**STATE OF ILLINOIS**
**ILLINOIS COMMERCE COMMISSION**

| | | |
|---|---|---|
| COMMONWEALTH EDISON COMPANY | | |
| Proposed tariffs filed pursuant to Article IX of the Public Utilities Act defining a competitive supply procurement process and, pursuant to Section 16-112(a) of the Act, establishing a market value methodology to be effective post-2006; providing for Power Purchase Options and for recovery of transmission charges post-2006; and enabling subsequent restructuring of rates and unbundling of prices for bundled service pursuant to Sections 16-109A and 16-111(a) of the Act. | : | No. 05-0159 |

# INITIAL BRIEF OF CONSTELLATION ENERGY COMMODITIES GROUP, INC.

Myra Karegianes
Karegianes&Field, LLC
208 South LaSalle Street
Suite 688
Chicago, IL 60604

# TABLE OF CONTENTS


**Page**

**I. Executive Summary……………………………………………2**

**II. Need for Commission Action…………………………………2**

**III. Legal Issues**

**A. Background: the Illinois Electric Service and Choice and Rate Relief Law of 1997…………………………..4**

**B. ICC Authority under Article IX and Article XVI to Approve the Filed Tariffs**

**1. Article XVI and Post Transition Rate Setting Authority…………………………………………5**

**2. Article IX Rate Setting Authority………………..7**

**C. Relationship of Illinois and Federal Law and Jurisdiction**

**1. FERC Jurisdiction of Wholesale Power Rates and Costs…………………………9**

**2. FERC Authority of Wholesale Power Purchased by Affiliates…………………………………………….9**

**3. The Auction is Consistent with Illinois Federal Law and Policy……………………………………………..11**

**D. Reference to Post-2006 Initiative Reports and Results.11**

**IV. Sufficiency of the Competitive Markets**

**A. Markets' Relationship to Auction Process……………….12**

**B. Other Jurisdictions' Experiences with Competitive Electricity Procurement…………………………………………………13**

**V. Auction Design Issues**

**F. Date of Initial Auction………………………………………14**

**L. Regulatory Oversight and Review**

**1. Nature of Commission Review Before, During, and After Auction……………………………………….15**

**2. Post Auction Commission Review of Results…..16**

**M. Supplier Forward Contracts**

**3. Proposed Clarifications and Modifications Accepted by ComEd……………………………………………….17**

**4. Proposed Clarifications and Modifications not Accepted by ComEd…………………………………………….17**

**VII. Tariff and Rate Design Issues**

**B. Matters Concerning Rider CPP**

**4. Rider CPP - Retail Customer Switching Rules**

**a. Enrollment Window**

**1. Duration of Window……………………18**

**D. Additional Tariff and Rate Design Issues**

**1. Staff's Rate Increase Mitigation Proposal…………19**

**CONCLUSION…………………………………………………21**

# STATE OF ILLINOIS
# ILLINOIS COMMERCE COMMISSION

| | | |
|---|---|---|
| COMMONWEALTH EDISON COMPANY | | |
| Proposed tariffs filed pursuant to Article IX of the Public Utilities Act defining a competitive supply procurement process and, pursuant to Section 16-112(a) of the Act, establishing a market value methodology to be effective post-2006; providing for Power Purchase Options and for recovery of transmission charges post-2006; and enabling subsequent restructuring of rates and unbundling of prices for bundled service pursuant to Sections 16-109A and 16-111(a) of the Act. | : | No. 05-0159 |

## INITIAL BRIEF OF CONSTELLATION ENERGY COMMODITIES GROUP, INC.

Constellation Energy Commodities Group, Inc. ("CCG"), by its attorneys, Karegianes&Field, LLC, pursuant to Section 10-101 of the Public Utilities Act ("PUA") and Section 200.800 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), hereby submits its Initial Brief with regard to the proposed tariffs defining a competitive supply procurement process ("Illinois Auction Proposal") filed by Commonwealth Edison Company ("ComEd") with the Commission on February 25, 2005.

