

PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

The People of the State of Illinois, *ex rel.*)
Illinois Attorney General LISA MADIGAN,)
)
Petitioner,)

v.)

Docket No. ER07-__

Exelon Generation Co., LLC, Constellation Energy)
Commodities Group, Inc., Dynegy Power Marketing,)
Inc., J.P. Morgan Ventures Energy Corporation,)
Ameren Energy Marketing Company, American)
Electric Power Service Corporation, Conectiv Energy)
Supply, Inc., DTE Energy Trading, Inc., Edison)
Mission Marketing & Trading, Inc., Energy)
America, LLC, FPL Energy Power Marketing, Inc.,)
J. Aron & Company, Morgan Stanley Capital Group,)
Inc., PPL EnergyPlus, LLC, WPS Energy Services, Inc.)

Respondents.)

**COMPLAINT BY THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.*
ILLINOIS ATTORNEY GENERAL LISA MADIGAN, REQUESTING THAT FERC
INVESTIGATE EVIDENCE OF PRICE MANIPULATION IN THE ILLINOIS AUCTION,
REQUIRE REFUNDS FOR SALES AT RATES THAT ARE NOT JUST AND REASONABLE,
AND DIRECT CERTAIN WHOLESALE ELECTRICITY SUPPLIERS TO SHOW CAUSE
WHY THEIR MARKET-BASED RATE AUTHORITY SHOULD NOT BE REVOKED**

Pursuant to Sections 205, 206 and 222 of the Federal Power Act (“FPA”), 16 U.S.C. §§ 824d, 824e and 824v, and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. § 385.206, the People of the State of Illinois (“the People”), *ex rel.* Lisa Madigan, Illinois Attorney General, hereby file this complaint against 15 electricity suppliers engaged in wholesale power sales to Illinois utilities at rates that are not just and reasonable and that, consequently, burden the People with at least \$4.3 billion in excess costs. The 15

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electricity suppliers are: Ameren Energy Marketing Company, American Electric Power Service Corporation, Conectiv Energy Supply, Inc., Constellation Energy Commodities Group, Inc., DTE Energy Trading, Inc., Dynegy Power Marketing, Inc., Edison Mission Marketing & Trading, Inc., Energy America, LLC, Exelon Generation Co., LLC, FPL Energy Power Marketing, Inc., J. Aron & Company, J.P. Morgan Ventures Energy Corporation, Morgan Stanley Capital Group, Inc., PPL EnergyPlus, LLC, WPS Energy Services, Inc. (collectively, "Wholesale Suppliers.") The Wholesale Suppliers' rates are not just and reasonable because: (a) they are almost 40% higher than prices in bilateral electricity markets; (b) they are approximately twice the marginal cost of generating electricity to serve Illinois customers; and (c) they were produced in a highly concentrated market in which there is evidence of price manipulation.

INTRODUCTION

On January 2, 2007, the Wholesale Suppliers began selling electricity to Commonwealth Edison Company¹ ("ComEd") and the Ameren Companies² ("Ameren") pursuant to supplier forward contracts ("the Contracts") executed in September 2006. Although sales have already commenced, FERC has not determined whether the rates specified in the Contracts are just and reasonable -- as required by FPA §§ 205(a) and 206(a), 16 U.S.C. §§ 824d(a) and 824e(a).³ Indeed, none of the

¹ Commonwealth Edison is a state-jurisdictional public utility that distributes electricity to 3.7 million customers in northern Illinois.

² The Ameren Companies are AmerenCILCO, AmerenCIPS and AmerenIP, three state-jurisdictional utilities that distribute electricity to 1.2 million customers in central and southern Illinois.

³ FERC has an obligation to conduct an independent analysis of generation cost data to determine whether the rates contained in the Contracts are just and reasonable. NSTAR Electric & Gas Corp. v. Federal Energy Regulatory Commission, No. 05-1362, at 16 - 18 (D.C. Cir., March 9, 2007).

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Wholesale Suppliers has filed an executed Contract⁴ at FERC to be reviewed, nor even reported the rates that they are charging ComEd and Ameren in an Electronic Quarterly Report.⁵

The Wholesale Supplier's failure to file the executed Contracts for review by FERC is particularly troubling because there is evidence that some Wholesale Suppliers manipulated prices in an auction that was used to set the rates contained in the Contracts. For example, one bidder – ExGen

— [REDACTED]
[REDACTED] won 97% of the 41-month ComEd contracts.⁶ There is also evidence of market allocation through coordinated interaction by some of the other Wholesale Suppliers. For example, [REDACTED] Suppliers — [REDACTED]

[REDACTED]
[REDACTED]

[REDACTED] close at clearing prices significantly higher than marginal cost.

