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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

REPLY BY TRI-COUNTY ELECTRIC COOPERATIVE, INC. TO THE BRIEF ON EXCEPTIONS BY CITATION OIL & GAS CORP. TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER SERVED MAY 28, 2015

Tri-County Electric Cooperative, Inc. (Tri-County) (Complainant) by its attorneys GROSBOLL, BECKER, TICE & BARR, Jerry Tice of counsel, herewith files its Reply to the Brief on Exceptions filed by Citation Oil & Gas Corp. (Citation) to the Administrative Law Judge's Proposed Order served May 28, 2015 and in support thereof states as follows:

I. CITATION HAVING PLACED AN ISSUE BEFORE THE COMMISSION CANNOT AFTER RECEIVING NOTICE OF A PROPOSED ADVERSE DECISION ON THE ISSUE, ASK THE COMMISSION TO ABSTAIN FROM RENDERING ITS FINAL DECISION ON THAT ISSUE.

Citation, during the trial and argument of this case, took the position that Citation was not subject to the Illinois Electric Supplier Act (ESA) provisions preventing an electric customer from choosing its electric supplier because the Electric Service Customer Choice and Rate Relief Act of 1997 ("Customer Choice Law" or "Deregulation Act") pre-empted or repealed the ESA. Citation took this position notwithstanding the specific provisions of the ESA and the "Customer

Choice Law" exempting electric cooperatives and municipal electric systems from the "Customer Choice Law." The issue was vigorously argued by Citation and Tri-County, both at trial and in their post-hearing briefs. Tri-County noted proper statutory interpretation required a review of both the "Customer Choice Law" and the ESA and such a review clearly indicated that when the Legislature adopted the "Customer Choice Law" in 1996, it did not either repeal or pre-empt the ESA. See Tri-County's arguments at pages 45-49 of its Initial Brief and pages 8–10, 13-15, and 21-25 of Tri-County's Reply Brief to the Initial Brief of Citation.

Now that the case has been marked "heard and taken" and the Administrative Law Judge has proposed an Order adverse to Citation regarding the issue of customer choice, Citation has changed its theory about the customer choice issue and wants the Commission to withdraw its proposed ruling on the same. Citation, having elected to test the water on its central issue in this case and receiving notice of an unfavorable decision regarding that issue cannot "mend its hold" or change its theory on the issue and seek to avoid the adverse decision by asking the Commission to find it is unnecessary to decide the issue. See Rural Electric Convenience Cooperative Co. v Illinois Commerce Commission 118 Ill App 3d 647; 454 NE2d 1200; 73 Ill Dec 951, 955 (4th District 1983) where the court prevented a litigant from changing its theory during the briefing period regarding an issue after the Commission had marked the case "heard and taken." In Larson v Johnson 1 Ill App 2d 36 (1st District 1953), the court discussed the legal theory of "mend its hold." In Larson, plaintiff buyer sought specific performance of a contract to buy defendant seller's real estate. Defendant seller alleged the defense of fraud. The trial court held in the buyer plaintiff's favor as to defendant's fraud defense but denied plaintiff's request for specific performance on other grounds. On appeal, the defendant having lost its fraud defense, raised a new defense to plaintiff's claim for specific performance. The Appellate Court

denied the defendant the right to raise a new defense to Plaintiff's claim for specific performance explaining at page 40:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principal of law."

The court at page 48 explained the application of "mend the hold" saying:

> "...that defendants for their own reasons, having nothing to do with their present defense of uncertainty, repudiated the contract and that at the time they did so, the only reason they could think of was that given in their carefully prepared letter of April 10, 1950, that is, misrepresentation and fraud. By their answer and cross-complaint this was the only issue presented, and all the evidence was directed toward that issue. Sometime during the proceeding, when it must have appeared to them that they could not sustain this charge of fraud, they shifted their ground to the indefiniteness of the lease provision. We are of the opinion that in equity and good conscience the principal restricting defendants to the defense set forth in their repudiation of the contract should be applied."

