UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Dynegy Midwest Generation, Inc. and	)	
Dynegy Power Marketing, Inc.	)	
Complainants	)	
	)	
v.	)	**Docket No. EL02-6-000**
	)	
Commonwealth Edison Company	)	
Respondent	)	

COMMENTS OF THE ILLINOIS COMMERCE COMMISSION

Pursuant to Rule 211 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.311, the Illinois Commerce Commission ("ICC") hereby submits its Comments in the above-captioned proceeding. The ICC respectfully requests that the Commission dismiss the Complaint filed by Dynegy Midwest Generation, Inc. and Dynegy Power Marketing, Inc. ("Dynegy") with prejudice, and for any and all other appropriate relief.

I. BACKGROUND

On October 17, 2001, Dynegy filed a Complaint against Commonwealth Edison Company ("ComEd") alleging that ComEd has allowed certain Transmission Customers, namely New Energy, Inc. ("New Energy") and Central Illinois Light Company ("CILCO"), to inappropriately rely on Firm LD, i.e., firm liquidated damages, contracts for the purchase of power as designated network resources.[1] Dynegy correctly notes that the Commission's rules, and ComEd's tariff provisions filed in accordance therewith, only permit power to be designated as a network resource if Transmission Customers own or have committed to purchase or lease

generation that is not committed for sale to non-designated third parties or otherwise cannot be called upon on a non-interruptible basis.[2] Dynegy contends, however, that power purchased through Firm LD contracts does not satisfy the Commission's requirements for network resources because power supplied through such contracts is interruptible, i.e., non-firm, and "committed for sale to others."[3]

Dynegy alleges that ComEd's practice of permitting Transmission Customers to designate power purchased through Firm LD contracts as designated resources harms Dynegy and other market participants.[4] In particular, Dynegy claims that such Transmission Customers receive higher transmission reservation and curtailment priority than they would otherwise be entitled, thereby depriving other parties of reservation and curtailment rights. Dynegy also contends that the practice permits Transmission Customers who engage in the practice to rely on generation capacity that other parties own, purchase or lease, thereby depriving those parties, including Dynegy, of capacity revenues. Finally, on a related note, Dynegy argues that such Transmission Customers' improper reliance on other parties' generation capacity results in double counting of capacity and skewed reserve numbers.

On October 19, 2001, the Commission noticed Dynegy's Complaint. The Commission ordered that all interventions, protests and answers to Dynegy's Complaint be filed with the Commission by October 26, 2001. The ICC hereby files its Comments in this proceeding.

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[1] Complaint at 7 - 10.

[2] *See*, ComEd OATT at §§ 30.1, 30.7; *see also*, Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, FERC Stats. & Regs. ¶ 31,036, at ¶¶ 31,753-54 (1996), *clarified*, 76 FERC ¶¶ 61,009, 61,347 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at ¶¶ 30,325, 30,327-28 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *aff'd and remanded sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *cert. Granted sub nom. People of the State of New York and Public Serv. Comm. of the State of New York v. FERC*, 69 U.S.L.W. 3582 (U.S. Feb. 27, 2001)(No. 00-568).

[3] Complaint at 8.

II. SUMMARY OF POSITION

The ICC recommends that the Commission find that ComEd's practice of permitting Transmission Customers to designate power purchased through Firm LD contracts as designated network resources is consistent with the Commission's requirements for designating network resources. In particular, the Commission should find the practice consistent with the requirement that designated resources must be commitments to purchase non-interruptible, or firm, service that is not committed for sale to a third party. As the ICC explains *infra*, such a conclusion is supported as a matter of law pursuant to established principles of contract interpretation. It is also the ICC's opinion that such a conclusion is appropriate as a matter of policy. Dynegy has provided no evidence to support its allegations that permitting Transmission Customers to designate power purchased through Firm LD contracts as network resources could harm reliability. In addition, the practice benefits Illinois' retail direct access program by encouraging competitive entry into the retail power supply business and, thereby, providing retail customers with competitive retail supply options.

