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RURAL ELECTRIC CONVENIENCE)
COOPERATIVE CO., and SOYLAND)
POWER COOPERATIVE, INC.,)
)
Complainants-Counter Respondents,)
)
vs)
)
CENTRAL ILLINOIS PUBLIC SERVICE)
COMPANY d/b/a AMERENCIPS,)
)
Respondent-Counter Complainant.)

Docket No. 01-0675

BRIEF ON EXCEPTIONS BY RURAL ELECTRIC CONVENIENCE
COOPERATIVE CO. TO THE ADMINISTRATIVE LAW JUDGE'S
PROPOSED ORDER SERVED JULY 17, 2003

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RURAL ELECTRIC CONVENIENCE COOPERATIVE CO. (RECC)

Complainant/Counter Respondent herewith files its brief on exceptions to the proposed order filed by the Administrative Law Judge Donald L. Woods in the above matter on July 17, 2003 and in support thereof states as follows:

- I. III. POSITIONS OF THE PARTIES
- A. FREEMAN
- 1. The Facts (commencing at page 3)

EXCEPTION NO. 1:

RECC takes exception to the reference of "The Facts" by Freeman as paraphrased in the proposed order as being undisputed facts. Not all of the facts set forth in the proposed order as being "undisputed" are correct. For instance, the following facts are listed incorrectly as "undisputed":

1. The last sentence, first paragraph, page 3 of the proposed order states: “The portion of the Freeman Crown III mine located at the borehole is presently served by a 34.5 kV or higher line by CIPS at the borehole and the mine requires that service.”

ARGUMENT:

That statement is incorrect in that it infers that the borehole in question requires service by a 34.5 kV or higher line. While the affidavit of David Care submitted by Freeman states that the borehole in question requires electric service from a 34.5 kV or higher line, the affidavit of Robert K. Harbour, an electrical engineer serving as Vice-President/Generation and Operations for Continental Cooperative Services submitted by RECC states that, in his opinion, based upon the electric usage billings provided by Freeman to RECC for the lime injection/air shaft borehole at the Arnold Premises, the borehole can be served by existing RECC three phase facilities and does not require service from a 34.5 kV or higher line. Accordingly, the claim by Freeman that the borehole in question must be served by a 34.5 kV or higher line is not an undisputed fact, but is for purposes of the Motion for Summary Judgment, a disputed fact.

2. The first sentence, last paragraph of the proposed order, page 3 states: “For the past 20 years, Freeman has extended its underground electrical distribution system from the main mine shaft in Macoupin County and has mined thousands of acres of underground coal”.

ARGUMENT:

This statement is not supported by any fact in the record. The only facts submitted by Freeman with respect to its Motion for Summary Judgment were the affidavits of David Care and Michael Caldwell. Neither affidavit made such assertion. Accordingly, such fact is not

even of record let alone disputed.

3. The second sentence, last paragraph of the proposed order, page 3 states: "Freeman has, for many years, been mining coal underneath the service area of RECC beyond the original 810 acres of surface area that it owns."

ARGUMENT:

This statement is not supported by any affidavit or fact submitted in the record by Freeman. The only facts submitted by Freeman appear in the affidavits of David Care and Michael Caldwell, neither of which make such assertion. Accordingly, such fact is not in the record let alone disputed.

4. The third sentence, last paragraph , page 3 of the proposed order states: "Freeman asserts that these activities were contemplated and understood at the time ESA 187 was decided because Freeman's underground electric load used in the Crown III Mine is at many places at any one time due to the fact that electric conveyors are used to move the coal from where it is mined to the main mine shaft and lighting and mining machinery are located over several miles underground at any one time."

ARGUMENT:

The only portion of this statement that appears in the record (affidavit of David Care) as a fact is the statement that "lighting and mining machinery in the Crown III Mine are located over several miles of underground area and are in use at any time." None of the rest of that statement referenced by the proposed order as undisputed facts appear in the affidavits of David Care or Michael Caldwell and therefore are outside of the record. Thus, nothing in the record supports the statement in the proposed order that the "...activities.." of Freeman at

the Arnold lime/injection borehole facility "...were contemplated and understood at the time ESA 187 was decided". Frankly, neither that statement or anything close to it appears in the order entered in ESA 187. Further, nothing in the record supports the statement as an undisputed fact that the "...underground electric load used in the Crown III Mine is at many places at any one time". Further, no fact appears in the record as to the location of the electric conveyors or the location of their use. These statements are outside of the record.

EXCEPTION NO. 2:

III. POSITIONS OF THE PARTIES

C. RECC

1. The Facts

Under the above heading, the proposed order at page 12 sets forth facts that RECC asserts in addition to facts asserted by Freeman. This statement of "facts" by the proposed order fails to include all of the facts set forth by RECC in the record.

ARGUMENT:

The facts asserted by affidavit and Exhibits which are part of the record but which the proposed order ignores are:

1. The lime injection/air shaft constructed by Freeman on 3.7 acres located on the "Arnold Premises" consists of an electric substation with transformer and controls, a 100 ton rock dust injection storage facility, and access area (Freeman Motion p. 4, Tom Jones Aff. & Pictures Ex. 3; Freeman response to RECC Data Request, Freeman Jan 16, 2001, Application for Surface Coal Mining and Reclamation Operations attached as Ex. 5 in an envelope marked "Confidential Information" per ALJ proprietary order entered April 26, 2002). It also consists of a separate meter by which the electric service to the facility is metered (Freeman Response

to RECC Data Request providing sample billing attached as Exhibit 7 in an envelope marked "Confidential Information" per proprietary order entered by ALJ April 26, 2002; DeLaby Aff. Ex. 2).

