

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Power Agency)
) ICC Docket No. 13-0546
Petition for Approval of the 2014 IPA)
Procurement Plan Pursuant to Section 16-)
111.5(d)(4) of the Public Utilities Act)

**VERIFIED INITIAL BRIEF ON REHEARING (PUBLIC)
ON BEHALF OF THE ILLINOIS POWER AGENCY**

The Illinois Power Agency (“IPA”), by and through its attorney, respectfully submits its Verified Initial Brief on Rehearing pursuant to Section 200.800 of the Illinois Commerce Commission’s (“Commission”) Rules (83 Ill. Admin Code. § 200.800).

I.

INTRODUCTION

The several statutory standards that comprise the Illinois Renewable Portfolio Standard (“RPS”) are amongst the country’s most complex, with three different standards depending on a customer’s supply service.¹ (*See* IPA Ex. 1.0R at 3:46-4:80.) This complexity, in part, reflects the vibrant retail market and the challenges of developing new generation—especially renewable energy generation—in a restructured state. However, problems associated with a complex statutory regime include: (1) multiple, sometimes conflicting, policy goals; and (2) unintended consequences. (*See, e.g.*, IPA Ex. 1.0R at 16:345-17:361 (identifying different policy goals); ICC Docket No. 12-0544, Final Order at 106-108, 113-114 (summarizing unintended difficulty with spending the Renewable Energy Resources Fund).) Unfortunately, the Illinois RPS at the moment appears to be hindered by both problems, leading to effects including the curtailment of the December, 2010 Long-Term Power Purchase Agreements procured by the IPA. While the

¹ These standards include for eligible retail customers (20 ILCS 3855/1-75(c)(1)-(4)), utility hourly customers (20 ILCS 3855/1-75(c)(5)), and Alternative Retail Electric Supplier customers (220 ILCS 5/16-115D (including both a renewable resource and alternative compliance payment component)).

current Rehearing addresses specific issues associated with curtailment, the Agency urges the Commission to consider the broader context of the Illinois RPS in resolving the issues at hand.

On December 18, 2013, the Commission issued a Final Order in the present docket (the “Final Order”). The Final Order authorized Commonwealth Edison Company (“ComEd”) and Ameren Illinois Company (“Ameren”) (collectively, “utilities”) to curtail both Renewable Energy Credit (“REC”) and energy purchases under the long-term power purchase agreements procured in December, 2010 (“LTPPAs”) to the extent that the utilities’ March, 2014 load forecasts showed that the Renewable Resources Budget would be exceeded.² (*See* Final Order at 179-80; *see also* 20 ILCS 3855/1-75(c)(2)(E) (setting out Renewable Resources Budget); IPA Ex. 1.0R at 4:81-5:106 (describing the LTPPAs and curtailment).) On January 21, 2014, the Renewable Suppliers (“RS”) timely filed an Application for Rehearing, which was granted by the Commission on February 5, 2014.³ The RS opposed a curtailment of energy; their primary recommendation requests that the Commission change its interpretation of the LTPPAs so there is no energy curtailment. In the alternative, however, if an energy curtailment is ordered, the RS request that funds from the Renewable Energy Resources Fund and utility-held hourly ACPs be used to augment the price of curtailed RECs to compensate the LTPPA counterparties for any losses due to energy curtailment.

The Commission granted rehearing based on a question whether non-curtailment of energy was in the public interest. In urging his fellow Commissioners to grant rehearing, Chairman Scott stated:

² Ameren filed its March, 2014 load forecast in the present docket on April 2, 2014 in a filing entitled “Ameren Illinois Company’s Updated Forecast Compliance Filing.” ComEd filed its March, 2014 load forecast in the present docket on March 28, 2013 in a filing entitled “Commonwealth Edison Company’s Notice of Compliance Filing.”

³ Because the RS group is not necessarily the entire universe of non-utility parties to the LTPPAs, the Agency refers to the Renewable Suppliers litigants as “RS” and the universe of non-utility parties to the LTPPAs as the “LTPPA counterparties.”

In the final Order, the Commission expressly stated that if the Renewable Suppliers were to provide sufficient evidence to prove that the proposals would be in the public interest, we would be inclined to revisit the issue. I feel that the testimony provided by the Renewable Suppliers has the potential to provide much needed clarification on the ramifications of implementing either of the group's proposal concerning Long Term Power Purchase Agreements. Additionally, I find merit in the argument that there was not adequate opportunity for submission of this evidence in the original proceedings, which supports the need for rehearing at this time.

