

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

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

**INITIAL POST-HEARING BRIEF**  
**OF COMMONWEALTH EDISON COMPANY**

October 7, 2005

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Commonwealth Edison Company (“ComEd”), by and through its attorneys, and pursuant to the Commission’s Rules of Practice and the direction of the Administrative Law Judge, submits this Initial Post-Hearing Brief.

## **I. Executive Summary**

With the enactment of the landmark 1997 restructuring legislation, the General Assembly recognized that federal and state regulatory changes had unleashed competitive forces that were affecting the market for electricity. It found that lower costs would follow from retail and wholesale competition and that the Commission should not only accommodate the progress toward competition, but should act affirmatively to promote it. (220 ILCS 5/16-101A). The Commission heeded that direction in the ensuing years, overseeing the entry of qualified competitive suppliers to serve customers in the Illinois retail market, facilitating wholesale competition through utility restructuring and divestiture of generating assets, and complying with the statutory direction to promote the development of competitive markets.

The 1997 Law and the changes it brought about have been a resounding success. They have saved residential customers statewide more than three billion dollars, significantly reduced the cost of service for industrial and commercial customers switching to new retail suppliers, encouraged construction by private investors of over 9,000 MWs of new generation in ComEd’s service territory alone, and shifted generating plant operational risks formerly borne by customers to private investors. The structure of the electricity market today is fundamentally altered, as the General Assembly anticipated it would be. ComEd has divested its fossil and nuclear generation assets, as have the various Illinois utilities now owned by Ameren Corporation. As the Commission has advised Illinois Governor Blagojevich, this means that

“the State’s largest electric utilities that no longer own generation must procure power in the wholesale market.” (ComEd Exhibit (“Ex.”) 1.1, 2).

This case is the next major step in the journey toward an effectively competitive electricity market that began with the 1997 legislation. While ComEd must procure power for its customers in the wholesale market, there are alternative approaches that can be pursued. This proceeding presents the Commission with the opportunity to review the procurement process that has emerged from lengthy study and debate as the best means to acquire supply for customers at the lowest possible prices.

The choice of this method — a vertical tranche auction patterned after the successful process used in the restructured New Jersey electric marketplace — is a direct result of an initiative launched by the Commission last year to consider alternative procurement processes. The Post 2006 Initiative was a collaborative effort in which all stakeholders could participate. It involved an extensive series of presentations, seminars, and workshops over many months, bringing a broad group of more than fifty participants together, including representatives of all classes of customers, competitive retail suppliers, generators, other wholesale power sellers, labor, environmental interests, utilities, and state and municipal governments. (ComEd Ex. 1.1, 2). The Initiative analyzed twelve acquisition approaches, identified the advantages and disadvantages of each alternative and reached a consensus on eighteen attributes that the ideal procurement process should have. Significantly, the consensus characteristics adhere to the course that the General Assembly charted in 1997, emphasizing that the process should allow competitive procurement, should result in rates for customers based on the market, and should facilitate and encourage supplier participation of all types in the wholesale market.

At the end of the Post 2006 Initiative, the Commission's Staff issued a Final Report weighing all of the considerations that had been explored and concluding that "[l]arge Illinois utilities that do not own significant generation resources should be encouraged to procure their electricity via a vertical tranche auction..." (ComEd Ex. 1.2, 18). ComEd has followed this direction and has proposed a vertical tranche auction to acquire supply for customers beginning on January 1, 2007. In designing the process and working out innumerable details, ComEd has sought advice from the best qualified experts, including Dr. Chantale LaCasse, who has served as Auction Manager for the successful New Jersey basic generation services auctions through four annual procurement cycles. Throughout this proceeding, ComEd has welcomed suggestions to improve the proposed process and to address concerns that the parties may have, incorporating many revisions in response to comments from the Commission's Staff and other witnesses.

The final product that is now before the Commission enjoys widespread support, not only from Staff, whose expert witness described it as "an efficient mechanism for procuring supply to serve ComEd's load at the best possible cost," (Salant Direct ("Dir."), ICC Staff Exhibit ("Staff Ex.") 1.0, 5:115-116), but also from the majority of the other parties who have participated in this proceeding. The proposal is opposed only by the Attorney General, CUB, and the Cook County States Attorney, and even an expert testifying in support of their position acknowledged that a genuinely competitive process implemented properly would put downward pressure on prices. (Salgo, Transcript ("Tr.") 731).

ComEd would much prefer to proceed with the unanimous support of all parties and, toward that end, has endeavored to elicit and address constructive recommendations from the few opponents of the vertical tranche auction process. However, the Attorney General, CUB and Cook County have not cooperated with that effort, and have made no specific alternative

proposal that could be evaluated by the Commission for possible implementation. Instead, they have dwelled in this proceeding and in other settings on superficial financial analysis and speculation about the costs presently being incurred by Exelon Generation to operate the nuclear power plants formerly owned by ComEd, suggesting that their views on that subject have something to do with the decision facing the Commission in this proceeding. The unequivocal answer is that they do not.

ComEd does not own any nuclear power plants and the costs incurred by those who do are beyond the jurisdiction of the Commission, are not subject to review here, and can play no role in the decision that is reached. That is true as a matter of federal and state law, and it is consistent with the goals of the Restructuring Law, which sought to provide customers with the benefits of competition, rather than continuing to expose them to the operational risks of the generation business, which had proven so costly in the past.

The Federal Energy Regulatory Commission (“FERC”) has exclusive jurisdiction over wholesale power transactions, and the FERC’s authority preempts state regulation of wholesale energy prices or the costs incurred by generating companies, such as Exelon Generation, that sell energy at wholesale. To the extent that the Attorney General, CUB, or Cook County seek to have the Commission examine and consider the costs of Exelon Generation, their effort conflicts with federal law.

Any attempt to divert attention from the issues properly considered here by criticizing and second guessing the decision to transfer ComEd’s nuclear plants to Exelon Generation also violates the specific provisions of the 1997 restructuring law under which the Commission authorized the divestiture. The law established criteria for the Commission’s review of transfers of generating assets and those criteria were applied in ICC Dockets 00-0230 and 00-0244

(Consol.). The Commission received testimony demonstrating that ComEd's continued ownership of the nuclear plants posed unique costs and risks to ComEd and its customers. (*See, e.g.,* ComEd (Group) Ex. 17.1, Supplemental Direct Testimony of Robert McDonald, ICC Docket Nos. 00-0230 and 00-0244 (Consol.), lines 76-151). After considering the record and the applicable standard of review established by the Act, the Commission approved the transfer and the Illinois Appellate Court affirmed that result.

The transfer of ComEd's nuclear assets to Exelon Generation has been approved by the Commission and the courts. It is not subject to further review in this proceeding. The 1997 Restructuring Law makes that clear, providing that a transaction authorized by the Commission "shall not in any subsequent proceeding or otherwise" be reviewed by the Commission. 220 ILCS 5/16-111(g). There is simply no question that efforts to turn back the clock and revisit past transactions approved by the Commission or speculate about costs that might have been incurred if ComEd still owned generating assets are not permissible in this case.

The direction from the 1997 Law and the goal of the vast majority of the parties to this proceeding is and has been to proceed on the path toward competitive procurement. That should be the Commission's focus as it reviews the overwhelming evidence that the vertical tranche auction proposed by ComEd is the best means of obtaining the lowest available prices for customers. As Dr. Phillip O'Connor, former Chairman of the Commission, testified, the auction process will benefit residential customers greatly, producing "intense competition at the wholesale level through a transparent mechanism for the opportunity to serve their load." (O'Connor, Tr. 200). No better method of procuring supply has been identified in the lengthy Post 2006 Initiative sponsored by the Commission, in studies by qualified experts with experience in this area, or in the testimony of any of the witnesses in this proceeding.

## **II. Need for Commission Action**

The record before the Commission is lengthy and reflects an exhaustive analysis of the issues for decision. The remainder of this Initial Post-Hearing Brief reviews the features of the auction process, the authority of the Commission to approve the filed tariffs implementing it, the improvements that have been incorporated as a result of suggestions from the parties, the questions that have been raised and the ways in which they have been resolved.<sup>1</sup> The Commission has before it everything that is necessary to conclude that the auction proposal is just and reasonable and that ComEd acted prudently in proposing it as a means of acquiring the electricity necessary to serve its retail customers. In the interests of customers and all parties, ComEd urges the Commission to approve ComEd's tariffs so that plans for securing reliable supply and reasonable and stable prices in the post transition period can proceed in accordance with the Act.

## **III. Legal Issues.**

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

In 1997, the General Assembly radically transformed the electric services industry in Illinois through the Illinois Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILCS 5/16-101 *et seq.* (the "1997 Law"). The 1997 Law brought about immediate and substantial benefits for consumers, including the largest guaranteed residential rate reductions in the country. ComEd was required to reduce its residential rates by 20%. In addition, tariffed electricity rates for traditional bundled customers have been frozen — for residential customers, at the reduced level — for almost a decade, from 1997 through 2006. This rate reduction and

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<sup>1</sup> In its surrebuttal testimony, ComEd committed to provide a list of changes to the auction process and tariffs that have been made to address suggestions from other parties. (Juracek Sur., ComEd Ex. 17.0, 22:502-504). A copy of the list is attached to this brief as Attachment 1.

freeze has saved residential and other customers three billion dollars statewide. (Clark Dir., ComEd Ex. 1.0, 5:118-6:130).

The 1997 Law also recognized 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.” 220 ILCS 5/16-101A(b). As a result of these changes, the Law provided 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.” *Id.*

As part of the transition to competitive markets for electricity in Illinois, the 1997 Law specifically authorized electric utilities to reorganize their businesses and to divest generation assets (the plants that generate electricity) with defined, but limited, Commission oversight of those transactions. *Id.*, § 16-111(g) (authorizing a utility to “implement a reorganization” and to “sell, assign, lease or otherwise transfer assets to an affiliated or unaffiliated entity”). While providing for Commission review, the General Assembly expressly chose to authorize Commission disapproval of such asset divestiture only if the agency found that the transaction would render the utility unable to provide safe and reliable service, or would result in a strong likelihood that the utility could seek a base rate increase during the mandatory transition period. 220 ILCS 5/16-111(g)(4).

With regard to the divestitures allowed by the statute, the 1997 Law further provides that, once the Commission approves a utility’s sale or transfer of its generation assets, “[t]he Commission shall not in any subsequent proceeding or otherwise, review such a reorganization or other transaction authorized by this Section.” *Id.* Rather, Section 16-111(i) explicitly directs that, after the mandatory transition period, “the Commission, in any proceeding to establish rates and charges for tariffed services offered by an electric utility, shall consider only ... the then

current or projected revenues, costs, investments and cost of capital directly or indirectly associated with the provision of such tariffed services ....” *Id.*, § 16-111(i) (emphasis added).

Although the 1997 Law encouraged the separation of the electric generation function from the distribution function, it requires a distribution company like ComEd to continue to provide “bundled” electric service to customers who do not yet have sufficient choice in their retail provider of electricity. Thus, in order to meet its ongoing mandatory service obligations, ComEd now must acquire the energy needed to serve customers from generation companies in the market.

Whether a utility generates power or purchases it, the costs incurred must be reasonable and prudent. And whether rates ultimately are lower based on the reasonable and prudent costs of acquiring power at market prices, or based on the reasonable and prudent costs of operating self-owned generation facilities, depends on a host of changing factors and market conditions. The virtually universal assumption that existed in 1997 and that remains widely held today, however, is that rates based on market prices will over time be lower than rates based on the captive costs of a utility’s operation of its own generation assets.