2. All of the surface mine operations and most of the subsurface mine operations are located in the area designated to be served by RECC pursuant to paragraph 2 and the maps of the February 19, 1969 RECC/CIPS Service Area Agreement (See Map designating service areas of RECC and CIPS for the Nilwood Township, Macoupin County, Illinois and Pitman Township, Montgomery County, Illinois, attached to DeLaby Aff. Ex 2; See Excerpt from Crown III Mine production map dated 9/20/02 produced by Freeman in discovery attached to DeLaby Aff. Ex. B).

3. The Crown III Mine main facilities in Section 1, Nilwood Township, Macoupin County, Illinois, consists of a slope for bringing coal to the surface; coal preparation plant; loading site for trucks and rail cars; warehouse; slurry pit; conveyors; and shower and dressing facilities (Jones Aff. Ex 3).

4. CIPS delivers electricity to a service connection point consisting of a meter and substation at the lime injection/air shaft/borehole at the "Arnold Premises" and the electric service is separately metered at the "location' (Harbour Aff. Ex. 4).

EXCEPTION NO. 3:

The balance of the proposed order with the exception of the "COMMISSION ANALYSIS AND CONCLUSIONS" and "FINDINGS AND ORDERING PARAGRAPHS" consists of a restatement of the arguments of RECC and Freeman. Unfortunately, by simply restating virtually word for word those arguments, the proposed order includes certain

statements of facts which RECC contended in its briefs and continues to contend were not a part of the record or conflict with the facts that do exist in the record. For instance, Freeman asserted in its argument the following incorrect facts or facts dehors the record but which the proposed order includes at various pages in the proposed order where Freeman's arguments are simply repeated as follows:

1. In the last paragraph of page 26, the proposed order asserts as an undisputed fact attributed to Michael Caldwell that Freeman holds a permit to mine "all of the Crown III Mine" and Freeman owns the right to mine the thousands of coal underground "consisting of the Crown III Mine".

ARGUMENT:

While his affidavit states Freeman holds a permit to mine and Freeman holds the right to mine thousands of acres of coal underground, that affidavit does not state that the permit is with respect to the Crown III Mine nor does it state that the right to mine the thousands of acres of underground coal refers to the Crown III Mine. The extent of the Freeman mine permit and the extent and location of the underground coal Freeman holds the right to mine are a material issue of fact and there is nothing in the record to answer that question.

2. In the first sentence of the first paragraph of page 27 of the proposed order, a recitation is made that the "Crown III Mine is an intricate interconnected underground area covering several miles".

ARGUMENT:

There are no facts in the record to support that statement, notwithstanding RECC, Exhibit 2B which shows only mined areas and does not reveal "an intricate interconnected

underground area”.

3. In the third sentence of the first paragraph of page 27 of the proposed order, the statement that: “Electric conveyors transport the coal on tracks from the face area where the coal is mined (broken off) back to the main mine shaft (where the coal comes to the surface)” does appear, with the exception of the bracketed portions, in the David Care affidavit.

ARGUMENT:

However, the additional fact that the main mine shaft is located in Section 1, Nilwood Township, Macoupin County, Illinois, and consists of a slope for bringing coal to the surface; coal preparation plant; loading site for trucks and railcars; warehouse; slurry pit; conveyors; and shower and dressing facilities, is also a part of the record and which is not recited by the trier of fact in the proposed order (See affidavit of Tom Jones, RECC Ex. 3).

4. There is no mention of the factual admission by Freeman that the need for or the location of a future borehole such as the Arnold lime injector/air shaft borehole was not discussed, was not an issue, and was not even contemplated at the time service rights to the main mine shaft for Crown III in Section 1, Nilwood Township, Macoupin County, Illinois, were determined in ESA 187.

5. The last sentence in the second paragraph of page 28 stating: “What was clearly known in ESA 187 was that as the 17,500 underground acres of coal mine was developed, the mine could expand to areas under RECC’s surface territory, and CIPS was to (sere) serve the entire mine.”

ARGUMENT:

The order in ESA 187 did not make such a finding, did not state it was “clearly

known” the mine would expand to areas under RECC’s surface territory and did not make a finding or order that CIPS was to serve the entire mine. Quite to the contrary, the Commission in ESA 187 found CIPS was to provide the electric service to the Crown III Mine **IN** Section 1, Nilwood Township, Macoupin County, Illinois. The Commission **DID NOT** find or order CIPS to provide electric service to Crown III at any other location.

6. In the first sentence of the third paragraph at page 29 of the proposed order, the reference is made that: “Applying this test (presumably referencing the Coles-Moultrie definition of "location") to the instant case reveals that the coal rights to Crown III Mine is a legal interest in real estate which is physically separate from the surface area. There are no intervening public or private rights within the mine. The Crown III Mine constitutes one location.”

ARGUMENT:

It is not clear whether this is a statement of fact made by the proposed order or whether it is simply a restatement of the assertion made by Freeman in argument. If in fact it is a statement of fact relied upon by the Administrative Law Judge with respect to the proposed order, it is not supported by the record and is certainly at best a disputed fact not amenable to a motion for summary judgment.

