

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

MIDWEST GENERATION, LLC)	
)	
v.)	Docket No. 01-0562
)	
COMMONWEALTH EDISON COMPANY)	
)	
Complaint as to unjust, unreasonable, and)	
anti-competitive energy and capacity charge)	
for station power, request for refunds, with)	
interest, and other relief.)	

**MIDWEST GENERATION, LLC.'S RESPONSE TO
COMMONWEALTH EDISON COMPANY'S MOTION TO DISMISS**

Now comes Midwest Generation, LLC (“Midwest”), through its attorneys, and hereby submits its Response to the Motion to Dismiss (“the Motion”) of Commonwealth Edison Company (“ComEd”) to the Illinois Commerce Commission (“Commission”). This Response is submitted pursuant to the schedule the Administrative Law Judge established at the status hearing on September 20, 2001.

I.
Introduction

ComEd’s Motion to Dismiss is legally and factually incorrect and should be denied. Under well-established Illinois law, in considering a motion to dismiss, a court (here, the Commission) must take as true all well-pled allegations of fact contained in the complaint and construe all reasonable inferences therefrom in favor of the complainant. *Vernon v. Schuster*, 688 N.E.2d 117-2, 1174, 179 Ill.2d 338, (Ill. 1997) (“*Vernon*”). As a basis for the Motion, however, ComEd inappropriately requests that the Commission completely ignore Midwest’s factual presentation and, instead, focus on its Motion which is fraught with inaccurate factual

statements. In short, ComEd raises factual questions that should be considered during a full evidentiary presentation, not in connection with a motion to dismiss.

Compounding this error is the fact that the Motion is legally deficient. As its primary argument supporting the Motion, ComEd makes a unilateral declaration that the subject Auxiliary Power Agreements (“the Agreements”) are “competitive contracts,” subject to the provisions of Article XVI of the Public Utilities Act (“the Act”). 220 ILCS 5/16-101 *et seq.* (2001). (Motion, p. 2) Nothing could be further from the truth. In reality, the Agreements are bundled contracts that include, among other things, the provision of power and energy, and delivery services (which included metering services). At the time the agreements were imposed, no competitor could possibly offer such a package in one contract. Furthermore, at the time these agreements were imposed, Midwest could not purchase auxiliary power from a competitor. Midwest is entitled to introduce evidence to this effect.

Further, it is not for ComEd to determine whether a particular agreement is a “competitive contract.” Yet, ComEd’s Motion essentially requests that the Commission abandon its jurisdiction and find that ComEd alone has the complete discretion to determine what agreements are competitive. As a result, ComEd seeks to shield its anti-competitive activity, and its imposition of unjust and unreasonable charges from Commission scrutiny by claiming that the Agreements are “competitive.” Such a position is outrageous. The Agreements are not “competitive contracts,” and the Commission has jurisdiction to examine the charges ComEd has imposed, as well as its anti-competitive behavior.

ComEd also raises a number of other contentions that are factually incorrect, or wrong as a matter of law. Midwest stands ready to introduce evidence that refutes ComEd’s factual claims.

Stripped of its legal and factual errors, ComEd's Motion provides the Commission no basis upon which to dismiss the Complaint. Accordingly, the Commission should deny the Motion and proceed with the procedural schedule already established so that the Commission may fully examine ComEd's unlawful and anti-competitive behavior.

II. **Argument**

A. ComEd's Attempt To Have The Commission Ignore The Factual Presentation Set Forth In Midwest's Complaint Is Legally Improper

Pursuant to the Commission's Rules of Practice, Midwest filed a Verified Complaint ("the Complaint") with the Commission that presented the facts and legal authority upon which its prayer for relief should be granted. Under well-established Illinois law, a cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that will entitle a complainant to recover. *Vernon*, 688 N.E.2d at 1175, 179 Ill.2d at 344. When determining the legal sufficiency of a complaint, all well-pled facts are taken as true, and all reasonable inferences from those facts are drawn in favor of the plaintiff. *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 589, 174 Ill.2d 482, 490 (Ill. 1996). For purposes of a motion to dismiss, a court must determine whether the allegations in a complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Abbasi v. Paraskevoulakos*, 78 N.E.2d 181, 184, 187 Ill.2d 386, 391 (Ill. 1999) (*emphasis added*).

