

2. Ameren's Section 3(b) Right to Continue Serving Existing Customer

According to Ameren, nothing in the Commission's *Unimin* decision in Docket 88-0276 "present[s] an identical issue to the one in this case" as claimed by Tri-County. (Am 2B at 15, citing Tri IB at 29) Ameren states that *Unimin* concerned large-line corridor rights and a silica sand/pit mining operation. At the outset of mining in 1963 "all of Unimin's processing and mining operations were conducted within the [IP] Corridor." Unimin operated a "private distribution network [that] transported the electricity to the Unimin mine pits which were, at that time, all located in the Corridor." Unimin later undertook to start two new pits in IVEC territory and, rather than attempt to extend its private network, "...requested that IVEC establish a point of delivery for electric service in IVEC's territory sufficient to serve New Pit No. 1 and New Pit No. 2." (Am 2B at 15)

Ameren states that IP complained and sought a temporary service authorization pursuant to ESA Section 8. The Commission denied IP's request because "[i]t appears...at this point in the proceedings, that [the new pits] are located in the territory...of IVEC." Ameren asserts that no question arose as to whether an "existing customer" grandfather clause protected IP's service rights to the new pits, and Unimin expressly "requested" IVEC service on the record of the proceeding. The case does not concern the extension of a customer-owned distribution network, and thus has little similarity to the record here. Moreover, unlike the interconnected and unitary operation of the statutorily-sanctioned Salem Unit, Unimin operated its various pits as severable and distinct electric loads. (Am 2B at 15-16)

Ameren states that Tri-County cites two appellate court decisions, *Southwestern*, 202 Ill. App. 3d 567 (1990), and *Wayne-White*, 223 Ill. App. 3d 718 (1992). (Tri IB at 39) Ameren asserts that neither decision involved the interpretation of service area agreement provisions similar to the Tri-County /IP SAA clauses at issue here. The *Southwestern* case involved a large oilfield customer, but the facts reflected that the operator purchased adjacent wells and facilities, then disconnected the existing co-op service, and extended its private system into the co-op territory. Ameren asserts, "Here, the Salem Unit boundaries have remained unchanged since its inception and nothing Citation or Ameren has done ousts TCEC of any existing service or revenues nor strands any existing TCEC facilities." (Am 2B at 16)

In the *Wayne-White* case, Ameren states that the parties' SAA treated the oilfield as two separate customers by placing all of it in Wayne-White's area, but acknowledging CIPS' grandfather rights to continue serving the portion of the field "south of Route 14." The Commission and the Court rejected Mobil's attempt to use CIPS as the sole supplier and oust Wayne-White from serving its existing portion of the field north of Route 14. Ameren asserts that the case concerned an agreement with different grandfather language protecting customers at locations which each was serving on July 2, 1965, and protected the ousted supplier's existing facilities and revenues in its defined territory. The co-op did not challenge CIPS' grandfathered right to continue serving the portion of the New Harmony field in Wayne-White's service area south of Route 14. (Am 2B at 16-17)

3. Whether Ameren is Attempting to do Indirectly what it may not do Directly

In Section III.D of its response brief, Ameren takes issue with arguments on page 41 of Tri-County's initial brief. There, Tri-County states that Ameren witnesses testified Ameren cannot utilize its own electric distribution lines to take electric service from the Texas Substation to the Citation gas plant or to the seven gas compressor sites located in Tri-County's service territory. Tri-County argues, "Likewise, IP should not be allowed to do so through the Citation owned distribution system because it subverts the intent of the [SAA] as exemplified by the course of conduct of Tri-County and IP in interpreting the [SAA]." (Tri IB at 41)

Ameren claims Tri-County's arguments about circumventing the SAA "lack any traction" because Tri-County knowingly agreed in 1968 that Ameren could continue to serve its existing customers and existing points of delivery in Tri-County's service area. (*Id.* at 18)

4. Further Response to Tri-County

In Section II.B of its reply brief, Ameren states that Tri-County claims that because Citation is not the same entity as Texaco, the former unit operator of the Salem Unit, Ameren's grandfather rights fail. (Am 3B at 6, citing Tri 2B at 10) Tri-County argues, "Therefore, Section 3(b) cannot be construed to treat Citation as an 'existing customer' since Citation was not IP's customer on March 18, 1968 or July 3, 1968." (Tri 2B at 10)

According to Ameren, Tri-County points to no language in the SAA that supports this interpretation. Ameren asserts that the SAA expressly distinguishes "existing customers" from "existing points of delivery" and treats the two as separate and distinct. Section 1(b) provides that "[e]xisting customers as used herein means a customer who is receiving electric service on the effective date hereof." While the SAA does not define "customer," Section 3.3 of the ESA states that "'customer' means any person receiving electricity for any purpose from an electric supplier." Ameren argues that because statutes furnish implied contract terms, no dispute exists that the Salem Unit oil field constituted Ameren's "existing customer" as of July 3, 1968 under the SAA. (Am 3B at 6, citing *Fox v. Heimann*, 375 Ill. App. 3d 34, 35 (2007))

Ameren states that the SAA defines "existing point of delivery" as "an electric service connection which is in existence and energized on the effective date hereof." According to Ameren, by distinguishing these two events, the SAA's plain language provides dual protection for both "existing customers" and "existing points of delivery" to ensure that the grandfathered service rights include not only persons or entities "receiving electricity" on July 3, 1968, but also the place or spot where a supplier had an "energized" "electric service connection" on July 3, 1968. Ameren states, "Consequently, even though the identity of the customer may change, the customer's supplier retains a continuing right to serve a different customer at the same point of delivery 'energized' on July 3, 1968." (Am 3B at 6-7)

Even assuming both the “existing customer” and “existing point of delivery” must simultaneously exist for Ameren to receive grandfathered rights, Ameren argues that the evidence establishes both conditions concurrently exist. In Ameren’s view, the SAA recognizes only two scenarios in which an “existing customer” can morph into a “new customer”: (1) where a customer “applies for a different electric service classification” or (2) applies for “electric service at a point of delivery which is idle or not energized on [July 3, 1968].” Ameren contends Tri-County has presented no evidence that either scenario occurred in connection with the gas plant or compressors. Ameren asserts that Citation never applied either to Tri-County or Ameren for electric service for the gas plant and compressors, and it did not apply for a different service classification to serve the gas plant or compressors. Thus, Ameren argues, Citation remains Ameren’s “existing customer” under the SAA with the corresponding service right. (Am 3B at 7)

In Section II.B of its final brief, Ameren takes issue with Tri-County’s reliance in its reply brief, as summarized below, on the Commission’s order in *MJM Electric Cooperative vs Illinois Power Company*, Docket No. 93-0150 (May 10, 2000) (“*MJM*”). (Am 3B at 7) Ameren states that Tri-County essentially argues that Ameren is judicially estopped from claiming an “existing point of delivery” may remain after the customer’s identity changes. According to Ameren, the doctrine of judicial estoppel applies only where litigants take one factual position and then seek to take a contrary factual position in a later judicial proceeding. Ameren asserts that five requirements must be shown for judicial estoppel to apply: (1) the party must have taken two positions; (2) that are factually inconsistent; (3) in separate judicial proceedings; (4) with the intent that the trier of fact accept the facts alleged as true; and (5) have succeeded in the first proceeding. (Am 3B at 8, citing *Smellis v. Lipkis*, 2012 IL App (1st) 103385)

According to Ameren, judicial estoppel does not apply here for the reason that Ameren has not taken inconsistent factual positions. Ameren states that in *MJM*, IP began providing electric service to a recently constructed VFW building in March 1993. (Docket 93-0150, Order at 12) The property the VFW purchased had been owned in the past by a drive-in movie theater. The property spanned both MJM and IP’s territorial boundaries. The drive-in theater had received electric service from a point of delivery located on the MJM territorial side from 1949 to 1980, but had not received electric service since that time. After the VFW acquired the property, it constructed a new building located in IP’s territory and applied for electric service with IP at a new delivery point located in IP’s territory. IP constructed a new three-phase line to provide the service. MJM had never provided electric service to the VFW, but claimed the right to serve it due to the fact that it had served the drive-in theater from 1949 through 1980, giving it grandfather rights to the entire “premises.” (Am 3B at 8-9, citing Docket 93-0150, Order at 3-4, 9)

IP argued that service rights under its agreement with MJM were not based on the “premises” but on whether the VFW qualified as a “new customer,” and since the VFW applied in 1993 for electric service at a new point of delivery, it qualified as a “new customer” that IP had the right to serve. Ameren states that the Commission agreed, holding that MJM had no service right to the VFW because “the VFW is an entity which applied for electric service at a point of delivery or electric service connection point which

was not energized on the effective date of the Agreement, and as such is a 'new customer'...." (Am 3B at 9, citing Docket 93-0150, Order at 12)

According to Ameren, in *MJM*, a new customer, the VFW, applied for electric service at a new point of delivery, a building located in IP's territory, a situation that does not exist in this case. The VFW did not operate its own distribution system, and in that proceeding neither utility provided electric service to the property for a 13-year period. (Am 3B at 9) Ameren asserts that here, Ameren has continuously served the unit operator of the Salem Unit for more than six decades at the same delivery point, the Texas Substation. Ameren adds, "The undisputed evidence, moreover, establishes that the Salem Unit constitutes a single customer who during the last 60 years regularly reconfigured and extended its own electric distribution system to drill and electrify pumps and other equipment, a situation that did not exist in *MJM*." (Am 3B at 9) Ameren contends that because the customer, the unit operator, and point of delivery, the Texas Substation, have not changed for 60 years, *MJM* has no application to these facts. (*Id.*)

Ameren also argues that there is not any language in the *MJM* decision that supports Tri-County's reliance on *MJM* for its claim that Section 3(b) of the SAA in the current case, which states that "each party shall have the right to continue to serve all of its existing customers and all of its existing points of delivery which are located within a Service Area of the other party on the effective date [July 3, 1968]," does not provide grandfather rights. (Am 3B at 11)

In Section II.E, Ameren states that Tri-County contends Ameren cannot assert grandfather rights under the SAA based on a claim that the Salem Unit is a single premises because the SAA does not assign service rights based on "locations or premises." (Am 3B at 12, citing Tri 2B at 18)

Ameren responds that it "does not dispute that the SAA does not allow service based on 'locations or premises.'" Ameren states that it has consistently maintained throughout these proceedings that it has service rights to the Salem Unit based on the fact that the SAA allows it to continue to serve its existing customers and existing points of delivery. Ameren claims the undisputed evidence establishes just that: the Salem Unit constitutes a single customer to whom Ameren has delivered electricity at the Texas Substation for more than 60 years. Ameren further argues that the undisputed evidence "establishes that while the unit operator has regularly reconfigured and modified its electrical distribution system, the boundaries of the Salem Unit and the point of delivery, the Texas Substation, have remained unchanged for more than 60 years." (Am 3B at 12)

In Section II.G, Ameren states that Tri-County claims the Texas Substation cannot be the point of delivery because Tri-County seeks only the right to serve the gas plant and seven compressors located in Tri-County's territory, not the entire field. (Am 3B at 16, citing Tri 2B at 25) Ameren responds, "Even though Tri-County purports to limit its right to serve to the gas plant/compressors, the logical extension of its argument would divest Ameren of any right to continue to deliver electricity to the Salem Unit because of the purported 'modifications' done to the substation." (Am 3B at 16)

VIII. CITATION'S POSITION

A. Whether a Transformer is a Point of Delivery within the Meaning of the SAA

Section III of Citation's initial brief is titled, "A transformer is a not a point of delivery within the meaning of the [SAA]." (Cit IB at 21) In 83 Adm. Code 400, Section 410.10 defines the term "point of delivery" as follows, "'Point of delivery' means the point at which the entity providing distribution facilities connects its lines or equipment to the lines or facilities owned or rented by the customer, without regard to the location or ownership of transformers, substations or meters, unless otherwise provided for by written contract or tariffs." (Cit IB at 22)

Tri-County argues that 83 Adm. Code 410 does not apply in this case because Section 410.20 excludes cooperatives from Part 410. According to Citation, while Section 410.20 excludes cooperatives from Part 410 "Standards of Service," that does not mean the definition is inaccurate. In Citation's view, this definition is useful to interpret the SAA. (Cit IB at 22)

Section III.B of Citation's initial brief is titled, "A transformer in a private distribution system is not a new point of delivery by an Electric Supplier under the SAA." (Cit IB at 24) Citation asserts, "If a transformer was a new point of delivery, all of the transformers used to pump the oil wells would be new delivery points but at no time from 1968 to 2005 did Tri-County ever claim any right to supply electricity to the Salem Unit and TCEC has never provided electric service to any oil well in the Unit (T. 543)." (*Id.* at 25)

Tri-County General Manager Marcia Scott regarded Tri-County's discussions with Citation as a "request" for service. (Tri Ex. A at 6) According to Citation, it did not become a "new customer" by inquiring about service options for either Tri-County or IP before it decided to extend its existing distribution system to the gas plant and compressors. Citation states that it did not ever apply for service from Tri-County or Ameren, did not fill out an application form, did not pay a deposit, and did not enter into a contract, and that Tri-County did not begin construction. (Cit IB at 25)

Citation asserts that Mr. Dew agreed Citation is one customer and the Texas Substation delivers voltage over Citation's distribution system at 12.47 kV. (Cit IB at 28, citing Tr. 848, 990-992)

Section III.C of Citation's initial brief is titled, "The *Old Ben* and *Freeman Coal* cases reject TCEC's claims." (Cit IB at 31) These cases were also cited by Ameren as discussed above.

