

## STATE OF ILLINOIS

### ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission :  
On Its Own Motion :  
: :  
Proceeding to determine whether : 07-0240  
to authorize public release of certain :  
auction-related information. :

### ORDER INITIATING PROCEEDING

By the Commission:

On March 29, 2007, the Commission received a Staff Report (“Staff Report”) from its Office of General Counsel. The Staff Report recommends that the Commission enter an Order initiating a proceeding to consider whether to authorize the public release of information related to the Illinois Auction that was provided in 2006 to the Office of the Attorney General (OAG) pursuant to Section 6.5 of the Attorney General Act (“AG Act”) [20 ILCS 205/6.5].

#### **Background**

On February 25, 2005, Commonwealth Edison Company (“ComEd”) filed with the Commission its proposed tariffs to establish a procurement methodology for the purchase of electricity it would use to serve customers after January 1, 2007. Central Illinois Light Company, d/b/a AmerenCILCO, Central Illinois Public Service Company, d/b/a AmerenCIPS, and Illinois Power Company, d/b/a AmerenIP (collectively the “Ameren Illinois utilities”) filed similar tariffs on February 28, 2005. As originally filed, each set of tariffs included a detailed description of an auction process that would be administered by an Auction Manager, pursuant to an auction manual developed by the utility in coordination with the Auction Manager. The Commission would retain an Auction Advisor who would report to the Commission, and be subject to Sections 5-108 and 4-404 of the Public Utilities Act [see, e.g., Commonwealth Edison Company, ILL.C.C. No. 4, Original Sheet No. 253]. The original filings also contained draft forms that were to be executed by prospective bidders seeking to participate in the auction. The Commission suspended all four sets of tariffs on March 9, 2005.

Issues related to the confidentiality of information generated in the auction process were litigated at some length in the resulting rate proceedings, along with a great number of other issues. Issues arose both with respect to information that would be received by persons employed by the Commission, and with respect to information in the possession of auction participants. The Commission entered its final Orders in the Procurement

Dockets on January 24, 2006. ComEd and the Ameren Illinois utilities filed tariffs pursuant to the Commission Orders in July 2006, and the auction was conducted in early September 2006.

Both before and after the auction, the OAG made several requests for information related to the auction, invoking the authority of the Attorney General pursuant to Section 6.5 of the Attorney General Act. That provision reads in part as follows:

Upon request, the Office of the Attorney General shall have access to and the use of all files, records, data, and documents in the possession or control of the Commission. 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.

15 ILCS 205/6.5(d) (excerpt)

The Staff Report recites that on several occasions, auction-related information was provided to the OAG on a confidential basis pursuant to these requests.

Within the five business days allowed it following the September auction completion date, the Commission determined not to initiate a proceeding to investigate the results the Fixed Price Section of the auction, and the successful bidders entered into supplier forward contracts with the utilities, as contemplated by utility tariffs and the auction process. Retail rates of ComEd and the Ameren Illinois utilities intended to recover the costs of procuring electricity under the supplier forward contracts, which had also been the subject of the Procurement Dockets, took effect January 2, 2007.

On March 16, 2007, OAG filed a complaint with the Federal Energy Regulatory Commission containing some allegations which, according to OAG, are “based on information that the Attorney General obtained from the Illinois Commerce Commission, pursuant to Section 6.5(d) of the Attorney General Act.” On March 19, 2007, the OAG sent the Commission’s Office of General Counsel a letter, the last paragraph of the corrected version of which reads as follows:

Today, the Attorney General calls on the Commission to publicly release all information about the auction that has been provided to the Attorney General. More than six months have passed since the 2006 electricity auction occurred. There is no legal basis for keeping information about that auction from the public. Indeed, the public has a right to know what actually happened during the auction that caused electric bills to skyrocket – in some cases as much as 300%. The Commission should, therefore, publicly

release all information about the auction that has been provided to the Attorney General – as well as any other auction-related information that the Commission possesses.

Letter from Office of the Attorney General, p. 2

The Staff Report focuses on strictures from three primary sources which require the Commission Staff to accord confidential treatment to auction documents: the tariff provisions governing the role of Staff, the Auction Rules, and the forms signed by prospective bidders.