[4] *See*, *Id.* at 1-2 (containing a summary of the alleged harms).

III. DISCUSSION

A. TRANSMISSION CUSTOMERS' COMMITMENTS TO PURCHASE POWER PURSUANT TO FIRM LD CONTRACTS CONSTITUTE COMMITMENTS TO PURCHASE FIRM OR NON-INTERRUPTIBLE POWER.

Dynegy correctly notes that the Commission's rules, and ComEd's tariff provisions filed in accordance therewith, only permit power to be designated as a network resource if Transmission Customers own or have committed to purchase[5] or lease generation that is not committed for sale to non-designated third parties or otherwise cannot be called upon on a non-interruptible basis.[6] In regard to the requirement that the purchase must be of firm, or non-interruptible, power, the Commission has generally held that power is firm when interruptible for reliability reasons.[7] On the other hand, power is not firm when interruptible for economic reasons or at the sole discretion of either party.[8]

Dynegy argues that power purchased pursuant to Firm LD contracts does not satisfy this requirement for designation as a network resource because such power is committed for sale to third parties or otherwise cannot be called upon on a non-interruptible basis. Dynegy's argument, however, is based on an incorrect legal interpretation of the contracts at issue. In this case, the contracts identified by Dynegy as ones upon which ComEd improperly permitted

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[5] It does not appear that Dynegy is arguing that Firm LD contracts do not constitute a commitment to purchase on behalf of the Transmission Customers. In regard to this criteria for designation as a network resource, the Commission has held that an option contract can only constitute a network resource once the option is exercised. *See, Wisconsin Public Power v. Wisconsin Public Serv.*, 84 FERC ¶ 61,120 at ¶ 61,652 (1998)("WPPI"). In this case, Dynegy has not alleged that Firm LD contracts are option contracts. In the absence of any such allegation or evidence to the contrary, the Commission should find that Firm LD contracts satisfy this element for designation of network resources.

[6] *See*, *supra* n. 2.

[7] *See e.g.*, *WPPI* at ¶ 61.652 n. 63, n. 67.

[8] *See*, *Id.* at ¶ 61,653 n. 79 (finding that power is not curtailable for economic reasons when the contract permits the buyer to override the curtailment by paying a higher price); *cf.*, *Id*. at ¶ 61,657 (finding power curtailable for economic reasons when the contract permits the buyer to request, but not demand, purchase at a higher price).

Transmission Customers to rely as designated network resources provide that the power can only be interrupted for reasons of *force majeure*.[9]

Dynegy's Complaint provides that one of Dynegy's subsidiaries, Dynegy Power Marketing, Inc. ("DYPM"), "entered into an Edison Electric Institute form Master Power Purchase and Sale Agreement (EEI Contract) with New Energy on January 1, 2001."[10] The EEI Contract defines Firm LD service, in part, as follows:

> 'Firm (LD)' means, with respect to a Transaction, that either Party shall be relieved of its obligations to sell and deliver or purchase and receive without liability *only to the extent that, and for the period during which, such performance is prevented by Force Majeure*.[11]

Accordingly, a Firm LD product, as defined by the EEI Contract, does not permit the power to be interrupted for economic reasons or at the discretion of either party, but instead requires the occurrence of *force majeure*.

Notably, if parties to an EEI Contract wanted the power to be interruptible for economic reasons or at the discretion of either party, then the parties would not have contracted for Firm LD power. Instead, the parties would have entered into a contract for Non-Firm power, which

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[9] Notably, two witnesses for Illinois Power Company ("IP"), which is a subsidiary of Dynegy, recently testified in an ICC proceeding supporting the conclusion that Firm LD power is only interruptible for reasons of *force majeure*. In particular, the two IP witnesses testified that such power "will be provided to the customer unless there is a 'force majeure' event," and that a supplier of Firm LD power "is required to provide power to the customer unless a 'force majeure' event has occurred." Rebuttal Testimony of Mr. Leonard M. Jones, Manager of Business Planning and Forecasting, and Mr. Mark J. Peters, Control Area Resource Manager, IP Ex. 2.6 at 7-9, ICC Docket Nos. 00-0259, 00-0395, 00-0461 (cons.)(filed Sept. 12, 2000).

