

# **ATTACHMENT AE**

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Constellation NewEnergy, Inc. :  
: :  
Application to Amend its Existing : 03-0325  
Certificate of Service Authority :  
Issued in ICC Docket No. 99-0447 :  
under Section 16-115 of the Public :  
Utilities Act. :

ORDER

By the Commission:

**I. PRELIMINARY AND PROCEDURAL MATTERS**

On May 13, 2003, Constellation NewEnergy, Inc. ("Applicant" or "NewEnergy") filed a verified application with the Illinois Commerce Commission ("Commission") requesting an amendment of its certificate of service authority as an alternative retail electric supplier ("ARES") in the State of Illinois issued in Docket No. 99-0447 pursuant to Section 16-115 of the Public Utilities Act ("Act"), 220 ILCS 5/1-101 et seq., and 83 Ill. Adm. Code 451 ("Part 451"). Applicant therein requests authority to sell retail electricity and power to eligible nonresidential retail customers with annual electrical consumption greater than 15,000 kilowatt-hours ("kWh") in the service areas of Illinois Power Company ("Illinois Power"), Central Illinois Public Service Company ("AmerenCIPS"), Union Electric Company ("AmerenUE"), and Central Illinois Light Company ("AmerenCILCO"). Authority to provide single-billing services for the AmerenCIPS service area was also requested. This request was withdrawn in a filing made by Applicant on June 12, 2003.

On May 15, 2003 notice of this application was published in the official state newspaper pursuant to Section 16-115(b) of the Act and Section 451.30. Pursuant to a ruling issued May 22, 2003, the Administrative Law Judge requested additional information relating to various provisions of Part 451, as well as certain clarifications of matters contained in the application. Applicant filed verified responses thereto on June 2, 2003. No intervening petitions were filed in this matter, and no appearances were entered other than by the Applicant.

**II. BACKGROUND**

On September 7, 1999, in Docket 99-0477, NewEnergy Midwest L.L.C. filed a verified application with the Commission requesting a certificate of service authority in order to become an alternative retail electric supplier in Illinois pursuant to Section 16-115 of the Act. On September 17, 1999 the Commission entered an Order granting

NewEnergy Midwest L.L.C. a Certificate to offer the sale of electricity and power to eligible nonresidential retail customers with annual electrical consumption greater than 15,000 kWh in the service territories of Commonwealth Edison Company and Illinois Power.

Thereafter, NewEnergy Midwest L.L.C. filed an Application for Rehearing in Docket 99-0447 asking the Commission to consider additional evidence in support of the Applicant's request to provide single billing service. The Commission, after reviewing the additional information provided on rehearing, concluded that Applicant should be certified to provide single billing services to all eligible nonresidential retail customers with annual electrical consumption greater than 15,000 kWh in the service area of Commonwealth Edison.

On January 25, 2001, a filing was made stating that NewEnergy Midwest, L.L.C., had been absorbed into its corporate parent, AES NewEnergy, Inc., with AES NewEnergy, Inc. serving as the successor in interest to NewEnergy Midwest, L.L.C., for all purposes. The filing went on to state that it was being submitted to demonstrate continued compliance with all relevant requirements of 83 Ill. Adm. Code 451, and it asked the Commission to amend the certificate previously granted NewEnergy Midwest, L.L.C., to show AES NewEnergy as the party in interest.

In order to consider this filing, the previous docket, 99-0447, was reopened. Based upon a determination that the Public Utilities Act did not contemplate the transfer of an ARES certificate, the Applicant was informed that the filing would be treated as a petition to abandon service by NewEnergy Midwest, L.L.C. and an application for certification as an ARES by AES NewEnergy, Inc.

On March 21, 2001, the Commission entered an order in the reopened docket and granted AES NewEnergy, Inc., a Delaware corporation, service authority to operate as an Alternative Retail Electric Supplier to provide power and energy as well as single billing services to all eligible nonresidential retail customers with annual electrical consumption greater than 15,000 kWh in the service area of Commonwealth Edison Company. At that time, the certification previously issued to NewEnergy Midwest, L.L.C. to operate as an ARES in the Illinois Power service territory was relinquished.

On September 9, 2002, the Constellation Energy Group, Inc., ("CEG") acquired the stock of AES NewEnergy, Inc. from AES Corporation pursuant to a stock purchase agreement. AES NewEnergy, Inc. was renamed Constellation NewEnergy, Inc. Neither the stock purchase nor the name change involved a change in the underlying incorporated legal entity.

