

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)
On its own Motion)
)
Proceeding to monitor the ongoing) No. 03-0056
Development of the marketplace for)
Commonwealth Edison Customers)

**VERIFIED RESPONSE OF
THE COALITION OF ENERGY SUPPLIERS
TO THE ILLINOIS INDUSTRIAL ENERGY CONSUMERS’
MOTION OF THE FOR ACCESS TO MARKET MONITORING DATA
AND FOR ADMINISTRATIVE NOTICE OF CERTAIN COMMISSION RECORDS**

Constellation NewEnergy, Inc., MidAmerican Energy Company, and Peoples Energy Services Corporation (collectively the “Coalition of Energy Suppliers”¹ or “Coalition”), by their attorneys DLA Piper Rudnick Gray Cary US LLP², pursuant to 83 Ill. Admin. Code 200.190, hereby respectfully respond to the Motion For Access To Market Monitoring Data and For Administrative Notice of Certain Commission Records (“Motion”) filed by the Illinois Industrial Energy Consumers (“IIEC”). In opposition to the Motion in part and in support of the Motion in part, the Coalition states as follows:

ARGUMENT

By its Motion, the IIEC seeks a highly unusual remedy: access to admittedly confidential, proprietary, and competitively sensitive information that has been subject to protection and non-disclosure pursuant to a Commission Order that has been in place for three (3) years. Yet, the

¹ The current members of the Coalition previously appeared as, and the Coalition was formerly known as, the “Retail Electric Supplier Coalition” or “RES Coalition.”

² The law firm previously appeared as, and was previously known as, “Piper Rudnick.”

IIEC provides only the most generic and conclusory explanation for the relief sought and fails to provide any specific detail regarding the scope of information it seeks. Moreover, the IIEC completely fails to identify the scope of protection that should control its access and review of the confidential, proprietary, and competitively sensitive information.³

It appears that the IIEC filed the Motion with the hope that – based on a few generic and conclusory statements – the Commission will ignore the importance of keeping confidential information confidential and simply grant this group of sophisticated industrial consumers, its lawyers, and its consultants access to several years of proprietary data submitted by competitive retail electric suppliers (RESs) in Illinois. The RESs submitted this data to the Commission with the explicit understanding that said information was and would remain confidential.

The IIEC is not a newcomer to these issues; indeed, it was a party when the instant proceeding was initiated in 2003. Since 2003 until filing its Motion, the IIEC never took the appropriate steps, as outlined in the Commission’s administrative rules and the Illinois Public Utilities Act (“the Act”), to file any pleadings to request that the Commission revisit the decisions affording confidential status to this information and limiting access to such information. Setting aside the legal infirmities of the Motion, the IIEC fails to set forth any good faith or reasoned explanation for revisiting the Commission’s three-year old decisions in this matter. Thus, the IIEC’s efforts to obtain confidential information through the instant Motion

³ As an initial matter, it is worth noting that all parties, including the IIEC, agree that the data in question is properly deemed confidential. That fact distinguishes this case from most involving requests for access to information, where the moving party typically will challenge the confidential designation of some or all of the information sought. Given that all agree that the information is confidential, the IIEC’s rather conclusory argument for access, discussed further herein, is particularly unpersuasive.

amount to nothing less than an improper collateral attack on the original decisions of the Commission in its April 9, 2003 Interim Order (“Interim Order”).

The IIEC’s attempt to access confidential information should be denied. Having stated that, however, the Coalition does not object to IIEC’s proposal to include in the instant proceeding relevant evidence from the procurement proceeding of Commonwealth Edison Company (“ComEd”), ICC Docket No. 05-0159.

I.

THE IIEC’S MOTION LACKS SPECIFICITY AND FAILS TO JUSTIFY ALTERATION OF THE COMMISSION’S PRIOR INTERIM ORDER

The Commission should reject the IIEC’s request to revisit the monitoring process that the Commission established in its April 9, 2003 Interim Order regarding the collection and dissemination of confidential information and data from retail electric suppliers (“RESs”). By its Motion, the IIEC seeks RES-specific information and data that the Commission has properly recognized as and deemed confidential.⁴ In recognition of the commercially-sensitive nature of this confidential information, the Commission established a process by which the Commission Staff would collect this data and information and disseminate it in an aggregated manner. Without explaining why the Commission should now alter its confidential treatment of the data or why providing Staff with the data will not suffice, the IIEC requests the Commission to provide suppliers’ market data to a group of sophisticated industrial consumers, its consultants, and its lawyers. The Commission should deny this request.

⁴ Section 4-404 of the Act specifically mandates that the Commission “shall provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person, corporation or entity.” 220 ILCS 5/4-404.