In Docket 89-0420, Old Ben Coal Co. developed an underground mine in 1962 and entered into an electric service contract with CIPS for CIPS to furnish electricity to Old Ben's Mine No. 24. CIPS provided power to the mine for over 27 years as the mine's underground operations developed. Citation states that CIPS had a service area

agreement with Southeastern Co-op similar to the SAA in the instant case. The agreement provided that neither party would provide electric service in the other's territory "except those consumers the constructing party is otherwise entitled to serve." (Cit IB at 31)

When Mine 24 was first constructed, Old Ben installed its own underground distribution lines from the CIPS connection point at the mine. Over several years, the underground operations of Mine 24 expanded outward under the area designated on the map as belonging to Southeastern. Due to the distance, Old Ben was unable to transmit the voltage needed on its distribution lines to meet its load requirements so it bored drill hole No. 7, and requested CIPS to provide electric service at the surface of drill hole No. 7. When CIPS connected electrical service to drill hole No. 7, Southeastern objected, claiming the exclusive right to serve it as part of its service area under the agreement. CIPS responded citing the exception allowing CIPS to serve consumers it was "otherwise entitled to serve." (Cit IB at 31)

The Commission found that Old Ben's Mine 24 consisted of, "a load moving and relocating as mining operations progress[ed]." The Commission stated, "As to Drill Hole No. 7, the Commission is of the opinion that a plain and reasonable reading of paragraph (3) of the PSAA indicates that the parties intended that each was authorized to extend service through the area or areas of the other in order to provide electrical service to the premises of a customer of the contracting supplier existing as of the date of the execution of the PSAA." The Commission added, "Therefore, CIPS has a right to supply all of the electric service requirements Old Ben Mine has for the operation of its Mine No. 24, including Drill Hole No. 7." (Cit IB at 32)

Citation argues, "Citation's situation in the present case is more compelling than *Old Ben* was. Here, there is no claim that IP cannot deliver electricity to Citation at the Texas Substation under the SAA." (Cit IB at 32)

In *Freeman Coal*, Docket 01-0675, Rural Electric Convenience Cooperative Company ("RECC") filed a complaint against CIPS under the ESA. The complaint alleged that Freeman's Crown III mine was in the process of constructing a lime injection/air shaft [borehole or drill hole] located in Montgomery County in RECC's territory referred to as the "Arnold premises." RECC claimed it was entitled to provide electric service to the new borehole to the mine pursuant to the boundary line in the service area agreement with CIPS. (Cit IB at 32-33)

The Commission stated, "In ESA 187 we ordered that CIPS should deliver 34.5 KV electric service to the Crown III Mine of Freeman in Macoupin County. We also determined that Freeman owned 810 acres of surface area in Macoupin County and had acquired approximately 17,500 subterranean acres of coal rights and that the mine process would involve the electrical powering of mining equipment that will continuously move underground." The Commission further stated, "Service to the mine, then, would involve the entire 17,500 acres as a single unit and it was anticipated that the load would

move outward well beyond the 810 acres of surface area owned by Freeman as the mine developed."

The Commission continued, "As a result ESA 187 foresaw that Freeman's electric load for the Crown III Mine would always be taken underneath RECC's surface service area and that Freeman's underground load would continuously move during the mining process...." The Commission added, "Our decision here is also congruent with conclusion reached by this Commission in the *Old Ben* case. ... Recognizing CIPS' original right to serve Old Ben Mine No. 24, we must also in the present case uphold CIPS' right to service the borehole as part of the Crown III Mine." (Cit IB at 34, citing and quoting Docket 01-0675, Order at 44-45)

According to Citation, in the instant case, Ameren is entitled under the SAA to serve Citation at the connection point at the Texas Substation. Citation argues that Citation is the "existing customer" within the definition of that term in the SAA because Citation is receiving electric services in the same manner as Texaco was in 1967 and Citation is receiving electricity at the same point that was energized on the effective date of the SAA. Citation states that production in the Salem Unit has evolved over the last 37 years and the number and location of active wells has constantly changed. Citation asserts that it has extended its distribution lines and drilled new wells to develop oil and gas in the Salem Unit the same way Old Ben and Freeman extended their lines to mine the coal as part of the natural evolution of the mining process. Citation argues, "Just as the service to those coal companies was service to a single customer, the service to Citation at the Texas Substation is the same service to the same customer." (Cit IB at 35, citing Am. Ex. 11 at 2-4, Ex. 11.2)

In Section III.D of its initial brief, Citation asserts that Citation's Salem Unit is a single real estate interest and single premises. According to Citation, The term "unit" in the definition of "Premises" in Section 3.12 of the ESA refers to the type of entity as the Salem Unit. In the *Freeman Coal* decision, the Commission stated, "Reduced to the most basic component, the critical issue in this case involves the question of whether the borehole is a new 'premises' under the Act or whether it is the same premises CIPS was designated to serve in ESA 187." (Cit IB at 36, citing Order, Docket 01-0675 at 44)

Citation states that the Supreme Court has declared that unitization of separate tracts for the purpose of sharing in the production of oil creates a single ownership of the entire unit by the owners of the several tracts making up the unit, subject to the terms of any oil and gas lease. (Cit IB at 36-37, citing *Ragsdale*, 40 Ill. 2d 68, 70-71 (1968)) Citation contends that the Salem Unit is a discernable real property interest recognized by law, *Jilek v. Chicago Wilmington & Franklin Coal Co.*, 382 Ill. 241 (1943), and that Citation's oil and gas rights to the Salem Unit meet the definition of "premises" set out in the ESA. (Cit IB at 36-37)

B. Waiver and Related Arguments; Other Issues

In Section V of its initial brief, Citation argues, "TCEC has waived any claim to serve the gas plant and 7 compressors and TCEC is barred by laches and estoppel." (Cit IB at 38) Regarding "waiver," Citation states that waiver is the intentional relinquishment of a known right. (*Id.*, citing *Crum & Forster v. Resolution Trust Corp.*, 156 Ill. 2d 384, 396 (1993))

Citation states that in *Illinois Valley Electric Cooperative v. Princeton*, 229 Ill. App. 3d 631 (1992) ("*Illinois Valley*") the Illinois Valley Electric Cooperative ("IVEC") had an unwritten policy of allowing the City to provide electric service if the City of Princeton had a primary line closer to the location where the service was to be taken. This policy was in practice from the earlier 1960's until the mid 1970's. According to Citation, IVEC subsequently claimed the right to serve a subdivision and a trailer park even though the City had a primary line closer to those locations, and the court held that IVEC waived any objection to the City's service to those properties by its long-standing conduct, and further that the subdivision and trailer park could be treated as a single unit and that neither were "new customers." (Cit IB at 38, citing *Illinois Valley* at 638-639)

In Citation's view, Tri-County has likewise waived any right it ever might have had to provide service to the gas plant and compressors under its transformer theory of new service because for decades Tri-County has allowed Citation and Texaco to install transformers to conduct electricity to oil well sites throughout the Salem Unit without any claim of the right to serve. (Cit IB at 38) Citation contends, "TCEC was aware of the numerous oil wells in the Salem Unit in its service area and at no time since 1968 has TCEC ever claimed the right to provide direct service to the Salem Oil Unit based on its transformer theory...." (*Id.* at 38-39, citing Tr. 543, 759, 1701-1703)

In Section V.B, Citation addresses laches. Citation states that principles of laches are applied when a party's failure to timely assert a right has caused prejudice to the adverse party, and that the two fundamental elements of laches are lack of due diligence by the party asserting the claim and prejudice to the opposing party. (Cit IB at 39, citing *Tully v. State*, 143 Ill. 2d 425, 432 (1991) ("*Tully*"))

Citation asserts that in the present case, Tri-County exhibited a lack of due diligence, failing, for over 35 years, to assert any claim to serve the Salem Unit's transformers while Citation has continued to expand and invest in its distribution network without any objection from Tri-County. Citation argues, "Because TCEC has failed to timely assert its claims and Citation would be prejudiced by a loss of its investment in its distribution facilities, compressors, and gas plant, TCEC is barred by laches." (Cit IB at 39)

Section V.B of Citation's initial brief is titled, "Necessary Party-Estoppel." Citation claims Tri-County is seeking relief that affects Citation's rights, but did not name Citation as a party to the proceeding. According to Citation, since the time the Complaint in this case was filed, Tri-County "allowed" Citation to extend its distribution lines and to

construct the gas plant and seven compressors all without Tri-County naming Citation as a party to this proceeding, which estops Tri-County from asserting any right or entitlement in this case. (Cit IB at 40)

In Section II.C of its initial brief, Citation states that Jeff Lewis, who is an engineering manager for Citation, testified that for safety reasons, the supplier of electricity to the gas plant should be the same supplier that provides electricity to the wells. (Cit IB at 14, citing Am. Ex. 4 at 6)

In Section VI of its initial brief, Citation argues, "Citation is not bound by the unsigned terms of the membership agreement." (Cit IB at 41)

Citation states that Marcia Scott incorrectly testified that Citation is a "member" of Tri-County for service at the office. (Tri Ex. A at 5). Tri-County Exhibit A-4 is an application for Membership and Agreement for Purchase of Electric Service dated December 10, 1998. Tri-County Exhibit A-4 proclaims that "acceptance" of this application by the cooperative shall constitute a contract for electric service that will remain in force for one year following the initial billing period and thereafter until cancelled by either party upon one month's notice in writing.

740 ILCS 80/1 provides, "No action shall be brought, ... upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Tri-County Exhibit A-4 also states that "acceptance" of the application shall constitute membership in the cooperative, and includes a location for the cooperative's signature but it is not signed. Typically, Tri-County does not sign its own applications (Tr. 563). Citation states that Ms. Scott could not identify the signature on Tri-County Exhibit A-4 but she knew it was not signed by anyone from Tri-County (Tr. 563) and she acknowledged that the exhibit requires acceptance by the cooperative (Tr. 619-620). Citation argues that the "agreement" in Tri-County Exhibit A-4 is for more than one year in length (one year following the initial billing period) and the failure of Tri-County to sign the agreement makes the agreement, and the purported membership, unenforceable as beyond the statute of frauds. (Cit IB at 41, citing 740 ILCS 80/1)

C. Point of Delivery

In Section IV of its "responsive brief" ("Cit 2B"), Citation states that Tri-County argues that the intention of the parties is best illustrated by the interpretation they have placed on the agreement themselves and that subsequent actions of the parties may be considered to determine their intent. (Cit 2B at 15, citing Tri IB at 36) According to Citation, this principle defeats the arguments of Tri-County's Amended Complaint. Citation asserts that the transformers at the gas plant and compressors comprise the same electric configuration that has existed in the Salem Unit at thousands of oil wells

since 1952 (Tr. 757, 766, 1601), and that hundreds of transformers were placed in service at these wells with Tri-County's knowledge (Tr. 543, 759, 1702-1703). Citation claims the meaning that the parties repeatedly placed on the SAA for decades is that a transformer is not a new point of delivery, and that Citation is the same customer of IP at the Texas substation that it has been since the SAA went into effect. Citation argues, "At no point from 1968 to 2005 did Tri-County claim that a transformer was a new point of delivery under the SAA (Tr. 543). These actions, not the discussions in 2005, reflect a long pattern of behavior and the true interpretation of the parties about the meaning of the SAA." (Cit 2B at 15-16)

In Section V of its responsive brief, Citation argues that the *Spoon River* case, 219 Ill.App.3d 291, cited by Tri-County, is inapplicable. (Cit 2B at 17) Citation states that Tri-County argues the Commission has previously refused to define a "point of delivery" as the place where the customer elects to connect its distribution system to the facilities of the electric supplier. Citation contends that *Spoon River* provides no support for Tri-County's position because Citation is not electing to make a "new connection" of its distribution system to an electric supplier. Citation asserts that Citation's distribution system connects at the Texas substation as it has since before the SAA. (Cit 2B at 17)

Citation argues, "Unlike *Spoon River*, the Texas substation and the connection of the Salem Unit to the Texas substation was in existence on the date the SAA went into effect. The instant case does not involve a situation where Citation is connecting its distribution system to an electric supplier." (*Id.*)

IX. TRI-COUNTY RESPONSE TO AMEREN AND CITATION

A. Response to Ameren

1. Section 3(b) Grandfather Rights

In Tri-County's reply brief ("Tri 2B") to Ameren's initial brief, Section I of Tri-County's Argument is titled, "Section 3(b) does not trump Section 1 of the [SAA]." (Tri 2B at 9)

According to Tri-County, while Section 3(b) gives each of Tri-County and IP the right to continue serving "existing customers" and "existing points of delivery" located in the service area of the other party, Section 1(c) states that an "existing customer" becomes a "new customer" if the existing customer applies for electric service at a "point of delivery" that was not energized or did not exist on March 18, 1968. Further, Section 1(d) defines an "existing point of delivery" as an electric service connection in existence and energized on March 18, 1968. Neither the gas plant or the eight gas compressor sites or the electric service connections for each existed on March 18, 1968. (Tri 2B at 9)

Tri-County argues, "Thus, the delivery points created for the gas plant and the eight gas compressor sites are new 'points of delivery' because Section 1(c) commands that an 'existing customer' becomes a 'new customer' if that customer establishes a 'point of

delivery' which was not energized or in existence on March 18, 1968." Consequently, even though Section 3(b) allows Tri-County and Ameren to serve existing customers at points of delivery existing on March 18, 1968, Section 1(c) prevents both Tri-County and Ameren from serving new "points of delivery" created by existing customers in the other party's service territory. To that extent, Section 3(b) cannot properly be construed to trump Section 1. (*Id.* at 9-10)

Tri-County next states that Ameren further argues Section 3(b) grants the right to Ameren to continue to provide electric service to "existing customers" and also to "existing points of delivery" forever. (Tri 2B at 10) It appears to Tri-County that Ameren's argument is that even if an "existing customer" creates a new "point of delivery," Ameren may continue to serve that existing customer's new point of delivery of electric service located in Tri-County's service territory because Ameren has concluded that the SAA treats existing customers separate and distinct from existing points of delivery and/or new points of delivery. Tri-County responds, "However, Citation is not the same entity as Texaco and Citation was not an 'existing customer' of IP on March 18, 1968. Therefore, Section 3(b) cannot be construed to treat Citation as an 'existing customer' since Citation was not IP's customer on March 18, 1968 or July 3, 1968." (Tri 2B at 10)