## I. EXECUTIVE SUMMARY

CCG is a wholly-owned subsidiary of Constellation Energy Group, Inc., a Fortune 200 diversified energy company based in Baltimore, Maryland. CCG's focus is on wholesale power transactions with wholesale customers. A substantial portion of CCG's business involves providing wholesale full requirements electricity service to load serving entities and distribution utilities that provide standard offer service to their customers. CCG is a potential wholesale bidder in the Illinois auction. CCG suggested changes to ComEd's Illinois Auction Proposal, as evidenced in Mr. Smith's Direct and Rebuttal testimonies. (CCG Exhs 1.0 and 2.0). Those suggested changes address such matters as auction timing, the Commission's review of the auction results and the proposed form Supplier Forward Contract ("SFC). Despite the changes that CCG has suggested as part of this proceeding, CCG continues to fully support ComEd's Illinois Auction Proposal; the modifications that CCG has suggested, if approved, will improve the process proposed by ComEd.

## II. NEED FOR COMMISSION ACTION

The Illinois General Assembly enacted the *Electric Service Customer Choice and Rate Relief Law* in 1997 ("Restructuring Law"). Among other things, the Restructuring Law provided the utilities with the flexibility to reorganize their businesses, retire generating plants and transfer or sell assets during the mandatory transition period. (220 ILCS 5/16-111(g)). The mandatory transition period ends on January 1, 2007. ComEd either sold or transferred all of its generating assets during the mandatory transition period and, thus, has no generating assets. It currently has an agreement with Exelon Generation LLC ("ExGen") to purchase power at wholesale. That agreement will end at the conclusion of the mandatory transition period, January 1, 2007. (*See* ComEd Ex. 1.0, lines 140-142). After January 1, 2007, ComEd will have to purchase its power supply from the wholesale market.

In an effort to identify and address issues related to the post-transition period, including issues related to the procurement of power, the Commission sponsored the Post-2006 Initiative, a collaborative working group process with extensive representation from various stakeholder interests. At the conclusion of that process, the Staff of the Commission issued its report endorsing a vertical tranche, descending clock auction. (*See* The Post 2006 Initiative: Final Staff Report to the Commission (Dec. 2, 2004)). The tariffs that were filed by ComEd in this proceeding set forth a process for a vertical tranche, descending clock auction whereby ComEd would purchase via a transparent mechanism generation service at market prices to serve its bundled service customers.

ComEd has an on-going obligation under the PUA to provide "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." (220 ILCS 5/16-103(c)). Because ComEd does not own generating assets, in order for ComEd to meet its obligation to provide bundled service under the PUA, it will have to purchase power and energy at wholesale from a company or companies that own or control the output of generating assets, or otherwise have entitlements to wholesale power. It must also be able to recover its prudently and reasonably incurred costs for such purchases. (220 ILCS 5/1-102(a)(iv)). Under governing federal law, those rates are subject to the jurisdiction of the Federal Energy Regulatory Commmission ("FERC")[1] As noted above, ComEd no longer owns generating assets and the mandatory transition period will end on January 1, 2007. Therefore, there is a need for Commission action in advance of January 1, 2007, to ensure that a process is in place for ComEd to purchase power and energy in order to meet its service obligations to its customers under the PUA.

## III. LEGAL ISSUES

### A. Background: the Illinois Electric Service Customer Choice and Rate Relief Law of 1997

The Restructuring Law created a new regulatory structure that would promote a competitive wholesale and retail electric market in Illinois. (220 ILCS 5/16-101, *et seq*.). Recognizing that "[c]ompetitive forces are affecting the market for electricity as a result of recent federal regulatory and statutory changes and the activities of other states" and that "[a] competitive...market must benefit all Illinois citizens" (220 ILCS 5/16-101A(b), (d)), the Restructuring Law stated that the "Commission should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." (220 ILCS 5/16-101A(d)). In order to bring about the new regulatory structure, alternative electric retail suppliers ("ARES") were permitted

