

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company )  
 )  
 Regarding a Complaint and Petition by ) Docket No. 02-0277  
 Commonwealth Edison Company for an Order )  
 finding PDV Midwest LLC in Violation of the )  
 Prohibition on Resale of Retail Electric Service )  
 contained in the Illinois Public Utilities Act and )  
 set forth in Rider 12, Conditions of Resale or )  
 Redistribution of Electricity by the Customer to )  
 Third Persons, and for other Relief. )

**JOINT MOTION FOR SUMMARY JUDGMENT  
 OF PDV MIDWEST REFINING, LLC AND CITGO PETROLEUM CORPORATION  
AND THE NEEDLE COKER COMPANY AND CHICAGO CARBON COMPANY**

Midwest Refining, LLC (“PDV Midwest”) and CITGO Petroleum Corporation (“CITGO”) and The Needle Coker Company (“NCC”) and Chicago Carbon Company (“CCC”) (collectively, “Respondents”), by and through their attorneys, hereby move pursuant to Section 200.190 of the Rules of Practice of the Illinois Commerce Commission (the “Commission”) for an order granting Respondents summary judgment with respect to the Verified Complaint and Amended Verified Petition (“Complaint and Petition”) filed by Commonwealth Edison Company (“ComEd”) as to ComEd’s claims that PDV Midwest engaged in the prohibited resale of electric service under the Rate CS Electric Service Contract, dated August 5, 1997 (the “Rate CS Contract”), and any and all relief sought under this claim, or, in the alternative, for an order staying further proceedings in this matter as described herein. In support of this Motion, Respondents state as follows:

**I.**  
**Introduction**

1. With eyes wide open, ComEd in August 1997 offered and entered into the Rate CS Contract for all points of electric service at the Lemont Facility. The Lemont Facility consists of a refinery, a needle coking plant, and a calciner plant. (The latter two operations, in part, use raw materials from the refinery to produce specialized carbon-based products sold to manufacturers of electrodes used in electric arc furnaces.) At the time of the Rate CS Contract, the refinery, the needle coking plant, and the calciner plant were under separate ownership, as described in detail below. Although they shared contiguous premises with the needle coking plant, there was no identity in ownership at the time of the Rate CS Contract between the refinery, owned 100% by PDV Midwest, and the calciner plant, which was owned 100% by Unocal Corporation through its affiliates (collectively, “Unocal”).

2. ComEd investigated and received full and accurate information with respect to the ownership structure of the Lemont Facility prior to the Rate CS Contract. The Lemont Facility is among the largest loads (approximately 70-90 MW) on ComEd’s system. Shortly before the Rate CS Contract, the ownership of the Lemont Facility had undergone a well-publicized restructuring which included the dissolution of a partnership in the refinery assets between PDV Midwest’s corporate parent, PDV America, Inc. (“PDV America”), and Unocal. ComEd by its admission was on notice of this restructuring. In fact, ComEd advised Unocal that it intended to split off the calciner plant from then-existing combined billing with the refinery based on the Lemont Facility’s ownership restructuring but reversed its position after being briefed on the new separate ownership structure, as described below. At all times, both before and during the Rate CS Contract, ComEd knew that PDV Midwest through its agent, CITGO Petroleum Corporation (“CITGO”), allocated the cost of service under the Rate CS Contract to the needle

coking and the calciner plants and ComEd assisted CITGO to perform this function. It should be noted that ComEd at the time of the Rate CS Contract was aware that the refinery (approximately 90% of the Lemont Facility's load) was investigating options to bypass ComEd including through cogeneration projects. In addition, legislation to restructure the Illinois electric utility industry and allow for competitive electricity supply was pending in the Illinois General Assembly. ComEd, thus, was motivated to secure the load of the Lemont Facility at the time of the Rate CS Contract. ComEd alone drafted the Rate CS Contract, and ComEd fully intended as reflected on the face of the agreement that the refinery, the needle coking plant, and the calciner plant all would be served under the agreement. The undisputed facts permit no other conclusion.

3. Approximately three (3) years into the term of the Rate CS Contract, PDV Midwest/CITGO and the other Respondents in this matter had a disagreement among themselves including over issues related to the Rate CS Contract. Respondents ended up in Cook County Circuit Court litigating claims relating to fraud, breach of contract, and breach of fiduciary duty. That case, *NCC, et al. v. CITGO, et al.*, Case No. 00 L 14496 (the "Cook County Litigation"), was dismissed with prejudice in or about December 2002 without reference to or adjudication of the merits of the underlying claims. ComEd has alleged that it "discovered" the Cook County litigation in or about June 2001. Shortly thereafter, ComEd based on precisely the same information it had received four (4) years earlier as to the ownership structure of the Lemont Facility set in motion a series of events that resulted in Unocal's unilateral removal from the Rate CS Contract by ComEd and, eventually, the filing of this case. ComEd's actions belie the undisputed facts. Respondents have put ComEd on notice of their concerns as to the factual bases for certain in the Complaint and Petition, including ComEd's assertions that it, in effect, was defrauded by Respondents, and have sought discovery into these allegations. ComEd has

not responded in a timely or forthcoming manner to such discovery which materially has limited and delayed Respondents' ability to bring this Motion.

4. In short, there is no dispute before the Commission that ComEd has received the full benefit of the Rate CS Contract, including the full cost of all electric service provided thereunder. Based on the undisputed facts, ComEd cannot claim legitimately that PDV Midwest has engaged in any prohibited resale of electric service under the Rate CS Contract or has violated the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.* (the "Act"), ComEd's Rider 12 (Conditions of Resale or Redistribution of Electricity by the Customer to Third Persons), or any other tariff.

5. If the Commission grants this Motion, the elimination of ComEd's claims with respect to PDV Midwest's alleged prohibited resale of electric service under the Rate CS Contract will narrow the issues in this proceeding and provide for the more efficient resolution of this matter by allowing the parties to focus on truly disputed matters. The deferral of these claims to arbitration would produce the same result.

6. In support of this Motion, Respondents have attached the Affidavits of Gary Ephraim, James Fillar, Derek Kruk, Rupa Natarajan, and Glenn Rabinak, (attached hereto as Atts. 1-5), a true and correct copy of the Rate CS Contract, and extensive other evidence, including ComEd's admissions as to the undisputed facts (*see* Exs. A-BB).