[10] Complaint at 9; *see also, Id.* at Ex. C (attaching the terms of the EEI Contract).

[11] *Id*. at Ex. C, EEI Contract, Schedule P: Products and Related Definitions at 31 (emphasis added). The EEI Contract defines the phrase "Force Majeure," in relevant part, as follows:

> 'Force Majeure' means an event or circumstance which prevents a Party from performing its obligations under one or more Transactions, which event or circumstance was not anticipated as of the date the Transaction was agreed to, which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which, by exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Force Majeure shall not be based on (i) the loss of Buyer's markets; (ii) Buyer's inability economically to use or resell the Product purchased hereunder; (iii) the loss or failure of Seller's supply; or (iv) Seller's ability to sell the Product at a price greater than the Contract Price. … The applicability of Force Majeure to the Transaction is governed by the terms of the Products and Related Definitions contained in Schedule P.

the EEI Contract defines as follows: "'Non-Firm' means, with respect to a Transaction, that delivery or receipt of the product may be interrupted for any reason or for no reason, without liability on the part of either Party."[12] Dynegy has not alleged that ComEd has permitted any Transmission Customer to designate power purchased pursuant to an EEI Contract for Non-Firm power to be designated as a network resource.

Rather, Dynegy attempts to rely on the EEI Contract's provisions for liquidated damages that apply to Firm LD power to support its allegation that Firm LD power is interruptible for reasons other than *force majeure*. In particular, the EEI Contract's definition of Firm LD contains the following language:

> In the absence of Force Majeure, the Party to which performance is owed shall be entitled to receive from the Party which failed to deliver/receive an amount determined pursuant to Article Four.[13]

Article Four is entitled "Remedies for Failure to Deliver/Receive" and contains liquidated damage provisions for both seller and buyer failures. In regard to the failure on the part of the seller to deliver contracted-for power, section 4.1 provides, in relevant part, as follows:

> Seller Failure. If Seller fails to schedule and/or deliver all or part of the Product pursuant to a Transaction, *and such failure is not excused under the terms of the Product* [Firm LD] or by Buyer's failure to perform, then Seller shall pay Buyer … an amount for such deficiency equal to the positive difference, if any, obtained by subtracting the Contract Price from the Replacement Price.[14]

Dynegy argues that this liquidated damages provision means that power purchased pursuant to a Firm LD contract can be interrupted at the seller's discretion, provided that the seller pays the buyer an amount calculated pursuant to section 4.1.

Id. at Ex. C, EEI Contract, General Terms and Conditions at §1.23.

[12] *Id.* at Ex. C, EEI Contract, Schedule P: Products and Related Definitions at 36.

[13] *Id.* at Ex. C, EEI Contract, Schedule P: Products and Related Definitions at 31.

[14] *Id.* at Ex. C, EEI Contract, Article Four at §4.1 (emphasis added).

It is well established, however, that liquidated damage provisions are remedial provisions that only come into play in the event of parties' breaches of contract. Liquidated damages provide a means of compensation in the event of one of the party's breach of the contract without the need for the performing party to file a claim in court and endure the uncertainty, time and expense associated with a court case. The New York Court of Appeals has explained the purpose of liquidated damage contractual provisions as follows:

> [L]iquidated damages constitute the compensation that, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a *breach of their contract*. In effect, a liquidated damage provision is an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement.[15]