[1] Wholesale costs or rates are governed exclusively by FERC. *See Nantahala Power & Light Co. v. Thornburgh,* 476 U.S. 953, 963 (1986).

to compete with utilities, a mandatory transition period was established, residential rates were reduced by 20%, all rates were frozen for the duration of the mandatory transition period, and utilities were permitted to restructure their businesses and divest assets, including generating assets. The new structure also promoted the development of wholesale electric markets. According to the testimony of Mr. McNeil, there is approximately 12,000 MW of new generation that is independently owned since 1997. (ComEd Ex. 3.0, p. 7). While the restructuring continues to evolve, several issues will need to be resolved, including the issue of how utilities that no longer own generation will procure power and energy so that they can meet their obligations for tariffed service. The proposed tariffs, if approved, would address this issue.

## B. ICC Authority under Article IX and Article XVI to Approve the Filed Tariffs

### 1. Article XVI and Post Transition Rate Setting Authority

The Restructuring Law notes that "[l]ong standing regulatory relationships need to be altered to accommodate the competition that could fundamentally alter the structure of the electric services market." (220 ILCS 5/16-101A(b)). The two key provisions under the Restructuring Law that address the approval of rates after the mandatory transition period are Sections 16-112(a) and 16-111(i). First, Section 16-112(a) instructs the Commission on how to determine market rates. This, among other things, includes a determination in accordance with "a tariff that has been filed by the electric utility with the Commission pursuant to Article IX…and that provides for a determination of the market value for electric power and energy." (220 ILCS 5/16-112(a)). Second, Section 16-111(i) mandates that the Commission, in establishing tariffed rates and charges, is to consider "the then current or projected revenues, costs, investments and cost of capital directly or indirectly associated with the provision of such tariffed services." (220 ILCS 5/16-111(i)). This Section also mandates that "[i]n determining the justness and reasonableness of the electric power and energy component of an electric utility's rates for tariffed services…the Commission shall consider the extent to the which the electric utility's tariffed rates...exceed the market value determined under Section 16-112…." (220 ILCS 5/16-111(i)).

Article XVI authorizes the Commission to establish market value through various means and mandates that the Commission take into account the market value in considering the justness and reasonableness of the charges for the power and energy component of the tariffed service. ComEd filed its tariffs pursuant to Article XVI and Article IX (discussed below) for the provision of tariffed services. Those tariffs establish a process for procuring power and energy in the wholesale market through an auction. The auction, by definition and design, is a competitive process where various suppliers will bid to provide wholesale full requirements electricity service to ComEd. The results of the bidding process will establish the market value for providing electricity service at wholesale under Section 16-112(a) and would also be the prudently incurred costs to ComEd. Clearly, Sections 16-112(a) and 16-111(i) authorize the Commission to establish market value and to consider market value in establishing just and reasonable rates.

### 2. Article IX Rate Setting Authority

As previously noted, Section 16-103 requires ComEd to continue to offer bundled electric service to its customers consistent with the bundled service it provided in 1997. (220 ILCS 16-103(c)). ComEd filed its tariffs in order to recover its costs so that it can meet its obligation to continue to provide tariffed service as mandated by the PUA. In addition to Sections 16-112(a) and 16-111(i), discussed above, the tariffs filed by ComEd are subject to all of the Commission's general ratemaking authority in Article IX of the PUA. (220 ILCS 5/9-101 *et seq.*). For example, the procedure for the filing of tariffs, as set forth in Sec. 9-201(b), provides that the Commission is authorized to suspend tariffs and "upon reasonable notice, to enter upon a hearing concerning the propriety of such rate or other charge, classification, contract, practice, rule or regulation." Also, the period of suspension shall not exceed an initial 105 days and, at the Commission's discretion, the period of suspension can be extended for an additional six months. (220 ILCS 5/9-201(b)). The tariffs that were filed by ComEd were indeed suspended by the Commission, initially through July 24, 2005, and then through January 24, 2006. The case was set for hearing and the Commission has an 11 month statutory deadline within which to make a final determination on the tariffs that are before it.