Taken in a light most favorable to Midwest, the Complaint alleges that ComEd imposed upon Midwest unjust and unreasonable charges in violation of Article IX of the Act. (Complaint, pp. 3-5) Additionally, the Complaint alleges that ComEd's actions were anti-competitive, subject to the Commission's examination under Article XVI of the Act.

(Complaint, p. 5) The verified facts set forth in the Complaint establish a cause of action for the Commission to find the imposition of the subject charges to be unjust, unreasonable and anti-competitive. Consequently, ComEd's Motion must be denied.

Despite well-established law concerning motions to dismiss, ComEd disputes almost every fact set forth in the Complaint and offers its own competing, and incorrect, factual recitation. (*See generally*, Motion) ComEd then asks the Commission to dismiss the Complaint based upon its own improper factual recitation rather than on the facts Midwest presented. The Illinois Supreme Court has stated in its *Vernon*, *Connick*, and *Abbasi* decisions that a motion to dismiss must be considered on a complainant's facts, taken in a light most favorable to the Complainant. A motion to dismiss is not the time to consider a respondent's evidentiary presentation.

Essentially, ComEd asks the Commission to accept its evidentiary presentation, without the benefit of any scrutiny whatsoever. This is not the law in Illinois. ComEd will have ample opportunity to make its own evidentiary presentation. For purposes of the Commission's consideration of the Motion, Midwest's Complaint contains a factual presentation that states a cause of action under the Act. Therefore, ComEd's Motion should be denied.

B. The Agreements Are Not "Competitive Contracts" Subject To Article XVI Of The Act

ComEd proclaims that the subject Agreements are "competitive service contracts that are not subject to the ratemaking provisions of Article IX." (Motion, p. 2) Instead, ComEd claims that these "competitive service contracts" fall within the definition of a "competitive service" under the definition of that term in Section 16-102 of the Act, and that such a service is

exempted from Article IX regulation pursuant to Section 16-116(b). (Motion, pp. 6-7) ComEd is wrong.¹

Midwest's Complaint asserts that the Agreements are subject to the provisions of Article IX of the Act for a very good reason—the Agreements do not address a competitive service as contemplated under Section 16-102. Instead, the Agreements are bundled contracts that provide for a wide array of otherwise tariffed, non-competitive services. Moreover, at the time these Agreements were entered into, the majority of Midwest's facilities under these Agreements were not eligible to acquire power and energy from an alternative supplier, under the eligibility requirements in Section 16-104. 220 ILCS 5/ 16-104 (2001). As such, the Agreements are not “competitive service contracts.” ComEd's position, therefore, should be rejected.

Section 16-102 defines “competitive service” in the following manner:

“Competitive service” includes (i) any service that has been declared to be competitive pursuant to Section 16-113 of this Act, (ii) contract service, and (iii) services, other than tariffed services, that are related to, but not necessary for, the provision of electric power and energy or delivery services.

Meanwhile, the relevant portions of Section 16-102 define the term “contract service” as follows:

“Contract service” means (1) services, including the provision of electric power and energy or other services, that are provided by mutual agreement between an electric utility and a retail customer that is located in the electric utility's service area, provided that, delivery services shall not be a contract service until such services are declared competitive pursuant to Section 16-113

220 ILCS 5/61-102 (2001)(*emphasis added*). Under these two definitions, a “competitive service” cannot be a tariffed service, nor can it be delivery services until such time as the Commission declares delivery services competitive.

¹ To the extent that ComEd failed to file the Agreements with the Commission as required under Article IX, as it admits in its Motion, ComEd may be subject to other regulatory actions that are not the subject of Midwest's Complaint.