Citation reasons that since the Commission proposes to render a decision allowing Ameren to serve Citation's gas plant and gas compressor sites through Ameren's Texas Substation as a "point of delivery" under the Service Area Agreement at issue, it is unnecessary to decide Citation's customer choice issue. Thus, Citation requests the Commission to simply withdraw its finding on that issue as if the issue had never been presented for a decision. This argument ignores the fact that Citation intervened in the case for the sole purpose of presenting the issue regarding the pre-emption or repeal of the ESA by the "Customer Choice Law," vigorously argued that issue through the hearing, which was marked "heard and taken" and in the post-hearing briefs and required Tri-County to argue against the same during the hearing and present briefs in opposition during the post-hearing briefing process. Much time and energy has been spent with regard to Citation's claim of customer choice notwithstanding the ESA. Citation should not be allowed to change its position regarding the necessity for the Commission to

decide the issue of customer choice and thus be allowed to "mend its hold" at this stage of the proceedings.

Since the administrative Law Judge has marked the case "heard and taken", the record is closed and the positions of the parties regarding the issues presented by the record are fixed. Citation has not made a request for additional hearings pursuant to 83 Ill Adm Code Section 200.870. Additionally, the Commission is required to present an order containing findings and conclusions and the reasons or basis therefore on all material issues of fact and law presented on the record, 83 Ill Adm Code Section 200.820(a)(1). The Commission cannot pick or choose what issues it will decide nor can it simply determine a decision on certain issues is unnecessary. Citation having presented the "Customer Choice Law" issue to the Commission for decision, that issue must now be decided by the Commission and cannot as suggested by Citation in its Brief on Exceptions simply find that it is unnecessary for the Commission to decide Citation's main argument in this case (See Citation's proposed change to the Commission proposed Order at Section X(D), page 3 of Citation's Brief on Exceptions). Thus, Citation cannot "mend its hold" regarding the need for the Commission to decide the customer choice issue.

The Commission should deny Citation's exceptions regarding the "Customer Choice Law" (Part D, page 83 Proposed Order) and Citation's proposed changes to the proposed Order regarding the same as those changes appear at page 3 through 4 of Citation's Brief on Exceptions.

II. THE COMMISSION PROPERLY DETERMINED THAT THE "CUSTOMER CHOICE LAW" DOES NOT PRE-EMPT OR REPEAL THE ESA AND THAT CITATION CANNOT UNILATERALLY CHOOSE ITS OWN ELECTRIC SUPPLIER.

Citation at pages 4 through 7 of its Brief on Exceptions again restates its argument that the Legislature when it adopted the "Customer Choice Law," repealed the ESA to the extent the ESA provides that customers have no right to choose their electric supplier. At page 5 in footnote 1 of Citation's Brief on Exceptions, it states that the Court in Central Illinois Public Service Company vs Illinois Commerce Commission and Southwestern Electric Cooperative, Inc. 202 Ill App 3d 567; 560 NE 2d 363; 148 Ill Dec 61 (4th Dist 1990) (Southwestern) determined that a customer has no right to choose its electric supplier and that when the Legislature adopted the "Customer Choice Law", it repealed that ruling. Citation cites no authority for that conclusion. Citation simply argues that by adopting the "Customer Choice Law" the Legislature intended to repeal all previous Commission and court decisions under the ESA regarding the right of a customer to choose its electric supplier. Nothing in the "Customer Choice Law" makes that finding and as noted by Tri-County in its Initial Brief at pages 45 through 49 and its Reply Brief to Citation at pages 8-10, 13-15, and 21-25, the Legislature took great pains to clearly and specifically exempt electric cooperatives and municipal electric systems from the provisions of the "Customer Choice Law" allowing customers to choose their electric supplier under the Alternative Retail Electric Supplier (ARES) provisions of the "Customer Choice Law".

Citation further argues at page 6 of its Brief on Exceptions that Citation has a valid statutory property interest to choose its electric supplier because the "Customer Choice Law" grants that right notwithstanding the ESA. This argument was denied by the Commission and

rightly so since as noted by Tri-County in its Reply Brief at pages 21-25 to Citation's Post Hearing Brief, the "Customer Choice Law" or "Deregulation Act" quite clearly excluded electric cooperatives and municipal electric systems from the "Customer Choice Law" and the rights of their customers to choose an electric supplier. Customers of electric cooperatives and municipal systems were not granted the right to utilize an ARES without approval of the governing boards of those entities (220 ILCS 4/17-100, 17-200 and 17-600). Thus, Citation did not acquire a property right by virtue of the "Customer Choice Law" and the Commission properly so found (See page 83 of the Proposed Order).

