

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>COMMONWEALTH EDISON COMPANY</b>	)	
	)	
<b>Proposal to implement a competitive</b>	)	
<b>procurement process by establishing</b>	)	<b>Docket No. 05-0159</b>
<b>Rider CPP, Rider PPO-MVM, Rider TS-</b>	)	
<b>CPP and revising Rider PPO-MI</b>	)	

**RESPONSE OF THE STAFF OF THE ILLINOIS  
COMMERCE COMMISSION TO MOTION TO DISMISS**

Pursuant to 83 Ill. Adm. Code 200.190, Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned attorneys, hereby files its response to the Motion To Dismiss By The People Of The State Of Illinois, The Cook County State’s Attorney, The Citizens Utility Board, and The Environmental Law And Policy Center (“Motion”) filed on May 17, 2005.

**I. INTRODUCTION**

The Motion filed by the People of the State of Illinois, the Cook County State’s Attorney, the Citizens Utility Board, and the Environmental Law and Policy Center (collectively, “Movants”) seeks to dismiss the portion of this tariff investigation proceeding related to Commonwealth Edison Company’s (“ComEd” or the “Company”) Rider CPP on the grounds that the proposed tariff allegedly seeks to develop rates for certain services using a method that is not within the authority of the Illinois Commerce Commission (“Commission”) as a matter of law. Motion, pp. 1, 9. Staff respectfully disagrees with Movants because, as explained below, the legal arguments presented in

the Motion are flawed and based on incomplete and inaccurate characterizations of the instant tariff filing.

## **II. STANDARD FOR REVIEW OF A MOTION TO DISMISS**

Although motions to dismiss are commonly utilized in court proceedings involving a complaint filed by one party against another (e.g., tort or contract actions), they are seldom if ever seen in Commission proceedings to establish rates. One reason that motions to dismiss are rare in Commission rate proceedings is that a Commission rate case investigation is legislative rather than judicial in nature, and does not involve the typical complaint-based litigation notions of plaintiffs, defendants, or causes of action. See *People ex rel. Hartigan v. Illinois Commerce Commission*, 117 Ill. 2d 120, 142 (1987) (“Setting utility rates is a legislative rather than judicial function.”). In recognition of the fact that the establishment of rates involves the exercise of a legislative function, it is well established that judicial review of Commission rate orders is limited:

An order of the Commission will be reversed only if it is outside the jurisdiction of the Commission or is not supported by substantial evidence, or if the proceedings or manner in which the order was arrived at violated the State or Federal Constitutions or relevant laws, to the prejudice of the appellant. [Citations Omitted.] It is well settled that a decision of the Commission is entitled to great deference because it is the "judgment of a tribunal appointed by law and informed by experience" ( *Village of Apple River v. Illinois Commerce Comm'n* (1960), 18 Ill. 2d 518, 523, 165 N.E.2d 329). Apart from examining whether the Commission acted outside the scope of its constitutional or statutory authority, a reviewing court is limited to determining whether the findings of the Commission are against the manifest weight of the evidence. [Citations Omitted.]

*United Cities Gas Co. v. Illinois Commerce Commission*, 163 Ill. 2d 1, 12 (1994).

Staff submits that the Commission’s ability to consider a motion to dismiss in a rate case proceeding is obviously no broader than the ability of a court to review a Commission order on appeal. To hold otherwise would improperly interpret the

Commission's authority in a manner that would necessarily evade any form of judicial review. Under this reasoning, Staff believes the Commission has the ability to consider Movants' claim that the proposed tariff seeks to impose rates that exceed the Commission's authority. However, the legislative nature of rate case proceedings along with the related absence of pleading requirements in such proceedings necessarily limits the scope and applicability of a motion to dismiss in the context of tariff investigations. Thus, Staff will review the general standards applicable to motions to dismiss as well as the impact on those standards of the limitations on a motion to dismiss in the context of a tariff investigation.

The standards applicable to motions to dismiss in Illinois courts are well established. In considering a motion to dismiss the court must "accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts" and "construe the allegations in the complaint in the light most favorable to the plaintiff." *Young v. Bryco Arms*, 213 Ill. 2d 433, 441 (2004); see also *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). The question presented by a motion to dismiss is "whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted"; and "a trial court is to dismiss the cause of action only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery." *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 808 N.E. 2d 957, 961-962 (2004).

