

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TRI-COUNTY ELECTRIC)
COOPERATIVE, INC.,)
)
Complainant,)
)
vs)
)
ILLINOIS POWER COMPANY, d/b/a)
AMERENIP,)
)
Respondent.)

Case No. 05-0767

ILLINOIS COMMERCE
COMMISSION
2012 MAY 11 P 3:22
CHIEF CLERK'S OFFICE

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

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TRI-COUNTY ELECTRIC COOPERATIVE, INC. (Tri-County) by its attorneys
GROSBOLL BECKER TICE TIPPEY & BARR files herewith its Reply to the Responsive Brief
of Citation Oil & Gas Corp (Citation) as follows:

CITATION'S INTRODUCTION

Citation states in its Introduction that the outcome of this case is governed by Citation's right to choose its electric supplier under the Electric Service Customer Choice and Rate Relief Act of 1997 (220 ILCS 5/16-101 et seq)(Deregulation Act). Citation's point is not well taken since it ignores the fact that the Illinois Commerce Commission's jurisdiction is limited in this docket to applying the Electric Supplier Act. Citation also ignores the provisions of the Deregulation Act that specifically exclude rural electric cooperatives as defined by Section 3.4 of the Electric Supplier Act (220 ILCS 30/3.4) from the jurisdiction of the Deregulation Act unless the electric cooperative chooses to become an Alternative Retail Electric Supplier (ARES)(220 ILCS 5/17-100 and 17-200).

CITATION'S CLAIM THAT TRI-COUNTY'S STATEMENT OF FACTS IS FLAWED

Although the pages of Citation's Responsive Brief are not numbered, Tri-County has taken the liberty to number them consecutively starting with the page containing the head note - I Introduction - as page number 1. Tri-County will review in sequential order Citation's claims that Tri-County's Statement of Facts is flawed. In doing so, Tri-County notes that Citation's statement regarding the facts does not conform with Rules for Briefs in as much as it contains argument intermingled with Citation's Statement of Facts.

1. Page 3, paragraph 1: Citation claims that Tri-County states in paragraph 5, page 4 of Tri-County's Initial Brief that the "electric service connection point" for the compressor sites and gas plant is a new transformer. Citation has not read the full Statement of Facts by Tri-County in paragraph 5, page 4. Tri-County identified the collection of electrical devices that Tri-County's consulting engineer testified comprise the electric service connection point from the standpoint of electrical engineering and it was not limited to just the transformer (Dew Eng Rep page 1-2, 15 Tri-County Ex D-2, Dew Dir Test page 3-5 Tri-County Ex D; Dew Cross Exam Tr 1/13/11 page 888-889). All of the electrical engineers testified in this docket regarding the "delivery point" or "service connection point" with respect to the gas plant and gas compressor site. Citation did not object to that testimony and therefore cannot now complain that such testimony is included in a statement of facts.

2. Citation footnotes 1 & 2: Citation footnotes numbered 1 and 2 at the bottom of page 3 claims Tri-County asserts the transformers at the gas plant and gas compressor sites constitute new "points of delivery" and since Tri-County did not allege such in their Amended Complaint this is a new theory that Tri-County waived. Citation intervened and is required to accept the record of this docket as it existed on the date of intervention 83 Ill Adm Code Section

200.200(e). IP did not file any objections to Tri-County's Amended Complaint and answered the same thereby waiving any defects in the Complaint. Tri-County's Scott testified regarding what constituted a "new point of delivery" under Section 1(c) of the Service Area Agreement

(Agreement) as follows:

- "Q: What has been the general operating practice followed by Tri-County during your tenure as General manager for determine a "new point of delivery" for electric service?
- A: During the time that I have been General Manager of Tri-County, Tri-County has always, pursuant to its engineering practice, considered a "new point of delivery" of electric service to be that point where electric service is taken from a distribution line and the voltage is reduced from the distribution voltage with the use of a transformer to a voltage acceptable for use by the customer's motors and equipment on the customer's premises.
- 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.

(Scott Dir Test Tri-County Ex A page 10 lines 14-22, page 11 lines 1-15).

Scott's testimony was introduced into evidence without objection by either IP or Citation that such testimony did not conform to the pleadings or introduced a new theory. IP's counsel cross examined Tri-County's consulting engineer Dew on his opinion that the electrical devices consisting of the transformer and other connecting devices at the gas plant and gas compressor

sites constituted new “points of delivery” and Dew responded “Yes, they did.” (Dew Cross Exam Tr 1/13/11 page 888 lines 15-22, page 889 lines 1-5). No attempt was made by either IP or Citation to strike that testimony and it stands as factual evidence in this docket. There are other examples of cross examination of Tri-County’s witnesses regarding the issue of the transformers and electrical devices at the gas plant and gas compressor sites constituting “points of delivery” under Section 1(c) of the Agreement without objection by either Citation or IP that such testimony and/or answers to cross examination questions did not conform to Tri-County’s Amended Complaint. Thus, Citation has waived any argument that such testimony does not conform to the pleadings. Just because of this very technical argument by Citation made without any reasonable grounds in fact or law, Tri-County has filed its motion to amend its Amended Complaint to conform the pleadings to the evidence and would refer the ALJ to Tri-County’s motion to amend and Tri-County’s reply to IP and Citation’s objections thereto.

3. Page 3, paragraph 2 – Citation “argues” that Tri-County concedes in paragraph 7 at page 5 of its Initial Brief that Citation takes its electric service from IP at the Texas substation. As Citation has been prone to do in this docket, it only selected a portion of the statement made by Tri-County in paragraph 7, page 5 of its Initial Brief and omits the phrase stating that the electricity Citation receives from the IP Texas substation is taken by Citation’s private 12,470 volt distribution line to each of the delivery points for the gas compressor sites and the gas plant (Dew Dir Test page 2-3, Tri-County Ex D.)

4. Last paragraph of page 4: Citation asserts in the last sentence that “...since IP did not construct a new service line, TCEC’s arguments contained in paragraphs 10 through 15, 23 ... are irrelevant.” Citation is referring to Tri-County’s Statement of Facts at pages 7 through 9 and 11 referencing the testimony by Tatlock and Siudyla that they understood Citation was

requesting a new “point of delivery” at the location of the Citation gas plant. Citation’s claim that such evidence is irrelevant, is argumentative, and not properly included in Citation’s Statement of Facts.

5. Page 5, First paragraph: Citation’s statement of facts that IP’s employees, presumably Tatlock, Siudyla, and Masten, mistakenly interpreted the Agreement when they said Citation was requesting a new “point of delivery” to the gas plant is not supported by the evidence in the record and appears to be argument by Citation (Scott Dir Test Tri-County Ex A page 6 lines 19-22, page 7, page 8 lines 1-10; and IP e-mails March 9, 2005 through June 21, 2005 between Tatlock Siudyla and Masten, Tri-County Ex A-5).