7. In the third sentence of the second paragraph, page 30 of the proposed order, the statement appears: “Here Freeman uses the electricity underground in an area physically separate from RECC’s service area.”

ARGUMENT:

Again, it is impossible to determine if this is intended as a statement of fact based upon

the record, relied upon in determining the proposed order, or whether it is merely a restatement of Freeman's argument. If it is the former, then it omits the fact that Freeman also uses electricity at the surface of the Arnold lime injector/air shaft borehole where the electricity is delivered to Freeman by CIPS at a meter located at a substation which meets the classic "normal service connection point"/ "delivery point" as defined by the Illinois Electric Supplier Act, 220 ILCS 30/3.10.

EXCEPTION NO. 4:

FINDINGS AND ORDERING PARAGRAPHS

Under paragraph (5), at page 46, the proposed order states: "The statements of facts set forth in the prefatory portion of this order are supported by the evidence and are hereby adopted as findings of fact;".

ARGUMENT:

That statement presumably makes reference to the two headings entitled: "1. The Facts." as they appear under the "POSITIONS OF THE PARTIES" with reference to Freeman at page 3 of the proposed order and RECC, page 12 of the proposed order. However, as noted above, those references to "The Facts" are either incomplete or include facts not properly in the record or state certain facts as being undisputed when in fact they are disputed which distinction is highly relevant on a motion for summary judgment. Accordingly, the proposed order does not properly set forth the findings of fact relied upon in determining the proposed order and to the extent the proposed order relies upon "facts" otherwise disputed or dehors the record, the proposed order is incorrect.

SUGGESTED FINDINGS OF FACT:

Since the proposed order fails to set forth the specific undisputed facts relied upon, RECC suggests the following "Findings of Fact" to be included:

UNDISPUTED FACTS:

1. RECC and CIPS are electric suppliers under the Act.
2. The Service Area Agreement dated February 19, 1969 between RECC and CIPS designates certain areas to be served exclusively by each. The "Arnold Premises" is located in the area designated as the exclusive service area of RECC by the Agreement and maps (Freeman Motion p. 4).
 3. Freeman initially denied, but has now admitted that RECC was providing electric service to the "Arnold Premises" on July 2, 1965 (Freeman Motion p. 3).
 4. The lime injection/air shaft constructed by Freeman on 3.7 acres located on the "Arnold Premises" consists of an electric substation with transformer and controls, a 100 ton rock dust injection storage facility, and access area (Freeman Motion p. 4, Tom Jones Aff. & Pictures Ex. 3; Freeman response to RECC Data Request, Freeman Jan 16, 2001, Application for Surface Coal Mining and Reclamation Operations attached as Ex. 5 in an envelope marked "Confidential Information" per ALJ proprietary order entered April 26, 2002). It also consists of a separate meter by which the electric service to the facility is metered (Freeman Response to RECC Data Request providing sample billing attached as Exhibit 7 in an envelope marked "Confidential Information" per proprietary order entered by ALJ April 26, 2002; DeLaby Aff. Ex. 2).
 5. CIPS delivers electricity to a service connection point consisting of a meter and

substation at the lime injection/air shaft/borehole at the "Arnold Premises" and the electric service is separately metered at the "location" (Harbour Aff. Ex. 4).

6. In ESA 187, the Commission authorized CIPS to provide electric service to the Crown III Mine located in Section 1, Nilwood Township, Township 11 North, Range 6 West of the 3rd P.M., Macoupin County, Illinois. The Commission order in ESA 187 did not authorize CIPS to serve any other location of the Crown III Mine.

7. The Crown III Mine main facilities in Section 1, Nilwood Township, Macoupin County, Illinois, consists of a slope for bringing coal to the surface; coal preparation plant; loading site for trucks and rail cars; warehouse; slurry pit; conveyors; and shower and dressing facilities, all of which are surface operations (Jones Aff. Ex 3).

8. All of the surface mine operations and most of the subsurface mine operations are located in the area designated to be served by RECC pursuant to paragraph 2 and the maps of the February 19, 1969 RECC/CIPS Service Area Agreement (See Map of designating service areas of RECC and CIPS for the Nilwood Township, Macoupin County, Illinois and Pitman Township, Montgomery County, Illinois, attached to DeLaby Aff. Ex 2; See Excerpt from Crown III Mine production map dated 9/20/02 produced by Freeman in discovery attached to DeLaby Aff. Ex. B).

DISPUTED FACTS:

1. Whether the lime injection/air shaft located at the "Arnold Premises" is a separate "premises" and/or "location" from the Crown III Main mine facilities located in Section 1, Nilwood Township, Macoupin County, Illinois, and which possesses a separate newly created "normal service connection point" determined in accordance with accepted engineering

practices for providing electric service which is in addition to the service connection point for the main mine facilities.

2. Whether accepted engineering practices requires the lime injection/air shaft at the “Arnold Premises” to be served from a 34.5 kV line or if it does, whether accepted engineering practices requires such a line to be in existence on July 2, 1965 or whether it can be served from a 34.5 kV line in existence post July 2, 1965 (Harbour Aff. Ex. 4).

3. The proximity of RECC existing 1965 lines to the “Arnold Premises” in comparison to the proximity of CIPS existing 1965 lines to the “Arnold Premises” (Stuva Aff. Ex. 1).

4. The additional investment to furnish the facilities necessary to serve the lime injection/air shaft at the “Arnold Premises”.

