

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

RESPONSE OF COMMONWEALTH EDISON COMPANY
TO PETITION FOR INTERLOCUTORY REVIEW

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In accordance with 83 Illinois Administrative Code § 200.520(a), Commonwealth Edison Company (“ComEd”), respectfully submits this Response to the Petition for Interlocutory Review (“Petition” or “Pet.”) filed by the Office of the Illinois Attorney General, the Cook County State’s Attorney, the Citizens Utility Board and the Environmental Law and Policy Center (collectively, “Petitioners”) to the June 1, 2005 decision of the Administrative Law Judge (“05-0159 ALJ Decision”) denying Petitioners’ motion to dismiss.

INTRODUCTION AND SUMMARY

As authorized by the 1997 amendments to the Public Utilities Act (“PUA”), *see* 220 ILCS 5/16-111(g), ComEd divested its electric generating facilities. ComEd now must purchase in the wholesale market the electricity it is statutorily required to provide to its customers. ComEd’s proposed Rider CPP utilizes a competitive procurement process to acquire that electricity at the lowest possible market price, and provides for that electricity to be sold to ComEd’s customers at ComEd’s own cost, without markup. The complete auction process, including the consumer protections it incorporates, the timing and scope of Commission review of auction results, and the bases for the proposal and its justness and prudence, will all be examined at length in the instant tariff proceeding.

Petitioners contend, however, that the Commission lacks authority to approve Rider CPP under any set of facts. Petitioners argue that until a tariffed service is declared competitive, consumers may not be charged “market-based rates,” but rather are entitled to cost-based rates. And Petitioners view “market-based rates” and “cost-based rates” as mutually exclusive and distinct in all circumstances.

As described in greater detail in Section I below, Administrative Law Judge Wallace properly rejected Petitioners’ argument in a carefully reasoned decision. Fundamentally, Petitioners ignore that the tariff at issue *does* establish “cost-based rates.” Rider CPP proposes precisely the recovery of the utility’s own prudently incurred *costs*, which Petitioners acknowledge ComEd is entitled to receive. *See* Pet. at 14 (contending that the Commission must “ensure that electric rates for a utility’s captive customers are *based on the actual cost of providing service* – and no more”) (emphasis added, footnote omitted). The Judge explicitly recognized that what is at issue in this proceeding is ComEd’s *costs*: “In the instant case, ComEd’s proposal is intended to recover only such costs as are actually incurred in procuring power and energy through the auction process.” 05-0159 ALJ Decision, at 6.

Petitioners also mischaracterize Section 16-103(c) of the Act, upon which they heavily rely. Petitioners ignore that the General Assembly expressly recognized in Section 16-103(c) that one measure of “cost” *is* “market based prices” paid by the utility, and Petitioners falsely imply that the cost-based rates at issue are unregulated, competitive retail rates as would ordinarily apply following a competitive declaration. This is not the case. As the Judge observed, Petitioners’ motion to dismiss rests on the unsupported claim that before a tariffed service is declared competitive, a utility cannot use an arms-length, competitive process to establish the recoverable costs of the wholesale electricity required to provide that service.

ComEd submits the Commission *can* and *should* approve a competitive wholesale procurement process such as that proposed in Rider CPP. As the Commission’s Staff and many other stakeholders have recognized, this is a prudent way for ComEd to incur the costs of acquiring the electric power and energy needed to serve its customers.

It would be a remarkable principle that, until a tariffed service is declared competitive, a utility’s costs could never be based on market prices. Indeed, many costs – from poles to vehicles, wires to computers – are prudently incurred precisely *because* they are incurred at market prices. As is established in Section II below, the Commission has possessed the statutory authority to regulate and permit the recovery of such costs for almost 100 years.

Petitioners complain that Rider CPP somehow prevents the Commission from evaluating the “profit” embedded in these “market-based rates” and from conducting its normal review of the utility’s charges. These arguments are curious, because ComEd has proposed adding *no* profit to the wholesale purchases at issue and will provide the electric supply component of its tariffed services at ComEd’s own direct costs. And there is a growing mountain of evidence in the instant proceeding regarding the appropriateness of the auction procedures proposed by ComEd and the competitiveness of the wholesale market. In the present tariff filing, ComEd has gone to the Commission so that all stakeholders may participate and comment on how ComEd should acquire its wholesale electricity *before* ComEd actually makes the purchases, rather than waiting and forcing a more circumscribed review of transactions that already have occurred and cannot be undone.