The Commission, under Article IX, "shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed… which it shall find to be just and reasonable." (220 ILCS 5/9-201(c)). Accordingly, in setting rates the Commission must determine that the rates accurately reflect the cost of service delivery and must allow the utility to recover costs prudently and reasonably incurred. *Citizens Utility Board v. Illinois Commerce Commission,* 166 Ill. 2d 111 (1995). In this case, ComEd's tariffs set forth a mechanism whereby it will purchase power and energy through a competitive process in the wholesale market through an auction. As discussed above, the actual cost of service, in this case, is the market value that will be established through the auction process.

Under Article IX, the Commission has discretion setting rates. Generally, rates are set through base rates that attempt to recover a utility's costs by estimating the total revenues necessary to recover its operating costs plus a cost of investor capital. *Citizens Utility Board v. Illinois Commerce Commission,* 124 Ill. 2d 195, 200-01 (1988). In addition, the Commission has the authority to set rates through automatic cost recovery mechanisms. *See, e.g., City of Chicago v. Illinois Commerce Commission,* 13 Ill. 2d 607, 618 (1958) (affirming the Commission's discretionary authority under Article IX to allow rate recovery of utility's costs through a purchase gas adjustment clause, later codified at 220 ILCS 5/9-220); *Citizens Utility Board,* 166 Ill.2d at 139 (affirming recovery of expenditures related to coal tar clean up through a rider mechanism).

Taken together, the provisions under Article XVI and under Article IX authorize the Commission to approve the tariffs filed in the instant proceeding.

### C. Relationship of Illinois and Federal Law and Jurisdiction

#### 1. FERC Jurisdiction of Wholesale Power Rates and Costs

The Federal Energy Regulatory Commission ("FERC") regulates the sale of wholesale power in interstate commerce under Section 201 of the Federal Power Act, *16 U.S.C.S. § 824 et seq.,* and as a result, wholesale rates and costs are governed exclusively by the 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). Since ComEd no longer has generating facilities, the power that it needs in order to be able to supply electricity to its customers under tariffed service has to be purchased at wholesale. The terms of those purchases, including the rates and costs, are reflected in purchased power agreements that are subject to the FERC's jurisdiction. As FERC pointed out in *Central Vermont Public Service Corporation,* 84 FERC ¶61,194 (1998), "a state commission is preempted by federal law from reviewing the prudence of power purchases…and to permit such a review would interfere with the Commission's [FERC's] plenary authority over interstate wholesale rates." *Id.*

#### 2. FERC Authority of Wholesale Power Purchased Affiliates

FERC's regulation of wholesale sales of power includes transactions between affiliates. In fact, FERC has established more stringent criteria in instances that involve affiliate transactions. *See Boston Edison Co. Re: Edgar*

*Electric Company,* 55 FERC ¶61,382 (1991) ("*Edgar").* The *Edgar* standards set forth three methods for demonstrating lack of undue preference to an affiliate: (1) evidence of direct head-to-head competition between the affiliate and competing unaffiliated suppliers in a formal solicitation or informal negotiation process; (2) evidence of the prices that non-affiliated buyers were willing to pay for similar services from the affiliate; and, (3) benchmark evidence that shows the prices, terms, and conditions of sale made by non-affiliated sellers. FERC expanded the standards in *Allegheny Energy Supply Co., LLC,* 108 FERC ¶61,082 (2004). ("*Allegheny").*

Recently FERC found that he descending clock auction process approved by the New Jersey Board of Public Utilities met the *Edgar* and *Allegheny* standards in *Public Service Electric & Gas Company and PSEG Energy Resources & Trade LLC,* 111 FERC ¶61,152 (2005). In that case, FERC noted:

> [the] underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue preference during any stage of the process. The Commission indicated the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: transparency, definition, evaluation and oversight.…[T]he Commission finds that the New Jersey statewide bidding process is an example of a process that meets these guidelines.

