apply to cooperatives, but as pointed out previously, Citation's argument involving the CCL pertains to the relationship between Citation and IP, not the relationship of TCEC and the CCL. Although rates charged for electricity are not normally considered under the ESA, the legislature certainly has moved away from that in the CCL by its legislative findings that competitive electricity will benefit all Illinois citizens and that consumers will benefit from lower costs of electricity that result from competition (220 ILCS 5/16-101A(d) and (e)).

Clearly, the legislature's policy is set forth in the CCL but to the extent TCEC has any doubt, TCEC need only to look to 220 ILCS 5/20-101 *et. seq.*, the Retail Electric Competition Act of 2006. In that statute, the legislature *reaffirmed* that thousands of large commercial consumers have experienced the benefit of competitive electricity with attractive prices and terms, but that millions of other Illinois consumers are unable to shop for alternatives to rates demanded by incumbent electric utilities. As a result, the General Assembly reiterated to the Illinois Commerce Commission that the Commission should promote the development of competitive electricity to benefit all Illinois consumers. Nothing in 220 ILCS 5/17-100 excludes cooperatives from the Retail Electric Competition Act of 2006 which declares that competitive rates should benefit all Illinois consumers.

In order for the Commission to even possibly declare any right for TCEC to serve the gas plant and compressors, the Commission would have to find that the CCL and the delivery service obligation of IP does not apply to IP for electricity flowing to the Texas substation and that Citation did not have a right to contract with an ARES. TCEC, recognizing the absurdity of that situation, does not even make the argument that Citation never had the right to choose an ARES

for the electric supply to the Salem Unit. In sum, TCEC's status as a cooperative is irrelevant to the issue raised by the CCL.

Next, TCEC argues that nothing in the CCL governs electric supplier territory and nothing in the ESA governs electric rates. TCEC fails to acknowledge that the CCL unbundled electric services and that bundled services is the only service set forth in the ESA. However, IP only provides delivery service to Citation at the Texas substation. IP is not selling power to Citation and thus the underlying assumption of bundled service in the ESA is obsolete and inapplicable to the circumstances in the present case. TCEC persists in ignoring the substantive difference between the CCL and ESA. TCEC simply has no territorial right under the ESA to provide service to the gas plant and compressors because Citation is not purchasing power from IP; therefore, nothing in the SAA applies to the way Citation purchases its electricity today because AEM is not a party to the SAA.

Citation has clearly laid out that as a retail customer within the meaning of 220 ILCS 5/16-102, Citation had a right to choose its electric supplier for electricity delivered to the Texas substation and it has lawfully done so. The CCL applies to the location of any retail customer where the electric utility was lawfully providing electric services on the effective date of the Act. 220 ILCS 5/16-102. Clearly, IP was lawfully providing electric utility services to Citation at the Texas Substation on October 1, 1999, the effective date of the CCL. Nothing that TCEC can point to in the ESA can overcome that.

TCEC argues that if it is the electric supplier for the gas plant and compressors, that arrangement will not abrogate Citation's right to purchase power from an ARES and that right "will be a matter between Tri-County and Citation and beyond the purview of the Commission." As repeatedly pointed out by TCEC, the CCL does not apply to cooperatives and TCEC fails to

explain how Citation could purchase any power from an ARES if TCEC is the electric supplier without TCEC's consent which it has withheld from Citation.

**XIII. The plain meaning of “point of delivery” is contrary to what TCEC argues.**

TCEC points out that the term “point of delivery” is not defined in the SAA and that nothing in the SAA defines “point of delivery” as the “location of the hand off of electricity to the customer” (TCEC second brief @ 27). While TCEC proceeds to argue that a step down transformer is necessary for Citation's motors to use the electricity, that argument still begs the question of the meaning of point of delivery. Clearly, the plain meaning of “point of delivery” is the location where the electricity is handed off to the customer. Any other definition doesn't make sense and leads to an absurd result.

The meaning of “point of delivery” in the SAA as raised by TCEC rests upon the flawed assumption that IP is breaching the SAA by delivering electricity to Citation's gas plant and compressors even though IP has no physical way to deliver electricity to the gas plant and compressors. IP is not delivering electricity to Citation at the transformers at the gas plant and compressors because IP has no distribution facilities beyond the Texas Substation. Delivery occurs at the Texas Substation where Citation purchases power from AEM. TCEC has the audacity to argue that the meaning of “point of delivery” in Sec. 1 and 3 of the SAA is NOT the location where electricity is handed off to Citation at the Texas Substation. The absurdity of this argument is readily apparent given the fact that IP is only providing delivery service up to the Texas substation and IP is not selling the electricity, and of course, not delivering electricity to the transformers at the gas plant and compressors.

Contrary to TCEC's conclusion, any other interpretation of "point of delivery" in the SAA other than the Texas Substation would contradict the policy of the legislature in the CCL and lead to absurd results.

