

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Ameren Energy Marketing
Central Illinois Light Company
Central Illinois Public Service Company
Illinois Power Company
Union Electric Company

Docket No. ER07-205-000

ORDER ACCEPTING AND SUSPENDING AFFILIATE SALES, SUBJECT TO
REFUND, AND ESTABLISHING HEARING PROCEDURES

(Issued December 29, 2006)

1. In this order, we accept an application under section 205 of the Federal Power Act (FPA),¹ by Union Electric Company (Union Electric)² and Ameren Energy Marketing Company (Ameren Energy Marketing) requesting Commission authorization to make power sales to their affiliates, Central Illinois Public Service Company (CIPS), Central Illinois Light Company (CILCO), and Illinois Power Company (Illinois Power), (collectively, the Ameren Illinois Utilities) if Union Electric or Ameren Energy Marketing is a successful bidder in response to a Request for Proposals for Capacity issued by Ameren Services Company on behalf of the Ameren Illinois Utilities (the “RFP”).³ We also suspend the authorization for a nominal period, to become effective on January 1, 2007, subject to refund, and establish hearing procedures.

¹ 16 U.S.C. § 824d (2000).

² In its application, Union Electric uses the name Union Electric Company d/b/a AmerenUE. However, Union Electric Company is the legally recognized name of this company. Therefore, Union Electric Company is the official name used throughout this order.

³ Union Electric, Ameren Energy Marketing, CIPS, CILCO, and Illinois Power are all subsidiaries of Ameren Corporation.

Background

2. On November 9, 2006, Union Electric and Ameren Energy Marketing jointly submitted a request for authorization to make power sales to their affiliates, the Ameren Illinois Utilities. Union Electric and Ameren Energy Marketing state that the requested authorization will permit Union Electric and Ameren Energy Marketing to participate in the RFP and to make power sales to their affiliates, the Ameren Illinois Utilities in the auction held pursuant to the RFP. Union Electric and Ameren Energy Marketing state that the RFP fully complies with the Commission's standards for approving affiliate sales that result from the participation in a competitive procurement process and further state that the resulting rates will be just and reasonable.

3. Union Electric and Ameren Energy Marketing state that CILCO provides electricity to approximately 200,000 electric customers in east and central Illinois. Union Electric and Ameren Energy Marketing state that CILCO transferred its generation to Ameren Energy Resources Generating Company (AERG) in October 2003, pursuant to a State of Illinois Restructuring Law,⁴ and that CILCO obtains its full requirements for power and energy to serve its customers under a power supply agreement with AERG that expires on December 31, 2006.⁵ Union Electric and Ameren Energy Marketing also state that CILCO's transmission system is under functional control of the Midwest Independent Transmission System Operator (Midwest ISO).⁶

4. Union Electric and Ameren Energy Marketing state that CIPS provides electricity to nearly 325,000 retail electricity customers in central and southern Illinois. Union Electric and Ameren Energy Marketing state that in 2000, CIPS transferred its generation to Ameren Energy Generating Company pursuant to a State of Illinois Restructuring Law in 2000,⁷ and that CIPS currently purchases energy and capacity from Ameren Energy Marketing pursuant to a power purchase agreement that expires on December 31, 2006.⁸ Union Electric and Ameren Energy Marketing also state that the CIPS transmission system is under functional control of the Midwest ISO.

5. Union Electric and Ameren Energy Marketing state that Illinois Power provides electric service to approximately 600,000 retail electric customers in northern, central and

⁴ See *Cent. Ill. Light Co.*, 99 FERC ¶ 62,143 (2002).

⁵ See *Cent. Ill. Generation, Inc.*, 101 FERC ¶ 61,082 (2002).

⁶ See *Cent. Ill. Light Co.*, 86 FERC ¶ 62,233 (1999).

⁷ See *Cent. Pub. Serv. Co.*, 89 FERC ¶ 62,125 (1999).