As described in Section III below, contrary to Petitioners’ claims that approval of Rider CPP would result in a denial of consumer protections, ComEd’s tariff proposal is designed to maximize consumer protections in the statutory post-transition period. Consumers are protected

because wholesale electricity must be acquired at competitive, transparent auctions where the lowest-price suppliers will prevail. Consumers are protected because the auctions will be administered by an independent auction manager and monitored by the Commission, which will have the opportunity to review and, if deemed necessary, reject the auction results. (Indeed, in this regard the proposed proceeding provides greater protection than the law would otherwise provide, as the standard under which the Commission may reject the auction results is broader than the standard governing a traditional “prudence” review.) Consumers are protected because wholesale purchases will be staggered to reduce effects of market volatility. Consumers are protected because ComEd will add no markup to the lowest-cost wholesale purchases resulting from the auction. In sum, Rider CPP removes discretion by the utility in the procurement process in favor of a carefully controlled objective mechanism, in which only those wholesale suppliers who offer the lowest costs for Illinois consumers will be selected. Petitioners do not begin to explain how this process is unjust or unreasonable, or how the Commission possibly could be prohibited from regulating the manner in which ComEd recovers these costs in its rates.

ARGUMENT

I. Section 16-103(c) Does Not Prohibit The Recovery Of Actual Costs Incurred In Arms-Length, Market-Based Transactions.

The entire thrust of Petitioners’ argument is that until a retail electric service is declared competitive for a customer class, Section 16-103(c) of the Act requires that customers continue to receive “cost based rates,” and *cannot* be charged “market based rates.” *See, e.g.*, Pet. at 2-3. Moreover, because Section 16-103(c) defines “market based prices” to include “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), Petitioners effectively contend that, until a service is declared competitive, customers cannot be

charged for electricity obtained through a competitive or other arms-length acquisition process. Thus, Petitioners would read Section 16-103(c) to mean that a utility like ComEd that owns no generation facilities of its own could not charge customers, prior to a competitive declaration, the costs of wholesale electricity acquired through a competitive process.

This proposition is not only unfounded but surprising in light of the consensus conclusion reached in the Commission's "Post 2006" Initiative. Beginning in early 2004, the Commission conducted a collaborative process to address issues regarding the Act's "post-transition" period commencing January 1, 2007. Those issues included how utilities should procure energy after the transition period ends. All interested stakeholders, including each of the Petitioners, participated in that process through several open working groups, including one focused specifically on procurement. Significantly, the declared *consensus* of *all* stakeholders in the Procurement Working Group was that "the ideal procurement method" for utilities that had divested their generation assets should, among other criteria, "*allow for a competitive procurement approach,*" "provide for the opportunity for full cost recovery to the utilities if they follow the Commission approved procurement approach" and "*result in market-based rates for customers.*" See The Post 2006 Initiative: Final Staff Report to the Commission, at 6 (Dec. 2, 2004) ("Post 2006 Report") (emphasis added).¹ Thus, Petitioners now ask the Commission to declare unlawful precisely what the Procurement Working Group recommended to the Commission as *consensus* items. *Id.*

¹ Although the Workshop Preamble indicates that the statements made, positions taken and documents and papers provided by individual participants in the working group process may not be used in other proceedings, there is no such bar on the use of the consensus results of the process as memorialized in reports issued by the Working Groups or Commission Staff. See Workshop Preamble, available at <http://www.icc.state.il.us/ec/docs/040511ecpostpreamble.pdf>.

This bold request is unsupported by the text of Section 16-103(c), as Judge Wallace concluded. Section 16-103(c) provides in full:

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).

Based on this text, the Judge explained that “from a simple reading of Section 16-103(c), and its numerous references to cost, it is clear that market-based prices and cost-based rates are not mutually exclusive concepts.” 05-0159 ALJ Decision at 6. Rather, “use of market-based prices is recognized as a mechanism for or subset of, not an exception to or ‘replacement’ of, establishing rate components based on cost. That is, use of market-based pricing is identified as one method for determining such costs, not an alternative thereto.” *Id.* The Judge emphasized that what is at issue in this proceeding is ComEd’s *costs*: “In the instant case, ComEd’s proposal is intended to recover only such costs as are actually incurred in procuring power and energy through the auction process.” *Id.* Given that “use of market-based prices” is not “inherently inconsistent with the principle of setting rate components at cost,” *id.*, the Judge explained that “the question is whether Section 16-103(c) *prohibits* the use of an auction or other market-based process in determining the costs of power and energy in setting rates for non-competitive customers.” *Id.* (emphasis added).