**XIV. The determination of "point of delivery" in the SAA must be viewed in context with the customer owned equipment.**

While TCEC disagrees that ownership of the customer's facilities is a valid consideration in determining the meaning of "point of delivery", a customer's facilities must be present at the point of delivery in order to receive delivery of the electricity. However, that doesn't fit well in this case within TCEC's strained interpretation of "point of delivery" as the transformer. Although TCEC responds that the SAA assigns territorial rights without consideration of ownership of the customer's facilities to receive the electricity, that is clearly not the case. The SAA in Sec. 3 creates exceptions to territorial boundaries proclaiming the right of each party to continue to serve its existing customers and existing points of delivery within the service area of the other party. The term "existing customer" is defined in Sec. 1 of the SAA as a customer who is *receiving* electricity on the effective date of the SAA. For a customer to receive electricity, it must have the facilities to do so and logically that means at the "point of delivery" where the electricity is transferred from the electric supplier to the customer, not where the voltage is stepped down.

TCEC relies heavily upon the testimony of Robert Dew, but Mr. Dew's testimony is simply not credible given his past bias in testifying in favor of cooperatives and his inability to present documentary evidence that "point of delivery" is understood in the electric supplier industry as a step down transformer. Mr. Dew's opinion also fails to account for the fact that IP

is not selling electricity to Citation at the Texas substation or anywhere else for that matter, but the SAA applies to the sale of electricity.

Finally, TCEC alleges that Citation's ownership of its distribution facilities is insignificant. In support of this argument, TCEC notes that Dr. Malmedal expressed the opinion that if IP installed the distribution line to the gas plant and compressors, the point of delivery would be at the meter at the gas plant and compressor sites. Ownership then of the distribution line to the point of delivery is absolutely critical because the facilities of an electric supplier must be used to get the electricity up to the point of delivery and the customer's facilities must be present at the point of delivery to receive it. Changing the point of delivery from the Texas Substation through hypothetical distribution lines to a new meter at the gas plant and compressors would logically be a new delivery because ownership of the electricity would change at that point.

**XV. The Commission's decisions in *Old Ben* and *Freeman Mine* are dispositive.**

At this point, TCEC argues that the *Old Ben* decision does not apply in the instant case because it was based on grandfather rights and what the parties intended with respect to their service area agreement relating to "otherwise entitled to serve" language. TCEC strives mightily to avoid the issue by discussing everything except the substance of what the Commission decided in *Old Ben*. The Commission held that the parties intended by the plain language of the partial service area agreement that CIPS would be entitled to continue to serve the Old Ben Mine even as it migrated outwards to a new drill hole. The analogy to the present case is compelling because clearly in this case both IP and TCEC recognized that the Salem Unit was a customer of IP's and that as the Salem Unit would evolve in the production of oil and gas, thus the parties intended that the Salem Unit remain a customer of IP's for purposes of the SAA. The transient

load in *Old Ben* is analogous to the transient load evolving the Salem Unit. Grandfather rights have nothing to do with the matter. The same holds true of the Commission's decision in *Freeman United Mine*. The purported differences outlined by TCEC do not address the holding in *Freeman* or *Old Ben*.

**XVI. The Salem Unit is a single premise.**

Clearly, the Salem Unit is a single premise and a single unit and TCEC does not dispute that, but instead argues that the definition of "premises" in the ESA is not relevant to the interpretation of the SAA or the parties intent. The delivery of the electricity to the Salem Unit is to a single premise or single customer and the fact that Citation constructed its own distribution facilities to the gas plant and compressors does not change the point of delivery. Furthermore, the CCL defines "retail customer" as a single entity using electric power or energy at a single premises and on the effective date of the CCL. Citation was clearly a retail customer receiving power from IP at the Texas substation for the entire Salem Unit at a single premises.

**XVII. Duplication of facility is not a factor in this case.**

While acknowledging that the duplication of facilities provision in Sec. 2 of the ESA applies only to electric suppliers and that Citation is not an electric supplier, TCEC rambles on to argue that it makes no difference whether or not Citation or IP constructed facilities from the Texas Substation to the gas plant and compressors. TCEC then bootstraps this concept with the unsupported argument that the delivery point is at the transformer. None of this involves duplication of facilities between electric suppliers as defined under the ESA and TCEC's argument on this point has no basis in the law.

**XVIII. Citation is not a member of TCEC.**

TCEC purportedly claims that even though the membership agreement is not signed and is unenforceable under the Illinois Statue of Frauds (70 ILCS 80/1 *et seq.*) that Tri-County is not seeking to enforce the membership agreement against Citation in this docket. However, if that is correct, TCEC would have no basis upon which to construct facilities to the gas plant and/or compressors without an easement from Citation, which Citation could withhold. TCEC's present policy requires its members to grant easements for its construction, but since Citation is not a member of TCEC, even for purposes of the Citation office, TCEC has no basis to claim that Citation is one of its members or that it could install service to the gas plant and compressors. The membership agreement, TCEC Ex. A-4, requires acceptance by the Cooperative for the membership to be accepted, but TCEC failed to sign the membership agreement (T. 563, 619-20). The membership agreement, therefore, is not binding on either Citation or TCEC and Citation is not a member of TCEC.

