

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.

The People of the State of Illinois, *ex rel.* Illinois  
Attorney General Lisa Madigan

Docket No. EL07-47-000

v.

Exelon Generation Co., LLC, *et al.*

ORDER ADOPTING PROTECTIVE ORDER, NOTIFYING PARTIES OF RELEASE  
OF INFORMATION AND EXTENDING TIME FOR ANSWERING COMPLAINT

(Issued May 2, 2007)

1. The Commission hereby notifies the parties that the Commission will adopt the attached protective order.<sup>1</sup> Upon any party's signing of the protective order, the Commission will release to that party's qualified Reviewing Representatives under the terms of the protective order documents that may be considered privileged. This order also extends the deadline for answering the complaint to 45 days after the date of this order.

**I. Background**

2. On March 15, as amended on March 16, 2007, the People of the State of Illinois, *ex rel.* Illinois Attorney General Lisa Madigan (Attorney General) filed a complaint against sixteen wholesale power suppliers alleging that they manipulated prices in an auction, resulting in unjust and unreasonable prices. The complaint was based on sensitive information received from the Illinois Commerce Commission (ICC). The

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<sup>1</sup> 18 C.F.R. § 388.112(e) (2006).

Attorney General requested privileged treatment for this sensitive information and accordingly, the complaint was heavily redacted. The filing did not contain a draft protective order, as required by the Commission's regulations.<sup>2</sup> The complaint stated that the ICC provided the information on which the complaint is based under 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."<sup>3</sup> The complaint states that the statute further requires that the Attorney General maintain the information as confidential, use the information for law enforcement purposes only, and share it only with other law enforcement officials.

3. Several parties, including Exelon Generation Co., LLC (Exelon) and Dynegy Power Marketing, Inc. (Dynegy), filed motions to dismiss the complaint or motions for the release of the non-public version of the complaint,<sup>4</sup> arguing that the public version of the complaint was "so heavily redacted as to make it impossible" to respond adequately.<sup>5</sup> Dynegy also proposed that, in order to protect the information from the bidding parties involved, the protective order limit release of the privileged information to a party's outside attorneys and outside consultants, "none of whom serve (or will serve in the future) as consultants to suppliers in the electric procurement process."<sup>6</sup>

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<sup>2</sup> 18 C.F.R. § 385.206 (e) (2006).

<sup>3</sup> Attorney General Complaint, March 16, 2007 *citing* 15 ILCS 205/6.5(d).

<sup>4</sup> Exelon; Dynegy; Ameren Energy Marketing Company (Ameren); Energy America, LLC (Energy America); Constellation Energy Commodities Group, Inc. (Constellation); DTE Energy Trading, Inc. (DTE); Morgan Stanley Capital Group, Inc. (Morgan Stanley); American Electric Power Service Corporation, (AEP); PPL EnergyPlus, LLC (PPL) and FPL Energy Power Marketing, Inc. (FPL) (together); Conectiv Energy Supply, Inc. (Conectiv); JP Morgan Ventures Energy Corporation (JP Morgan); Sempra Energy Trading Corporation (Sempra); and Edison Mission Energy (Edison) all filed motions to release the non-public version of the complaint and/or dismiss the complaint entirely.

<sup>5</sup> Dynegy Motion to Dismiss, p. 5, March 23, 2007.

<sup>6</sup> Dynegy Answer and Motion to Release Non-Public Version of Complaint and Establish Due Date for Answers, p. 5, March 23, 2007.