A. The Commission Has Deemed The Specific Information Sought By IIEC To Be Confidential

The IIEC's Motion requests that the Commission grant, without any meaningful limitation, the IIEC access to "data on the development of the market for services to ComEd customers with demands of 3MW or greater." (Motion at 1.) The IIEC sought and the Commission denied similar relief in 2003. The IIEC offers no new argument or rationale for access that the Commission denied three years ago. Thus, the IIEC is requesting that the Commission either ignore or vacate its Interim Order that required ComEd and RESs to provide certain market information to the Commission on a confidential basis. As such, the parties to the instant docket, including the IIEC, understood that said information would not be disclosed to the public in a manner that may expose the identity of those RESs providing the data. (See Interim Order at 3-6.) The IIEC's Motion lacks any meaningful rationale to support reversal of the Commission's prior decision to limit the disclosure of confidential supplier information.

B. The IIEC Fails To Provide Any Rationale For Altering The Commission's Prior Decision

Although the IIEC argues for the "review and discussion" of the data, it provides no analysis as to why the Commission should reverse its prior decision and thereby provide the IIEC access to confidential data in order to make such a review and discussion possible. The Commission cannot grant the IIEC's highly unusual request, which clearly implicates the disclosure and possible dissemination of competitively sensitive, proprietary information, without the IIEC providing substantive argument and reasoning. The IIEC's Motion falls well short of the mark.

Indeed, the IIEC's Motion fails to explain, even in cursory fashion, why the Commission-approved process, by which RESs would continue to provide the competitively sensitive, confidential and proprietary information and data to Staff, is now inadequate. The IIEC fails to

explain why Staff is now an inadequate repository for said information. Moreover, the IIEC fails to explain why Staff is now unable or unqualified to evaluate such information and present it in an aggregated format to the Commission. The IIEC offers a generic, blanket statement that “a review and evaluation of the data by IIEC would require greater access to filed confidential data than a presentation of agreed aggregated data” (Motion at 4.) But that conclusory statement begs the question, what does the IIEC wish to demonstrate by its review and evaluation? The only possible answer found in the Motion is the IIEC’s quotation of the Interim Order:

[A] full picture of the competitive nature of the ComEd marketplace depends on the number of customers actually being served by all providers of electricity and the prices customers are actually paying for electric power and energy

(Motion at 2, *quoting* Interim Order at 7.)

Certainly, the IIEC does not intend to suggest that the IIEC requires RES-specific pricing data to prepare and present its position in the instant proceeding. Indeed, in conversations with Coalition members and representatives, the IIEC has provided assurances that it does not seek any pricing information.

Nevertheless, in quoting the Commission’s Interim Order, it appears that the IIEC seeks RES-specific information regarding: (1) the number of customers being served and (2) prices customers are paying. However, the IIEC provides no explanation of why there would be any material difference, whether that information is presented in the aggregate or whether it is presented with particularity. Simply put, the IIEC provides no explanation of why the Staff’s compilation of aggregate information, combined with other information available to the public is insufficient to provide it with a “full picture of the marketplace for the ≥ 3 MW customers.” (Motion at 4.) More importantly, the Coalition notes that the members of the IIEC, its consultants, and its attorneys actively participate in the solicitation of and negotiation of

competitive electric service from RESs. As such, and based upon the manner in which this request has been placed before the Commission, the Coalition is concerned that the IIEC may be attempting to obtain this highly confidential and proprietary pricing information for reasons that are beyond the scope of this proceeding.

Permitting the IIEC to access confidential RES information regarding competition in the ComEd service territory would be directly contrary to the previous decisions made by the Commission in the instant proceeding. Because the IIEC has failed to provide any justification for the Commission reversing its prior ruling, this portion of the IIEC's Motion should be denied. (*See Newkirk v. Bigard*, 109 Ill. 2d 28, 39, 485 N.E.2d 321, 325-26 (1985) (“[T]he general rule is that a party cannot collaterally attack an agency order . . . unless the order is void on its face as being unauthorized by statute”). Since the applicable law is well established, and the IIEC has failed to allege that the Commission's order is void on its face, the Commission should not revisit this portion of the IIEC's Motion. *See Kemeny v. Skorch*, 22 Ill. App. 2d 160, 164, 159 N.E.2d 489, 490-91 (1st Dist. 1959) (recognizing that a ruling on whether or not a document is privileged can become the law of the case); *see also* 14 Ill. Law & Prac. *Courts* § 78 (2006) (“The purpose of the law-of-the-case doctrine is to protect settled expectations of the parties, ensure uniformity of decisions, maintain consistency during the course of a single case, effectuate proper administration of justice, and bring litigation to an end.”)