**XIX. Waiver and latches.**

TCEC relies on Sec. 2-613 of the Code of Civil Procedure (725 ILCS 5/2-613) to argue that Citation waived its waiver argument by not pleading it earlier. The Code of Civil Procedure does not apply to Commission proceedings, thus, the cases relied on by TCEC have no bearing on the argument. The Commission's rules of practice, 83 Ill.Admin.Code Part 200.10, *et seq.*, govern practice and procedure before the Illinois Commerce Commission in docketed proceedings. Sec. 200.100(b) provides that all pleadings shall contain a "plain and concise" statement of any facts upon which the pleadings are based. Fact pleading, as required by the Code of Civil Procedure, is not required under the Commission's rules.

In the instant case, Citation filed its Petition to Intervene and petitions to intervene require only that the intervenor set forth a plain and concise statement and the nature of the

petitioner's interest. 83 Ill.Admin.Code Sec. 200-200(a)(2). There is no requirement in the Commission's rules that any intervenor file any other pleading other than a petition for leave to intervene and there is certainly no explicit requirement that an intervenor allege affirmative defenses of waiver. In filing its Petition to Intervene, TCEC objected to Citation's participation and obtained a ruling limiting the amount of evidence that Citation could present. Citation was allowed to intervene and required to accept the status of the record as it existed at the time of that intervention. 83 Ill.Admin.Code 200.200(e). Nothing in the Commission's rules of practice require that affirmative defenses be plead like the Code of Civil Procedure requires. Sec. 200.180 of the Commission's rules simply require that answers contain an explicit admission or denial of each allegation in the pleading and a concise statement of the nature of the defense. No affirmative defenses need be plead at all.

Moreover, the waiver and latches argument is no surprise to TCEC. There are hundreds of oil wells throughout the Salem Unit (T. 543). Over the past 40 years, thousand of oil wells have been drilled and each one of them has used a transformer. At no time since the 1968 SAA has TCEC ever claimed the right to provide service based on its newly created transformer theory (T. 543). Electric service from the Texas Substation to the Salem Unit via numerous transformers has existed before the SAA and throughout the existence of the SAA. TCEC has been aware of Citation's private distribution network in the Salem Unit and its existing transformers for decades. Sec. 200.200(e) of the Commission's rules of practice provide that any intervenor shall be allowed to comment in briefs on any matter addressed in the proceeding whether before or after intervention. TCEC's argument, that a transformer in the Salem Unit is a new point of delivery, has long ago been waived and is state by latches and the *Illinois Valley* decision is dispositive of the issue. Despite TCEC's assertions in its "reply" brief to the contrary

(page 44), TCEC has argued in its initial brief that it has the right to serve the entire Salem Unit (TCEC Brief @18, par. 34). The Commission's rules requires that TCEC's Motion to Strike Citation's waiver argument be denied.

Furthermore, nothing in TCEC's Amended Complaint sets forth any claim that: (1) Citation is a new customer under the SAA on the basis that Citation purportedly applied for electric service from TCEC (an allegation which Citation denies); or (2) that IP made certain modifications to the Texas substation within the meaning of Sec. 1(d) of the SAA that would cause the Salem Unit as a whole to be a new customer. Therefore, Citation moves those unplead arguments reflected in the following portions of TCEC's initial brief be stricken: pages 5 - 6, par. 8 - 9; pages 11 - 12, par. 23; pages 15 - 17, pars. 31 - 33; issue 5 on page 27; Article VI, page 42 - 44. Neither of these arguments is in the Amended Complaint or in TCEC's motion to now re-amend its Complaint.

**XX. TCEC is estopped from claiming the right to serve the gas plant or compressors by its failure to name Citation as a necessary party in 2005 when it initially filed its complaint in this docket.**

While TCEC is correct that the Commission is a creature of statute and that its jurisdiction is limited, the Commission's jurisdiction in this case is not confined to the ESA. The CCL includes regulation of electric utilities and Sec. 16-101 (220 ILCS 5/16-101) provides that the Public Utilities Act, except as otherwise modified by the CCL, applies to public utilities, rates and services. Therefore, since TCEC raises the issue of IP's service to Citation, the Commission clearly has jurisdiction in this case beyond the ESA.

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

/s/ Gary L. Smith  
Gary L. Smith

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**PROOF OF SERVICE**

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

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/s/ Gary L. Smith  
\_\_\_\_\_  
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