Judge Wallace concluded there is no such prohibition in the statute. Rather, the statute requires that “rate components for competitive services may only be set, not surprisingly, by using market-based prices to establish cost.” *Id.* But “just because that particular method is statutorily mandated for establishing certain cost components for competitive services does not somehow mean it is statutorily prohibited for other services or customers, particularly where, as in the instant case, use of market-based prices is expressly recognized as one means of establishing costs in Section 16-103(c).” *Id.*

The Judge observed that Petitioners’ argument would have a curious effect. He noted that “it is difficult to see by what means Movants envision the cost of procuring power and energy being determined for non-competitive services in a manner consistent with Movants’ theory.” *Id.* at 6. Because Section 16-103(c) defines market-based prices to include costs determined through a competitive bidding “*or other arms-length acquisition process,*” 220 ILCS 5/16-103(c) (emphasis added), the Judge observed: “Since ComEd has divested itself of virtually all generation assets pursuant to Section 16-111(g) of the Act, it is unclear how the cost of procuring power and energy would be established for non-competitive services, when existing contracts expire at the end of 2006, if all such market-based mechanisms were prohibited as Movants contend. Stated another way, the Commission cannot set rates in a vacuum.” 05-0159 ALJ Decision, at 7.

The Judge ultimately ruled that the set of formulas proposed by ComEd “to pass through market-based procurement costs actually incurred through the auction process,” would be reviewed at length in the instant proceeding based on the full record, including “all comments, criticisms, modifications and alternatives proposed by the Movants and other parties.” *Id.* The Judge noted that “formula-based rate mechanisms” have been approved by the Commission and

courts. *Id.* at 7-8. Judge Wallace concluded: “Whether an auction process . . . should be conditioned on the imposition of a more formal or more comprehensive review process than the one proposed by ComEd involves mixed questions of fact and law that can be addressed by the parties during the course of the proceeding. . . . The arguments contained in the Motion on this issue are not a sufficient basis to terminate the docket at this time.” *Id.* at 8.

Judge Wallace’s conclusions concerning Section 16-103(c) are mandated by the language and purpose of the statute, accord with other provisions of the PUA, and should be affirmed. Contrary to Petitioners’ repeated assertions, Section 16-103(c) simply does not prohibit the Commission from allowing utilities to recover their costs of procuring power in the wholesale market at market-based prices. In addition to confusing market-based retail rates with costs established in the wholesale market, Petitioners would add an additional word to the statute – *see* Pet. at 12 (“Section 16-103(c) must be read to authorize market-based ratemaking solely for service that has been declared competitive.”) (emphasis in original) – that simply does not appear and that cannot be glossed onto the provision. Absent an ambiguity, a statute should be interpreted in accordance with the words used by the legislature, and provisions that do not appear may not be added. *See, e.g., People v. Glisson*, 202 Ill. 2d 499, 504 (2002) (“where a statute is clear and unambiguous, courts cannot read into the statute limitations, exceptions, or other conditions not expressed by the legislature”); *Donahoo v. Bd. of Educ. of School Dist. No. 303*, 413 Ill. 422, 426 (1953) (“We cannot read out of the statute words which the legislature has placed therein any more than we can read into the statute words which are not within the manifest intention of the legislature as determined by the statute itself.”) (citations omitted). A purpose of Section 16-103(c) is to *mandate* certain forms of market-based pricing when a service is declared competitive. But there is no basis to read into the statute a prohibition that *until* a

competitive declaration, a utility's recoverable costs cannot be based on competitive, arms-length transactions, or market prices that define the utility's actual costs.

Petitioners also misconstrue the context of Section 16-103(c). Petitioners contend that, until a service is declared competitive, the language in Section 16-103(c) that “each electric utility shall continue offering to all residential customers and to all small commercial retail customers . . . a tariffed service . . . *consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997*” means that these customers cannot be charged “market-based rates” until their service is competitive. 220 ILCS 5/16-103(c) (emphasis added); *see* Pet. at 8. Petitioners fundamentally misread the statute, in effect adding language and obligations that are not there. This portion of Section 16-103(c) requires ComEd to continue to provide a bundled tariff *service*, notwithstanding other provisions of the Act. *See, e.g.,* 220 ILCS 5/16-103(a) (requiring a utility to provide service until the service is declared competitive). The quoted language says nothing about *pricing* before a service is declared competitive, and it is nonsensical to contend that, despite the substantial changes engendered by the 1997 amendments – including the authorization for a utility to divest its generation facilities, *see* 220 ILCS 5/16-111(g) – a utility must continue to *price* its mandatory services in the *identical* manner as those services were priced in 1997, when the utilities owned and operated their own generation facilities. As set forth above, Section 16-103(c) then further requires that when service for these customers *is* competitive, “cost *shall be* the market based prices.” 220 ILCS 5/16-103(c) (emphasis added).