⁸ See *Madison Gas & Elec. Co.*, 90 FERC ¶ 61,115 (2000).

southern Illinois. Union Electric and Ameren Energy Marketing state that Illinois Power jointly owns three diesel generators with a combined net generating capacity of 5.25 MWs. Union Electric and Ameren Energy Marketing state that Illinois Power purchases the majority of the electricity it supplies to retail customers through long-term power purchase agreements. Union Electric and Ameren Energy Marketing also state that Illinois Power has transferred functional control of its transmission facilities to the Midwest ISO.

6. Union Electric and Ameren Energy Marketing state that Union Electric is a Missouri corporation that owns approximately 8,706 MW of generating capacity located within the states of Missouri and Illinois. Union Electric and Ameren Energy Marketing state that Union Electric is a transmission-owning member of the Midwest ISO and provides transmission service pursuant to the terms of the Midwest ISO's Open Access Transmission Tariff.

7. Union Electric and Ameren Energy Marketing state that Ameren Energy Marketing is a power marketer that does not own any generation, transmission or distribution facilities and does not have any captive customers.

8. Union Electric and Ameren Energy Marketing state that the Ameren Illinois Utilities have divested themselves of all but a *de minimus* amount of electric generation. However, the Ameren Illinois Utilities are obligated to supply electricity to their retail customers who do not choose an alternative supplier. Union Electric and Ameren Energy Marketing state that the Ameren Illinois Utilities currently serve their customers through long-term power supply contracts that will expire on December 31, 2006. Union Electric and Ameren Energy Marketing state that once these contracts expire, the Ameren Illinois Utilities will need to purchase electricity in the wholesale market to supply customers who continue to rely on the Ameren Illinois Utilities for retail service.

9. On April 5, 2006, Union Electric and Ameren Energy Marketing jointly submitted a request for authorization to make power sales to their affiliates, the Ameren Illinois Utilities pursuant to the Illinois Competitive Procurement Auction (CPA), which was approved by the Illinois Commerce Commission (Illinois Commission) on January 24, 2006. The Commission approved the request of Union Electric and Ameren Energy Marketing on June 1, 2006.⁹ The first CPA began on September 5, 2006, and on September 8, 2006, the Auction Manager announced the close of the CPA, including the real-time priced product section. The Auction Manager and Illinois Commission Staff submitted confidential reports concerning the CPA to the Illinois Commission on September 12, 2006. After reviewing these reports, the Illinois Commission determined that the auction process worked properly, with no indication of anti-competitive behavior, but that there was a high-level of uncertainty associated with supplying the real-time

⁹ *Ameren Energy Marketing Co.*, 115 FERC ¶ 61,286 (2006), reh'g pending.

products, and, as a result, the real-time product auction did not generate sufficient interest and resulted in an outcome that may be uneconomic. Pursuant to the rules of the CPA, the Illinois Commission initiated an investigation of the real-time product section of the CPA..

10. On September 22, 2006, the Illinois Commission, the Auction Manager, Commonwealth Edison and the Ameren Illinois Utilities met pursuant to the Illinois Commission-approved contingency plans following rejection of a CPA result, and unanimously concluded that conducting the descending clock auction again for the real-time products would not address the concerns expressed by the Illinois Commission investigation.¹⁰ The Ameren Illinois Utilities developed an alternative process for procurement of the needed supply, which includes a redesigned product and the RFP mechanism to procure that product.

11. The RFP is a competitive solicitation issued by Ameren Services Company on behalf of the Ameren Illinois Utilities. It is the means by which the Ameren Illinois Utilities will procure the capacity necessary to fulfill their ongoing obligations under Illinois law to provide supply for retail customers. Union Electric and Ameren Energy Marketing state that the RFP fully accords with the Commission's standards for approving affiliate sales that result from participation in a competitive procurement process, as set forth in *Boston Edison Co. Re: Edgar Elec. Energy Co.*,¹¹ and *Allegheny Energy Supply Co., L.L.C.*¹²

12. Union Electric and Ameren Energy Marketing state that the RFP seeks bids for up to 2,150 MWs of capacity in increments of 50 MWs, to be supplied for a period January 1, 2007 through May 31, 2007.