4. The Attorney General responded on March 29, 2007, stating that, while she cannot release the confidential information, the Commission may be in a position to release it under a protective order. The Attorney General included a draft protective order based on a protective order issued by the Commission in *Aero Energy, LLC*.<sup>7</sup>
5. On April 5, 2007, Ameren, AEP, Conectiv, DTE, Edison, Energy America, FPL, Integrys Energy Services, Inc., J. Aron & Company (J. Aron), JP Morgan, PPL, and Sempra (collectively, Indicated Participants) filed a response to the protective order proposed by the Attorney General and a revised proposed protective order. The Indicated Participants state that they support the issuance of a protective order and that the Attorney General authorized them to state that the Attorney General does not object to their version.
6. On April 6, 2007, the Commission issued a proposed protective order,<sup>8</sup> based largely on the proposal filed by the Indicated Participants, and requested comments by April 13, 2007.
7. The ICC, NERA Economic Consultants (NERA), Dynege and Indicated Participants<sup>9</sup> filed timely comments on the proposed protective order issued by the Commission. Indicated Participants support it, while Dynege opposes it. The ICC and NERA suggest some additional modifications to the proposed protective order.
8. Generally, the ICC is concerned that the proposed protective order would allow persons who served as principals, advisers, or consultants on behalf of bidders in the auction (and who may serve in that capacity in the future) to have access to competitively sensitive information of other bidders in the auction. The ICC is concerned that that could undermine the competitiveness of future competitive procurement processes in Illinois. Additionally, the ICC states that Dynege's concerns regarding the proposed protective order are reasonable.

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<sup>7</sup> *Aero Energy, LLC*, 118 FERC ¶ 61,047 (2007) (*Aero*).

<sup>8</sup> *The People of the State of Illinois, ex rel. Madigan v. Exelon Generation Co., LLC, et al.*, 119 FERC ¶ 61,027 (2007) (proposed protective order.)

<sup>9</sup> Indicated Participants include AEP, Conectiv, Constellation, DTE Energy Trading, Exelon Generation, Edison Mission, Energy America, FPL, Integrys Energy, J. Aron & Co., J.P. Morgan, Morgan Stanley, PPL EnergyPlus, and Sempra. The filing states that Indicated Participants comprise 14 of the 16 named respondents in this proceeding.

9. Dynegy comments that the proposed protective order would permit the dissemination of confidential information about participants' bidding activities in the auction to other suppliers and thus would compromise the ability of Dynegy and other suppliers to participate in future auctions in Illinois. If the proposed protective order is adopted, Dynegy comments that the respondents in this case may, in the future, be unable to certify, in accordance with the Illinois auction rules, that they have not received various competitors' confidential information about bidding strategy. Therefore, Dynegy again suggests that the Commission restrict access to outside counsel and outside consultants (who will not serve as consultants to suppliers in future Illinois Auctions).<sup>10</sup>

10. NERA comments that, as the auction manager, it is subject to non-disclosure obligations regarding information relating to the Illinois auction. Thus, NERA is concerned that the proposed protective order may not protect materials that may be relevant to the issues raised in this proceeding that it possesses as a result of its role as the auction manager. NERA argues that the disclosure of this material may affect the commercial interests of participants. NERA suggests several revisions to the proposed protective order to address these concerns. Additionally, NERA requests that the Commission extend the deadline for comments on the complaint and provide for the same time period to comment as will be provided for answers to the complaint, that is, 45 days from the issuance of a protective order.

11. Indicated Participants filed initial and supplemental comments on the proposed protective order. In their initial comments, Indicated Participants reiterate their position that Dynegy's proposed restrictions on access would threaten the due process rights of the respondents and undermine their ability to respond to the allegations. Additionally, Indicated Participants state that forbidding consultants who receive the information to participate in future auctions and procurement processes would limit the number of consultants willing and able to participate in this proceeding. Such a limitation would make it difficult to respond to the complaint, since the complaint relies heavily on economic testimony.<sup>11</sup>

12. In their supplemental comments, Indicated Participants state that they are sympathetic to the concerns raised by the ICC and NERA and accept the ICC and NERA's proposed modifications, subject to a few minor changes. Regarding the ICC's

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<sup>10</sup> Dynegy April 13 Comments at 7, *citing* April 6, 2007 comments on Indicated Participants' proposal for protective order

<sup>11</sup> Indicated Participants April 13 Comments at 6.