According to Tri-County, to accept this argument ignores Section 1(c) of the SAA that makes an "existing customer" a "new customer" when that existing customer creates a "point of delivery" that was not energized on the effective date of the SAA. Thus, Tri-County asserts, Ameren's argument that the SAA creates two separate bases for Ameren's continued right to serve Citation's gas plant and seven of the eight gas compressor sites located in Tri-County's territory violates accepted contract construction principals which require the trier of fact to give meaning to all provisions of an agreement and all parts must be construed together to render them consistent with each other. (Tri 2B at 10-11, citing *Roubik v Merrill, Lynch, Piece, Fenner*, 285 Ill. App. 3d 217 (1997); *P.R.S. International v Shred Pax Corp.*, 292 Ill. App. 3d 956, (1997))

In Section I.B of its Argument, Tri-County contends, "IP's argument that Section 3(b) of the [SAA] creates grandfathered rights is inconsistent with IP's previous interpretation of Section 3(b)." (Tri 2B at 11)

Tri-County states that Ameren argues that the phrase "existing point of delivery" means if an "existing customer" goes out of business or vacates the premises, the electric supplier retains the continuing right to re-establish service to a different customer at the place or "spot" where IP had an "existing point of delivery." According to Tri-County, Ameren argued the opposite proposition before the Commission regarding identical Section 3(b) language in the *MJM* case in Docket No. 93-0150. (Tri 2B at 11)

Tri-County states that in *MJM*, the Commission held that a service area agreement very similar to the SAA at issue in this docket does not create grandfathered rights. In that docket, *MJM* contended it had grandfathered rights to serve property or "premises" occupied by a drive-in theater which *MJM* had served prior to the date of the SAA at issue in that docket. When the SAA was created between *MJM* and IP, the territorial boundary

line split the drive-in theater property in half with part of the drive-in theater facilities on MJM's side of the boundary line and part of the facilities on IP's side of the boundary line with MJM serving the whole drive-in theater complex from a transformer and delivery point which pre-dated the IP/MJM agreement and which delivery point was located on MJM's side of the boundary line.

The drive-in theater went out of business and vacated the "premises." Later, a VFW building was constructed on the former drive-in theater property with the actual building and IP's new electric delivery point located on IP's side of the boundary line. MJM contended it was grandfathered by Section 3(b) of the service area agreement, the language of which is the same as in the SAA at issue in this docket, to serve the whole drive-in theater property from MJM's point of delivery that was then in existence and which had been in existence on MJM's side of the boundary line when the territory agreement was signed.

IP argued no grandfathered rights existed under the agreement and the Commission agreed, stating at page 12 of its order, "While a supplier's grandfather rights to serve certain 'premises' are addressed in Section 5 of the Act and in caselaw interpreting Section 5 and the definitions used therein, the parties' Agreement does not assign service rights based on a right to serve 'premises', but instead bases such rights on terms like 'existing point of delivery.'" The Order continued, "As argued by IP, and made clear by the courts, it is the provisions of the Agreement, once approved, and not the provisions of the Act, which are controlling." The Order added, "As explained by the Illinois Supreme Court in *Rural Electric*, 'These two sections (Sections 2 and 6 of the ESA) make clear that once properly approved by the Commission, such ... agreements control the right of the parties ... to the exclusion of the Act, except insofar as the agreement incorporates the Act.'" (Tri 2B at 11-12)

In Tri-County's view, Ameren's argument in this docket that the same Section 3(b) provision of the SAA assigns service rights on the basis of grandfathered rights or "premises" is inconsistent with IP's argument in the *MJM* docket. Tri-County states that Ameren attempts to bar Tri-County's right to serve new service connection points or "delivery points" created in Tri-County's service area by Citation, by claiming the SAA grandfathers Ameren to serve all of Citation's points of delivery. Tri-County argues that Ameren cannot base its claim in this docket on an argument which is inconsistent with its earlier successful argument in the *MJM* docket. (Tri 2B at 12-13, citing *Giannini v. First National Bank of Des Plaines*, 136 Ill. App. 3d 971; 91 Ill. Dec. 438, 449 (1985))

Ameren further argues that the definition of "customer" as used in the ESA means a person receiving electricity from an electric supplier and since the Salem Oil Field was receiving electricity from IP in 1968 and since laws in existence at the time of the contract are considered part of the contract, the Salem Oil Field was IP's existing customer in 1968. Tri-County responds, "However, there is no evidence in the record the Salem Oil Field is a "person" as defined by Section 30/3.11 ... and cannot arguably be a 'customer' as defined in Section 30/3.3...." (Tri 2B at 13) Tri-County further asserts that Ameren's argument fails to recognize the *MJM* decision. Thus, Tri-County argues, Ameren cannot

now claim the right to serve either the Salem Oil Field as a unit or as a single premises or to be grandfathered to a "new delivery point" to serve Citation, which is "particularly true" since Citation is not the same customer as Texaco which IP was serving on March 18, 1968. (Tri 2B at 13)

2. Whether Citation Constructed New Points of Delivery for each of the Gas Plant and Compressor Sites

Section II of Tri-County's Argument is titled, "Citation actually created, constructed and is using new points of delivery for each of the gas plant and the gas compressor sites located in Tri-County's service territory." In Section II.A, Tri-County argues, "IP's claim that Citation never requested electric service for the gas plant and gas compressor sites is a ruse to allow IP to circumvent the [SAA]." (Tri 2B at 13)

Michael Tatlock, Ameren's electric engineer charged with the responsibility of dealing with the service territory issues under the SAA, considered the contacts by Finch of Citation with Ameren as requests for electric service at a new point of delivery to be located adjacent to the gas plant. Marcia Scott, the General Manager of Tri-County, considered the request by Finch and Gardner, both of Citation, with Tri-County's Dennis Ivers and Bradley Grubb as requests for electric service for the gas plant. (Tri 2B at 14, citing Tr. 498, 1224-1228; Tri Ex. A at 6)

According to Tri-County, to argue that Citation never made an application for electric service but simply utilized its own electric distribution line to bring electric service to the new delivery points constructed for the gas plant and the gas compressor sites ignores the issue in this docket. The only questions to be decided are "(1) do each of the step down transformers and associated apparatus at the gas plant and gas compressor sites constitute delivery points and (2) were they created after March 18, 1968." (Tri 2B at 15-16)

In Tri-County's view, "To accept IP's argument that Citation never applied for electric service at the new service connection points for the gas plant and the gas compressor sites would simply allow customers to circumvent the valid Commission approved [SAA] delineating service rights between Tri-County and IP." (Tri 2B at 17)

In Section II.B of its Argument, Tri-County responds to Ameren's claim in its initial brief that Tri-County's interpretation of Section 1(c), that an "existing customer" such as Citation becomes a "new customer" when Citation creates a delivery point that did not exist on March 18, 1968, divests Ameren of its grandfathered service rights under the SAA. Tri-County argues that the SAA at issue in this docket "does not create grandfathered rights for either Tri-County or IP...." (Tri 2B at 17-18, citing *MJM* Order in Docket 93-0150) Tri-County adds, "If grandfathered rights do not exist, they cannot be forfeited." (Tri 2B at 17-18)

In Section II.C of its Argument, Tri-County argues, "The [SAA] does not determine service rights on the basis of 'premises' or units." (Tri 2B at 18) Tri-County states that

Ameren argues in its initial brief at pages 18-21 that the Salem Oil Field is a single unit or a premise and as such should be treated as one customer which can establish its own electric distribution system to power all of the electrical equipment located within the Salem Oil Field unfettered by the territorial boundary lines established by the SAA. In support of this claim, Ameren refers to testimony of Herr, Ameren's witness, that over 245 contiguous oil and gas leases were combined when the Salem Oil Field was unitized. According to Tri-County, this is not an accurate statement of Herr's testimony on this point. Rather, Herr testified that prior to unitization, there were 245 separate leases involved in the Salem Oil Field. (Tri 2B at 18, citing Am Ex. 8 at 4-5)

Ameren also premises this argument on the legal effect of unitization of separate oil leases citing *Ragsdale*, 40 Ill. 2d 68 (1968) and on the definition of "premises" in Section 3.12 of the ESA. Tri-County responds that the word "premise" does not appear in the SAA at issue in this docket and *Ragsdale* held that all the separate oil lease owners had to be parties to the litigation because the field had been unitized. Tri-County states that Ameren made no attempt to add all the separate oil lease owners in the Salem Oil Field as parties to this docket leading to the conclusion the *Ragsdale* decision is not relevant to this docket. Tri-County further contends that Ameren's argument ignores the testimony of its witness Herr that unitization of the Salem Field has no relationship to the electric distribution system for the oil field which can be served by multiple suppliers even though it is unitized. (Tri 2B at 18-19, citing Tr. 1777-1778)

Most importantly, Tri-County argues, service rights delineated in the SAA are not delineated on the basis of premises or units. Rather, electric service rights of Tri-County and Ameren are based upon the location of points of delivery of electric service for a particular customer and where the physical location of that point of delivery is located in relationship to the territorial boundary line established by the SAA and not the unitization of the oil field or the oil field as a single premise. (Tri 2B at 19, citing Docket 93-0150, Order at 11-13) Tri-County argues, "To accept IP's argument that the Salem Oil Field is a single premise to which IP was providing electric service for the whole of the Salem Oil Field on the date of the [SAA] and thus, should be entitled to continue to provide electric service to the whole of the oil field thereafter despite the establishment of new delivery points within the oil field or a change in the customer is contrary to the intent of the [SAA] at issue in this docket." (Tri 2B at 19)

Tri-County argues that the Commission, "when interpreting the [SAA] at issue in this docket, has never accepted the argument presented by Ameren that the Salem Oil Field as a single premise controls the outcome of this case. Tri-County states that in the *Unimin* decision in Docket 88-0276, the Commission refused to let IP serve the new delivery points created by Unimin for the new Unimin strip mines located in Illinois Valley's service territory by means of Unimin's electric service distribution line connected to IP's transmission line in IP's territory. (Tri 2B at 19-20)

Tri-County states that Ameren cites *Central Illinois Public Service Company vs Wayne-White Counties Electric Cooperative*, ICC Docket 92-0463, for the proposition that new wells drilled in a unitized operation do not create new customers.

According to Tri-County, the order in that docket was interpreting an entirely different service area agreement than the one in this docket. The Agreement between Wayne-White and CIPS granted electric service rights to each of Wayne-White and CIPS by virtue of physical premises delineated by physical boundaries and specifically granted certain grandfathered service rights. In Docket No. 92-0463, Superior Oil Company ("Superior") decided to disconnect CIPS electric service from oil wells that had been served by CIPS or its predecessors since prior to July 2, 1965 and prior to the service area agreement of July 3, 1968 and a second agreement of March 12, 1975. Under the agreements, CIPS was grandfathered to serve customers at locations which it was serving on July 2, 1965 even though the location was located in Wayne-White's service area designated under the agreement. Superior disconnected wells located in CIPS' grandfathered location from CIPS' electric service and connected the wells to Wayne-White's service. The Commission determined the agreement grandfathered each party to continue to furnish service to customers at locations which it served on July 2, 1965 and that Superior as the customer could not disconnect CIPS' electric service from wells situated in CIPS' grandfathered location and connect the wells to Wayne-White's service. (Tri 2B at 20)

Tri-County argues that the Order in Docket 92-0463 is based on an agreement that specifically provided for grandfather rights at customer locations or premises situated in specifically designated service territories, while the Tri-County/IP SAA does not. (Tri 2B at 21)

3. Point of Delivery; "Modifications" under Section 1(d)

In Section III.A, Tri-County takes issue with Ameren's argument that Tri-County must "concede" that the point where Citation's system connects to the Texas Substation constitutes "an electric service connection which is in existence and energized on [July 3, 1968]" in order to attempt to prove that "modification[s] of such electric service connection ... by which an additional phase or phases of electric current are added to the connection" have occurred. According to Tri-County, it is Ameren, not Tri-County, who raised the argument that Ameren's Texas Substation is the point of delivery and/or service connection point for the gas plant and the gas compressor sites located in Tri-County's service territory. (Tri 2B at 22)

In response to the argument by Ameren, Tri-County's witness Dew testified that if the Texas Substation is the delivery point of electric service for the Salem Oil Field, which Tri-County disputes, then Ameren has made numerous modifications to that substation which have increased its capacity to provide electric service to not only the Salem Oil Field, but to the other customers served by Ameren from the Texas Substation. (Tri 2B at 23, citing Tri Ex. D at 7-13)

Dew stated that substations are the heart of the electric supplier's distribution system with electric power delivered from the generating station at 34.5 kV or 69 kV to the substation where transformers reduce the voltage to 12.47 kV for distribution across 12.47 kV 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. He testified that virtually all electric motors are either small motors utilizing single phase or larger motors utilizing three phase and because all of those motors are served by the same substation, 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. Tri-County argues that if, as Ameren claims, the Texas Substation is the "delivery point" and if, as Ameren 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 Ameren to serve with impunity additional customers with electric facilities in Tri-County's service territory in violation of Section 3(a) of the SAA. (Tri 2B at 23, citing Tri Ex. F at 3-5, Tr. 745)

Tri-County states that neither Tatlock nor Malmedal, who testified for Ameren, contradicted Dew's opinion that the modifications made by Ameren to the Texas Substation allowed Ameren to increase capacity at the Texas Substation and provide additional electric service to IP's customers including Citation. IP's outside electrical engineer Keith Malmedal agreed that Citation could disconnect its 12.47 kV distribution line from the Ameren 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 12.47 kV distribution line. (Tri 2B at 24, citing Tr. 1951-1952)