*Id.*

The Illinois Auction Proposal is modeled after the New Jersey auction and, if approved, it too would pass muster under FERC's *Alleghany* and *Edgar* standards for transactions with affiliates.

### 3. The Auction is Consistent with Illinois and Federal Law and Policy

As discussed above on pages 4 and 5, the intent of the Restructuring Law is to promote competition and to be equitable to consumers. The process outlined by ComEd in its tariffs, if approved, will be a transparent process that will be administered by an independent auction manager and have Commission oversight. (ComEd Ex. 3.0, pp. 27-30, 60-61).

The benefits of competition would be brought to ComEd's customers through the competitive bidding and would further the goals of the Restructuring Law. Likewise, as discussed above, FERC regulates the sale of power at wholesale within the framework of the Federal Power Act and recently found that a statewide solicitation such as the auction in New Jersey meets even the more stringent standards established to protect against affiliate abuse as outlined in *Alleghany* and *Edgar.* Thus, the Illinois Auction Structure, if approved, would meet the goals of both the Illinois and Federal law and policy.

## D. Reference to Post-2006 Initiative Reports and Results Significance of the Initiative

CCG participated in the Commission's Post-2006 Initiative where more than 10 different proposals were fully vetted for the "procurement and pricing of full requirements electricity service for standard offer customers, including the Illinois Auction Structure proposed by ComEd in this case." (CCG Ex. 1.0, lines 53-57). The Commission's Post-2006 Initiative provided various stakeholders an opportunity to seriously and thoughtfully consider the various options being proposed, which led to the development of a list of 18 attributes of a successful procurement model. Those participating in the Post-2006 Initiative determined that the Illinois auction structure meets those attributes. (CCG Ex. 1.0, lines 64-68).

Thus, the Post-2006 Initiative, as a precursor to the instant proceeding, helped in the gathering and analysis of information on various procurement options. The significance of that information is that it helps develop a complete and thorough record in the instant proceeding, which in turn helps the Commission in formulating an informed decision.

## IV. SUFFICIENCY OF THE COMPETITIVE MARKET

### A. Markets' Relationship to Auction Process

As discussed in the testimony of CCG witness Smith, if ComEd's auction proposal is approved, there will be substantial participation by suppliers of electricity that will lead to a "robust competitive process". (CCG Ex. 1.0, lines 93-96). As Mr. Smith explained during cross-examination, his testimony is based on the participation of CCG in other competitive procurement processes that have occurred, especially in the eastern PJM market. Mr. Smith explained that potential bidders are interested in the product, know how to price it and that competition brings suppliers to the process. (Smith, Cross Tr., p. 751). As a result, the auction process will ensure that ComEd procures power and energy in "the most cost-effective manner." As Mr. Smith further noted, "there are always going to be…customers who do not or cannot go out to the market themselves and seek a competitive price. This [the auction] brings that product directly to them….and…it creates downward pressure on prices." (Smith, Cross Tr., p. 752).

If the auction process is approved, the robust participation by suppliers will lead to competitive market prices for the cost of power and energy and bring the benefits of competition to ComEd's customers.

### B. Other Jurisdictions' Experiences with Competitive Electricity Procurement

As noted earlier, ComEd's proposal is modeled after the New Jersey auction process. CCG has been providing wholesale full requirements electricity service to utilities in the States of Maine, Massachusetts, New Jersey and Maryland. In addition, CCG was active in the design of the procurement process in New Jersey. (CCG Ex. 1.0, lines 43-44). CCG urges the Commission to consider experiences of other jurisdictions that have an impact on suppliers willingness to participate in the procurement process and thus are key to bringing customer benefits. Those experiences relate to expedition and certainty. Specifically, the New Jersey Board of Public Utilities ("New Jersey BPU") and the Public Utilities of Ohio, reviewed and rendered auction results within two business days of completion of the auction. In addition, the New Jersey BPU focused its post auction review on mechanical aspects of the auction. It also considered whether there was "evidence of collusion, gaming or market anomalies that would call into question the competitiveness of the bidding process." (CCG Ex. 1.0, p. lines, 162-167).