proposal to eliminate paragraph 10<sup>12</sup> of the proposed protective order, Indicated Participants instead recommend strengthening paragraph 10 by requiring the participant to certify that it would be “unduly” prejudiced in preparing its defense if the participant was unable to rely upon the assistance of the competitive duty personnel. Indicated Participants argue that this modification would strengthen the standard, in response to the ICC’s concerns, by requiring a higher showing than “mere” prejudice. They comment that deleting paragraph 10 or modifying the paragraph as suggested by the ICC, *i.e.*, inserting language that a participant must certify that “its ability to effectively participate in this proceeding *would not be possible*” (emphasis added) without relying on competitive duty personnel to review the non-public information, could make it difficult to respond to the complaint.

13. DTE filed separate supplemental comments on the proposals by the ICC and NERA. It states that, while it does not object to the Indicated Participants’ proposed compromise language for paragraph 10, any further compromise on that language could endanger the due process rights of the respondents.

14. Regarding NERA’s proposed changes to paragraph 8 of the proposed protective order,<sup>13</sup> Indicated Participants state that such language would impose an impossible burden on each respondent to mark as “protected material” any competitively sensitive information that it believes might harm another participant if publicly disclosed. Therefore, Indicated Participants suggest that Paragraph 8 include a sentence applicable solely to the auction manager and other parties who are not market participants that may have market sensitive information: “the Illinois Auction Manager, Illinois Commerce Commission or Illinois Attorney General will physically mark any additional Protected Materials that it believes in good faith contains market sensitive information, public disclosure of which would competitively harm any Participant, with words ‘Not Available to Competitive Duty Personnel.’”

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<sup>12</sup> Paragraph 10 of the protective order addresses the circumstances in which an individual who is “Competitive Duty Personnel” may serve as a Reviewing Representative.

<sup>13</sup> NERA proposed to amend the second sentence of paragraph 8 of the proposed protective order to read as follows: “...Any Participant will physically mark any additional Protected Materials that the disclosing Participant believes in good faith contain market sensitive information, public disclosure of which would competitively harm the Participant *itself or another Participant*, with the words ‘Not Available to Competitive Duty Personnel.’” (Emphasis added.)

15. J. Aron also filed separate supplemental comments on the proposed ICC and NERA revisions to the proposed protective order. It supports the ICC's proposal to impose stringent restrictions on the ability of Competitive Duty Personnel to review proprietary and commercially sensitive information provided by other participants. However, it states that some Competitive Duty Personnel may need to review the information in order to prepare an adequate defense. Therefore, J. Aron supports the Indicated Participants' modifications to the proposed protective order regarding the release of redacted information in the complaint, but states that a more stringent standard should be adopted for the release of any proprietary or commercially sensitive information that may be provided by a participant in the later stages of this proceeding, such as answers to the complaint.

## II. Discussion

### A. Procedural Matters

16. We grant the various motions for release of a non-public version of the Complaint under the attached protective order. We deny the motions to dismiss the complaint, since the protective order will allow the respondents the time period and information necessary to adequately answer the complaint.

### B. Commission Determination

17. All parties have a right to assess the legitimacy of the Attorney General's claims. The Attorney General does not object to the Commission releasing the information to parties, based on the same reasoning found in *Aero*. The Attorney General states that, if the Commission issued a protective order governing the access that parties have to the information, it would be the Commission releasing the information to the parties, not the Attorney General. Therefore, the Commission will issue a protective order similar to the one filed by the Indicated Participants filed, with revisions suggested by the parties.