6. Page 5, second paragraph: Citation claims Tri-County mischaracterizes Tatlock’s testimony on cross examination at Transcript page 1207-1217, 1224, 1228 and further claims Tatlock did not testify that the transformer constituted a new “point of delivery” for purposes of the Agreement. Such claims disregard Tatlock’s cross examination as follows:

“Q: You said in your testimony, Mr. Tatlock, that Citation Oil, which I presume was Clyde Finch at that point is who you are referring to?

A: Yes.

Q: On behalf of Citation Oil discussed the possibility of applying for a new point of delivery for electric service to the gas plant?

A: Correct.

Q: Mr. Tatlock, what other facilities do you envision as comprising the new point of delivery that you refer to in your supplemental testimony that we have been going over and over?

A: Facilities-wise you are speaking of equipment, not a building or a foundation. I need a little help of what facilities you are ---

Q: I don’t know. I am asking you what are the facilities that would be included in that new point of delivery that you have referenced in your testimony.

A: Okay. We would agree upon a proper size transformer.

Q: What else besides the proper size transformer would you consider to be the facilities of that new delivery point?

A: It would need to be metered.

(Tatlock Cross Exam Tr 1/14/11 pages 1223 – 1225).

The above verbatim transcript makes clear Citation's assertions regarding Tri-County's Statement of Facts on this point are incorrect.

7. Page 5 footnote No. 3: Citation states that Tri-County's Statement of Facts regarding IP's modifications to the Texas substation is a new theory not alleged in Tri-County's Amended Complaint. For the reasons stated at pages 2-4, paragraph 2, Citation has waived that argument. Further, Tri-County has never claimed that the IP Texas substation is the "point of delivery" for the Citation gas plant and gas compressor sites. That argument arose because IP made the claim in its motion for summary judgment and in its prepared direct testimony that the Section 1 "delivery point" for the Citation gas plant and gas compressor sites was the IP Texas substation. In response to that assertion in IP's testimony, Tri-County responded that if the IP Texas substation was the "delivery point", then IP has modified it to the extent that it has become a "new delivery point". See also Tri-County's response to these claims by both IP and Citation at pages 21-26 in Tri-County's Reply Brief to IP's Initial Brief.

8. Page 5, last paragraph – page 6, first paragraph: Citation claims that Tri-County's argument in opposition to IP's claim that the IP Texas substation is the "point of delivery" for the Citation gas plant and compressor sites is in violation of a stipulation between Tri-County and Citation. The stipulation is attached to Citation's Responsive Brief as Exhibit A. Basically, the stipulation provides that Tri-County will not assert any right or claim to provide electric service to Citation's oil field for any oil wells, injection wells, and compressors, except those included in the Amended Complaint, and any production or injection plants installed more than

10 years prior to June 3, 2010. Tri-County's claim that IP has modified its Texas substation such as to make it a new "point of delivery" under Section 1(d) of the Agreement has been made in answer to IP's claim that the Texas substation is its "delivery point" to the gas plant and gas compressor sites. Tri-County has never made a claim to serve any part of the Salem Oil Field other than those "new delivery points" created by Citation in Tri-County's service territory. Citation's assertions are a misrepresentation of the facts, arguments, and pleadings.

9. Page 6 last paragraph, page 7 first paragraph, page 7 second full paragraph: Citation states that it can use its privately owned distribution line to transfer electricity received at the IP Texas substation to any point it wishes. First, this is not a statement of fact. It is a statement of the principal that Citation and IP wish to have applied to the Service Area Agreement for the purpose of allowing IP to provide electric service to the gas plant and gas compressor sites in Tri-County's territory by use of the customer-owned distribution line. The facts are pretty clear that the electrical engineers agreed if IP used its own 12,470 volt distribution line to bring electric service to the step down transformers located at the gas plant and gas compressor sites, the location of those step down transformers would be a new "point of delivery" located in Tri-County's territory and IP's attempt to do that would be a violation of the Agreement.

10. Page 7, last paragraph – page 8, first paragraph: Citation asserts that in this docket, the quote "premises served" is the Salem unit, not various locations within the Salem Oil Field. Citation makes the mistake of assuming service rights under the Service Area Agreement are assigned on the basis of "premises" and /or "locations". That of course is not the law MJM Electric Cooperative vs Illinois Power Company, Ill Com Comn Docket no. 93-0150 (May 10, 2000)(MJM). See Tri-County's discussion of the MJM case and how it prohibits the assignment

of service rights under the Service Area Agreement by any means other than “delivery points” at pages 11-13 of Tri-County’s Reply Brief to IP’s Initial Brief.

11. Page 8 last paragraph: Citation mistakenly attempts to apply the 1965 NEC to this docket. IP’s Malmedal testified that the NEC does not apply to Citation, IP or Tri-County. The NESC does apply to IP and Tri-County (Malmedal Cross Exam Tr 4/28/11 page 1894-1896). Dew testified that the 1961 NESC does not define “delivery point”, but does define “service” to mean the connection of the medium voltage (12,470 volts) electric distribution line to the customer’s place of usage of the electricity (Dew Rebut Test page 10-12 Tri-County Ex F, F-1, F-2, and F-3; Dew Rebut Test page 13-14).

ARGUMENT

I. THE TRI-COUNTY-IP SERVICE AREA AGREEMENT

Citation claims in Part III page 9 of its Responsive Brief that the Tri-County/IP Service Area Agreement (Agreement) does not control the decision in this docket. Citation cites no authority for that statement which ignores the Supreme Court’s axiom in Rural Electric convenience Cooperative Co. v Illinois Commerce Commission 75 Ill 2d 142; 387 NE2d 670; 25 Ill Dec 794, 796 (1979)(Rural Electric). The Commission has never strayed from the Rural Electric ruling. The only basis provided by Citation for its request that the Commission ignore Rural Electric ruling is the Electric Service Customer Choice and Rate Relief Act of 1997 (200 ILCS 5/16-101 et seq)(Deregulation Act). However, Citation ignores, without explanation, the specific provisions of the Deregulation Act that exclude rural electric cooperatives from the Act’s application. See Part IIA pages 4-6 of Tri-County’s Reply Brief to Citation’s Initial Brief.