**III. RELIEF SOUGHT IN DOCKET 03-0325; REQUIREMENTS FOR ALL APPLICANTS UNDER SECTION 16-115 AND SUBPART A OF PART 451**

Applicant Constellation NewEnergy, Inc. is a corporation incorporated under the laws of the State of Delaware. Applicant holds a Certificate of Authority to Transact Business in the State of Illinois. As noted above, Applicant is a subsidiary of CEG.

Applicant has offices in Chicago, Illinois. It also has offices in Baltimore, Maryland; Boston, Massachusetts; Columbus, Ohio; Houston, Texas; Austin, Texas; Los Angeles, California; Walnut Creek, California; Dearborn Heights, Michigan; New York, New York; and Philadelphia, Pennsylvania.

As an ARES, Applicant and its predecessors have actively provided the sale of electricity and power to non-residential retail customers in the service area of Commonwealth Edison in Illinois since the market was opened to competition in 1999. NewEnergy asserts that it also serves commercial and industrial customers in virtually every other service territory that offers open access, including Maine, Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Texas, Delaware, Maryland, Michigan, Rhode Island, New Hampshire, and California.

In the instant proceeding, Docket No. 03-0325, Applicant requests authority to sell retail electricity and power to eligible nonresidential retail customers with annual electrical consumption greater than 15,000 kilowatt-hours in the service areas of Illinois Power, AmerenCIPS, AmerenUE, and AmerenCILCO. In connection with the instant application, Applicant has provided notice to the Illinois electric utilities of its intent to serve in the utilities' respective service areas.

Applicant states that its employees will not be installing, operating, and maintaining generation, transmission, or distribution facilities within Illinois. No further demonstration of compliance with the requirements of Section 451.20(f)(2) has been made. Accordingly, Applicant's employees are not permitted to perform such functions, and other entities are not permitted to perform such functions pursuant to contractual arrangements with Applicant.

Applicant has certified that it will comply with all applicable regulations; that it will provide service only to retail customers eligible to take such services; that it will comply with informational and reporting requirements established by Commission rule; that it will comply with informational and reporting requirements pursuant to Section 16-112 of the Act; and that it will comply with all other applicable laws, regulations, terms and conditions required to the extent they have application to the services being offered by Applicant as an ARES.

Applicant has agreed to submit good faith schedules of transmission and energy in accordance with applicable tariffs. Applicant has agreed to adopt and follow rules relating to customer authorizations, billing records, and retail electric services. Applicant has agreed to confidential treatment of customer data.

#### **IV. TECHNICAL, FINANCIAL, AND MANAGERIAL REQUIREMENTS OF SECTION 16-115 AND SUBPART D OF PART 451; SINGLE-BILLING**

Applicant asserts that it meets the **financial qualifications** set forth in Section 16-115(d)(1). For purposes of demonstrating compliance with the provisions of Section 451.50(a) of Part 451, a copy of Applicant's Licensing Bond was provided.

Financial qualifications under Subpart C are set forth in Section 451.220. Under Subsection 451.220(a), an applicant is deemed to possess sufficient financial resources to be certified as an ARES if it meets any one of six criteria identified in Subsections 451.220(a) (1) through (6). In many applications, parental guarantees, as described in Subsection 451.220(a)(3)(A), have been used to demonstrate compliance with the financial requirements of Section 451.220 of the Commission's ARES Rules. Fully satisfying Section 451.220 solely through Subsection 451.220(a)(3)(A) is not an available option for NewEnergy, however, as recent amendments to Part 451 make Subsection 451.220(a)(3)(A) available only to obligations to unaffiliated companies.

At this time, certain other subsections in Section 451.220 are not available to Applicant as a stand-alone means of demonstrating full compliance with Section 451.220. For example, Subsection 451.220(a)(6) provides that an applicant may demonstrate compliance with Section 451.220 by earning 12 points on the financial ratios set forth in subsection (a)(6)(A). However, Subsection (a)(6)(B) requires an accountant's report for the applicant's certified financial statements. Because Constellation Energy Group, Inc., ("CEG") did not acquire the stock of AES NewEnergy, Inc. until September 9, 2002, certified financial statements are not available for a full 12-month period as contemplated in Subsection (a)(6)(B).

Due in part to these reasons, it is the intent of NewEnergy, for purposes of this proceeding, to demonstrate its Section 451.220 financial qualifications to conduct its business as an ARES in Illinois by means of Subsection 451.220(b) of Part 451. Subsection 451.220(b) is available to an applicant "that does not either meet or qualify for certification under any of the criteria set forth in subsection (a) . . . ."