The standards applicable to motions to dismiss filed in Illinois courts cannot be literally applied in the context of a motion to dismiss a tariff investigation. The investigation of a proposed tariff filing does not involve or require the filing of a

complaint, and a tariff investigation does not present a “cause of action” whereby one party is alleging facts under which it is entitled to recovery against another party. Under these circumstances, and given that the Commission exercises a legislative rather than a judicial function in setting rates, an argument can be made that a motion to dismiss a tariff investigation must be denied where the utility or any other party can postulate a set of facts (even if those facts are not alleged in any prior filing) upon which the Commission would have the apparent authority to adopt the proposed tariffs. That is, given the absence of formal pleading requirements<sup>1</sup> in tariff investigations, it would be unfair and inappropriate to dismiss a utility’s tariff proposal for failure to meet pleading requirements (i.e., to allege facts supporting its proposal) that simply do not exist. Moreover, the Commission is not limited under the Public Utilities Act, 220 ILCS 5/1-101 et seq. (the “Act” or “PUA”), to accepting or rejecting a utility’s tariff proposal. Thus, the

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<sup>1</sup> Although tariff investigations may be initiated on the basis of a complaint, the Commission may commence such an investigation on its own motion without a complaint. 220 ILCS 5/9-201(b). Further, even where a tariff investigation is commenced upon the filing of a complaint, that complaint serves as the vehicle to commence an investigation rather than state a cause of action and the PUA makes clear that formal pleading requirements do not apply:

“Whenever there shall be filed with the Commission any schedule stating an individual or joint rate or other charge, classification, contract, practice, rule or regulation, the Commission shall have power, and it is hereby given authority, either upon complaint **or upon its own initiative without complaint**, at once, and if it so orders, **without answer or other formal pleadings by the interested public utility or utilities**, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate or other charge, classification, contract, practice, rule or regulation”

*Id.* (emphasis added). Although formal pleading requirements do not apply, Staff submits that pre-filed testimony fulfills at least some of the notice functions served by the requirement to file a complaint or answer in judicial proceedings. If pre-filed testimony is treated as the equivalent of the traditional judicial pleadings, then it would be inappropriate to consider a motion to dismiss in a tariff investigation until all pre-filed testimony has been filed – including direct, rebuttal and surrebuttal testimony,

question presented in a motion to dismiss a tariff investigation is whether there is any action the Commission can take that would be within its authority.

In any event, the standards applicable to a motion to dismiss would, at a minimum, require that the Commission accept as true all facts alleged or stated by the utility in the filed tariffs, in filings made pursuant to Part 285, and in any pre-filed testimony. The Commission would further be required to accept all reasonable inferences to be drawn from those facts, and to construe all allegations in those filings in the light most favorable to the utility. When these standards are applied to ComEd's proposed tariffs, it is clear that Movants' request to dismiss a portion of the instant tariff investigation must be denied.

### **III. THE MOTION'S CHARACTERIZATION OF THE PROPOSED TARIFFS UNDER INVESTIGATION IN THIS DOCKET IS INCOMPLETE AND INACCURATE**

The key legal principal upon which the Motion is ultimately based is the assertion that Section 16-103 of the PUA divests the Commission of authority to set rates for non-competitive services in the manner prescribed for certain competitive services in Subsection (c) of Section 16-103.<sup>2</sup> See Motion, pp. 7-8; 220 ILCS 5/16-103. As

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<sup>2</sup> Movants' describe as "market-based" the methods allowed under Section 16-103(c) for setting rates for residential customers and small commercial retail customers taking power and energy services declared to be competitive. This reference is potentially misleading in the context of the issues presented by the Motion, and certainly inaccurate as used by Movants. While Section 16-103(c) does refer to "market-based prices", this phrase is used in defining "costs" and it is clear from the statutory language of Section 16-103(c) that the Legislature did not consider "market-based prices" and "cost-based rates" to be mutually exclusive concepts. Rather, Section 16-103(c) indicates that the rates for certain competitive services must "reflect recovery of all **costs components** for providing the service" and that "**costs** shall be the market based prices . . ." which are specifically defined as "either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the **electric utility's cost** of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process.". 220 ILCS 5/16-103(c) (emphasis added). Thus, it is clear from the language of Section 16-103(c) that "market-based prices" as used in Section 16-103(c) may be determined based on the utilities actual cost of obtaining such power and energy through any (continued...)

explained in Section IV below, Movants' statutory construction is faulty and erroneous. Moreover, the factual premise allegedly supporting Movants' faulty legal analysis – i.e., that Rider CPP sets market-based rates instead of cost-based rates – is equally defective in that it is based on an incomplete and inaccurate characterization of the tariffs under investigation in this docket.