Tri-County states that Malmedal agreed the Ameren Texas Substation was built as a three-phase substation and that it was not customary to build substations with less than three phases. He also agreed that adding Citation's gas plant to the electric circuit taking electricity from the Texas Substation actually increased the electric load of the substation. Because all electric substations used by electric suppliers are built as three-phase substations and because in the current docket Citation could easily disconnect its 12.47 kV distribution line from the Ameren Texas Substation and reconnect it to Tri-County's Salem Substation nearby, it was Dew's engineering opinion that the parties did not intend for substations used by Tri-County and Ameren to be considered a "delivery point" for purposes of the SAA. (Tri 2B at 24-25, citing Tri Ex. F at 5-8, Tr. 1934-1940)

In Section III.C of its reply brief, Tri-County asserts that Dew's engineering opinion differed from Ameren's claim because those modifications allowed Ameren to serve increased electrical needs of both Citation and other customers served by that substation in the same manner as increasing the phases of electricity would at the "point of delivery" located on the customer's site where the electricity is actually utilized by electric motors of the customer. Thus, there is an engineering dispute regarding the proper interpretation of Section 1(d) if in fact it is determined, contrary to Tri-County's position, that the Texas Substation is a "delivery point" for purposes of the Salem Oil Field. (Tri 2B at 25-26)

Tri-County takes issue with Ameren's assertion that "TCEC's contention that adding capacity to the Texas Substation forfeits Ameren's right to continue serving its existing customers would effectively bar Ameren from improving a facility that serves many customers other than Citation." (Am IB at 25) According to Tri-County, "The logical answer to Ameren's argument is that substations are not intended to be delivery points under the [SAA.]" (Tri 2B at 26)

Tri-County next states that Ameren implies Tri-County is claiming the right to serve all of the Salem Oil Field electric facilities in Tri-County's service area. According to Tri-County, "That is not the claim in this docket." Tri-County asserts that in the first place, Tri-County is not claiming IP's Texas Substation is a "point of delivery." Secondly, Tri-County "claims only the right to serve the gas plant and seven of the eight gas compressor sites located in Tri-County's service territory based upon the establishment of the new 'delivery points' by Citation at the sites of each of those facilities for purposes of delivering electricity at a usable voltage to those facilities." (Tri 2B at 26-27)

In a footnote on page 22 of its initial brief, Ameren states that because Tri-County admits Ameren upgraded components of the Texas Substation on numerous occasions since 1969, Tri-County is presumptively guilty of laches for failure to assert its claim sooner.

In response, Tri-County asserts that if this is intended as an argument to support Ameren's claims, then Ameren is barred from raising it, as laches is an affirmative defense that must be specifically pled in Ameren's answer which Ameren did not do. (Tri 2B at 25, citing 735 ILCS 5/2-613(d); 83 Ill. Adm. Code 200/180(b)) Tri-County adds, "As noted earlier, Tri-County's argument that the Texas Substation has been modified many times was raised in direct response to IP's claim raised for the first time in IP's testimony that the Texas Substation constituted a delivery point under the Agreement." (Tri 2B at 25)

In Section III.D of its reply brief, Tri-County states that Ameren appears to claim for the first time in its initial brief, on page 23, that the Ameren Texas Substation is not the "delivery point" for the Salem Oil Field. Instead, Ameren argues that the actual "point of delivery" is the point where the Citation electrical conductors forming the 12.47 kV distribution line connect to the Ameren Texas Substation and that any modification to the Ameren Texas Substation would be irrelevant to the issue in this docket because those modifications occurred "behind" the actual "point of delivery" and within the substation structure. In Tri-County's view, this argument fails to consider all of the relevant language in Section 1(c) and (d) as well as in Section 3 regarding use of the phrase "point of delivery" and "electric service connection." Tri-County submits that the two are not used together in every instance in Sections 1 and 3. (Tri 2B at 28)

Tri-County states that Ameren implies the transformation of the electric voltage from the voltage generated at the electric generation station to a voltage usable by the customer's electric motors is either unimportant or unnecessary to the meaning of "point of delivery" as used in the Agreement. According to Tri-County, such reasoning is not supported by the engineering testimony in this docket. In the first place, Ameren's

electricity enters the high side of the transformers located in the IP Texas Substation at 69 kV. Voltage is reduced by transformers located within the Ameren Texas Substation to 12.47 kV which is then passed to the Citation conductors comprising the Citation distribution line at 12.47 kV. That connection takes place at the low side of Ameren's Texas Substation transformers. Consequently, there is a transformation or reduction in the voltage at the Texas Substation before the electricity is passed on to the Citation distribution facilities. Tri-County states that the Citation distribution facilities carry the 12.47 kV several miles to another "point of delivery" downstream from the substation where another transformer is located reducing the 12.47 kV to a voltage of 277/488 and passed by a conductor from the low side of that transformer into the gas plant and the gas compressor sites for operation of the Citation electric motors at those locations. (Tri 2B at 28-29)

4. Defining "Delivery Point" according to its Plain Meaning

In Section III.E of its reply brief, Tri-County states that Ameren argues that the common ordinary dictionary meaning of "connection", "delivery", "point", and "service" should be utilized in interpreting "point of delivery" and "electric service connection" as used in the Tri-County/IP SAA. (Tri 2B at 29-30, citing Am IB at 23-26)

According to Tri-County, "No evidence appears in this record that the parties intended the use of the common dictionary meanings for the words in question. That is a new argument raised for the first time in Ameren's Initial Brief and not supported by any of the evidence." (Tri 2B at 31) As noted by Tri-County witness Dew, those phrases when used in conjunction with each other have a common meaning within the electric supplier industry. Ameren's Tatlock relied upon that common understanding within the electric supplier industry when he testified that it was his understanding Citation was asking for a new "point of delivery" for the gas plant when Citation's Clyde Finch contacted him regarding construction of electric facilities for service to the Citation gas plant. Ameren's Siudyla testified to the same effect regarding the use of the phrase "point of delivery" within the electric supplier industry. Ameren witness Malmedal concurred with the commonly understood use of "point of delivery" within the electric supplier industry when he testified that if Ameren owned the 12.47 kV distribution line bringing electricity to the transformers which reduced that voltage to a usable voltage for each of the gas plant and gas compressor sites, the "electric service point" would be at the low side of the transformer at that location and the "delivery point" would be at the meter and would in this case be located in Tri-County's service territory. (Tri 2B at 30-31, Tr. 1886-1887, 1892, 1907-1908)

Section III.F of Tri-County's Argument is titled, "Point of delivery is not defined in the Tri-County/IP [SAA]." (Tri 2B at 31) Tri-County takes issue with Ameren's argument that Tri-County witness Dew's opinion testimony as to what the phrase "point of delivery" means in the electric utility industry has no relevance. (Am IB at 25-26)

According to Tri-County, Ameren's argument begs the question because "point of delivery" is not defined in the Agreement and neither is "electric service connection."

Thus, Tri-County argues, the Commission has to turn to outside evidence to establish the meaning of those phrases. The only testimony in this record regarding the meaning of those phrases is that which has been supplied by Tri-County's engineer Dew, Ameren's engineers Tatlock, Siudyla and Malmedal, and Tri-County's Marcia Scott. Additionally, if the Commission must look to other outside references besides the testimony in this docket to arrive at the meaning of the phrase "point of delivery" or "electric service connection," the ESA has fact defined "normal service connection point" to mean "...that point on a customer's premises where an electric connection to serve such premises would be made in accordance with accepted engineering practices. ..." (Tri 2B at 32, citing 220 ILCS 30/3.10) In applying that statutory definition, the Commission has determined that the "normal service connection point" is deemed to be the location of the transformers used to reduce the voltage to a level usable by the consumer. (Tri 2B brief at 31-32, citing *Jo-Carroll*, Dockets 93-0450 and 93-0030, Cons. on Remand (October 9, 1996))

In Tri-County's view, this definition comports with Dew's testimony that "point of delivery" as utilized in the electric supplier industry is the point where the step-down transformer is located in close proximity to the customer's place of usage of the electricity. (Tri 2B at 32, citing Tri Ex. D at 5-6; Tr. 745) Tri-County states that Ameren's Siudyla agreed the step-down transformer at the gas plant would constitute a "new point of delivery" in Tri-County's territory and Ameren could not extend its distribution line to the gas plant to provide electric service. (*Id.* citing Tr. 1346-1351, 1375-1377) Tri-County argues that even if the dictionary definition for each of the words "connection," "delivery," "point," or "service" were utilized, it would not change the generally understood usage of "point of delivery" within the electric supplier industry as utilized in the SAA. (Tri 2B at 32-33)

Tri-County takes issue with an argument by Ameren that the use of the phrase "as used herein" means that the parties intended to exclude the extrinsic evidence to interpret the phrase "point of delivery." According to Tri-County, the Commission and the courts have directed that where a phrase such as "point of delivery" is not defined within the Agreement, it is appropriate for the Commission to utilize extrinsic evidence to determine the meaning of such a phrase. Tri-County argues, "That is exactly what the parties did in this case." Tri-County further observes that Ameren also introduced extrinsic evidence in this proceeding as to the meaning of "point of delivery." (Tri 2B at 33)

5. Whether Citation is a "New Customer" under the SAA with respect to Gas Plant and Compressors Sites in Tri-County's Territory

In Section IV of Tri-County's Argument in its reply to Ameren's initial brief, Tri-County argues, "As to the gas plant and gas compressor sites in Tri-County's territory, Citation is a 'new customer' under the Tri-County/IP [SAA]." (Tri 2B at 33) In Section IV.A, Tri-County argues, "Tri-County's evidence clearly shows Citation created new delivery points for the electricity used at Citation's new gas plant and gas compressor sites." (*Id.*)

Tri-County states that on page 27 of its initial brief, Ameren claims Tri-County never links its point of delivery argument to a particular section of the SAA, and Ameren reasons that if each point of delivery is the location where the electricity is reduced to a voltage usable by the customer's facilities, then hundreds of new customers are created within the Salem Oil Field. Tri-County responds that the SAA controls whether a new customer is created when an existing customer creates a new point of delivery, and that Tri-County references Section 1, paragraph (c) and Section 3(a) of the SAA in its Complaint. Tri-County asserts that its interpretation of the Agreement that Citation as an "existing customer" of Ameren becomes a "new customer" under Section 1(c) by reason of creating new delivery points for the gas plant and gas compressors is uniformly applicable to both Tri-County and Ameren and avoids manipulation of the agreement by a customer. (Tri 2B at 34-35)

According to Tri-County, while Section 1(b) defines "existing customer" as one receiving electric service on the date of the SAA, Section 1(c) defines "new customer" as a "...person, corporation or entity including an existing customer who applies for ... electric service at a 'point of delivery' which is not energized on the effective date of this Agreement." Tri-County argues, "If, as IP argues, all it has to do is establish that the Salem Oil Field is an 'existing customer' served by IP on March 18, 1968 in order for IP to continue to serve all of the electrical facilities established by Citation subsequent to March 18, 1968, then there would be no need for Section 1(c) to include the phrase 'including an existing customer' when defining a 'new customer.'" (*Id.* at 35)

Tri-County contends that the SAA allows for an "existing customer" such as Citation to become a "new customer" when a "point of delivery" for electric service is established that did not otherwise exist on March 18, 1968. Tri-County argues, "That is exactly what has happened in this docket with respect to the Citation gas plant and the Citation gas compressor sites." If the definition of the "point of delivery" is as defined by Dew, Siudyla and Tatlock, then each of the gas plant and the seven gas compressor sites located in Tri-County's service territory are "new points of delivery" and under Section 1(c) Citation as an "existing customer" becomes a "new customer" with respect to those delivery points. Tri-County argues that since those "new delivery points" are located in Tri-County's service territory, Section 3(a) prohibits Ameren from providing electric service to them. (Tri 2B at 35-36)

In Section IV.B of its Argument, Tri-County argues, "Citation cannot utilize the 12.47 kV of electricity received from IP at the Texas substation to operate the gas plant and gas compressor sites." (Tri 2B at 36)

Tri-County states, "IP contends that Tri-County's argument that each of the step-down transformers and other devices comprising the connection of the gas plant facilities and gas compressor site facilities to the Citation 12.47 kV distribution line ... if literally applied would by implication create separate delivery points at the connection point of the Citation 12.47 kV distribution line with the IP Texas Substation." (Tri 2B at 36, citing Am IB at 28) Ameren claims that at that location, there are transformers that reduce the 12.47 kV voltage to a voltage usable by electric motors and metering devices. According to Tri-

County, those "delivery points" were created before the SAA and are not at issue in this docket since Tri-County has made no claim to provide electric service to the same. Tri-County also asserts that Ameren's electrical engineer Malmedal testified Citation could not reduce the 12.47 kV of electricity received from Ameren at the Texas Substation to a level of 277/480 volts and transmit that voltage level across its distribution line and expect to have sufficient voltage to operate the electric motors at the gas plant and gas compressor sites without using tremendously large conductors and support structures, all of which would be very expensive. (Tri 2B at 36, citing Tr.1863-1869)

Tri-County states that Ameren further claims a large industrial customer can purchase high voltage energy and use its own distribution system to move the energy anywhere on its premises. Tri-County responds, "This argument assumes that 'premises' and grandfathered rights to those premises are part of the equation in determining whether a 'point of delivery' is served by Tri-County or IP. That simply does not conform to the [SAA] at issue in this docket nor with the Commission's [Order in Docket 93-0150], that the parties' [SAA] simply does not assign service rights based on a right to serve grandfathered 'premises.'" (Tri 2B at 36-37) Tri-County argues, "Therefore, the fact that Citation utilizes its own distribution facilities to move the voltage received from IP at the Texas Substation to different locations for further reduction of the voltage and use at those separate locations does not allow IP to automatically provide electric service to those separate electric facilities of Citation unless those facilities are in IP's service territory which they are not in this docket." (2B at 36-37)

Section IV.C of the Argument in Tri-County's reply brief is titled, "IP cannot identify any provision of the [SAA] that incorporates IP's Texaco or Citation electric service contracts or IP's tariff." (Tri 2B at 37)

Ameren argues on page 29 of its initial brief that "point of delivery" is contractually defined in IP's Electric Service Contract with Texaco as the point where Ameren's 69 kV lines connect to the Ameren Texas Substation. Ameren further argues that IP's applicable tariff defines "point of delivery" as the IP Texas Substation. Tri-County responds, "However, the evidence in this docket shows that the IP/Texaco and Citation Electric Service Agreements and the IP tariffs are not agreements to which Tri-County is a party." (Tri 2B at 37) Tri-County argues that there is no evidence in this docket that Tri-County was ever aware of these agreements between IP and Texaco or of IP's tariffs, and that the authorities cited by Ameren are not applicable to Tri-County.