In attempting to satisfy Section 451.220 by means of Subsection 451.220(b), NewEnergy filed, among other things, an unconditional parental guarantee in the amount equal to 7.5% of NewEnergy's prior fiscal year's revenues from the sale of electric energy to end-use retail customers in Illinois as described in Subsection 451.220(a)(3)(A). As explained above, this guarantee, standing alone, is not sufficient to satisfy Section 451.220; however, it may be submitted as part of a Subsection 451.220(b) showing.

Applicant also provided CEG's current rating reports. The Fitch Ratings Report shows that the senior secured debt of CEG is rated A- and CEG's commercial paper is rated F2. The Standard & Poor's Ratings Report shows the senior secured debt of

CEG is rated A- with a short-term rating of A-2. The Moody's Ratings Report shows CEG's senior secured debt is rated Baa1 and its commercial paper is rated P-2.

In addition, Applicant provided Dunn and Bradstreet Business Information Reports for both Applicant and CEG. The Dunn and Bradstreet Business Information Reports for both Applicant and CEG show a PAYDEX score of 77 for each and a Composite Credit Appraisal of 3 for CEG. The Commission notes that these scores compare favorably to the standards for certification of alternative gas suppliers contained in 83 Ill. Adm. Code 551.80(a).

Applicant also submitted financial information as part of its verified response to the Administrative Law Judge's request for clarification/additional information. Included in this response were Applicant's unaudited financial statements for the period of January 1, 2002 through December 31, 2002. Due to the recent change in ownership of Applicant in September 2002, certified financial statements were not available for a full 12-month period. As noted above, because certified financial statements were unavailable, Applicant was unable to fully comply with Section 451.220 financial qualifications using only Subsection 451.220(a)(6). However, Applicant provided financial ratios and supporting calculations demonstrating, based on unaudited financial statements for the 12-month period ending December 31, 2002. While the Commission does not necessarily agree with all the assumptions used in the calculations, the Commission observes that the ratios easily exceed the standards set forth in Subsection 451.220(a)(6).

In addition, Applicant provided its Audited Financial Statements for the period of September 9, 2002 through December 31, 2002, and an accountant's report for the aforementioned period; CEG's 2002 Annual Report; AES NewEnergy Audited Financial Statements for the year ending December 31, 2001 and; Applicant's unaudited financial statements for the period of January 1, 2003 through March 31, 2003.

The Commission has reviewed the extensive information provided by Applicant, including the supplemental information provided, and finds that Applicant has demonstrated that its financial resources are sufficient for the goods and services it seeks to provide and that Applicant's financial documents establish that it possesses adequate financial resources to provide the services for which it seeks a certificate of service authority within the meaning of subsection (b) of Section 451.220. The Commission's finding also gives consideration to the fact that Applicant has been an active participant in the Illinois retail electric market since the market was opened to competition in 1999.

Applicant also represents that it meets the **technical and managerial qualifications** set forth in Section 16-115(d)(1) and Sections 451.230 and 451.240. Applicant identified the personnel who purportedly satisfy the criteria, and provided biographical information for these individuals. The Commission has reviewed the application and attachments along with the supplemental information provided by Applicant regarding the technical and managerial requirements of Section 16-115 of the

Act and Part 451, and finds that Applicant has sufficiently demonstrated compliance with those requirements.

In its application, Applicant also requested authority to provide **single-billing** services to nonresidential retail customers with annual electrical consumption greater than 15,000 kilowatt-hours in the AmerenCIPS service territory. Financial qualifications for the provision of single-billing are set forth in Subpart F, Section 451.510. Under that section, an applicant must demonstrate credit-worthiness for single-billing in any one of four ways.

On June 12, 2003, Applicant filed a "Notification" voluntarily withdrawing its request for certification to offer single-billing in the AmerenCIPS service territory, with the understanding that it may apply for such certification at a later date. Therefore, Applicant's request for authority to provide single-billing service in the AmerenCIPS service territory should be deemed withdrawn, without prejudice to being requested again at a later time.

## **V. RECIPROCITY ANALYSIS**

### **A. Statutory Provisions**

Section 16-115 of the Act states in part:

(d) The Commission shall grant the application for a certificate of service authority if it makes the findings set forth in this subsection based on the verified application and such other information as the applicant may submit:

(5) That if the applicant, its corporate affiliates or the applicant's principal source of electricity (to the extent such source is known at the time of the application) owns or controls facilities, for public use, for the transmission or distribution of electricity to end users within a defined geographic area to which power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered, the applicant, its corporate affiliates or principal source of electricity, as the case may be, provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by the electric utility, and provided further, that the applicant agrees to certify annually to the Commission that it is continuing to provide such delivery services and that it has not knowingly assisted any person or entity to avoid the requirements of this Section. For purposes of this subparagraph, "principal source of electricity" shall mean a single source that supplies at least 65% of the applicant's electric power and energy, and the purchase of transmission and distribution services pursuant to filed tariff under the jurisdiction of the Federal Regulatory Commission or a

state public utility commission shall not constitute control or access to the provider's transmission and distribution facilities;