This assumption is reflected in the 1997 Law itself, which created strong incentives for such divestitures. Section 16-111(i) of the Law provides that, after the statute’s “transition period,” and before a tariffed service is declared “competitive,” the Commission “may establish” a utility’s charges for the electric power and energy component of tariffed services “at a rate equal to the market value [for such electric power and energy] plus 10%.” 220 ILCS 5/16-111(i). This provision puts a utility at risk of being limited to recovering no more than market value plus 10%, no matter how efficient or prudent the utility’s operation of its own generation assets might be.

In accordance with the explicit statutory grant of authority in Section 16-111(g), ComEd has fully divested its generation assets, selling some and transferring others to an affiliated entity. As the Commission explicitly recognized in approving these divestitures, it was fully understood that as a result of the divestitures, “subsequent to 2006, [ComEd] would obtain all of its supply from market forces.” *In re Commonwealth Edison Co., Proceeding Pursuant to Section 16-111(g)*, 2000 Ill. PUC LEXIS 667 at \*6 (Aug. 17, 2000). In sum, in order to meet its ongoing mandatory service obligations, *see* 220 ILCS 5/16-103, ComEd now must purchase the electricity needed to serve its customers, and it has been understood since the time ComEd divested its generation assets that, beginning in 2007, ComEd would purchase that electricity at prices determined by market forces.

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

**1. The Regulatory Framework in Illinois Regarding Utility Costs.**

Despite the significant transformation of the electric services industry in Illinois brought about by the 1997 Law, ComEd remains subject to ongoing mandatory service requirements, *see* 220 ILCS 5/16-103, and the essential principles of Illinois law governing ComEd’s rates for those mandatory service obligations have remained unchanged for almost 100 years.

Pursuant to long-settled statutory authority, an electric utility is entitled to recover its prudently incurred costs. The General Assembly expressed its intent in the Public Utilities Act (the “Act”) that utility service prices “accurately reflect the long-term cost of such services” and 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. Consistent with this expression of legislative intent, Article IX of

the Act requires that utility rates be “just and reasonable.” 220 ILCS 5/9-101. This requirement, which “has remained unchanged since the [Public Utilities Act] of 1913,” means that rates “should be sufficient to provide for operating expenses, depreciation, reserves ... and a reasonable return to the investor.” *Illinois Bell Tel. Co. v. ICC*, 414 Ill. 275, 286-88 (1953). Rates “must allow the utility to recover costs prudently and reasonably incurred.” *Citizens Util. Bd. v. ICC*, 166 Ill. 2d 111, 121 (1995).

As explained above, as expressly authorized by the 1997 Law, ComEd has divested its electric generating facilities. As a result, the make-up of the company’s costs has changed. The cost of the energy supplied to customers no longer reflects ComEd’s historical and current operating costs of maintaining its own generating facilities but, instead, reflects the cost of purchasing this energy in wholesale power transactions. Although the method of obtaining power is now different, the same statutory principles apply: a public utility like ComEd is entitled to recover the actual, out-of-pocket costs it reasonably and prudently incurs to supply electricity to its customers. Simply put, ComEd cannot be forced to purchase electricity at one price, and then to sell the electricity to its customers at a lower price, thereby forcing ComEd to operate at a loss.

Indeed, if the Act did not authorize recovery of costs that ComEd necessarily must incur — including, now, wholesale electricity acquisition costs — 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).

## 2. ICC Authority Under Article IX.

Under long-standing regulatory principles, the Commission has authority to approve the mechanism by which ComEd will incur, and recover, the actual costs the utility must incur to fulfill its mandatory service obligations. Moreover, there is nothing in the Act that prohibits the Commission from establishing that mechanism in advance, as it previously has done in analogous situations. The Act requires the Commission to ensure that rates are just and reasonable. 220 ILCS 5/9-101. But 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 (1958).

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.<sup>2</sup> In upholding this rate setting 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

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<sup>2</sup> 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.

cents,” as is done in a general ratemaking case. *Id.* The Court found it sufficient that the Commission retained its power to initiate a proceeding to investigate the reasonableness of the utility’s rates — a statutory power that remains intact under Rider CPP-Competitive Procurement Process (“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 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 the control of the utility. *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”).<sup>3</sup>

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<sup>3</sup> 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).

Rider CPP establishes a competitive auction procurement mechanism by which ComEd prudently may incur the costs associated with its wholesale power purchases and allows ComEd to recover those costs without any markup to consumers. The appropriateness of the details of that mechanism are addressed in the following sections of this brief. What is significant to the issue of authority, however, is that the proposed procurement mechanism is beyond the control of the utility and fully monitored by the Commission. *See* CPP Rider Original Sheet Nos. 254-57, 266-68 (Feb. 25, 2005). Once the auction is completed, an independent auction manager must submit a formal report to the Commission summarizing what occurred at the auction. *Id.* The Commission's Staff 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 rates will be set by pre-determined formula based on the auction results. *Id.* at Sheet Nos. 275-94. The Commission also retains its authority to initiate an investigation into the rate at any time and any aggrieved party may file a complaint if the rate is unjust and unreasonable. 220 ILCS 5/9-250. For all these reasons, the cost recovery mechanism in Rider CPP is fully consistent with the principles set forth by the Illinois Supreme Court in *City of Chicago* and related cases, and is within the Commission's authority to approve under Article IX of the Act.

### **3. ICC Authority Under Article XVI.**

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) of the Act. 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 Law, 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.

Rider CPP plainly comports with the specific authorization provided by Sections 16-111(i) and 16-112(a) to base rates for the electric power and energy component of tariffed service on the market value of that energy. “Market value” as used in Section 16-111(i) is defined in Section 16-112. Significantly, Section 16-112 broadly establishes that the Commission may determine “market value” pursuant to a “tariff 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.” 220 ILCS 5/16-112(a) (emphasis added). As one would expect, a competitive auction process fits squarely within the statutory criteria for establishing the “market value” for electric power and energy under Section 16-112(a).<sup>4</sup> The Attorney General and others have ignored this critical provision.

Although Section 16-112(a) allows “market value” to be determined by various surrogate measures or proxies (such as through use of index measures), the procurement method at issue in Rider CPP produces a much more immediate and precise assessment of market value. It would be illogical for the statute to authorize the use of a generalized proxy for market value but prohibit the most objective, fair and classic determinant of market value — a competitive auction. One “should start with the assumption that the legislature intended to enact an effective law” and should “interpret [a] statute ... as to give it efficient operation and effect as a whole.” *Pliakos v. Ill. Liquor Control Comm’n*, 11 Ill. 2d 456, 460 (1957); *see also Village of Lake Villa v. Branley*, 348 Ill. App.3d 280, 284 (2d Dist. 2004) (“The primary purpose of statutory construction is to determine and give effect to the legislature’s intent, while presuming the legislature did not intend to create absurd, inconvenient, or unjust results.”). And in doing so, one should not strain to impose a narrow, unduly literal interpretation never intended by the legislature. *City of Champaign v. Hill*, 29 Ill. App. 2d 429, 444 (3d Dist. 1961); *Krome v.*

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<sup>4</sup> By definition, an auction defines a “market.” An “auction market” is “[a]n organized market in which prices adjust continuously in respect to shifts in supply and demand.” MIT Dictionary of Modern Economics, at 20 (4th ed. 1992). It is, in fact, “the text-book model for competitive supply.” *Id.* Moreover, the contracts resulting from the auction are precisely “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.” 220 ILCS 5/16-112(a). Where, as under Rider CPP, the utility divides its actual bundled retail electricity load obligation into discrete segments, and the lowest bidder for a given segment is selected for the contract, Rider CPP at Sheet Nos. 250-54, 257, the resulting supply contracts could not be more directly “applicable” to the utility’s retail market.

*Halbert*, 263 Ill. 172 (1914); *California v. United States*, 320 U.S. 577, 585 (1944).<sup>5</sup> For these reasons, Rider CPP is independently authorized by the provisions of Article XVI.

**4. Rider CPP Is Not Prohibited by Section 16-103(c).**

**a. The Attorney General’s Section 16-103(c) Argument has Already been Correctly Rejected.**

Certain parties, including the AG, have contended that Rider CPP is prohibited by Section 16-103(c) of the Act. These arguments already have been rejected by Judge Wallace in a detailed and careful decision affirmed by the Commission when it denied a petition for interlocutory review.

The entire thrust of the argument made by the parties relying on Section 16-103(c) 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.” 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), these parties 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. The parties’ argument confuses retail and wholesale markets. The auction proposal is a wholesale auction, whereby ComEd will purchase electric energy at wholesale from

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<sup>5</sup> The Commission has stated in another context that the market value in Section 16-112 is a retail market value, *see In re Commonwealth Edison Co.*, 2001 Ill. PUC LEXIS 419, at \*418 (Ill. Commerce Comm’n Apr. 11, 2001), because full requirements power and energy is that required to meet retail load and it also has recognized that “the wholesale market ... appears to offer the best source of data currently available.” *Id.* at \*419-20. For purposes of the “market value” measure of the “electric power and energy component” of tariffed rates in Section 16-111(i), which explicitly applies “prior to the time that the provision of such electric power and energy is declared competitive,” 220 ILCS 5/16-111(i), the wholesale market value of the full requirements product is the best source of data available.

third party suppliers to serve its retail load. It is not a retail auction. ComEd will be charging its retail customers its actual costs of procuring power at wholesale. ComEd will not be charging its retail customers market-based rates. Thus, these parties 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 parties now advancing the Section 16-103(c) argument, 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). Thus, the parties relying on Section 16-103(c) now ask the Commission to declare unlawful precisely what the Procurement Working Group recommended to the Commission as consensus items. *Id.*

Judge Wallace correctly concluded that these parties' bold request is unsupported by the text of Section 16-103(c), which 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, Judge Wallace ruled 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 of June 1, 2005 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.* Judge Wallace 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.*, Judge Wallace 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 properly 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.*

Judge Wallace observed that the argument made in support of the motion to dismiss 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), Judge Wallace 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 of June 1, 2005 at 7.

Judge Wallace noted that “formula-based rate mechanisms” have been approved by the Commission and courts. *Id.* at 7-8. He 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.* at 7; *see also id.* at 8.

**b. The Attorney General’s Construction of Section 16-103(c) is Contrary to the Language and Purpose of the Statute.**

Judge Wallace’s conclusions concerning Section 16-103(c) are mandated by the language and purpose of the statute and accord with other provisions of the Act. 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.

To put Section 16-103 in context, the provision is captioned, and defines, the “[s]ervice obligations of electric utilities.” 220 ILCS 5/16-103. Subsection 16-103(a) provides that until a tariffed service is declared “competitive” pursuant to Section 16-113 — meaning that until the Commission determines that a customer segment or group can obtain equivalent electric service “from one or more providers other than the electric utility,” 220 ILCS 5/16-113 — an electric utility remains obligated to provide tariffed retail services to that customer segment or group. 220 ILCS 5/16-103(a). However, once a tariffed service is declared “competitive,” a utility generally can choose not to provide service at all or can provide unregulated service, priced any way it wants. 220 ILCS 5/16-113(b), 16-119. That of course is the point of bringing competition to formerly regulated retail markets.