5. Which of RECC or CIPS was first serving in the area encompassed by the “Arnold Premises”.

6. Which of RECC or CIPS has done more to create the demand for the new service.

7. The customer’s (Freeman) preference for an electric supplier. (Stuva Aff. Ex. 1).

EXCEPTION NO. 5:

The references in the proposed order under the headings of POSITIONS OF THE PARTIES with respect to “The Law”; “Freeman’s Reply”; and “RECC’s Rebuttal” appear to be a verbatim restatement from the briefs filed by the parties as to their respective arguments and rebuttals/replies to the other party’s arguments and therefore, no exception is made by RECC to those portions of the proposed order, except as noted herein where the proposed order appears to adopt Freeman arguments as proof of facts not properly of record or if of

record are disputed.

II. COMMISSION'S ANALYSIS AND CONCLUSION

EXCEPTION NO. 6:

IV. COMMISSION ANALYSIS AND CONCLUSION

The first full paragraph under head note IV "COMMISSION ANALYSIS AND CONCLUSION" found at page 43 of the proposed order, reads as follows:

"The Commission has reviewed the evidence and arguments of the parties and concludes that the Motion for Summary Judgment should be granted on all counts. Our decision is based upon an application of the transactional test to the facts in ESA 187, affirmed by the appellate court, and the undisputed facts set forth in the present case. Also pertinent to our inquiry are the appellate court's decisions in Coles-Moultrie Electric Coop. v. Ill. Com. Com. 76 Ill. App 3d 165 (1979) and the decision in Central Illinois Public Service Co. V. Ill. Com. Com. 202 Ill. App. 3d 567 (1990) ("Southwestern")."

ARGUMENT:

The proposed order is based upon the assumption that the premises of Crown Mine III at the time ESA 187 was decided, February 17, 1982, included the borehole to which electric service is at issue in this case. At the time of that decision, the evidence did not show any contemplation by the then parties that the mine would extend beyond the 810 surface acres involved in the ESA 187 litigation and which was located in Section 1 Nilwood Township, Macoupin County, Illinois. The evidence is quite clear and undisputed that the main mine facilities of the Crown III Mine at the time of ESA 187 and presently are located in Section 1,

Nilwood Township, Macoupin County, Illinois, and consists of a slope for bringing coal to the surface; coal preparation plant; loading site for trucks and railcars; warehouse; slurry pit; conveyors; and shower and dressing facilities (RECC Jones Aff. Ex. 3). Freeman also admitted that no one contemplated or that there even existed plans for the Arnold lime injection/air shaft borehole at the time of the proceedings in ESA 187. There are no facts that dispute the conclusion that the point of delivery for electric service in the ESA 187 litigation was the main mine shaft situated on the 810 surface acres located in Section 1, Nilwood Township, Macoupin County, Illinois, and that the “normal service connection point” for such electric service between CIPS and Freeman was on the surface at that location where the substation and metering devices were located. Consequently, the issue in ESA 187 was the determination of the location for the delivery of electric service from CIPS to Freeman and which of the two electric suppliers, RECC or CIPS, was entitled to provide electric service at that “normal service connection point” established by the customer. No evidence was presented by Freeman and no evidence exists in the record that during the proceeding in ESA 187 there was any expectation or business plan presented to the Commission that contemplated electric service being delivered by an electric supplier to Freeman at any other location than the main mine shaft situated in Section 1, Nilwood Township, Macoupin County, Illinois. Accordingly, the transactional test for determining res judicata, even when applied in a pragmatic sense, cannot be applied to prevent a hearing upon the right of RECC to provide electric service to the Arnold Premises and the “normal service connection point” established by Freeman at the lime injection/air shaft borehole on the Arnold premises.

EXCEPTION NO. 7:

The second paragraph on page 43 under head note “IV. COMMISSION ANALYSIS AND CONCLUSION” should be modified in the first line thereof by deleting the phrase “RECC” and substituting therefore “The Parties” so that the first sentence reads as follows: “We first note that the Parties concede that ESA 187 involved a final judgment on the merits and that there is an identity of parties to that case and this case.”

ARGUMENT:

Such change more accurately states the actual position of each of RECC and Freeman on the nature of the ESA 187 judgment on the merits, the identity of the parties thereof, and the parties in this case.

EXCEPTION NO. 8:

The first and second full paragraphs on page 44 read as follows:

“765 ILCS 505/7 states that the right to mine coal is a real estate interest separate from the land and that it can be taxed separately. It is undisputed that Freeman owns the right to mine all of the coal in the Crown III Mine, which consists of approximately 17,500 acres of underground coal, and has obtained the right to position its borehole on land that is located in service territory subject to service rights in RECC. The coal mine itself, as indicated on the mining maps, is an interconnected underground area that is geographically connected yet separate from the surface. It is our conclusion that the Crown III Mine as a whole meets the legal definition of “premises.” Even though Freeman’s initial mine shaft is located in Macoupin County over one mile away from the borehole in Montgomery County, the mine is a

connected unit of real estate independent from the area contemplated by the surface map in the Service Area Agreement between RECC and CIPS. The Crown III Mine constitutes a single underground tract, while the borehole is more in the nature of a ‘point of delivery’ to the premises, as that term is used in the Act.