### **B. The Fifth District Court Decision**

Section 16-115(d)(5) of the Act was recently interpreted by the Appellate Court of Illinois, Fifth District. *Local Union Nos. 15, 51, and 702, International Bhd. of Elec. Workers v. Illinois Commerce Comm'n and WPS Energy Services, Inc., and Blackhawk Energy Services, L.L.C.*, 331 Ill. App.3d 607, 772 N.E. 2d 340, 265 Ill. Dec. 302 (2002) ("IBEW" or "IBEW Decision")

In its decision, the Appellate Court interpreted Section 16-115(d)(5) in the following manner:

"(d) The Commission shall grant the application for a certificate of service authority if it [finds] \* \* \*:

\* \* \*

(5) That *on condition that* (1) the applicant, its corporate affiliates[,] or the applicant's principal source of electricity (to the extent such source is known at the time of the application) owns or controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area to which electric power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered, (2) the applicant, its corporate affiliates[,] or principal source of electricity, as the case may be, provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by the electric utility, and provided further, that (3) the applicant agrees to certify annually to the Commission that it is continuing to provide such delivery services and that it has not knowingly assisted any person or entity to avoid the requirements of this Section. \* \* \*." (772 N.E.2d 347)

The Court further stated that, "the statute must be construed such that before the Commission grants a certificate of service authority, it must find that the applicant complies with each condition set forth in section 16-115(d)(5)." (772 N.E.2d 348)

### **C. Information Provided by Applicant**

In the instant case, the Applicant is affiliated with Baltimore Gas and Electric Company ("BGE"), a public utility that offers retail gas and electricity services to customers in the state of Maryland. BGE owns and controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area. Other than BGE, Applicant represents that no corporate affiliate of Applicant

owns or controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area.

Applicant represents that electric power and energy can be physically and economically delivered by Illinois Power Company, AmerenCIPS, AmerenUE, and AmerenCILCO to the service territory of BGE. Applicant also alleges that the delivery services offered by BGE are reasonably comparable in nature and scope to those offered by Illinois Power, AmerenCIPS, AmerenUE, and AmerenCILCO. Applicant makes a number of assertions in support of its position. The statements contained in the next five paragraphs of this order are among the assertions made by the Applicant, and are not intended to be findings of fact by the Commission.

The BGE service territory is part of a regional electric grid that is operated by PJM Interconnection, L.L.C. ("PJM"). PJM is a large centrally dispatched and coordinated system. PJM controls the transmission systems of transmission owners, including that of BGE. As the country's first fully functioning regional transmission organization ("RTO"), PJM operates the world's largest competitive wholesale electricity market and North America's largest power grid. PJM currently coordinates a pooled generating capacity of more than 71,600 megawatts and operates a wholesale electricity market with more than 200 market buyers, sellers and traders of electricity.

PJM allows bilateral contracts and bid-based exchanges through a spot price power exchange. According to Article 9.1(c) of PJM's Reliability Assurance Agreement Among Load Serving Entities in the PJM Control Area, every PJM member must "make available its Capacity Resources to the other Parties through the Office of the Interconnection for coordinated operation and to supply the needs of the PJM Control Area for Operating Reserves." In order for an entity to be integrated into the PJM control area, the entity must possess generation and transmission attributes that enable it to share its reserves with all other entities in the PJM Control Area. PJM's Schedule 2 enables a downstate Illinois utility to deliver power and energy into BGE by merely delivering power and energy into PJM.

Because AmerenCIPS, AmerenUE, and AmerenCILCO are all MISO members, the physical capability and transmission economics of delivering power and energy from AmerenCILCO's service territory through the combined control area of AmerenCIPS and AmerenUE to BGE in PJM is no different from delivering power and energy from the service territory of AmerenCILCO to BGE's service territory.

The downstate Illinois utilities also could physically and economically deliver power and energy to the BGE service territory by engaging in transactions within PJM. The downstate Illinois utilities no longer own generation. Nevertheless, one way in which they can physically and economically deliver power and energy to the BGE service territory is by purchasing electric power and energy from facilities within their own service territories or from generation affiliates and then delivering the electric power and energy into the BGE service territory. However, they also could physically and

economically deliver power and energy to the BGE service territory simply by participating in PJM's wholesale market and BGE's retail market.