Tri-County states that is not a subscriber of Ameren nor is Tri-County deemed by implication to have knowledge of IP's tariffs, and Ameren never introduced any evidence in this docket to reflect that IP gave notice to Tri-County of its contracts for electric service or its tariffs regarding the definition of "point of delivery" when the SAA was negotiated and signed. Tri-County argues, "For IP to now claim that these separate agreements constitute a part of the [SAA] is a grossly unfair interpretation of the [SAA] and violates the covenant of good faith and fair dealing that is implicitly a part of the [SAA]...." (Tri 2B at 37-38)

In Section IV.D of its Argument, Tri-County responds to Ameren's reliance on the "*Old Ben*" decision in Docket 89-0420 which is a Commission decision allowing CIPS to extend electric service underground by use of Old Ben Mine No. 24 electrical facilities to a mine hole located in Southeastern's service territory under the SAA. Tri-County states that the service area agreement at issue in that case incorporated by reference the grandfathering provisions of Section 5 of the ESA and therefore grandfathered CIPS to continue to serve electrical customers with which it had a binding electric service contract in existence on the date the agreement was entered into.

Tri-County states that CIPS claimed it did have such an agreement in existence and was therefore grandfathered to follow the electric service of Old Ben Mine into Southeastern's service territory, and the Commission agreed. In Tri-County's view, the *Old Ben* case is not applicable to this docket because Ameren cannot point to any similar grandfathering provision in the SAA at issue in this docket nor can Ameren point to any provision of the SAA that incorporates the grandfathering provisions of Section 5 of the ESA. (Tri 2B at 39)

6. Further Responses to Ameren

In Section I of its reply to Ameren's response brief, Tri-County argues, "IP's actions in this case have created the ambiguity in the [SAA] regarding the meaning of 'point of delivery.'" (Tri 3B at 5)

According to Tri-County, until July 14, 2005 Tri-County and IP uniformly applied the phrase "point of delivery" for electric service as used in Section 1(c) and (d) as the connection between the distribution line and the customer's voltage reduction transformer reducing the distribution line voltage to a voltage usable by the customer's facilities. Tri-County claims it was not until Citation decided it wanted IP's electric service did IP's definition of "point of delivery" for electric service as used in Section 1(c) and (d) of the Agreement change to mean where ownership of the electricity is handed off to the customer. That action by IP created the ambiguity regarding the phrase "point of delivery." (Tri 3B at 8)

In Section I.B, Tri-County argues, "IP does not explain what the commonly understood meaning is of 'point of delivery' and 'electric service connection' as used in Sections 1(c) and (d) of the Agreement." (Tri 3B at 9)

In Section I.C, Tri-County argues that Ameren incorrectly claims that "delivery," "service," and "connection" are used in the Agreement in accordance with their common ordinary meaning. (Tri 3B at 9) Tri-County argues that none of the electrical engineers, Dew, Tatlock, Siudyla and Malmedal, testified regarding their understanding of each of those single words but rather testified as to the phrases "point of delivery" and "electric service connection." "Point of delivery" and "electric service connection" are words of art within the electric utility industry with a more extensive meaning than the commonly understood separate meanings of "deliver" or "point" or "connection." (Tri 3B at 9-10)

In Section I.D, Tri-County argues that IP created the dispute regarding the meaning of "point of delivery" by changing the definition of the phrases. (Tri 3B at 10)

In Section I.E, Tri-County takes issue with Ameren's argument that "if a 1968 'existing customer' with unitary facilities simultaneously operating in both service areas morphs into a 'new customer' every time it unilaterally extends conductors to a new motor (or security light or recloser station), §3(b) grandfather rights would evaporate." (Am 2B at 7)

Tri-County responds, in part, that Sections I(c) and (d) and 3(b) of the Agreement must be construed together. According to Tri-County, when this is done, it is clear that an existing customer such as Citation, which happens to be an existing customer of both Tri-County and Ameren, will be considered a "new customer" if a "point of delivery" for electric service that did not exist on the effective date of the Agreement is created by the existing customer. Tri-County argues, "All other 'points of delivery' of the 'existing customer' that were in existence on the effective date of the Agreement remain either Tri-County's or Ameren's to serve. That is all Section 3(b) does." (Tri 3B at 11)

In Section I.F, in response to Section III.A.5 of Ameren's response brief ("Am 2B"), Tri-County takes issue with the assertion by Ameren that the undisputed evidence establishes that Ameren's Texas Substation transforms 69 kV electricity to 12.47 kV, which is a "level usable by the customer." (Am 2B at 12) According to Tri-County, both consulting electrical engineers, Dew and Malmedal, testified that none of the gas plant electric facilities and gas compressor facilities could utilize a voltage at the level of 12.47 kV and if it were tried, the voltage would destroy the motors. The voltage had to be reduced to 277/480 volts by a step-down transformer located adjacent to the gas plant and each of the gas compressor sites. (Tri 3B at 13, citing Tr. 987-989, 1839-1848, 1863-1869)

In Section I.G, Tri-County responds to an argument by Ameren that Tri-County's "practical construction" argument "actually boomerangs in favor of Ameren because TCEC stood by for over 37 years while Texaco and Citation repeatedly extended the distribution system to new pumps for some 98 new wells and two central pumping stations, all in TCEC's service area." (Tri 3B at 13, citing Am 2B at 11)

Tri-County characterizes Ameren's "practical construction" argument as an untimely "waiver argument" that was "only briefly mentioned" in a footnote on page 22 of Ameren's initial brief, in the form of a "laches" claim for which no argument was presented. (Tri 3B at 13)

Tri-County states that hardly any evidence appears in the record regarding laches or waiver most likely because Ameren did not properly plead the issue and allow discovery regarding the same or file testimony on the issue. Tri-County also states that Tri-County witness Ivers testified that Tri-County was not aware of any new wells. (Tri 3B at 14-15, citing Tr. 666) Tri-County further states that Ameren 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.

In Section I.H, Tri-County takes issue with Ameren's assertion that Tri-County's interpretation would mean that the parties intended to bar the Salem Unit from extending its existing distribution system to reach every new well or pumping station sited in Tri-County territory after 1968 and force the unit operator to purchase Tri-County electric service. Tri-County also disagrees with Ameren's argument that other circumstances surrounding the execution of the contract make it unreasonable to infer that Ameren had any intent to interpret "point of delivery" any differently than as stated in its contemporaneous tariffs and electric service agreements. (Am 2B at 12-13)

According to Tri-County, Ameren's position is not supported. Tri-County notes that no witness who was involved in negotiating the SAA testified in this docket. Tri-County also asserts that Ameren's claim the Commission must apply the definition of "point of delivery" found in IP's electric service contracts and tariffs is inconsistent with Ameren's position that "point of delivery" and "electric service connection" are unambiguous terms and the Commission cannot seek the aid of any extrinsic evidence in defining the same. Tri-County, argues, "Certainly, IP's tariffs and electric service contracts with Texaco and Citation are extrinsic evidence." Tri-County further argues that Ameren's tariffs are limited by the terms of the tariff to Ameren's customers. (Tri 3B at 16)

In Section III of its brief, Tri-County replies to arguments in Section III.C of Ameren's response brief regarding the decisions in *Southwestern*, 202 Ill. App. 3d 567 (1990), and *Wayne-White*, 223 Ill. App. 2d 718 (1992).

Ameren attempts to distinguish the opinions in those cases from this docket because they involved a different type of service area agreement regarding grandfather rights. According to Tri-County, "However the principal announced in *Southwestern* and *Wayne-White* is that the customer cannot use its own distribution line to circumvent the [agreement]. That principal applies to all [service area agreements] regardless of the methodology used in the agreement to assign service rights." (Tri 3B at 18-19)

Tri-County states that in Section III.C of Ameren's response brief, Ameren attempts to distinguish the Commission decision in the *Unimin* case in Docket 88-0276, by claiming Unimin utilized two electric suppliers for its silica sand mine and it did not involve the extension of the Unimin's customer distribution line to serve the new sand pits opened in Illinois Valley's territory. Unimin's private distribution line did extend across the IP/Illinois Valley territory boundary, but Unimin decided to have Illinois Valley extend a new line to serve the new mine pit in Illinois Valley's territory rather than extend its own distribution line connected to IP's substation on IP's side of the territory line. (Tri 3B at 19)

Tri-County states that IP opposed this arrangement and lost. According to Tri-County, the only difference between the *Unimin* case and this docket is the customer chose to abide by the agreement and have Illinois Valley construct the electric facilities for the new mine in Illinois Valley's territory rather than building its own line to bring IP

electricity to the new mine. In the instant docket, Tri-County argues that Citation chose to build its own distribution line to the gas plant "to bring IP electric service" to the gas plant effectively circumventing the SAA at issue in this docket. (Tri 3B at 19-20)

In Section IV, Tri-County replies to arguments by Ameren in Section III.D of Ameren's response brief. According to Tri-County, whether Ameren has a right to serve a "delivery point" in Tri-County's service territory depends on whether the "delivery point" existed on the date of the SAA or is newly created. Tri-County argues "that is the issue in this docket" and Ameren can point to no language in the Agreement that declares Tri-County relinquished its right to serve these new "delivery points" in its service territory when it signed the Agreement. Tri-County adds, "There is no mention in the Agreement regarding the Salem Oil Field and there is no exception in the Agreement regarding the Salem Oil Field allowing Ameren to ignore the distinction between an "existing point of delivery" and a new point of delivery. (Tri 3B at 20)

B. Response to Citation

1. Point of Delivery

In Section III.A of its reply brief to Citation's initial brief, Tri-County asserts, in response to Citation's reliance on the definition of "point of delivery" in 83 Ill. Adm. Code 410.10 (Citation IB at 22), that electric cooperatives, such as Tri-County, are excluded from the provisions of Section 410.10 by Section 410.20. Tri-County states that Citation's argument ignores the fact that a Commission decision in this docket assigning service rights directly affects Tri-County's operations. In Tri-County's view, "Because Section 410.20 excludes Tri-County, as an electric cooperative, from the application of Part 410 of the Administrative Rules including Section 410.10, the Commission has no authority to apply the definition of 'point of delivery' found in Section 410.10 to the phrase 'point of delivery' as used in the [SAA]." (Tri 2B at 27)

In Section III.B, Tri-County takes issue with Citation's statement at page 25 of its initial brief that between 1968 and 2005 Tri-County never supplied electricity to the Salem Unit or any oil wells. Tri-County states that Scott was asked on cross examination if there had in the past been discussions about who would have the right to serve newly drilled oil wells, and she responded, "No, I assume there was no question. We have a territorial agreement." (Tri 2B at 29, citing Tr. 543)

Tri-County asserts that Citation's statement at the bottom of page 25 that Citation never applied for service omits Scott's testimony in which Scott stated Citation never completed a Request for Service Form for the gas plant on Tri-County's written form but Tri-County received other information from Citation in other avenues as Tri-County frequently does. (Tri 2B at 29-30, citing Tr. 539) Tri-County states that "the other information Scott referred to that appears on the Request for Service Form and which Tri-County received from Citation was location of service for the gas plant." (*Id.* at 30, citing Tr. 537-538) Tri-County states that it already had Citation's mailing address and billing information because it served Citation's office and Citation was a member of Tri-County.

Tri-County also argues that in criticizing Mr. Dew's opinion in pages 26-29 of its initial brief, Citation pays no heed to the fact the SAA does not assign service rights to Tri-County and Ameren on the basis of ownership of the electricity or of the electric distribution facilities. (Tri 2B at 31)

In response to statements on pages 29-31 of Citation's IB regarding Dr. Malmedal's testimony, Tri-County asserts that Malmedal's opinion changed and he concurred with the opinions of Dew, Tatlock and Siudyla that if Ameren owned the 12.47 kV distribution line and the transformers at the gas plant and gas compressor sites, the service point would be at the low side of the transformer and the delivery point would be at the meter, all located at the gas plant and the gas compressor sites. (Tri 2B at 33, citing Tr. 1886-1887, 1892, 1907-1908)

In Section IV of its reply brief to Citation's initial brief, Tri-County takes issue with Citation's reliance on the *Old Ben* and *Freeman Mine* cases in Section III.C of Citation's initial brief. These cases were also discussed by Ameren, and *Old Ben* was discussed by Tri-County in its response to Ameren, as discussed above.

