

Blackhawk Energy Services, L.L.C.)

CHIEF CLERK'S OFFICE

Application for Certificate of)
Service Authority under Section)
16-115 of the Public Utilities Act.)

Docket No. 01-0174

COMMENTS AND RESPONSE OF JOINT PETITIONERS REPRESENTATIVES
KURT M. GRANBERG AND J. PHILIP NOVAK

Representatives Kurt M. Granberg and J. Philip Novak, as Joint Petitioners ("Joint Petitioners"), submit these comments and response in opposition to the application of Blackhawk Energy Service, L.L.C. ("Blackhawk") for certification as an Alternative Retail Electric Supplier ("ARES") pursuant to Section 16-115(d)(5) of the Public Utilities Act ("Act").

On March 16, 2001 order, the Commission reopened Docket No. 00-0199 for the purpose of determining whether the Commission erred in interpreting Section 16-115(d)(5) (the reciprocity provision) when the Commission granted WPS' application for certification as an ARES on April 18, 2000. Joint Petitioners believe that the Commission's interpretation of Section 16-115(d)(5) was contrary to the General Assembly's legislative intent for the provision and caused the Commission to incorrectly grant WPS' application to become an ARES.

In its April 18, 2000 order, the Commission accepted WPS' argument that Section 16-115(d)(5) allows an out-of-state power company to compete in Illinois so long as it can demonstrate that it is either economically or physically inefficient for Illinois power companies to provide electricity in WPS' service area. (See Commission April 18, 2000

order, p. 9). The Commission found, based on WPS' allegations, that because WPS can provide power in Wisconsin at a cheaper rate than an Illinois power company it "would not be economical...for the Illinois utilities...to deliver electric power [in WPS' service area]." *Id.* However, the Commission rejected WPS' argument that electrical power could not be physically wheeled into its service area because WPS's affiliate, Wisconsin Public Service Corporation, contracted with Commonwealth Edison Company (Com Ed) to wheel and sell electricity into its affiliates service area for the last three years. Nonetheless, the Commission determined that WPS should be granted an ARES certificate and able to provide electricity in Illinois.

For legislative intent purposes, Section 16-115(d)(5) was added in order to solidify the support of two very important stakeholders, the International Brotherhood of Electrical Workers (IBEW) and the member companies of the Illinois Energy Association (IEA). Without the support of these parties, the Act would not have become law and Illinois would not enjoy the benefits of lower electricity rates and its relatively smooth transition toward retail electricity competition.

Section 16-115(d)(5) of the Act was added by the General Assembly as an integral part of the measured transition to competition. The purpose of the reciprocity provision is to not to stifle competition, but to assure that competition in the Illinois electricity market is conducted on a level playing field. Through the reciprocity provision, the General Assembly's recognizes that it would be fundamentally unfair to allow out-of-state power companies to sell electricity in Illinois, but not require the out-of-state power companies to reciprocate. In short, the reciprocity provision fosters the

establishment of new sources of generation in Illinois in order to forestall a situation similar to California, which is substantially reliant upon out-of-state generation sources.

Joint Petitioners believe the Commission captured the General Assembly's overall intent for Section 16-115(d)(5) in two statements made in its March 16, 2001 order in Docket No. 00-0199. First, the Commission reasonably concluded that the General Assembly added the reciprocity provision "to ensure that any entity which availed itself of the newly created business opportunities provides for the creation of similar opportunities to those it enjoys under [the Act]." *Id.* at 3. Second, the Commission stated:

The General Assembly may well have believed that a business entity which is affiliated with an electric public utility should not be allowed to purchase delivery services for electric power and energy, irrespective of where the electricity was initially generated, unless the business entity's retail affiliate (or nominally non-affiliated utility for whom the business served as a retail sales conduit) made delivery services available over which electric power and energy (once again, irrespective of where the electricity was generated) could be delivered by third parties to the electric utility's retail customers.

Id. Taken together, Petitioners believe these statements reflect the General Assembly's intent for Section 16-115(d)(5), without, of course, the qualifying terms.

Joint Petitioner's interpretation of the reciprocity provision, as stated above, is consistent with the opinion of one legal scholar who has analyzed Section 16-115(d)(5). In a recent *Indiana Law Review* article, the author correctly opined that "[i]f an ARES, its affiliate, or its principal source of electricity owns or controls facilities for the distribution and transmission of electricity in its own defined service territory, then that ARES *must* provide reasonably comparable delivery service to the electric utility in whose service area the proposed service will be provided by the ARES." Kelly A. Karn,

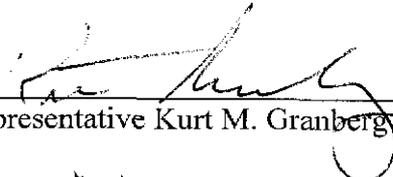
Note, *State Electric Restructuring: Are Retail Wheeling and Reciprocity Provisions Constitutional*, 33 Ind. L. Rev. 631, 641-42 (emphasis added).

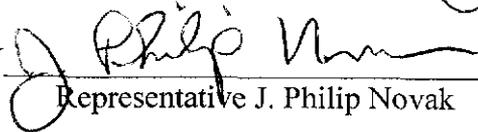
In short, Section 16-115(d)(5) bars any out-of-state power company, or its in-state affiliates, from selling or marketing electricity in the Illinois electricity market without equivalent concessions. As a result, the Commission's interpretation of the reciprocity provision in its April 18, 2000 order is inconsistent with the General Assembly's legislative intent.

Finally, Joint Petitioners are cognizant of statements made by certain stakeholders that the reciprocity provision is purportedly unconstitutional. Joint Petitioners reserve comment on that issue for another day. Nonetheless, Joint Petitioners remind the Commission that as an administrative agency it does not have the discretion to limit the construction of the reciprocity provision even though the Commission or certain Commissioners may believe it to be unconstitutional. See Van's Material Co. v. Department of Revenue, 131 Ill. 2d 196, 202-03, 545 N.E.2d 695, 699 (Ill. 1989) (holding that an agency interpretation of a statute cannot expand or limit the scope of the relevant statute); cf. Whitman v. American Trucking Ass'ns, 121 S. Ct. 903, 2001 U.S. LEXIS 1952, *25-*26 (2001) (“[w]e have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limited construction of [a] statute”). Therefore, the Commission must give full effect to the reciprocity provision as Joint Petitioners have outlined above.

Dated in Springfield, Illinois this 28th day of March, 2001.

Respectfully submitted,

BY 
Representative Kurt M. Granberg

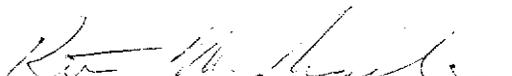
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Joint Petition of Representatives Kurt M. Granberg and J. Philip Novak For Leave To Intervene and its Comments and Response in Opposition to the application of Blackhawk Energy Services, L.L.C. to become an alternative retail electric supplier. upon the persons on the attached service list, served as indicated, on this 28th day of March, 2001



Representative Kurt M. Granberg
On Behalf Joint Petitioners

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