

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
-vs-)	
Illinois Power Company)	Docket 03-0757
)	
Proceeding pursuant to Section 16-111(g) of)	
the Public Utilities Act concerning proposed)	
transfer of generating plant (Notice filed on)	
November 14, 2003))	

**Illinois Power Company’s Brief on Exceptions to the
Administrative Law Judge’s Proposed Order**

I. Statement of Exception

Illinois Power Company (“Illinois Power” or “IP”) takes one exception to the Administrative Law Judge’s Proposed Order (“ALJPO”) issued January 16, 2003 in this docket. The ALJPO would terminate this docket pursuant to IP’s Notice of Withdrawal filed December 22, 2003. While Illinois Power does not object to termination of this docket, IP does take exception to Finding (5) and the second ordering paragraph of the ALJPO to the extent that they prohibit IP from undertaking “any similar transaction” to the transaction described in IP’s §16-111(g) notice (the “Notice”) herein, “without first providing notice under Section 16-111(g).”

Illinois Power does not object if the order terminating this docket contains language stating that IP must file a new §16-111(g) notice with the Commission should IP decide to proceed with the transaction described in its original Notice in this case. However, there is absolutely no basis for the order terminating this docket to direct IP to file a §16-111(g) notice prior to undertaking “any similar transaction”, or to “prohibit” IP from undertaking “any similar transaction”. Finding (5) and the second ordering paragraph of the ALJPO go beyond the scope

of IP's Notice that resulted in the initiation of this docket, and are vague and ambiguous as well.

Thus, the Commission should revise Finding (5) and the second ordering paragraph as follows:

- (5) the Commission further finds that Illinois Power Company should not undertake the ~~this or similar~~ transaction described in its Notice herein and in the first paragraph of this Order, without first providing notice under Section 16-111(g).

* * * * *

IT IS FURTHER ORDERED that Illinois Power Company is prohibited from undertaking the ~~this or similar~~ transaction described in its Notice herein and in the first paragraph of this Order, without first providing notice under Section 16-111(g).

II. Argument

On November 14, 2003, Illinois Power filed its Notice with the Commission pursuant to 220 ILCS 5/16-111(g). The Notice advised the Commission that IP was entering into a First Amendment to the Sublease dated as of October 1, 1999 between Illinois Power, as Sublessor, and Dynegy Midwest Generation, Inc. ("DMG") relating to the combustion turbine units and related equipment located at the site commonly referred to as the Tilton Energy Center (the "Equipment"). A copy of the Sublease Amendment was attached to the Notice. As stated in the Notice and as quoted in the first paragraph of the ALJPO:

The purpose of the Amendment is to clarify that as a result of Illinois Power exercising the "Purchase Option" under that certain amended and restated Participation Agreement dated October 20, 2002, by and among Illinois Power, as Lessee, ABN AMRO Bank, N.V., as Agent Lessor, and certain other participants, DMG will be designated as the recipient of the Equipment, will be obligated to reimburse Illinois Power for the purchase price of the Equipment, and will be entitled to receive delivery of the Bill of Sale for the Equipment from the Agent Lessor.¹

¹As indicated in the ALJPO and the Initiating Order, IP does not presently own the Equipment. IP sold the Equipment to ABN AMRO Bank, N.V. and other participants in 1999, leased the Equipment back from the buyers, and subleased the Equipment to DMG (formerly known as Illinova Power Marketing, Inc.) pursuant to the Sublease.

On December 11, 2003, the Commission issued an order pursuant to §16-111(g) initiating this docket. The Initiating Order stated that the 90-day period for the Commission to issue its order under §16-111(g) would not commence until IP filed certain additional information. Illinois Power has not filed the additional information. Instead, at the prehearing conference on December 18, 2003, IP announced that it was withdrawing its Notice. IP filed a written Notice of Withdrawal on December 22, 2003, stating that it withdrew its Notice and requesting that this docket be dismissed. Thus, no evidentiary record was compiled in this docket.

As Illinois Power indicated at the December 18 prehearing conference, IP is evaluating whether to proceed with the transaction described in its Notice. Because IP does not know if it will proceed with that transaction and because the Initiating Order directed IP to file additional information before proceedings in this docket would commence, IP concluded that it would be appropriate to simply withdraw its Notice at this time. Accordingly, it would be appropriate for the Commission to issue an order simply terminating the docket, without more – since IP has withdrawn the Notice that was the basis for initiating this proceeding, there is no basis for this docket to proceed. However, because Illinois Power had initially filed a Notice advising the Commission of its entry into the Sublease Amendment attached to the Notice, IP certainly does not object to the additional language in the ALJPO that requires IP to provide a (new) notice pursuant to §16-111(g) should it decide to proceed with the Sublease Amendment as described in its Notice. Moreover, such language in the order would be responsive to, and fully address, the concern expressed by Staff in connection with IP's Notice of Withdrawal: as stated in the ALJPO, "Staff expressed a concern *about IP's intent to enter into the First Amendment to the Sublease*, stating that IP should not proceed without giving proper notice pursuant to Section 16-111(g) of the Act." (ALJPO, p. 2; emphasis added) For additional clarity, IP recommends that

Finding (5) and the second ordering paragraph refer to the description of the transaction that is contained in the first paragraph of the ALJPO.

There is no basis, however, for the Commission to issue an order in this docket directing Illinois Power to file a §16-111(g) notice should it undertake “any similar transaction”, or purportedly prohibiting IP from undertaking “any similar transaction” without filing a §16-111(g) notice. The only transaction before the Commission in this §16-111(g) docket is the specific transaction described in IP’s Notice. There are no grounds for the Commission to issue any directives or impose any prohibitions with respect to any other transactions. Moreover, as noted above, the inclusion in the order of language simply directing IP to provide a (new) notice to the Commission if IP undertakes the transaction described in its (original) Notice will be sufficient to address the concerns expressed by Staff with respect to IP’s Notice of Withdrawal.

Further, the inclusion in the ALJPO of the directive to file a §16-111(g) notice before undertaking “any similar transaction”, and prohibiting IP from undertaking “any similar transaction” without providing such a notice, inappropriately prejudices the question of whether future transactions that IP might undertake require approval under §16-111(g).

Finally, the language used in the ALJPO, “any *similar* transaction”, is vague and ambiguous. Even assuming that the Commission could, in the order terminating this docket, impose any directives or prohibitions with respect to any future potential transactions other than the specific transaction described in IP’s Notice, the phrase “any similar transaction” leaves IP to guess at its peril whether any future transaction it might contemplate is “similar” to the Sublease Amendment attached to its Notice herein.

Accordingly, Illinois Power respectfully requests that the Commission modify the Administrative Law Judge’s Proposed Order in accordance with IP’s exceptions.

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Respectfully submitted,

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