Movants repeatedly assert that Rider CPP sets market-based rates instead of cost-based rates. See Motion, pp. 2-4, 7-9, and note 2. This factual premise is key to Movants' argument which is essentially as follows:

1. Section 16-103(c) divests the Commission of authority to set market-based rates for services declared competitive.
2. Rider CPP sets market-based rates instead of cost-based rates for services that have not been declared competitive.
3. Therefore, Rider CPP seeks rate relief that is beyond the Commission's authority and must be dismissed because it seeks approval of market-based rates.

Staff disagrees with both the factual and legal underpinnings of the Movants' argument, and will explain here why the factual assertions reflected in item 2 are clearly flawed and inaccurate.

While it is true that Rider CPP proposes to use the wholesale contracts resulting from the proposed auction process to establish the market value of electric power and energy, it is also true that Rider CPP uses those contracts "to establish the Company's costs of procurement under this tariff." Rider CPP, Ill. C.C. No. 4, Original Sheet No 245. Rider CPP specifically states that the market values derived under its terms "are

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arms-length acquisition process – including a competitive bidding process. As a result, Movants' reference to "market-based prices" is improperly used to suggest that market-based prices can never be the same as cost-based rates under Section 16-103(c).

equivalent to the Company's costs of such procurement, [and that such costs] are translated into seasonal and peak and off-peak values, as applicable, for use in calculating individual supply-related charges in the Company's retail tariffs to which this rider is applicable." *Id.* Rider CPP also states that there are "mechanisms to ensure the Company does not over or under recover such procurement **costs** . . . ." *Id.* (emphasis added).

The foregoing review of Rider CPP indicates that even a cursory analysis of the Company's filed tariff discloses assertions that ComEd is proposing "cost-based" rates. Movants' characterization of ComEd's filing as seeking the approval of "market-based rates for retail customers" is an incomplete description of the fact statements in ComEd's filings and – when included in Movants' assertion that ComEd's proposed rider "attempts to replace cost-based rates with market-based rates" – an incorrect description. Motion, p. 4. In any case, Movants' characterization of ComEd's filing contravenes the requirement to "accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts" in considering a motion to dismiss. *Young*, 213 Ill. 2d at 441; see also *City of Chicago*, 213 Ill. 2d at 364. Thus, even accepting, *arguendo*, Movants' flawed statutory construction of Section 16-103(c) of the Act, there are no facts in ComEd's filings supporting their legal theory. Since ComEd states that it is proposing cost-based rates through Rider CPP, the argument that Section 16-103(c) of the Act requires cost-based rates instead of market-based rates for certain non-competitive services does not support the argument that the Commission is being asked to take an action beyond its statutory authority.

Although the foregoing analysis and repudiation of Movants' main factual premise is dispositive, there are several other factual assertions by Movants that are similarly flawed or incomplete under the standards applicable to a motion to dismiss. Movants allege that Rider CPP "automatically set[s] market-based rates . . . without any subsequent review by the Commission to determine whether these rates are just and reasonable." Motion, p. 3. It is not clear how this statement supports the Motion since, as explained in Section VI below, Illinois courts have long recognized that the Commission's rate setting authority includes the ability to set formula-based rates and is not limited to the approval of rates fixed in terms of dollars and cents. Regardless, this factual statement ignores that the Commission is determining here whether Rider CPP will produce just and reasonable rates. To the extent that the Movants' statement was intended to indicate that there is no review of Rider CPP, it is contrary to the provisions in Rider CPP that do provide for Commission oversight.

Furthermore, the Company's filings are sufficient to withstand a motion to dismiss on the issue of whether Rider CPP satisfies the requirement to set just and reasonable rates. Rider CPP establishes a Competitive Procurement Process ("CPP") which employs multiple-round, descending clock auctions to procure full requirements electric supply in a transparent forum. Rider CPP, Ill. C.C. No. 4, Original Sheet No. 250. The pre-filed testimony of Dr. Chantalle LaCasse (ComEd Exhibit 4.0) clearly supports ComEd's proposal, and details the benefits of procuring full requirements electric supply through the proposed CPP. Dr. LaCasse's pre-filed testimony indicates that "[b]ecause the auction ends when bidders are no longer willing to better their offers, the bidders who do win at the end of the auction are those that are willing to serve the load at the

lowest prices.” *Id.* at 27-28. Dr. LaCasse further summarized the benefits of ComEd’s auction proposal as follows:

- The clock auction format, as an open auction, is an effective way of eliciting the best bids when all bidders are evaluating a common market opportunity so as to get competitive prices consistent with the market;
- The clock auction, as a simultaneous auction, can be expected to lead to the efficient allocation of the supply responsibility over ComEd’s different products;
- The auction format is ideally suited to the procurement of different products such as is the case in the CPP Auction;
- The auction format maximizes the possibility that each and every one of these products will be fully subscribed;
- The final rules will be well specified and the bidders will be able to clearly understand how the final auction prices are determined and how winning bidders emerge;
- The auction format does not advantage established players and enables prospective bidders to participate on a fair and equal basis.