A. CITATION REQUESTS THE COMMISSION TO IGNORE THE ACTIONS OF THE CUSTOMER IN THIS DOCKET

Citation claims in Part III pages 9-10 that the place of usage of the electricity is unimportant and that the Commission has never determined that the voltage reduction transformer adjacent to the customer's place of usage is a "service connection point" pursuant to the Electric Supplier Act. In making that claim, Citation misreads the Commission decision in Interstate Power Company vs Jo-Carroll Electric Cooperative, Inc. Ill Com Comn 92-0450 and 93-0030 Consolidated on Remand, pages 9-10 (Oct 8, 1996)(Interstate). It is true the Interstate decision did not involve a service area agreement. Instead, service rights were determined on the basis of proximity under Section 8 of the Electric Supplier Act (220 ILCS 30/8) of each of Jo-Carroll's and Interstate's 1965 existing lines, Section 3.13 (220 ILCS 30/3.13). In order to make the "proximity" determination, the Commission had to determine the customer's "normal service connection point" as defined in Section 30.10 (220 ILCS 30/3.10). In the final analysis, the Commission determined, that based on accepted engineering practices, a customer's "normal service connection point" is the place where the customer locates the step down transformer in accordance with the appropriate design of the customer's electric facilities (Second full paragraph page 10 of Interstate Order). In this docket, both Dew and Malmedal testified you had to use a 12,470 volt distribution line to delivery electricity at a voltage adequate to operate the gas plant and gas compressor sites (Dew Tr 1/14/11 page 111-1112; Malmedal Tr 4/28/11 page 1863-1869). Further, Dew, Malmedal, and Siudyla all testified that the use of step down transformers located adjacent to the gas plant and compressors sites and connecting Citation's 12,470 volt distribution line to the gas plant and each gas compressor site was appropriate design for those facilities and if the facilities were not designed in that manner, the gas plant and gas compressor sites could not use the electricity delivered at the point of usage by the Citation

12,470 volt distribution line (Dew Rebut Test p 15-16, Tri-County Ex F; Dew Redirect Ex Tr 1/13/11 page 987-989; Malmedal Cross Exam Tr 4/28/11 p 1839-1848; Siudyla Cross Exam Tr 2/4/11 p 1316-1318; 1323-1326, 1328-1329, 1346-1347, 1349-1351) IP's Tatlock testified that Citation's 1500 kVA step down transformer would be located within 200 feet of the gas plant (Tatlock Cross Exam Tr 1/14/11 p 1207-1217, 1224-1228). The Commission's Interstate decision defines "normal service connection point" as used in Section 30/3.10 of the Electric Supplier Act, in the same manner as Tri-County has in this docket that is the location of the step down transformers adjacent to the customer's use of the electricity. Both IP and Citation strenuously argue that the statutes in effect when the Tri-County/IP Service Area Agreement was signed are a part of the Agreement. If that is correct, then the Agreement in this docket incorporates the meaning of "normal service connection point" as defined in Section 30.10. Thus, the Commission's Interstate decision is instructive regarding this docket.

B. CITATION'S CLAIM THAT CITATION DOES NOT RECEIVE ELECTRIC SERVICE FROM AN ELECTRIC SUPPLIER

Citation's claim at Part III page 10 of its Responsive Brief that Citation's transformers (presumably at the gas plant and gas compressor sites) are not receiving electricity from an electric supplier belies the testimony in this docket. IP's Tatlock testified that there are switches or disconnects at the connection of the Citation 12,470 volt distribution line to the low side of the IP transformers at the IP Texas Substation and that the purpose of those switches is to stop the flow of energy to the Citation 12,470 volt distribution line (Tatlock Cross Exam Tr 1/14/12 p 1283 lines 2-22 page 1285 line 22, page 1286 lines 1-22, page 1287, page 1288 lines 15-22). Citation does not explain how Citation would obtain electric energy to operate the gas plant and gas compressor sites if the disconnects connecting the Citation 12,470 volt distribution line to the

low side of the IP Texas Substation are opened. IP is an electric supplier providing electricity to IP through the Texas Substation (Dew Cross Exam Tr 1/14/11 page 1116).

C. CITATION IMPROPERLY EQUATES THE TRANSFORMERS AT THE GAS PLANT AND GAS COMPRESSOR SITES TO TRANSFORMERS IN HOUSEHOLD APPLIANCES

At Part III page 10-12, Citation claims the transformers at the gas plant and gas compressor sites are like transformers in door bells and computers. However, the Service Area Agreement is an agreement that assigns service rights between two electric suppliers and the terminology has to be construed in a manner that relates to the functions and duties of electric suppliers pursuant to the Electric Supplier Act. The function and duty of both Tri-County and IP is to design and build distribution systems of medium voltage adequate to provide sufficient electric voltage for the needs of their customers. Thus, the Service Area Agreement and the terms therein apply to the facilities provided by Tri-County and IP. Dew testified that the 12,470 volt distribution line is a very common distribution voltage in America (Dew Redirect Test Tr 1/13/11 page 992). Dew and Malmedal both testified that the use of the 12,470 volt distribution line to distribute electricity from the IP Texas Substation is the appropriate design and is necessary to have adequate electric power at the location of the gas plant and gas compressor sites (Dew Tr 1/14/11 page 1111-1112, Malmedal Cross Exam Tr 4/28/11 page 1863-1869). Dew testified that the 1961 National Electric Safety Code (NESC) definition of 'service' refers to the connection of a medium voltage distribution line which is 12,470 volts to a customer's place of usage of the electricity through use of a step down transformer allowing the voltage to be reduced to a level capable of being used by the customer's equipment (Dew Rebut Test page 13-14, Tri-County Ex F). Malmedal agreed that the NESC but not the NEC applied to IP and Tri-County (Malmedal Cross Exam Tr 4/28/11 page 1894-1896). Tatlock concurred that IP is

required to design its electrical distribution facilities to comply with the NESC (Tatlock Cross Exam Tr 1/14/11 page 1171 lines 7-22, page 1172 lines 1-22, page 1173 lines 1-10). Thus, the Commission must construe the terms “delivery point” and “service connection point” as used in the Service Area Agreement taking into account the electric facilities utilized by Tri-County and IP and not those electric appliances normally found in a residence.

D. THE CITATION OWNED DISTRIBUTION LINE

Citation argues at Part III page 12 of its Responsive Brief that Section 3(a) of the Agreement cannot be construed in a manner that prevents Citation from using its distribution line to bring electricity from IP’s Texas Substation to the gas plant and compressor sites. Citation provides no authority for that proposition. As noted in Tri-County’s Initial Brief, pages 38-42, the Commission and courts have already decided Citation cannot use its private distribution line to bring IP electric service to the gas plant and gas compressor sites located in Tri-County’s service territory.