⁴ FERC reviewed early drafts of two of the Contracts, *which did not contain the rates to be charged*, when two Wholesale Suppliers sought FERC approval to make power sales to their affiliates through an electricity auction. Commonwealth Edison Company and Exelon Generation Company, 113 FERC ¶ 61,278 (2005), reh'g denied, 115 FERC ¶ 61,133 (2006), appeal pend'g (D.C. Cir. No. 06-1234); Ameren Energy Marketing Company, et al., 115 FERC ¶ 61,286 (2006). FERC granted preliminary approval for affiliate sales under the draft contracts, but also specifically required ExGen and Ameren Energy Marketing to report the contractual terms and conditions of any such sales for FERC to review and to determine whether those terms are just and reasonable. 113 FERC ¶ 61,278, at 45; 115 FERC ¶ 61,286 at 48. The People have appealed FERC's order granting preliminary approval for ExGen's sales to ComEd. That appeal is now pending before the D.C. Circuit Court of Appeals. D.C. Cir. No. 06-1234.

⁵ FPA Sections 205(c) and (d), 16 U.S.C. §§ 824d(c) and (d), require wholesale suppliers to file contracts for the sale of electricity with FERC. FERC also requires suppliers to file Electronic Quarterly Reports summarizing all wholesale transactions. Southern Co. 86 FERC. p 61,131, at 61,459.

⁶ The other wholesale contracts at auction were less valuable because the contract term was shorter: 17 months and 29 months versus 41 months.

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“Market-based rate regulation presumes – appropriately – that a functioning marketplace will drive prices towards marginal cost, and therefore toward . . . [a] ‘zone of reasonableness.’”⁷ The Wholesale Suppliers’ rates do not fall within this “zone of reasonableness” because they are approximately double the marginal cost of producing electricity to serve the customers of ComEd and Ameren. Indeed, more than 90 percent of the time, the Wholesale Suppliers’ rates are more than three times the marginal cost of producing electricity to serve these customers. The rates that the Wholesale Suppliers are charging ComEd and Ameren are also significantly higher than prices for comparable products in bi-lateral electricity markets.

It is neither just nor reasonable to burden the People with rates that are twice the marginal cost of producing the electricity needed to serve them and almost 40% higher than prices in bi-lateral markets. Nonetheless, the artificially high prices that the Wholesale Suppliers are charging ComEd and Ameren are being passed through to almost five million retail customers in Illinois. These customers experienced double- and triple-digit increases in their bills in January 2007, when ComEd and Ameren began purchasing electricity from the Wholesale Suppliers at rates that are outside the “zone of reasonableness.” *Id.*

The People respectfully request that the Commission suspend the rates that the Wholesale Suppliers are charging ComEd and Ameren and open a proceeding to determine whether those rates are just and reasonable, as required by FPA §§ 205 and 206, 16 U.S.C. §§ 824d and 824e. In that proceeding, the People request that FERC investigate evidence of price manipulation by the Wholesale Suppliers, pursuant to FPA § 222, 16 U.S.C. § 824v. The People also request that FERC require the Wholesale Suppliers to refund any amounts already collected from consumers not found to be just and

⁷ Public Utility District No. 1 of Snohomish County Washington v. Federal Energy Regulatory Commission, 471 F.3d 1053, 1089 (9th Cir. 2006) (“Snohomish”) citing Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 285 F.3d 18, 31-32 (DC Cir. 2002)(“INGAA”).

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reasonable and to modify any terms in the Contracts not found to be just and reasonable, pursuant to FPA §§ 205 and 206, 16 U.S.C. §§ 824d and 824e.

SERVICE

The name, address, phone number, facsimile number and e-mail address of the People's designated recipients for service are as follows:

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DESCRIPTION OF COMPLAINANT

The Office of the Illinois Attorney General represents the People of the State of Illinois on public utility issues in proceedings before state and federal regulatory agencies and in state and federal courts. The Illinois Attorney General has authority “to protect the rights and interests of the public in the provision of all elements of electric . . . service both during and after the transition to a competitive market, and . . . to ensure that the benefits of competition in the provision of electric . . . services to all consumers are attained” 15 ILCS 205/6.5(a).