*Id.* at 59.

ComEd no longer possesses the generation assets to produce its own energy, and must procure its energy supply from third parties. The benefits of using an auction process to procure that supply as described in Dr. LaCasse’s testimony support the position that ComEd’s proposal is consistent with the requirement for just and reasonable rates, and clearly prevents the Commission from finding that no set of facts can be proven that support ComEd’s proposal. See *Borowiec*, 808 N.E. 2d at 961-962. Certainly, it can be inferred from the facts alleged in ComEd’s filings – as required in a motion to dismiss -- that its competitive procurement process is a prudent and reasonable method of procuring safe, efficient, reliable and affordable energy supply to serve its customers. While other parties (including Staff) may ultimately file testimony

that (i) disagrees with one or more aspects of the testimony offered by Dr. LaCasse, (ii) proposes additional or modified tariff terms and conditions, or (iii) proposes additional or modified auction rules, procedures or documents – all in support of arguments asserting that ComEd’s proposal does not produce or needs to be modified to produce just and reasonable rates – the only relevant inquiry for purposes of Movants’ motion to dismiss is whether ComEd has alleged facts that may allow its tariff proposal to prevail. Staff submits that ComEd’s filings have met this burden with respect to the question of just and reasonable rates, and Movants’ assertion that ComEd’s proposal will somehow evade Commission consideration of whether Rider CPP produces just and reasonable rates is factually inaccurate.

Although the formula-based proposal embodied in Rider CPP does not provide for post-auction rate cases, Movants’ statement that ComEd’s proposal does not allow “subsequent review by the Commission to determine whether these rates are just and reasonable” suggests that the Commission has no oversight function under ComEd’s proposal. Motion, p. 3. To the contrary, ComEd’s proposal provides for Commission oversight of the CPP, including the use of an Auction Advisor and Auction Monitor. The Auction Advisor acts as an independent monitor of the auctions and submits to the Commission within one business day of each Auction Completion Date a formal report that includes an assessment of whether the auctions were conducted fairly and appropriately. Rider CPP, ILL. C.C. No. 4, Original Sheet Nos. 254, 257. Similarly, the Auction Manager is required to submit to the Commission within one business day of each Auction Completion Date a formal report that includes a certification that “such auctions were conducted fairly and appropriately in accordance with the CPP rules and

procedures.” Rider CPP, ILL. C.C. No. 4, Original Sheet No. 257. Moreover, ComEd’s proposal provides the Commission an opportunity to prevent implementation of the auction results by specifying that ComEd will not execute the Supplier Forward Contracts (“SFCs”) resulting from the auction if, within three business days of the Auction Completion Date, the Commission “initiates a formal investigation or other formal proceeding regarding the [auctions].” Rider CPP, ILL. C.C. No. 4, Original Sheet No. 268.

While the above-described oversight provisions do not establish a *de novo* post-auction review by the Commission of the supply costs actually resulting from implementation of the procedures, processes and formulas contained in Rider CPP, these oversight provisions (i) provide assurance of compliance with the procedures, processes and formulas that will have already been determined by the Commission to result in just and reasonable rates and (ii) allow the Commission a limited ability to review each auction. Under ComEd’s proposal, the Commission receives reports that will allow it to determine if there is reason to question the auction results – such as information indicating that an auction was not conducted in accordance with the approved procedures, processes and formulas. In such event, the Commission can initiate an investigation or other proceeding that will automatically prevent, under the terms of Rider CPP, use of the auction results. When these facts are considered, as they must be in a motion to dismiss, it is clear that Movants’ statement that ComEd’s proposal does not allow “subsequent review by the Commission to determine whether these rates are just and reasonable” inappropriately and inaccurately suggests that

ComEd's proposal does not provide for any Commission oversight of the post-approval implementation of Rider CPP.