II. CITATION’S CLAIM THAT “POINT OF DELIVERY” IS NOT AN AMBIGUOUS TERM IN THE SERVICE AREA AGREEMENT.

A. PRIOR TO THIS DOCKET, TRI-COUNTY AND IP CONSISTENTLY APPLIED THE SAME MEANING TO “POINT OF DELIVERY”

Citation in Part II pages 13-14 argues “point of delivery” in the Agreement is not ambiguous because there is only one definition for the term which is the Texas Substation. However, that statement begs the question. The evidence shows that until this docket, both Tri-County and IP interpreted “point of delivery” as used in this Service Area Agreement to identify the location where a step down transformer is located to reduce distribution line voltage to the level a customer’s motors could utilize at that location (Scott Rebut Test Tri-County Ex E, page 6 lines 3-22, page 7 lines 1022, page 8 lines 1022, page 9 lines 102). IP’s Siudyla told IP’s

Masten, Carls and Tatlock that IP's change in its interpretation of "point of delivery" to accommodate Citation is a change from IP's prior position in similar situations (Siudyla July 14, 2005 e-mail, Tri-County Ex E-3 attached to Scott's Rebuttal Test, Tri-County Ex E). This testimony was not disputed by IP or Citation. Until this docket, Tri-County and IP stood in agreement on the meaning of "point of delivery" as used in the Agreement. IP's unilateral insistence that "point of delivery" should now be interpreted to mean where the electricity is handed off to the customer creates a second possible meaning of the phrase "point of delivery" which is otherwise not fully defined by the Agreement.

B. IP AND CITATION HAVE RAISED THE ISSUE OF OWNERSHIP OF THE DISTRIBUTION LINE

Citation in Part IV page 14 of its Responsive Brief claims the electric supplier must own the distribution line to the gas plant for a new service or a new delivery point to occur and the intent of the customer cannot be the basis for defining "point of delivery". Citation cites no authority for those two propositions. Further, the agreement contains no provisions assigning service rights on the basis of ownership of the distribution facilities or the customer's intent. The Commission has declared the customer cannot use a customer owned distribution line to allow the competing electric supplier to circumvent the Commission approved Service Area Agreement 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, 66 (4th Dist 1990) (Southwestern); Central Illinois Public Service Company v Illinois Com Comn and Wayne-White Counties Electric Cooperative Inc. 223 Ill App 3d 718; 585 NE2d 1302; 166 Ill Dec 280, 282 (5th Dist 1992)(Wayne-White) Central Illinois Public Service Company v Spoon River Electric Cooperative, Inc. ESA 249 (October 4, 1989)(page 5-6 of the Commission Order (Spoon River). Citation has clearly decided to use its own distribution line it constructed for the sole

purpose of taking IP electric service for use in Tri-County's territory. This action directly flaunts the Commission and court decisions on this issue.

C. CITATION INCORRECTLY STATES THE EVIDENCE OF TRI-COUNTY'S AND IP'S ACTIONS REGARDING PAST OIL WELLS IN THE SALEM OIL FIELD

Citation claims at Part IV pages 15-16 that Tri-County and IP have since 1968 interpreted the Agreement so as to allow IP to serve new wells (since 1968) opened in Tri-County's territory. That is not the evidence. In the first place, neither IP nor Citation raised such a "waiver" or "laches" theory in their pleadings. Neither did Citation nor IP introduce any evidence regarding this matter (See pages 42-46 of Tri-County's Reply Brief to Citation's Initial Brief). There is little, if any evidence on this point and what there is came from Citation's Cross Examination of Scott as follows:

- "Q: Before this dispute in June of 2005 Tri-County and AmerenIP had never discussed who had a right to supply electricity to the unit operator at the Salem Unit, correct?
A: Prior to ---
Q: June 2005.
A: Not that I can recall, no.
Q: There were never any discussions about who would have the right to serve an oil well that would be newly drilled and put on pump?
A: No, I assume there was no question. We have a territorial agreement.
Q: But no discussion, correct?
A: That's correct."

(Citation Cross Exam of Scott Tr 1/13/11 page 543).

There is no evidence to assert that prior to this docket the parties interpreted the Agreement to mean that a transformer is not a new point of delivery or that Citation has always been the same customer of IP served from the Texas Substation since the Agreement become effective.

III. CITATION'S CLAIM THAT THE SPOON RIVER DECISION DOES NOT APPLY

At Part V page 17 of Citation's Responsive Brief, Citation claims the Commission decision in Spoon River does not apply because Citation has not made a new connection of its distribution system to an electric supplier. This proposition assumes the phrase "point of delivery", as used in the Agreement, for the gas plant and gas compressors is the IP Texas Substation. That assumption begs the question of whether the creation of the service connections at the gas plant and gas compressor sites constitute a "point of delivery" under the Agreement.

The preponderance of the evidence in this docket is:

a) The step down transformer and connecting devices located adjacent to and connecting the gas plant and gas compressor sites to the 12,470 volt distribution line and which reduce the voltage to the appropriate level for use at each site constitutes the appropriate electrical engineering design which is required to utilize the electricity at each site.

b) Tri-County and IP have consistently in the past interpreted the arrangement described in (a) to constitute a new "point of delivery" when applying the Agreement to similar situations.

Citation claims this docket does not involve connecting its distribution system to an electric supplier and it is erroneous to interpret the Agreement in a manner that focuses on the place where the electricity is actually used. Again, Citation provides no authority for that assertion. However, in similar situations where the customer has attempted to circumvent the Service Area Agreement by use of the customer's own distribution line the Commission has focused its decision on the place of usage of the electricity and not the place where the wires were connected Southwestern 148 Ill Dec 61, 66.

Citation argues this docket is not a territorial dispute because Citation or its predecessor Texaco connected its 12,470 volt distribution line to the IP Texas Substation long before the Agreement and nothing has changed at that connection. Citation overlooks the evidence that

Citation expended an estimated \$76,335.00 to rebuild 1161 feet of No. 4 CU three phase line to 2/O ACSR three phase line and to build 4,119 feet of new 2/O ACSR three phase distribution line so that Citation could bring electricity from IP's Texas Substation to serve the gas plant by means of the IP Texas Substation (Dew Direct Test Tri-County Ex D page 13-14, Tr 1/12/11 page 745; Ivers Direct Test Tri-County Ex B page 4 Tr 1/12/11 page 630). Citation took a direct and active role to create the facilities necessary to bring IP electric service to the gas plant and gas compressor sites located in Tri-County's territory. Every engineer that testified in this docket agreed IP was prohibited by the Agreement from constructing or owning the facilities to bring electric service to the gas plant and gas compressor sites. In every case where the customer has tried to circumvent that rule, the Commission has prohibited the customer from doing so unless the Agreement specifically authorized the customer to do so. That is not the case in this docket.