**II.**  
**Statement of Undisputed Facts**

**PDVSA and Unocal**

7. Petroleos de Venezuela, S.A. (“PDVSA”) is the national oil company of the Bolivarian Republic of Venezuela. PDVSA operates in North America through its subsidiary PDV America which, in turn, operates through affiliates including PDV Midwest and CITGO.

8. Unocal is the parent company of the Union Oil Company of California. Unocal is an independent oil and gas exploration and production company, which previously owned and operated petroleum refinery and marketing assets in North America.

9. Prior to on or about December 1, 1989, Unocal including through its affiliates owned 100% of the Lemont Facility, including 100% of each of the refinery, the needle coking plant, and the calciner plant.

**The Uno-Ven Transaction**

10. In or about 1989, Unocal (including through its affiliates) was in the process of divesting certain refining and marketing assets, including some of the assets at the Lemont Facility.

11. On or about December 1, 1989, Unocal and PDV America through certain affiliates created The Uno-Ven Company (“Uno-Ven”), an Illinois general partnership. Unocal and PDV America through their respective affiliates each owned 50% of Uno-Ven. Uno-Ven, in turn, owned 100% of the Lemont Facility refinery. Thus, Unocal and PDV America, through affiliates which owned Uno-Ven, each owned 50% of the refinery located at the Lemont Facility.

12. ComEd was notified of the pending Uno-Ven transaction on November 28, 1989. (See CE 01538, attached hereto as Ex. A).

13. The Uno-Ven transaction coincided with other changes in ownership of the Lemont Facility's operating assets:

(a) The needle coking plant began operating as NCC, an Illinois general partnership. Unocal through affiliates contributed interests in certain operating facilities to be used by NCC in exchange for a 50% ownership stake in NCC. Uno-Ven also contributed interests in certain facilities to be used by NCC in exchange for a 50% ownership stake. Thus, after on or about December 1, 1989, NCC owned 100% of the needle coking plant, and Unocal and PDV America owned 75% and 25% of NCC, respectively, through their affiliates and their ownership in Uno-Ven.

(b) Unocal through affiliates retained 100% ownership of the calciner plant assets not contributed to NCC.

#### **Combined Billing of the Lemont Facility**

14. Beginning in or about 1989, ComEd combined the billing to designated points of service at the Lemont Facility—including the refinery, the needle coking plant, and the calciner plant—on one general service account under Uno-Ven's name. ComEd was aware at all times after combined billing began that Uno-Ven allocated the cost of electric service for the needle coking and calciner plants under the combined bill and invoiced NCC and Unocal for the same. (*See* CE 01139-01140, attached hereto as Ex. B).

#### **Initial Special Contract Activities**

15. In or about 1995, Uno-Ven began investigating alternatives to reduce its costs for electric service, including through the development of cogeneration facilities and/or the negotiation of a special contract with ComEd. This investigation, which addressed the loads of the refinery and the needle coking plant, included meetings beginning in or about 1996 between Uno-Ven and ComEd representatives and the exchange of information.

16. On or about June 24, 1996, ComEd declined to offer Uno-Ven a special contract under Rate CS in a meeting at ComEd's offices in Oak Brook, Illinois. (*See* CE 01436, attached

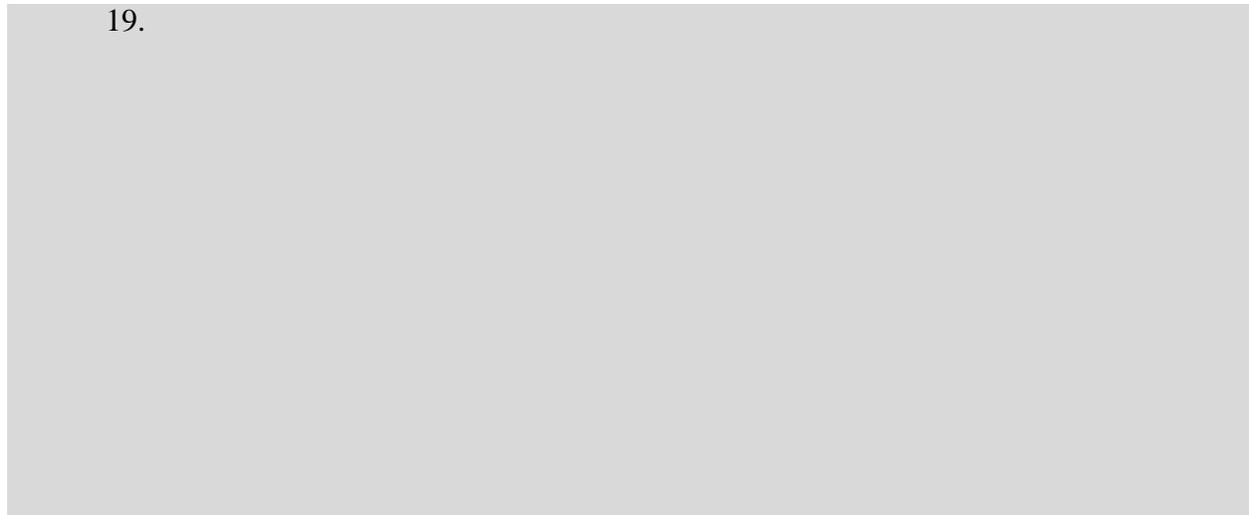
hereto as Ex. C). Uno-Ven was “very upset” by the “bad news.” (Ex. C). Uno-Ven continued its investigation into the development of cogeneration facilities to serve the refinery and needle coking plant loads.

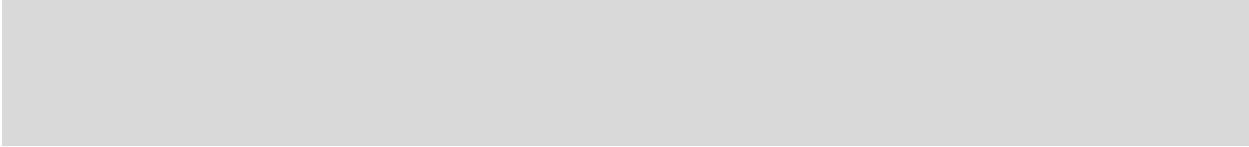
17. In or about December 1996, PDV America and Unocal agreed to unwind the Uno-Ven partnership. As announced on or about December 26, 1996, the transaction would result in PDV America owning all Uno-Ven’s refining and marketing assets including 100% of the refinery assets at the Lemont Facility. (*See* PC 004516, attached hereto as Ex. D).