II.

RETAIL ELECTRIC SUPPLIERS WOULD BE SUBSTANTIALLY PREJUDICED BY DISCLOSURE OF THE INFORMATION REQUESTED BY THE IIEC

The IIEC's broad request for confidential material threatens disclosure of proprietary market information without adequate protections. Despite the expansive scope and ill-defined nature of the IIEC's request, the IIEC has failed to specify the exact information it seeks.

Further, the parties to the instant proceeding have been more than willing to discuss ways in which they could accommodate a reasonable request to provide relevant information to the IIEC. Should the IIEC truly wish to obtain additional information regarding suppliers' participation in the competitive markets in Illinois, then it should develop a formal and precise proposal articulating its need for additional market data and addressing the appropriate protections that will be established to ensure that such confidential data will be protected from unauthorized disclosure. The instant Motion lacks such a formal and precise proposal.

A. The IIEC Disregards Parties' Ongoing Willingness To Discuss An Alternative Option

The IIEC's Motion disregards the parties' willingness to work with the IIEC to develop an alternative means for the IIEC to analyze the state of the competitive market for ≥ 3 MW customers. The IIEC incorrectly suggests that the IIEC has been working diligently to "define a process for reviewing and assessing data that is acceptable to all parties." (Motion at 3.) Parties to the instant proceeding have participated in several conference calls in an effort to determine the scope and degree of the information sought by the IIEC. To date, the IIEC has presented arguments no clearer than those presented in its Motion. In fact, to the Coalition's knowledge, the IIEC never convened a conference call to discuss the information that it is now seeking.⁵

⁵ The IIEC references Attachment A to its Motion as "A list of data required for a minimal picture of the marketplace, which IIEC has distributed for the consideration by other parties . . ." (Motion at 3.) The document referenced by the IIEC as "Attachment A" is the same as the document that the IIEC provided to counsel on March 24, 2006 – the business day prior to the IIEC filing its Motion. The IIEC states that it was "compelled by the calendar to file this motion," yet provides no specific explanation as to the "compelling" nature of its need. (Motion at 3.) Certainly, the IIEC should have provided parties with a reasonable opportunity to respond.

B. The IIEC Repeatedly Has Failed To State With Any Degree Of Specificity What Data It Needs

The IIEC consistently has failed to specify what data it seeks in order to facilitate its analysis. In fact, the IIEC's requests are obscure and contradictory. Although the IIEC states a desire "to review all the confidential data the Commission has required ComEd to provide to Staff" it later states that the "IIEC has not sought disclosure of all information that the IIEC deems relevant." (*Compare* Motion at 3 *with* Motion at 4, fn 2.) This contradiction begs the question: what additional information may the IIEC be seeking above and beyond that which ComEd has provided to Staff? The IIEC has simply failed to provide an explanation that would justify the disclosure of the RES-specific data; and it has failed to identify the specific information needed to achieve those objectives.⁶

At a minimum, the IIEC must inform the parties and the Commission whether the information sought would be RES-specific or aggregated, and whether it would be provided under a protective order to the IIEC's consultants or only to the IIEC's counsel.⁷ Until the IIEC properly delineates the scope and degree of its request, neither the parties to the instant proceeding, nor the Commission can be expected to resolve the IIEC's non-specific request. The Motion as it stands should be denied.

⁶ As noted above, the IIEC asserts that the information listed in its "Attachment A" document can only give a "minimal picture of the marketplace." (Motion at 3.) This statement again implies that the IIEC's request was only partial. Even after providing a partial request, the IIEC has not contacted any of the members of the Coalition to further elaborate on the objectives, methodologies, and protections it might envision for the reasonable assembly and dissemination of the confidential information it seeks. In addition, it is unclear who the IIEC proposes to conduct the HHI calculations cited in Attachment A.

⁷ The IIEC states a "willingness to consider attorneys only access to certain data for preliminary assessment of need" but fails to identify the "certain data" to which it refers. (Motion at 4, fn 2.)

III.

THE IIEC IGNORES THE SENSITIVE NATURE OF THE RES DATA

The IIEC pays lip service to the importance of the confidential and proprietary data and information at issue. Yet, while recognizing the proprietary nature of the information, the IIEC provides no plan -- let alone a clear, enforceable, and prudent plan -- to protect against unauthorized use or dissemination. Instead, the IIEC shifts the focus toward the largely dubious concept that the IIEC is the “sole representative” of the ≥ 3 MW customers in Illinois, ignoring the reality that the Commission Staff is a more appropriate repository for confidential market data than a group of sophisticated industrial consumers. In any event, absent an adequate explanation and plan regarding controls on dissemination, the Motion must be denied.