### **Tariff Provisions Governing the Role of Staff**

The Staff Report notes that as originally proposed by all four companies, the procurement tariffs did not envision a significant role for the Commission Staff in the auction process. Rather, the Commission was to have selected an Auction Advisor who would provide expert advice on auction matters, and who would file both a confidential and a public report with the Commission. The Auction Advisor was to have been “bound by the confidentiality obligations applicable to Staff under Section 4-404 and Section 5-108 of the Public Utilities Act (Act).” See, e.g., Commonwealth Edison Company, ILL. C. C. No. 4, Original Sheet No. 254; Commission record in 05-0159.

The Commission considered evidence eliminating the tariffed role for the Auction Advisor, and recommending that its Staff take on a greater role in monitoring the auction process generally, observing the actual conduct of the auction, filing a confidential report with the Commission in the immediate wake of the auction, and filing a public report several months later. See Commonwealth Edison Company, Exhibit 9.0, lines 271-302; Commission record in 05-0159. The Commission approved the enhanced role of Staff in its Orders. Order in 05-0159, p. 108; Order in 05-0160, 05-0161, and 05-0162, Consolidated, p. 120.

The tariffs filed after the Commission’s Orders in the Procurement Dockets all provided that Staff would “[r]emain bound by the confidentiality obligations applicable to Staff under Section 4-404 and Section 5-108 of the Public Utilities Act.” [220 ILCS 5/4-404 and 5-108]. See Commonwealth Edison Company, ILL. C. C. No. 4, First Revised Sheet No. 262; Central Illinois Light Company, d/b/a AmerenCILCO, Ill. C. C. No. 18, 1st Revised Sheet No. 27.026; Central Illinois Public Service Company, d/b/a AmerenCIPS, Ill. C. C. No. 16, 1st Revised Sheet No. 27.026; Central Illinois Light Company, d/b/a AmerenCILCO, Ill. C. C. No. 18, 1st Revised Sheet No. 27.026; Illinois Power Company, d/b/a AmerenIP, Ill. C. C. No. 35, 1st Revised Sheet No. 27.026.

Section 4-404 of the Public Utilities Act States as follows: “The Commission shall provide adequate protection for confidential and proprietary information furnished,

delivered or filed by any person, corporation or other entity.” 220 ILCS 5/4-404. Section 5-108 of the Public Utilities Act reads thus:

Any officer or employee of the Commission who divulges any fact or information coming to his knowledge during the course of an inspection, examination or investigation of any account, record, memorandum, book or paper of a public utility, except in so far as he may be authorized by the Commission or by a circuit court, shall be guilty of a Class A misdemeanor.

220 ILCS 5/5-108

The tariffs filed under authority of the Commission’s Orders also required Staff to file two reports with the Commission. The first of these was a confidential report described as follows in the tariffs:

In accordance with the ICC’s Order entered in Docket No. 05-0159, the Staff submits a formal, confidential report to the ICC by the end of the second business day following the Auction Completion Date. Such report, the Confidential Report of the Staff to the ICC, provides an independent assessment to the ICC as to whether the Illinois Auction was conducted fairly and appropriately and all necessary actions to ensure the competitiveness and integrity of such auction were followed. Such report also addresses activities undertaken prior to the commencement of the Illinois Auction, external events that may have affected the Illinois Auction results, any issues or concerns identified by the Staff, and any recommendations the Staff has regarding further action by the ICC.

Commonwealth Edison Company, ILL. C. C. No. 4, 1st Revised Sheet No. 263.

Staff notes that the Ameren Illinois utilities’ tariffs are substantially the same, citing Central Illinois Light Company, d/b/a AmerenCILCO, Ill. C. C. No. 18, 1st Revised Sheet No. 27.026 and 27.027; Central Illinois Public Service Company, d/b/a AmerenCIPS, Ill. C. C. No. 16, 1st Revised Sheet No. 27.026 and 27.027; Illinois Power Company, d/b/a AmerenIP, Ill. C. C. No. 35, 1st Revised Sheet No. 27.026 and 27.027.

Staff states that the only portions of the tariffs that permit the Staff to publicly disclose any auction-related information are the portions concerning the public report of the Staff. The public report is addressed as follows:

In accordance with the ICC’s Order entered in Docket No. 05-0159, the Public Report of the Staff is made available no earlier than thirty (30) calendar days prior to the date that the Company is scheduled to begin procuring full requirements electric supply in accordance with the [Supplier

Forward Contracts] . . . This report provides an assessment of the conduct of the Illinois Auction, including a review of the Auction Manager's actions. The report also details any suggestions for improvement identified by the Staff and any recommendations the Staff has for future implementation of the auction process. This report is made available to any interested entity and is posted on a publicly accessible web site.