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COMPLAINT

The People file this complaint pursuant to FPA §§ 205, 206 and 222, 16 U.S.C. §§ 824d, 824e, and 824v, and Rule 206 of FERC Rules of Practice and Procedure, 18 C.F.R. § 385.206. In support of this complaint, the People state as follows:

FACTS

In September 2006, ComEd and Ameren held a descending clock, fixed-price auction to purchase electricity to serve their respective customer loads. Ex. 1 – Affidavit of Robert F. McCullough, at 2. During the auction, electricity suppliers submitted bids over the internet for 17-month, 29-month, and 41-month contracts to sell electricity to ComEd and Ameren. *Id.* The combined peak load to be served through the auction totals 25,474 megawatts (“MW”). Ex. 1, at 3.

THE WHOLESALE SUPPLIERS ARE CHARGING PRICES THAT ARE AT LEAST DOUBLE THE MARGINAL COST OF GENERATING ELECTRICITY AND SIGNIFICANTLY HIGHER THAN PRICES IN BILATERAL MARKETS

The Wholesale Suppliers bid for the right to sell electricity to ComEd and Ameren at the clearing prices set by the auction. When the auction ended, the final clearing prices were as follows:

	17-month contracts to serve residential and small/medium nonresidential customers	29-month contracts to serve residential and small/medium nonresidential customers	41-month contracts to serve residential and small/medium nonresidential customers	17-month contracts to serve large commercial & industrial customers
ComEd	\$63.96/MWH	\$64.00/MWH	\$63.33/MWH	\$90.12/MWH
Ameren	\$64.77/MWH	\$64.75/MWH	\$66.05/MWH	\$84.95/MWH

Id. The weighted average clearing price produced by the auction was \$70.14. Ex. 1, at 4.

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The \$70.14/MWH average clearing price, which the Wholesale Suppliers are now charging ComEd and Ameren, is approximately twice the marginal cost of producing electricity to serve ComEd and Ameren customers. *Id.* In fact, a recent study by Argonne National Lab and the University of Illinois found that over 90 percent of the time the marginal cost of supplying electricity in the region is only \$ 20 – 28 / MWH. Ex. 2 - Affidavit of Richard R. Cirillo, at 1; Figure 4.1.4-2, at 5. Ninety-five percent of the time the marginal cost is under \$36/MWH. *Id.*

The Wholesale Suppliers' rates are also significantly higher than prices in bi-lateral electricity markets for comparable products. In the New York Mercantile Exchange for Northern Illinois, the price for a 17-month strip of forward contracts would be \$50.41/MWH. Ex. 1, at 4. The price for a strip of 29-month forward contracts and a strip of 41-month contracts would be \$50.35/MWH. Ex. 1, at 4-5. As shown in the table below, the Wholesale Suppliers' average rate was nearly 40% higher than in prices in bi-lateral electricity markets:

Marginal cost of generating electricity in Illinois	\$30 - 40/MWH	Wholesale Suppliers' rate is 100% higher
Price in bi-lateral electricity markets	\$50/MWH	Wholesale Suppliers' rate is 40% higher
Wholesale Suppliers' average rate	\$70/MWH	-----

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No external factors were present [REDACTED] that explain [REDACTED]

[REDACTED] In fact, activity in alternative electricity markets and the market for natural gas made participation in the Illinois auction more attractive over time. *Id.* Ultimately, neither external market stimulae nor changes in the offering price explain [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

An alternative explanation is [REDACTED]

[REDACTED] one or more types of market allocation. The evidence in this case is consistent with any one of the following market allocation scenarios:

- a. Since the ability of new entrants to this market is dependent upon purchases from existing suppliers, it is possible that the contracts might include "triggers" which would allow existing suppliers to terminate the contract under certain conditions. If such triggers were present, it would appear that purchasers were dropping out of the auction due to miniscule price changes whereas the actual situation was that they were withdrawing their bids as the triggers reduced their potential source of supply. Such partnership arrangements were characteristic of Enron's control of third-party generation in the WECC during the Western Market Crisis of 2000-2001.
- b. Quid pro quo arrangements outside the auction are another likely possibility. It is possible to make a departing bidder whole by simply agreeing to purchase the same energy in the bilateral market at favorable prices. Since the departure affects prices for all auction participants, an agreement to purchase the energy involved in an exit from the auction would be quite cost effective. Such partnership arrangements have been observed in other structured markets. A prime example is the cooperative bidding of Enron and Powerex in the "Project Stanley" market manipulation scheme in Alberta.
- c. A similar, although more difficult to detect, arrangement is to make a quid pro quo arrangement in a different geographic area. In this case, a departing bidder would be granted a lucrative contract elsewhere in the U.S. or Canada. This would be particularly easy if the departing bidder had been dependent on transmission of its bid from a neighboring RTO. Such an arrangement would benefit both parties by reducing the potential of expensive wheeling costs.

