

119 FERC ¶ 61,027
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 PROPOSING PROTECTIVE ORDER AND EXTENDING TIME FOR
ANSWERING COMPLAINT

(Issued April 6, 2007)

1. The Commission proposes and seeks comments on the attached protective order. This order also extends the time period for answering the complaint to forty-five days after the date on which a protective order is issued.

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 (Illinois Commission). The 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.¹ The complaint stated that the Illinois Commission 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

¹ 18 C.F.R. § 385.206 (e) (2006).

[Illinois] Commission.”² 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,³ arguing that the public version of the complaint was “so heavily redacted as to make it impossible” to respond adequately.⁴ 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.”⁵

4. The Attorney General responded on March 29, 2007, stating that, while her office cannot release the confidential information, the Commission may be in a position to release the requested materials 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*.⁶

5. On April 5, 2007, Ameren, AEP, Conectiv, DTE, Edison, Energy America, FPL, Integrys Energy Services, Inc., J. Aron & Company, JP Morgan, PPL, and Sempra (collectively, “Indicated Parties”) filed a response to the protective order proposed by the Attorney General and submitted a revised proposed protective order. The Indicated

² Attorney General Complaint, March 16, 2007 citing 15 Ill. Comp. Stat. 205/6.5(d).

³ 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).

⁴ Dynegy Motion to Dismiss, p. 5, March 23, 2007.

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

⁶ *Aero Energy, LLC*, 118 FERC ¶ 61,047 (2007) (*Aero*).

Parties 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 the revisions proposed by the Indicated Parties.

II. Discussion

6. All parties in this proceeding have a right to assess the Attorney General's claims. The Attorney General does not object to the Commission releasing the information to parties, based on the reasoning 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 proposes to issue the protective order filed by the Indicated Parties, which is similar to the one issued in *Aero*.

7. Parties have seven days from the date of this order to comment on the proposed protective order. The Commission proposes to give qualified participants seven days after the Commission issues an order adopting a protective order in which to submit an executed non-disclosure certificate and proposes to release non-public information to any qualified Reviewing Representatives no sooner than seven days after receipt of an executed non-disclosure certificate. The Commission will allow all parties 45 days from the date of issuance of a protective order to file an answer to the complaint.

8. The proposed protective order is attached. The Commission seeks comments on the proposed protective order no later than seven days after the date of issuance of this order.

The Commission orders:

(A) Comments on the proposed protective order shall be filed with the Commission no later than seven days after the date of this order.

(B) Answers to the complaint must be filed with the Commission within forty-five days from the date of the issuance of a protective order. The previous Commission notice setting April 16, 2007 as the answer date is superseded.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.

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Attorney General LISA MADIGAN

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PROPOSED PROTECTIVE ORDER

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1. This proposed 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 which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury.

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 and all 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” 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 such redacted material 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; (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 which 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 to indicate that they are Protected Materials.

(2) The term “Notes of Protected Materials” means memoranda, handwritten notes, or any other form of information (including electronic forms) which 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 annexed 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.
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 7-11.
 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. 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." 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 its ability to effectively participate in this proceeding

would be prejudiced 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. If a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 3(d) above, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached, that person shall be a Reviewing Representative pursuant to Paragraphs 3(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Commission for resolution.

12. (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.

13. 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.

14. Subject to Paragraph 17, 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 17 shall apply.

15. 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.

16. 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.

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

18. 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.

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

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

Secretary

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

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

v.

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NON-DISCLOSURE CERTIFICATE

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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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: _____