Tri-County argues that neither the *Old Ben* nor the *Freeman Mine* decisions are applicable to this docket. (Tri 2B at 33) Regarding *Old Ben*, Docket 89-0240, Tri-County argues, "While the Commission decision was expressed in terms of what the parties intended with respect to the Partial Service Area Agreement 'otherwise entitled to serve' language, the legal basis for the Commission decision was CIPS' Section 5(b) grandfathered contractual rights as authorized by the [ESA]." Tri-County asserts, "In this docket, IP does not possess grandfathered contractual service entitlements for any part of the Salem Oil Field because the [SAA] at issue in this docket does not assign service rights on the basis of grandfathered rights or on the basis of premises and does not incorporate into the Agreement the grandfathering provisions of Section 5 of the [ESA]." (Tri 2B at 34-35)

Tri-County states that in *Freeman Mine*, Docket ESA 187, the Commission determined the service area agreement required service rights to be determined under the ESA and since neither CIPS nor RECC had Section 5 grandfathered rights under the ESA to serve the mine, service rights would be determined under Section 8 of the ESA based upon the proximity of adequate 1965 existing lines to the proposed customer. The Commission determined CIPS had a 34.5 kV line which was required to serve the mine, in closer proximity to the mine than did RECC. Thus, the Commission awarded service rights to the mine to CIPS. (Tri 2B at 35-36)

Later, *Freeman* extended its mine into RECC's service territory under the agreement. Tri-County states that when RECC claimed the right to serve the new mine bore hole, the Commission found in Docket 01-0675 that service rights had already been determined for the mine in ESA 187 and on summary judgment dismissed RECC's claim on the basis of *res judicata*.

According to Tri-County, the *Freeman Mine* case is not applicable to this docket for a number of reasons. First, Tri-County states that the *Freeman* decision in ESA 187 was determined on the basis of the ESA and Section 8 proximity of adequate 1965 lines to the customer, and the decision in Docket 01-0675 was based solely on the decision in ESA 187 and the principal of res judicata; whereas, there has been no prior Commission prior decision assigning service rights to the Salem Oil Field.

Tri-County also states that the SAA in this docket controls the assignment of service rights, and does not assign service rights on the basis of premises or grandfathered rights or on the provisions of the ESA except Sections 2 and 6 of the Act which authorize SAAs; rather, the SAA in this docket assigns service rights on the basis of a customer's "point of delivery" in relation to the designated service territory boundary.

As another such reason, Tri-County states that IP previously successfully persuaded this Commission to hold that the same SAA provisions which are at issue in this docket do not assign service rights on the basis of grandfathered rights or premises but on the basis of point of delivery and its location in relation to the territory boundary. (Tri 2B at 36-37, citing *MJM*, Docket 93-0150)

In Section V of its reply to Citation's IB, Tri-County responds to an argument in Section III.D of Citation's IB that "the Salem Unit is a premises." (Tri 2B at 37)

Tri-County contends that whether or not the Salem unit is a premise is not a relevant factor for assigning service rights under the Tri-County/IP SAA. According to Tri-County, the SAA between Tri-County and Ameren is the controlling instrument and the Commission has already determined that the parties agreed not to assign service rights under the agreement on the basis of either premises or grandfathered rights. Therefore, Tri-County argues, the definition of premises in the ESA is not relevant to the decision herein "nor are" the Commission decisions in *Freeman Mine*, ESA 187, which assigned CIPS initial service rights based on Section 8 proximity of adequate 1965 lines, and Docket No. 01-0675 which granted CIPS service rights to Freeman's new bore hole on the basis of the order in ESA 187 and res judicata. In Tri-County's view, to the extent the Commission's order considered the Freeman mine a premise or unit in Docket No. 01-0675, such would not make that order relevant to this docket "because the parties have agreed by their [SAA] in this docket not to assign service rights on the basis of a premises...." (Tri 2B at 37, citing Docket 93-0150)

In Section II.C of its brief in reply to Citation's responsive brief, Tri-County argues that Citation incorrectly states the evidence of Tri-County's and IP's actions regarding past oil wells in the Salem Oil Field. (Tri 3B at 14)

Tri-County states that Citation argues in Part IV on pages 15-16 that Tri-County and IP have since 1968 interpreted the SAA so as to allow IP to serve new wells since 1968 opened in Tri-County's territory. Tri-County claims that is not the evidence. Tri-County asserts that neither Ameren nor Citation raised such a "waiver" or "laches" theory in their pleadings, and neither introduced any evidence regarding this matter. Tri-County

states that there is little if any evidence on this point and what there is came from Citation's cross examination of Scott (Tr. 543) 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.

Tri-County concludes, "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." (Tri 3B at 14)

Tri-County states that at Part V on page 17 of Citation's responsive brief, Citation claims the Commission's decision in *Spoon River* does not apply because Citation has not made a new connection of its distribution system to an electric supplier. According to Tri-County, "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." Tri-County asserts that this 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. (Tri 3B at 15)

In Tri-County's view, the step-down transformer and connecting devices located adjacent to and connecting the gas plant and gas compressor sites to the 12.47 kV distribution line and which reduce the voltage to the appropriate level for use at each site constitutes a new "point of delivery" under the Agreement. (*Id.*)

Tri-County states that 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. According to Tri-County, 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. (*Id.*, citing *Southwestern*, 148 Ill. Dec. 61, 66)

2. Waiver, Related Arguments and Other Issues

In Section VIII.A of its reply to Citation's initial brief, Tri-County argues that Citation's waiver and laches claims raised in its brief are affirmative matters that Citation

must raise in its pleadings, 735 ILCS 5/2-613(d). Tri-County states that 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). Tri-County asserts that Citation made no attempt to raise the affirmative defenses of waiver and laches in its petition to intervene. An affirmative defense is one which gives color to the opposing party's claim and then asserts new matters which may defeat the claim. (Tri 2B at 42) Tri-County cites *Worner Agency, Inc v Doyle*, 121 Ill. App. 3d 219 (1984), "where the court held that the Defendant's claim there was a failure of consideration for a contract was an affirmative defense because if true, it would defeat plaintiff's contract claim." (Tri 2B at 42)

Tri-County argues that "matters constituting a defense to a plaintiff's complaint must be plainly set forth in the answer. See *Kermeen v. City of Peoria* 65 Ill. App. 3d 969 ... (1978) where the City's defense to plaintiff's mandamus action for a building permit was that plaintiff's plans for the site did not meet drainage and fire protection standards constituted an affirmative defense which the City had not pled and plaintiff did not have notice of." (Tri 2B at 42) Tri-County asserts, "Any affirmative defense not expressly stated in the pleadings which would take the opposite party by surprise must be plainly set forth in the answer even though it may appear to be within the evidence. See *International Ass'n of Firefighters v City of East St. Louis* 213 Ill. App. 3d 91 ... (1991) where the City was precluded from arguing that plaintiff's contract claim was required to be arbitrated because it was an affirmative defense the City failed to include in any pleading." Tri-County further argues, "In addition, waiver is an affirmative act *Western Casualty & Surety Co. v Brochu* 105 Ill. 2d. 486 ... (1985) [*Western Casualty*]" and must be pled as an affirmative defense." (Tri 2B at 43)

Tri-County also states that 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 the Salem Oil Field, has known since at least June 22, 2005 that Tri-County would not release its service rights at issue in this case. Tri-County asserts, "Yet, Citation filed only one pleading on April 29, 2010, that being its Petition to Intervene, and still did not allege the affirmative claims of waiver or laches by Tri-County" (Tri 2B at 43), and "hardly has clean hands in this matter." (Tri 2B at 46) Tri-County also states that Ameren has not filed any pleadings alleging waiver or laches on the part of Tri-County regarding the exercise of its rights under the SAA. (Tri 2B at 43)

In Section VII.B, Tri-County argues, "The docket contains insufficient evidence to support Citation's claim of waiver and laches." (Tri 2B at 43) Tri-County states that it "had no knowledge of the creation by Citation of the gas compressor sites until 14 months into the litigation at which time Tri-County promptly filed its amended complaint to include a claim of right to serve the gas compressor sites in Tri-County's territory." (*Id.* at 44) Tri-County has made no claim for the right to serve any other "delivery points" in the Salem Oil Field and no party filed any testimony on the issues of waiver and laches because neither Ameren nor Citation raised the issues in their pleadings. (*Id.*)

Tri-County states that Citation claims Tri-County had never before requested the right to provide service to the oil wells in the Salem Oil Field citing Scott's cross examination (Tr. 543). Tri-County responds that Scott's testimony was in response to a question by Ameren whether there had ever been any discussions about electric service to any newly drilled oil well, and her reply was "no" because there was a territorial agreement. (Tri 2B at 44)

Tri-County states that Citation also claims Tri-County was aware of numerous oil wells in the Salem Oil Field and had not since 1968 claimed the right to serve any of them, citing Dew's testimony (Tr. 759) and Garden's testimony (Tr. 1702-1703). Tri-County responds that Dew's testimony (Tr. 759) refers only to the fact Tri-County has numerous distribution lines throughout the Salem Oil Field, and Garden's testimony (Tr. 1702-1703) states that Tri-County has numerous distribution lines in the Salem Oil Field and there are private residences in the Salem Oil Field. (Tri 2B at 44-45) According to Tri-County, Garden did not even know how many oil wells were in the Salem Oil Field (Tr. 1703), and Tri-County's Ivers testified Tri-County was not aware of any new wells. (Tri 2B at 44-45, citing Tr. 666)

In Tri-County's view, none of the testimony referred to by Citation supports its claims that Tri-County has rested on its rights for 35 years. Tri-County argues, "Waiver can only arise if there is an affirmative act by which one intentionally relinquishes a known right. See *Western Casualty* ... 105 Ill 22 486 ... (1985) where the court held an insurer did not waive its right to deny coverage to the insured even though the insurance company initially told the insured the insurance company would undertake the defense but was reserving its rights under two policy exclusions." (Tri 2B at 45)

According to Tri-County, Citation refers to no evidence in the record that either Citation or IP told Tri-County when new oil wells were established in the Salem Oil Field. Without such knowledge Tri-County could not make a knowing, intentional and conscious decision to forego a claim for service rights under the SAA to the new well. Tri-County asserts that Citation's reliance on *Illinois Valley*, Ill. App. 3d 631 (1992), is misplaced because the court only agreed that waiver or estoppel applied to Illinois Valley's claim because there was evidence of an agreement between Illinois Valley and Princeton that Princeton could provide the electric service to customers in Illinois Valley's service area in return for Princeton allowing Illinois Valley to provide electric service to its headquarters located in Princeton. Tri-County contends there is no evidence in the record in this docket of such an agreement. (Tri 2B at 45-46)

Tri-County states that Citation also claims it will lose its investment. Tri-County responds that there is no evidence regarding the amount of investment by Citation in the Salem Oil Field let alone how much if any Citation would lose should Tri-County be determined to be the proper electric supplier for the gas plant and gas compressor site in Tri-County's territory. In Tri-County's view, "Citation has failed to prove Tri-County is guilty of laches. Citation has intervened although in an untimely manner which is the fault of Citation and no one else." (Tri 2B at 46)

In Section VII of its reply to Citation's initial brief, Tri-County takes issue with the argument in Section VI of Citation's IB where Citation contends, "Citation is not bound by the unsigned terms of the membership agreement." (Cit IB at 41)

Tri-County states that Citation argues that the Citation Membership Agreement with Tri-County is unenforceable by reason of Section 80/1 of the Illinois Frauds Act ("Statute of Frauds"), 750 ILCS 80/1. According to Tri-County, Citation's claim is not well taken. Tri-County argues that the Statute of Frauds would only be applicable if Tri-County were seeking to enforce "the membership agreement" against Citation, and Tri-County has made no claim against Citation in this docket to enforce the membership agreement. Tri-County's only claim in this docket is to enforce the SAA. (Tri 2B at 39-40) Secondly, Tri-County contends that even if Tri-County were attempting to enforce the membership agreement against Citation, the Commission most likely would not have jurisdiction to hear such a claim since the Commission's jurisdiction is limited to hearing disputes between electric suppliers regarding territorial issues or disputes arising from Commission-approved service area agreements.

Tri-County further argues that "Citation's claim that Citation's membership agreement is unenforceable because it is not signed by Tri-County, fails because the Statute of Frauds only requires that the person against whom the contract is being enforced must have signed the agreement or memorandum of the agreement. (Tri 2B at 40, citing 740 ILCS 80/1; *Nassau Terrace Condo v Silverstein* 182 Ill. App. 3d 221 (1989)) Tri-County states that here, Citation claims Scott could not identify the signature on the membership agreement (Tri-County Ex A-4) noting only it was not the signature of anyone from Tri-County. However, Citation omits the next question by Citation's counsel and Scott's answer:

Q: Is it your understanding...that's not a signature of someone at [TCEC]?
A: That is correct. That is a signature by someone at Citation." (Tr. 563)

Tri-County states that Citation also omits the same questions by Ameren's counsel and Scott's answer (Tr. 507-508):

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

Tri-County states that the testimony by Scott that the signature on the Membership Application and Agreement (Tri-County Ex A-4) is someone from Citation was not

contradicted or rebutted. Thus, Tri-County argues, the evidence in the record is that Citation did sign the Application and Agreement and Citation cannot raise the Statute of Frauds as a defense to a claim by Tri-County on this Agreement. (Tri 2B at 41)

In Section II.I, Tri-County responds to arguments on page 14 of Citation's IB that for safety reasons, the supplier of electricity to the gas plant should be the same supplier that provides electricity to the wells. According to Tri-County, Citation's argument is not supported by the evidentiary record which shows that Citation already suffers electric outages on all four circuits of its 12.47 kV distribution line and has in place safety mechanisms to protect its equipment when outages occur on a particular circuit shutting down one or more gas wells or the gas plant or vice versa. (Tri 2B at 16-17)

X. APPLICABILITY OF THE CONSUMER CHOICE LAW ("CCL")

A. Citation Position

Section II of Citation's initial brief is titled, "Citation has a statutory right to choose its electric supplier notwithstanding the terms of the SAA." Section II.A is titled, "Applicability of the Consumer Choice Law." In Section II.B, Citation states that in 1997 the General Assembly enacted the Electric Service Customer Choice and Rate Relief Act of 1997 ("Customer Choice Law" or "CCL"), 220 ILCS 5/16-101 et. seq. The stated purpose of the CCL was to introduce competition into the Illinois electricity market, 220 ILCS 5/16-101(A)(b). (Cit IB at 6)