In sum, Judge Wallace correctly found that there is nothing in Section 16-103(c) that prohibits the recovery of costs based upon arms-length, competitive transactions or “market-

based pricing.” Indeed, as set forth below, the Commission long has had the authority to permit the recovery of such costs.

II. The Commission Has Authority Under Article IX and Article XVI To Approve Rider CPP.

In proposing Rider CPP, ComEd did *not* rely on Section 16-103(c) as the basis for the Commission’s authority. Petitioners ignore the bases of authority advanced by ComEd in the tariff – Article IX and Sections 16-111(i) and 16-112 of the Act – and suggest that if authority is not expressly conveyed in the language of Section 16-103(c), then authority is lacking. There is no logic to this argument. The proper question is whether Rider CPP is authorized by the PUA, not whether it is authorized by Section 16-103(c). The PUA provides the Commission with ample authority to approve Rider CPP.

A. The Commission Has Authority To Allow A Utility To Recover Actual Costs Incurred In Arms-Length, Market-Based Transactions.

The essential thrust of Petitioners’ brief establishes that the Commission clearly has the authority to approve Rider CPP. The entire predicate for Petitioners’ argument is that, until a service is declared competitive, captive customers are entitled to “cost-based rates.” Thus, Petitioners declare that “[t]he Commission must . . . ensure that electric rates for a utility’s captive customers are based on the actual cost of providing service – and no more.” Pet. at 14 (footnote omitted). As Judge Wallace recognized, however, that is precisely what is at issue in Rider CPP. ComEd is not proposing rates that are divorced from its costs. ComEd seeks to recover *only* its actual costs of procurement, with no profit on those costs. As the Judge, Commission staff, and others have recognized, Petitioners’ argument curiously ignores this fact.

1. Rider CPP establishes a mechanism for incurring and recovering costs, the reasonableness of which will be reviewed in this proceeding.

Rider CPP establishes a mechanism for incurring prudently, in a competitive wholesale market, the actual costs that ComEd necessarily must incur in order to meet its mandatory service obligations and provide electricity to its customers. Rider CPP establishes a competitive auction procurement mechanism by which ComEd will incur the costs associated with its wholesale power purchases. The appropriateness of this mechanism will be reviewed by the Commission over the course of eleven months in the instant proceeding, in which all interested stakeholders may participate and in which the facts germane to the Commission's decisions will be determined.²

As set forth in the supporting testimony submitted by ComEd at the time of filing, the proposed procurement mechanism is beyond the control of the utility, implemented by an independent auction manager, and monitored by the Commission. CPP Rider Original Sheet Nos. 254-57, 266-68 (Feb. 25, 2005).³ Once the auction is completed, the independent auction manager must submit a formal report to the Commission summarizing what occurred at the auction. *Id.* An independent auction advisor (selected by the Commission) also must submit a report to the Commission regarding the auction. *Id.* The Commission then has the opportunity to review the auction and, if it determines necessary, reject the auction results by initiating an investigation or other formal proceeding. *Id.* at Sheet Nos. 266-68. Retail charges will be set by

² Petitioners' original Motion before the Judge sought dismissal only of Rider CPP. *See* Mot. at 1. In their reply to the opposition to the Motion, as well as in the instant petition for review, Petitioners also refer to Riders BGS, BGS-L, D and MV. *See* Reply to Opp. to Mot. to Dismiss at 1; Pet. at 1. ComEd respectfully submits that it is improper for the Petition to raise matters not included in the original filing.

³ ComEd recognizes that a hearing will be held on all factual issues, where the facts supporting the tariff filing must be fully established. In the context of a motion to dismiss, however, the factual information set forth in ComEd's filing must be assumed to be correct.

pre-determined formula based on the auction results. *Id.* at Sheet Nos. 275-94. Thus, explicit notice and opportunity to take action is provided to the Commission before retail charges based on the auction may go into effect. The Commission's authority to initiate an investigation into the rate, and the rights of other parties under the Act, also remain unchanged. 220 ILCS 5/9-250.