Commonwealth Edison Company, ILL. C. C. No. 4, 1st Revised Sheet No. 269.

Once again, the Staff Report recites that the Ameren Illinois utilities' tariffs are substantially the same. Central Illinois Light Company, d/b/a AmerenCILCO, Ill. C. C. No. 18, 1st Revised Sheet No. 27.034; Central Illinois Public Service Company, d/b/a AmerenCIPS, Ill. C. C. No. 16, 1st Revised Sheet No. 27.034; Illinois Power Company, d/b/a AmerenIP, Ill. C. C. No. 35, 1st Revised Sheet No. 27.034.

The Commission Staff issued its Public Report on December 6, 2006. See [http://www.icc.illinois.gov/docs/en/Post\\_Auction\\_Public\\_Report\\_Staff.pdf](http://www.icc.illinois.gov/docs/en/Post_Auction_Public_Report_Staff.pdf). The Staff Report states that no other public release of auction-related information has been authorized by the Commission or by a circuit court.

## **Auction Rules**

The Staff Report recites that proposed tariffs of ComEd and of the Ameren Illinois utilities originally provided that the auction would be conducted pursuant to rules developed by the utility in coordination with the Auction Manager. As originally proposed, the ComEd tariffs read as follows concerning the Auction Manual:

The Company, in coordination with the Auction Manager, develops one or more Auction Manuals applicable to each auction. Each such Auction Manual is provided to Staff for informational purposes and made available to the public, including prospective bidders, in accordance with the provisions of the CPP Timeline section of this Competitive Procurement Process part. Each Auction Manual provides operational details of the individual auction to which it is applicable that are consistent with the terms and conditions set forth in this rider.

Commonwealth Edison Company, ILL. C. C. No. 4, Original Sheet No. 257.

The proposed Ameren tariffs were similar:

The Company, in coordination with and subject to the review and approval of the Auction Manager, develops a set of Auction Rules applicable to each

auction. Each such set of Auction Rules is provided to Staff for informational purposes and made available to the public, including prospective bidders. Each such set of Auction Rules provides operational details of the individual auction to which it is applicable that are consistent with the terms and conditions set forth in this rider.

Central Illinois Light Company, d/b/a AmerenCILCO, Ill. C. C. No. 18, Original Sheet No. 27.017; Central Illinois Public Service Company, d/b/a AmerenCIPS, Ill. C. C. No. 16, Original Sheet No. 27.017; Illinois Power Company, d/b/a AmerenIP, Ill. C. C. No. 35, Original Sheet No. 27.017.

The Staff Report states that the tariffs that were placed into effect by virtue of the Commission Orders reflect several significant changes. The final tariffs shifted responsibility for the promulgation of the rules from the utilities to the Auction Manager, although they still reserved a role for the utilities in reviewing and approving the rules. The Auction Manager was also required to coordinate with Staff, which is consistent with other tariff changes enhancing the role of Staff and with the following language, which the Staff Report quotes from the Commission's Order in the Ameren procurement dockets: "With further regard to the role of Staff, the Auction Manager will coordinate with Staff, before the auction, the finalizing of auction documents and methodologies" (Order in 05-0160 through 0162, Consolidated, p. 119).

The final ComEd tariff addressing the Auction Rules reads as follows:

The Auction Manager, in coordination with the Staff and in accordance with applicable orders issued by the ICC, subject to the review and approval of the Company and other electric utilities participating in the Illinois Auction, develops a set of rules, the Illinois Auction Rules, applicable to each Illinois Auction. Each set of rules is established in accordance with and used to implement the provisions of the ICC's Order entered in Docket No. 05-0159 and the terms and conditions of this Rider. The Illinois Auction Rules are provided to Staff for informational purposes and made available to the public, including prospective bidders. Each set of Illinois Auction Rules also provides details of the individual auction to which it is applicable that are consistent with the terms and conditions set forth in this rider.

Commonwealth Edison Company, ILL. C. C. No. 4, 1st Revised Sheet No. 263.

The Ameren Illinois utilities' tariffs are identical, except that they refer to Docket Nos. 05-0160/05-0161/05-0162 (Cons.) rather than Docket No. 05-0159. Central Illinois Light Company, d/b/a AmerenCILCO, Ill. C. C. No. 18, 1st Revised Sheet No. 27.027; Central Illinois Public Service Company, d/b/a AmerenCIPS, Ill. C. C. No. 16, 1st Revised Sheet

No. 27.027; Illinois Power Company, d/b/a AmerenIP, Ill. C. C. No. 35, 1st Revised Sheet No. 27.027.