(February 5, 2014 Bench Session Minutes, filed March 5, 2014.) In response to this statement of the issues on rehearing, the IPA offered the Direct Testimony on Rehearing of Anthony Star; Staff, Ameren, and ComEd also filed Direct Testimony on Rehearing. To more fully respond to Chairman Scott's directive, the IPA offers this Verified Brief on Rehearing.

II.

DISCUSSION

As presented by the RS, the questions for the Commission in this rehearing are whether the RS's: "primary proposal [or] their alternative proposal would harm utility customers and [whether] each proposal would be in the public interest." (RS Application for Rehearing dated January 21, 2014 at 2.) The RS's primary proposal, as explained both in their Application for Rehearing and Direct Testimony is straightforward: do not curtail energy under the LTPPA. (See, e.g., RS Ex. 1.0 at 3:67-4:78; RS Application for Rehearing dated January 21, 2014 at 6 ¶ c.) However, this approach would be a departure from the previous Commission approach and would require reinterpretation of the LTPPAs. (See Final Order at 179-180 ("The RS suggests the Commission should unilaterally change the terms of the contract to favor one party over the other party to the contract"); Staff Ex. 1.0C at 11:230-12:240, ComEd Ex. 1.0 at 8:136-9:161; IPA Ex. 1.0R at 7:142-8:149 *cf.* RS Ex. 1.0 at 19:447-20:454 (disagreeing that reinterpreting the contract is needed).) The question before the Commission is whether such a move would be in the "public interest" or "harm utility customers." The evidence shows that the public interest is

not served by reinterpreting the contracts, because the primary proposal is inconsistent with legislatively mandated requirements of the IPA procurement process, which in turn could harm eligible retail customers by adding uncertainty to future procurements. The RS's primary proposal may help the individual LTPPA counterparties—the owners of now existing renewable generation—but does little to incentivize new renewable development in Illinois as claimed by the RS. Thus, on balance, the primary proposal should be rejected.

In contrast, the RS's secondary proposal does not harm utility customers. In fact, provided that it is narrowed to conform with existing statutory mandates and has a methodology to prevent over-compensation, the IPA supports this approach. The RS have proposed a methodology, to which the IPA has no objection. Thus, as long as the RS's secondary proposal is limited to use of the utility-held hourly customer ACP funds ("hourly ACPs"), the IPA supports the RS's secondary proposal.

A. The Commission Should Consider the Impact on Ratepayers and Language of the LTPPAs in Deciding the Issue of Energy Curtailment, but not Alleged Impacts on Future Renewable Development

The public interest is best served by maintaining the *status quo* of curtailing energy in proportion to RECs under the LTPPAs. Because the LTPPAs apply to a fixed number of newly constructed renewable generation facilities—in future procurements, the IPA could propose, or the Commission could order, different curtailment language—the Commission should focus on the costs and benefits of potentially rewriting IPA-procured contracts due to one party's economic loss and the actual costs of potentially curtailed energy to ratepayers.⁴ Both factors weigh in favor of the Commission not rewriting the LTPPAs to avoid energy curtailment.

⁴ The IPA notes that the environmental benefits of the facilities are not relevant to this discussion because the environmental benefits are captured by the RECs. No party appears to dispute the validity of the Commission's curtailment order regarding RECs, nor does any party argue that the Commission should compel any party to

First, the Commission has already found that the plain language of the LTPPAs requires curtailment, and rewriting IPA-procured contracts after the fact could severely damage the IPA procurement process. Such an approach would be contrary to the Public Utilities Act mandate for IPA procurements on behalf of eligible retail customers:

The procurement administrator, in consultation with the utilities, the Commission, and other interested parties and subject to Commission oversight, shall develop and provide standard contract forms for the supplier contracts that meet generally accepted industry practices. Standard credit terms and instruments that meet generally accepted industry practices shall be similarly developed. The procurement administrator shall make available to the Commission all written comments it receives on the contract forms, credit terms, or instruments. **If the procurement administrator cannot reach agreement with the applicable electric utility as to the contract terms and conditions, the procurement administrator must notify the Commission of any disputed terms and the Commission shall resolve the dispute. The terms of the contracts shall not be subject to negotiation by winning bidders, and the bidders must agree to the terms of the contract in advance so that winning bids are selected solely on the basis of price.**