**Electric Restructuring Legislation/Renewed Special Contract Talks**

18. In or about January 1997, HB 362, amending the Act, was introduced in the Illinois House of Representatives. HB 362, as amended, eventually was passed and enacted into law as the Electric Service Customer Choice and Rate Relief Law of 1997, P.A. 90-561 (the “1997 Restructuring Act”) which, among other things, provided for the phased-in implementation of retail customer choice in Illinois and the opportunity for electric utilities, such as ComEd, to recover certain so-called “stranded costs.” Uno-Ven (later CITGO) was known to ComEd as opponent of HB 362, which ComEd supported. (*See* CE 01169, attached hereto as Ex. E).

19.





20. On or about April 16, 1997, HB 362, which had been passed in the House of Representatives on April 15, 1997, arrived in the Illinois Senate.

21. On or about April 17, 1997, CITGO announced that it would become the operator of the refinery assets at the Lemont Facility after the transaction to unwind Uno-Ven and transfer 100% of Uno-Ven's refining and marketing assets to PDV America closed on May 1, 1997. (See PC 004520-004521 attached hereto as Ex. G).

22.



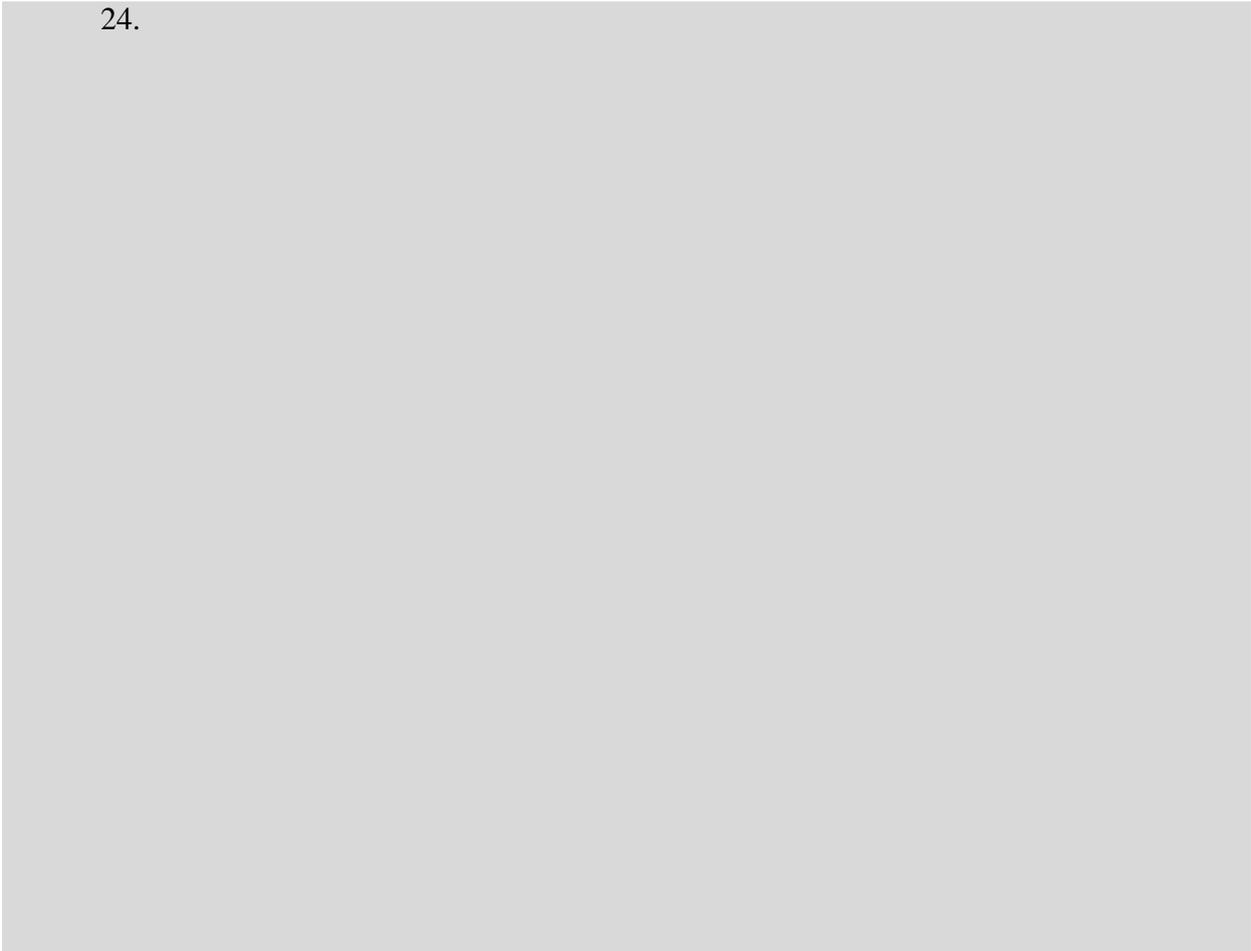
**Uno-Ven Unwound**

23. On or about May 1, 1997, the previously announced transaction to unwind the Uno-Ven partnership closed. (See PC 004517-004519, attached hereto as Ex. I). On or about this date, various changes took place in the ownership of the Lemont Facility's operating assets, including the following:

(a) Uno-Ven transferred certain assets and liabilities to PDV Midwest, including 100% of the refinery assets and one-half of Uno-Ven's 50% ownership interest in NCC. Thus, PDV Midwest owned 100% of the refinery assets at the Lemont Facility and 25% of NCC which, in turn, owned the needle coking plant.

(b) Uno-Ven was renamed CCC, and became a wholly-owned affiliate of Unocal. Unocal through affiliates owned 75% of NCC (Uno-Ven's remaining 25% stake plus Unocal's affiliate's pre-existing 50% stake). Unocal's affiliate's 100% ownership of the calciner plant assets was unaffected by the termination of the Uno-Ven partnership.

24.



25. On or about May 16, 1997, the deadline for final action on HB 362 in the Illinois Senate was extended to May 31, 1997.

26. Prior to on or about May 21, 1997, ComEd's Preuss contacted Ron Lee, manager of Unocal's calciner plant at the Lemont Facility and stated that ComEd intended to remove the calciner plant from combined billing with the refinery based on the calciner plant's separate ownership by Unocal.

**Rate CS Contract Proposal and Continued Combined Billing**

27. On or about May 21, 1997, representatives of ComEd and CITGO met at the refinery to discuss ComEd's new proposal presented on that date of a Rate CS special contract. (See PC 02937-02939, attached hereto as Ex. J). In a separate meeting at the calciner plant on the same date, arranged by ComEd, representatives of ComEd, CITGO, and Unocal met to discuss whether ComEd would continue to combine the billing of the refinery, the needle coking plant, and the calciner plant. Each meeting is described below.