The subject Agreements related to the provision of bundled service, not competitive service. The Agreements contain language addressing the provision of delivery services. These delivery services include not only the wires charges, but also metering charges. At the time these agreements were imposed on Midwest, the provisioning of metering was a tariffed service and not a competitive service. In sum, the Commission need only ask the following question: Could any competitor provide Midwest with power and energy and delivery services at the time the Agreements became effective? The answer, of course, is no. No competitor could provide delivery services, including metering service. Accordingly, the Agreements are non-competitive bundled contracts, subject to Article IX regulation.²

Moreover, the majority of Midwest's generating sites did not meet the eligibility requirements for obtaining power and energy from an alternative supplier.³ Only those non-residential customers meeting the requirements of Section 16-104(a)(1) were allowed to choose an alternative supplier of power and energy at the time the Agreements became effective. 220 ILCS 5/16-104(a)(1) (2001). The majority of Midwest's facilities did not meet the eligibility requirements. Consequently, Midwest had no competitive alternative and, as such, could not have entered into a "competitive service contract" for power and energy with ComEd.⁴

Despite these facts, ComEd asserts that the Commission cannot investigate the Agreements or investigate claims that ComEd behaved in an anti-competitive manner, because ComEd has deemed the Agreements to be "competitive service contracts." (Motion, pp. 6-7) Of

² The Commission was provided authority under 220 ILCS 5/9-102.1 to approve rates schedules filed with the Commission enabling public utilities to provide bundled service to customers under negotiated contracts, provided that no such contracts could be entered into after January 1, 2001.

³ Midwest maintains that it did not need to acquire power and energy from ComEd or any other provider as it had the right to self-supply its auxiliary power needs.

⁴ Moreover, it is unreasonable for ComEd to claim the Agreements are competitive when ComEd demanded that Midwest enter into the Agreements as a condition to the sale of the generating stations. Midwest is prepared to introduce evidence to support the fact that this condition was imposed.

course, ComEd has declared the Agreements to be “competitive service contracts” of its own volition, wholly outside of the Commission’s regulatory process. As such, ComEd attempts to shield its actions through its own proclamations. Evidently, ComEd believes that it can self-regulate its own activities. The Commission should reject this improper belief.

C. Midwest’s Complaint Raises Issues Applicable to Article IX, Article X, and Article XVI

In asserting that the Agreements are “competitive contracts,” ComEd is essentially arguing that it can operate without Commission scrutiny of its actions. This is an unreasonable position for a number of reasons.

First, there is no question that the Commission has jurisdiction over this matter. The Complaint concerns the unjust and unreasonable charges and requirements imposed by a regulated monopoly subject to Commission jurisdiction. Second, and equally important, the Complaint properly alleges that ComEd engaged in anti-competitive behavior. Here, again, the General Assembly has specifically charged the Commission with the responsibility to promote a competitive electricity market. To that end the General Assembly has stated:

(d) A competitive wholesale and retail market must benefit all Illinois citizens. The Illinois Commerce Commission should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers. Consumer protections must be in place to ensure that all customers continue to receive safe, reliable, affordable and environmentally safe electric service.

220 ILCS 5/16-101A(d) (2001).

Finally, the Commission should be wary of ComEd’s argument. ComEd is seeking to exempt itself from the Commission’s complaint jurisdiction. In effect, ComEd is arguing that—whether anti-competitive or not—its actions relating to “competitive contracts” are not subject to Commission scrutiny. This is an absolutely unreasonable position that is inconsistent with the

Commission's charge under Article XVI. Under ComEd's theory, it has *carte blanche* to engage in whatever anti-competitive activity it chooses with no regulatory consequences. This position is unreasonable, unlawful, and should be rejected.

Midwest's Complaint raises competitive issues at both the wholesale and retail level. (Complaint, pp. 3-5) It is clear from the General Assembly that the Commission should act to ensure the proper development of the electricity market. To that end, the Commission has ample jurisdiction under the provisions of Article X of the Act, particularly Sections 10-101 and 10-108, to examine the actions of ComEd. 220 ILCS 5/10-101; 5/10-108 (2001). Accordingly, contrary to ComEd's claim, the Commission has the jurisdiction to hear Midwest's Complaint.