Notice of Filing and Responsive Pleadings

13. Notice of the Union Electric and Ameren Energy Marketing filing was published in the *Federal Register*,¹³ with motions to intervene and protests due on or before

¹⁰ The descending clock auction begins at a price level where registered suppliers bid surplus quantities of power and energy in the form of tranches. The Auction Manager reduces the price in subsequent rounds until quantities that are bid by suppliers match the load requirements being secured through the auction.

¹¹ *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (“*Edgar*”).

¹² *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082 at P 33 (2004) (“*Allegheny*”).

¹³ 71 Fed. Reg. 69,107 (2006).

November 30, 2006. The Illinois Commission filed a notice of intervention on November 21, 2006, and ISG Hennepin Inc. filed a motion to intervene on November 27, 2006. On December 20, 2006, the Illinois Commission filed a motion for leave to file comments out of time and comments recommending that the Commission investigate whether there was any undue preference in connection with the RFP.

Discussion

A. Procedural Issues

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notice of intervention and timely, unopposed motion to intervene serve to make the entities that filed them parties to this proceeding. We will grant the Illinois Commission's motion for leave to file comments out of time. The Commission believes that the Illinois Commission's comments can serve to create a more complete record.

B. RFP Analysis

15. The primary issue in reviewing the Union Electric and Ameren Energy Marketing filing is whether the RFP is structured in a manner that satisfies the Commission's concerns regarding affiliate abuse. In *Edgar*, the Commission stated that, in cases where affiliates are entering into market-based rate sales agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted. The Commission has approved affiliate sales resulting from competitive bidding processes after the Commission has determined that, based on the evidence, the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.¹⁴ When an entity presents this kind of evidence, the Commission has required assurance that: (1) a competitive solicitation process was designed and implemented without undue preference for an affiliate; (2) the analysis of bids did not favor affiliates, particularly with respect to non-price factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors.¹⁵

16. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process such as the one in the instant proceeding

¹⁴ See *Edgar*, 55 FERC ¶ 61,382 at 62,167-69. See also *Connecticut Light & Power Co. and Western Massachusetts Electric Co.*, 90 FERC ¶ 61,195 at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217 at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027 at 61,059-60 (1999).

¹⁵ *Edgar*, 55 FERC ¶ 61,382 at 62,168.

satisfies the *Edgar* criteria. As the Commission stated therein, the underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue preference during any stage of the process. The Commission stated that the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: (1) Transparency: the competitive solicitation process should be open and fair; (2) Definition: the product or products sought through the competitive solicitation should be precisely defined; (3) Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders and; (4) Oversight: an independent third-party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection.

1. Transparency Principle

17. Union Electric and Ameren Energy Marketing state that the RFP is transparent, open to all interested parties with generating resources capable of providing capacity that meet the Midwest ISO's requirements. Union Electric and Ameren Energy Marketing further state that the RFP was announced through direct contact with 81 respondents, and that all relevant information about the RFP was released to these potential bidders at the same time. Under the RFP, Union Electric and Ameren Energy Marketing contend that no party receives an informational advantage, and there is a free flow of information to all parties.

18. Ameren Services Company will use a third party consultant, Burns & McDonnell, as the single point of contact for all correspondence related to the RFP.¹⁶ The RFP provides that Burns & McDonnell set up an e-mail account to receive all communications from prospective bidders as well as to provide uniform communication, including updates and specific details regarding the bidding process. The RFP requires that all questions concerning the RFP be submitted in writing to the consultant at the e-mail address established for the RFP, and provides that answers will be provided to all bidders via an RFP website set up and administered by Burns & McDonnell.¹⁷

2. Definition Principle

19. Union Electric and Ameren Energy Marketing contend that the RFP satisfies *Allegheny's* guidelines regarding the definition principle. Union Electric and Ameren Energy Marketing state that the product sought through the RFP is defined in a clear and nondiscriminatory manner. Specifically, the RFP solicits bids for the provision of up to 2,150 MWs of capacity in increments of 50 MWs. Ameren Services Company will seek this product on a continuous basis throughout the period from January 1, 2007 until

¹⁶ RFP § 2.2.1.

¹⁷ RFP § 2.4.