28.



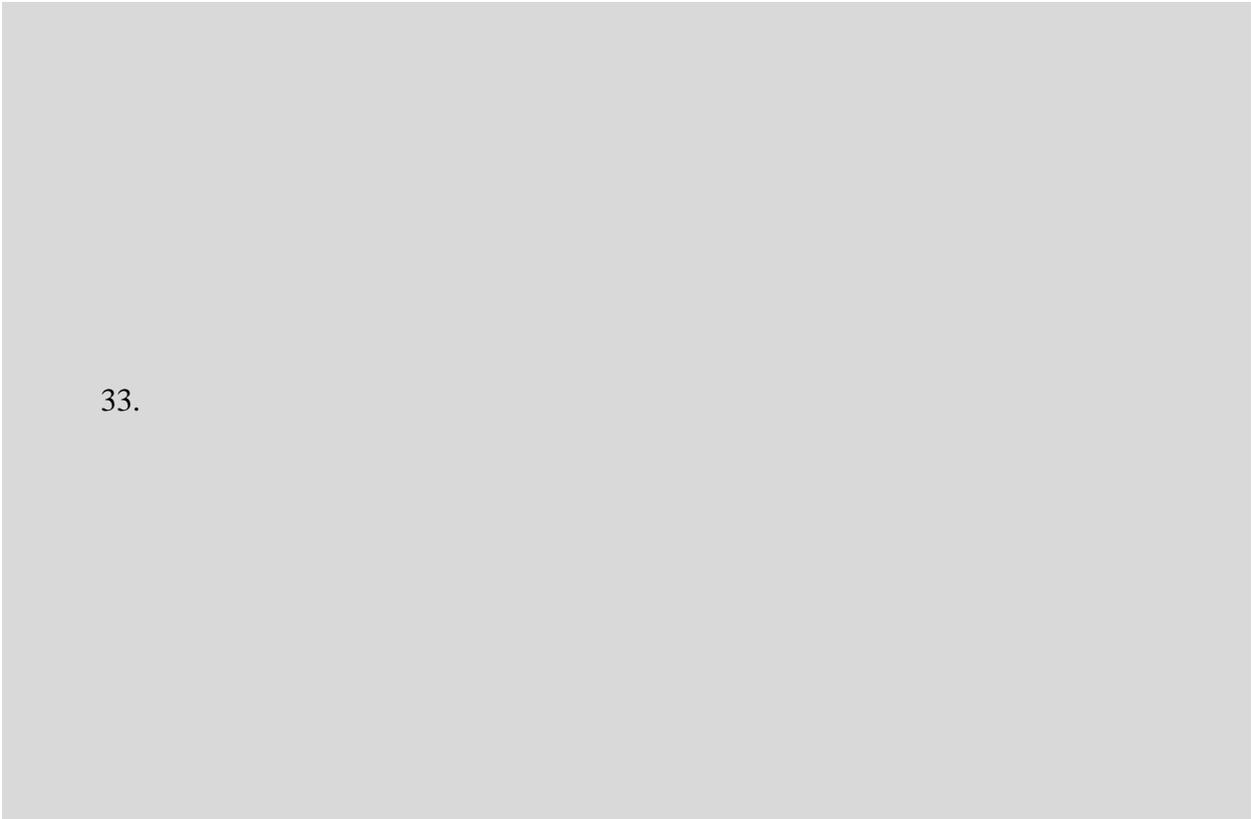
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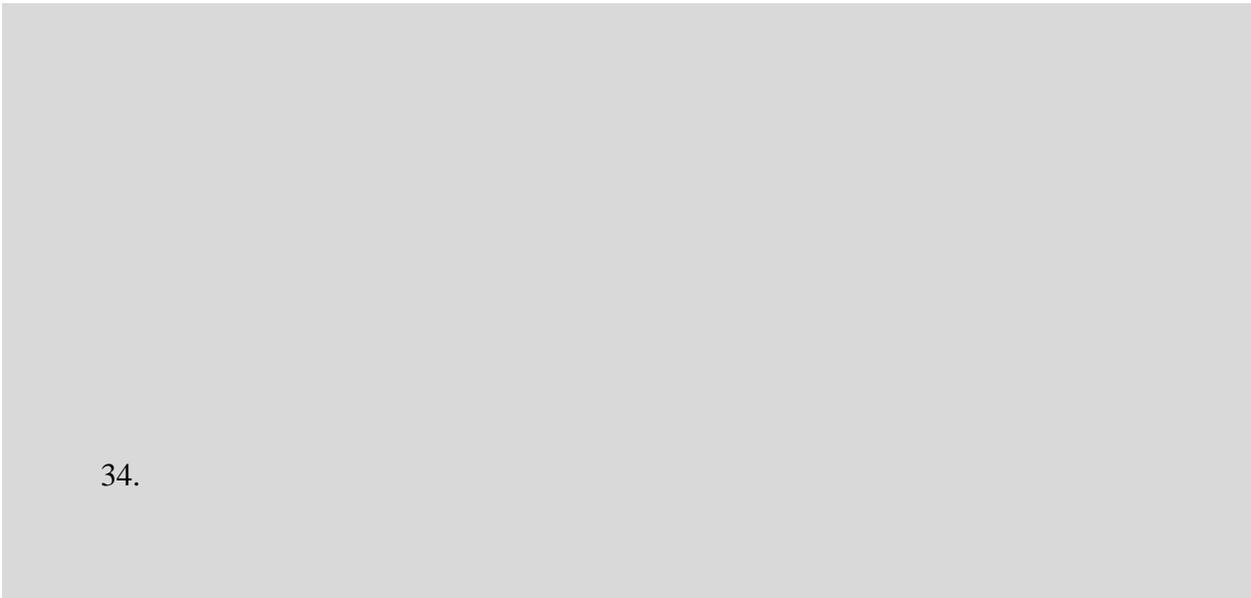
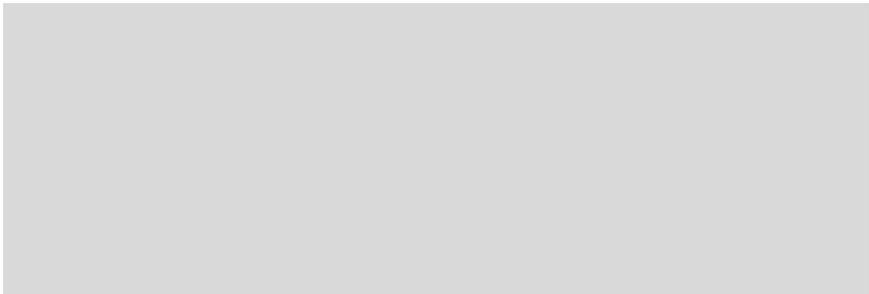
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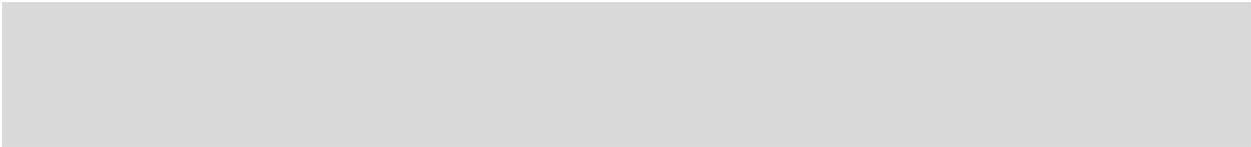
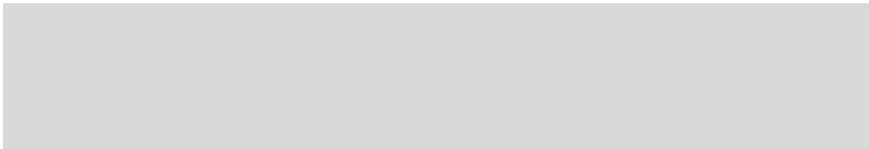
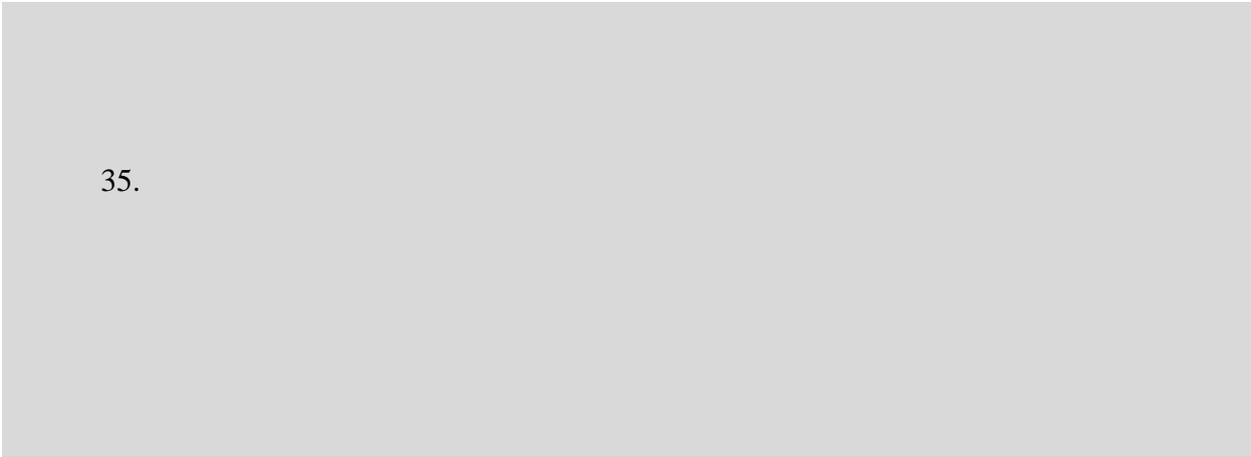