Subsection 16-103(c), however, sets forth a limited exception to this rule for smaller customers. The section begins by declaring that “[n]otwithstanding any other provision of this Article” — meaning notwithstanding the provisions of Sections 16-103(a) and 16-113 described above — “each electric utility shall continue offering to all residential customers and to all small commercial retail customers” bundled electric service indefinitely, even if the service is declared

competitive. 220 ILCS 5/16-103(c) (emphasis added). Section 16-103(c) then continues by defining how, when service to these smaller customers becomes “competitive,” the still-ongoing mandatory service obligation shall be priced, providing that pricing shall be at “at rates which reflect recovery of all cost components for providing the service.” Finally, Section 16-103(c) concludes by defining “cost” in this setting, stating that “[f]or those components of the service which have been declared competitive, cost shall be the market based prices.” *Id.* (emphasis added). “Market based prices” as referred to in Section 16-103(c) means either as provided for in Section 16-112, or the utility’s “cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process.” *Id.*

The import and purpose of Section 16-103(c) is that the General Assembly determined in the 1997 Law that “residential” and “small commercial retail” customers — unlike all other customers — should be entitled to remain with their existing public utility, even after their service is declared competitive. Thus, these small customers would never be “forced into the market” and could continue to receive their electric service from their existing public utility as they had done before the 1997 Law. However, the General Assembly made sure that the utility could not take advantage of small customers who, through inertia or otherwise, chose to remain with their existing utility. Thus, the General Assembly provided that, once a service is declared competitive, these small customers who remain with the utility are entitled to rates based on costs determined by market forces. Even if the utility’s actual costs prove to be higher (as might happen, for instance, if the utility had chosen to retain its own generation facilities and those facilities had proved to be higher-cost facilities), the utility is limited to charging these small customers rates based on costs determined by market forces.

Thus, Section 16-103(c) is an exception that applies for limited customer groups when a service is declared competitive, and it defines how a utility shall obtain “recovery of all cost components” at and after that time. Section 16-103(c) says nothing about the situation here, where all parties agree that the relevant customer classes have not yet been declared competitive. *See* Compl. ¶¶ 1, 2, 13, 14. Critically, the fact that “cost” must be based on market prices when a service for certain small customer groups is declared competitive does not mean that “cost” cannot ever be based on market prices at any other time. The Attorney General effectively rewrites the statute as if it read that “cost shall be the market based prices only for any service that has been declared competitive.” But the word only nowhere appears in, and cannot be glossed onto, the provision. Absent an ambiguity, a statute must 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). Section 16-103(c) is inapposite: it addresses pricing for residential and small commercial customer classes that have been declared competitive. ComEd’s tariff does not purport to apply to such a situation.

**c. The Attorney General’s Interpretation of Section 16-103(c) Would Lead to Absurd Results and Would Render Other Provisions of the Act Superfluous.**

The Attorney General’s interpretation of Section 16-103(c) would also violate other settled canons of statutory construction. First, it would lead to absurd results. Many costs — from poles to wires — are prudently incurred precisely because they are incurred at market prices. It would be illogical to read into the statute a prohibition that until a service is declared

competitive, a utility's recoverable costs cannot be based on competitive, arms-length transactions or market prices that define the utility's actual costs. Because ComEd no longer owns generation assets, it necessarily must acquire wholesale electricity in the market, at prices subject to FERC regulation. That is why it is correct that "market-based prices and cost-based rates are not mutually exclusive concepts." 05-0159 ALJ Decision of June 1, 2005 at 6; *see also id.* at 7.

Put another way, 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 utilities owned and operated their own generation facilities. Moreover, under this view, a utility that has no generation assets and necessarily must acquire power in the market would be prohibited from recovering its costs. Such absurd results are to be avoided in statutory construction. *See, e.g., Chatham Foot Specialists, P.C. v. Health Care Servs. Corp.*, 2005 Ill. LEXIS 965, \* 50 (Sept. 22, 2005) ("We will not interpret a statute so as to achieve an absurd result."); *People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 280 (2003) ("In construing a statute, we presume that the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience or injustice.").<sup>6</sup>

It is also significant that, contrary to the implication in the Attorney General's argument, ComEd does not propose to charge a retail "market-based rate" for its utility services based on

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<sup>6</sup> Such a construction would also raise constitutional concerns, *see supra* at 24–26 (discussing constitutional law concerning utility cost recovery), and statutes are to be construed so as to avoid obvious constitutional problems. *Eden Retirement Center, Inc. v. Dep't of Revenue*, 213 Ill. 2d 273, 281 (2004); *Methodist Old People's Home v. Korzen*, 39 Ill. 2d 149, 156 (1968).

the potential competitive offerings of other retail suppliers. That indeed would be inappropriate for any customer class before a service is declared “competitive” under Section 16-113. Rather, ComEd seeks to recover its actual costs, which happen here — as often is the case — to be incurred at market-based prices in the various wholesale markets in which ComEd must purchase electricity.

Second, the Attorney General’s view contravenes another cardinal principle of statutory interpretation, namely, that a “statute should be evaluated as a whole” and that “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). “[I]f possible,” “no term [should be] rendered superfluous or meaningless.” *Texas-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill.2d 262, 270 (1998). The Attorney General contends that, before a service is declared competitive, rates cannot be based on the market value of electric power and energy. However, as explained above, *see supra* at 7-8, 13 *et seq.*, Section 16-111(i) explicitly provides that, before a service is declared competitive, the Commission must consider the market value of electricity in setting rates. To ignore Section 16-111(i) as the Attorney General does would impermissibly render that provision meaningless.

Therefore, for all these reasons, 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.”

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

#### **1. The Reasonableness of the Price of Wholesale Power Transactions is Governed Exclusively by Federal Law and the FERC.**

As previously discussed, the essential requirements of Illinois utility law remain that rates shall be “just and reasonable,” 220 ILCS 5/9-101, including that they shall “allow the utility to

recover costs prudently and reasonably incurred,” *Citizens Util. Bd.*, 166 Ill. 2d at 121; *see also* 220 ILCS 5/1-102. As further explained below, the incurrence of the costs for procuring wholesale power contemplated by the tariff is indisputably prudent under state law. The reasonableness of the price ComEd pays for that power is governed by federal law, and may not be reevaluated by the Illinois Commerce Commission.

The Commission has no jurisdiction over wholesale electricity costs or rates because they occur in interstate commerce. It is well established that under the Federal Power Act and the Supremacy Clause of the United States Constitution, wholesale power transactions are subject to FERC’s exclusive regulatory authority — including the authority to determine the reasonableness of wholesale energy prices. *See New York v. FERC*, 535 U.S. 1, 18-19 (2002) (“[T]he FPA gives FERC jurisdiction over the transmission of electric energy in interstate commerce and ... the sale of such energy at wholesale”) (internal quotation marks and citation omitted); *Mississippi Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988) (“FERC has exclusive authority to determine the reasonableness of wholesale rates.”); *see also FPC v. So. Cal. Edison Co.*, 376 U.S. 205, 210 (1964) (holding that Federal Power Administration’s authority encompassed “all sales of electric energy at wholesale in interstate commerce not expressly exempted by the [Federal Power] Act itself.”). It is firmly established that FERC’s authority preempts state regulation of wholesale energy prices. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *General Motors Corp. v. ICC*, 143 Ill. 2d 407, 416-17 (1991) (recognizing preemptive effect of FERC determination of reasonableness of wholesale rate).

Thus, a wholesale rate accepted for filing by FERC binds not only the entities involved but also state authorities. *See Mississippi Power*, 487 U.S. at 374 (“States may not regulate in

areas where FERC has ... determine[d] just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.”); *see also* 16 U.S.C. § 824d(c) (describing FERC rate filing procedure). That is, where FERC has determined that wholesale prices are just and reasonable, a state may not conclude otherwise, including by preventing the utility from passing those costs to retail customers. *Nantahala*, 476 U.S. at 966, 972-73. Such a state determination would subject the utility to unlawful “trapped costs” — that is, costs the utility reasonably incurred in FERC-regulated wholesale markets, but then could not recover in state-regulated retail markets. *See Mississippi Power*, 487 U.S. at 372 & n.12 (state authorities may not issue an order “trapping’ the costs” of wholesale power purchases by a local utility, including by conducting a “prudence review” in order to determine whether those costs will be passed on to utility customers or trapped).

## **2. Purpose of Rider CPP.**

Although the Supremacy Clause precludes ICC review of the reasonableness of the price of ComEd’s wholesale power transactions, ComEd filed Rider CPP to enable the Commission and all interested parties to review the method by which ComEd would make its wholesale power acquisitions, recover the resulting costs, and allocate those costs among ComEd’s different customer classes. ComEd’s proposed Rider CPP utilizes a competitive procurement process to acquire the electricity needed by Illinois consumers 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, all have been examined at length in the instant tariff proceeding.

#### **D. References to Post 2006 Initiative Reports and Results.**

The Attorney General and certain other parties to these proceedings previously sought, in a motion in limine, to exclude all references to the Commission's Post 2006 Initiative, including all of the publicly available Working Group Reports that reflect the consensus items of each Working Group, and reports prepared by the Commission, its Staff, and its Office of General Counsel. Judge Wallace properly exercised his discretion to deny the motion. 05-0159 ALJ Decision of August 26, 2005; *see also Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 681 (1st Dist. 2003) (noting judge's broad discretion to grant or deny a motion in limine); *Jeanguenat v. Zibert*, 78 Ill. App. 3d 948, 953 (3d. Dist. 1979) (explaining that a motion in limine should be denied where ill-founded, seeks to exclude relevant and admissible evidence, or is untimely); *People v. Owen*, 299 Ill. App. 3d 818, 823-24 (4th Dist. 1998). In denying the motion in limine, the Judge concluded: "I can find no instances of ... inappropriate disclosures" of "specific positions or statements made in workshops or other inappropriate disclosures." 05-0159 ALJ Decision of August 26, 2005.

There is no basis for reexamining Judge Wallace's decision. Exclusion of all references to the working group reports would be contrary to the Commission's well-established policy that consensus items from its workshop processes are admissible in related proceedings; would result in an incomplete and misleading record; and would deprive the Commission of valuable information for understanding and analyzing the complex and critically important issues that must be resolved as the State approaches the end of the statutorily mandated transition period, *see* 220 ILCS 5/16-101 *et seq.* The Commission has been preparing to address these issues for many years, and its Post 2006 Initiative was designed for that very purpose. Nothing requires the Commission to ignore that effort. Indeed it would be foolhardy to do so.

**1. The Working Group Reports Were Intended to be Public Documents to Assist in Addressing the Issues Facing the Illinois Electricity Market in the Post-Transition Period.**

In initiating the Post 2006 process, the Commission planned “meetings and workshops to examine the future of the state’s electric market and identify public policy issues surrounding deregulation of the electric industry in Illinois. Press Release, Ill. Commerce Comm’n, *ICC to Host Workshops on Future of Deregulated Electricity Markets* (Feb. 4, 2004) (Response of Commonwealth Edison Company to Motion in Limine to Exclude Testimony Filed by the People of the State of Illinois (“ComEd Response to Mot. in Limine”), Ex. 1). The Commission further requested that, following the workshop process, each Working Group submit a final report during the fall of 2004 (Press Release, Ill. Commerce Comm’n, *ICC Begins Process to Deregulate State’s Energy Market* (Feb. 26, 2004) (ComEd Response to Mot. in Limine, Ex. 2). Specifically, the five Working Groups (Procurement, Rates, Competitive Issues, Utility Service Obligations, and Energy Assistance) were tasked with “achiev[ing] consensus on as many substantive issues as possible. Substantive agreements must be by consensus, not weight of opinion. Where consensus is not possible on a result, the group should nonetheless reach consensus on a precise definition of the remaining issue and a list of the possible resolutions (without attribution).” *Post 2006 Initiative Workshop Process — “Rules of the Road,”* at 2 (Mar. 31, 2004) (ComEd Response to Mot. in Limine, Ex. 3).