A draft set of the Auction Rules themselves, which contained, among other things, association and confidential information rules, was submitted as part of the evidence in Docket No. 05-0159. The Commission ultimately approved the association and confidential information rules in the Order in Docket No. 05-0159:

The Commission finds that the [association and confidential information] rules proposed by ComEd ensure the independence of bidders, prevent collusion among bidders, and prevent any one bidder from gaining advantage in the auction through better information about its competitors.

Order in 05-0159, p. 98.

The Order in the Ameren procurement dockets contained similar language:

Having reviewed the record, the Commission finds that the A&CI [association and confidential information] rules proposed by Ameren, which are intended to ensure the independence of bidders, prevent collusion among bidders, and prevent any one bidder from gaining advantage in the auction through better information about its competitors, should be approved.

Order in 05-0160 through 0162, Consolidated, p.115.

The Staff Report states that the Auction Rules were developed in coordination with Staff, consistent with the final tariffs. After a review and comment process, they were finalized on May 15, 2006, and posted to the Auction Manager's web site. The final rules contained the following provision governing confidentiality:

The bidders, ComEd, Ameren, the Auction Manager, and the ICC Staff will hold any Auction results to which they have access to be confidential. Before being registered to participate in the Auction, the bidders will agree to keep all Auction results confidential, until such time as certain, limited information is permitted to be released publicly (as discussed later, in section V). The bidders will agree not to disclose any such confidential information about the Auction, except for any aspects of the Auction results that the Commission releases as part of its decision of whether to approve the results, or that the Commission explicitly authorizes can be released.

Auction Rules, p. 35; [See [http://www.illinois-auction.com/resources/auction/Illinois\\_Auction\\_Rules\\_5-15.pdf](http://www.illinois-auction.com/resources/auction/Illinois_Auction_Rules_5-15.pdf)]

The Association and Confidential Information portion of the Auction rules contains detailed definitions of “confidential information,” including the following:

Confidential Information regarding the Auction process means information that is not released publicly by the ICC or the Auction Manager and that a bidder acquires as a result of participating in the auction process, in writing or verbally, which if were to be made public could impair the integrity of current or future Auctions, harm consumers, or injure bidders or applicants. Confidential Information regarding the auction process includes (but is not limited to) the list of qualified bidders for a Section, the list of registered bidders for a Section, the initial eligibility in an Auction, the status of a bidder’s participation in the Auction, and all non-public reports of results and announcements made by the Auction Manager to all or any one bidder during the auction process regarding any and all Sections.

Auction Rules, p. 70.

The Auction Rules also set forth the following provision governing the release of certain information in conjunction with the issuance of the public reports of the Auction Manager and of the Commission Staff:

No earlier than December 1, 2006, the Auction Manager will release its Public Report and the ICC Staff will release its Public Report, which will provide information about the auction process and certain, specific information that was held confidential up to that point in time. Included in these reports will be a discussion about the conduct of the Auction itself, suggestions for future improvements, the winning bidders and the number of tranches that each winning bidder will be supplying, and if possible, the round-by-round prices and a measure of excess supply by round. Such information is intended to assist in the Process Improvement Workshop that will be held by the ICC after the start of service commences.

Final Auction Rules, p. 66.

As noted above, the Commission Staff issued its Public Report on December 6, 2006.

The Staff Report further notes that in a manner consonant with Section 5-108 of the Public Utilities Act, the Association and Confidential Information portion of the Auction Rules permits the Commission to release information in addition to that specifically contemplated for release by the Commission Staff:

If there is a Declaration of a Successful Result for a Section, the Auction Manager will release information regarding final Auction process and the names of the winners for the Section. The ICC may choose to release



additional information. At that point, a winner may itself release information regarding the number of tranches it has won and the products that the winner will be serving, and a losing bidder may itself release information only regarding the fact that it participated in the Auction. The winners and losing bidders otherwise continue to be bound by their certifications [of confidentiality].

Auction Rules, p. 76.