18. Dynegy requests that we limit the release of privileged information to a party's outside attorneys and outside consultants with a restriction on future activities. The Commission finds that these restrictions are too broad. Limiting the Reviewing Representatives solely to outside counsel or consultants would unduly prejudice the participants in preparing a defense, and the limitations on "competitive duty personnel" in the attached protective order (*i.e.* requiring a party to certify that without the review of such "competitive duty personnel" the party would be unduly prejudiced in preparing a defense) adequately address the concerns raised by Dynegy. Regarding Dynegy's proposal to restrict Reviewing Representatives from engaging in future auction activities, we find that such a restriction would make it extremely difficult for a party to obtain outside counsel or an outside consultant to be a Reviewing Representative. The

Commission will limit the release of protected material to those individuals designated as Reviewing Representatives who are not competitive duty personnel as described in paragraph 9, or otherwise certified as necessary to prevent a participant from being unduly prejudiced in preparing its defense in paragraph 10. We find that this restriction strikes the appropriate balance between protecting the parties from the harm of releasing protected material while not unduly limiting future actions of those who serve as Reviewing Representatives.

19. The Commission will adopt the attached protective order, with the modifications proposed by the ICC, NERA, and Indicated Participants, as discussed in their comments filed responding to the Commission's proposed protective order.

20. The Commission's regulations require that, before the Commission releases a document for which privileged treatment has been requested, the Commission provides notice of that release.<sup>14</sup> This order provides the Attorney General with such notice. The Attorney General is advised that, since the Commission is adopting the protective order, the information will be made available to qualified Reviewing Representatives of parties in the proceeding upon the Reviewing Representative's execution of the non-disclosure certificate attached to the protective order. Any such Reviewing Representative seeking access to this confidential information via the protective order must execute the non-disclosure certificate and submit it to the Commission within five days of the issuance of this order. The Commission will release the non-public information to any qualified Reviewing Representatives of any party that has executed the non-disclosure certificate no later than five days after that date.

21. All parties will be given 45 days from the date of issuance of this order to file an answer to or comment on the complaint.

The Commission orders:

(A) Parties seeking the confidential information that the Attorney General submitted will have five days to execute and file with the Commission the non-disclosure certificate annexed to the attached protective order. The non-public version of the complaint will be released not later than five days after that to qualified Reviewing Representatives of any party that has executed the non-disclosure certificate.

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<sup>14</sup> 18 C.F.R. § 388.112 (2006).

(B) Answers to the complaint must be filed with the Commission within 45 days from the date of this order.

By the Commission.

( S E A L )

Philis J. Posey,  
Deputy Secretary.

**ATTACHMENT**

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

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PROTECTIVE ORDER

(Issued May 2, 2007)

1. This Protective Order shall govern the use of all Protected Materials, as defined in Paragraph 3(b)(1), produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Federal Energy Regulatory Commission (“Commission”).

2. A Participant may designate as protected those materials that customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and that: (a) if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; or (b) the Participant remains obligated to protect from public disclosure.

3. Definitions – For purposes of this Order:

(a) The term “Participant” shall mean a Participant as defined in 18 C.F.R § 385.102(b).

(b)(1) For the purposes of this Protective Order, the term “Protected Materials” means: (A) any material redacted from the “Public Version” of the “Amended 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” (the “Amended Complaint”) filed on March 16, 2007, in Commission Docket No. EL07-47000; provided, however, that nothing in this Protective Order shall prevent a Participant from disclosing material redacted from the Public Version of the Amended Complaint or any information identified by the Complainant pursuant to Paragraph 3(b)(1)(B) that is specific to that Participant and is related to the specific charges made against that Participant to any employee, agent, representative, counsel or consultant that such Participant determines is necessary for the conduct of this proceeding; provided, further, that nothing in this Protective Order shall prevent a Participant from disclosing material redacted from the Public Version of the Amended Complaint or any information identified by the Complainant pursuant to paragraph 3(b)(1)(B) to any employee, agent, representative, counsel or consultant (a) to whom the information is already known and (b) who is subject to an ongoing obligation not to disclose this information; (B) any other information that the Complainant identifies as having been provided to the Complainant by the Illinois Commerce Commission pursuant to 15 ILCS 205/6.5(d); (C) materials designated by a Participant as protected in any pleading filed in this proceeding by that Participant; (D) any information contained in or obtained from such designated materials; (E) any other materials that are made subject to this Protective Order by a Presiding Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants; (F) notes of Protected Materials; and (G) copies of Protected Materials. The Commission shall physically mark Protected Materials as defined in Paragraphs 3(b)(1)(A) and (B), and any Participant shall physically mark any other Protected Materials on each page as “PROTECTED MATERIALS” or with words of similar import as long as the term “Protected Materials” is included in that designation.