CCG witness Smith, in his testimony, urges the Commission to consider rendering a decision on the auction results as expeditiously as possible and to consider making that determination within two business days rather than three as proposed. (CCG Ex. 1.0, lines 195-196). Also, Mr. Smith urges the Commission to adopt a post auction review that is similar in scope to that which the New Jersey BPU adopted in its Order.[2] (CCG Ex. 1.0, p. 6). As ComEd witness Mr. McNeil noted, experience in other jurisdictions, such as New Jersey, indicates that at the conclusion of the auction, prompt regulatory action leads to the best terms because there will be certainty in the results. (ComEd Ex. 3.0, lines 1362-1366).

CCG urges the Commission to consider the experiences of other jurisdictions in making its determination in the instant case.

## V. AUCTION DESIGN ISSUES

### F. Date of Initial Auction

ComEd is proposing that the auctions for both ComEd and Ameren be held simultaneously in September 2006. (CCG Ex. 2.0, lines 32-33). CCG witness Mr. Smith testified in his Direct testimony that a May auction would be better because it would provide "sufficient time, subsequent to the initial auction, for the utilities, winning suppliers and the Midwest ISO and PJM to ensure that all of the operational details associated with providing service…are in place." (CCG Ex. 1.0, lines 128-133). Notwithstanding its preference, CCG does not object to a simultaneous September auction, but prefers May. In addition, ComEd

[2] *See New Jersey BPU Docket No. E004040288,* 2/16/05, pp. 3-4, CCG Exhibit 1.1.

suggested it would be amenable to a July auction if that were Staff's preference. CCG does not object to a July auction, but it should be noted that it is its last preference. (CCG Ex. 2.0, lines 35-43).

## L. Regulatory Oversight and Review

### 1. Nature of Commission Review Before, During and After Auction

The structure of the auction process incorporates Commission involvement before, during and after the auction.

Before the auction, the Commission, within the framework of the PUA as argued above, is authorized to review ComEd's proposed tariffs through the hearing process that is currently under way. That process involves filing testimony, taking evidence, and filing briefs for the purpose of developing a full and complete record that would assist the Commission in evaluating the tariffs filed by ComEd. At the conclusion of this process, the Commission will presumably enter an order approving or modifying the proposed tariffs based on that record evidence. If the Commission approves ComEd's proposal, with or without modifications, there will be rules in place that will govern the auction and that will allow ComEd to recover its prudently incurred costs.

During the auction, ComEd's proposal calls for Commission oversight of the auction. The oversight would include a Commission review of the auction results based on a report from the Auction Advisor and Staff of the Commission. The Commission would have a certain period of time within which to decide whether to accept or reject the auction results. (McNeil Cross, Tr. p. 504).

After the auction, ComEd's proposal calls for annual workshops that would provide parties with an opportunity to discuss modifications to the auction process . . It also calls for a formal Commission proceeding every three years that would also provide an opportunity to modify and improve the auction process. (McNeil Cross, Tr. pp. 601-603). The Commission's authority under the PUA to examine the auction process by initiating a proceeding or by other mechanism permitted by law for the purpose of improving the auction process for future auctions is not diminished and the parties would continue to have the option of petitioning the Commission. (McNeil Cross, Tr. p. 603).

**2. Post Auction Commission Review of Results**

CCG has suggested that the Commission consider adopting a post auction review that is similar to the one adopted by the New Jersey BPU. (*See* the discussion above on page **XX.**) By defining the scope of the post auction review so that it focuses on ensuring that the Commission's approved auction process is followed and that no "anomalies were found in the bids or process that would call into question the competitiveness of the bids received," the potential bidders would have confidence that the auction will result in executed SFCs. (CCG Ex. 1.0, lines 145-149). This type of certainty would encourage suppliers to participate in the bidding process resulting in benefits to consumers. Therefore, CCG continues to urge the Commission to adopt a scope for its post auction review that is similar to that adopted by the New Jersey BPU.