As for RECC’s argument about the location of the meter, Coles-Moultrie held that a location is not equated with the point of delivery or where the meter is located. The court went on to hold that to constitute a separate location, there must be some feature of the area in question, which would set it apart from the surrounding parcels. A public road, a body of water, or a legal division such as platting or subdividing of the land could serve to distinguish one location from another location. Here, there is no such feature, RECC’s sandbar argument notwithstanding, which would serve to separate the mine into parcels. Our decision here follows Coles-Moultrie and rejects RECC’s argument.”

ARGUMENT:

The conclusion in the proposed order that the 17,500 acres of underground coal forms the Crown III Mine and constitutes an “underground” premises within the meaning of the Act is not supported by the facts or by the law. First, it is obvious that the “premises” that was at issue in ESA 187 was the 810 surface acres located in Section 1, Nilwood Township, Macoupin County, Illinois, and where the “normal service connection point” would be located with respect to the delivery of electric service by CIPS to Freeman at that location. No issue of fact or law was presented about any other delivery point in ESA 187. Consequently, the facts, issues, and the law of ESA 187 are limited to that “premises” and cannot be expanded to

include the surface premises consisting of the Arnold premises located more than one mile away in the South Half, Southwest Quarter, Section 7, Pitman Township, Montgomery County, Illinois, and the “normal service connection point” for delivery of electric service to the meter and substation established at that location by Freeman some twenty-three years later. No one has even attempted to state that such “premises” was contemplated or even dreamed of let alone planned for during the ESA 187 litigation commencing July 10, 1978 and ending February 17, 1982. For the proposed order to conclude that the surface premises of the Arnold location was so contemplated at that time is a vivid stretch of one’s imagination and is certainly not within the purview of a pragmatical application of the doctrine of res judicata to the issues at hand. Further, it is undisputed that the surface premises of the Crown III Mine as contemplated in ESA 187 and the Arnold premises at issue in this case are not contiguous and are separated by almost a mile of property.

In order to avoid the problems of establishing a single “premise” with respect to the surface, the proposed order reasons that the 17,500 acres of underground coal constitute an interconnected underground area “geographically connected yet separate from the surface”, which meets the definition of premise established by Coles-Moultrie. The proposed order then concludes that the mine is “a connected unit of real estate independent from the area” located on the surface contemplated by the RECC and CIPS Service Area Agreement. First, it is impossible for the physical area of the subsurface to be separate from the surface. Second, there is no conclusive evidence in the record where the 17,500 acres are located so as to be interconnected. In fact, there is no evidence in the record as to the exact location of those

acres in relationship to the Arnold premises and the main mine premises in Section 1, Nilwood Township, Macoupin County, Illinois. The affidavit of David Caldwell does not even mention the location of the 17,500 acres of underground coal nor that they are interconnected in any respect whatsoever. The Caldwell affidavit talks of only “thousands of underground acres of coal reserve known as the Herrin No. 6 Coal Seam”. Thus, since there is no clear undisputed fact to substantiate the location or interconnection of the underground coal acreage of Freeman with respect to the Arnold premises and the main mine premises in Section 1, Nilwood Township, one cannot on the basis on this record reach the conclusion that such is an undisputed fact sufficient to support the conclusion that only a single interconnected underground premises exists between the main shaft of Crown III Mine at issue in ESA 187 and the Arnold lime injector/air shaft borehole at issue in this case.

Thirdly, there is absolutely no evidence in the record that the Freeman underground coal rights constitute an area or premises not contemplated by RECC and CIPS to be covered by the Service Area Agreement map. No one raised that issue. No one presented any facts by affidavit to support or deny such a claim. The Agreement itself is silent on that issue creating a question as to what part, if any, of the subsurface RECC and CIPS intended that the map boundaries would apply to. Sufficient question is now raised to preclude the conclusion that the surface map boundaries do not apply to the subsurface.

Even if the conclusion in the proposed order that the underground coal rights of Freeman constitute a single premise tying the main mine shaft of Crown III in Section 1, Nilwood Township to the Arnold premises at issue in this case, that single premises does not

answer the issue. Whether or not a particular customer's "premises" answers the issue of electric service depends upon whether or not one electric supplier or the other had the right under Section 5 to provide electric service to the customers "premises". In this case, there is no evidence in the record that in fact CIPS was grandfathered to provide electric service to any part of the Freeman Crown III Mine underground coal "premises" on July 2, 1965. In fact, the evidence is quite opposite in that the electric service to the Crown III main mine facilities in Section 1, Nilwood Township, Macoupin County, did not commence until post July 2, 1965, to wit: sometime in 1978. Further, ESA 178 was decided on the basis of Section 8 of the Act. Consequently, electric service to the Freeman underground coal "premises" must be determined by other provisions of the Electric Supplier Act or the Service Area Agreement in question. Coles-Moultrie Electric Cooperative v. Ill. Com. Com. 76 Ill App 3d 165; 394 NE2d 1068; 31 Ill Dec 750 (4th Dist 1979)(Coles-Moultrie). Accordingly, the first and second full paragraphs of page 44 of the proposed order should be deleted.

EXCEPTION NO. 9:

Paragraph three at page 44 of the proposed reads as follows:

"Our decision is also congruent with the Southwestern case, where the court affirmed this Commission's decision adopting a functional utilization test to be used in determining the nature of a premises or location. The functional utilization test focuses on the place where a customer is using electricity, not the place where the wires carrying the electricity are connected to the load. Here the load is taken underground to mine the coal. RECC's focus on the location of the meter does not address the question and it's approach is rejected."