IV. CITATION'S ARGUMENT THAT CITATION'S USE OF ITS OWN DISTRIBUTION LINE IS LAWFUL

At Part VI pages 18-20 of Citation's Responsive Brief, Citation claims it has the right to (a) duplicate facilities; (b) IP has no responsibility for or control over Citation's distribution facilities because Citation owns the facilities, not IP; and (c) the legislature's adoption of the Deregulation Act overrules the Commission's jurisdiction over electric suppliers and Commission approved Service Area Agreements and Commission and court decisions prohibiting customers from choosing their electric supplier of choice. Citation has raised nothing new in this argument than what Citation argued in its Initial brief regarding the sweeping effect of the Deregulation Act. Accordingly, Tri-County refers the ALJ to Tri-County's Initial Brief pages 45-49 and pages 4-10 of Tri-County's Reply Brief to Citation's Initial Brief. Because the Legislature went to great pains to exclude rural electric cooperatives from the Deregulation Act,

the fact Citation has a right to purchase electrical energy from an alternative retail energy supplier does not abrogate the holding that a customer cannot unilaterally choose its electric supplier except in limited circumstances provided for in the Electric Supplier Act or as may be provided for in a Commission approved service area agreement between two electric suppliers. Citation's actions in this case clearly evidence an attempt to violate those principles.

V. CITATION'S PROPOSITION THAT IP HAS NO CONTROL OVER CITATION'S DISTRIBUTION SYSTEM

Citation claims that IP is helpless to do anything to prevent Citation from using Citation's own distribution line to bring IP electric service to the gas plant and gas compressor sites. Citation for the first time admits in the last sentence of the second paragraph page 21 of its Responsive Brief that "If IP constructed its own distribution line to the gas plant or compressors, it would be delivering electricity to that point." IP's engineers admitted that if IP built or owned the distribution line to the gas plant, IP would be deemed to be serving the gas plant which IP was prohibited from doing under the Agreement (Tatlock Cross Exam Tr 1/14/11 page 1206-1210; Siudyla Cross Exam Tr 2/4/11 page 1346-1347, page 1349-1351, page 1375-1377; Malmedal Cross Exam Tr 4/28/11 page 1948, 1886-1887, 1892, 1907-1908).

A. CITATION'S CLAIM THAT IT OWNS THE DISTRIBUTION LINE, MAINTAINS IT, IP HAS NO RESPONSIBILITY FOR IT, AND IP HAS TAKEN NO ACTION TO VIOLATE THE AGREEMENT

The Commission and courts have clearly held that a customer does not have a right to choose its own electric supplier except in limited circumstances that do not apply in this case and a customer cannot use its own distribution system to circumvent the assignment of service rights under a Commission approved service area agreement Southwestern supra, Wayne-White supra, Spoon River supra. To allow that to happen would, as expressed by the Commission in its Spoon River decision ESA 249, (a) frustrate the purposes of the Electric Supplier Act; (b)

destroy the integrity of territorial boundary lines created in service area agreements adopted pursuant to the Act; (c) encourage disputes between electric suppliers resulting from the location of the point of delivery; (d) encourage development of unregulated private electrical distribution facilities; e) discriminate against small residential and commercial customers; (f) allow customers to choose their electric suppliers; and (g) encourage the demise of boundary certainty fostered by service area agreements adopted under the Act. Thus, even though IP does not own Citation's distribution line and did not construct it, the Commission will not allow use of the customer owned distribution line to circumvent the Agreement by IP.

B. CITATION'S CLAIM THAT TRI-COUNTY SHOULD HAVE NEGOTIATED DIFFERENT TERMS TO THE SERVICE AREA AGREEMENT TO PREVENT USE OF CUSTOMER OWNED DISTRIBUTION LINES.

This proposition by Citation ignores the evidence in the record. In Scott's Prepared Rebuttal Testimony, Scott testified that Tri-County and IP had prior to this dispute consistently interpreted "point of delivery", as used in the Agreement, to identify the location where a step down transformer is located to reduce distribution line voltage to a level usable by the customer's motors at that location (Scott Rebut Test Tri-County Ex E page 6 lines 3-22, page 7 lines 1-22, page 8 lines 1-22, page 9 lines 1-2). Scott testified that the phone call by IP's Masten to Scott on July 14, 2005, to tell Scott that IP considered the gas plant electric load to be IP's to serve under Section 3(b) of the Agreement, constituted a complete change in how Tri-County and IP had interpreted "point of delivery" as used in the Agreement in prior situations similar to the Citation gas plant service (Scott Rebut Test Tri-County Ex E page 7 lines 13-22, page 8 lines 1-22, page 9 lines 1-2). This testimony is not limited to just Scott. Siudyla, IP's electrical engineer, told IP's Masten, Carls and Tatlock that IP's switch in its interpretation of "point of delivery" is a change from IP's prior position in similar situations (Siudyla July 14, 2005 e-mail,

Tri-County Ex E-3 attached to Scott's Rebut Test Tri-County Ex E). Neither Citation or IP presented evidence disputing Tri-County's claim that Tri-County's and IP's application of 'point of delivery', as used in Section 1 of the Agreement, to the Citation gas plant between March 2005 and mid July 2005 was any different than the way Section 1 had been applied in prior similar situations. Citation does not explain how Tri-County should be expected to know or anticipate IP's sudden change and to insist on amending the language of the Agreement.

C. TRI-COUNTY AND IP HAVE NOT, SINCE 1968, INTERPRETED THE AGREEMENT TO INCLUDE SUBSTATIONS AS A POINT OF DELIVERY

Neither has Tri-County acquiesced in the right of IP to serve new oil wells brought into production since 1968 in Tri-County's territory by use of the Citation distribution line connected to the Texas Substation. This claim smacks of a waiver or laches argument. However, Waiver and Laches are affirmative matters that must be raised in the pleadings and neither Citation nor IP made any attempt to do so 735 ILCS 5/2-613(d) and 83 Ill Adm Code 200.180(b), Worner Agency, Inc v Doyle 121 Ill App 3d 219; 459 NE2d 633; 76 Ill Dec 718, 720 (4th Dist 1984). Matters constituting a defense to a plaintiff's complaint must be plainly set forth in the answer, Kermeen v City of Peoria 65 Ill App 3d 969; 382 NE2d 1374; 22 Ill Dec 619, 622 (3d Dist 1978). 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, 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). 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.