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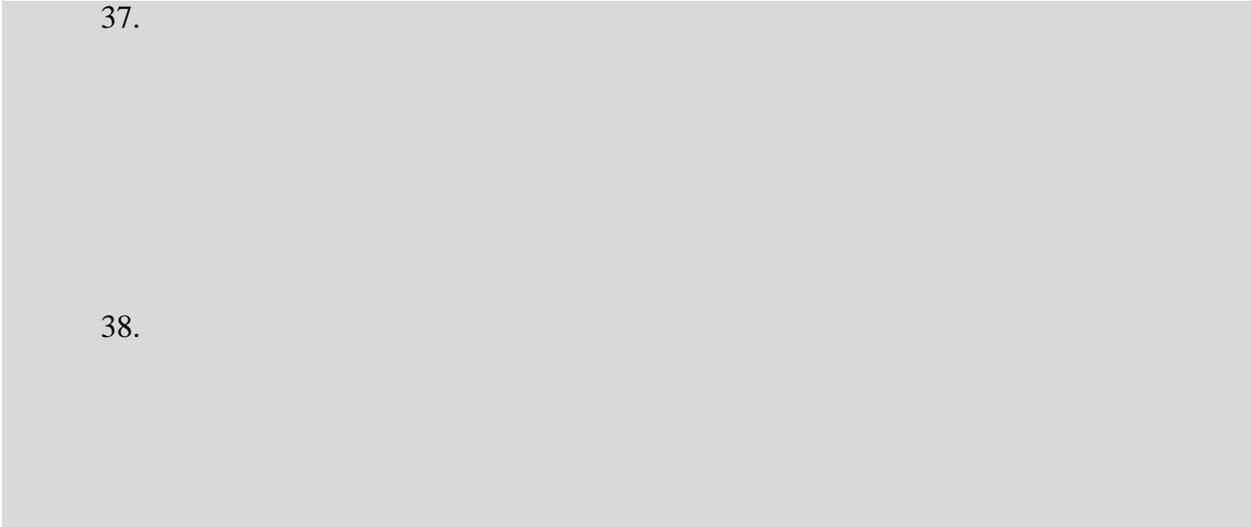
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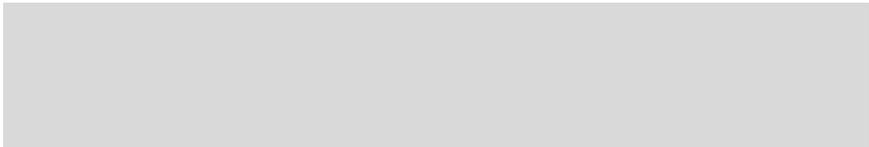
**The Revised Rate CS Proposal—CITGO, NCC, and Unocal**

36. On or about May 30, 1997, the Illinois Senate deferred voting on HB 362, and the deadline for final action on the bill was extended to January 1, 1998.