Ex. 1, at 14.

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**ONE BIDDER HAD A VIRTUAL MONOPOLY
OVER THE MOST VALUABLE CONTRACT IN THE AUCTION**

HHI⁹ statistics [REDACTED] were extremely high – indicating a high level of market concentration. Ex. 1, at 5-6. The HHI exceeded 1800, the U.S. Department of Justice standard for finding that a market is concentrated, [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

In this highly concentrated market, [REDACTED]

[REDACTED] ExGen won 95% of the ComEd 41-month contracts, which closed at \$63.33/MWH. *Id.* ExGen also won over 40% of the ComEd 29-month contracts, which closed at \$64.00/MWH. *Id.*

The cost of generating electricity at ExGen's Illinois power plants is only \$17.8/MWH. Ex. 3 - Affidavit of Jonathan G. Koomey, at 2. That means that ExGen is charging ComEd over three times ExGen's cost to generate electricity to serve ComEd's customers. Because ExGen and ComEd have the same corporate parent, this mark-up of over 200% is passed through to Exelon Corporation – resulting in a massive transfer of money from ComEd's captive customers to the stockholders of Exelon Corporation.¹⁰ In this highly concentrated market, [REDACTED]

⁹ “‘HHI’ means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which HHI is in excess of 1800 points are considered to be concentrated.” U.S. Department of Justice website, <http://www.usdoj.gov/atr/public/testimony/hhi.ht>.

¹⁰ In FERC Docket No. ER06-43, the People alleged that ExGen's sales to ComEd through the auction would result in a transfer of benefits from ComEd's captive customers to Exelon's stockholders, in violation of FERC's affiliate abuse standards. Commonwealth Edison Company and Exelon Generation Company, 113 FERC ¶ 61,278 (2005), reh'g denied, 115 FERC ¶ 61,133 (2006), appeal pend'g (D.C. Cir. No. 06-1234). “Affiliate abuse takes place when the affiliated public utility and affiliated power marketer transact in ways that result in a transfer of benefits from the affiliated public utility (and its customers) to the affiliated power marketer (and its shareholders).” Heartland Energy Services, Inc., 68 FERC ¶ 61,223 at 62,062 (1994). The People have appealed FERC's prospective

THE WHOLESALE SUPPLIERS' CHARGES CAUSED DOUBLE- AND TRIPLE-DIGIT INCREASES IN COMED AND AMEREN CUSTOMERS' BILLS

ComEd and Ameren customers have experienced double- and triple-digit increases in their electric bills in 2007 as a result of the Wholesale Suppliers' charges. Exs. 4-7 – Affidavits of Scott J. Rubin and Kristav M. Childress. They will pay an extra \$4.3 billion from 2007 – 2009 because their utilities purchased electricity from the Wholesale Suppliers through the auction, rather than in bi-lateral electricity markets. Ex. 1, at 2. That's because on January 2, 2007, new retail tariffs went into effect authorizing ComEd and Ameren to recover from their respective customers the full price of electricity purchased from the Wholesale Suppliers at an average of \$70/MWH. Ex.1, at 4. ComEd and Ameren customers are now paying 100% more than if their rates were based on the marginal cost of generating electricity, and nearly 40% more than if their rates were determined by prices in bi-lateral electricity markets instead of the auction. Ex. 1, at 4-5.

Under ComEd's new tariffs, residential customers' winter 2007 bills are 26% to 56% higher than winter 2006. Ex. 4. Customers in ComEd's Large Load rate class (400 kilowatts to 1 megawatt) are experiencing average annual increases in charges for electricity supply and delivery of more than 60 percent over 2006 charges. Ex. 5. ComEd's Very Large Load rate class (1 megawatt to 3 megawatts) is experiencing average annual increases of more than 70 percent over the previous year. *Id.* Some commercial and industrial customers are experiencing annual increases over 100 percent. Ex. 5, at 2.

finding that the ExGen-ComEd transaction would not violate the Commission's affiliate abuse standards. D.C. Cir. No. 06-1234.

¹¹ Snohomish, at 1089, citing INGAA, at 31-32.