Accordingly, the inclusion of liquidated damage provisions within the EEI Contract should not be construed to alter the terms of the Firm LD product as it is defined in the EEI Contract. Indeed, as emphasized above, the EEI Contract's liquidated damages provision for a seller's failure to supply provides that the liquidated damages provision is only triggered in the event the "seller fails to schedule and/or deliver all or part of the Product pursuant to a Transaction, *and such failure is not excused under the terms of the Product* [Firm LD]."[16] Since the terms of the Firm LD product only excuse a seller's failure to deliver for reasons of *force majeure*, a seller's failure to deliver for any other reason would constitute a breach of the EEI Contract. Accordingly, the Commission should not find that power provided pursuant to an EEI Contract for a Firm LD product is non-firm power merely because the EEI Contract contains a liquidated damages provision. Rather, the Commission should find that a Firm LD product

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[15] *Truck Rent-A-Center v. Puritan Farms 2nd*, 41 N.Y.2d 420, 361 N.E.2d 1015, 1017-18 (N.Y. 1997)(emphasis added).
[16] Complaint at Ex. C, EEI Contract, Article Four at §4.1 (emphasis added).

entered into pursuant to the terms of the EEI Contract is a contract for the transfer of firm, or non-interruptible, power.

Dynegy's Complaint also provides that "DYPM's predecessor, Electric Clearinghouse, Inc., entered into a power purchase and sale agreement with Cilco May 1, 1997."[17] The CILCO Contract defines the phrase "firm transactions," in relevant part, as follows:

> Firm Transactions. For purposes of this Agreement, a Transaction shall be deemed firm to the extent, as specified in the terms of the documentation of the Transaction, a Party may be excused from Scheduling the Contract Quantity *only for reasons of force majeure* … or pursuant to the provisions of the last sentence of this Section. In the event the Transaction is a firm Transaction and a Party interrupts the Scheduling of Power for reasons other than those authorized in the prior sentence, then the interrupting Party shall have the obligations set forth in Section 3.2 of this Agreement. In addition, the Parties may agree in specific Transactions to the specific circumstances under which either Party may interrupt without liability.[18]

Section 3.2 of the CILCO Contract provides, in relevant part, as follows:

> Interruptions of Firm Transactions. If the Transaction is a firm Transaction, then with respect to the *unauthorized failure* to Schedule in whole or in part deliveries or receipts in accordance with this Agreement:
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> …
>
> (b) If Seller fails to Schedule for delivery the Contract Quantity then Seller shall pay Buyer an amount for each unit of such deficiency equal to the positive difference between (i) the price at which Buyer is, or would be able to obtain comparable supplies of Power at a commercially reasonable price and (ii) the applicable Contract Price (as adjusted to reflect reasonable differences in transmission costs, if any).[19]

While the drafting is different in the CILCO Contract, the provisions are similar to the EEI Contract in permitting the parties to agree to a transaction of a Firm product that is power only interruptible for reasons of *force majeure* while, at the same time, agreeing to liquidated

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[17] *Id.* at 10; *see also*, Id. at Ex. G (Attaching the agreement)("CILCO Contract").

[18] *Id.* at Ex. G, Article 2 Transactions and Commitments of the Parties at § 2.3 (emphasis added). While section 2.3 permits interruption pursuant to specific circumstances agreed-to by the parties in specific transactions, Dynegy has not alleged that DYPM and CILCO agreed to additional grounds for interruption in their specific transactions that ComEd permitted CILCO to designate as network resources. Nor has Dynegy included any evidence of the specific transactions other than that the transactions were entered into pursuant to the CILCO Contract.

damages in the event of an unauthorized failure to perform on the part of either party, i.e., a breach of contract. Accordingly, the Commission should interpret the CILCO Contract in the same manner as the EEI Contract. The Commission should find that a contract for a Firm product entered into pursuant to the terms of the CILCO Contract is a contract for the transfer of firm, or non-interruptible, power.

B. TRANSMISSION CUSTOMERS' RELIANCE ON FIRM LD PRODUCTS AS NETWORK RESOURCES HAS NOT BEEN SHOWN TO THREATEN RELIABILITY IN EITHER THE SHORT- OR LONG-TERM.