Additionally Citation, again citing Jahn v Troy Fire Protection District 255 Ill App 3d 933; 627 NE2d 1216; 194 Ill Dec 574 (3d Dist (1994), restates it argument at page 6 of its Brief on Exceptions that because the "Customer Choice Law" was adopted in 1996 after the adoption of the ESA on July 2, 1965, the Legislature repealed the ESA with respect to its provisions regarding a customer's right to choose its own electric supplier. However, in Jahn v Troy, the Tort Immunity Act imposing liability for municipal fire departments based upon willful and wanton conduct and the Fire Fighter Liability Act imposing liability on fire protection districts based on negligent conduct both dealt with the question of tort liability and in so doing created different competing liability standards for two governmental bodies. Therefore the later adopted Tort Immunity Act imposing liability only for willful and wanton conduct repealed the earlier adopted Fire Fighter Liability Act imposing liability for negligent acts.

However, the subject matter of the Electric Supplier Act deals only with electric supplier service territories and the assigning of rights of electric suppliers to serve customers in those territories. Citation points to no provision of the "Customer Choice Law" that regulates territorial issues between electric suppliers and Citation points to no provision of the Electric Supplier Act

that regulates the sale or purchase of electric energy. In fact in the "Customer Choice Law," the Legislature created an exemption excluding electric cooperatives serving customer in their service territories authorized under the Electric Supplier Act from being automatically required to allow their customers to purchase electric energy from an ARES Thus, the two statues which regulate two different subject matters are not in conflict with each other. Each statute establishes regulatory schemes intended to meet separate and distinct governmental needs. There is no conflict between the two statutes and therefore, the "Customer Choice Law' when enacted in 1996 did not repeal the ESA enacted in 1976.

Therefore, Citation's proposed changes at page 7 of Citation's Brief on Exceptions to the Commission's Proposed Order at page 83, part D entitled "Customer Choice Law" should be rejected.

III. CITATION FAILS TO SHOW THAT THERE IS ANY AMBIGUITY IN THE COMMISSION'S PROPOSED ORDER DETERMINING THAT CITATION DOES NOT HAVE STATUTORY AUTHORITY TO CHOOSE ITS ELECTRIC SUPPLIER UNDER THE CUSTOMER CHOICE LAW NOTWITHSTANDING THE TERMS OF THE ELECTRIC SUPPLIER ACT.

The Commission's Proposed Order in the last paragraph on page 83 provides as follows:

> "Having reviewed the arguments, the Commission agrees with Tri-County that Citation does not have a statutory right to choose its electric supplier under the CCL 'notwithstanding the terms of the SAA'."

Citation suggests the Commission revise this finding so it would be effective only if Tri-County were found to be the correct supplier of electric service to Citation's gas plant and gas compressor sites. However, Citation's argument is based upon the premise that the Commission's proposed finding is ambiguous because the Commission finds Ameren, a public utility, is the proper service provider to Citation's gas plant and gas compressor sites.

There is no ambiguity in the Commission's finding when reading all of Section D "Customer Choice Law" at pages 83-84 of the Proposed Order. This docket deals with an electric cooperative which, under the provisions of the "Customer Choice Law," is specifically excluded from the provisions of that Act allowing customers to choose an ARES as an electric supplier. The Legislature painstakingly defined "electric utilities" and "electric cooperatives" and meticulously excluded electric cooperatives from the "Customer Choice Law" 220 ILCS 15/17-100. Nothing in the "Customer Choice Law" diminishes the exclusive right of electric cooperatives to continue to serve customers in their service territory as determined by the Electric Supplier Act, 220 ILCS 5/17-200.