37.



38.



[REDACTED]

**The Rate CS Contract**

39.

[REDACTED]

[REDACTED]

[REDACTED]

40. ComEd was aware at all times during the term of the Rate CS Contract that CITGO was required to allocate the cost of electric service for the needle coking and calciner plants and invoice NCC and Unocal for the same.

41. On or about November 15, 1997, HB 362, as amended, was passed by the Illinois General Assembly. The 1997 Restructuring Act was enacted on December 16, 1997 and provided for the phased implementation of retail electric choice in Illinois starting in October 1999 for non-residential customers. The Rate CS Contract's five (5) year term precluded the

refinery, the needle coking plant, and the calciner plant from bypassing ComEd or taking advantage of retail choice for nearly three (3) years after that date.

**“I Was Afraid Someone Would Ask”**

42. On or about January 16, 1998, ComEd’s Preuss sent the following e-mail to other ComEd personnel responding to a complaint received from Unocal concerning ComEd personnel accessing the Unocal substation included under the Rate CS contract via CITGO’s property.

Preuss wrote:

Joe, (and anyone who may enter CITGO or Unocal) Erich Skach of Unocal called and explained that ComEd appears (at least Unocal claims this to be true) to be accessing J332-3 a Unocal ESS via a CITGO gate. Unocal needs to know when ComEd is on the Unocal site. ComEd will need to enter Unocal through the Unocal entrance, and leave the Unocal via the Unocal gate. The Unocal gate is approximately ¼ mile North of 127<sup>th</sup> Street on the West Side of New Avenue. ComEd needs to enter the Unocal entrance for J332-3. If ComEd needs to access CITGO they should enter a CITGO gate and leave through the CITGO gate. J332-1, J332-2, & J-332-4 are CITGO substations. There is an open gate between CITGO and Unocal. ComEd should not use this gate.

(See CE 01415, attached hereto as Ex. V).

43. On or about the same date, ComEd’s Timothy E. McShane, responded to Preuss, asking:

Bob, How do we have two different customers with the same ESS number? I always thought that each customer had it’s (sic) own ESS number. To have a -1 or -2 station number associated with the ESS it required two ESS’s (same customer) on the same property. Has this changed?

(See Ex. V).

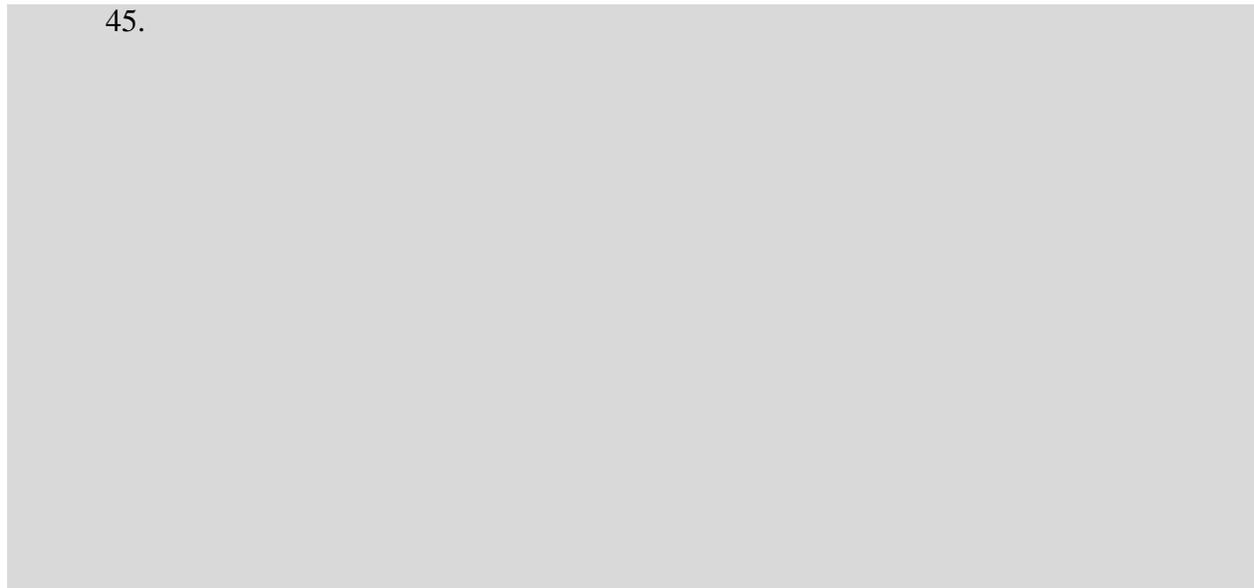
44. On or about January 19, 1998, Preuss responded, as follows:

Tim, I was afraid someone would ask. I'll try to explain .... CITGO is the ComEd customer on the billing account. BUT .. There are two companies (possibly 3) on the CITGO site (I'm using 'site' to be descriptive of our billing account). The problem comes from the difference in the billing name and the actual companies. The only account on record with ComEd is CITGO's account FU75-BZ-43079. However, the 'company' Unocal is included in this account and has three service locations (one from the 34 kV J332-3 and two 12 kv locations). Having 2 companies and only one ComEd account is unusual to say the least, and this is OK by our billing rules. You may want to have Unocal's name on J332-3 for clarity(?). They have different phone numbers, personnel, etc ... that are responsible for Unocal's electric power distribution inside the refinery. CITGO (the company) does not operate J332-2, Unocal does. Any more questions, email or call me.

(See CE 01414, attached hereto as Ex. W).

**“Sorry . . . But You Are a Separate Entity”**

45.



**ComEd's Removal of Unocal from the Rate CS Contract**

46. On or about December 14, 2000, NCC and CCC filed a lawsuit against PDV Midwest and CITGO in Cook County Circuit Court (Case No. 00 L 14496) alleging claims for common law fraud, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, breach of contract, and breach of fiduciary duty in connection with

billings under the Rate CS contract. ComEd has alleged that it “discovered” this litigation in June 2001. (*See* Compl. & Pet., ¶ 21).

47. On or about July 5, 2001, Preuss sent to ComEd’s Geraghty a copy of Preuss’s now more than four (4) year old note memorializing the May 21, 1997 meeting at the calciner plant regarding combined billing of the Lemont Facility and confirming Preuss’s review at the time of the ownership structure diagrams for the Lemont Facility presented by Unocal’s Lee. (*See* CE 00746, attached hereto as Ex. Y).