ARGUMENT:

The proposed order is not in accord with the Southwestern case. The Southwestern case dealt with service area agreements between two electric suppliers and the location of the service area boundaries. What the Southwestern decision determined was that electric service provided by one electric supplier in the other electric supplier's service area as designated by the service area agreement would not be allowed. The Southwestern case had nothing to do with determining "premises" or "locations" as defined by the Act, but rather followed service area boundaries assigned by a service area agreement between electric suppliers and approved by the Commission. Contrary to the Southwestern case, the effect of the proposed order is to allow CIPS to provide electric service in the service area designated to be served by RECC under the applicable service area agreement. To assert that the Southwestern decision authorizes this conclusion is absurd. Even if the Southwestern case stands for a "functional utilization test", that is where the electricity is used, that test is applied for determining where the electricity will be used and not for determining the nature of a "premise" or "location" as claimed in the proposed order. And, in this case, the electricity is being used on RECC's side of the service area agreement boundary.

Further, to claim the electricity is being used at a subsurface "premises", presumably the Freeman underground coal interests, and that such subsurface interest can be detached from the surface area so that the Service Area Agreement boundaries do not apply, is contrary to Southwestern. Southwestern dealt with electric service to oil wells in Southwestern's territory designated by the Service Area Agreement. However, the oil wells existed in fields extending

beyond the territory boundaries on the surface. Further, oil which is a mineral is a real estate interest which can be separated from the surface interest just as coal, 765 ILCS 505/7. Yet, the Commission in Southwestern still applied the Service Area Agreement boundaries in determining where the electricity was being used. The “premises” for purposes of determining the service issue was synonymous with the boundary lines established on the surface by Southwestern and CIPS even though the subsurface oil mineral interest extended well beyond those boundaries. The proposed order turns the Southwestern decision on its head in order to justify characterizing Freeman’s underground coal interest as a premises separate and distinct from the Freeman surface in order to ignore the Service Area Agreement boundaries.

SUGGESTED SUBSTITUTE FOR PARAGRAPH THREE, PAGE 44:

The surface area of the Crown III Mine consists of 810 acres located in Section 1, Nilwood Township, Macoupin County, Illinois. The Arnold premises consists of a tract in the South Half, Southwest Quarter, Section 7, Pitman Township, Montgomery County, Illinois. The two tracts are separated and not contiguous and therefore do not consists of a single premises as defined by the Act. Accordingly, electric service to the surface of the main mine facilities in Section 1 at issue in ESA 187 did not include the issue of electric service to the Arnold premises which is a separate unconnected premises located more than one mile away and which is at issue in the instant case. Further, no one contemplated during ESA 187 that electric service would ever be required at the Arnold premises in the future. Accordingly, no party to the proceeding, nor did the trier of fact make any decision regarding electric service to the Arnold premises and no operative set of facts existed or could have existed to link the

issues surrounding service rights to the Arnold premises borehole, particularly when applied in a pragmatic or practical manner, because none of the parties contemplated need for or existence of the Arnold premises borehole.

The contention by Freeman that the underground coal rights held by Freeman which consists of 17,500 acres constitute a single premises to which electric service was at issue in ESA 187 is not supported by the facts. No evidence is in the record as to the location of the 17,500 acres of underground coal nor whether it is geographically connected. Further, nothing in the Act indicates that "premises" is intended or otherwise includes anything other than surface interest for purposes of determining electric supplier issues. The Electric Supplier Act itself, when deciding services issues under the Act and specifically Section 8, contemplates electric service being delivered by an electric supplier to a customer at a "normal service connection point" and determining "proximity" between that "normal service connection point" and 1965 existing lines. The facts in this case clearly show that the "normal service connection point" for the Arnold premises is located on the surface and consists of a meter and substation. It is that point that is utilized for determining electric service rights based upon proximity from existing surface facilities of either electric supplier. Even if the underground coal interest of Freeman constitutes a single premises, that single premises aids in the determination of electric service rights only if grandfathered rights exists for one or both of the electric suppliers. It is undisputed that CIPS did not possess grandfathered rights to the Freeman premises whether they existed on the surface or subsurface either during ESA 187 or at the present time.

EXCEPTION NO. 10:

The following phrase in the first line of the fourth paragraph at page 44 stating: "Once the nature of the mine as a single premises has been made," should be deleted as well as the last two sentences of that paragraph.

EXCEPTION NO. 11:

The last two sentences of the fourth paragraph on page 44 and the top of page 45 state as follows:

"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 issue then becomes, whether the recognition of the expansive nature of the mining operation beyond the delivery point in Macoupin County should result in ESA 187 barring any additional claims to serve the mine at a delivery point that is inarguably outside Macoupin County."

The third sentence of the first paragraph on page 45 reads as follows:

"Here, the Commission's ESA 187 order concluded that Freeman's Crown III Mine was located in RECC's service area, but through the application of Section 8 and the rejection of RECC's Section 5 claim, we concluded that CIPS should be the appropriate supplier for the Crown III Mine."

And, the last two sentences of the first paragraph on page 45, read as follows:

"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. Pragmatically applied, service to the Crown III Mine, whether under RECC's territory or not, constitutes a single claim or cause of action, whether the electricity is delivered through the main shaft or through the borehole."