Petitioners and other stakeholders have submitted extensive comments regarding Rider CPP, and there already is an extensive record being developed for this proceeding. Among other issues, evidence has been submitted concerning the competitiveness of the wholesale electricity market in ComEd's service territory. At issue now, however, is Petitioner's motion that the instant proceeding should be *dismissed*, regardless of the procedural protections built into Rider CPP and even if the wholesale market is sufficiently competitive as ComEd contends.⁴ Under long-standing regulatory principles, the Commission certainly has authority to approve the mechanism by which ComEd will incur, and recover, such actual costs. And there is nothing in the statute that prohibits the Commission from establishing that mechanism in advance, as it previously has done in analogous situations.

2. ComEd is entitled to recover costs reasonably and prudently incurred.

The PUA requires the Commission to ensure that rates are just and reasonable. 220 ILCS 5/9-101. The statute does not dictate *how* the Commission should make this determination and, indeed, it is firmly established that Commission has wide latitude in establishing "preferable techniques in utility regulation." *City of Chicago v. Ill. Commerce Comm'n*, 13 Ill. 2d 607, 618

⁴ Technically, if the instant proceeding were dismissed, ComEd's tariff filing simply would go into effect. As Petitioners note, "[o]n March 9, 2005, the ICC opened docket 05-0159 to investigate 'the propriety of the proposed tariff sheets' and suspended Rider CPP, as well as the other tariffs proposed by Commonwealth Edison. *Suspension Order, ICC Docket No. 05-0159, March 9, 2005.*" Pet. at 5. Presumably, what Petitioners intend is that the Commission rule on the merits as a matter of law that Rider CPP is unlawful under the provisions of the PUA. ComEd will respond herein accordingly.

(1958). As Petitioners themselves acknowledge, the General Assembly has expressed its intent that “tariff rates for the sale of various public utility services . . . accurately reflect the cost of delivering those services and allow utilities to recover the total costs prudently and reasonably incurred.” 220 ILCS 5/1-102(a)(iv); *see* Pet. at 17. The requirement that utility rates be “just and reasonable” means that rates “should be sufficient to provide for operating expenses, depreciation, reserves . . . and a reasonable return to the investor.” *Ill. Bell Tel. Co. v. Ill. Commerce Comm’n*, 414 Ill. 275, 286-88 (1953). Simply put, rates “must allow the utility to recover costs prudently and reasonably incurred.” *Citizens Util. Bd. v. Ill. Commerce Comm’n*, 166 Ill.2d 111, 121 (1995).

Indeed, if the statute did *not* authorize recovery of costs that ComEd necessarily must incur, and will incur pursuant to the Rider CPP procedures at the lowest available price, the statute would raise substantial constitutional concerns. As the Illinois Supreme Court has explained: “The power of the Legislature over rates to be charged is not absolute, but is limited. It is the power to regulate and not to confiscate.” *City of Edwardsville v. Ill. Bell Tel. Co.*, 310 Ill. 618, 621 (1924). “The state has no power to compel a corporation engaged in operating a public utility to serve the public without a reasonable compensation.” *Id.*; *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309-10 (1989); *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 594 (6th Cir. 2001).

Nor can the issue be the costs of the *supplier*. Section 16-111(i) allows consideration only of the *utility’s* costs associated with *the provision of tariffed services*, not the costs of any affiliate or supplier. *See* 220 ILCS 5/16-111(i)(4). The supplier does not provide a *tariffed* service under the Act. Moreover, the Commission has no jurisdiction over wholesale electricity costs or rates, which are governed exclusively by FERC. *See, e.g., New York v. FERC*, 535 U.S.

1, 19-20 (2002); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 370 (1988); *Nantahala Power & Light Co. v. Thornburgh*, 476 U.S. 953, 963 (1986); *Gen. Motors Corp. v. Ill. Commerce Comm'n*, 143 Ill. 2d 407 (1991). Any effort by the Commission to mandate wholesale sales from Illinois wholesale suppliers at particular cost-based rates not only would violate the Supremacy Clause, but also the Commerce Clause, of the federal Constitution. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982). The Commission certainly can require ComEd to incur its wholesale electricity costs in a prudent manner (as Rider CPP does), but it cannot limit ComEd's rates to its *suppliers'* costs. The statute should be construed to avoid such obvious constitutional problems. *See Eden Retirement Center, Inc. v. Dep't of Revenue*, 213 Ill. 2d 273, 281 (2004).