(220 ILCS 5/16-111.5(e)(2) (emphasis added).⁵) The clear requirement is that all disputes on contractual terms must be resolved by the Commission before winning bidders sign the contracts, after which “the contracts shall not be subject to negotiation” and “the bidders must agree to the terms of the contract in advance.” (*Id.*) IPA witness Director Star⁶ testified that there would be serious policy ramifications for renegotiating IPA-procured contracts after the fact, upsetting a “fair and transparent approach that meets the goals of the [Public Utilities Act] and IPA Act.” (*See* IPA Ex. 1.0R at 8:151-166.) Under the current system, “the playing field is level, and . . . every entity can assess risk based on the same contract terms” while “every winning bidder’s

purchase additional RECs. Furthermore, the facilities have already been built, and the environmental benefits will accrue without regard to who pays and how much.

⁵ In addition, subsequent changes potentially run afoul of the requirement that all prices be evaluated by the benchmarking process set out in Section 16-111.5(e)(3) of the Public Utilities Act: if terms change for one or more suppliers, it is possible that the benchmark could significantly change to reflect the different rights and responsibilities of the parties.

⁶ Director Star filed Direct Testimony on Rehearing as the IPA’s Acting Director, but he was subsequently confirmed by the Senate on March 20, 2014.

rights and obligations were known and agreed to when they voluntarily placed their respective bids.” (*Id.* at 8:155-159; *see also* ComEd Ex. 1.0 at 14:265-15:280.) ComEd provides corroboration, noting: “As reiterated in multiple bidder presentations bidders were informed prior to submitting bids that once finalized, the contract terms would not be subject to negotiation by winning bidders.” (ComEd Ex. 1.0 at 9:164-166 (footnote citing ComEd Exs. 1.01 and 1.06 omitted).)

In the present docket, the Commission acknowledged that the proper interpretation of the LTPPAs is that energy is to be curtailed, but the Commission also faced the question of whether to “unilaterally change the terms of the contract to favor one party over the other party to the contract.”⁷ (Final Order at 179.) The Commission further found that “the definition of Product contained [in the LTPPAs] specifically included both the energy and REC component and that definition was accepted by both parties to the LTPPAs,” and the curtailment provision addressed curtailment of “Product.” (*Id.* at 180.) ComEd has presented substantial evidence that the LTPPA counterparties knew or should have known that the curtailment provision contemplated curtailment of energy in addition to RECs. Subsequent discomfort with any particular provision should not convince the Commission to “unilaterally change” the contractual terms—as Director Star testified: “Although I doubt every bidder is 100% comfortable with each and every term in the contract documents, there is no question [that] every winning bidder’s rights and obligations were known and agreed to when they voluntarily placed their respective bids.” (IPA Ex. 1.0R at 8:156-159.)

Second, eligible retail customers have paid out and additional ***Begin Confidential***XXXXXXXXXX***End Confidential*** through February, 2014 (ComEd) and

⁷ The Commission also acknowledged favorably its approval of interpreting the LTPPAs to require curtailment of energy in ICC Docket No. 12-0544. (Final Order at 180.)

\$7.211 million through January, 2014 (Ameren) to compensate the RS for an energy purchase structure that allows the LTPPA counterparties to collect the difference between a fixed energy price and an average hourly energy price. (See IPA-ComEd Cross Exhibit 1 (Confidential); IPA-ComEd Cross Exhibit 2; IPA-Ameren Cross Exhibits 1 and 2.) In other words, eligible retail customers have spent an additional ***Begin Confidential***XXXXXXXXXXXX***End Confidential*** compared to purchasing the same supply at the average hourly energy price.

