

OFFICIAL FILE

ORIGINAL

ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS

COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION FEB 10 A 9:54

CHIEF CLERK'S OFFICE

RURAL ELECTRIC CONVENIENCE )  
COOPERATIVE CO., and SOYLAND )  
POWER COOPERATIVE, INC., )

Complainants-Counter Respondents )

vs. )

DOCKET NO. 01-0675

CENTRAL ILLINOIS PUBLIC SERVICE )  
COMPANY d/b/a AMERENCIPS, )

Respondent-Counter Complainant )

**MOTION TO STRIKE PORTIONS OF THE  
REPLY BRIEF BY INTERVENOR FREEMAN  
UNITED COAL MINING COMPANY FILED  
JANUARY 31, 2003 OR FOR LEAVE TO FILE  
REBUTTAL THERETO**

RURAL ELECTRIC CONVENIENCE COOPERATIVE CO., (RECC) Complainant-Counter Respondent by its attorneys GROSBOLL, BECKER, TICE & REIF, Jerry Tice of counsel, pursuant to 83 Ill Adm Code 200.800 moves to strike portions of the Reply by FREEMAN UNITED COAL MINING COMPANY, (Freeman) filed January 31, 2003 or in the alternative, requests leave of the Illinois Commerce Commission (Commission) and the Administrative Law Judge (ALJ) to file a Rebuttal Brief to the Reply of Freeman filed January 31, 2003 and in support thereof states as follows:

1. In the initial Motion for Summary Judgement filed by Freeman, Freeman presented the following arguments:

A. That the Freeman Crown III mine consists of 17,500 acres of underground coal reserves surrounding the 810 surface acres owned by Freeman which include reserves under

the Arnold premises and therefore the Freeman Crown III mine is a continuing underground mining operation (Affidavit of Michael Coldwell) (p 10, 11, 12, 17 of Freeman's Motion). It should be noted that Freeman has not supported such claim with any documents providing the description of or location of the coal reserves.

B. That the "...Crown III Mine and the borehole at the Arnold premises is nothing more than the natural evolution and the development of the same mine at its underground location." Freeman cited the statutory definition of a coal mine found in 220 ILCS 705/1.03 to support this claim. However the statutory definition of a coal mine does not speak of "premises" or "locations".

C. That the Commission decision in ESA 187 regarding electric service to the main Crown III Freeman mine in said Section 1, Nilwood Township, Macoupin County, Illinois is res judicata as to the issues presented in this docket because the Crown III mine at said Section 1, Nilwood Township, Macoupin County, Illinois, and the lime injection/air shaft/borehole at the Arnold premises are part of one mining operation.

2. Freeman did not, in its Motion for Summary Judgment and initial argument claim that the underground coal interests of Freeman constituted a separate "premise" and/or "location" from that of the surface within the meaning of "premises" and or "location" as defined by the Illinois Electric Supplier Act (Act) which connected the lime injection/air shaft/borehole at the Arnold premises with the Crown III main mine in Section 1 Nilwood Township, Macoupin County, Illinois. The definitions of "premises" and "location" as defined by 220 ILCS 30/3.12 and Coles-Moultrie Electric Cooperative v. Illinois Commerce Commission 76 Ill App 3d 165; 394 NE 2d 1068; 31 Ill Dec 750 (4<sup>th</sup> Dist. 1979) (Coles-Moultrie) refer to the surface of the land by defining premises as physical locations except

where separated by intervening public or private rights of way or easements. It is obvious that no private rights of way or easements or other divisions of land such as public roads or subdivisions exist underneath the surface of the land.

3. Freeman, in its reply to RECC's response to the Freeman Motion for Summary Judgment, raises for the first time the following arguments:

A. That the underground mineral interests of Freeman constitute a "premises" and/or "location" within the meaning of Section 30/3.12 of the Act and the Coles-Moultrie case and that such underground "premise" connects the lime injection/air shaft/borehole on the Arnold premises with the main Crown III mine located in Section 1, Township 11 North, Range 6 West, of the 3<sup>rd</sup> P.M. Nilwood Township, Macoupin County, Illinois.

B. At page 6 of Freeman's reply under the heading RES JUDICATA BARS RECC'S COMPLAINT Freeman reasons that the underground coal mineral interests constitute "premises" and/or "locations" and again at page 7 claims that the Freeman mine is a "geographically connected area" and that the mine

"...is a single premises in its own right, and, as a definition of premises 'suggests', electric service to the Crown III Mine can be at more than one point of delivery and still be to the same premises."

C. That the service connection point at the lime injection/air shaft/borehole located on the Arnold premises is simply a second service connection point located on the same "premises" as the Crown III main mine in Section 1, Nilwood Township, Macoupin County, Illinois. (p 7 Freeman's Reply Argument). In doing so, Freeman misapplies the Electric Supplier Act which authorizes more than one service connection point by different suppliers to this same "premises" and/or "location" under Section 8 of the Act for the reason Section 8 electric service is determined primarily on the basis of proximity of July 2, 1965 lines to the

“premise” or “location”.