The CCL became effective December 16, 1997, and required large electric utilities like IP to provide "delivery services" to certain sized customers on or before October 1, 1999, 220 ILCS 5/16-104(a). (Cit IB at 7)

Citation states that it was "a retail customer of IP on October 1, 1999, i.e., Citation was receiving and it was eligible to receive tariffed delivery services from IP at the Texas Substation within the meaning of Sec. 16-102." (Cit IB at 9)

Citation claims it "has a valid statutory property interest to choose its electric supplier (220 ILCS 16/104 and 16-101(A)) that the Commission is not authorized to curtail or abolish" which preempts any SAA contract dispute between Tri-County and Ameren. (*Id.* at 9-10)

Citation submits that 220 ILCS 5/9-102 requires public utilities such as Ameren to file tariffs with the Commission and Ameren has a delivery tariff that Citation subscribes to for delivery services. (*Id.* at 10)

In Section II.B, Citation argues, "Citation owns the electricity and has the right to use it without interference from TCEC." (Cit IB at 10) Citation contends that the CCL gave Citation the property right to buy electricity from an ARES, and as owner of that right and of the electricity, Citation had the right to use the electricity for its own purposes in any way it wanted. (*Id.* at 11)

In Section II.C, Citation argues that “the SAA cannot be interpreted to deprive Citation of its property.” (Cit IB at 12) Citation states that Tri-County is a cooperative, and the CCL “does not apply to cooperatives (220 ILCS 5/17-110) unless the cooperative files a Notice of Election with the Commission to allow the customer access to an ARES (220 ILCS 5/17-200(b)).” (Cit IB at 12) Citation submits that without the election, the customer of a cooperative is required to receive bundled electric service and cannot purchase power from an ARES, and Tri-County’s prayers for relief request the Commission to determine that Tri-County has the exclusive right to provide all electricity to the gas plant and compressors. (Cit IB at 12)

If the Commission were to declare Tri-County to be the electric provider for the gas plant and the seven compressors, Citation recommends that certain conditions be imposed, including “TCEC waiving its exemption under Sec. 17-100 and allowing Citation the option to purchase power for the gas plant and 7 compressors from an ARES as set forth in 220 ILCS 17-200.” (Cit IB 15)

In Section II.D of its initial brief, Citation contends “TCEC seeks relief that would unconstitutionally impair the obligation of contracts.” Citation argues that under the CCL, a non-residential consumer has the right to choose its electric supplier, that Citation is currently under a contract to purchase electricity for the Salem Unit from AEM which includes the gas plant and 7 compressors, and that to impair that right would violate the Contracts Clauses of the United States and Illinois Constitutions. (Cit IB at 15-16, citing U.S. Const. Art I, Sec 10)

In Section II.E, Citation argues, “If there is a conflict between the ESA and CCL, then the CCL prevails” because it is the more specific and the more recent statutory provision. (Cit IB at 17-21)

In Section II.F, Citation argues that “the Commission does not have the authority to annul Citation’s right to choose its electric supplier.” Citation asserts that “no statute allows the Commission to abrogate Citation’s right to choose an ARES.” (Cit IB at 21)

In its BOE, Citation takes exception to the PO determination that Citation does not have a statutory right to choose its electric supplier under the CCL. Citation complains that, even if the finding were necessary, the finding is written such that it is ambiguous. Citation proposes language that, it states, would clarify the finding.

B. Tri-County Response

In Section II.A of its reply brief to the Citation IB, Tri-County argues that the clear provisions of the Electric Service Customer Choice and Rate Relief Act of 1997 exclude rural electric cooperatives and municipal electric systems from the Act. (Tri 2B at 4)

Tri-County argues, “Not only are electric cooperatives excluded from the [CCL] Act (220 ILCS 15/17-100), the [CCL] specifically states it shall not be construed to conflict

with the rights of an electric cooperative as declared in the Electric Supplier Act (220 ILCS 5/17-600)." (Tri 2B at 4-5)

That is, "It is very clear the Legislature did not intend to apply the [CCL] and its 'customer choice' provisions to consumers of electric cooperatives unless the governing board of the electric cooperative authorized the same (220 ILCS 5/17-200) and it is clear Tri-County Electric Cooperative, Inc. as an electric cooperative has not made that election." (Tri IB at 47-48, citing Tri Ex. H at 6-8; Tr. 498)

Tri-County states that Citation contends the CCL defines "delivery services" as those services provided by an "electric utility" (220 ILCS 5/16-104(a)) and have to be provided to all non-residential customers by December 31, 2000. In response, Tri-County asserts that it is not by definition an "electric utility" under the CCL.

Section 5/16-102 of the Act defines "electric utilities" as a "public utility" as defined in 220 ILCS 5/3-105(b)(3) which in turn excludes electric cooperatives as defined in the Electric Supplier Act (220 ILCS 5/3-105(b)(3); 5/3-119, and 220 ILCS 30/3.4). Tri-County further submits, "Not only are electric cooperatives excluded from the [CCL] (220 ILCS 15/17-100), the Act specifically states it shall not be construed to conflict with the rights of an electric cooperative as declared in the [ESA] (220 ILCS 5/17-600)." (Tri 2B at 4-5)

In Section I.D of its reply to Citation's initial brief, Tri-County argues that even if Citation has a right under the CCL to receive electricity from an ARES, the right is conditioned by the statute upon Ameren being the appropriate electric supplier to provide electric service to Citation. The right of Ameren to continue to provide electric service to the Citation gas plant and seven of the eight gas compressor sites is dependent upon which of Tri-County or Ameren has that right under the ESA and the Tri-County/IP Commission-approved SAA. (Tri 2B at 8-9)

Tri-County states that Citation's claim to a property interest in the right to purchase electricity from an ARES is based solely on the provisions of the CCL that govern "public utilities" such as Ameren, and that Citation ignores those provisions of the CCL that govern the right of customers of electric cooperatives and municipal electric systems to purchase electricity from an ARES. Tri-County asserts that the CCL is clear and precise on what a customer's rights are in that regard (220 ILCS 5/17-100, 17-200 and 17-600), and it does not give Citation an absolute right to purchase electricity from an ARES when Citation is a customer of Tri-County, an electric cooperative. Tri-County argues, "Since the [CCL] does not provide Citation with such absolute right, Citation cannot claim the [CCL] provides Citation with a statutory property interest to purchase electricity from an ARES." (Tri 2B at 9, 13)

In Section II.G, in response to arguments in Section II.C of Citation's initial brief, Tri-County states that there is no evidence in the record that Citation asked Tri-County if it would allow Citation to purchase energy for the gas plant and gas compressors from an ARES. Thus, Citation's argument on this point is speculation. The issue of who is the appropriate electric supplier for the gas plant and gas compressor has yet to be decided.

According to Tri-County, not until that is decided can any consideration be given to elections under 220 ILCS 5/17-200 by Tri-County regarding Citation's purchase of power from an ARES. (Tri 2B at 14)

In Section II.J, Tri-County responds to Citation's contention on page 15 of its initial brief that if the Commission were to declare Tri-County to be the electric provider for the gas plant and the seven compressors, certain conditions should be imposed, including "TCEC waiving its exemption under Sec. 17-100 and allowing Citation the option to purchase power for the gas plant and 7 compressors from an ARES as set forth in 220 ILCS 17-200."

Tri-County responds that none of the requests for conditions "are within the jurisdiction of the Commission to award or order performed" and none are supported by the evidence. (Tri 2B at 17-18)

In Section II.K of its reply to Citation's initial brief, Tri-County responds to Citation's argument in Section II.D of Citation's IB that "TCEC seeks relief that would unconstitutionally impair the obligation of contracts."

Tri-County responds that Citation knowingly entered into the ARES contracts and now "brazenly" claims a Commission decision awarding service rights to the gas plant and the gas compressor sites will unconstitutionally impair its ARES contract. The contract Citation claims would be unconstitutionally impaired post-dates the Electric Supplier Act, the Tri-County/IP SAA, and the litigation in this docket. Tri-County argues, "Therefore, the application of the [ESA] and the Tri-County/IP [SAA] to the issues in this docket cannot possibly impair Citation's ARES contract because the [ESA] predates Citation's ARES contract." Tri-County further argues, "As noted in *Commonwealth Edison v [ICC]* 398 Ill App 3d 510 ... 338 Ill. Dec. 539, 561 (2009) '...the underlying purpose of the contract clause is to protect the expectations of persons who enter into contracts from the danger of subsequent legislation.' Citation points to no legislation which was adopted after December 2008 and which will be applied by the Commission to the issues in this docket." (Tri 2B at 19-20)

In Section II.E of its IB, Citation argues, "If There is a conflict between the ESA and CCL, then the CCL prevails." (Cit IB at 17)

In Section II.L of its reply brief, Tri-County responds that there is no conflict between the CCL and the ESA. (Tri 2B at 21) According to Tri-County, Citation cannot point to any provision of the CCL that authorizes Citation as a customer of Tri-County to unilaterally choose its electric supplier. Tri-County argues, "In fact, the [CCL] specifically provides to the contrary unless Tri-County elects to allow its customers to purchase power from an ARES (220 ILCS 5/17-100 and 5/17-200)." Tri-County adds, "In so doing the Legislature put in place a statutory scheme that recognized the inherent differences between rural electric cooperatives and municipal electric systems on the one hand and electric utilities on the other hand...." (Tri 2B at 24)

Tri-County submits that the subject matter of the ESA deals only with electric supplier service territories and the assigning of rights of electric suppliers to serve customers in those territories. Tri-County concludes, "Thus, the two statutes 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." (Tri 2B at 25)

In Section II.B of its initial brief, Citation argues that the Commission does not have the authority to annul Citation's right to choose its electric supplier.

In Section II.M of its reply brief, Tri-County responds that the Commission has the specific power under the ESA to approve and interpret the SAA Agreement at issue in this docket. (Tri 2B at 25)

According to Tri-County, Citation's right to choose an ARES under the CCL is not the issue in this docket. The issue is which of Tri-County or Ameren is entitled to serve Citation's gas plant and gas compressor sites in Tri-County's service territory. In Tri-County's view, because that is the only issue, the Commission has authority to decide the same. (Tri 2B at 24-25, citing 220 ILCS 30/2 and 30/6) Tri-County further asserts that if the Commission determines Tri-County is the appropriate electric supplier, the Commission will not abrogate Citation's right to purchase power from an ARES. Tri-County argues, "Rather, Citation's right to purchase power from an ARES under the [CCL] will be a matter between Tri-County and Citation and beyond the purview of the Commission. That is the regulatory structure established by the Legislature and the Commission will not be exerting any authority over the subject matter of that transaction (220 ILCS 5/17-500)." In this docket, the Commission is requested to render an order regarding the appropriate electric supplier, not whether Citation can choose its power provider under the CCL. (Tri 2B at 25)

In its RBOE, Tri-County supports the PO finding that Citation does not have a statutory right to choose its electric supplier under the CCL notwithstanding the terms of the SAA. Tri-County offers that, to the extent there is ambiguity in the finding, it could be reworded to observe that Citation is Tri-County's customer at the office site.

XI. COMMISSION ANALYSIS AND CONCLUSIONS

A. Background

On March 18, 1968, Illinois Power Company, n/k/a Ameren Illinois, and Tri-County Electric Cooperative entered into a Service Area Agreement ("SAA") pursuant to the Electric Supplier Act. They did so "for the purpose of defining and delineating, as between themselves, service areas in which each is to provide electric service." The Agreement was approved by the Commission on July 3, 1968.

In the instant proceeding, Tri-County filed a complaint against Ameren Illinois pursuant to the Electric Supplier Act, and then an amended complaint which was further amended in 2012.

The Ameren Texas Substation was built in 1952 and is located within the service area assigned to Tri-County in the SAA. Approximately 90 percent of the Salem Oil Field, now operated by Citation, is also located within the service area assigned to Tri-County in the SAA. On the surface, the Salem field encompasses approximately 14 square miles. The Citation gas plant and the seven compressors at issue in this proceeding were built or installed by Citation in 2005 and are also located within the service area assigned to Tri-County in the SAA.

After it became the Salem Unit Operator in 1952, Texaco constructed its own electric distribution system in the Salem Unit and operated that system until the unit was sold to Citation in 1998. Pursuant to contracts beginning in 1955, IP provided electrical power to Texaco at a connection point at the Texas Substation. From there Texaco continuously distributed the power, over its own distribution system, to its electrical equipment at numerous sites, in the Salem field, that were located in the area that was eventually assigned to Tri-County in the SAA in 1968.

After the SAA went into effect in 1968, nothing changed with respect to the arrangement described above. That is, Texaco continued to use its distribution system to distribute electricity, obtained from IP at the Texas Substation, to the Salem Oil Field facilities, including new wells, located in the area assigned to Tri-County.

In approximately December of 1998, Texaco sold the Salem Unit to Citation. The sale included the electrical energy distribution system that Texaco built and operated. Citation and IP entered into an electrical service contract on December 14, 1999 and again on December 14, 2004. As Texaco had done, Citation used the distribution system to distribute electricity, obtained from AmerenIP at the Texas Substation, to the Salem Oil Field facilities located in the area assigned to Tri-County.

The record indicates that from January 1, 1970 to 2010, the Salem Unit Operator, Texaco and then Citation, drilled, completed and connected at least 98 new producing oil wells, and two electrified central pumping stations, to their existing electric distribution system. The Salem Unit Operator, Texaco and then Citation, used its distribution system to distribute electricity, received at the Ameren Texas Substation, to those new wells and facilities situated in the Tri-County service area. Tri-County has not served any of those facilities other than the Citation office complex at any time.

B. Analysis

The current dispute arose when Citation constructed a gas plant and seven compressors in Tri-County's territory and rebuilt and extended its distribution line so that it could move electricity from the Texas Substation to the new gas plant.