3. The Commission has the authority to approve formula-type rates.

Both the Commission and Illinois courts also long have held that, among the techniques that may be used to establish the justness and reasonableness of utility rates, the Commission has the authority to approve formula-type rates, particularly for costs that fluctuate. Thus, in 1958, the Illinois Supreme Court upheld the Commission's authority to permit a utility to automatically increase its rates to recover the costs of wholesale power purchases pursuant to an approved "mathematical formula." *City of Chicago*, 13 Ill. 2d at 611-13.⁵ In upholding this ratesetting method, the Court explicitly recognized that "it is clear that the statutory authority to approve rate schedules embraces more than the authority to approve rates fixed in terms of dollars and cents," as is done in a general ratemaking case. *Id.* The Court found it sufficient that the

⁵ The Supreme Court first upheld the automatic rate adjustment mechanism independent of any specific statutory authorization, under the Commission's general Article IX authority. *See City of Chicago*, 13 Ill. 2d at 611-13. The General Assembly subsequently enacted specific provisions governing fuel adjustment clauses.

Commission retained its power to initiate a proceeding to investigate the reasonableness of the utility's rates – a statutory power that also remains intact under Rider CPP. *Id.* at 617; *see* 220 ILCS 5/9-250. Quoting its earlier decision in *Antioch Milling Co. v. Pub. Serv. Co.*, 4 Ill. 2d 200, 210 (1954), the Court also emphasized that “[t]he act provides that rates shall be reasonable; but it entrusts the enforcement of that obligation in the first instance to the commission.” *City of Chicago*, 13 Ill. 2d at 618 (internal quotation marks and citation omitted).

More recently, the Illinois Supreme Court agreed with the Commission that, in the case of “unexpected, volatile or fluctuating expenses,” an adjustment mechanism provides a more “accurate and efficient” means than a general rate case for tracking costs and matching them with rates. *Citizens Util. Bd. v. Ill. Commerce Comm’n*, 166 Ill. 2d 111, 139 (1995). Such mechanisms simply – and fairly – provide for cost recovery and do not affect the utility’s fair rate of return. *See City of Chicago v. Ill. Commerce Comm’n*, 281 Ill. App. 3d 617, 628 (1st Dist. 1996). What is critical is that the measure of costs, and the utility’s rates, must be outside of the utility’s unilateral control. *See Citizens Util. Bd. v. Ill. Commerce Comm’n*, 275 Ill. App. 3d 329, 340 (1st Dist. 1995) (“the Commission may not approve a tariff which permits a utility to set its own rates”).⁶

⁶ Such mechanisms have not been limited to fuel purchases. *See Citizens Util. Bd.*, 166 Ill. 2d at 133 (upholding recovery of “coal tar clean up expenditures” through a flexible “rider” mechanism, which the Court described as a mechanism that could “increase a rate, allowing the utility to recover the cost as it is incurred, alleviating the delay of waiting until the utility files a general rate case to recover expenses”); *City of Chicago*, 281 Ill. App. 3d at 627-28 (upholding rider recovery of utility municipal franchise fees); *In re Ill. Power Co.*, No. 04-0294, 2004 WL 2208508, at *47 (Ill. Commerce Comm’n Sept. 22, 2004) (approving automatic adjustment clause for 90% of asbestos litigation costs). Indeed, transmission expenses of utilities – another federal jurisdictional cost – have been recovered through riders without objection since the advent of restructuring. *See, e.g.*, ComEd’s Rider TS – Transmission Services, Ill. C.C. No. 4, 2nd Rev. Sheet No. 217 *et seq.*

4. The prudence of ComEd’s procurement mechanism and resulting acquisitions properly is evaluated at the time the costs are incurred.

For several reasons, Petitioners also are wrong in suggesting that it is necessary for the Commission to conduct hindsight “prudence” review of ComEd’s wholesale acquisitions after the auction is held and ComEd is obligated the purchase the electricity. First, it is firmly established that the prudence of a utility’s actions must be determined with reference to “only those facts available at the time judgment was exercised.” *Ill. Power Co. v. Ill. Commerce Comm’n*, 339 Ill. App. 3d 425, 428 (5th Dist. 2003). Thus, the prudence of a wholesale electricity purchase *must* be evaluated based on the facts existing at the time the acquisition is made – *i.e.*, under Rider CPP, at the time the auction is conducted – and not “second guessed” based on facts or market conditions existing at the time of some subsequent review. Rider CPP provides for review both of the auction procurement process and of its results. It is appropriate for that *mechanism* to be reviewed before these large wholesale purchases are made, and for the auction *results* to be reviewed immediately based on the facts existing at that time.

Second, it is significant that Rider CPP provides a standard for rejecting the auction results that is *broader* than that typically available in a traditional “prudence” review. The Commission has discretion under the proposed tariff to reject the auction results even if it believes the utilities acted prudently. The tariff simply requires that sufficient cause exist to *open* an investigation. CPP Rider Original Sheet No. 268.