#### **IV. THE MOTION IS BASED ON AN INCORRECT INTERPRETATION OF THE PUBLIC UTILITIES ACT**

Movants argue that the PUA limits the Commission's authority to approve "market-based rates" to customers who take electric service that has been declared competitive, that all other customers (i.e., those taking non-competitive services) are entitled to cost-based rates, and that Rider CPP violates the PUA because it would impose market-based rates on customers taking non-competitive services. Motion, pp. 3-4. Staff has previously demonstrated in Section III above that the factual underpinnings of Movants' argument are erroneous and flawed. To reiterate, Movants' assertion that Rider CPP establishes market-based rates to the exclusion of cost-based rates is contrary to the facts alleged in ComEd's filings. The balance of this Section of Staff's response will review the various legal concepts relied upon by Movants, and demonstrate that the key legal principles advocated in support of Movants' argument are flawed and erroneous.

Movants begin by reviewing some general principles applicable to the establishment of rates under Article IX of the PUA. Motion, p. 4. Although Staff does not dispute the general principles reflected in the judicial and statutory language quoted by Movants, it should be noted that Movants quote from the declaration of findings and intent contained in Section 1-102 of the PUA. The law in Illinois is that statutory declarations of findings, intent and policy do not constitute substantive provisions of the Act, and as such those provisions do not impose obligations or confer specific powers

or rights. *Governor's Office of Consumer Services v. Illinois Commerce Commission*, 220 Ill. App. 3d 68, 74 (3<sup>rd</sup> Dist. 1991); *Monarch Gas Co. v. Illinois Commerce Commission*, 261 Ill. App. 3d 94, 99 (5<sup>th</sup> Dist. 1994). Thus, such language may be used to clarify otherwise ambiguous substantive portions of the PUA, but does not itself establish any specific rights or obligations and may not be used to create ambiguity in other substantive provisions. Movants leap from their general statement of cost-based rate principles to the conclusion that "Rider CPP attempts to replace cost-based rates with market-based rates . . . ." Motion, p. 4. As previously explained above, this statement is inconsistent with the facts stated in ComEd's filings and cannot be accepted as a basis to dismiss ComEd's proposed tariffs.

Movants then discuss the amendments to the PUA implemented by the Electric Service Customer Choice and Rate Relief Act Law of 1997 ("Customer Choice Act") codified in Article XVI of the PUA. 220 ILCS 5/16-101 et seq.; Motion, pp. 4-5. As with their discussion of rate setting principles, Movants begin by quoting certain language found in the declaration of findings contained in the Customer Choice Act. Motion, pp. 4-5. While Movants appear to be quoting such language to provide background information, it must again be pointed out that such provisions do not constitute substantive provisions of the Act. See *Governor's*, 220 Ill. App. 3d at 74; *Monarch*, 261 Ill. App. 3d at 99. In any event, Staff notes that the declaration of findings quoted by Movants makes clear that the Legislature acknowledged that "[c]ompetitive forces are affecting the market for electricity" and that it intended for the Commission to "promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." *Id.*; 220 ILCS 5/16-101A(b). If anything, such

language supports the proposal under investigation in this docket. The proposed Rider CPP clearly acknowledges competitive developments and is consistent with the development of competitive markets and – under the facts alleged in ComEd’s filings interpreted in the light most favorable to ComEd – contains adequate protections for consumers and others.

Movants next explain their key legal argument that Section 16-103(c) of the Act restricts the Commission’s authority to set rates for non-competitive services in the manner proposed in Rider CPP. Motion, pp. 5-8. Movants quote the following language contained in Section 16-103(c) of the Act in support of their statement that the Customer Choice Act “appears to adopt FERC’s approach in competitive wholesale markets to competitive retail markets.

. . . For those components of the service which, have been declared competitive, cost shall be the market based prices. Market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility’s cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process.”

Motion, p. 5, quoting from 220 ILCS 5/16-103(c). Movants then contend that the quoted “amendatory language expressly authorizes market-based rates for customers who take service that has been declared competitive pursuant to § 16-113 of the PUA.” Motion, p. 5 (footnotes and citations omitted).

Movants then argue that nothing in the Customer Choice Act “authorizes the Commission to approve market-based rates for customers [taking service that has not been declared competitive] . . . .” Motion, p. 6. Movants then quote the following language from Section 16-103(c) of the Act to support their statement that “the PUA specifically states that customers are entitled to continue receiving the same service

that was offered to customers before the 1997 amendments until such time as service to these customers is ‘declared competitive’.”

[E]ach electric utility shall continue offering to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer’s premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1977.