ARGUMENT:

There is no evidence to support the conclusion by the proposed order that the 17,500 acres form a single unit and that it was anticipated that the load would move outward beyond the 810 acres in Macoupin County as the mine developed. In fact, the findings of fact in ESA 187 found that service was to be provided by CIPS to the Crown III Mine located in Section 1, Township 11 North, Range 6 West, 3rd P.M., Nilwood Township, Macoupin County, Illinois, (See the final ordering paragraph of the February 17, 1982 Commission Order in ESA 187). In fact, the proposed order incorrectly ignores that the electric service ordered in ESA 187 was to the "normal service connection point" of Freeman in Section 1, Nilwood Township, Macoupin County, Illinois. No further finding was made by the Commission that CIPS was entitled to provide electric service to the Crown III Mine for use at any other location and/or premises. Therefore, for the proposed order to conclude that it was "anticipated that the load would move outward well beyond the 810 acres of the surface area owned by Freeman as the mine developed" is unfounded and unsupported. The conclusion of the Commission in ESA 187 clearly shows that service at the Arnold premises was neither planned, contemplated, or imagined at the time the issues in ESA 187 were determined.

The "transactional test" used in Cload v West 328 Ill App 3d 946; 767 NE2d 486; 263

Ill Dec 35, 40 (2nd Dist 2002) for invoking the principal of res judicata required review of six factors. The six factors require comparing the ESA 187 facts with the facts in this case in relationship to 1) time; 2) space; 3) origin; 4) motivation; 5) whether both set of facts form a convenient trial unit; and 6) whether treating both set of facts conforms to the parties expectations, business usage or understanding. Applying these factors to the facts here reveals:

1. Time: Twenty-three years have elapsed between the first determination of service at the “normal service connection point” in Section 1, Nilwood Township, Macoupin County, Illinois, and the determination of the “normal service connection point” at the Arnold premises. Such a lengthy lapse of time does not merit finding the facts are connected particularly since Freeman admits no one participating in ESA 187 contemplated, planned for, or anticipated the creation of the Arnold premise borehole. As a practical matter, it is impossible to apply the “transactional test” to such a lengthy lapse of time.

2. Space: It is undisputed the “normal service connection point” at issue in ESA 187 and the “normal service connection point” at issue in the instant case are separate unconnected premises more than a mile distant from each other. As a practical matter, it is not possible to apply the “transactional test” to two locations of electric use more than one mile apart.

3. Origin: There is nothing in the ESA 187 decision evidencing the parties in that case contemplated the Arnold premises borehole. The facts created by that borehole simply did not exist in 1978 or 1982, and since they did not, linkage, as contemplated by the “transactional test”, does not exist.

4. Motivation: The motivation of the parties in ESA 187 was with reference to service rights to the “normal service connection point” as dictated by Section 8 principles of proximity with respect to the Crown III Mine in Section 1, Nilwood Township, Macoupin County, Illinois. No evidence exists in the record or in ESA 187 that the parties planned, contemplated, or anticipated the Arnold premises borehole. In fact, nothing in ESA 187 indicates either party anticipated the need for any additional “normal service connection points” outside of Section 1, Nilwood Township, Macoupin County, Illinois. Thus, “motivation” does not exist in this case to support the application of the “transactional test”.

5. Facts form a convenient trial unit: If the facts existing in this case regarding the need for service to the Arnold premises did not exist at the time of ESA 187, there is no basis to conclude the unknown facts of the Arnold premises would have formed a convenient trial unit with the ESA 187 facts. To form a convenient trial unit, the facts must exist. Admittedly, they did not.

6. Treatment of facts as a single unit conforms to the parties’ expectations: Freeman admits the Arnold premises electric service facts now in issue did not exist at the time of ESA 187. Such facts must exist before Freeman can expect the two sets of facts to be treated as one unit.

Accordingly, no evidence supports the conclusion of the proposed order that ESA 187 “foresaw” Freeman’s electric load would be utilized at the Arnold premises creating an issue of electric service to the meter and substation providing electric delivery to the Arnold premises lime injection/air shaft borehole. Accordingly, the principal of res judicata cannot,

as a practical matter, be applied to the issues in this docket.

SUGGESTED SUBSTITUTIONS THEREFORE:

The first sentence of the fourth paragraph on page 44 should be deleted.

The last two sentences of the fourth paragraph on page 44 should be deleted and in lieu thereof, the following should be substituted:

Based upon the facts in this case, it is clear that ESA 187 did not foresee Freeman's electric load for the Crown III Mine would be utilized at the Arnold premises resulting in delivery of electric service at a meter and substation located on the surface of the Arnold premises. That surface area is neither connected to or a part of the premises to which electric service was authorized by this Commission to be supplied by CIPS for the Freeman Mine located in Section 1, Township 11 North, Range 6 West of the 3rd P.M., Nilwood Township, Macoupin County, Illinois. Consequently, electric service to the main mine shaft in Section 1 for the Crown III Mine is not the same claim as the claim by RECC for electric service to the meter, substation, and borehole located on the Arnold premises. Accordingly, the claims of RECC are not prohibited under the principal of res judicata as set forth in River Park v City of Highland Park.

The third sentence of the first paragraph on page 45 should be modified by adding at the end thereof the phrase: "...at Section 1, Nilwood Township, Macoupin County, Illinois." in order to correctly restate the order of the Commission in ESA 87. Thus, the sentence would read as follows:

"Here, the Commission's ESA 187 order concluded that Freeman's Crown III Mine

was located in RECC's service area, but through the application of section 8 and the rejection of RECC's section 5 claim, we concluded that CIPS should be the appropriate supplier for the Crown III Mine at Section 1, Nilwood Township, Macoupin County, Illinois."