May 31, 2007.¹⁸ The RFP provides further detail about Ameren Services Company's requirements for the product, including that the service provided by a successful bidder must comply with the Midwest ISO's requirements for Energy from a Capacity Source as set forth in the Midwest ISO's TEMT and Business Manuals. The RFP requires that a potential seller warrant that the Capacity Source satisfies the Midwest ISO's definition of a Generation Resource and that the Capacity Amount of the Capacity Source has been deemed deliverable by the Midwest ISO.

20. Further, the RFP specifies that Ameren Services Company will require each successful bidder to execute a standard contract, either the EEI Master Power Purchase and Sale Agreement (Version 2.1) or an ISDA 2002 Master Agreement with the Power Annex.¹⁹ Union Electric and Ameren Energy Marketing contend that use of standard contracts will impose consistency with respect to standard requirements such as insurance, indemnification, performance guarantees, liquidated damages for non-performance, firm security, assignment rights and a "regulatory out" provision. Union Electric and Ameren Energy Marketing assert that they will enter the solicitation process and submit bids on the same footing as other bidders, knowing that the Ameren Illinois Utilities' stated capacity requirements and terms of the RFP and the nature and terms of the ultimate contracts for service.

21. The new auction is intended to attract more bidders and therefore make a similarly uneconomic result less likely to occur. The CPA was for a full requirements contract for seventeen months. The RFP, however, is only seeking bids in 50 MW increments for a period of five months. This will allow greater flexibility and should open the bidding up to more prospective bidders. Accordingly, while the CPA suffered from a lack of interest, the new RFP should remedy that outcome by allowing more potential bidders to take part.

3. Evaluation Principle

22. Union Electric and Ameren Energy Marketing declare that the RFP sets forth criteria for evaluation of the bids: (1) compliance with RFP terms; (2) pricing; and (3) satisfaction of the Midwest ISO requirements as a Capacity Source, capable of being designated a Network Resource. Union Electric and Ameren Energy Marketing contend that the evaluation criteria for the RFP are specific and detailed, allowing not only Union Electric and Ameren Energy Marketing, but also all other bidders, sufficient available capacity to respond to the RFP.

23. Union Electric and Ameren Energy Marketing assert that the evaluation process begins with the third party consultant privately reviewing all proposals for completeness

¹⁸ RFP § 2.5.

¹⁹ RFP § 6.1.

and responsiveness. The third party consultant will then conduct a preliminary screening, relying on information contained in each bid, to determine that the represented capacity is fully deliverable in accordance with the latest Midwest ISO Deliverability Tests and that the Identified Commercial Pricing Node²⁰ is valid. Once deliverability is confirmed, Union Electric and Ameren Energy Marketing state that the third party consultant will evaluate the bids “primarily on the basis of the price per MW day over the term of the agreement” and will provide a ranked list of bidders to Ameren Services Company.²¹ In evaluating bidders, Ameren Services Company will take anticipated unit availability and planned outage schedules into consideration in accordance with prudent utility practice.²² Union Electric and Ameren Energy Marketing further contend that other non-price terms are expected to be consistent across bidders because successful bidders will supply awarded capacity pursuant to a standard EEI or ISDA contract.

4. Oversight Principle

24. Union Electric and Ameren Energy Marketing declare that the RFP satisfies the oversight principle in *Allegheny*. Specifically, Union Electric and Ameren Energy Marketing assert that an independent third party, Burns & McDonnell, which has no financial interest in any of the potential bidders (including Union Electric and Ameren Energy Marketing) or in the outcome of the procurement process, will oversee the design, administration and evaluation stages of the auctions held under the RFP.²³ Union Electric and Ameren Energy Marketing also note that Burns & McDonnell will perform the independent evaluation of the bids.

25. As noted above, Burns & McDonnell will be the exclusive point of contact for all bidder communications. Union Electric and Ameren Energy Marketing claim that Burns & McDonnell’s role as the sole link for transmitting information between potential bidders and Ameren Services Company should preclude Ameren Services Company from favoring any particular bidder, including Union Electric or Ameren Energy Marketing.²⁴ Union Electric and Ameren Energy Marketing contend that the use of an independent third party, Burns & McDonnell, to administer the RFP and evaluate bids will ensure that no affiliate receives an undue preference.