Hardly any evidence appears in the record regarding laches or waiver most likely because neither Citation nor IP properly pled the issue and allowed discovery regarding the same or filed

prepared testimony on the issue. IP's counsel did cross examine Scott regarding the right to provide service to the oil wells in the Salem Oil Field at Transcript 1/12/11 page 543. However, Scott's reply to the question by IP whether there had ever been any discussions about electric service to any newly drilled oil well was "No. I assume there was no question because we have a territorial agreement." 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).

Waiver can only arise if there is an affirmative act by which one intentionally relinquishes a known right, Western Casualty & Surety Company 105 Ill 22 486; 475 NE2d 872; 86 Ill Dec 493, 499-500 (1985). 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 or that Tri-County had knowledge of the new oil wells at the time they were drilled. 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 a new oil well.

VI. CITATION'S CLAIM THAT NO MODIFICATIONS WERE MADE TO THE IP TEXAS SUBSTATION.

A. TRI-COUNTY HAS NEVER MADE A CLAIM IN THIS DOCKET THAT A SUBSTATION SUCH AS IP'S TEXAS SUBSTATION OR TRI-COUNTY'S SALEM SUBSTATION IS INTENDED TO BE A POINT OF DELIVERY UNDER SECTIONS 1 AND 3 OF THE SERVICE AREA AGREEMENT

Citation argues at Point VIII pages 23-25 of its Responsive Brief that Tri-County claims a right to serve all of the Salem Oil Field because Tri-County claims that IP has made modifications to the Texas Substation. Citation further claims that Tri-County's attempt to assert modifications by IP to the Texas Substation violates the Tri-County and Citation stipulation that

Tri-County would not assert a claim to provide electric service to oil wells, injection wells and compressors, except those for which service rights are claimed in this docket, or to production and injection plants to which electric service was put in place more than 10 years prior to June 3, 2010.

Such an argument by Citation is ludicrous. As a defense to Tri-County's claim in this docket, IP, not Tri-County, raised the argument that the IP Texas Substation was the delivery point by which IP furnished electric service to Citation's electric facilities in the Salem Oil Field. IP then claimed that because the IP Texas Substation was the delivery point for the Citation Salem Oil Field, the transformers and other connecting devices located at the point where the Citation 12,470 volt distribution line connected to the gas plant and the gas compressor sites could not be considered the delivery point for purposes of providing electric service to those facilities (Tatlock Direct Test, IP Ex 1 p 5-7). In response to this argument, Tri-County's Dew testified that if the IP Texas Substation is the delivery point of electric service for the Citation Salem Oil Field, then IP has made numerous modifications to that substation which have increased its capacity to provide electric service to not only the Citation Salem Oil Field, but to the other customers served by IP from the Texas Substation (Dew Direct Test, Tri-County Ex D p 7-13).

Dew noted that substations are the heart of the electric supplier's distribution system with electric power delivered from the generating station at 34.5KV or 69KV to the substation where transformers reduce the voltage to 12.47KV for distribution across 12.47KV distribution lines to transformers at electric facilities of customers where transformers again reduce the distribution line voltage to a voltage usable by the customers' motors. Dew testified that virtually all substations are built to handle three phases of electric current in order to furnish adequate electric

service to all the customers of the electric supplier receiving service from that substation. Dew concluded that if, as IP claims, the Texas Substation is the “delivery point” and if, as IP claims, the Agreement only allows a delivery point to be modified by a change in the phase of electricity at the delivery point, then the Texas Substation could never be modified in terms of the delivery point, but yet capacity could be increased at the Texas Substation to allow IP to serve with impunity additional customers with electric facilities in Tri-County’s service territory in violation of Section 3(a) of the Agreement (Dew Rebuttal Test pages 3-5, Tri-County Ex F; Tr 1/13/11 page 745).

Neither Tatlock nor Malmedal contradicted Dew’s opinion that the modifications made by IP to the Texas Substation allowed IP to increase capacity at the Texas Substation and provide additional electric service to IP’s customers including Citation (Dew Rebuttal Test, Tri-County Ex F pages 5-6; Tr 1/13/11 page 745)(See also MJM Docket No. 93-0150). Dew testified that if, as IP claims, the Texas Substation is the delivery point for the utilization of electricity by Citation in the Salem Oil Field, then Citation could disconnect its distribution line from IP’s Texas Substation and connect it to the Tri-County three phase Salem Substation located nearby and in Tri-County’s designated service territory. In doing so, the Tri-County Salem Substation would become the “delivery point” located in Tri-County’s service territory for the Citation Salem Oil Field resulting in a switch in the electric service by Citation from IP to Tri-County (Dew Rebuttal Test page 9, Tri-County Ex F; Tr 1/13/11 page 745). IP’s outside electrical engineer Keith Malmedal agreed that Citation could disconnect its 12,470 volt distribution line from the IP Texas Substation and reconnect it to the Tri-County Salem Substation taking electricity from Tri-County to power the Citation gas plant, gas compressors and all of the Salem Oil Field or any other additional electrical load that Citation chose to serve with its own 12,470

volt distribution line (Malmedal Cross Exam Tr 4/28/11 pages 1951-1952). Because of the foregoing evidence, it was Dew's engineering opinion that the parties did not intend for substations used by Tri-County and IP to be considered a "delivery point" for purposes of the Tri-County/IP Service Area Agreement (Dew Rebuttal Test pages 5-8, Tri-County Ex F; Tr 1/13/11 page 745). Therefore, Tri-County's position in this docket is that the parties never intended a substation to be a "delivery point".

How Citation twists Tri-County's position in this docket that substations are not intended to be "points of delivery" under the Agreement to constitute a claim of right by Tri-County to serve the whole Salem Oil Field on the basis that substations are a delivery point is bizarre.

B. CITATION'S CLAIM THAT THE TEXAS SUBSTATION IS A POINT OF DELIVERY UNDER SECTIONS 1 AND 3 ALLOWS CITATION TO DISCONNECT AT WILL THE SALEM OIL FIELD ELECTRIC SERVICE OR ANY PART OF IT FROM THE IP TEXAS SUBSTATION.

The reliance by IP and Citation upon the argument that the Texas Substation is the "point of delivery" for the Salem Oil Field creates an anomaly for both Tri-County and IP. For instance, if the Texas Substation or for that matter, Tri-County's Salem Substation is a delivery point under the service area agreement, then they are arguably subject to the modification provisions of Section 1(d) of the Agreement exposing IP and Tri-County to loss of service rights every time the substation is modified. On the other hand, if a substation is a delivery point under the Service Area Agreement, but is not subject to the modification provisions of section 1(d) of the Agreement, then Tri-County and IP can ignore the designated territorial boundaries of the Agreement through the use of customer owned distribution lines depriving the other supplier of service rights it otherwise would rightfully be entitled to under the Agreement. The proposal by IP to include substations within the meaning of "point of delivery" in the Agreement cuts both ways with respect to Tri-County and IP unless the Commission applies the principle that

distribution lines whether customer owned or electric supplier owned, cannot be used to delivery electricity from a substation to the place of use in the competing supplier's territory.