In addition, the last two sentences of the first paragraph on page 45 should be deleted.

EXCEPTION NO. 12:

The last four paragraphs of: "IV. COMMISSION ANALYSIS AND CONCLUSIONS" at page 45 and the top of page 46, should be deleted.

ARGUMENT:

The Commission's interpretation of the Old Ben case ignores the stated reasons set forth in the Old Ben decision for granting the service rights to the new drill hole No. 7 located in Southeastern's territory. CIPS claimed the right to serve that drill hole by reason of being grandfathered by a pre-July 2, 1965 electric service agreement to provide electricity to the Old Ben Mine that allowed CIPS to provide all of the electric service for the mine no matter where that electric service was located. The proposed order totally ignores that reasoning which became the legal basis for the decision. Instead, the proposed order looks to the result of the decision as the legal basis for the conclusion. The proposed order concludes CIPS was awarded service rights to drill hole No. 7 because the drill hole was part of the original Old Ben Mine. But, nothing in the Service Area Agreement there in issue authorized electric service based upon the "whole mine". Likewise, nothing in the Act states that electric service is based on the customer's premises or the "whole mine" unless there are existing Section 5 grandfather rights. Thus, the Old Ben decision found CIPS possessed Section 5 contract rights

to serve drill hole No. 7. Accordingly, to hold that the Old Ben decision is based solely on "premises" as a basis for advocating the whole mine theory is to beg the question and provides no legal authority for the proposed order in the instant case.

EXCEPTION 13:

The last two paragraphs of the COMMISSION'S ANALYSIS AND CONCLUSIONS should be stricken.

ARGUMENT:

There is nothing in Section 5 of the Act that equates a right to provide electric service based upon the magnitude of service being provided on July 2, 1965. The proposed order neither points to any language set forth by the Legislature in Section 5 of the Act, nor to any evidence of legislative intent supporting such principles, or to any facts in this case that would support such a conclusion. The Supreme Court has not accepted the magnitude of service argument sought to be imposed by Freeman in this case and sanctioned by the proposed order in this instance and neither has the Legislature. Where the language of a statute is perfectly clear, there is no basis for departing from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the plain words, In Re Chicago Flood Litigation 176 Ill 2d 179; 680 NE2d 265; 223 Ill Dec 532, 539 (1997). Legislative intent arises from the words of the Act or if Section 5 is deemed ambiguous from legislative journals evidencing the Legislature's intent as to the statutory language. The record in this case is devoid of such. Accordingly, those paragraphs should be deleted.

III. FINDINGS AND ORDERING PARAGRAPHS

EXCEPTION NO. 14:

Findings No. 6, 7, 8, 9, 10, and 11 should be deleted and the following should be substituted therefore:

- (6) The Commission found in ESA 187 that the purpose of the proposed service extension by CIPS was to provide electric service to the Crown III Mine in Macoupin County, Illinois, which mine consisted of 810 acres of surface area with mineral rights and approximately 17,500 subsurface acres. The Commission did not determine that the subsurface coal acreage was contiguous or formed one premises or that the development of the mine would extend the underground areas beyond the 810 surface acres owned by Freeman.
- (7) In ESA 187, the Commission determined that pursuant to Section 8 of the Act based primarily upon proximity of 1965 lines to the customer's "normal service connection point", CIPS was to be the electric supplier to the Crown III Mine with the customer's "normal service connection point" located in Section 1, Township 11 North, Range 6 West of the 3rd P.M., Macoupin County, Illinois.
- (8) The Crown III Mine has developed a lime injection/air shaft/borehole located more than one mile from the Crown III Mine facilities to which electric service was at issue in ESA 187. This borehole is located on the surface of the Arnold premises and consists of a meter and substation to which electric service is delivered to Freeman for use on the surface at the Arnold premises and underground.

- (9) The borehole at the Arnold premises does not constitute a portion of the premises of the Crown III Mine as defined by the order entered February 17, 1982 in ESA 187 wherein the Commission found that CIPS should provide electric service to the Crown III Mine at a "normal service connection point" located in Section 1, Township 11 North, Range 6 West of the 3rd P.M., Macoupin County, Illinois. Neither does the Arnold premises borehole constitute a part of the Crown III Mine premises at issue in ESA 187 under the Electric Supplier Act or under the Service Area Agreement between RECC and CIPS.
- (10) The Freeman United Coal Company's Motion for Summary Judgment should be denied.

IV. ORDERING PARAGRAPHS OF THE PROPOSED ORDER

EXCEPTION NO. 15:

The five ordering paragraphs of the proposed order should be deleted and in lieu thereof the following substituted:

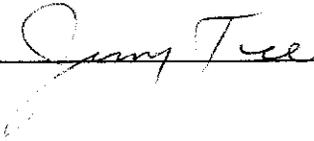
IT IS THEREFORE ORDERED that the Motion for Summary Judgment filed by Freeman United Coal Company and CIPS to the extent that it has concurred therein should be denied and this matter set for trial.

WHEREFORE, RECC requests this proposed order be modified in accordance herewith.

Respectfully submitted,

RURAL ELECTRIC CONVENIENCE
COOPERATIVE CO.

By GROSBOLL, BECKER, TICE & REIF

By 

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PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the ____ day of July, 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 the following persons at the addresses set opposite their names:

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