As promised, in October 2004 each Working Group publicly presented its findings, and each report was then made publicly available on the Commission’s website. See Press Release, Ill. Commerce Comm’n, *ICC to Hear Recommendations Regarding Deregulation in Illinois* (Oct. 12, 2004) (ComEd Response to Mot. in Limine, Ex. 4) ; Press Release, Ill. Commerce Comm’n, *Stakeholders to Provide ICC Policymaking Guidelines for Future Illinois Electricity Restructuring* (Oct. 14, 2004) (ComEd Response to Mot. in Limine, Ex. 5). It is these publicly

available consensus reports and all references to the workshop process, along with other publicly available Post 2006 Initiative reports authored by Staff, the Commission, the Implementation Working Group, and the Office of the General Counsel, that the Attorney General and others have sought to exclude from the present proceeding. The fact is, these reports were, from the outset, intended to be public documents that would assist future decision-makers as they addressed the complicated issues facing the Illinois electricity market in 2007.

**2. The Post 2006 Initiative Preamble Does Not Support Exclusion of All References to the Workshops and Subsequent Consensus Reports.**

Traditional Commission policy dictates that while non-consensus items are afforded a level of protection similar to that in “settlement negotiations,” the consensus items resulting from a workshop process are in fact publicly available information and wholly appropriate to reference in future proceedings. *See infra* at 28. The Workshop Preamble, upon which the motion in limine largely relied, is consistent with the Commission’s policy:

In order to facilitate free and open discussions the stakeholders wish to assure that statements made, positions taken, and documents and papers provided by the stakeholders in the Post 2006 Initiative Process will not be used by the stakeholders in any subsequent litigation, including administrative proceedings before the Illinois Commerce Commission, the Federal Energy Regulatory Commission, and other federal, state, or local governmental authorities.

(Attachment C to Mot. in Limine (emphasis added)). Thus, while the Preamble protects those statements made and documents provided by stakeholders during the actual meetings, the Preamble does not shield from public disclosure those consensus items agreed upon by the parties, reflected in the official reports, and published in publicly available reports after the workshop process concluded. Nor are consensus items and reports of the Staff, Office of the General Counsel, and Commission the “statements” or “positions” of “stakeholders.” Not once

has ComEd sought to introduce into evidence the individual “statements made, positions taken, and documents and papers provided by” any stakeholder. To do so would be unfair. But, to place the consensus items under lock and key would surely work an absurd result, rendering the parties’ efforts and the consensus achieved meaningless.

That the protection afforded to the stakeholders in the Preamble was limited to non-consensus items and the deliberative comments of the parties made during the meetings which were never made public is reflected in numerous contemporaneous Post 2006 Initiative materials, including agendas, meeting minutes and the final reports. For example, the transmittal letter accompanying the publicly filed report of the Procurement Working Group specifically states that “[a]t the first meeting participants were informed by Commissioner Erin O’Connell-Diaz of the applicability of the Illinois Commerce Commission’s traditional policy barring the subsequent use of non consensus ‘positions taken, and documents and papers provided by the stakeholders in the Post 2006 initiative process in any subsequent litigation... .” Transmittal Letter to *Final Report to the Illinois Commerce Commission Presented by the Procurement Working Group* (Sept. 23, 2004) (ComEd Ex. 1.4). *See also* *Final Report, Rates Working Group*, (ComEd Ex. 1.5). Likewise, the agendas for the individual groups’ meetings also reflect this principle: “Consensus principles — applicability of traditional settlement discussion rule to non-consensus items and ‘brainstorming’ of issues and alternatives.” Agenda, Rates Working Group (May 4, 2004) (ComEd Response to Mot. in Limine, Ex. 8) (emphasis added).<sup>7</sup>

The Attorney General and others were quite familiar with this traditional policy to exclude only non-consensus items. Indeed, in Docket No. 00-0596, the AG made a similar

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<sup>7</sup> These contemporaneous documents also make it clear that the working group meetings were part of a public Commission-sponsored workshop process, not a private party-run settlement process. *See* Minutes, Procurement Working Group (May 14, 2004) (ComEd Response to Mot. in Limine, Ex. 9).

argument to that made in the motion in limine in this case, and lost, as Judge Wallace ruled in that case that consensus items are not afforded the “settlement negotiations” protection that non-consensus items receive. Transcript, Docket No. 00-0596, at 232 (Jan. 16, 2002) (ComEd Response to Mot. in Limine, Ex. 10) (emphasis added). “Otherwise,” the Judge explained, “why would you continue to go through workshop processes except for the sole purposes of identifying issues that you're going to litigate later... .” *Id.* at 229 (emphasis added).

The case for including the consensus items is straightforward: there is no dispute concerning the identity of the consensus items; in fact, the Procurement Working Group was unanimous in its findings. *Final Report of the Illinois Commerce Commission's Post 2006 Initiative to Governor Rod. R. Blagojevich & the Illinois General Assembly*, (ComEd Ex. 1.1). The Preamble simply affords no support for excluding references to these items.

**3. Permitting References to the Working Group Reports is Consistent with the Failure of Any Stakeholder to Object to the Public Availability of the Reports.**

Consistent with established Commission policy, each Working Group prepared a final report and submitted it to the Commission without any mention that the report itself was confidential or otherwise inadmissible in subsequent litigation. This omission is significant given the fact that a disclaimer for non-consensus items was announced at the meetings. The Commission, in turn, established an Implementation Working Group, which issued its own report, and the Commission's Office of General Counsel also provided comments on each Working Group's report. These reports and comments, which are publicly available on the Commission's website, also lack any disclaimers or confidentiality designations. And finally, the Commission provided its own report to the Governor and General Assembly, submitting each Working Group report along with its report.

In fact, the parties who sought to exclude references to the working groups' reports relied on those reports in this proceeding in their own testimony and during the motion to dismiss briefing and hearing. (Steinhurst Dir., CUB-CCSAO Ex. 2.0, 5:108-6:138, 8:185-9:222) (referring to and quoting from the workshop meetings and reports), (Steinhurst Rebuttal ("Reb."), CUB-CCSAO Ex. 4.0, 5:103-6:120, 35:779-43:988, fn 1.) (comparing witness's proposed alternative to the Procurement Working Group's consensus criteria), (Weinberg, Tr. 32-35).

**4. Excluding References to the Working Group Reports Would Reflect an Unduly Narrow View of the Commission's Authority and Role and Would Defeat the Purpose of the Commission-Initiated and Directed Workshop Process.**

Consistent with its broad authority and expertise (*see* discussion *infra* at 9-13), the Commission has initiated workshop processes in the past to address a variety of unique issues confronting the particular industries and stakeholders within its purview. *See, e.g., Rulemaking to Implement Recommendation 1*, Order, Dkt. Nos. 92-0193 & 92-0389 (Cons.), LEXSEE 1995 Ill. PUC LEXIS 889, at \*5 (Ill. Commerce Comm'n Dec. 20, 1995) (referencing the least cost planning workshops). The Post 2006 Initiative workshop process was certainly nothing new and, as shown above, the policies on the admissibility of consensus vs. non-consensus items were well established. The Post 2006 workshops were designed to anticipate and address those issues facing the Illinois electricity market beginning in 2007: "this Commission in early 2004 announced a plan to host a series of meetings and workshops to examine the future of the electric market in Illinois, public policy issues surrounding restructuring of the electric industry, and critical questions concerning procurement of supply to serve customers in the post 2006 environment." (ComEd Response to Mot. in Limine, Ex. 11 at 2). As the Office of General Counsel observed following its review of the resulting consensus reports, "[c]ollectively, [the

working group reports] represent a body of information and analysis that will greatly assist those who must make the ultimate decisions concerning the future of the electricity market in the State of Illinois.” Mem. from P. Casey to Ill. Commerce Comm’n Re: OGC Comment and Analysis on Working Group Implementation Reports (Nov. 23, 2004) (ComEd Response to Mot. in Limine, Ex. 16) (emphasis added). Thus, the reports were intended to help decision-makers. Excluding references to the working group reports would deny that assistance.

The Commission is a uniquely active and even proactive body. It is “not just an umpire. It has been given active functions of policy making and supervision. It may initiate hearings on its own motion, and it has a wide discretion in shaping proceedings brought by others.” *Antioch Milling Co. v. Pub. Serv. Co. of N. Ill.*, 4 Ill. 2d 200, 210 (1954). Moreover, the Commission’s decisions as to which processes to use are entitled to great deference. *See, e.g., Institute of Shortening & Edible Oils, Inc. v. Ill. Commerce Comm’n et al.*, 45 Ill. App. 3d 98, 103-04 (4th Dist. 1977) (affirming the Commission’s “wide discretion” to set in motion certain procedures and its “policy making prerogative”). The 1997 Restructuring Act also recognized the Commission’s unique role: “The Illinois Commerce 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).

Consistent with its policymaking authority, the Commission has used the workshop process to define issues and establish consensus when possible. *See* ComEd Response to Mot. in Limine, Ex. 10 at 228-29 (discussion by Judge Wallace of extensive use and benefits of working group process by the Commission). Like the Commission, many stakeholders value the workshop process and, in the case of the Procurement Initiative, invested an extraordinary amount of time and resources into the process, meeting on roughly fourteen separate occasions

for a total of more than fifty-two hours. (ComEd Response to Mot. in Limine, Ex. 6). By all accounts, and they are numerous, the participants' efforts were rewarded and the workshops were a success, with the parties reaching consensus on many issues and establishing a framework that the Legislature and Commission could utilize in addressing post 2006 issues:

The undertaking was well worth the time and effort it required. Much has been achieved in a relatively short time. Significant issues that in other jurisdictions might have been aired in contentious litigation settings have been explored extensively in a well organized, efficient and respectful manner by parties who, despite some differing interests, all acted in good faith to arrive at a framework for emerging from the transition period established under the 1997 Restructuring Act. ComEd Response to Mot. in Limine, Ex. 11 at 2 (emphasis added).

[T]he stakeholders have ultimately arrived at policy conclusions in the form of consensus recommendations. There is a consistency and symmetry in the consensus of opinions of each of the working groups which in many areas aligns with that of the Commission's Staff. Stakeholders and Staff have provided clear and consistent direction to the policy-makers in the State. *Id.* at 3 (emphasis added).

The [Procurement Working Group] agreed that any procurement process adopted through legislative fiat or by Commission rule should include, to the extent possible, the attributes enumerated in [the Procurement Working Group Report]. This effort was designed to provide guidance to either the Legislature or the Commission as they approach their respective responsibilities for the "post" transition period. This document was the group's effort to provide as much guidance as possible without giving specific preference to any procurement process. ComEd Response to Mot. in Limine, Ex. 6 at 2 (emphasis added).

This report of the activities of the Procurement Working Group provides a "good faith consensus" road map for policy makers to consider when making the final decisions on energy procurement policy in the Post 2006 era. *Id.* (emphasis added).

Thus, the reports themselves make abundantly clear the stakeholders' intentions that these reports be considered by the decision-makers. It is well within the Commission's authority to take into consideration the Post 2006 reports, particularly when they are part of the record. It

would certainly be an unprecedented waste of time, money and other resources to ignore the working groups' consensus findings and observations, contrary to the stakeholder intent.<sup>8</sup>

While the Commission is bound by the record in a proceeding, nothing prohibits it from taking into account the larger factual context of the proceeding — particularly when that context is supported by numerous witnesses and exhibits. Here, for example, the references to the workshops and subsequent consensus reports show that ComEd's Rider CPP filing is simply the next step in the evolution of the Post 2006 process, and that a filing related to procurement was fully anticipated by the Procurement Working Group.<sup>9</sup>

“The principal goal of the hearing process is to assemble a complete factual record to serve as basis for a correct and legally sustainable decision.” Ill. Admin. Code tit. 83, § 200.25(a). Excluding references to the working group reports would impede this process by resulting in a record that provides no context for ComEd's Rider CPP filing. This is clearly convenient for those parties that oppose the filing, as it would lend credence to arguments (which ComEd believes to be baseless) made by those parties' witnesses to the effect that ComEd did not adequately consider or analyze alternatives. *See, e.g.,* ComEd Response to Mot. in Limine,

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<sup>8</sup> ComEd further notes that it has never sought to hold any stakeholder to a position or argue that they are bound by the reports in some way. Indeed, the consensus items identified in the Procurement Working Group report only set forth the desirable attributes or features of a procurement process and did not recommend adoption of a specific procurement method. That said, to the extent it may be argued that the reports are settlement agreements (which they are not), ComEd notes that such agreements are generally legally enforceable and admissible in court. *See, e.g., Collins v. Educ. Therapy Ctr.*, 184 F.3d 617, 620 (7th Cir. 1999). Efforts to now distance themselves from the consensus reports speaks volumes, raises questions of credibility, and further bolsters ComEd's position that these consensus reports are in fact relevant and material.