The RS argue that the energy component of the LTPPAs act as a hedge against higher energy prices for eligible retail customers, thus providing a customer benefit. (See RS Ex. 1.0 at 16:356-17:383; RS Ex. 1.2 at 3:62-71.) First, the IPA notes that it did not consider using LTPPAs for renewable resource (particularly wind resources) as price hedges at the time it proposed the LTPPAs, and has not considered—and does not anticipate considering—using such an approach. (See IPA Ex. 1.0R at 9:185-10:196.) The available empirical supports the IPA's position: the monthly cost or benefit of the hedge to eligible retail customers during the life of the LTPPAs show that not all months are losses for customers, but to date, on average customers are taking a loss on these contracts. (See IPA-Ameren Cross Exhibit 1; IPA-ComEd Cross Exhibit 1 (Confidential); IPA Ex. 1.0R at 10:197-203.) The IPA, Staff, Ameren, and ComEd all agree consumers have not benefitted from using the LTPPA as an energy price hedge, and that not curtailing energy will increase the harm to eligible retail customers. (See *id.*; Staff Ex. 1.0C at 11:219-229; Ameren Ex. 1.0 (RH) at 4:69-86, 5:100-103; ComEd Ex. 1.0 at 13:254-14:264.) Assuming current energy price trends continue over the upcoming delivery year, energy curtailment would shelter eligible retail customers from taking larger losses; as a result, it would harm those same customers if the Commission reversed the curtailment.

As described above, a Commission order that reversed energy curtailment would cause significant harm to both the IPA procurement process and eligible retail customers. The public interest weighs strongly against this approach, and the IPA respectfully requests that the Commission reject it.

B. Further Development of Renewable Energy in Illinois Is a Critical Question, but Should not Be Resolved by Rewriting the LTPPAs

Several RS witnesses make the claim that reinterpreting the LTPPAs to prevent curtailment of energy will help development of renewable energy in Illinois, but this claim should be rejected. (*See, e.g.*, RS Ex. 1.0 at 19:431-33; RS Ex. 2.0 at 4:76-80; 4:79-91.) The question of how to develop additional renewable energy in Illinois is a critical question, but the limited scope of this docket renders it an inappropriate place to fully address that and other questions of how to satisfy the Illinois RPS's goals. (*See* IPA Ex. 1.0R at 16:341-17:354.) As described below, the IPA believes that the question of energy curtailment is less critical than several other factors in the lack of new renewable development in Illinois.

As a threshold matter, the IPA notes that as an agency it is significantly invested Illinois-based renewable development, as well as the other goals of the Illinois RPS. (*See id.* at 17:355-361.) Despite the RS's testimony that the curtailment issue is preventing them from further development in Illinois, the IPA believes that the question of curtailing energy from existing LTPPAs with existing facilities is largely irrelevant to this question. The IPA has identified several factors that it believes are of more importance to the development of renewable resources in Illinois.

First, the IPA believes that the most important reasons that little renewable development occurred in Illinois in 2013 and several RS witnesses averred that they are no longer interested in building in Illinois right now are:

- The Illinois REC market is “oversupplied” with low cost wind RECs (from Illinois and other qualifying states)
- The Renewable Resources Budget anticipated to be at or near its cap for the next several years for both utilities, and
- The Renewable Resources Fund requiring a parallel utility procurement.

(*See, e.g.*, RS Ex. 3.2 at 2; IPA Ex. 1.0R at 15:320-327; Ameren and ComEd March 2014 Load Forecasts (cited in note 1 *supra*); 20 ILCS 3855/1-56(c) and (d).) These are all significant challenges that will not be resolved by rewriting the LTPPAs. The IPA further notes that if a developer managed to secure a long-term contract with an entity in this climate (i.e. when there are no funds available under the Renewable Resources Budget and the Renewable Energy Resources Fund cannot be spent), it would not be IPA procured, and thus subject to arms-length negotiated curtailment provisions.

Second, given the experience of the last year with curtailment, the Commission or IPA may consider different curtailment language in future contracts to insulate against future disputes.⁸ (*See* IPA Ex. 1.0R at 14:301-306.) Neither the Commission nor the IPA are bound to order or recommend (respectively) the same contract language in *subsequent* procurements. At minimum, comments on future long-term renewable contract language would be germane during: the comment period pursuant to Section 16-111.5(o) of the Public Utilities Act, the public comment period for any IPA Procurement Plan that recommends a renewable procurement, the docketed proceeding to approve that Procurement Plan, and pre-procurement bidder comments to the Procurement Administrator. The RS and similarly situated entities do and will have ample opportunities to raise issues related to future curtailment provisions.