D. ComEd's Arbitration Claims Are Unfounded

ComEd asserts that disputes about the Agreements are subject to arbitration provisions found in the Agreements. (Motion, p. 8) Yet, grudgingly, ComEd recognizes that such arbitration provisions may not deprive the Commission of its jurisdiction to hear the Complaint. (*Id.*) Indeed, there is no question that the Commission has primary jurisdiction to hear the Complaint. Moreover, Midwest is in no way violating the arbitration provisions of the Agreements.

Midwest is not seeking to have the Commission resolve a dispute under the Agreement. Rather, Midwest is seeking to have the Commission find that the Agreements are void *ab initio*, as the Agreements are contrary to sound regulatory policy and result in the imposition of fundamentally unjust and unreasonable charges. This request is fully supported by the FERC's recent decisions in *PJM Interconnection, LLC*, 94 FERC ¶ 61,251, at 61,889, order denying reh'g, 95 FERC ¶ 61,333 (2001)(hereafter "*PJM*") which determined that a self-supplying generator does not cause another party to incur any costs associated with generation that would

warrant a form of consideration to a contract. Additionally, on at least two occasions, ComEd personnel have explicitly informed Midwest that it should seek a regulatory solution if it has an issue with the Agreements. Consequently, ComEd's claims do not square with the facts.

As stated in the previous Section of this Response, there is no question that the Commission has jurisdiction to hear this Complaint. The Complaint concerns the unjust and unreasonable charges and anti-competitive actions of a regulated monopoly subject to Commission jurisdiction. The General Assembly has specifically charged the Commission with the responsibility to promote a competitive electricity market. Therefore, ComEd's argument that the Commission lacks jurisdiction to hear this Complaint is without merit and should be rejected.

E. The FERC's Recent *PJM* Decisions Affirm Midwest's Long-Standing Position That ComEd Improperly Precluded Midwest From Self-Supplying Auxiliary Power

Midwest's Complaint states that it was required to purchase auxiliary power from ComEd as a condition to the sale of the generating stations. This requirement was imposed on Midwest subsequent to the Commission's approval of the sale. (Complaint, p. 2) Despite ComEd's protestations to the contrary, Midwest is prepared to introduce evidence to support its claim.

The FERC's recent decisions in *PJM* determined that an independent generator may meet its facility's auxiliary power requirements through self-supply, whether on-site or remote self-supply. Midwest is not seeking to "escape" from the Agreements as ComEd portends. Rather, Midwest is seeking to be treated in a manner consistent with the *PJM* decision, which is the treatment Midwest sought in 1999. This is not a "second bite at the apple"—it is the way Midwest wanted the "apple" in the first instance.

Curiously, ComEd states that the “the *PJM* decisions make clear that, nationally, generators may have other supply options, including self-supply. (Motion, p. 8) ComEd further states that it would have permitted such an option in 1999. (*Id.*) If that were the case, Midwest would not now be seeking relief from the Commission, as the Agreements would have never been imposed in the first instance. Midwest is prepared to introduce evidence showing that ComEd imposed these Agreements on Midwest with no other options.

If, however, it is now ComEd’s position that Midwest can self-supply its own auxiliary power, then a great deal of this Complaint can be resolved. The Commission, through an Interim Order, immediately should direct ComEd to allow Midwest to self-supply, whether on-site or remotely, its auxiliary power requirements as allowed under the *PJM* decisions.

In conclusion, the *PJM* decisions are relevant and demonstrate conclusively that the subject Auxiliary Power Agreements are unjust and unreasonable. In order to promote effective competition, the Commission should find that these Agreements are void *ab initio* and immediately find that Midwest can self-supply its auxiliary power requirements.

F. Midwest Has Suffered Financial And Competitive Harm

Midwest’s Complaint alleges that it has suffered financial harm as a result of ComEd’s anti-competitive behavior. (Complaint, pp. 4-6) Taking these facts as true, as the Supreme Court decisions in *Vernon*, *Connick*, and *Abbasi* require when considering a motion to dismiss, ComEd’s attempt to refute these facts with its own inaccurate factual presentation is improper and outside of proper consideration of a motion to dismiss.