<sup>9</sup> Likewise, Chairman Hurley, during the hearing of the AG's (et al.'s) motion to dismiss the present proceeding, referenced the “process here at the Commission, which we call the post-2006 process.” Mot. Limine, Ex. 15 at 32. The Chairman then requested that each presenter address “whether this issue was raised in that process, and how — what the outcome of the issue was in that process.” *Id.* at 32-33 (Chairman Hurley). Neither the AG nor any other presenter objected to the Chairman's reference to the process, and each party, including the AG, answered the Chairman's question.

Ex. 13 at 3, 5-9; ComEd Response to Mot. in Limine, Ex.14 at 6, 13, 33-35. Such witnesses have also claimed that if the Commission fails to order additional proceedings it will be acting “blithely” (in an implied disregard of its responsibilities) if it approves the auction, and without a sufficient foundation for review. *See, e.g.*, ComEd Response to Mot. in Limine, Ex.14 at 10. *See also Jeanguenat*, 78 Ill. App. 3d at 953. Exclusion of the testimony related to the Post 2006 Initiative is not only misleading and unfair to ComEd and the many other parties that support the auction, it is clearly to the detriment of the Commission in establishing a “complete factual” — and legally sustainable — record.

Therefore, for all the reasons set forth above, the Commission should not disturb Judge Wallace’s decision, made in the exercise of his sound discretion, to permit references to the Post 2006 Initiative Working Group consensus items.

**E. Evidentiary Issues.**

ComEd has no other evidence issues to address at this time.

**F. Other Legal Issues.**

**1. The Governor’s Letter Regarding this Issue is Highly Inappropriate and Should Not be Considered.**

The Governor of Illinois’s unprecedented letter of August 31, 2005, in which he demands that the Commission deny ComEd’s tariff request, constitutes an unprecedented and inappropriate attempt to influence on these proceedings.<sup>10</sup> Respectfully, the Governor’s action evinces a profound disregard for the Commission’s independence and the separation of powers,

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<sup>10</sup> The Governor’s letter states among other things: “I appointed members of the Commission to protect the consumer. . . . I consider an approval of a reverse auction procurement process of market-based rates for wholesale power either a serious neglect of duty or gross incompetence by the ICC. I will take whatever action is necessary to protect the public and ensure that the law is followed . . . the request for higher rates must be rejected. Letter from Governor Blagojevich to ICC Commissioners of August 31, 2005, at 1 (emphasis added).

and for the due process rights of parties participating in Commission proceedings. The letter deserves no consideration in reviewing ComEd's proposal.

The Illinois Supreme Court has observed that, in establishing a Commission "appointed by law and informed by experience," "the Legislature intended to create an office of dignity and great responsibility" that would not be swayed by "fear of popular disfavor." *State Pub. Util. Comm'n ex rel. City of Springfield v. Springfield Gas & Elec. Co.*, 291 Ill. 209, 216 (1919). The General Assembly created the Commission as an independent body, one capable of balancing the public's need for efficient, safe and affordable utility service with the need to encourage the investment of private capital in public service, and whose acts have the force and effects of acts of legislature itself. *See Alton Water Co. v. Ill. Commerce Comm'n*, 279 F. 869, 871 (S.D. Ill. 1922); *see also Lunding v. Walker*, 65 Ill. 2d 516, 525-27 (1976) ("It is plain that the legislators intended, and the public interest demands, that [officials appointed by the Governor] not be amenable to political influence or discipline in the discharge of their official duties. To subject a neutral, bipartisan, and independent board to the unbridled whim of the Governor ... would destroy its purpose and its efficacy.").

The Commission's independence is reflected in the broad discretion it enjoys as the expert body committed with plenary power over public utility regulation. *See Archer-Daniels-Midland Co. v. Ill. Commerce Comm'n*, 184 Ill. 2d 391, 397 (1998) ("[T]he Commission is entitled to great deference because ... [of its] expertise in the field of public utilities."); *Cent. Ill. Pub. Serv. Co. v. Ill. Commerce Comm'n*, 243 Ill. App. 3d 421, 445 (4th Dist. 1993) ("Because of its complexity and need to apply informed judgments, rate design is uniquely a matter for the Commission's discretion."); 220 ILCS 5/10-201(d) (requiring reviewing courts to hold

Commission findings of fact prima facie true, and Commission rules, regulations, orders, and decisions prima facie reasonable).

The Governor's undisguised attempt to dictate the Commission's decision is inconsistent with the principles just stated and with the separation of powers provided for by the Illinois Constitution. *See* ILL. CONST. Art. II, § 1. The Commission exercises a legislative power granted to it by the General Assembly, *see, e.g., Monarch Gas Co. v. ICC*, 261 Ill. App. 3d 94, 100 (5th Dist. 1994), and its decisions are subject to appellate review only by the Courts, *see* 220 ILCS 5/10-201. The Governor has no authority to interfere with the Commission's delegated legislative power, and no authority to review Commission decisions. His actions impermissibly intrude on the prerogatives of other branches of government.

Finally, as the federal courts have recognized, this type of attempt to influence politically an administrative agency's decision is also inconsistent with the due process rights of those participating in the regulatory process:

[T]he right of private litigants ... to the appearance of impartiality ... cannot be maintained unless those who exercise the judicial function are free from powerful external influences.... To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the 'wrong' decision ... sacrifices the appearance of impartiality — the *sine qua non* of American judicial justice.

*Pillsbury Co. v. Fed. Trade Comm'n*, 354 F.2d 953, 965 (5th Cir. 1966) (setting aside a Federal Trade Commission decision as improperly tainted by Congressional oversight hearings on the Commission's decisional processes); *see also ATX, Inc., v. United States Dept. of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) ("An administrative adjudication is 'invalid if based in whole or in part on [Congressional] pressures.' Congressional interference so tainting the administrative process violates the right of a party to due process of law." (internal citations omitted)).

The Act sets forth extensive procedural requirements to ensure that all parties in a tariff proceeding are afforded due process of law and that decisions are rendered based on the record. *See generally* 220 ILCS 5/9-201, 10-101, 10-103, 10-104, 10-108, and 10-110; *see also Fleming v. Ill. Commerce Comm'n*, 388 Ill. 138, 147 (1944) (“A hearing before the commission is not a partisan hearing with the commission on one side arrayed against the utility on the other. It is an administrative investigation instituted for the purpose of ascertaining and making findings of fact.”). Nor can the Commission simply deny a rate request filed by a utility without a hearing to determine whether the rate would be just and reasonable. *See Ill. Bell. Tel. Co. v. Commerce Comm'n ex. rel. City of Edwardsville*, 304 Ill. 357, 360 (1922). The Governor’s insistence that the Commission ignore the record and deny the tariff proposal because that is the Governor’s political preference cannot be reconciled with the right of all parties to this proceeding to an impartial process.

For all of these reasons, the Governor’s letter must be disregarded.

#### **IV. Sufficiency of the Competitive Market.**

##### **A. Markets’ Relationship to Auction Process.**

The Illinois Auction Proposal will bring the benefits of competitive procurement to ComEd’s customers. Suppliers will compete to provide a slice of customer requirements at the lowest cost. In doing so, suppliers will have to assemble portfolios of power resources. Even suppliers who own generation will have to contract for additional generating resources to assemble their portfolios. They will also need to use the bilateral market to enter into forward-term deals with generators or other suppliers, as well as the spot to fill in the shape of their customers’ demand curves as needed. Even the value they assign to whatever of their own resources they rely on will be disciplined in the market by the prices of competing resources and

the need to generate the lowest overall price to win the auction. While an auction process has distinct advantages even in the absence of a competitive wholesale market, as shown below, the huge competitive PJM market, of which northern Illinois forms an integral part, will fully meet these needs. ComEd's proposal thus brings the benefits of a competitive wholesale market to Illinois customers as well.

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

The Illinois Auction proposal is patterned on the successful New Jersey Basic Generation Services ("BGS") auctions, which have been conducted since 2002 to acquire \$5 billion of electric supply for four New Jersey electric distribution companies, Atlantic City Electric d/b/a Conectiv Power Delivery, Jersey Central Power & Light, Public Service Electric & Gas, and Rockland Electric. (LaCasse Dir., ComEd Ex. 4.0, 5:109–110; 16:364–22:487). Beginning in February, 2003, two BGS auctions have been held in New Jersey each year. One (the BGS-FP auction, "FP" for fixed-price) is to procure fixed price supply for residential and other smaller customers under staggered 3-year contracts. The other (the BGS-CIEP auction, CIEP for Commercial and Industrial Pricing) is to procure real time energy price supply for larger commercial and industrial customers using 1-year term agreements.

The vertical tranche auction process in New Jersey has been very successful. For example, Peter M. Yochum, Chief Policy and Planning, Division of Energy, New Jersey Board of Public Utilities, made the following comments to the New Jersey Commissioners on February 16, 2005 immediately following the most recent auction:

We think that in light of where natural gas prices have gone over the last two years, natural gas, the NYNEX strip is up about 25 percent in the last year and where oil prices have gone they're up about 30 percent. Coal is also up. That these increases, although we certainly always like to report a rate decrease, are certainly very acceptable and show both the efficiency

of the auction process... And it also speaks to the decision by the Board to have a rolling three year supply period which modifies any of the one year rate increases or energy increases that we do see.

Commissioner Butler added: “These prices are terrific, especially given where the NYNEX strip and the oil prices have been over the last year or so.”

The actual auction clearing prices in this auction for the 3-year fixed price products only increased 18.6% for PSE&G, and 6.5%–7.2% for the three smaller utilities.

(McNeil Surrebuttal (“Sur.”), ComEd Ex. 18.0, 18:392–19:410).

The price of supply under any procurement process will be dependent on the cost of the inputs (such as fuel prices), as well as the balance between supply and demand. If the cost of the inputs increases, the price of supply will increase as well and no competitive process can insulate customers entirely from those increases. (McNeil Sur., ComEd Ex. 18.0, 18:381–391). However, the experience over four years with the vertical tranche auction process in New Jersey demonstrates the effectiveness of competition, obtaining the best available prices in the wholesale electric market to meet the needs of customers.

### **C. Retail Market Conditions.**

To date, success in bringing to end-use customers the benefits of the wholesale electric competition encouraged by Congress and the FERC has varied widely by region. In ComEd’s retail service territory, many large and a number of smaller commercial and industrial customers have taken advantage of offerings by competitive retail electric service providers, who depend on the wholesale markets opened up by federal policy. To date, small commercial and industrial customers in ComEd’s territory have not themselves switched to alternative suppliers in the same numbers as larger customers. At present, no residential customers in Illinois take service from a Retail Electric Suppliers (RESs), and none have actively entered the market to serve them, but the indirect benefits to them, including the twenty percent rate reduction, have been considerable.