The Commission's Proposed Order in this docket deals with the dispute between Tri-County and Ameren regarding electric service to Citation. Citation as a party argued it could choose its electric supplier regardless of the status of Tri-County as an electric cooperative under the ESA and despite the specific exclusion of electric cooperatives such as Tri-County from the customer choice provisions of the "Customer Choice Law." It must be remembered that Citation is currently a customer of Tri-County because Tri-County provides electric service to the Citation Salem Oil Field office (Scott Direct Test p 3-4, Tri-County Exs A and A-2, Tr 1/12/11 p 498). Those service rights are not at issue in this docket. However, Citation's proposed change, if adopted, would place Tri-County's service rights to Citation's Salem Oil Field office in jeopardy. Thus, if there is any perceived ambiguity in the Commission's proposed finding in Section D, the last paragraph at page 83 may be reworded as follows:

> "Having reviewed the arguments, the Commission agrees with Tri-County that Citation, **who is the current customer of Tri-County an electric cooperative at the Salem Oil Field office,** does not have a statutory right to choose **who** its **appropriate** electric supplier **will be for such electric service** under the CCL 'notwithstanding the terms of the SAA'."

Therefore the finding of the Commission in the last paragraph on page 83, when taken in the context of this docket, is quite clear and there is no need to modify it in the manner suggested by Citation at pages 8-9. In the alternative, if a revision is deemed necessary by the Commission, Tri-County suggests the above change.

IV. THE COMMISSION'S PROPOSED ORDER IN THE FIRST TWO FULL PARAGRAPHS AT PAGE 83 THEREOF FINDING CITATION IS NOT A REQUIRED PARTY AND DOES NOT HAVE STANDING TO ASSERT WAVIER BY TRI-COUNTY IS APPROPRIATE.

The Commission has determined that the customer is not a proper party under Sections 5 and 6 of the Electric Supplier Act (220 ILCS 30/5 and 30/6) Illinois Rural Electric Co., vs Central Illinois Public Service Company, Ill Com Comn No. 91-0133 October 11, 1991 page 1-2 of the order) and the Commission does not have authority over a customer except with regard to enforcement of an order regarding the appropriate electric supplier to the customer, Central Illinois Public Service Co. vs. Illinois Commerce Commission and Southwestern Electric Cooperative, Inc. 202 Ill App 3d 567; 560 NE2d 363; 148 Ill Dec 61, 66-67 (4th Dist 1990)(Southwestern). When a customer is made a party against its will, the Commission will dismiss the customer at the customer's request. See Southwestern Electric Cooperative, Inc. vs Central Illinois Public Service Co. and Exxon Company U.S.A. ESA 243 where the customer Exxon was made a party by Southwestern and upon motion by Exxon, the ALJ entered an order dismissing Exxon. Citation can point to no law, rule or case that states Citation must be made a party to a territorial docket before the Commission pursuant to the Electric Supplier Act.

Citation, without citing any authority, argues at page 9-10 of its Brief on Exceptions that it is unnecessary for the Commission to rule on Citation's argument that Tri-County should have made Citation a party to the proceeding and that Tri-County waived its rights to contest

Ameren's electric service to Citation's gas plant and gas compressors. However, Citation raised these issues which were argued during the hearing, the hearing was marked "heard and taken," and the parties argued the issues in the post-hearing briefs. Because Citation received an adverse ruling on these issues, Citation has now found it advantageous to change its theory on these issues and requests the Commission to refrain from deciding the issues. The Commission cannot do this because Citation cannot "mend its hold" on these issues for the reasons stated in Part 1 at pages 1-4 of this Reply by Tri-County to Citation's Brief on Exceptions.

Therefore, Citation should not be allowed to "mend its hold" as to these issues and Citation's suggested deletion of the first two full paragraphs at page 84 of the proposed order should be denied.

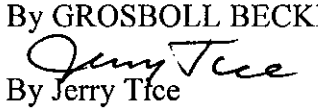
CONCLUSION

For the foregoing reasons, Tri-County requests the Illinois Commerce Commission to deny Citation's request that the Proposed Order be modified pursuant to the prayer for relief in Citation's Brief of Exceptions.

Respectfully submitted,

TRI-COUNTY ELECTRIC COOPERATIVE, INC.

By GROSBOLL BECKER TICE & BARR



By Jerry Tice

Tri County Reply Brief to Citation's Brief on Exceptions Sept 2015/jtelec

PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 4th day of September, 2015, I e-mailed a copy of the attached "Reply by Tri-County Electric Cooperative, Inc. to the Brief on Exceptions by Citation Oil & Gas Corp. to the Administrative Law Judge's Proposed Order Served May 28, 2015" addressed to the following persons at the e-mail addresses set opposite their names:

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