

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY

Proposed tariffs filed pursuant to Article IX of the
Public Utilities Act defining a competitive supply
procurement process and, pursuant to Section
16-112(a) of the Act, establishing a market value
methodology to be effective post-2006; providing
for Power Purchase Options and for recovery of
transmission charges post-2006; and enabling
subsequent restructuring of rates and unbundling
of prices for bundled service pursuant to
Sections 16-109A and 16-111(a) of the Act.

No. 05-0159

**REPLY BRIEF OF CONSTELLATION
ENERGY COMMODITIES GROUP, INC.**

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**INITIAL BRIEF OF CONSTELLATION
ENERGY COMMODITIES GROUP, INC.**

Constellation Energy Commodities Group, Inc. (“CCG”), by its attorneys, Karegianes&Field, LLC, pursuant to Section 10-101 of the Public Utilities Act (“PUA”) and Section 200.800 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), hereby submits its Reply Brief regarding the proposed tariffs defining a competitive supply procurement process (“Illinois Auction Proposal”) filed by Commonwealth Edison Company (“ComEd”) with the Commission on February 25, 2005, in response to the Initial Briefs filed by various parties to this proceeding.

I. EXECUTIVE SUMMARY

CCG, as stated in its Initial Brief, is a potential bidder in the Illinois Auction, if approved by the Commission, and fully supports ComEd's Illinois Auction Proposal although it made certain suggestions for improving the process.

III. LEGAL ISSUES

B. ICC Authority under Article IX and Article XVI to Approve the Filed Tariffs

Although Judge Wallace and the Commission¹ rejected the arguments made by the People of the State of Illinois ("AG"), Citizens Utility Board ("CUB") and the Cook County State's Attorney ("CCSA") that Section 16-103(c) prohibits the Commission from taking action to approve ComEd's proposed tariffs, these parties continue to make the same faulty arguments.

Their theory is that until a service is declared competitive, the Commission lacks the authority under Section 16-103(c) to approve the rules for the procurement of power and energy and the mechanism under which ComEd would recover its costs for such procurement. That reading of Section 16-103(c) is simply wrong. There is no prohibition in Section 16-103(c) on how the Commission is to set rates for bundled tariffed services. The purpose of Section 16-103(c) is to ensure that electric utilities continue to offer "to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer's premises...." (220 ILCS 5/16-103(c)). Section 16-103(c) does require that "[f]or

¹ Administrative Judge's Ruling in 05-0159, June 1, 2005; Petition for Interlocutory Review denied by the Commission, July 13, 2005.

those components of the service which have been declared competitive, cost shall be the market based prices.” *Id.* It does not prohibit the opposite, namely that if a service is not declared competitive, market based rates cannot be utilized. As Judge Wallace correctly stated in his ruling, “from a simple reading of Section 16-103(c), and its numerous references to cost, it is clear that market-based prices and cost-based rates are not mutually exclusive concepts...use of market-based pricing is identified as one method for determining such costs, not an alternative thereto.” 05-0159 ALJ Ruling, June 1, 2005 at 6. As discussed in CCG’s Initial Brief, the Commission’s authority for setting rates during the post transition period rests in Sections 16-111(i), 16-112(a) and Article IX. Furthermore, nothing in Section 16-103 or any other section of the Public Utilities Act (“PUA”) limits the Commission’s long standing plenary authority to determine how tariffed rates are to be set under Article IX which includes the setting of rates through cost recovery mechanisms based on formulas.

C. Relationship of Illinois and Federal Law and Jurisdiction

As stated in CCG’s Initial Brief, the Federal Energy Regulatory Commission (“FERC”) regulates the sale of wholesale power in interstate commerce under Section 201 of the Federal Power Act, 16 U.S.C.S. §824 *et. seq.* The Commission has no authority over wholesale rates or costs of electricity because they occur in interstate commerce. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371-372 (1988) (“States may not bar regulated utilities from passing through to retail consumers FERC-

mandated wholesale rates.”); *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986) (“The filed-rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates.”). Clearly the states are preempted from evaluating the reasonableness of a wholesale rate on file with FERC.

Both the AG and CCSA among other parties, cited to the *Pike County* exception in their Initial Brief for the proposition that states are not precluded from evaluating the prudence of a utility’s decision to purchase power from a particular source. (AG Initial Brief, p. 14; CCSA, pp. 17-18). In *Pike County Light & Power Company v. Pennsylvania Public Utility Commission*, 465 A. 2d 735, 738 (1982), all of Pike County’s power supply was provided by its parent company through a Power Supply Agreement that had been filed with FERC. The court determined that under the facts of that case, the Pennsylvania Public Utility Commission could review the prudence of such purchases. The facts in this case, however, are completely different. As discussed below on pp. 5-7, the proceedings in this docket are for the purpose of determining the methodologies and procedures for the purchase of power and energy through an auction which, if approved, would be a prudent and reasonable way to procure power. Hence, power and energy would be procured through a Commission approved competitive process that the Commission would have determined is prudent and reasonable where various suppliers will be bidding against each other for the opportunity to provide power supply to ComEd. Under the facts of

this case, the prudency review discussed in *Pike County* would have taken place in this docket.