While no one can guarantee, especially after nearly a decade of frozen bundled retail rates, that supply costs will not rise, competitive forces are our best tool to make sure that those costs are held as low as reasonably possible. Under the Illinois Auction Proposal, where ComEd would essentially act as an aggregator of retail load, ComEd's costs of procuring energy and capacity to serve customers would be kept to the minimum available amount through a transparent auction process. (Moler Dir., ComEd Ex. 2.0, 3:54–67).

**D. Relevant Product Market.**

Northern Illinois is an integral part of the PJM market, the largest and most developed wholesale power market in the world. (Naumann Dir., ComEd Ex. 5.0, 5:94–96). PJM is a Regional Transmission Organization (RTO), which both operates the transmission grid and runs a unified market for wholesale power consisting of one centrally dispatched control area that covers all or parts of thirteen states and the District of Columbia. Generation from this very wide and diverse area is now available to serve customers in northern Illinois. Moreover, the elimination in 2004 of the transmission rate barrier between PJM and the Midwest ISO (“MISO”), the adjoining multi-state RTO, means that generation from the MISO area is also available to serve customers in northern Illinois. This will make for a robust competitive auction, because suppliers will be able to access generation in a broad multi-state region in assembling portfolios to bid into the procurement process. (Moler Dir., ComEd Ex. 2.0, 4:87–5:107). Whereas ComEd's peak load is under 23,000 MW, there are approximately 160,000 MWs of generation in PJM, and over 1,000 generating units, which have a diverse mix of fuel and operating characteristics. (Naumann Dir., ComEd Ex. 5.0, 13:280-14:298). There is no evidence that this is a concentrated or oligopolistic market; indeed, there are literally hundreds

of distinct buyers and sellers actively participating in the PJM markets. (*E.g.*, Rose, Tr. 660:21 - 661:10).

### **1. Required Products.**

Bidders will need to acquire a range of products to serve the full-requirements load. In addition to base load or block supply, bidders will need intermediate and peaking resources, certain ancillary services, and will likely acquire hedging products if not implicit in their supply portfolio. Suppliers that bid into the auction can access this huge amount of generation through the bilateral market either to serve their load obligations under contracts of varying lengths or to act as a financial hedge for these obligations. Such bilateral contracts can supply both the energy and the capacity that suppliers need. In addition to the bilateral market, PJM operates central energy and capacity markets. PJM operates two spot markets for energy, a day-ahead market and a real-time market. PJM also operates a capacity market on which suppliers can rely to meet their capacity obligations. Supplier access to this vast range of resources will ensure that there is robust competition to support an efficient auction.

### **2. Physical vs. Financial Markets.**

There are several fundamental features of the PJM energy and capacity markets that ensure a robust auction. One of them is that PJM automatically dispatches the generation connected to the system to serve customer demands reliably every day. Thus, in committing to serve a slice of ComEd's load, a supplier takes only a financial risk. The supplier is committed to sell at a fixed price, but there is no risk of customers not being served if the supplier does not schedule deliveries of power; the supplier will simply owe PJM for the power that PJM dispatches. In other words, financial arrangements for supplying power are independent of the actual physical power that is delivered. This means that generation throughout PJM is available

to suppliers bidding in the auction, even though the suppliers cannot know in advance the system operating conditions in any hour. It also means that the price to customers in northern Illinois is determined by the lowest price at which the auction clears, regardless of where the physical source of power delivered in Chicago may be in any hour. In the same way, through a service like FTD a customer can have flowers delivered in Chicago at a set price from a florist in New Jersey or indeed from a website, regardless of where the actual blooms come from. (Naumann Dir., ComEd Ex. 5.0, 9:188–11:233).

One result of this separation between physical and financial transactions is that because a supplier assumes only financial risks, financial entities that own no generation can participate in the auction. Staff witness Mr. Ogur, in discussing the “non-physical” strategies for participating in the auction, recognized that the auction essentially deals with the movement of dollars and not energy. (Ogur Dir., Staff Ex. 4.0, 14:320–18:411). Since the universe of entities that are financially strong is far larger than the universe of generation owners, the PJM market will allow the largest field of bidders to participate in the auction. (Schnitzer Dir., ComEd Ex. 6.0, 8:196–9:211). These financial players are not mere middlemen who buy low and sell high. The essential task of any supplier in the auction — whether or not it owns generation — is to assemble supply portfolios and hedge the financial risks of making a firm commitment to supply an unknown and continuously varying amount of power on a daily basis for one, three or five years. As Prof. Hogan explained, the product in the auction is a risk-hedging product that determines the value of energy. (Hogan Reb., ComEd Ex. 16.0, 18:399–400). Financial players with expertise in hedging risks can play a valuable role in the procurement process, and they have done so in the New Jersey auction, where prices would almost surely have been higher without their participation. (Schnitzer Dir., ComEd Ex. 6.0, 9:211–10:245). Financial players

are among the largest electricity sellers in wholesale and retail markets and several of them were successful bidders in the New Jersey BGS auction. (Hieronymus Reb., ComEd Ex. 15.0, 19:382–20:396).

A related feature of the PJM market that will ensure a robust auction is that in operating its interstate grid, PJM does not use transmission reservations within the region. This means that suppliers in the auction can contract with any generator in PJM to hedge the price risk of their auction commitments. This gives bidders a huge array of price hedges, allowing them to line up hedges both before and after the auction is completed. (Schnitzer Dir., ComEd Ex. 6.0, 11:250–264). Rather than using transmission reservations to manage congestion on the transmission system, PJM uses the market mechanism of “locational marginal prices (LMPs),” under which congestion in an area of the grid will raise power prices in that area. The data clearly show that northern Illinois is an area with no persistent transmission congestion, and as a result, in most hours northern Illinois enjoys among the lowest LMPs in PJM. (Naumann Dir., ComEd Ex. 5.0, 15:320–16:358).

These characteristics of the PJM market — together with those discussed in more detail below, such as the requirement that generators bid into the PJM spot market every day, PJM bid caps for constrained grid locations and the continuous independent market oversight provided by the PJM Market Monitoring Unit — assure that the existing competitive wholesale market is fully capable of supporting an Illinois auction that will produce the best available prices for Illinois customers.

### **3. PJM Capacity Market.**

Most discussion focuses on the energy markets, because they are the fundamental source of the supply needed to meet customer demands. Without capacity to back up energy, however,

the continuity of service to customers cannot be assured. Capacity is sometimes referred to as “iron in the ground” (meaning the actual equipment used to generate the energy); it consists of a contractual right to call upon certain generating resources when needed, no matter what the market conditions may be. To assure the reliability of supply to end-use customers, PJM requires that all load-serving entities back up their obligations to serve customers with capacity. The capacity can be in the form of generation owned by or under contract to the load-serving entity. In addition, however, PJM operates a capacity market in which any supplier can secure the necessary capacity. As explained above, the PJM capacity markets, both bilateral and the market operated by PJM, will be available to suppliers in the Illinois auction. The PJM capacity market further assures robust participation in the auction, including by parties that do not own generation.

Intervenors offer various speculative arguments that northern Illinois could become isolated from PJM energy markets and thus should be considered a separate market. These speculations were refuted by hard evidence, as discussed in detail below. In addition, however, CUB and CCSAO witness Fagan suggested that PJM’s proposed Reliability Pricing Model (RPM) would result in a separate capacity market in northern Illinois in the future. (Fagan Reb., CUB-CCSAO Ex. 3.0, 47:1137–48:1147). This is simply not factually correct. RPM is a new way of managing the capacity market that PJM has proposed to FERC. Under RPM there could be differences in locational capacity prices that differ based on system congestion, just as there are differences in locational marginal prices in the energy markets now. But PJM’s RPM proposal would not result in separate prices for load connected to the ComEd system, nor would it produce separate markets in which local generation could exercise market power in capacity. Mr. Fagan’s attempt to bootstrap the locational design of RPM into a justification for asserting

there will be separate capacity markets is simply wrong. (Naumann Sur., ComEd Ex. 23.0, 19:403–411).

**E. Relevant Geographic Market.**

The AG, CUB, and CCSAO presented testimony questioning whether competitive markets would in fact function efficiently in the future or whether they would allow some generators to exercise market power. Their witnesses do not allege that the auction itself, which is essentially an auction for financial hedges, could be the source of market power. (Fagan Reb., CUB-CCSAO Ex. 3.0, 31:691–694). This is important, because as Prof. Hogan pointed out, to show market power in the auction, one would have to show there was market power in the market for financial hedges. (Hogan Reb., CUB-CCSAO Ex. 3.0, 19:403–419). Rather the witnesses allege that if generators could exercise market power in the physical spot markets, they could bias the auction results, resulting in supra-competitive prices in the auction. (Fagan Reb., CUB-CCSAO Ex. 3.0, 4:69-73; 29:657–667). None of this testimony, however, presented any facts or analyses supporting the existence of market power or future potential market power in any market. Moreover, the claims largely relied on the false and disproved assumption that northern Illinois alone was a relevant market and the inferences drawn (often improperly, as well) from pre-PJM data for ComEd’s service territory alone that wholly ignored the broader PJM market.

AG witness Dr. Rose merely suggested that there might be problems with markets for electricity, and therefore more study is needed. Dr. Rose did not himself present any study of the competitiveness of the wholesale markets of which northern Illinois forms part, and the data he claimed were relevant to this question were outdated, deriving from the period before ComEd was fully integrated into the PJM market. (Hieronymus Sur., ComEd Ex. 24.0, 29:629–30:653).

Dr. Rose simply alleged that “there is not yet enough information on which to base a conclusion that electricity markets are sufficiently competitive to support an auction,” (Rose Reb., AG Ex. 5.0, 7:26-29), and urged that an “independent” analysis of the market be performed. (Rose Reb., AG Ex. 5.0, 12:9–12). CUB-CCSAO witness Mr. Fagan attempted to show that there would be problems in the electricity market relevant to northern Illinois, but his testimony was based entirely on speculation and is inconsistent with the demonstrated facts. Like Dr. Rose, Mr. Fagan presented no study and relied on outdated data in reaching the conclusion that generators in northern Illinois could exercise market power under certain conditions — conditions that Mr. Fagan never attempted to show would exist. Mr. Fagan’s basic argument, like Dr. Rose’s, was that further analysis of the market should be performed, though he went further than Dr. Rose in asserting that in the absence of an analysis that would satisfy him, the existence of market power should be “presumed.” (Fagan Reb., CUB-CCSAO Ex. 3.0, 10:226–11:230).

**1. Significance of Political Boundaries (*e.g.*, Northern Illinois).**

The false premise underlying the chain of erroneous observations in which both Dr. Rose and Mr. Fagan engage is the tacit assumption that northern Illinois by itself constitutes the wholesale market that an analyst should be concerned with in evaluating the competitiveness of the wholesale market relevant to the proposed ComEd auction. Geographical markets for electricity are not determined by the political boundaries of a state, but by the access of consumers to suppliers and the extent to which one supplier can be substituted for another. Even before ComEd was integrated into PJM, the market to which it had access was not limited to northern Illinois. Now however, it has access to the huge PJM market and to the adjoining MISO market. Neither Mr. Fagan nor Dr. Rose expressly asserted that northern Illinois is a relevant geographical market for wholesale power. In their rebuttal testimonies, Dr. Rose

expressly conceded that he was making no such assertion, and Mr. Fagan stated that he was not claiming northern Illinois is a separate market. (Rose Reb., AG Ex. 5.0, 17:18–19:4; Fagan Reb., CUB-CCSAO Ex. 3.0, 13:299-301). Moreover, under cross-examination, both witnesses were conceded that, operationally, the PJM market is integrated and there is no separate northern Illinois market. (*E.g.*, Fagan, Tr. 358:21 - 361:8; Rose, Tr. 646:11 - 647:9, 674:6 - 676:8). Yet both witnesses blithely went on to testify as if northern Illinois were a relevant geographical market.