Motion, p. 6 (brackets in original). After citing to a portion of a 1919 Supreme Court opinion addressing certain rate principles, Movants state their ultimate position that “the ICC cannot approve market-based rates in markets that are not competitive.” *Id.* at 7.

Movants then attempt to explain their position that the Commission lacks the authority to approve market-based rates for customers whose service has not been declared competitive. Motion, pp. 7-8. Movants cite to Section 16-103(c) of the Act for the proposition that the Customer Choice Act expanded the Commission’s authority “to approve market-based rates for customers who take electric service that has been declared competitive.” *Id.* at 7. Movants further state that the PUA does not “grant the Commission authority to approve market-based rates for customers who take service that has not been declared competitive” and argue that “[i]f the General Assembly had intended to authorize market-based prices for customers who do not have competitive choices, the General Assembly could have explicitly done so.” *Id.* at 8. Movants then conclude that the Commission “lacks authority to approve the market-based rates in Rider CPP” because “[n]one of the customer groups covered by this tariff take electric service that has been or could be declared competitive pursuant to § 16-113 of the PUA.” *Id.*

Although Movants accurately quote a portion of Section 16-103(c) of the Act, their argument presents an inaccurate and incomplete reading of Section 16-103.

Movants state that Section 16-103(c) of the Act expressly authorizes market-based rates for customers whose service has been declared competitive. This is clearly an overstatement. The quoted portion of Section 16-103(c) only applies to residential and small commercial customers. Section 16-103(c) provides, in its entirety, as follows:

(c) Notwithstanding any other provision of this Article, each electric utility shall continue offering to all **residential customers** and to all **small commercial retail customers** in its service area, as a tariffed service, bundled electric power and energy delivered to the customer's premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997. Upon declaration of the provision of electric power and energy as competitive, the electric utility shall continue to offer to **such customers**, as a tariffed service, bundled service options at rates which reflect recovery of all cost components for providing the service. For those components of the service which have been declared competitive, cost shall be the market based prices. Market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility's cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process.

220 ILCS 5/16-103(c) (emphasis added). It is clear from a complete reading of Section 16-103(c) that the language quoted by Movants is only applicable to residential and small commercial customers.

The foregoing analysis also reveals another inaccuracy in Movants' argument. Although Section 16-103(c) allows and addresses market-based rates for competitive services, Section 16-103(c) is a limitation on the ability of electric utilities to set market-based rates rather than the original grant of such authority as depicted by Movants. The real grant of authority to set market-based rates for all retail competitive services is found in Section 16-103(a) of the Act, which provides, in its entirety, as follows:

(a) An electric utility shall continue offering to retail customers each tariffed service that it offered as a distinct and identifiable service on the effective date of this amendatory Act of 1997 until the service is (i) declared competitive pursuant to Section 16-113, or (ii) abandoned

pursuant to Section 8-508. Nothing in this subsection shall be construed as limiting an electric utility's right to propose, or the Commission's power to approve, allow or order modifications in the rates, terms and conditions for such services pursuant to Article IX or Section 16-111 of this Act.

220 ILCS 5/16-103(a). Thus, subject to limitations stated elsewhere in the Customer Choice Act, an electric utility is relieved of its obligation to provide retail services offered at the time of enactment of the Customer Choice Act when “the service is . . . declared competitive pursuant to Section 16-113 . . . .” Id. Once so relieved of its provider of last resort obligations, an electric utility is free to charge market rates subject to any limitations stated elsewhere in the Act.

One such limitation is set forth in Section 16-103(c) of the Act, which places limits on the rates that a utility may charge competitive residential and small business services by requiring the continued offering of tariffed services for such customers “at rates which reflect recovery of all cost components for providing the service . . . .” As previously explained in footnote 2 above, Section 16-103(c) of the Act provides that “costs shall be the market based prices . . . .” and further defines “market-based prices” in a manner that includes the utilities actual cost of obtaining power and energy through any arms-length acquisition process – including a competitive bidding process. 220 ILCS 5/16-103(c). Thus, as stated earlier, Movants’ reference to “market-based prices” is improperly used to suggest that market-based prices can never be the same as cost-based rates under Section 16-103(c) of the Act. Furthermore, when one properly reads Section 16-103(c) of the Act as imposing a limitation on market rates that allows either a market-value rate under Section 16-112 of the Act or a cost-based rate, Movants’ argument that Section 16-103(c) prohibits the Commission from setting rates according

to any of the methodologies set forth therein – what Movants call “market-based rates – is illogical and contrary to existing law establishing the Commission’s authority.