Dynegy claims that ComEd's practice of permitting Transmission Customers to designate power purchased pursuant to contracts for Firm LD products as network resources raises reliability concerns. In particular, Dynegy alleges that designating Firm LD products harms reliability by double counting capacity and skewing resources. The result, Dynegy claims, is that "adequate reserves [are] not being carried to serve retail load."[20] Dynegy alleges that the aforestated reliability concerns arise because Firm LD products are not capacity-backed.[21]

Reliability is a critically important factor in all ICC decisions concerning the electric industry. Indeed, the Illinois Public Utilities Act states as follows:

> With the advent of increasing competition in this [electric] industry, the State has a continued interest in assuring that the safety, *reliability*, and affordability of electrical power is not sacrificed to competitive pressures ….”[22]

Accordingly, the ICC recommends that the Commission seriously evaluate allegations of reliability concerns and determine whether such allegations are supported by factual evidence. In this case, however, Dynegy's Complaint fails to support its claims that designating contracts for Firm LD product threatens reliability in any way.

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[19] *Id.* at Ex. G, Article 3 Quantity and Interruptions of Firm Transactions at §3.2 (emphasis added).
[20] *Id.* at 21.

First, Dynegy has only alleged that Firm LD power purchases are not capacity-backed. Dynegy has not included any evidence to support its allegations. Such evidence may be found in the specific Transaction agreements between DYPM and the alternative retail electric suppliers ("ARES") that have purchased Firm LD power pursuant to either the EEI or CILCO Contracts. Presumably, if Dynegy's allegations are true, Dynegy has not included documentation of specific Transaction agreements to support the allegations because of confidentiality provisions in the EEI and CILCO Contracts. However, the Commission has rules to protect the confidentiality of such material, and Dynegy should be required to submit any documentary evidence to support its allegations to the Commission for examination pursuant to such confidentiality rules.

Even assuming, however, that Dynegy is able to support its allegations with evidence that Firm LD power purchases are not capacity-backed, Dynegy has not demonstrated that capacity-backed contracts would be inherently more firm or more reliable than Firm LD power purchases. The liquidated damage provisions of the EEI and CILCO Contracts for Firm LD product provide that if a seller does not supply power from an intended source(s),[23] then the seller must either supply the power from an alternative source(s) or fund the purchase of replacement power. For example, a unit purchase could be a capacity-backed purchase, but, because of unplanned unit outages, such a power purchase may, indeed, be less firm and less reliable than would a

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[21] *Id.* at 9.

[22] 220 ILCS 5/16-101A(c)(2000)(emphasis added).

[23] On a different but related note, Dynegy asserts that specific generating units must be identified to support network resource designations, and complains that ComEd has permitted the designation of "IP," i.e., Illinois Power, which is a Dynegy subsidiary, as a network resource. However, the Commission has clearly held to the contrary:

> We reject El Paso's allegation that the Participation Agreement cannot be considered a Network Resource under section 29.2 of the pro forma tariff because imports of reserve energy may come from multiple units. Nothing in the pro forma tariff lends itself to the conclusion that we intended the definition of Network Resources to be so limited. We did not intend the phrase 'designated generating source' in the definition of Network Resource to mean one specific generating unit. The only definitional limitation on what can be designated a Network Resource is that the resource cannot be committed for sale to third parties or otherwise cannot be called upon on a non-interruptible basis.

Southwest Reserve Sharing Group, 95 FERC ¶ 61,071, slip op. at 13-14 (2001).

liquidated damages contract that either assures the delivery of power from an alternative source or the provision of money sufficient for the counter-party to purchase replacement power.[24]

Moreover, Dynegy has not provided any evidence that ComEd's flexible practices with regard to designated network resources have resulted in less generating capacity being available to Illinois retail customers than would have been the case had such OATT flexibility not been available to ARES. Neither has Dynegy provided any evidence that, in the future, retail customers in Illinois will likely have access to fewer megawatts of generating capacity because of ComEd's designated resource flexibility than would otherwise be the case if ComEd were required to cease offering such flexibility.