Third, if an objective process beyond the control of the utility is approved and followed, and the utility thereafter adds no markup or profit to the resulting costs, there necessarily is less need for a detailed review of the acquisition after the fact. In sum, ComEd has yielded the traditional discretion it exercises in the procurement process in favor of a carefully controlled, objective mechanism, in which only those wholesale suppliers who offer the lowest costs for

Illinois consumers will be selected. Given these facts, the Commission's review of the proposal is entirely consistent with the requirements of the Act.

B. Under Section 16-111(i), The Commission Not Only May, But Must, Consider Market Value Prior To The Time A Service Is Declared Competitive.

In addition to the Commission's longstanding authority under Article IX, express authority to approve Rider CPP is also provided by Section 16-111(i). That provision directly addresses how the Commission must evaluate rates in the context presented here, *i.e.*, after the mandatory transition period *but before a tariffed service is declared competitive*. Section 16-111(i) directs:

In determining the justness 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 the tariffed service is declared competitive, 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) (emphasis added).

In addition, Section 16-111(i) expressly permits the Commission to "establish such electric power and energy component at a rate equal to the market value plus 10%." *Id.* In other words, the Act explicitly recognizes that, *prior to the time a service is declared competitive*, charges for the electric power and energy component of the service may be measured by that component's "market value." Thus, Section 16-111(i) implements the longstanding Article IX "just and reasonable" rates requirement, 220 ILCS 5/9-101, in the context of the electricity services restructuring envisioned by the 1997 Act, by expressly allowing the Commission to make market value a reference point for the justness and reasonableness of charges for the electric power and energy component of tariffed services.

Petitioners' only response to Section 16-111(i) is entirely circular. Petitioners contend that Section 16-111(i) cannot mean what it says because that would contradict Petitioners' construction of Section 16-103(c). *See* Pet. at 18 (“Section 16-111(i) does *not* authorize the Commission to simply pass through the market value, calculated in accordance with Section 16-112(a), to set retail rates for services that have not been declared competitive. To suggest otherwise would be inconsistent with Section 16-103(c).”) (emphasis in original).

Petitioners' argument also violates two basic rules of statutory construction. First, “a statute should be evaluated as a whole; each provision should be construed in connection with every other section.” *Abrahamson v. Ill. Dep't of Prof. Reg.*, 153 Ill.2d 76, 91 (1992). *See also, e.g., Castaneda v. Illinois Human Rights Comm'n*, 132 Ill.2d 304, 318 (1989). Second, a construction of a statute should be avoided that “render[s] any portion of the statute meaningless or void.” *Sylvester v. Industrial Comm'n*, 197 Ill.2d 225, 232 (2001). Petitioners' reading – that Section 16-103(c) somehow trumps Section 16-111(i) – fails to harmonize the two provisions, and would render Section 16-111(i) superfluous.

C. Federal Law Evaluates the Price of Wholesale Power Contracts By Reference to Market Prices.

Petitioners' ultimate objection to the proposed auction procurement mechanism goes to the *merits* of the proposal – this objection involves issues that Petitioners have asserted, and certainly may continue to assert, in this proceeding, but which are factual in nature and thus inappropriate for a motion to dismiss. Specifically, Petitioners contend that there are *alternatives* to the proposed auction, and that “[t]he most obvious alternative is the purchase of electricity through bilateral wholesale contracts with the utilities' low-cost generation affiliates.” Pet. at 22. Petitioners urge that the preferred procurement method would be one requiring ComEd to enter a bilateral contract with its “low-cost” affiliate, presumably at “low cost,” below-market prices.

Pet. at 22-23. But, at bottom, ComEd is no more entitled today to the potential “low-cost” generation of its affiliate than it could be saddled tomorrow with *above*-market costs of its affiliate, should market conditions change.

Petitioners criticize ComEd for asserting that FERC scrutinizes affiliate power contracts carefully and ordinarily requires that they reflect market prices. Yet Petitioners recognize that any wholesale power procurement must comply with federal law as administered by the FERC.⁷ They point out that FERC has stated that it will approve contracts between a utility and its affiliate under at least three conditions. *See* Pet. at 22. In addition to direct head-to-head competition between the affiliate and competing unaffiliated suppliers, FERC has mentioned “prices comparable to the prices that non-affiliated buyers were willing to pay for similar services from the affiliate,” and “prices, terms and conditions of sale comparable to those accepted by the utility in contracts with non-affiliated sellers.” *Id.* But Petitioners fail to note that *all* of those alternatives are tied to market prices that result from competition. FERC has even held that a cost-based power contract between affiliates will be tested by reference to market prices. *Southern California Edison Co., LLC*, 106 FERC ¶ 61,183 (2004). The simple point remains that wholesale contracts between affiliates must be comparable to contracts between non-affiliates. *See, e.g., Allegheny Energy Supply Co., LLC*, 108 F.E.R.C. ¶ 61,082, at 61,417 (2004); *Edgar*, 55 F.E.R.C. ¶ 61,382, at 62,167. In today’s power markets, contract prices are determined by competitive market forces.