When carried to its logical extreme, Movants’ argument would prevent the Commission from setting any power and energy rates for ComEd’s residential and small commercial customers taking noncompetitive services. Since setting rates based on the cost of electric supply acquired through an arms-length negotiation process is explicitly allowed under Section 16-103(c) for competitive services provided to residential and small commercial customers, Movants’ argument that the Commission is not allowed to set rates under the methodologies set forth in Section 16-103(c) for non-competitive services would prevent the establishment of rates on such a basis. Since ComEd no longer possesses its own generation assets, the only means for ComEd to acquire the electric supply it needs to serve its customers is through third party suppliers. The fallacy in Movants’ argument is thus revealed as Movants’ argument would prevent the Commission from setting rates based on the costs incurred through the only means available to ComEd to obtain such supply. Accordingly, the legal assumptions underlying Movants’ arguments lack merits, and its request to dismiss this tariff investigation must be denied.

Movants attempt to read into the Act a limitation where no such limitation explicitly exists is also contrary to applicable rules of statutory construction. Illinois courts have long held that the “primary rule of statutory construction is to give effect to legislative intent by first looking at the plain meaning of the language.” See *e.g.*, *Davis v. Toshiba*, 186 Ill. 2d 181, 184-85 (1999). Where the statutory language is clear and unambiguous, moreover, “a court must give it effect as written, without reading into it

exceptions, limitations or conditions that the legislature did not express.” *Id.* (Internal punctuation and citations omitted). Section 16-103(c) contains no explicit limitation on the Commission’s authority to set rates, and Movants have offered no valid reason to read such a limitation into the Act.

Furthermore, Movants’ argument contravenes the explicit language contained in Section 16-103(a) which provides that “[n]othing in this subsection shall be construed as limiting an electric utility’s right to propose, or the Commission’s power to approve, allow or order modifications in the rates, terms and conditions for such services pursuant to Article IX or Section 16-111 of this Act.”. 220 ILCS 5/16-103(a). As previously explained, Section 16-103(c) is a limitation on the Legislature’s decision to generally relieve electric utilities of their obligation to provide services that are declared competitive. The Legislature has specifically directed that nothing with respect to its decision to remove competitive services from traditional regulatory oversight shall be interpreted or construed to limit the Commission’s authority or power pursuant to Article IX or Section 16-111. Movants’ argument is in direct contravention of this explicit legislative directive because Movants’ interpretation of the limiting provisions contained in Section 16-103(c) utilizes the Legislature’s explicit decision in Section 16-103(a) to remove competitive services from traditional regulatory oversight to limit the Commission’s authority. For all of these reasons, Movants’ argument must fail and their Motion must be denied.

#### **V. IMPLICATIONS OF SECTION 16-111(i) OF THE ACT**

As demonstrated above, Movants’ motion to dismiss continuously ignores relevant factual allegations and operative statutory provisions. This struthious treatment

of facts and legal principles that are contrary to Movants' ultimate position continues with respect to Section 16-111(i) of the Act. Although Section 16-111(i) of the Act is mentioned in footnote 7 of the Motion, Movants never fully acknowledge its application and relation to the instant filing. Because the meaning and applicability of Section 16-111(i) of the Act was discussed at some length in the public reports issued in connection with the Post 2006 Initiative Working Group Implementation Reports, we will summarize here some of the relevant discussions contained in such reports.

The General Counsel for Commission previously advised the Commission that it is within the Commission's authority to review a competitive procurement process-driven tariff such as the tariffs here filed by ComEd. (Memorandum to the Commission from Philip A. Casey, November 23, 2004, Subject: OGC Comment and Analysis on Working Group Implementation Reports). The General Counsel indicated that such tariffs must clear at least two hurdles: (1) FERC regulation, including strictures governing wholesale electric transactions between sellers of electricity and affiliated wholesale purchasers, and (2) the provisions of the Public Utilities Act (PUA) relevant to the setting of rates after 2006 including Article IX, and Section 16-111(i) of the Act, with its directive that the Commission consider the extent to which the power and energy component or rates exceeds the market value determined pursuant to Section 16-112 of the Act. (OGC Comments on Procurement Working Group Implementation Report ("PWGIR"), p.1). In a footnote to the PWGIR the General Counsel further observed that "As noted in the Rates Working Group's Final Report, 'the Illinois Commerce Commission may retain jurisdiction to review rates including FERC-jurisdictional prices, as permitted by federal law, e.g. under the 'Pike County' doctrine'. (See *Pike County*

*Light & Power Co. v. Pennsylvania Public Utility Comm'n*, 465 A.2d 735 (Comm. Ct. of Pa. 1983)).“ RWG Final Report, pp. 16-17 (in discussion of Scenario 4).