⁸ The IPA also anticipates that future bidders will be (or at least should be) more acutely aware of the possibility of a curtailment, given that such an event has happened. (*Cf.* IPA Ex. 1.0R at 11:224-12:247 (noting and disagreeing with RS witness Mr. Gordon’s argument that a curtailment could not have been anticipated).)

Third, pursuant to Section 1-75(c)(3) of the IPA Act, the Agency may not restrict its procurements on behalf of eligible retail customers to Illinois-based facilities. (20 ILCS 3855/1-75(c)(3).) Under the currently effective portion of that Section:

After June 1, 2011, cost-effective renewable energy resources located in Illinois and in states that adjoin Illinois may be counted towards compliance with the standards set forth in paragraph (1) of this subsection (c). If those cost-effective resources are not available in Illinois or in states that adjoin Illinois, they shall be purchased elsewhere and shall be counted towards compliance.

(*Id.*; see also IPA Ex. 1.0R at 15:307-312.) As Director Star testified:

[E]ven if this [curtailment] issue were entirely resolved to the satisfaction of the RS it does not guarantee that there will be future development of renewable energy resources in Illinois to meet the future Illinois RPS goals. Some or even most of the development could occur in other states.

(IPA Ex. 1.0R at 15:313-316.) As Director Star noted, the Ameren and ComEd LTTPAs themselves are for facilities in Illinois, Indiana, and Iowa. (*See id.* at 4:84-5:86.) Thus, any change to the LTTPAs of the present or future will, at best, encourage more bidders in the procurement process—but not necessarily more bidders pursuing new projects located in Illinois.

Finally, Director Star identified wide range of objectives for the Illinois RPS beyond Illinois economic development:

I believe that new development of renewable resources in Illinois helps meet several important goals including, increasing diversity in the supply portfolio, and reducing emissions from fossil fuels generation necessary to meet our supply needs. The renewable portfolio standard—along with programs to incentivize energy efficiency, demand response, and energy storage—is a significant part of how Illinois reaches these goals.

(IPA Ex. 1.0R at 17:355-361.) At times, as Director Star pointed out, these goals are not always aligned, including with other portions of the Agency’s mission to acquire “adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability.” (220 ILCS 5/16-111.5(d)(4) (Commission’s standard of review for IPA Procurement Plan); IPA Ex. 1.0R at 16:348-17:354

(noting the conflict between least cost and new renewable development.) Rewriting the LTPPAs held by existing facilities to make energy uncurtailable would not necessarily have any environmental benefits, but—based on the discussion of impact on eligible retail customers above—it would harm the Agency’s mission of “lowest total cost over time.” (*See also* 20 ILCS 3855/1-5(A), 1-20(a)(1) (setting out Agency mission identified above).)

In sum, if the Commission adopts the RS’s primary recommendation, there is no guarantee or assurance that there will be a positive effect on future Illinois-based development. To the extent there is a positive impact, it is not possible to quantify *a priori* and thus judge whether any Illinois-specific benefits outweigh the costs detailed above.

To the extent that the Commission agrees with the RS and IPA that there are public interest benefits to attracting new renewable development to Illinois, the IPA has identified several significantly more important barriers than the existing curtailment provisions. The IPA understands that the scope of the present docket is too limited to fully address those barriers, but pledges that it will be an active participant in any Commission-centered discussions as it has in previous regulatory and legislative discussions about the Illinois RPS.

C. The IPA Supports the RS’s Alternative Recommendation, Provided it Is Limited to Hourly ACPs and the Commission Approves an Appropriate Methodology

Unlike the RS’s primary proposal, the alternative proposal does not require the LTPPAs to be rewritten or for eligible retail customers to incur financial burdens. (*See* IPA Ex. 1.0R at 12:248-254.) As a result, the IPA supports this approach. However, due to statutory and practical constraints, the IPA can only support the RS’s alternative proposal if only hourly ACP funds are used and the Commission adopts a methodology to determine the proper price for each REC.