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Under Ameren's new tariffs, residential customers' winter 2007 bills are 49 – 125% higher than winter 2006. Ex. 6. Ameren's Large General rate classes (over 1 megawatt of peak demand) are experiencing average annual increases ranging from 80 – 130%. Ex. 7.

BASIS FOR RELIEF

The primary purpose of the FPA is to protect power consumers from excessive prices. Pa. Water & Power Co. v. Fed Power Comm'n 343 U.S. 414, 418 (1952); California ex rel. Lockyer v. FERC, 383 F.3d 1006, 1017 (9th Cir. 2004). “[T]he most obvious ‘public interest’ underlying the FPA . . . [is] avoidance of unnecessarily high rates for the consuming public.” Snohomish, at 1089.

To protect consumers from excessive prices, the FPA authorizes FERC to regulate the sale of electric energy at wholesale in interstate commerce.¹² 16 U.S.C. § 824. FPA § 205 requires FERC to review new rates to determine whether they are just and reasonable. *Id.* § 824d. Section 206 authorizes FERC to review rates and modify private contracts already in effect when there is an excessive burden on third parties. *Id.* § 824e. FPA Section 222 prohibits market manipulation by wholesale suppliers of electricity. *Id.* § 824v.

The Wholesale Suppliers are charging ComEd and Ameren rates that fail to comply with FPA §§ 205 and 206. FERC has not even conducted an initial review of the rates or contracts to determine whether they are just and reasonable. In addition, there is evidence that some of the Wholesale Suppliers engaged in conduct that violates FPA § 222 – evidence that warrants a full investigation by the Commission.

¹² In the FPA, the term “sale of electric energy at wholesale” means a sale of electric energy to any person for resale. 16 U.S.C. 824(d).

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THE COMMISSION SHOULD REVIEW THE JUSTNESS AND REASONABLENESS OF THE WHOLESALE SUPPLIERS' RATES

The Wholesale Suppliers are charging ComEd and Ameren rates that have not been found to be just and reasonable, as required by the FPA. Section 205(a) of the FPA expressly requires FERC to review new wholesale contracts to determine whether the rates specified in the contracts are just and reasonable:

All rates and charges made, demanded or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

16 U.S.C. § 824d(a).¹³

The Commission has not even had an opportunity to review the rates that the Wholesale Suppliers are charging ComEd and Ameren because the Wholesale Suppliers have not filed those rates with FERC. FPA § 205(c) requires wholesale suppliers of electricity to file all wholesale rates and contracts with FERC:

. . . every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to jurisdiction of the Commission . . . together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

16 U.S.C. §824d(c) (emphasis added).¹⁴

¹³ FERC has jurisdiction over the transmission and sale of electric energy at wholesale in interstate commerce. 16 U.S.C. § 824. The FPA defines the term “public utility” as “any person who owns or operates facilities subject to the jurisdiction of the Commission. . . .” 16 U.S.C. § 824(e). The word “facilities” has been broadly construed as “a widely inclusive term” that applies to “corporate organization[s], contracts, accounts, memoranda, papers and other records, in so far as they are utilized in connection with such [interstate] sales “of electricity.” Hartford Electric Light Co. v. FPC, 131 F.2d 953, 961 (1942). Hence, power marketers involved in the interstate sales of electricity are subject to the FPA, even if they do not own generation or transmission facilities.

¹⁴ Rule 205 of the Commission’s Rules of Practice and Procedure, which implements FPA §205, also expressly provides that any person engaged in wholesale sales of electricity *must* file a *specific tariff or rate* with the Commission to establish or change the rate or contract: “A person must make a tariff or

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Wholesale suppliers are typically required to file new rates sixty days before they are scheduled to go into effect:

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect.

16 U.S.C. §824d(d) (emphasis added).

THE COMMISSION SHOULD SUSPEND THE NEW RATES AND COMMENCE PROCEEDINGS TO DETERMINE WHETHER THE WHOLESALE SUPPLIERS' RATES ARE JUST AND REASONABLE

FPA §205(e) authorizes the Commission to schedule hearings, "either upon complaint or its own initiative without complaint" to review "the lawfulness" of the new rates that the Wholesale Suppliers are charging ComEd and Ameren. During such hearings the Commission has the power to suspend the new rates for up to five months:

. . . pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect.

16 U.S.C. §824d(e). The Commission is required to "give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible." 16 U.S.C. §824d(e).

rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation . . ." 18 C.F.R. § 385.205.