Citation's argument that "point of delivery" as used in Sections 1(d) and 3(b) includes substations is not rational. It allows Citation to choose its electric supplier for the Salem Oil Field at will and switch the "point of delivery" from the IP Texas Substation to Tri-County's Salem Substation by disconnecting the 12,470 volt distribution line from the Texas Substation to the Salem Substation which then becomes the "point of delivery" which is located in Tri-County's service territory. Either scenario causes untold havoc upon the Service Area Agreement at issue in this docket and destroys the integrity of the territorial boundaries.

Certainly Citation has shown the propensity to make such a switch. Lewis of Citation asked Scott of Tri-County in January 1999, shortly after Citation purchased the Salem Oil Field, if Tri-County could serve the entire Salem Oil Field. Jack Edwards, Energy Manager of Citation, followed up in August 1999 inquiring if Tri-County would serve part of the Salem Oil Field. Edwards explained Citation was negotiating electric rates with IP and was having problems. Scott declined stating Tri-County would only serve the part of the oilfield in Tri-County's service territory (Scott Rebut Test Tri-County Ex E pages 2-5). Citation did not deny Scott's testimony about Citation's request to change electric suppliers.

Citation claims in the last paragraph of Part VIII page 25 that Citation is not seeking to change its connection to IP's Texas Substation. Yet, the hard evidence in this docket belies Citation's assertion. It is no wonder. Citation wants the Commission to define the phrase "point of delivery" as used in Sections 1 and 3 to include substations not subject to modification except by change in phases of electricity. Since all substations of the type used by IP and Tri-County are constructed as three phase (Dew Rebut Test page 3-5 Tri-County Ex F; Malmedal Cross

Exam Tr 4/28/11 page 1934-1940) that definition would include both the IP Texas Substation and Tri-County's Salem Substation setting up the destructive results discussed at pages 24-26 of Tri-County's Reply Brief to IP's Initial Brief. Such a definition of "point of delivery" serves only Citation, destroying the integrity of service area agreements and diminishing the ability of the Commission to perform its regulatory jurisdiction of the Electric Supplier Act.

VII. THE CONTRACT COVENANT OF GOOD FAITH AND FAIR DEALING

Despite Citation's comments about the covenant of good faith and fair dealing, it is a principle of contract construction that is applicable to this docket. Both Citation and IP seek a construction of Sections 1 and 3 of the Agreement that will allow both Citation and IP to utilize customer owned distribution lines to eradicate the fairly negotiated service territory boundary lines with impunity. Tri-County seeks a construction of Sections 1 and 3 of the Agreement that utilizes the commonly understood meaning of "point of delivery" as used in the electric supplier industry which retains the integrity of the service territory boundary lines established by the Agreement. It is clear that the interpretation Citation and IP ask the Commission to place on "point of delivery" as used in Sections 1 and 3 of the Agreement, that is the Texas Substation is a "point of delivery" under the terms of the Agreement, wrecks havoc on the Agreement and produces irrational results harmful to both IP and Tri-County. The principle that contracts should be construed to avoid unfair or absurd results is applicable.

VIII. CITATION, THE DEREGULATION ACT, AND CUSTOMER CHOICE

Citation at Part X page 27 of its Responsive Brief argues that because Citation was a customer of IP, an investor owned utility when the Deregulation Act was adopted, Citation became vested in its right to choose its electric supplier regardless of Tri-County's service rights under the Agreement and the Electric Supplier Act. Citation cites no authority for that statement.

Further, it is not even clear that Citation was even a customer of IP on the effective date of the Deregulation Act which was adopted effective December 16, 1997. The record in this docket indicates Citation bought the Salem Oil Field in 1998 (Lewis Cross Exam Tr 4/26/11 page 1601). Thus, according to Lewis, Citation was not a customer of IP on December 16, 1997.

Citation further claims that:

(a) Citation is not a customer of Tri-County. Why or on what basis Citation makes that claim is not provided. No record cite for the statement is provided. The record is clear, Citation has purchased electricity from Tri-County for the Salem Oil Field office since 1998 (Scott Direct Test page 3-4 Tri-County Ex A and Citation's signed membership agreement, Tri-County Ex A-4; Lewis Cross Exam Tr 4/26/11 page 1612, 1647-1648).

(b) Citation's right to choose its electric suppliers is paramount under the Deregulation Act and the Service Area Agreement cannot be interpreted to interfere with that right. Citation provides no authority for that proposition except to say "point of delivery" in the Tri-County/IP Service Area Agreement cannot be interpreted in a way that makes Citation a customer of Tri-County. As noted above, Citation is already a customer of Tri-County and has been since 1998. Further, the legislature very meticulously excluded rural electric cooperatives from the Deregulation Act unless the cooperative acting through its Board of Directors determined it appropriate to participate. See Tri-County's analysis of the relationship of the Deregulation with the Electric Supplier Act and rural electric cooperatives in Tri-County's Initial Brief Part VIII pages 45-49 and Tri-County's Reply Brief Part II pages 4-10 and 18-25 to Citation's Initial Brief.

c) No new "service connection point" has been created with Citation by IP as the electric supplier. This proposition is simply a restatement of Citation's arguments that IP has done

nothing and that Citation has used its own facilities to bring IP electric service to Citation's gas plant and gas compressor sites. Citation then claims that no new "point of delivery" has been created because IP owns none of the distribution facilities used to deliver the electricity. See Tri-County's response to Citation's ownership argument at Part III pages 26-33 of Tri-County's Reply Brief to Citation's Initial Brief and Part IV pages 38-42 of Tri-County's Initial Brief.

IX. CITATION'S WAIVER ARGUMENT

A. CITATION FAILED TO PROPERLY PLEAD ITS WAIVER CLAIM

On February 29, 2010, Citation filed its petition to intervene which was granted by the ALJ on August 12, 2010. The order denied Citation the right to present testimony or raise new evidentiary issues because Citation's petition to intervene was not timely filed. The ALJ's August 12, 2010 ruling was modified by order entered October 5, 2010 allowing Citation to present testimony limited to Citation's legal argument that it has a statutory right to choose its electric supplier. That claim was the only one presented in Citation's Petition to Intervene.