Although the IIEC states as an objective “to respect the expressed confidentiality concerns of other parties,” (Motion at 3) it proposes no methodology for ensuring such protection. The IIEC states that it should be granted the right to view all confidential data “subject to appropriate confidentiality restrictions” but does not propose the nature of the revised confidentiality restrictions that it seeks the Commission to impose. (Motion at 3.)

The Commission’s Interim Order properly outlines those materials which are required to be provided to Commission Staff and also outlines the scope and form that the respective public and confidential data should take.

The Coalition recently has been informed by Commission Staff and ComEd that only a select few of the twenty (20) alternative retail electric suppliers (“ARES”) listed by the Commission as certificated in Illinois actually have been providing the information required by

the Interim Order.⁸ This fact only serves to heighten the need to ensure that the confidential data of those complying ARES is adequately protected. Therefore the IIEC's proposal in "Attachment A" to have disclosed market data assigned to individual suppliers and "identified only as A, B, etc." would be insufficient to protect (and in fact could serve to harm through potential disclosure) those suppliers who have complied with the Commission's Interim Order.

Absent a specific proposal from IIEC that, at the very least, includes a draft protective order and non-disclosure agreement, the Commission should be extremely wary of pressing forward with any disclosure. Given the failure of the IIEC to present such a complete analysis, the Commission should deny this portion of the IIEC's Motion.

IV.

THE IIEC'S MOTION INAPPROPRIATELY DISCOUNTS THE COMMISSION STAFF'S REPRESENTATION OF ILLINOIS CONSUMERS

The IIEC's assertion that it is "the sole representative of the directly affected ≥ 3 MW customers of ComEd" (Motion at 4) improperly discounts the Commission Staff's role both in this proceeding specifically and in the context of Illinois consumers protection generally.

The Commission Staff is, in part, charged with ensuring that the Act and the regulations of the Commission are implemented in a manner consistent with their enactment. (*See* 200 ILCS 5/2-105(b) ("The executive director shall obtain . . . employees as may be necessary to carry out the provisions of this [Public Utilities] Act or to perform the duties and exercise the powers

⁸ In the short term, the Commission should consider whether it would be appropriate to issue data requests to all RESs requesting this information. Over the long term, the Commission should consider whether it would be helpful to send a "reminder letter" to all RESs regarding the reporting requirements imposed under the Interim Order in this proceeding, as well as other reporting obligations imposed upon RESs.

conferred by law upon the Commission.”); *Business & Professional People for the Pub. Interest v. Ill. Commerce Comm’n*, 136 Ill. 2d 192, 202, 555 N.E.2d 693, 697 (1989) (“The Commission, usually through its Staff, may gather evidence, subpoena witnesses, depose witnesses, or require the production of documents in order to determine whether a utility has complied with the [Public Utilities] Act.”).) In the instant proceeding, the Commission appropriately sought out its own Staff as the neutral repository for the confidential RES information and data required by the Interim Order. The Commission no doubt had the public interest in mind when it charged the Commission Staff with that responsibility. For the IIEC to suggest otherwise is inappropriate and improper.

IV.

THE COALITION GENERALLY SUPPORTS THE IIEC’S PROPOSAL FOR THE COMMISSION TAKING ADMINISTRATIVE NOTICE OF RELEVANT PORTIONS OF THE PROCUREMENT PROCEEDING RECORD

The Coalition generally supports the IIEC’s proposal for administrative notice of the relevant positions in the record in ICC Docket No. 05-0159 (the “Procurement Proceeding”). As the record to the instant proceeding will be assembled without evidentiary hearings, and since many of the issues surrounding the development of competition in the ComEd service territory similarly were raised in the Procurement Proceeding, administrative notice would be an efficient and effective means of ensuring that the record herein contains the greatest amount of relevant information regarding the development of retail competition in Illinois. The Coalition also would expect to offer relevant portions of its testimony in the Procurement Proceeding to supplement the record in the instant proceeding. Accordingly, the Coalition supports the IIEC’s proposal for administrative notice, but reserves its right to object to any particular offering made by the IIEC or any other party.

WHEREFORE, Constellation NewEnergy, Inc., MidAmerican Energy Company, and Peoples Energy Services Corporation respectfully request that the Commission:

1. Deny the IIEC's Motion to the extent that it seeks disclosure of confidential information;
2. Grant the IIEC's Motion to the extent it seeks to allow the IIEC and other parties to designate for administrative notice certain portions of the record in ICC Docket No. 05-0159; and
3. Grant such further relief as the Commission deems just and appropriate.

Respectfully submitted,

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