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The Commission should suspend the Wholesale Suppliers' new rates "at once", pursuant to FPA §205(e), and order the Wholesale Suppliers to file the Contracts, as required by FPA §§ 205(c) and (d). The Commission should also commence a proceeding, pursuant to FPA §205(e), to determine whether these rates are just and reasonable. In this proceeding, the Wholesale Suppliers will have the burden of proof. 16 U.S.C. § 824d(e). The new rates must be rejected if the Wholesale Suppliers cannot demonstrate that they meet the just and reasonable standard set forth in FPA §205(a).

THE COMMISSION SHOULD MODIFY THE CONTRACTS TO PROTECT THE PUBLIC INTEREST

FPA § 206(a) authorizes FERC to review existing contracts and to modify any terms that are not just and reasonable:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge classification, rule, regulation, practice or contract to be thereafter observed and in force, and shall fix the same by order.

16 U.S.C. §824e(a). FERC has an obligation under § 206(a) to conduct an independent analysis of generation cost data to determine whether the rates contained in the contract are just and reasonable.

NSTAR Electric & Gas Corp. v. Federal Energy Regulatory Commission, No. 05-1362, at 16 - 18 (D.C. Cir., March 9, 2007).

This section of the FPA, "... allows FERC to modify the terms of a private contract when third parties are threatened by ... the imposition of an 'excessive burden.'" Northeast Utilities Service Company v. Federal Energy Regulatory Commission, 55 F.3d 686, 691 (1st Cir. 1995) discussing United Gas Pipe Line Co. v. Mobile Gas Serv., 350 U.S. 332 (1956) and Federal Power Comm'n v. Sierra Pacific Power Co., 350 U.S. 348 (1956) ("Mobile-Sierra"). "[T]he purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private

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interests of utilities [A] contract may not be said to be either ‘unjust’ or ‘unreasonable’ simply because it is unprofitable to the utility.” Sierra, at 355.

The Wholesale Suppliers’ contracts with ComEd and Ameren specifically provide that modifications to the contract are governed by the Mobile-Sierra doctrine:

. . . the Parties agree that the standard of review for any change to this Agreement, whether proposed by a Party, a non-party, the ICC or FERC acting sua sponte, will be the “public interest” standard of review set forth in United Gas Pipeline Co. v. Mobile Gas Public Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

<http://www.illinois-auction.com/index.cfm?fa=bid.con>. When a contract is challenged on the grounds that a rate is too high, the Mobile-Sierra public interest standard is applied in the following manner:

“[I]f a challenged contract imposes any significant costs on ultimate customers because of a wholesale rate too high to be within a zone of reasonableness . . . that contract affects the public interest.”

Snohomish, at 1089, citing INGAA, at 31 (emphasis added). In order to fall within the “zone of reasonableness,” wholesale prices must result from normal market forces and bear a market-based relationship to marginal cost. *Id.*

THE CONTRACTS AND RATES SHOULD BE MODIFIED BECAUSE THEY IMPOSE AN EXCESSIVE BURDEN AND ARE OUTSIDE THE ZONE OF REASONABLENESS

The Wholesale Suppliers’ rates have imposed an excessive burden on ComEd and Ameren customers. Since the contracts went into effect, the almost five million customers in the ComEd and Ameren service territories have experienced double- and triple-digit increases in their electric bills. Ex. 4 – 7. These customers will be forced to pay a premium over prices in bi-lateral markets of at least \$4.3 billion from 2007 –2009 if the Contracts are not modified. Ex. 1, at 2. The premium over marginal costs is even greater. This is an excessive burden on the People, which cannot be justified on the basis of cost.

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The Wholesale Suppliers' rates are outside "the zone of reasonableness" because they significantly exceed marginal cost (Ex. 1, at 4; Ex. 2) and the higher-than-cost-based prices were produced by a highly concentrated market in which there is evidence of price manipulation. Ex. 1, 5-14. In order to fall within the "zone of reasonableness," wholesale prices must result from normal market forces and reflect marginal cost:

Market-based rate regulation presumes – appropriately – that a functioning marketplace will drive prices towards marginal cost, and therefore toward such a reasonable range . . . Even if a particular rate exceeds marginal cost, however, it may still be within this reasonable range – or "zone of reasonableness" -- if that higher-than-cost-based price results from normal market forces and is part of a general trend toward rates that do reflect cost.

