

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Central Illinois Light Company	:	
d/b/a AmerenCILCO	:	
	:	05-0160
Proposal to implement a competitive procurement	:	
process by establishing Rider BGS, Rider BGS-L,	:	
Rider RTP, Rider RTP-L, Rider D, and Rider MV.	:	(Cons.)
(Tariffs filed on February 28, 2005)	:	
Central Illinois Public Service Company	:	
d/b/a AmerenCIPS	:	
	:	05-0161
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(Tariffs filed on February 28, 2005)	:	
Illinois Power Company d/b/a AmerenIP	:	
	:	05-0162
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(Tariffs filed on February 28, 2005)	:	

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

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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 Central Illinois Light Company d/b/a AmerenCILCO,

Central Illinois Public Service Company d/b/a AmerenCIPS, and Illinois Power Company d/b/a AmerenIP (“Ameren”) with the Commission on March 9, 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 Ameren’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 Jones and the Commission<sup>1</sup> rejected the arguments made by the People of the State of Illinois (“AG”) and Citizens Utility Board (“CUB”) that Section 16-103(c) prohibits the Commission from taking action to approve Ameren’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 Ameren 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

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<sup>1</sup> Administrative Judge’s Ruling in 05-0160 (Consolidated), June 1, 2005; Petition for Interlocutory Review denied by the Commission, July 13, 2005.

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 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 Jones 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.

The AG cited to the *Pike County* exception in its 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. 7-8, 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 that, 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 Ameren. Under the facts of this case, the prudency review discussed in *Pike County* would have taken place in this docket and the resulting costs should be passed on to customers without further review.

## **V. AUCTION DESIGN ISSUES**

### **K. Regulatory Oversight and Review**

#### **2. Post-Auction Commission Review of Results**

Under the Ameren Auction Proposal, the Staff and the Auction Manager will submit independent auction reports to the Commission by the end of the business day following the end of the auction. Ameren suggests that “[t]he Staff report will assess whether or not the Ameren Companies’ auctions were conducted fairly and appropriately and all necessary actions to ensure the competitiveness and integrity of the auctions were followed.” (Ameren Initial Brief, p. 76). Commission Staff also suggests that the Confidential Staff Report that would be provided to the Commission after the completion of the auction would address questions, such as:

- Is there any evidence of collusion or improper coordination among bidders?
- Is there any evidence of a breakdown in competition in the auction?
- Were bidding patterns observed during the auction consistent with competitive bidding and the efficient allocation of load among bidders?

Staff Initial Brief, p. 43.

As evidenced above, both Ameren and Staff suggest that the independent reports on which the Commission will rely in making its determination as to whether to approve or reject the auction results, address certain questions. The language in Original Sheet No. 27.028, however, is devoid of any definition describing the scope of the Commission's review of the auction results. That language, in part, states:

If the ICC, during the period that ends on the third business day following the Auction Completion Date, acts through the filing of a formal complaint, the initiation of a formal investigation, or the undertaking of any other similar formal action regarding the CPA, then the Company shall not execute the SFCs resulting from the CPA.

Original Sheet No. 27.028.

Nothing in that provision sets forth the scope of the Commission review or a standard which the Commission would utilize in taking any action. CCG has suggested that the Commission state that the post-auction review will be focused on ensuring that the approved auction process was followed and that there were no anomalies in the bids or process that would call into question the competitiveness of the bids received. In its recent order approving auction results, the New Jersey Board of Public Utilities indicated that its review of the auction results focused on the mechanical elements of the auction and on whether there was evidence of collusion, gaming or market anomalies. (New Jersey BPU Docket No. EO04040288, 2/16/05, pp 3-4)<sup>2</sup>.

By defining the scope of the Commission's post-auction review, potential suppliers would have confidence that the auction results would result in executed Supplier Forward Contracts ("SFC") if the auction process is followed and no

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<sup>2</sup> The New Jersey BPU Docket No. EO04040288 Order was filed in this Docket as CCG Exhibit 1.1.

anomalies in the bidding process are found. This type of certainty would maximize supplier participation in the auction process and bring about greater competitiveness.

CUB and the AG suggest that at the conclusion of the auction, after the prices are known, the Commission should hold a prudence review. (See, CUB Initial Brief, p. 19; AG Initial Brief, p.50). Both CUB and the AG miss the point. This proceeding is the vehicle within which to address prudence and it will establish the process by which Ameren 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 Ameren will procure power and energy at the wholesale market and would also approve the cost recovery to Ameren for those purchases. The resulting prices would, therefore, be prudent.

“Prudence” has been previously defined by the Commission. 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<sup>d</sup> 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)).

“Prudence” is determined by 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 use of a Commission approved mechanism and governing rules for the purchase of power and energy by Ameren. As Staff noted in its Initial Brief in footnote 10, p. 100, “the record in this proceeding fully supports a finding that the Ameren Companies’ auction proposal as modified by Staff will result in prudently incurred reasonable costs....” *Id.* Ameren 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, which in this case is the adherence to the Commission approved mechanism and rules, 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 Ameren’s consumers without further review by the Commission.

In order to eliminate the possibility of ambiguity and to bring about certainty with regard 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 Ameren to modify Original Sheet No. 27.028 accordingly.

**L. Supplier Forward Contracts**

**4. Proposed Clarifications and Modifications not Accepted by Ameren**

In its Initial Brief, Ameren stated that it did not adopt CCG's suggestion to include language in the SFC that would establish a mechanism for the Commission to address the issue as to whether any such new taxes be passed on to retail customers because the SFC provides that the Delivery Point as the clear line of demarcation for tax responsibility. (Ameren Initial Brief, p. 106). Ameren misses the point. CCG has no disagreement with Ameren as to the line of demarcation and responsibility for new taxes. The point is that the SFC has no mechanism that would allow the Commission to determine whether new taxes that may be imposed on suppliers should be passed on to end users. As CCG pointed out in its testimony, "if a new tax were imposed on Ameren as the load serving entity, it would pass the tax on to end users if it were entitled to do so; BGS Suppliers should have the same right." (CCG Ex. 2.0, lines 108-110). The language that CCG suggested be added to Section 15.14 of the SFC is as follows:

If new taxes are imposed on Energy or Capacity or any other component of BGS-[FP] Supply after the date of this Agreement, within forty-five (45) days of the final adoption of any such new taxes, the Companies will notify the BGS-[FP] Suppliers that such new tax has been adopted, will seek approval from the ICC to collect the new taxes from BGS-[FP] Customers, and will provide the BGS-[FP] Suppliers with a copy of the Company's petition seeking such approval from the ICC. Upon receipt of ICC approval

of the collection of the new taxes from BGS-[FP] Customers, the BGS-[FP] Supplier will be excused from liability for payment of those new taxes.

CCG Ex. 1.0 lines 261-270.

CCG respectfully requests that Ameren be directed to include the language suggested by CCG in Section 15.14 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. The plan calls for an "adjustment process that would take place after all components of the bundled ratemaking process are complete. That would include the current proceeding, the auction and the delivery service rate case." (Staff Initial Brief, p. 187). Under these circumstances, the migration analysis will have another layer of uncertainty since the application of the mitigation plan to the final bundled retail rates will not likely be known until after the auction. This uncertainty may add an additional risk premium.

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 Ameren'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,

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