²⁰ A Commercial Pricing Node can include, but is not limited to, a particular Hub, Load Zone or Generation Commercial Pricing Node, as these terms are defined by the Midwest ISO Energy Markets Tariff.

²¹ Application at 16, *quoting* RFP § 5.1.

²² RFP at § 5.1.

²³ *See Allegheny*, 108 FERC ¶ 61,082 at P 33.

²⁴ *See Allegheny*, 108 FERC ¶ 61,082 at P 34.

C. Illinois Commission Comments

26. The Illinois Commission argues that the RFP process described by the applicants in their filing falls short of the Commission's standards set forth in *Edgar* and *Allegheny*. It contends that the RFP issued by Ameren Services Company on behalf of the Ameren Illinois Utilities does not contain adequate safeguards to ensure that Union Electric Company and Ameren Energy Marketing do not receive undue preference. The Illinois Commission notes that the applicants did not seek approval from or coordination with the Illinois Commission in the design, development, administration, or oversight of the RFP process in this case, and that it does not appear that any party other than the Ameren Illinois Utilities or Ameren Services Company was involved in the RFP design, development, or oversight process in this case. The Illinois Commission submits that these facts are in contrast to the facts in the *Allegheny* case.²⁵

27. The Illinois Commission questions the role of the third party consultant, Burns & McDonnell, in the RFP process. It states that there is little information on how Burns & McDonnell was involved in the design and development of the RFP, and it is not clear what role Burns & McDonnell played in the evaluation of bids. The Illinois Commission states that this is inconsistent with the Commission's policy that the independent third party be able to perform a range of functions in an RFP process, such as ensuring that it is transparent and fair and credibly assessing all bids based on price and non-price factors.²⁶ According to the Illinois Commission, with respect to Burns & McDonnell's role in the RFP process in this case, there is little in applicants' application to demonstrate compliance with the Commission's independence standard for designing an RFP or evaluating bids received pursuant to an RFP.

28. The Illinois Commission states that Ameren Services Company did not conduct a pre-bidding process to evaluate potential bidders' credit, nor were credit standards specified in the RFP. The Illinois Commission maintains that this fails to satisfy the guideline that a transparent bid evaluation process clearly specify the price and non-price criteria under which bids are to be evaluated.²⁷

D. Hearing Procedures

29. As noted above, the underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue preference during any stage of the process. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process satisfies the *Edgar* criteria. We note, however, that the guidelines set forth in *Allegheny* are

²⁵ *Id.* at 6.

²⁶ *Id.*

²⁷ *Id.* at 7-8.

guidelines, not a bright-line test. Nevertheless, applicants' request for authorization to make affiliate sales as a result of the RFP raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing procedures ordered below. In particular, we are unable to determine whether the RFP at issue here satisfies our affiliate abuse concerns.

30. Our preliminary analysis indicates that authorization for Union Electric and Ameren Energy Marketing to make sales to their affiliates, the Ameren Illinois Utilities, pursuant the RFP has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the applicants' application under FPA section 205 requesting Commission authorization for Union Electric and Ameren Energy Marketing to make power sales to their affiliates, the Ameren Illinois Utilities, if Union Electric or Ameren Energy Marketing is a successful bidder in response to the RFP, suspend the authorization to make affiliate sales for a nominal period, make it effective January 1, 2007, subject to refund, and set it for hearing. In setting this matter for hearing, the Commission affords applicants an opportunity to demonstrate that there is evidence that satisfies the Commission's affiliate abuse concerns, as discussed in *Edgar* and *Allegheny*, that no affiliate should receive undue preference during any stage of a competitive solicitation process.

The Commission orders:

(A) The application for authorization for Union Electric and Ameren Energy Marketing to make sales to its affiliates, the Ameren Illinois Utilities, pursuant to the RFP is hereby accepted, the authorization to make affiliate sales is suspended for a nominal period, to become effective January 1, 2007, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the justness and reasonableness of affiliate power sales between Union Electric or Ameren Energy Marketing and the Ameren Illinois Utilities.

(C) A presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish

Docket No. ER07-205-000

11

procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.