Ultimately, it appears that the harm alleged by Dynegy, i.e., lack of sufficient capacity, would only result in an instance where DYPM sold contracted-for Firm LD power to a third party. As explained *supra*, however, such action on the part of DYPM would constitute a breach of contract. Rather than finding that contracts for Firm LD power cannot serve as the basis for network resources, emphasis should be placed on parties upholding their ends of contractual bargains. In other words, in such a case, the selling party's breach of contract would be the cause of capacity over-counting and skewing of reserves – the cause would not be the purchasing parties' designation of the Firm LD power as a network resource.

C. COMED'S PRACTICE OF PERMITTING THE DESIGNATION OF FIRM LD POWER PURCHASES AS NETWORK RESOURCES PROMOTES MARKET EFFICIENCY AND ILLINOIS' RETAIL DIRECT ACCESS PROGRAM.

[24] As explained *supra* at n. 9, IP witnesses Jones and Peters recently testified in an ICC proceeding regarding the nature of Firm LD power. Mr. Jones and Mr. Peters provided another example of how Firm LD power provides additional reliability: "[Firm LD power] is generally delivered 'Into' a control area rather than delivered to a specific transmission delivery point…. Since [Firm LD power] is delivered 'Into' a system, the failure of a transmission path is not deemed a 'force majeure' event and the supplier is still required to deliver the energy via another transmission delivery path." Rebuttal Testimony of Mr. Leonard M. Jones, Manager of Business Planning and Forecasting, and Mr. Mark J. Peters, Control Area Resource Manager, IP Ex. 2.6 at 9, ICC Docket Nos. 00-0259, 00-0395, 00-0461 (cons.)(filed Sept. 12, 2000).

Illinois law requires the ICC to "act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers."[25] The Illinois General Assembly has also directed that "[a] competitive wholesale and retail market must benefit all Illinois citizens."[26] Accordingly, the ICC both desires, and is bound, to advance these market principles.

ComEd's complained-of network resource designation practice is consistent with the directives the ICC has been given to promote effectively competitive electricity markets. As the Commission recognized in *American Transmission Systems,* it is proper to give state-certified suppliers competing for unbundled retail load "more flexibility in using purchased power to satisfy their load requirements."[27] ComEd's flexible network resource designation practice with regard to purchase power contracts to be used by ARES to supply unbundled Illinois retail load is a useful feature for Illinois' aggregate retail direct access program. It is likely that such practices have been a contributing factor in the relative success of competitive entry of ARES into ComEd's service territory as compared with the service territories of the other Illinois utilities.

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[25] 220 ILCS 5/16-101A(d).
[26] *Id.*
[27] 93 FERC ¶ 61,336 at ¶ 62,140 (2000). As explained *supra*, a modification to the pro forma tariff is not needed to accommodate ComEd's practice because Firm LD contracts satisfy the Commission's requirements for designating network resources. Nonetheless, if the Commission finds that a modification to the pro forma tariff is necessary, the ICC notes that in *Arizona Independent Scheduling Administrator Association,* the Commission ruled that "reasonable accommodation[s] to spur competitive [retail] access" are appropriate modifications to the pro forma OATT. 93 FERC ¶61,231 at ¶ 61,761 (2000).

V. CONCLUSION

WHEREFORE, for each and all of the foregoing reasons, the Illinois Commerce Commission respectfully requests that the Commission dismiss Dynegy's Complaint with prejudice, and for any and all other appropriate relief.

October 26, 2001

Respectfully submitted,

ILLINOIS COMMERCE COMMISSION

/s/ Sarah A. Naumer

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Comments of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 26th day of October, 2001.

/s/ Sarah A. Naumer

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Sarah A. Naumer
Special Assistant Attorney General
Illinois Commerce Commission