### **Applications to Bid in the Auction**

As noted above, the Commission's Order in the Ameren procurement dockets contemplated that the Auction Manager would coordinate with Staff, before the auction, the finalizing of auction documents and methodologies (Order in 05-0160 through 0162, Consolidated, p. 119). As a precondition to participating in the auction, prospective bidders were required to submit applications in a two-phase process. The document required to be completed by applicants for Part 1 of the process was posted to the Auction Manager's web site on May, 1, 2006, and contained the following sentence on the first page: "*Any information provided in response to this Part 1 Application will be provided on a confidential basis to the Auction Manager Team, and representatives of the ICC.*"

[http://www.illinois-auction.com/resources/applications/Part\\_1\\_Application\\_Final\\_May\\_1\\_2006\\_Locked.doc](http://www.illinois-auction.com/resources/applications/Part_1_Application_Final_May_1_2006_Locked.doc) (emphasis in original). The Part 2 application, to be submitted by successful Part 1 applicants, was posted to the Auction Manager's web site on June 6, 2006, contained the same sentence, also on the first page, with the exception that "Part 2" was substituted for "Part 1." See [http://www.illinois-auction.com/resources/applications/Part\\_2\\_Application\\_Final\\_Jun\\_6\\_2006\\_Locked.doc](http://www.illinois-auction.com/resources/applications/Part_2_Application_Final_Jun_6_2006_Locked.doc)

### **Recommendation in Staff Report**

The Staff Report recites that the Commission heard extensive evidence in the Procurement Dockets before ordering into effect tariffs under which the Illinois Auction was created. The final tariffs bound the Commission Staff to the confidentiality requirements of Sections 4-404 and 5-108 of the Act, and required Staff to file a confidential report and a separate, public report with the Commission following the auction.

The Staff Report notes that the Auction Manager duly adopted Auction Rules, after a public comment process, on May 15, 2006. The Auction Rules bound all participants in the auction to the confidential treatment of broadly defined Confidential Information. The Auction Rules also permitted the release of certain information in the public report of the Commission Staff, and contain several provisions making clear that the Commission has the authority to release information the release of which is not otherwise provided for.

The Staff Report alludes to language in the Ameren Procurement Orders providing that the Auction Manager was to coordinate with Staff, before the auction, the finalizing of auction documents. The Part 1 and Part 2 application forms are the auction documents that prospective bidders in the auction were required to complete as prerequisites to being considered for bidder status. Each of these forms states that information the prospective bidder provides on the form will be provided on a confidential basis to representatives of the Commission.

The Commission's Office of General Counsel concluded from the foregoing that the Commission Staff is not in a position to release to the public any auction information other than what has been released through the public report, but states that it is also clear that the Commission has authority under Section 5-108 to authorize its Staff to release information it would not otherwise be permitted to release.

OGC thus recommends that the Commission enter an order to initiate a formal proceeding to receive argument, or evidence and argument, concerning whether it should, pursuant to the request of OAG, authorize the release of any of the information that has been provided to the OAG on a confidential basis. The Commission is of the opinion that the recommendation is a reasonable one.

The Commission, having reviewed the Staff Report and being fully advised in the premises, is of the opinion and finds as follows:

- (1) the Commission has jurisdiction over the subject matter of this proceeding;
- (2) the recitals set forth in the prefatory portion of this order are hereby adopted as findings of fact;
- (3) the Staff Report should be made a part of the record of this proceeding; and
- (4) an investigation should be initiated under Sections 4-404, 5-108, and 10-101 of the Public Utilities Act to determine whether the Commission should authorize the public release of records in the possession of the Commission Staff which are related to the Illinois Auction and which were released to the Office of the Attorney General pursuant to the mandate in Section 6.5(d) of the Attorney General Act [15 ILCS 205/6.5(d)].

IT IS THEREFORE ORDERED that an investigation is initiated under Sections 4-404, 5-108, and 10-101 of the Public Utilities Act to determine whether the Commission should authorize the public release of records in the possession of the Commission Staff which are related to the Illinois Auction and which were released to the Office of the Attorney General pursuant to the mandate in Section 6.5(d) of the Attorney General Act [15 ILCS 205/6.5(d)].

IT IS FURTHER ORDERED that the Staff Report is hereby made a part of the record of this proceeding.

IT IS FURTHER ORDERED that this Order be served electronically on the parties to Docket No. 05-0159 and Docket Nos. 05-0160, 05-0161, and 05-0162 (Consolidated).

IT IS FURTHER ORDERED that this order is not final; it is not subject to the Administrative Review Law.

By order of the Commission this 4th day of April, 2007.

(SIGNED) CHARLES E. BOX

Chairman