Snohomish, at 1089, citing INGAA, at 31-32, internal citations omitted. As discussed above, the exception that allows some higher-than-cost-based prices to fall within the "zone of reasonableness" does not apply in this case. Because of the high levels of market concentration in Illinois, normal market forces are not able to drive prices toward marginal cost.

THE CONTRACTS SHOULD BE REVIEWED UNDER A RELAXED PUBLIC INTEREST STANDARD TO PROTECT CONSUMERS

"[I]f a challenged contract imposes any significant costs on ultimate customers because of a wholesale rate too high to be within a *zone of reasonableness* . . . that contract affects the public interest." Snohomish, at 1089, citing INGAA, at 31 (emphasis added). Where, as here, FERC is reviewing a contract for the first time, the Commission uses a relaxed public interest standard to determine whether modification of the contract is necessary "to safeguard the interests of third parties." Northeast Utilities, 55 F.3d 686, 692, citing Northeast Utilities Service Company v. Federal Energy Regulatory Commission, 993 F.2d 937, 961 (1st Cir. 1993). "FERC must give predominant weight in determining whether to modify a contract under section 206 to the impact of a challenged

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wholesale contract on the rates paid by the consuming public who use the energy covered by the contract.” Snohomish, at 1054.

THE WHOLESALE SUPPLIERS MUST REFUND ANY AMOUNTS COLLECTED FROM COMED AND AMEREN THAT ARE NOT FOUND JUST AND REASONABLE

FPA § 205(e) requires Wholesale Suppliers to refund, with interest, any charges collected from ComEd and Ameren that are not found to be just and reasonable:

... after full hearings, either completed before or after the rate, charge, classification or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order . . . upon completion of the hearing . . . require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.

16 U.S.C. §824d(e).

FPA § 206(b) also authorizes FERC to order refunds of amounts paid under existing contracts in excess of just and reasonable rates:

... At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amount paid . . . in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force.

16 U.S.C. §824e(b).

Since the Wholesale Suppliers’ new rates have never been reviewed by FERC, the People are entitled to a refund under Section 205(e) of any charges incurred under rates that were not just and reasonable – from the first day the rates were charged. The People should not have to wait for FERC to set a refund effective date in the future under Section 206(b):

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a

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proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period.

16 U.S.C. §824e(b). However, in the event that FERC disagrees, the Commission should set a refund effective date no more than 60 days after the date of this filing to ensure that the People are protected until such time as the contracts can be modified.

THE COMMISSION SHOULD INVESTIGATE EVIDENCE THAT SOME OF THE WHOLESALE SUPPLIERS ENGAGED IN MARKET MANIPULATION

In 2005, the FPA was amended to expressly prohibit manipulation of wholesale markets by electricity suppliers:

It shall be unlawful for any entity . . . directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission . . . in contravention of such rules as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of ratepayers.

16 U.S.C. §824v.

FERC's rules against market manipulation prohibit entities involved in the purchase or sale of electricity, directly or indirectly:

- (1) To use or employ any device, scheme, or artifice to defraud,
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
- (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

Prohibition of Energy Market Manipulation, Order No. 670, 114 FERC ¶ 61,047, FERC Stats. & Regs.

¶ 31,202, reh'g denied 1114 FERC ¶ 61,300, at 63-64 (2006); 18 C.F.R. § 1c.2.

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There is evidence that [REDACTED] engaged in market manipulation in connection with their wholesale sales to ComEd and Ameren. Ex. 1, at 7-14. These Wholesale Suppliers should be required to show cause as to why their market-based rates should not be revoked. If the Commission's investigation turns up evidence that any other Wholesale Supplier engaged in market manipulation, they should be required to do the same.

SPECIFIC RELIEF REQUESTED

The People respectfully request that the Commission enforce the provisions of §§ 205, 206 and 222 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e and 824v, as follows:

- (1) order the Wholesale Suppliers to file the executed Contracts with FERC, as required by 16 U.S.C. § 824d(c) and (d);
- (2) suspend the rates in the Wholesale Suppliers' Contracts with ComEd and Ameren, pursuant to 16 U.S.C. § 824d(d);
- (3) commence a proceeding to determine whether the Wholesale Suppliers' rates are just and reasonable, and to investigate the evidence of price manipulation, pursuant to 16 U.S.C. §§ 824d(a) and (e), 824e(a) and (b), and 824v;
- (4) refund any amounts charged by the Wholesale Suppliers in excess of the amounts found to be just and reasonable, pursuant to 16 U.S.C. §§ 824d(e) and 824e(b) and, if appropriate, set a refund effective date no more than 60 days after the date of this filing;
- (5) modify any terms of the Contracts that are contrary to the public interest and/or not found to be just and reasonable, pursuant to 16 U.S.C. §§ 824e(a) and (b);
- (6) assess civil penalties against Wholesale Suppliers that violated prohibitions against market manipulation and require any such violators to disgorge excess profits, pursuant to 16 U.S.C. §§ 824v and 825o-1; 18 C.F.R. § 1c.2; and
- (7) direct [REDACTED] to show cause as to why their market-based rate authority should not be revoked, pursuant to the FERC Policy Statement on Enforcement, 113 FERC ¶ 61,068 (2005).

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REQUEST FOR CONFIDENTIAL TREATMENT

The raw data that forms the basis for this Complaint was collected by the Illinois Commerce Commission ("ICC"). Some of the data has not been publicly released¹⁶ or provided to the Wholesale Suppliers. The ICC provided this non-public data to the Illinois Attorney General on a confidential basis, in accordance with an Illinois statute that grants the Attorney General "access to and the use of all files, records, data, and documents in the possession or control of the Commission." 15 ILCS 205/6.5(d). "The Office of the Attorney General may use information obtained under this Section, including information that is designated as and that qualifies for confidential treatment, which information the Attorney General's office shall maintain as confidential, to be used for law enforcement purposes only, which information may be shared with other law enforcement officials." *Id.*

Accordingly, the People have filed public and nonpublic versions of this Complaint and Exhibit 1 – The Affidavit of Robert F. McCullough. The People request confidentiality for certain information contained in the nonpublic version of the Complaint and Exhibit One, in accordance with Rules 206(e), 107(g) and 112 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.206(e); 388.107(g) and 388.112. An original and three copies of the Complaint and affidavits are being filed with the Commission and marked "Confidential – Nonpublic Version." 18 C.F.R. § 385.206(e). Eleven copies are being submitted, from which the confidential information has been deleted, marked "Public Version." *Id.*

No proposed protective agreement has been submitted in this case because the Illinois Attorney General's disclosure of this data has been limited by state statute to disclosure to law enforcement

¹⁶ The People have requested that the ICC publicly release all of the data that forms the basis of this complaint, but the ICC has not granted that request. A number of the Wholesale Suppliers have indicated that they object to release of round-by-round, bidder-by-bidder data from the September 2006 auction.

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officials. 15 ILCS 205/6.5(d). Commission rules exempt “records or information compiled for law enforcement purposes” from public disclosure. 18 C.F.R. § 388.107(g). The Commission’s exemption for “commercial or financial information obtained from a person and privileged or confidential” may also be applicable in this case. 18 C.F.R. § 388.107(d).

PRIOR NEGOTIATIONS AND RELATED PROCEEDINGS

The issues that are raised in this Complaint are not pending in any other Commission proceeding or in any other proceeding in which the People are a party. Because of the confidential nature of certain facts that form the basis of this Complaint, negotiation with the Respondents is not a practical alternative in this case. Alternative dispute resolution is not appropriate because an authoritative resolution is needed to ensure that there is applicable precedent, should similar issues arise if ComEd and Ameren are allowed to go forward with their plans to hold another wholesale electricity auction in 2008. Commission action is therefore needed to resolve the issues set forth herein.

ELECTRONIC NOTICE

In accordance with Rule 206(b)(10) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.206(b)(10), the required notice for the Federal Register is being submitted on a disk enclosed with this filing.

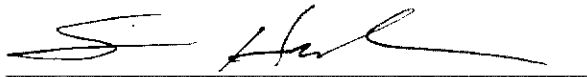
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CONCLUSION

WHEREFORE, for the foregoing reasons, the People respectfully request that the Commission grant the relief requested in this Complaint.

Respectfully Submitted,
The People of the State of Illinois

By LISA MADIGAN, Attorney General\



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March 15, 2007

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CERTIFICATE OF SERVICE

The undersigned has caused the public version of this Complaint and appended affidavits to be served by electronic mail on the designated corporate official for each Respondent, as listed on the FERC web site, and on Commonwealth Edison and Ameren, in accordance with 18 C.F.R. §§ 385.206(c) and (e)(2) and 385.2010(f)(3). She also caused a copy of the nonpublic version of this Complaint and appended affidavits to be served by hand delivery on the Illinois Commerce Commission. A service list is attached.

March 15, 2007



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