Throughout the OGC Comments on PWGIR, the General Counsel made reference to Section 16-111(i). (OGC Comments on PWGIR, pp.1, 3, 4, 6, 8)<sup>3</sup> In connection with the establishment of rates subsequent to the mandatory transition period for the electric power and energy component of non-competitive services, Section 16-111(i) of the Act requires the Commission to “consider the extent to which the electric utility's tariffed rates for such component for each customer class exceed the market value determined pursuant to Section 16-112”. 220 ILCS 5/16-111(i). The Commission is also authorized to impose a rate ceiling in the event the rates<sup>4</sup> for that electric power and energy component exceed the market value by more than 10%. *Id.* Movants’ ignore that in order for post-transition period rates to comply with Section 16-111(i) of the Act the utility must provide or propose some method to compare its proposed rates to the market value determined pursuant to Section 16-112 of the Act. ComEd’s proposal was clearly intended to provide such a method, and the Motion ignores this aspect of ComEd’s filing as described above.

In its discussion of market value, Section 16-111(i) makes reference to Section 16-112 of the Act. Section 16-111(i) specifically provides that:

... in determining the just and reasonableness of the electric power and energy component of an electric utility's rates for tariffed services subsequent to the mandatory transition period and prior to the time that the provision of such electric power and energy is declared competitive,

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<sup>3</sup> The OGC Comments on the Rates Working Group Report to Implementation Working Group also referenced Section 16-111(i). *Id.* at 11, 12 and 18.

<sup>4</sup> The rates for electric power and energy must be just and reasonable, as required by Sections 9-101 and 9-201 of the Act. 220 ILCS 5/9-101, 9-201.

the Commission shall consider the extent to which the electric utility's tariffed rates for such component for each customer class exceed the market value determined pursuant to Section 16-112, ...

220 ILCS 5/16-111(i). The General Counsel further advised the Commission consistent with Section 16-111(i) that market value would be determined pursuant to Section 16-112 of the Act (OGC Comment on PWGIR, p. 1). Section 16-112 provides that:

(a) The market value to be used in the calculation of transition charges as defined in Section 16-102 shall be determined in accordance with either (i) a tariff that has been filed by the electric utility with the Commission pursuant to Article IX of this Act and that provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy, or (ii) in the event no such tariff has been placed into effect for the electric utility, or in the event such tariff does not establish market values for each of the years specified in the neutral fact-finder process described in subsections (b) through (h) of this Section, a tariff incorporating the market values resulting from the neutral fact-finder process set forth in subsections (b) through (h) of this Section.

220 ILCS 5/16-112(a).

ComEd has filed its proposed tariffs pursuant to 16-112(a). Whether those tariffs meet the requirements of 16-112(a), i.e. the tariff “provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy”, is a question of fact. The Commission can only make that determination after reviewing all the evidence and briefs in this matter following hearings.

## **VI. THE COMMISSION HAS THE AUTHORITY TO SET FORMULA BASED RATES**

Movants argue without citing to any authority that the Commission cannot approve rates that are set “automatically” as a result of the auction process. Motion, p. 9 (emphasis added). Movants thus appear to be taking issue with Rider CPP’s use of formulae. The Movants’ argument should be rejected. The General Counsel previously brought this issue to the attention of the Commission and noted that formulae have been used on prior occasion by utilities in Illinois and approved by Illinois courts. See *City of Chicago v. Illinois Commerce Comm’n*, 13 Ill.2d 607, 150 NE.2d 776 (1958). The General Counsel advised the Commission that “[c]ertainly there are provisions in Articles IX and XVI that can be interpreted as permitting the adoption of tariffs that stop short of expressing charges on the basis of cents or dollars per unit of commodity or service. Also, any tariff that would express electricity charges in terms of the unknown outcome of a competitive procurement process would, as a prerequisite to enforceability, have to have been determined by the Commission to be consistent with the provisions of Article XVI.” OGC Comments on PWGIR, p. 4. Given the Movants’ failure to cite to any authority for their position or explain the basis or scope of their position, and the clear legal authority for the Commission to establish formula-based rates, Movants’ argument must be rejected.

WHEREFORE, for the reasons set forth above, Staff respectfully requests that the Commission deny Movants' motion to dismiss this tariff investigation proceeding.

Respectfully submitted,

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