In April 1999, Maryland passed its Electric Restructuring Act ("Maryland Law") that provides for retail choice for Maryland consumers as well as standard offer service for customers that do not opt for choice. BGE entered into a settlement, approved by the Maryland Public Service Commission ("MPSC"), requiring retail choice for all BGE customers effective with their first meter reading on or after July 1, 2000 (with certain limited exceptions for customers with individual preexisting contracts). The settlement also included frozen rates and rate design methodologies; the provision of standard offer service; the possibility of lump-sum customer transition charge payments for certain customer classes; and competitive metering services. All commercial and industrial customers in BGE's service territory may currently opt for choice. Moreover, the downstate Illinois utilities are eligible to be certified as a competitive electric supplier by the MPSC if they desire to serve customers located in the BGE service territory.

Having reviewed the record, **the Commission finds** that Applicant's affiliate, BGE, owns or controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area to which electric power and energy can be physically and economically delivered by the Illinois electric utilities at issue here. The Commission also finds that BGE provides delivery services that are comparable in nature to those offered by electric utilities in Illinois. Similar to the situation in Illinois, it appears there are essentially no limitations on the type or number of BGE customers that may select delivery services.

The Commission further finds that Applicant's utility affiliate provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by Illinois electric utilities. Applicant is hereby directed to certify annually to the Commission that its utility affiliate will continue to provide such delivery services and that Applicant has not knowingly assisted any person or entity to avoid the requirements of Section 16-115(d)(5) of the Act. In conclusion, the Commission finds that Applicant meets the requirements of Section 16-115(d)(5) as interpreted by the Court in *IBEW*.

## **VI. COMMISSION'S CONCLUSIONS; CERTIFICATE OF SERVICE AUTHORITY**

The Commission has reviewed the application and attachments along with the supplementary information provided by Applicant regarding the technical, financial, and managerial requirements and any and all other requirements of the Act and Part 451 and finds that the Applicant sufficiently demonstrates compliance with the requirements. Subject to the conditions set forth herein, the Commission concludes, therefore, that Applicant's Certificate as an ARES should be amended to include the following additional authority:

CERTIFICATE OF SERVICE AUTHORITY

IT IS CERTIFIED that Constellation NewEnergy, Inc. is granted service authority to operate as an Alternative Retail Electric Supplier as follows:

SERVICES TO BE PROVIDED: The sale of electricity and power.

CUSTOMERS TO BE SERVED: All eligible nonresidential retail customers with annual electrical consumption greater than 15,000 kilowatt-hours.

GEOGRAPHIC REGIONS SERVED: The service areas of, Illinois Power Company, AmerenCILCO, AmerenCIPS, and AmerenUE.

**VII. FINDINGS AND ORDERING PARAGRAPHS**

The Commission, having reviewed the entire record, is of the opinion and finds that:

- (1) Applicant, which is organized under the laws of Delaware and is authorized to do business in Illinois, seeks authority to amend its certificate as an ARES under Section 16-115 of the Act;
- (2) the Commission has jurisdiction of the party hereto and the subject matter hereof;
- (3) except as otherwise noted, the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact; the findings made herein are intended to apply to the application before the Commission in this proceeding; whether similar findings would apply to Applicant's existing authority as an ARES is a question that is not before the Commission in this docket;
- (4) as required by Section 16-115(d)(1) of the Act, Applicant possesses sufficient financial, technical, and managerial resources and abilities to provide power and energy to eligible nonresidential retail customers with annual electrical consumption greater than 15,000 kWh throughout the service areas certificated herein;
- (5) Applicant has met the reciprocity standard in Section 16-115(d) of the Act as articulated by the Appellate Court of Illinois, Fifth District in *IBEW*;
- (6) subject to the conditions stated herein, Applicant should be granted the Certificate of Service Authority set out in Section VI of this Order and

should thereafter comply with all applicable Commission rules and orders and any applicable amendments thereto.

IT IS THEREFORE ORDERED by the Commission, subject to the conditions stated herein, that Applicant is hereby granted the amended Certificate of Service Authority set out in Section VI of this Order.

IT IS FURTHER ORDERED that Applicant's request for authority to provide single-billing service in the AmerenCIPS service territory is hereby deemed withdrawn, without prejudice to being requested again at a later time.

IT IS FURTHER ORDERED that Applicant shall comply with all applicable Commission rules and orders now and as hereafter amended.

IT IS FURTHER ORDERED that all information contained in this Order is public, not proprietary, in nature.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 26<sup>th</sup> day of June, 2003.

(SIGNED) EDWARD C. HURLEY

Chairman