D. Freeman argues for the first time at the bottom of page 8 of its Reply that:

“The Crown III Mine constitutes a single underground tract that connects the main shaft and the borehole.”

E. Freeman further argues at page 9 and 10 of the Reply Brief that “pragmatically applied, the Crown III Mine is a single property right or premises.” (Freeman Reply Argument p 10).

F. Freeman again argues at pages 12-13 of its Reply Brief that Freeman was merely extending its lines underground in developing the Crown III mine as a separate premises.

4. By raising such argument in Freeman’s Reply to RECC’s Response to the Summary Judgment Motion, Freeman raises a new legal theory to support its contention that the Crown III main mine at which electric service is received and the borehole at the Arnold premises at which electric service is also received are one mining operation. Thus Freeman reasons for the first time in its reply that the underground mineral interests satisfy the definition of “premises” and/or “location” and create one “premises” for purposes of the Electric Supplier Act.

5. With respect to briefs, points not argued in the Initial Brief are waived and shall not be raised in a Reply Brief (Supreme Court Rule 341(e)(7)). Simply stated all arguments not raised in the opening brief are waived. (See Jordan v Civil Service Commission 246 Ill App 3d 1047; 617 NE 2d 142; 186 Ill Dec 903, 905 (1<sup>st</sup> Dist. 4<sup>th</sup> Div. 1993) where the court held that failure of Plaintiff to address Count III of the Amended Complaint in Plaintiff’s opening brief resulted in the application of the foregoing rule that all arguments not raised in the opening brief are waived). Thus, the failure of Freeman to present in its opening brief the legal point that underground mineral interests comprise “premises” and/or “locations” within

the meaning of Section 30/3.12 of the Act and the Coles-Moultrie decision prevents Freeman from raising such point as a new legal theory for supporting its Motion for Summary Judgment in its Reply Brief. Further, even if Freeman could conceivably be deemed to have raised the “premises” argument by claiming the Crown III mine is a continuous underground mining operation, the failure of Freeman to support such argument with the contention that its underground mineral interests comprise a “premises” and/or “location” for purposes of the Electric Supplier Act together with appropriate citation of authority therefore bars Freeman from raising such claim in its Reply Pyskaty v Oyama 266 Ill App 3d 801; 641 NE 2d 552; 204 Ill Dec 328, 344 (1<sup>st</sup> Dist. 1<sup>st</sup> Div. 1994).

WHEREFORE, RECC requests the following relief from the Commission:

A. To strike the following points and arguments raised by Freeman in its Reply Brief in Support of the Motion for Summary Judgment:

- (1) The Crown III mine and all its underground mineral interests constitute a single “premises” within the meaning of the Act.
- (2) The Crown III main mine in Section 1, Nilwood Township, Macoupin County, Illinois and the lime injection/air shaft/borehole at the Arnold premises constitute a single “premises” and/or “location” within the meaning of the Electric Supplier Act by reason of the underground mineral interests of Freeman.
- (3) As a single premises in its own right the electric service to the Crown III mine can be at more than one point of delivery on the same premises and served by the same electric supplier.

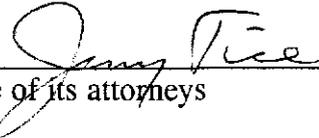
B. In the alternative to allow RECC to file a Rebuttal Brief to the Reply to RECC’s

Brief by Freeman in support of Freeman's Motion.

C. For such other and further relief as the Commission deems just and appropriate.

RURAL ELECTRIC CONVENIENCE  
COOPERATIVE, CO., Complainant-Counter  
Respondent

By: GROSBOLL, BECKER, TICE & REIF

By:   
One of its attorneys

GROSBOLL, BECKER, TICE & REIF  
Attorney Jerry Tice  
101 East Douglas Street  
Petersburg, Illinois 62675  
Telephone: 217/632-2282  
Fax: 217/632-5189  
reccmotstrikefreemanbrief675.jtrecc

PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the      day of February, 2003, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the document attached hereto and incorporated herein, addressed to each of the following persons at the addresses set opposite their names:

Mr. Scott Helmholz  
Brown Hay & Stephens  
205 S. 5<sup>th</sup>  
Suite 700  
Springfield, IL 62701

Gary Smith  
Loewenstein, Hagen & Smith P.C.  
1204 S 4<sup>th</sup> St.  
Springfield, IL 62703

Don Woods  
Administrative Law Judge  
Illinois Commerce Commission  
527 E. Capital St.  
Springfield, IL 62705

Greg Rockrohr  
Engineering Staff  
Illinois Commerce Commission  
527 E. Capital St.  
Springfield, IL 62701-1827

  
\_\_\_\_\_

GROSBOLL, BECKER, TICE & REIF  
Attorney Jerry Tice  
101 E. Douglas  
Petersburg, IL 62675  
Telephone: 217-632-2282