(2) The term “Notes of Protected Materials” means memoranda, handwritten notes, or any other form of information (including electronic forms) that copies or discloses materials described in Paragraph 3(b)(1). Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials, except as specifically provided in this order.

(3) Protected Materials shall not include (A) any information or document contained in the files of the Commission, or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order, or (C) any information or document labeled as “Non-Internet Public” by a Participant, in accordance with Paragraph 30 of FERC Order No. 630, FERC Stat. &

Regs. ¶ 31,140. Protected Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

(c) The term “Non-Disclosure Certificate” shall mean the certificate appended hereto by which Participants who have been granted access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding.

(d) The term “Reviewing Representative” shall mean any person who has signed a Non-Disclosure Certificate and who is:

- (1) Commission Trial Staff, should any be designated in this docket;
- (2) any attorney who makes an appearance in any proceeding in this docket for a Participant;
- (3) any attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Subparagraph (2);
- (4) any expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;
- (5) any person designated as a Reviewing Representative by order of any Presiding Judge or the Commission; or
- (6) any employees or other representatives of Participants that may appear in this proceeding with significant responsibility for this docket.

(e) The term “Illinois Auction” shall mean the competitive procurement process approved by the Illinois Commerce Commission in its orders dated January 24, 2006 in dockets 05-0159, 05-01560, 05-01561 and 05-0162.

(f) The term “Auction Manager” shall mean the entity retained to prepare, promote and conduct the Illinois Auction.

4. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided in Paragraphs 7-10, or as otherwise required by law.

5. Protected Materials shall remain available to Participants until the later of the date on which an order terminating this proceeding becomes no longer subject to judicial review, or the date on which any other Commission proceeding relating to the Protected Material is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraph 6, below. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. Any Protected Materials not returned or destroyed shall remain subject to the Protective Order.

6. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 8-9. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities. For documents submitted to the Commission, the Commission shall follow the notification procedures of 18 CFR § 388.112 before making public any Protected Materials.

7. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding, or as otherwise required by law. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

8. The Commission will physically mark Protected Material, as defined in Paragraphs 3(b)(1)(A) and (B), "Not Available to Competitive Duty Personnel." Any Participant will physically mark any additional Protected Materials that the disclosing Participant believes in good faith contain market sensitive information, public disclosure

of which would competitively harm the Participant, with the words “Not Available to Competitive Duty Personnel.” The Illinois Auction Manager, Illinois Commerce Commission or the Illinois Attorney General will physically mark any additional Protected Materials that it believes in good faith contains market sensitive information, public disclosure of which would competitively harm any Participant, with the words “Not Available to Competitive Duty Personnel.” Any material marked “Not Available to Competitive Duty Personnel” shall only be made available to Reviewing Representatives as set forth in Paragraphs 9 and 10.

9. Solely with respect to Protected Materials that have been marked “Not Available to Competitive Duty Personnel” (and information derived therefrom), a Reviewing Representative may not include any person whose duties include: (i) the marketing or sale of electric power at wholesale; (ii) the purchase or sale of electric power at wholesale; (iii) the direct supervision of *any* employee with such responsibilities; or (iv) primary responsibility for negotiating power purchase agreements and transmission service (collectively, “Competitive Duties”). Counsel or consultants employed or designated by a party are not Competitive Duty Personnel. If any person who has been a Reviewing Representative subsequently is assigned to perform any Competitive Duties, or if previously available “Protected Materials” are marked as “Not Available to Competitive Duty Personnel,” with the exception of the Reviewing Representative's own data, such person shall have no access to materials marked “Not Available to Competitive Duty Personnel” (and information derived therefrom) and shall dispose of such Materials, and shall continue to comply with the requirements set forth in the Non-Disclosure Certificate and this Protective Order with respect to any Protected Materials to which such person previously had access.