Notwithstanding the legal infirmities of ComEd’s argument on this issue, the fact is that Midwest has paid more than it would have otherwise paid as a consequence of these Agreements. Indeed, ComEd’s claims regarding the comparison of price under the Agreements and the

purchase power agreements (“PPAs”) simply is wrong. (Motion, pp. 10-11) ComEd’s claims that its actions did not have competitive ramifications also are incorrect. (*Id.*) Midwest’s position will be proved so at hearing, where a discussion of these facts properly belong. Accordingly, the Commission should reject ComEd’s argument on this point.

G. Midwest Is Not Seeking Free Service

ComEd’s Motion would lead the Commission to believe that Midwest is seeking free service. (Motion, p. 11) ComEd’s position is baseless and should be rejected out of hand. The Commission need only look to page 3 of the Complaint, footnote 3, to confirm that Midwest acknowledges it may be required to pay appropriate charges for the provision of transmission and distribution service. (Complaint, p. 3) ComEd’s accusations about paying for transmission and distribution are a red-herring. Midwest already has stated that it may be subject to such charges where appropriate. Accordingly, ComEd’s claims are completely without merit and should be disregarded.

H. Midwest’s Claim For Refunds Is Proper

ComEd imposed unlawful charges on Midwest related to the provision of auxiliary power. (Complaint, pp. 5-6) It is Midwest’s position that the subject Agreements are void *ab initio* and, as such, all appropriate sums should be refunded. Of course, to the extent that Midwest utilized ComEd’s transmission and distribution facilities, Midwest already has agreed to pay for the use of such facilities. However, Midwest did not utilize those facilities to the extent billed under the Agreements. Additionally, should the facts demonstrate that other charges are appropriate, Midwest likewise would meet its obligation to pay such charges. Indeed, Midwest continues to pay ComEd for ongoing charges incurred under the Agreements,

even though it is not obligated to do so with respect to contested charges, under Part 280 of the Commission's Rules. 83 Ill. Adm. Code §280 (2001).

Midwest stands ready to present evidence showing that a refund is due and owing, including appropriate interest on the amount of the refund. Midwest was charged and paid more under the Agreements than if it was allowed to self-supply, as legally recognized by the FERC (and apparently now by ComEd (*See* Motion, p. 8)). Not only does this include charges for service, but taxes that it would not have otherwise paid. Because the self-supply of power and energy for auxiliary power is not considered a sale, there is no taxable event. ComEd's allegations to the contrary are without merit.

I. ComEd's Claims Concerning Monthly Netting Are Inappropriate

ComEd's assertions regarding Midwest's Monthly Netting proposal suffer from the same legal defect that spans throughout the Motion: ComEd is inappropriately attempting to have the Commission consider its factual presentation. (Motion, pp. 13-14) The FERC clearly has indicated that intervals upon which to base a netting calculation could be greater than one hour. *PJM*, 94 FERC ¶ 61,251, at 61,892 (2001). Consequently, the question is not as simple as ComEd suggests. As the Complaint and Motion suggest, this is a policy matter ripe for the Commission's consideration. The Commission should not base an important regulatory policy decision solely on ComEd's untested claims. Indeed, Midwest will demonstrate that ComEd's claims are in error. Moreover, as discussed in detail herein, ComEd's facts are not the basis upon which to consider a motion to dismiss. Accordingly, ComEd's arguments on netting should be rejected.

III.
Conclusion

ComEd's Motion is wrong as a matter of law and factually incorrect. Midwest has presented a Complaint that properly alleges a cause of action under the Act and, therefore, is entitled to have its Complaint heard. Midwest, therefore, respectfully requests that the Commission deny ComEd's Motion.

Dated: October 5, 2001

Respectfully submitted,

Midwest Generation, LLC

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CERTIFICATION

I, John E. Rooney, hereby certify that I served a copy of the Midwest Generation, LLC.'s Response to Commonwealth Edison Company's Motion to Dismiss upon the service list in Docket No. 01-0562 by email and regular mail on October 5, 2001.

John E. Rooney