Citation after being allowed to intervene is required to accept the status of the record as it existed at the time of intervention, 83 Ill Adm Code Section 200.200(e). At the time of Citation's intervention, Tri-County's Amended Complaint had been on file since February 7, 2007, IP had filed its Answer, discovery had been conducted, and prepared testimony had been filed. No objections had been raised regarding the pleadings. Therefore, the pleadings are accepted.

Likewise, waiver is an affirmative matter 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 defense of waiver in its petition to intervene. An affirmative defense is one which gives color to the opposing party's claim and then asserts new matter which may defeat the claim, Worner Agency, Inc. v Doyle 121 Ill App 3d 219; 459 NE2d 633; 75 Ill Dec 718, 720 (4th Dist 1984). Matters constituting a defense to a plaintiff's complaint must be plainly set forth in the answer Kermeen v City of Peoria 65 Ill App 3d 969; 382 NE2d 1374; 22 Ill Dec 619, 622 (3d Dist 1978).

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 claim of waiver by Tri-County. Neither has IP filed any pleadings alleging waiver 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 issue of waiver. Thus, Citation's attempt to raise and argue waiver comes too late and should be denied.

Lastly, Citation did not raise this waiver argument until the filing of its Responsive Brief. While Citation presented a waiver, laches and estoppel argument in its Initial Brief, those claims were based on (a) Tri-County having never made a claim of service rights to facilities in the Salem Oil Field prior to this docket and (b) Tri-County's failure to name Citation as a party defendant in this docket. See pages 38-40 of Citation's Initial Brief. Citation raises this new waiver argument based on Tri-County's pleadings and the Tri-County/Citation stipulation for the first time in its Responsive Brief. That violates the Rules on Briefs prohibiting the raising of an argument in reply briefs that is not responsive to arguments in Tri-County's Initial Brief (83 Ill Adm Code Section 200.800(c)), the Order allowing Citation's intervention and the Commission

rules governing pleadings (83 Ill Adm Code Section 200.100 an 200.200).

B. CITATION'S SUBSTANTIVE CLAIM THAT TRI-COUNTY WAIVED THE RIGHT TO PRESENT EVIDENCE THAT IP MODIFIED THE TEXAS SUBSTATION AND THAT CITATION APPLIED FOR SERVICE AT THE GAS PLANT.

Citation argues that Tri-County waived the right to argue that IP modified the IP Texas Substation and that Citation applied for electric service at the gas plant because (a) Tri-County entered into a stipulation with Citation that Tri-County would not assert a claim to provide electric service to Citation's oil wells, injection wells and compressors, except the compressors at issue in this docket, or to production and injection plants to which electricity had been installed more than 10 years prior to June 3, 2010. First, as to the Stipulation, it does not limit the substance of the arguments or the basis for Tri-County's claim of right to serve the gas plant and compressor sites at issue in this docket. Secondly, Citation misconstrues Tri-County's argument that IP modified the IP Texas Substation. Tri-County has never claimed that the IP Texas Substation is a "point of delivery" under Section 1 and 3 of the Agreement. As a defense to Tri-County's claim in this docket, IP, not Tri-County, raised the argument that the IP Texas Substation was the delivery point by which IP furnished electric service to Citation's electric facilities in the Salem Oil Field. See Tri-County's discussion on this point at pages 20-23 of this Reply Brief. Tri-County's Dew rendered his engineering opinion that the parties did not intend for substations used by Tri-County and IP to be considered "delivery points" for purposes of the Tri-County/IP Service Area Agreement (Dew Rebuttal Test pages 5-8, Tri-County Ex F; Tr 1/13/11 page 745). Therefore, Tri-County's position has been that the parties never intended a substation to be a "delivery point", as that term is used in Sections 1 and 3 of the Agreement, for the purpose of assigning service rights.

Citation's wavier argument is not applicable and cannot be used to restrict Tri-County's

right to present evidence and argument to counter IP's and Citation's claims. While both Citation and IP moved to strike portions of Tri-County's evidence, both Citation and IP only moved to strike the same on the basis that Tri-County's evidence consisted of "inappropriate legal conclusions concerning the interpretation of a the party's service are agreement and the legal effect of statements made by AmerenIP employees". The failure of Citation and IP to object to Tri-County's evidence at trial for the reason that it did not conform to or was at variance with Tri-County's amended complaint or that Tri-County by reasons of the Tri-County/Citation stipulation waived any right to argue that the IP Texas Substation has been modified by IP constitutes a waiver of such objection Nikolopoulos v Balourdos 245 Ill App 3d 71; 614 NE2d 412; 185 Ill Dec 278, 281 (1st Dist 1st Div 1990; Schwarzbach v City of Highland Park 82 Ill App 3d 807; 403 NE2d 102; 38 Ill Dec 87, 90 (2nd Dist 1980).

Further, Citation claims the since Tri-County did not plead in its Amended Complaint that Citation applied for electric service at the gas plant and gas compressor sites, Tri-County has waived any right to produce testimony in that regard or to argue Citation applied for electric service. For the reason already stated, Citation's claim of wavier as to these matters is untimely and lacks substance. The status of the pleadings has long since been resolved and IP answered Tri-County's complaint. Further, the ALJ and Commission have the right to render findings on issues formed by the record even if they are not formally raised in the pleadings Schwarzbach v City of Highland Park 82 Ill App 3d 807; 403 NE2d 102; 38 Ill Dec 87, 90 (2nd Dist 1980). Tri-County is entitled to make any argument implied from the pleadings. The circumstances of Citation's requests for electric service at the gas plant are implicit in the claim of right by Tri-County to serve the gas plant and gas compressors. Testimony has been offered and accepted into the record regarding Citation's communications with both Tri-County and IP for electric

service. Neither Citation nor IP objected to Tri-County's evidence regarding that issue. Citation cannot wait until its Responsive Brief to raise the affirmative defense that Tri-County has waived the right to present evidence and argument on the issue. Therefore, Citations' wavier argument should be summarily denied.

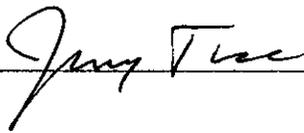
CONCLUSION

For the foregoing reasons, 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 sites located in Tri-County's Service Area Agreement designated territory.

Respectfully submitted,

TRI-COUNTY ELECTRIC COOPERATIVE, INC.

By GROSBOLL, BECKER, TICE, TIPPEY & BARR

By  _____

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PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 11th day of May 2012, I e-mailed a copy of the attached "REPLY OF TRI-COUNTY ELECTRIC COOPERATIVE, INC. TO THE RESPONSIVE BRIEF OF CITATION GAS & OIL CORP" addressed to the following persons at the e-mail addresses set opposite their names:

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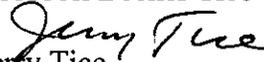
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