## M. Supplier Forward Contracts

### 3. Proposed Clarifications and Modifications Accepted by ComEd

CCG made several suggestions requesting clarifications and modifications to the SFCs. ComEd accepted the following:

- ComEd accepted CCG's suggestion that Section 5.4.e be changed so that when multiple agreements are in existence between the parties, the Non-Defaulting Party as well as ComEd would calculate the termination payment. (ComEd Ex. 9.0, p. 30);

- ComEd accepted CCG's suggestion that Section 5.4.e be changed so that when there is termination of one SFC between ComEd and a supplier because of default, that all SFCs between the same two parties be terminated (ComEd Ex. 9.0, p. 30);

- ComEd accepted CCG's suggestion that Section 15.13 be modified requiring parties to provide copies of any applicable tax exemption certificates. (ComEd Ex. 9.0 p. 30);

- CCG suggested that the second paragraph of Section 13.2 of the form SFC be modified in order to remove what appears to be an inconsistency in that it is not clear as to whether ComEd or the CCP supplier will be responsible for "changes in charges associated with delivery service or NITS… This inconsistency could lead to disputes between ComEd and a CPP Supplier as to whether changes in charges or requirements downstream of the Delivery Point are borne by ComEd or the Supplier." (CCG Ex. 1.0, p. 10). ComEd indicated that it is not opposed to clarifying that language. (ComEd Corrected Ex. 17.0, lines 765-768).

### 4. Proposed Clarifications and Modifications Not Accepted by ComEd

ComEd did not accept one of the three suggested modifications made by CCG.

- CCG suggested that Section 15.13 of the form SFC be modified to include language that would incorporate a mechanism for the Commission to determine whether any new taxes that may be imposed on suppliers should ultimately be borne by ratepayers.

> The language proposed by CCG is the same language as in the New Jersey BGS Supplier Master Agreement. (CCG Ex. 1.0, p. 9).

This language is intended to provide a mechanism for the Commission to review any new tax that could be imposed on a supplier and determine whether that tax should be passed on to customers. It's a matter of risk allocation for suppliers; adding this language to the SFC will provide suppliers with a measure of comfort that they may not bear unknown tax liabilities. The imposition of such a tax on suppliers is a real possibility: as Mr. Smith noted during cross-examination, for instance, "there's a new commercial-activity tax in Ohio that could land – and it's still being analyzed – on a wholesale supplier of electricity." (Smith Cross Tr. p. 753). To the degree that a new tax could potentially be imposed on wholesale suppliers, there should be a mechanism to address it.

## VII. TARIFF AND RATE DESIGN ISSUES

### B. Matters Concerning Rider CPP

#### 4. Rider CPP - Retail Customer Switching Rules

##### a. Enrollment Window

###### 1. Duration of Window

CCG's observation in its testimony with regard to the duration of an enrollment window is that since the CPP-A customer will have a period of time within which "to choose to take the CPP-A service…it is likely that the generation supply rates for CPP-A customers will be higher as suppliers will likely price an auction premium into their bids to account for this optionality." (CCG Ex. 1.0, lines 84-89). It should be noted that CCG does not take a position as to the duration of the enrollment window and only makes an observation that the duration could impact price.