V. AUCTION DESIGN ISSUES

K. Regulatory Oversight and Review

2. Post-Auction Commission Review of Results

The Commission Staff, ComEd, Morgan Stanley Capital Group (“MSCG”) and CCG all support the concept that the scope of the Commission’s post-auction review should be whether the auction process was followed and whether there were anomalies in the bids or process that would call into question the competitiveness of the bids received. (See Staff Initial Brief, p. 45; ComEd Initial Brief, p. 113; MSCG Initial Brief, pp. 3-5; and CCG’s Initial Brief p. 16). By defining the scope of the Commission’s post-auction review in this manner, potential suppliers would have the confidence that the auction results would result in executed Supplier Forward Contracts (“SFC”) if the auction process is followed and no anomalies in the bidding process are found. This type of certainty would maximize supplier participation in the auction process and bring about greater competitiveness.

Some parties suggest that at the conclusion of the auction, after the prices are known, the Commission should hold a prudence review. (See, Cook County Initial Brief County, p. 38; AG Initial Brief, p. 65; CUB Initial Brief, pp. 21-23) These parties miss the point. This proceeding is the vehicle within which to address prudence and it will establish the process by which ComEd and all

parties can be assured, in advance, that the procurement practices are prudent. It is a contested case with notice and opportunity to be heard. If the Commission approves the tariffs in the instant proceeding, it would be approving the rules and the procedures under which ComEd will procure power and energy at the wholesale market and would also approve the cost recovery to ComEd for those purchases. This has to be viewed in the context of the meaning of prudence. In *Illinois Commerce Commission vs. Illinois Power Company*, Docket No. 01-0701 (Order entered Feb. 19, 2004), the Commission stated:

the Commission has previously defined prudence as the standard of care which a reasonable person would be expected to exercise under the same circumstances by utility management at the time decisions had to be made.

Id. at 22.

The courts have also upheld the Commission's view of prudence. In *Illinois Commerce Commission vs. Illinois Power Company*, 245 Ill. App. 3^d 367 (3d Dist. 1993), the Court stated:

[i]n determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.

Id. at 371. (quoting ICC Docket No. 88-0142 at 25-26 (Order entered Feb. 5, 1992).

Therefore, prudence is the evaluation of circumstances surrounding the judgment of a utility to make purchases at the time that the decision is made. The circumstances here would be the Commission approved mechanism and governing rules for the purchase of power and energy by ComEd. The approved mechanism and rules would, therefore, be prudent and reasonable. ComEd

would not be making any selection of suppliers independently of the approved mechanism and rules. Once a determination is made that the utility's judgment is prudent, the utility's costs are passed on to consumers without further review. Accordingly, if the Commission determines at the conclusion of the auction that the auction process established in this case was followed and that no anomalies in the bidding process took place, then the auction prices that result from the prudent and reasonable auction are required to be passed on to ComEd's consumers without further review by the Commission.

In order to eliminate the possibility of ambiguity as to the scope of the Commission's review at the conclusion of the auction, CCG urges the Commission to define the scope of its post-auction review as outlined above in its Order and to direct ComEd to modify its tariffs accordingly.

L. Supplier Forward Contracts

4. Proposed Clarifications and Modifications not Accepted by ComEd

In its Initial Brief, ComEd merely noted that there were certain suggested clarifications and modifications to the SFCs that ComEd could not accept and referred to its testimony in this docket for its reasoning. (ComEd Initial Brief, p. 118). CCG suggested the inclusion of language in Section 15.13 of the SFC that would provide a mechanism for the Commission to review any new taxes that may be imposed on a supplier in order to determine whether that tax should

be passed on to ComEd's customers. In its testimony, ComEd dismisses that suggestion as speculative. (ComEd Ex. 17.0, lines 751-752). CCG hopes that no new taxes will ever be imposed on wholesale suppliers. If that is the case, the language establishing the mechanism would never be triggered. If such taxes should be imposed, however, then there would be a mechanism in place for the Commission to address the issue. The language CCG suggested in its testimony (CCG Ex. 1.0, lines 260-268) is the same language that appears in the New Jersey Supplier Master Agreement. (CCG Ex. 1.0, lines 270-272).

CCG respectfully requests that ComEd be directed to include the language suggested by CCG in Section 15.13 of the SFC.

VII. TARIFF AND RATE DESIGN ISSUES

C. Additional Tariff and Rate Design Issues

1. Staff's Rate Increase Mitigation Proposal

One of CCG's concerns with regard to Staff's Mitigation Proposal is that the plan might impact suppliers' risk assessment of customer migration. ComEd, in responding to that concern in its testimony, proposed to make the "prism" mechanics available 105 days prior to the auction. In addition, ComEd explained that the delivery service case and the thresholds of the mitigation plan would be established by June 2006. (ComEd Ex. 17.0, lines 576-581). CCG agrees that having the actual data, including the mechanics of the mitigation plan available well in advance of the auction, should address the attrition concern. It should be pointed out, however, that no final decision has been made as to the auction date

and, although CCG does not object to a September Auction, its preference continues to be a May Auction. If a May Auction were approved by the Commission, the risk assessment of customer migration would continue to be an issue since the rate case would not be resolved prior to June 2006.

CCG's other concern with the proposed mitigation plan is that no bidder be paid less than the auction clearing price. CCG continues to urge the Commission to take these issues into consideration in evaluating Staff's Mitigation Proposal.

CONCLUSION

Constellation Energy Commodities Group, Inc., fully supports the Illinois Auction Proposal which is designed to produce market rates through a competitive auction process that would bring benefits to ComEd's customers. The testimony of Constellation Energy Commodities Group, Inc., has been for the purpose of making recommendations that would improve the process. Accordingly, Constellation Energy Commodities Group, Inc., respectfully requests that the Commission enter an order consistent with the recommendations outlined in its Initial Brief and in this Reply Brief.

Respectfully submitted,

**CONSTELLATION ENERGY COMMODITIES
GROUP, INC.**

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