Contrary to the baseless assumptions of Mr. Fagan and Dr. Rose that northern Illinois is a relevant market in which to measure market concentration, ComEd's witnesses presented evidence that northern Illinois is an integral part of a large interstate regional market. Dr. Hieronymus, a leading expert on market power in the electric industry, presented a study demonstrating that northern Illinois is not a relevant market by showing that wholesale electric prices in northern Illinois are formed over a broad interstate area. Dr. Hieronymus showed that ComEd zonal prices are essentially identical to those in Northern Indiana Public Service, the lower peninsula of Michigan, American Electric Power, Dayton Power & Light, Cinergy and the Ohio portion of First Energy. Much of the time, ComEd zonal prices are also identical to prices in MidAmerican Energy, Louisville Gas & Electric and Illinois Power. (Hieronymus Reb., ComEd Ex. 15.0, 10:194–11:209). This study demonstrates that northern Illinois is not a separate market and that bidders into the Illinois auction can hedge their obligations with contracts to buy power in this broader area. (Hieronymus Reb., ComEd Ex. 15.0, 11:212–223).

Dr. Hieronymus presented a second study to the same effect. The U.S. Department of Justice and Federal Trade Commission *Merger Guidelines* define a relevant geographical market by whether a monopolist who controlled all the supply in that region could profitably sustain a

small but significant price increase. Dr. Hieronymus' second study showed that that is emphatically not the case for northern Illinois. A hypothetical monopolist who owned all the generation in northern Illinois would have to raise its bid prices by about 40 percent to achieve a 5 percent price increase for a year, because replacement generation would come in from outside Illinois. In the process, the monopolist would lose about 17 million MWh of sales, making the exercise of market power unprofitable. Since no entity actually owns all the generation in northern Illinois, an actual supplier is still less likely to be able to raise prices profitably, given that it would face competition from inside as well as outside Illinois. (Hieronymus Reb., ComEd Ex. 15.0, 11:226–12:246).

Thus the probative evidence in the proceeding clearly establishes that northern Illinois is not a separate market for which generation concentration statistics can meaningfully be calculated; it is simply an integral part of the multi-state PJM market. Intervenors' allegations that generators located in northern Illinois may be able to exercise market power that could adversely affect the auction are without basis and are contrary to the facts.

Furthermore, even if generators were able to exercise some degree of market power, this would not justify an abandonment of ComEd's auction proposal. As Dr. LaCasse has explained:

Q. Even if you were presented with some evidence that market power could be exercised in one or several relevant wholesale market, would this convince you that the Auction Process should be abandoned?

A. No. As I testified earlier, a change in the procurement method will not pulverize the realities of the situation. Ultimately ComEd will require supply from the market, regardless of whether that supply is procured through an auction, through an RFP, through a managed portfolio or through the spot market. The Auction Process is designed to harness the competition for the supply of the portfolio management service and to bring the benefits of the competition that exists in wholesale market to the retail customers. It is the best procurement process for customers whatever the state of the wholesale markets. If there is a problem with the wholesale markets, that problem must be fixed directly and cannot be fixed by ComEd's choice of procurement mechanism. As I explain in

detail in Section 3 of my testimony, I believe that the competitive safeguards proposed are sufficient to safeguard against anti-competitive behavior in the auction.

(LaCasse Reb., ComEd Ex. 11.0, 18:438–19:451).

## **2. PJM/MISO “Seam” and Joint Operating Agreement.**

There are two Regional Transmission Organizations, PJM and MISO, in Illinois — in the northern and southern parts of the state, respectively. Mr. Fagan asserted that the “seam” between the RTOs posed impediments to transactions occurring between the two, and that this would make markets in both RTOs less competitive. (Fagan Dir., CUB-CCSAO Ex. 1.0, 21:421-25:497). Mr. Naumann showed, however, that even if these assertions were true they would be irrelevant, since the PJM market is more than adequate to support the ComEd auction even if the MISO market were totally inaccessible. (Naumann Reb., ComEd Ex. 14.0, 17:345–346). In fact, however, Mr. Fagan’s assertions are not true. Mr. Fagan ignores the fact that PJM and MISO will implement a joint and common market under which they will essentially operate as one entity. He also ignores the fact that they have already taken the essential steps towards the joint and common market. Mr. Fagan refers to “day to day operational hurdles the RTOs must overcome to allow efficient transactions between the regions.” (Fagan Dir., CUB-CCSAO Ex. 1.0, 22:432-435). Yet he fails even to discuss the fact that day to day operations are now being handled under the PJM/MISO Joint Operating Agreement (JOA). The JOA has contributed to unprecedented operational integration between the two RTOs, assisted in the smooth inter-operation of their markets and their cooperative management of system congestion, and is a major step toward a full joint and common market. (Naumann Reb., ComEd Ex. 14.0, 17:354–18:368 ; Hieronymus Reb., ComEd Ex. 15.0, 30:611–613). Prof. Hogan testified that the

practical effect of the JOA is to substantially blur the electrical boundaries between the two RTOs, so that “the boundary ‘seams’ are disappearing.” (Hogan Sur., ComEd Ex. 25.0, 9:n6).

The unprecedented degree of coordination under the JOA greatly facilitates the reliable and efficient movement of power between the two RTOs and will result in the same power flows on the grid—and thus the same locational marginal prices — as if ComEd and AEP were in the MISO. In addition, as of December 1, 2004, FERC eliminated the transmission “barrier” between the two RTOs, so that a transaction passing between them pays only one transmission rate, not two. Thus the cost of transmission will be the same, whether the generator is located in MISO or PJM. The result is that even if the auction were held today, bidders could rely on supplies in MISO. (*See* Ogur Dir., Staff Ex. 4.0, 24:537–40). They can both use MISO generation as a financial hedge for service in northern Illinois and arrange physical delivery of MISO generation to northern Illinois. (Naumann Reb., ComEd Ex. 14.0, 20:414–421).

#### **F. Market Characteristics, including Supplier Concentration.**

The purpose of Mr. Fagan and Dr. Rose in making their ambiguous claim that northern Illinois is a relevant market to be studied was to establish that there was a high concentration of generation in this “market” and that therefore questions of market power should be studied further — although Mr. Fagan and Dr. Rose admitted they had not done so themselves. (Rose, Tr. 672–673; Fagan, Tr. 334–338). The evidence showed, however, that since northern Illinois is not a separate market, the concentration statistics the witnesses used were not relevant — and they were also erroneous.

The universally used measure of market concentration is the HHI statistic adopted in the *Merger Guidelines* published by the U.S. Department of Justice and the Federal Trade Commission. In accordance with the *Guidelines*, these market concentration statistics are

calculated only for a relevant geographical market. As noted above, neither Mr. Fagan nor Dr. Rose expressly asserted that northern Illinois is a relevant geographical market and on rebuttal Dr. Rose conceded he was making no such claim. (Rose Reb., AG Ex. 5.0, 17:18–19:4). Yet both witnesses continued to rely on HHI calculations that purport to show that northern Illinois is a concentrated market — despite not claiming that it is a market at all, and despite FERC’s conclusion that the issue of generation market power within PJM should be analyzed on a PJM-wide basis. (See Naumann Reb., ComEd Ex. 14.0, 8:162–167, with citations).

Dr. Hieronymus showed that even if one believed northern Illinois were a relevant geographic market, a proper calculation of HHIs would show that this market was only moderately concentrated, rather than highly concentrated, as Mr. Fagan erroneously claimed. (Hieronymus Reb., ComEd Ex. 15.0, 9:172–181). More important, however, were the studies that Dr. Hieronymus presented that are described above. In particular, Dr. Hieronymus’ second study used the test for a relevant geographic market defined in the DOJ/FTC *Merger Guidelines* and showed that even a monopolist who owned all the generation in northern Illinois could not profitably raise prices. Because HHIs are only meaningful in a relevant geographic market, this solid evidence makes the purported market concentration calculations of Mr. Fagan and Dr. Rose wholly irrelevant.

Professor Sibley echoes the erroneous claims of Mr. Fagan and Dr. Rose that generation capacity in Illinois is concentrated, although he does not support their view that the former ComEd northern Illinois control area is a relevant geographic market. Having incorrectly concluded that a wholesale market concentration problem exists, Professor Sibley then turns to the Illinois Auction volume adjustment and load cap rules, contending that they can be modified and used to address potential exercises of market power. Although Professor Sibley’s market

concentration analysis is flawed for the reasons described by ComEd's witnesses, his effort to manipulate auction rules to control the wholesale market is misguided and provides no basis for abandoning sound principles of auction theory and practice that underlie the procedures and rules recommended by Dr. LaCasse.

A fundamental feature of the Illinois Auction is that suppliers do not bid to provide wholesale market products, as Professor Sibley's views suggest, but rather compete to supply a wide range of integrated risk management services along with a portfolio of other products. This "full requirements" product definition, which is at the heart of the auction proposal, is discussed in Section V (B) of this brief. However, the distinction between the product in the auction, for which suppliers compete, and the wholesale products in whatever relevant market Professor Sibley addresses are two entirely different things. Even if there were concentration in the wholesale product market, it would not tell us whether there is concentration in the market for the auction product. The evidence is that there are many potential suppliers for the risk management auction product, some of whom own generation capacity and many of whom do not, making Professor Sibley's contentions about concentration irrelevant. (LaCasse Reb., ComEd Ex. 11.0, 22:528–24:566; 33:796–37:880).

In addition, even if there were a concentration issue in the broad PJM markets, auction rules could not "fix" it as Professor Sibley suggests. As Dr. LaCasse explains, a competitive safeguard in an auction for full requirements risk management services, such as the load cap or volume adjustment rule, is not going to change the realities in the wholesale markets for energy and capacity. (LaCasse Reb., ComEd Ex. 11.0, 36:866–37:880). Misusing volume adjustment rules, which are discussed in more detail in Sections V (C)(5) and (6), will not solve any perceived problems arising from concentration of capacity. (LaCasse Reb., ComEd Ex. 11.0,

39:926-41:988). Efforts to do so would be completely ineffective, and would only expose customers to volatile spot market prices for supply services that ended up being withdrawn from the auction for inappropriate reasons having nothing to do with the competitiveness of the competition for the full requirements auction product.

### **G. Transmission Constraints.**

Mr. Fagan argued that it was appropriate to use northern Illinois as a market in which to measure market concentration because there might be times when transmission constraints would prevent generation outside northern Illinois from competing with Illinois generation. (Fagan Reb., CUB-CCSAO Ex. 3.0, 10:211–215). Mr. Fagan, however, to provide no evidence whatsoever that transmission congestion which would turn northern Illinois into a “load pocket,” either has existed or is likely to exist in the future.

By contrast, the probative evidence introduced in the case showed that these claims about transmission constraints are without merit. The two studies presented by Dr. Hieronymus that were described above refuted Mr. Fagan’s speculations. The first study, which showed that prices in the ComEd zone are essentially identical to prices in a wide interstate region, by itself demonstrates that transmission constraints are not separating northern Illinois from the broader PJM market. The second study, which showed that a monopolist who owned all the generation in northern Illinois could not profitably raise prices because so much replacement generation would come in from outside Illinois, similarly shows the baseless nature of Mr. Fagan’s unproven assumptions about transmission constraints isolating northern Illinois. Indeed, because Northern Illinois exports low cost energy for which there is no demand in northern Illinois, area generators would first have to forego export sales (that create counterflows on the transmission system) before even beginning to use up the substantial import capacity into northern Illinois. In

addition, Dr. Hieronymus presented data directly demonstrating that there were no significant transmission constraints to importing power into northern Illinois. PJM data on limiting transmission elements in the area around northern Illinois show no significant constraint into northern Illinois, and this is confirmed by transmission loading relief data. (Hieronymus Reb., ComEd Ex., 15.0, 14:286–16:316). Mr. Naumann presented updated data showing that binding transmission constraints that would isolate northern Illinois simply have not happened through August 16, 2005, which captures the full summer season of 2005. (Naumann Sur., ComEd Ex. 23.0, 12:252-255).