### D. Additional Tariff and Rate Design Issues

#### 1. Staff's Rate Increase Mitigation Proposal

As CCG understands it, Staff proposed (Staff Ex. 6.0) a "mitigation plan" wherein after the auction and after the delivery service rate case, if the retail rate increased by more than a certain threshold percentage for any customer in the Blended Segment supply group, then the retail rate of that group would be reduced to the threshold amount. The retail rates of all of the other Blended Segment customers would then be increased in order to meet ComEd's revenue requirements. (Staff Ex. 6.0, pp. 19-21). CCG's concern about the proposed mitigation plan is its potential impact on the migration analysis. In preparing their bids, suppliers assess the risk of migration from bundled service to competitive supply and from competitive supply to bundled service and account for that risk in their prices. Since there will be uncertainty as to the mitigation plan until after the auction, the migration analysis cannot be completed before the auction. This adds an additional level of uncertainty which cannot accurately be modeled before the auction and thus adds an additional risk premium. (CCG Ex. 2.0, pp. 4-5).

In addition, CCG believes that there is no need to have a plan to artificially "mitigate" the bundled rates of customers after completion of the auction or to soften the impact of any potential "rate shock." The Illinois Auction Proposal is designed to generally ensure that the proper price signal is developed through the competitive bidding. (*See discussion,* CCG Ex. 2.0 pp. 5-6). The resulting rates would therefore be the "actual operating electricity market as it exists at the time of the auction." (CCG Ex. 2.0, lines 163-164).

Nevertheless, should the Commission approve a rate mitigation plan, then CCG requests that the Commission hold the following principles inviolate: First, the mitigation plan cannot impact the generation prices. All winning bidders must be paid the auction clearing price applicable to the tranches they are selected to provide. (CCG ex. 2.0, lines 182-184).

As discussed earlier, the FERC has exclusive jurisdiction over wholesale costs or rates and therefore the Commission cannot revise the rates agreed to by wholesale suppliers without being in violation of federal law. (*See Nantahala Power & Light Co. v. Thornburgh,* 476 U.S. 953, 963 (1986). In addition, if there is any risk that suppliers will not be paid the auction clearing price, it is very likely that they will decline to participate in the auction. (CCG Ex. 2.0, lines 185-187). Also, any mitigation plan should not create uncertainty for potential and actual bidding suppliers. Uncertainty increases risk which tends to increase prices. "Any mitigation plan should thus operate in such a way that the full retail prices of affected bundled customers can be calculated for various auction generation price results—i.e. the "rate prism" is established and fixed—prior to the commencement of the auction and such prices will not change after completion of the auction." (CCG Ex. 2.0, lines 187-192).

## CONCLUSION

Constellation Energy Commodities Group, Inc., is involved in this proceeding because it fully supports the Illinois Auction Process. It provides wholesale full requirements electricity service to a number of entities, including distribution utilities and has been active in offering that service in Maine, Massachusetts, New Jersey and Maryland and it is a potential bidder in the Illinois Auction Process.

The Illinois Auction Proposal is designed to produce market rates through a competitive auction process that would in turn bring the benefits of competition to ComEd's customers.

Constellation Energy Commodities Group, Inc., urges the Commission to approve the proposed tariffs filed in this docket and also suggests that the proposed tariffs be revised to: Define the scope of the post auction review similar to the way the New Jersey Board of Public Utilities defines its post auction review; and, make a final determination on the auction results within two business days of the auction being completed as does the New Jersey Board of Public Utilities. Constellation Energy Commodities Group, Inc., also suggests that the Commission direct ComEd to revise the form Supplier Forward Contract to include a paragraph in Section 15. 13 which would establish a mechanism for addressing cost recovery of any new taxes that may be imposed on suppliers. Finally, consistent with Constellation Energy Commodities Group, Inc.'s comments herein, to the extent the Commission approves a rate mitigation plan, such a plan must not impact the prices paid to auction participants and such a plan should not add additional uncertainty into the auction process.

**WHEREFORE,** Constellation Energy Commodities Group, Inc., respectfully requests that the Commission enter an order consistent with the recommendations outlined herein.

Respectfully submitted,

**CONSTELLATION ENERGY COMMODITIES GROUP, INC.**

By: /s/Myra Karegianes
One of its Attorneys

Myra Karegianes
Karegianes&Field, LLC
208 South LaSalle Street
Suite 688
Chicago, IL 60604