48. On or about October 15, 2001, ComEd’s Preuss and Geraghty met with Unocal’s Lee and Glynn at the calciner plant concerning separating Unocal and NCC from service under the Rate CS Contract.

49. On or about November 1, 2001, Preuss and Geraghty met with CITGO’s Derek Kruk at the refinery concerning separating Unocal and NCC from service under the Rate CS Contract.

50. On or about November 13, 2001, ComEd’s Preuss left voicemail messages for Unocal’s Pat Glynn and CITGO’s Derek Kruk addressing the removal of Unocal from the Rate CS Contract. (*See* CE 1449, Ex. Z).

51. On November 15, 2001, Preuss wrote to CITGO’s Kruk concerning ComEd’s intent to separate Unocal from the Rate CS contract for the Lemont Facility. (*See* CE 01189-01198, attached hereto as Ex. AA). Attached to the letter, in support of ComEd’s plan, was a “Company Organization” diagram describing the ownership structure of the Lemont Facility’s operating units, which is copied directly from the diagram Preuss received and reviewed more than four (4) years earlier at the May 21, 1997 at the calciner facility. (*See* Ex. AA, at CE 01191; *compare* Ex. N, at CE 01135).

52. On January 29, 2002, ComEd unilaterally removed the designated points of service for the calciner plant—Nos. (3) Unocal West ESS, J332-3, (4) Unocal East #1, 474254S3, and (5) Unocal East #2, 474253S4—from the Rate CS contract.

**The 75% Solution**

53. On April 23, 2002, ComEd filed its initial Petition in this matter.

54. On or about April 24, 2002, ComEd’s Mary Anne Emmons wrote to John Bassett, who by this time had become general manager of Unocal’s calciner plant, concerning billing for NCC. Emmons stated:

In light of the fact that Unocal owns 75% of Needle Coker, ComEd has concluded that Chicago Carbon Company/Unocal is the responsible entity for this electrical use, regardless of whom (sic) operates the equipment.

(See CE 01273-01274, attached hereto as Ex. BB).

55. On or about August 2, 2002, ComEd filed its Verified Complaint and Amended Petition in this matter.

56. On or about August 26, 2002, the Rate CS Contract expired.

**III.**  
**Argument**

**Legal Standard**

57. The Commission can render summary judgment by applying the same principles that would be applied in the Circuit Courts. *Bloom Township High School v. Ill. Commerce Comm’n*, 309 Ill. App. 3d 163, 722 N.E.2d 676 (1st Dist. 1999). Summary judgment is appropriate “when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.*

**Summary Judgment Is Appropriate Because the Undisputed Facts Show that No Prohibited Resale Occurred under the Rate CS Contract**

58. ComEd has alleged that PDV Midwest engaged in the prohibited resale of electric service to NCC and Unocal under the Rate CS Contract in violation of the Act (220 ILCS 5/9-250) and ComEd's tariffs (Rider 12). Specifically, ComEd has alleged that it was, in effect, defrauded with respect to the ownership structure of the Lemont Facility in or about May 1997, such that ComEd continued to combine bill the entire Lemont Facility under the Rate CS Contract through at least January 29, 2002, where it otherwise would have billed NCC and Unocal as separate customers. (Compl. & Pet., ¶¶ 14, 30-31).

59. The undisputed facts show that these claims are appropriate for summary judgment, because no prohibited resale took place under the Rate CS Contract. ComEd knew precisely at the time of the Rate CS Contract that the refinery and the calciner plant at the Lemont Facility shared no common ownership (after the unwinding of the Uno-Ven partnership) and that the refinery was owned 100% by PDV Midwest and the calciner plant 100% by Unocal (through its affiliates). ComEd also knew precisely that NCC was majority owned (75%) by Unocal (through its affiliates). These facts are established by the evidence in support of this Motion. ComEd largely has admitted to these facts.

60. ComEd sought and was provided great flexibility under the Act with respect to Rate CS (*see* 220 ILCS 5/9-102.1), and ComEd employed that flexibility in drafting and offering a Rate CS Contract for all points of service at the Lemont Refinery. The undisputed facts show that ComEd knew, when it entered into the Rate CS Contract, that there were separate corporate and partnership entities operating at the designated points of service in the agreement and that electric service would be provided to these independent parties under the agreement. The provision of electric service to these entities under the Rate CS Contract fully was intended, and

the Rate CS Contract was in no respect unlawful under the Act or any of ComEd's tariffs, including Rider 12.

61. Based on the undisputed facts, the Commission reasonably may infer that ComEd intended to induce PDV Midwest, NCC, and Unocal's affiliate to take electric service under the Rate CS Contract for purposes of (1) preventing bypass of the refinery load, (2) securing the Lemont Facility's entire load in advance of the advent of retail competition in Illinois, and/or (3) defusing CITGO's known opposition to the restructuring bill backed by ComEd.

62. For its own purposes, ComEd now seeks to disavow the Rate CS Contract and to assert that, because PDV Midwest was the only party signatory, NCC, and Unocal's affiliate were not parties in interest to the agreement. The undisputed facts establish the contrary. Under Illinois law, where there are questions about the identity of the parties to the contract, rules of construction require that "all of the facts and circumstances surrounding the making of the contract" be considered to ascertain the real parties in interest. *See Munroe v. Brower Realty & Mgmt Co.*, 206 Ill. App. 3d 699, 705, 565 N.E.2d 32, 36 (1st Dist. 1990) ("Signatures alone cannot be considered in determining who are parties to a lease.").

63. Furthermore, it is undisputed from the face of the Rate CS Contract that Unocal was, at a minimum, a third-party beneficiary. A party is a "third-party beneficiary of a contractual provision if the parties to a contract, or at least the promisee intended that the agreement confer a benefit on him." *Bates & Rogers Constr. Corp. v. Greeley & Hansen*, 109 Ill. 2d 225, 232, 486 N.E.2d 902, 906 (1985). Intent is "to be gleaned from a consideration of all of the contract and the circumstances surrounding the parties at the time of its execution." *Id.* In this case, the acknowledgment of the different points of service within the Lemont Facility,

including specifically Unocal as a separate entity involved, clearly indicates the contracting parties' intent for the Rate CS Contract to benefit Unocal.