10. Notwithstanding the foregoing, persons who otherwise would be disqualified as Competitive Duty Personnel may serve as Reviewing Representatives, subject to the following conditions: (i) the Participant who employs or has retained that person certifies in writing to the Commission that it would be unduly prejudiced in preparing its defense in this proceeding if it was unable to rely on the assistance of the particular Reviewing Representatives; (ii) the party claiming such prejudice must identify by name and job title the particular Reviewing Representative required; (iii) the party claiming such prejudice must acknowledge in writing to the Commission that access to the Protected Materials which are “Not Available to Competitive Duty Personnel” shall be restricted only to purposes of the litigation of this proceeding, absent written consent of the Commission; (iv) such party acknowledges that any other use shall constitute a violation of an order of the Federal Energy Regulatory Commission; and (v) the Competitive Duty Personnel acting as a Reviewing Representative has provided a declaration or affidavit acknowledging his or her familiarity with the contents of this order and the particular restrictions set forth in this paragraph. Once materials are clearly and correctly labeled,

compliance will be the responsibility of the Reviewing Party. Materials marked as “Not Available to Competitive Duty Personnel” shall be returned or destroyed at the conclusion of this proceeding as otherwise provided herein.

11. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate; provided, that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney’s instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

(b) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

12. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 3(d), access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

13. Subject to Paragraph 16, the Commission shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Commission, the parties to the dispute shall use their best efforts to resolve it. Any participant that contests the designation of materials as protected shall notify the party that provided the protected materials by specifying in writing the materials the designation of which is contested. This Protective Order shall automatically cease to apply to such materials five (5) business days after the notification is made unless the designator, within said 5-day period, files a motion with the Commission, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the participant seeking protection. If the Commission finds that the materials at issue are not entitled to protection, the procedures of Paragraph 16 shall apply.

14. All copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to Protected Materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS" and shall be filed under seal and served under seal upon the Commission and all Reviewing Representatives who are on the service list. For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such, will also be filed with the Commission and served on all parties on the service list and any Presiding Judge. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

15. If any Participant desires to include, utilize or refer to any Protected Materials or information derived therefrom in testimony or exhibits during any hearing in these proceedings in a manner that might require disclosure of such material to persons other than reviewing representatives, such participant shall first notify both counsel for the disclosing participant and any Presiding Judge or the Commission of such desire, identifying with particularity each of the Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Commission.

16. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

17. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge, the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

18. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Commission.

19. All Protected Materials filed with the Commission, any Presiding Judge, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order.

20. If the Commission finds at any time in the course of this proceeding that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for three (3) business days from the date of issuance of the Commission's determination. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Commission's decision respecting Protected Materials or Reviewing Representatives.

21. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

22. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

23. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this proceeding. Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

By the Commission.

( S E A L )

Philis J. Posey,  
Deputy Secretary.

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

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

**v.**

**Docket No. EL07-47-000**

**Exelon Generation Co., LLC, *et al.***

**NON-DISCLOSURE CERTIFICATE OF NON-COMPETITIVE DUTY  
PERSONNEL**

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Representing: \_\_\_\_\_  
Date: \_\_\_\_\_

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**Exelon Generation Co., LLC, *et al.***

**NON-DISCLOSURE CERTIFICATE OF COMPETITIVE DUTY PERSONNEL**

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of such Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I understand that access to Protected Materials shall be restricted only to purposes of the litigation in this proceeding and that access to Protected Materials identified as “Not Available to Competitive Duty Personnel” shall be restricted and that I shall only be given access to such material in accordance with the procedures established by Paragraph 10 of the Protective Order issued in this proceeding. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Representing: \_\_\_\_\_  
Date: \_\_\_\_\_