Regarding the first constraint, there is wide-ranging discretion on spending of the hourly ACP funds: “the Agency shall increase its spending on the purchase of renewable energy resources to be procured by the electric utility for the next plan year.” (20 ILCS 3855/1-75(c)(5).) In contrast, Section 1-56(d) of the IPA Act require that the “price paid to procure renewable energy credits using monies from the . . . Renewable Energy Resources Fund shall not exceed the winning bid prices paid for like resources procured for electric utilities.” (20 ILCS 3855/1-56(d).) The RERF has a cost cap of the imputed REC price, while the hourly ACP funds have no such cost cap. As a result, the IPA believes that the Commission could order the Agency to spend utility-held hourly ACPs on RECs at a price different from what eligible retail customers pay. (*See also* IPA Ex. 1.0R at 12:256-13:264.) Thus, if the RS required a price for curtailed RECs that averaged to \$10 extra per REC, the Commission could authorize that payment. However, as the Commission held in Docket No. 12-0544, the Commission does not have the authority to order the IPA to do so with the RERF, and the IPA believes it is statutorily barred from such a transaction. (*See, e.g.*, ICC Docket No. 12-0544, Final Order dated December 19, 2012 at 113.)

Regarding the second constraint, in the event that the Commission approves RS alternative recommendation, the IPA requests that the Commission approve a methodology to ensure each LTPPA counterparty is properly compensated. (*See* IPA Ex. 1.0 at 13:265-273.) Put another way, the IPA views the RS’s alternative recommendation as approaching the LTPPA like a cost-based contract, and the secondary mechanism should strive to prevent over- or under-recovery. (*See, e.g.*, Ameren Ex. 1.0 (RH) at 6:122-123 (describing curtailment as a “shortfall of revenue”).) Responding to Director Star’s request for a methodology, RS witness Mr. Gordon identified a methodology in his Rebuttal Testimony that appears to take into account the

questions raised by Director Star and Staff witness Mr. Zuraski. (*See* RS Ex. 1.2 at 9:218-10:235.) The IPA has no objection to the Commission adopting this methodology.

III.

CONCLUSION

The IPA respectfully recommends that the Commission reject the RS's primary proposal to render energy under the LTPPAs uncurtailable, but supports the Commission accepting the RS's alternative recommendation (subject to limitations described above). The IPA recognizes that the Illinois RPS is struggling with conflicting goals and unintended consequences, and urges the Commission to not attempt to solve all outstanding problems in the present docket but instead begin a dialogue—in which the IPA will fully participate.

Dated: April 25, 2014

Respectfully submitted,

Illinois Power Agency

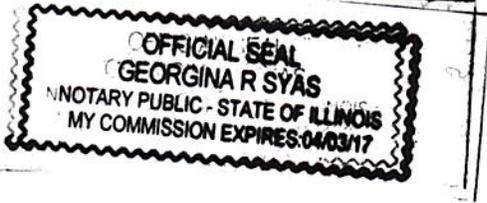
By: /s/ Michael R. Strong

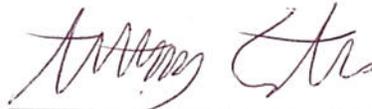
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STATE OF ILLINOIS)
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VERIFICATION

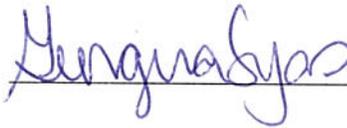
Anthony M. Star, being first duly sworn, on oath deposes and says that he is the Director for the Illinois Power Agency, that the above Initial Brief on Rehearing on Behalf of the Illinois Power Agency has been prepared under his direction, he knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.





Anthony M. Star

Subscribed and sworn to me
This 25th day of April, 2014



**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Power Agency)	
)	ICC Docket No. 13-0546
Petition for Approval of the 2014 IPA)	
Procurement Plan Pursuant to Section 16-)	
111.5(d)(4) of the Public Utilities Act)	

NOTICE OF FILING

Please take notice that on April 25, 2014, the undersigned, an attorney, caused the Initial Brief on Rehearing on Behalf of the Illinois Power Agency to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission in the above-captioned proceeding:

April 25, 2014

/s/ Michael R. Strong
Michael R. Strong

CERTIFICATE OF SERVICE

I, Michael R. Strong, an attorney, certify that copies of the foregoing document(s) were served upon the parties on the Illinois Commerce Commission's service list as reflected on eDocket via electronic delivery from 160 N. LaSalle Street, Suite C-504, Chicago, Illinois 60601 on April 25, 2014.

/s/ Michael R. Strong
Michael R. Strong