64. By analogy, for example, a third party beneficiary situation arises between a manufacturer and the ultimate buyer of a product in a breach of warranty case, when there is a “direct relationship” between the manufacturer and the buyer. *Chicago Heights Venture v. Dynamit Nobel of Am., Inc.*, 575 F. Supp. 214, 219 (N.D. Ill. 1983) (citing *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 408 N.E.2d 403 (1st Dist. 1980)). In this case, a homeowner who had hired a roofer sued the manufacturer of the roofing supplies claiming, among other things, breach of an express warranty. *Id.* The District Court found that under Illinois law “warranties are not applicable between a buyer and a remote manufacturer; however, where there is a direct relationship between the manufacturer and the seller, or where the manufacturer knew the identity, purpose and requirements of the dealer's customer and delivered the goods specifically to meet those requirements, a warranty suit between a buyer and such a manufacturer will lie.” *Id.*

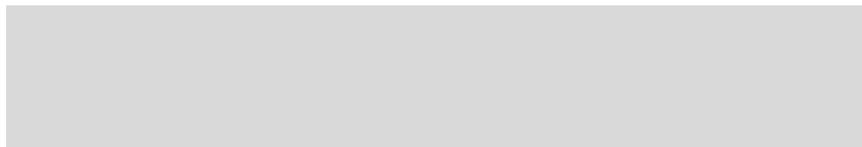
65. The standard to determine the existence of a third-party beneficiary is that the benefit is direct and not merely incidental to the third party. *Midwest Concrete Products Co. v. LaSalle Nat'l Bank*, 94 Ill. App. 3d 394, 396, 418 N.E.2d 988, 990 (1st Dist. 1981) (“it must appear from the language of the contract when properly construed that the contract was made for the direct benefit of the third person and that the benefit was not merely incidental.”). Accordingly, the fact finder needs to ascertain the intent of the parties “as it appears from the contract and the circumstances surrounding the parties at the time of the contract’s execution.” *Candlewick Lake Utilities Co. v. Quinones*, 82 Ill. App. 3d 98, 103, 402 N.E.2d 369, 373 (2d Dist. 1980) (finding that a utility was a third-party beneficiary to purchase-sale agreements between a developer and lot owners where the contracts incorporated a declaration that the

owners agreed to pay certain utility charges). Illinois law is clear that such third-parties need not be named in the contract, if they are “otherwise sufficiently described or designated.” *Id.* Here, there is ample evidence that ComEd regarded NCC and Unocal’s affiliate as beneficiaries of the Rate CS Contract.

66. In short, ComEd has received the full benefit of the Rate CS Contract, including the full cost of electric service provided thereunder. Based on the undisputed facts, PDV Midwest has not engaged in any prohibited resale of electric service under the Rate CS Contract and has not violated the Act, ComEd’s Rider 12, or any other tariff. Summary judgment is an appropriate remedy as to these claims.

**In the Alternative, This Proceeding Should Be Stayed Pending Arbitration of ComEd’s Claims Relating to the Rate CS Contract**

67. The Rate CS Contract contains an unambiguous arbitration clause that states in pertinent part:



(*See* Ex. U, at PC 03601).

68. Through its Complaint and Petition, ComEd has placed at issue a dispute as to the parties, beneficiaries, and real parties in interest to the Rate CS Contract. Pursuant to its rights under the Rate CS Contract, PDV Midwest has notified ComEd in writing of its request for arbitration as to ComEd’s claims relating to the Rate CS Contract including that PDV Midwest engaged in the prohibited resale of electric service under the Rate CS Contract.

69. These issues go to the heart of the Rate CS Contract’s interpretation and fall within the ambit of the agreement’s arbitration clause. Under Illinois law, arbitration clauses that

contain such language have been categorized as “generic” arbitration clauses. *Johnson v. Baumgardt*, 216 Ill. App. 3d 550, 558, 576 N.E.2d 515, 520 (2d Dist. 1991). “A dispute is within the scope of a ‘generic’ arbitration clause if it arises out of the subject matter of the contract.” *Id.* The claims in ComEd’s Complaint and Petition plainly arise out of the subject matter of the Rate CS Contract. Therefore, these claims are arbitrable.

70. Section 10-101.1(a) of the Act states that it is “the intent of the General Assembly to permit and encourage voluntary mediation and binding arbitration of disputes arising under the Act.” 220 ILCS 5/10-101.1(a). Illinois courts also have recognized that “arbitration as a means of dispute resolution is favored” and is regarded “as an effective and cost-efficient method of resolving disputes.” *United Cable Television Corp. v. Northwest Ill. Cable Corp.*, 128 Ill. 2d 301, 306, 538 N.E.2d 547, 549 (1989).

71. Here, the Commission should defer to arbitration of ComEd’s claims that PDV Midwest engaged in the prohibited resale of electric service under the Rate CS, because the resolution of the issues raised does not lie exclusively with the Commission but rather involves ordinary issues of contract interpretation. *See, e.g., Midwest Generation, LLC v. Commonwealth Edison Co.*, Docket No. 01-0562, (Ill. C.C. May 29, 2002) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991)).

72. In addition, while any alleged violation of the Act raises policy considerations, a determination of the issues presented for arbitration by PDV Midwest relating to the identity of the Rate CS Contract’s parties, beneficiaries, and the parties in interest are factual and case specific in nature and any Commission ruling on these questions would not have broad policy application. Arbitration is an appropriate venue for such matters.

**IV.**  
**Conclusion**

WHEREFORE, for all these reasons, PDV Midwest and CITGO and NCC and CCC respectfully request an order (1) finding that PDV Midwest did not engage in the prohibited resale of electric service by entering into the Rate CS Contract that ComEd knew included the loads of NCC and Unocal's affiliate and that ComEd has received the full benefit of the Rate CS Contract under the Act and its own tariffs; (2) granting summary judgment in favor of Respondents with respect to any and all relief sought by ComEd for its claims that PDV Midwest engaged in the prohibited resale of electric service under the Rate CS Contract; and (3) providing such other relief as is just and proper; or, in the in the alternative, staying further proceedings in this matter pending arbitration of the claims subject to this Motion.

Dated: April 25, 2003

Respectfully submitted,

PDV MIDWEST REFINING, LLC AND  
CITGO PETROLEUM CORPORATION

By: \_\_\_\_\_  
One of their attorneys

CHICAGO CARBON COMPANY AND  
THE NEEDLE COKER COMPANY

By: \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I, Thomas A. Andreoli, hereby certify that I sent a copy of the Joint Motion for Summary Judgment of PDV Midwest Refining, LLC and CITGO Petroleum Corporation and The Needle Coker Company and Chicago Carbon Company to the service list in Docket No. 02-0277 by electronic mail on April 25, 2003.

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Thomas A. Andreoli