Again, it is noteworthy that the affiliate purchases now advocated by Petitioners were expressly considered by the Commission’s Procurement Working Group. That group reached a

⁷ The competitive auction process proposed in Rider CPP does so. *See Boston Edison Co.*, 55 F.E.R.C. ¶ 61,382, at 62,167 (1991) (*Edgar*).

consensus on many shortcomings of such a procurement approach, including that it is “[n]ot a competitive procurement method”; it is not a transparent process; it does not foster wholesale competition; it is “[i]nconsistent with FERC affiliate transaction rules”; it provides little opportunity for stakeholders to review and comment on the procurement plan; it limits regulatory oversight by the ICC; and it limits the ability of non-affiliated suppliers to sell power to the utility. *See* Final Report to the Illinois Commerce Commission Presented by the Procurement Working Group, Scenario 4, at 2 (Sept. 23, 2004).

In any event, as the Judge recognized, the issue of whether a bilateral contract procurement method is preferable to that set forth in Rider CPP goes to the *merits* of ComEd’s proposed tariff, not to whether the Commission has authority to approve it. As the Judge observed: “Just how well the procurement proposal advanced by ComEd is designed to properly quantify those costs, ensure the prudence of them and reflect them in just and reasonable rates is a complicated, multi-faceted question involving a number of issues, some factual in nature, that many parties will likely address in this proceeding. These determinations can best be made by the Commission with the benefit of a full record, including all comments, criticisms, modifications and alternatives proposed by the Movants and other parties.” 05-0159 ALJ Decision, at 7.

III. ComEd’s Rider CPP Fully Provides The Very Consumer Protections Sought By Petitioners.

Petitioners also claim that the Commission lacks authority to approve Rider CPP because it eliminates essential consumer protections that are part of the Commission’s traditional review of utility rate filings. Yet every one of the consumer protections identified by Petitioners is preserved, and indeed advanced, by Rider CPP. Once again, Petitioners’ argument strongly *supports* the appropriateness of the proposal now before the Commission.

Petitioners first contend that rates must be “based on a review of the prudence of management decisions.” Pet. at 15. Yet the instant 11-month tariff review proceeding is designed precisely to allow all parties to review and comment on the prudence of ComEd’s proposed competitive procurement mechanism, and it provides stakeholders far *greater* input into ComEd’s purchasing decisions than they ordinarily would have. Second, Petitioners claim (without supporting law) that rates must be “based on a direct review of profits.” *Id.* Here, however, ComEd proposes *no* profits, and it is hard to imagine what “review” by the Commission could be lost. Third, Petitioners contend that rates must be “determined through public proceedings with procedural safeguards.” Pet. at 16. Yet that is precisely the type of proceeding now pending before the Commission. Fourth, Petitioners contend that rates must be determined “through a deliberative decision-making process based on the evidence in the record and applicable law.” Pet. at 16. Again, however, that is precisely the type of record now being developed at the Commission. Finally, Petitioners argue that rates must be “determined by an independent Commission whose ratemaking decisions are subject to scrutiny by the Court and can be reversed or voided for violations of the PUA and ethics laws.” Pet. at 16 (footnotes omitted). Yet every decision of the Commission, both in this proceeding and in connection with its review of each auction procurement, remains subject to these standards.

In sum, the consumer protections invoked by Petitioners are vibrantly preserved in the very docket now pending before the Commission. Indeed, it is Petitioners, not ComEd, who seek to curtail this proceeding, and the development of a full evidentiary record, through a ruling on a preemptory motion to dismiss.

CONCLUSION

Settled statutory and constitutional principles compel the unremarkable conclusion that a public utility with a mandatory service obligation must be permitted to recover its actual,

out-of-pocket, prudently incurred costs for power delivered to its customers. Those costs often are based on competitive transactions and market-based prices. Nothing in Section 16-103(c) of the Act changes the authority of the Commission to regulate and approve the recovery of such costs. The decision of the Judge denying the motion to dismiss is correct and should be affirmed.

Respectfully submitted,

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