Section 3(a) of the SAA provides, in part, "Except as otherwise provided in or permitted by this Section ..., each party shall have the exclusive right to serve all customers whose points of delivery are located within its Service Area and neither party shall serve a new customer within the Service Areas of the other party." (Tri Ex. A-1)

Section 3(b) of the SAA provides, "Each party shall have the right to continue to serve all of its existing customers and all of its existing points of delivery which are located within a Service Area of the other party on the effective date."

Section 1(b) of the SAA provides, "'Existing customer' as used herein means a customer who is receiving electric service on the effective date hereof."

Section 1(c) provides, "'New customer' as used herein means any person, corporation, or entity, including an existing customer, who applies for ... electric service at a point of delivery which is idle or not energized on the effective date of this Agreement."

Section 1(d) states, "'Existing point of delivery' as used herein means an electric service connection which is in existence and energized on the effective date hereof. Any modification of such electric service connection after the effective date hereof by which an additional phase or phases of electric current are added to the connection, shall be deemed to create a new point of delivery."

Tri-County focuses on the term "delivery point" or "point of delivery" as used in Section 3 of the SAA. In Tri-County's view, the point where the Citation distribution system connects with and takes power from the Ameren system at the Ameren Texas Substation is not a point of delivery under the SAA.

Relying primarily on the testimony of consulting electrical engineer Robert Dew, and to some degree on other engineering witnesses, Tri-County contends that a "point of delivery" as customarily used within the electric utility industry normally consists of a step-down or distribution transformer located adjacent to the site where the customer intends to utilize the electricity so that the electricity received from the 12.47 kV distribution line can be reduced to a voltage usable by the customer's facilities at the site.

Therefore, in Tri-County's view, each of the step-down transformers and associated apparatus located adjacent to the Citation gas plant and to each of the gas compressor sites which are used to reduce the 12.47 kV on the Citation-owned distribution line to 277/480 volts for use by the electric facilities at the gas plant and gas compressor sites constitute new "delivery points" within the meaning of the March 18, 1968 SAA. Tri-County argues, "Consequently, Citation, as an existing customer of IP, becomes a 'new customer' by reason of establishing the new electric points of delivery that did not exist on March 18, 1968." (Tri IB at 30-31) As such, Ameren would not be entitled to any alleged grandfather protections under Section 3(b).

In somewhat of a preliminary argument, Ameren asserts that the phrase "point of delivery" as used in the SAA is clear and unambiguous, and therefore, the extrinsic evidence in the form of opinion testimony from Mr. Dew must be ignored. In arriving at its interpretation of the phrase, Ameren essentially strings together dictionary definitions for each of the individual words in the phrase. The record shows, however, that Ameren, and Citation, also introduced extrinsic evidence to interpret the phrase "point of delivery," such as definitions in tariffs and other contracts, Ameren engineering testimony and

"practical construction" or "course of conduct" contentions that Tri-County "stood by for 37 years" while Texaco and Citation repeatedly extended the distribution system to new pumps for 98 new wells. Ameren's argument that Mr. Dew's testimony must be ignored while Ameren's own extrinsic evidence should be considered is not consistent and will not be adopted. Accordingly, his testimony will be duly considered along with the other evidence and arguments in the case, as will evidence adduced by Tri-County regarding statements by AmerenIP employees prior to the construction of the Citation gas plant and compressors.

Having reviewed the record, the Commission finds that the point at the Ameren Texas Substation where Citation's distribution system connects to and takes power from the Ameren system is a "point of delivery" under Section 3(b) of the SAA. While Tri-County's competing interpretation of point of delivery is well explained in its testimony and briefs, and warrants consideration, the Commission believes that application of it to the circumstances in this case would produce a result that was not intended by the parties to the Agreement at the time it became effective.

As noted above, at the time the SAA took effect, IP was providing electricity to Texaco, by means of the point of connection at the Texas Substation. From there the power was distributed by Texaco over its distribution system to sites, both new and existing, that were located in areas within the Salem Oil Field which were assigned to Tri-County in the SAA. To accept Tri-County's interpretation of point of delivery as used in the SAA would mean the parties intended to immediately preclude IP from continuing its long-standing practice of supplying electricity to Texaco, at the Texas Substation, for distribution by Texaco to new wells and pumps sited in Tri-County's area.

Such an interpretation is undermined by the actions or conduct of Ameren and Tri-County after the SAA took effect. Texaco simply continued to do what it had been doing, i.e., using its distribution system to distribute electricity, obtained from IP at the Texas Substation, to the Salem Oil Field facilities located in the area assigned to Tri-County. Presumably, if Tri-County believed the newly signed SAA was intended to put an end to such deliveries into what had just become its service area, its management then in place would have made that position known, but it did not. From then, 1968, until 2005 and thereafter, IP continued to supply Texaco and then Citation with electricity at the Texas Substation, for delivery by Texaco and Citation to at least 98 new oil wells and associated pumping equipment in the Tri-County area of the Salem field, all without resistance from Tri-County until it objected in 2005.

Given these practical construction considerations, it appears Ameren's point of connection with the Salem operator's distribution system at the Texas Substation was intended by the parties to the SAA to be considered a point of delivery under the grandfather clause in Section 3(b). Inasmuch as the dispute in the current case similarly involves the movement of electricity by Citation, over its own distribution system, from the connection point at the Texas Substation -- where it takes the electricity from Ameren -- to Citation facilities in the Salem Oil Field, it is reasonable to treat the connection as a point of delivery under those grandfather provisions in Section 3 of the SAA.

The Commission also agrees with Ameren that the *MJM* decision in Docket 93-0150, relied upon by Tri-County, involved different facts and does not defeat Ameren's grandfather rights in Section 3(b) of the SAA. In *MJM*, unlike the present case, the customer did not operate its own electric distribution system and neither supplier in *MJM* had served the property for a 13-year period preceding the connection which gave rise to the dispute.

The Commission also believes the *Unimin* decision in Docket 88-0276, cited by Tri-County is distinguishable. There is no indication that the parties to the service area agreement in *Unimin*, or in *MJM*, engaged in a practical construction of those agreements similar to that applied by the parties in the instant case, which involves a sprawling oilfield operation where the Citation distribution system has been used for decades to move electricity from the Texas Substation to numerous and constantly evolving well sites in Tri-County's area, as described above.

As noted above, Section 1(d) of the SAA states, "Existing point of delivery' as used herein means an electric service connection which is in existence and energized on the effective date hereof." It then states, "Any modification of such electric service connection after the effective date hereof by which an additional phase or phases of electric current are added to the connection, shall be deemed to create a new point of delivery." (Emphasis added)

Tri-County argues that if the Ameren Texas Substation is determined to be the delivery point of electric service for the Citation Salem Oil Field -- which Tri-County disputes as explained above -- then Ameren "has modified its Texas substation such that it constitutes a new point of delivery." (Tri IB at 42) In making this "modification" argument under Section 1(d) of the SAA, Tri-County contends, and the Commission agrees, that Tri-County has not conceded or waived any of its other positions in the case.

Tri-County witness Mr. Dew testified there have been numerous "modifications" to the Texas Substation since the 1968 Service Area Agreement which have enabled Ameren to serve additional electric loads for customers through the Texas Substation. Mr. Dew opined that each time Ameren modifies its Texas Substation so that it can serve additional load, whether for an existing customer or a new customer, it creates a new point of delivery or a new service connection point at the Texas Substation within the engineering meaning of Section 1(d) of the Agreement.

Ameren states that Mr. Dew's position, if correct, would arguably nullify an otherwise "existing point of delivery" and defeat a Section 3(b) grandfather right to continue to serve what would otherwise constitute "existing points of delivery ... located within a Service Area of the other party...." (Am IB at 21-22)

Ameren argues, and the Commission agrees, that no "modification" as defined in Section 1(d) of the SAA, whereby "an additional phase or phases of electric current are added to the connection," has occurred. Simply stated, there have been no additional phases of electric current added to the three-phase connection that was in place at the

time the SAA took effect. Therefore, any otherwise applicable grandfather rights under Section 3(b) have not been relinquished.

Tri-County witnesses also testified that they interpreted Citation's discussions and other communications as a "request" by Citation for electric service for the gas plant. If Tri-County is actually claiming Citation made such a request, that position is not supported by the record. As explained by Ameren, Tri-County and Citation had discussions and other communications and Tri-County provided an estimate of the cost to extend Tri-County's electric facilities to the gas plant, but Citation did not communicate any acceptance of that offer to construct the line or otherwise request such service, and Tri-County did not begin construction of any such line or take similar actions relating thereto.

C. Other Arguments

Ameren and Citation also refer to testimony by Mr. Lewis of Citation that for safety reasons, Citation prefers that the supplier of electricity to the gas plant is the same as the supplier of electricity to the wells. In reaching its decision in this case, the Commission has not given consideration to this argument. First of all, Tri-County has explained that Citation already has in place safety mechanisms to protect its equipment when outages occur on a particular circuit shutting down one or more gas wells or the gas plant or vice versa. Further, the Commission is called upon by the Electric Supplier Act to determine rights, under the SAA, as between the parties to the SAA. The parties to the SAA are Tri-County and Ameren. The preferences of Citation for one supplier or the other, and the reasons for those preferences, are not part of that analysis.

In its brief, Citation also briefly argues that Tri-County's complaint should be barred under the theories of waiver and laches. The Commission notes that the parties to the SAA are Tri-County and Ameren. Citation does not explain how it, as a non-party to the SAA, has standing to assert that Tri-County's rights under its agreement with Ameren have been waived.

Citation also argues in its brief that Tri-County should have named Citation as a necessary party to the proceeding, and should now be barred and estopped from asserting its rights in the proceeding. As noted by Tri-County, Citation was well aware of the dispute and of the filing of Tri-County's complaint. Citation employees were also witnesses for Ameren. Citation could have filed a petition for leave to intervene at that time but chose not to, relying instead on Ameren. Also, Citation cites no Commission ESA proceeding where the customer was named as a "necessary party." Citation's position that Tri-County should be barred from asserting its rights under its SAA with Ameren will not be adopted.

D. Customer Choice Law

Citation also contends that it has a statutory right to choose its electric supplier under the Electric Service Customer Choice and Rate Relief Act of 1997 ("Customer

Choice Law" or "CCL"), 220 ILCS 5/16-101 et seq., "notwithstanding the terms of the SAA" between Ameren and Tri-County. The CCL is part of the Public Utilities Act ("PUA").

In response, Tri-County argues that the clear provisions of the CCL exclude rural electric cooperatives and municipal electric systems from the Act.

Tri-County argues, "Not only are electric cooperatives excluded from the [CCL] (220 ILCS 5/17-100), the [CCL] specifically states it shall not be construed to conflict with the rights of an electric cooperative as declared in the Electric Supplier Act (220 ILCS 5/17-600)." (Tri 2B at 4-5)

That is, "It is very clear the Legislature did not intend to apply the [CCL] and its 'customer choice' provisions to consumers of electric cooperatives unless the governing board of the electric cooperative authorized the same (220 ILCS 5/17-200) and it is clear Tri-County Electric Cooperative, Inc. as an electric cooperative has not made that election." (Tri IB at 47-48)

Having reviewed the arguments, the Commission agrees with Tri-County that the CCL, by its own terms, was not intended to impair the rights afforded to electric cooperatives in the ESA.

Section 17-100 of the CCL, cited by Tri-County, states, in part, "Electric cooperatives, as defined in Section 3.4 of the Electric Supplier Act ... shall not be subject to the provisions of this amendatory Act of 1997, except as hereinafter provided in this Article XVII."

Section 17-600, also cited by Tri-County, provides, "Except as expressly provided for herein, this Article XVII shall not be construed to conflict with the rights of an electric cooperative or a municipal system as declared in the Electric Supplier Act or as set forth in the Illinois Municipal Code or the public policy against duplication of facilities as set forth therein."

As also indicated by Tri-County, Section 17-200(a) provides, in part, "An electric cooperative or municipal system each may, by appropriate action and at the sole discretion of the governing body of each, from time to time make one or more elections to cause one or more of the existing or future customers of each respective system to be eligible to take service from an alternative retail electric supplier for a specified period of time."

As explained by Tri-County, such elections are made at the "sole discretion of the [cooperative's] governing body," and Tri-County has not made such an election. Accordingly, Citation's argument that it has a statutory right to choose its electric supplier under the CCL "notwithstanding the terms of the SAA" is not correct and will not be adopted.

E. Conclusion

For the reasons explained in Section X.B above, Tri-County's Amended Complaint against Ameren Illinois under the Electric Supplier Act should be denied as hereinafter set forth.

XII. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein, is of the opinion and finds that:

- (1) the Commission has jurisdiction over the Parties and the subject matter herein;
- (2) the facts recited and conclusions reached in Section X of this Order above are supported by the record and are hereby adopted as findings of this order; and
- (3) the Complaint as amended should be denied as hereinafter set forth.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Complaint filed and amended by Tri-County Electric Cooperative, Inc. is denied.

IT IS FURTHER ORDERED that all motions, petitions, objections, and other matters in this proceeding which remain unresolved are to be disposed of in a manner consistent with the conclusions herein.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this Order is final; it is subject to the Administrative Review Law.

By order of the Commission this 9th day of March, 2016.

(SIGNED) BRIEN SHEAHAN

Chairman

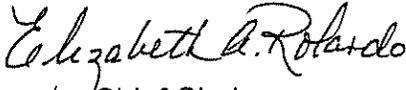
STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION
CERTIFICATE

Re: 05-0767

I, ELIZABETH A. ROLANDO, do hereby certify that I am Chief Clerk of the Illinois Commerce Commission of the State of Illinois and keeper of the records and seal of said Commission with respect to all matters except those governed by Chapters 18a and 18c of The Illinois Vehicle Code.

I further certify that the foregoing is a true, correct and complete copy of the Order made and entered of record by said Commission on March 9, 2016.

Given under my hand and seal of said Illinois Commerce Commission at Springfield, Illinois, on March 10, 2016.


Chief Clerk