In response to this mass of evidence, Mr. Fagan simply asserted that actual data and 2006 projected data were insufficient to prove that transmission constraints would not develop in the period 2007-2011. (Fagan Reb., CUB-CCSAO Ex. 3.0, 12:253–255). Dr. Hieronymus pointed out, however, that both FERC and the antitrust agencies commonly use current and near term forward conditions in assessing the potential for the exercise of market power on a going-forward basis. (Hieronymus Sur., ComEd Ex. 24.0, 7:142–156). Mr. Naumann showed that conjectures about future conditions on the system are less probative than the PJM planning process. If the current condition of the transmission system is adequate — as at least Dr. Rose agreed it is (Rose Dir. AG Ex. 1.015:4–11; Rose, Tr. 665) — the entire purpose of the PJM Regional Transmission Expansion Plan is to assure its adequacy on an ongoing basis by continually performing studies to identify where potential constraints can develop on the system, which then become the basis for planning system reinforcements. Rather than perform a one-time analysis of the future, as Mr. Fagan recommends, PJM continually performs studies to ensure that the system remains reliable and can support market operations by allowing

generation resources to be deliverable throughout PJM. (Naumann Sur., ComEd Ex. 23.0, 13:266–280).

Indeed, Mr. Fagan appears to have pretty well given up on his claims about possible future transmission constraints creating structural market problems, because his call for studies of the 2007-2011 period recommends that such studies be based on model assumptions about strategic bidding behavior. (Fagan Reb., CUB-CCSAO Ex. 3.0, 12:264–273). Dr. Hieronymus pointed out that both FERC and the antitrust agencies use structural modeling — as Dr. Hieronymus does — rather than behavioral modeling, which is based on too many questionable assumptions to be probative. Moreover, behavioral modeling would do nothing to establish transmission constraints. (Hieronymus Sur., ComEd Ex. 24.0, 8:178–9:195). Dr. Hieronymus also pointed out that merely shifting from structural to behavioral modeling does not change the fact that northern Illinois is not a constrained area. As his hypothetical northern Illinois monopolist analysis shows, the attempt to artificially raise prices in the area would be unprofitable, precisely because of the absence of constraints. Finally, Dr. Hieronymus showed that any study of 2007–2011 showing temporary market aberrations, as Mr. Fagan hypothesizes, would be of little relevance to the auction because what will be important to the bidders in the 2006 auction is the forward prices in 2006, which will be based on general expectations of future market trends. (Hieronymus Sur., ComEd Ex. 24.0, 4:78–81).

Nothing reveals the insubstantiality of Mr. Fagan’s arguments about transmission constraints more clearly than the fact that he never attempted to distinguish between significant and systematic transmission constraints that would actually separate northern Illinois from the larger PJM market, creating a load pocket — which the evidence shows have not and will not occur — and the occasional temporary divergence of locational marginal prices on the system

caused by temporary congestion that has no effect whatever on the market. Mr. Fagan stated on cross-examination that as used in his testimony, a binding constraint exists whenever generation is redispatched. (Fagan, Tr. 364). But occasional local redispatch does not result in separation of markets, has nothing to do with bidding in the proposed auction (and therefore could not skew or distort bidding therein) and certainly does not permit the exercise of market power. The hourly price separations among different nodes on the system and accompanying local generation dispatch show the normal efficient operation of a complex market and facilitate, rather than inhibit, efficient allocation of resources. (Naumann Sur., ComEd Ex. 23.0, 5:92–104). Indeed, Mr. Fagan’s implication that locational marginal pricing equates to local market power is inconsistent with his acknowledgement that he has “no major concern with the general design of the PJM LMP spot markets.” (Fagan Reb., CUB-CCSAO Ex. 3.0, 16:382–383).

Thus, the probative evidence in this proceeding clearly establishes that northern Illinois does not experience binding transmission constraints that would cause it to separate from the rest of PJM and become a “load pocket.” Yet Intervenors’ market power allegations absolutely depend on this occurring; the allegations must therefore be rejected.

#### **H. Limitations on Generator Entry.**

Dr. Rose correctly asserts that ease of entry of new competitors is one measure of how competitive a market is, but then incorrectly suggests that the entry of new generation may be difficult because of the long lead times required. (Rose Dir., AG Ex. 1.0, 14:14–15.3). Dr. Rose does not even relate this vague statement to northern Illinois. If he did, and if we ignored the fact that his concern would depend on the invalid assumption that northern Illinois is a separate market, it is worth pointing out that the concern would still be baseless. In the near term (*i.e.*, before new generation can be built), entry is not needed to discipline prices, as there is

substantial excess capacity in the relevant market. Considering the longer term, the existing transmission system and operating rules permit efficient generator entry, and historically generator entry has occurred with a high degree of rapidity. (Naumann Reb., ComEd Ex., 14.0, 15:316–318). Because the PJM markets have visible locational prices, the increase in prices for energy and capacity as supplies tighten signals the need for new generation. Moreover, the standardized interconnection processes and terms in the PJM transmission tariff also facilitate entry. Since 1999, in northern Illinois alone over 8,000 MW of new generation, nearly all owned by independent generators, has been interconnected to ComEd’s system. (Naumann Reb., ComEd Ex. 14.0, 15:320–16:341).

**I. Relationship to Service to Small Commercial and Residential Customers.**

To date competitive electric markets have had less impact on small commercial customers in northern Illinois than they have on the large customers, many of whom are taking service from competitive suppliers. Residential customers have received great benefits in the transition to competition, notably a 20 percent rate reduction for nearly a decade. They have not yet, however, received offers for service from competitive providers, who clearly have not seen a profit in aggregating small accounts at the low prevailing prices. Under the Illinois Auction Proposal, ComEd would in effect aggregate the demands of small customers and offer them to wholesale suppliers through a transparent auction process. Acquiring new supply through any means whatever is unlikely to leave the resulting rates at their current artificial — reduced and frozen — level. Accessing the competitive market through the proposed auction format, however, is calculated to result in ComEd incurring the lowest cost available to serve its customers’ needs, and in doing so it will bring the benefits of wholesale competitive markets to small customers. Aligning ComEd’s rates with actual wholesale market prices will also make

small customers more attractive to competitive suppliers, giving these customers direct access to retail competition. Finally, the auction format is a straightforward, open and transparent mechanism for establishing the market value required under Article XVI of the Act.

## **J. Market Rules and Monitoring.**

Even if — contrary to fact — there were merit to Dr. Rose’s and Mr. Fagan’s allegations that northern Illinois should be regarded as its own highly concentrated power market, there are built-in features of the PJM market that would frustrate any attempts by generation owners in northern Illinois to exercise market power. These market rules are enforced by an independent Market Monitoring Unit that polices the behavior of all market participants.

### **1. PJM Market Rules.**

The most important of PJM’s market rules (a) prevent the physical or economic withholding of generation, which is the chief strategy for exercising market power; and (b) when transmission constraints exist in a local region, require (with minor exceptions not relevant to ComEd) that bids be at no more than cost plus 10 percent.

#### Mandatory Day-Ahead Bidding

Increasing prices through the exercise of market power inherently involves withholding supply. The profitability of the strategy, if any, arises from receiving such high prices on the generation that is not withheld that they more than make up for not being paid for the generation that is withheld. (Hieronymus Reb., ComEd Ex. 15.0, 18:356–359). Several circumstances ensure that northern Illinois generators cannot withhold their supply from the PJM market.

The PJM market rules require that every generator that qualifies as a capacity resource — which includes nearly all generation in northern Illinois — must bid into the PJM day-ahead market every day unless the generation is on an authorized scheduled outage or a legitimate

forced outage. The PJM Market Monitor may investigate to determine whether the forced outage was legitimate. (Naumann Dir., ComEd Ex. 5.0, 21:461–469). Thus, physically withholding generation violates PJM market rules and is closely watched by the Market Monitor. As to economically withholding generation by bidding it at excessively high prices, Dr. Hieronymus’ study described above demonstrated that even an entity that owned all the generation in northern Illinois could not profitably engage in that strategy, let alone any actual generation owner. Mr. Fagan suggested that a generator could employ “nimble strategies” to take advantage of temporary binding constraints at peak hours. (Fagan Reb., CUB-CCSAO Ex. 3.0, 22:512–24:542). But assuming, contrary to the evidence, that such constraints will exist, generators could not be “nimble” enough to profit from them by bidding high in the peak hours, because they must bid into the day-ahead PJM market at the same price for all 24 hours of the day. (Hieronymus Sur., ComEd Ex. 24.0, 13:288–292).

The must-bid rule is extremely important in the functioning of the PJM market, in particular because mandatory bidding in the day-ahead market also disciplines potential market power in the forward market. A generator cannot demand an exorbitant price for a long-term bilateral contract, because the customer always has the opportunity of passing up the offer and instead buying from the generator in the spot market. (Naumann Dir., ComEd Ex. 5.0, 21:472–22:475). Instead, the existence of the forward financial contracts will reduce incentives to exercise market power in the spot market. (Fagan Dir., CUB-CCSAO Ex. 1.0, 14:278–280, Hogan Reb., ComEd Ex. 16.0, 17:363–365).

Furthermore, the largest generation owner in northern Illinois is Exelon Generation and its generation is primarily nuclear. FERC has repeatedly recognized that “the operational characteristics of, and regulatory scrutiny over, nuclear units virtually eliminate the possibility of

withholding output to drive up prices.” *Exelon Corporation and Public Service Enterprise Corporation, Inc.*, 112 FERC ¶ 61,011 (2005); *USGen New England, Inc.*, 109 FERC ¶ 61,291 (2001); *Commonwealth Edison Co.*, 91 FERC ¶ 61,036 (2000). Nuclear units are in fact price-takers, bid into the market around the clock. Thus the largest northern Illinois generator could not engage in either physical or economic withholding. (Hieronymus Sur., ComEd Ex. 24.0, 14:272–283).

### The Bid Mitigation Rule

In addition, if the circumstances that Mr. Fagan and Dr. Rose hypothesize were to occur — if transmission constraints were to temporarily isolate northern Illinois from the rest of PJM and leave it with less than three pivotal suppliers — then PJM’s market mitigation rules would be triggered automatically. Under such circumstances, the generators in the constrained area would not be allowed to bid their generation at market rates but would be required to reduce their bids to their marginal cost plus 10% or less. (Hieronymus Reb., ComEd Ex. 15.0, 13:263–271). Mr. Fagan asserted that a price of marginal cost plus 10% could still allow exercise of market power because bids would exceed barebones short-run variable costs. (Fagan Reb., CUB-CCSAO Ex. 3.0, 33:754-35:794). Dr. Hieronymus, however, testified, based on the PJM *State of the Market Report*, that this claim was without merit in that this constrained price results in a lower cost-price ratio than is typical when no constraints are present. (Hieronymus Sur., ComEd Ex. 24.0, 3:64–4:81). He noted further that if prices were always limited to marginal cost, the marginal seller could never recover any of its fixed costs, and such an approach to market bidding would not be sustainable. (Hieronymus Reb., ComEd Ex. 15.0, 25:516–523). Mr. Naumann pointed out that FERC has agreed that “PJM’s current offer capping rules work effectively to mitigate market power in a manner that is fair to most generating units.” (Naumann Sur., ComEd Ex. 23.0, 23:505–508).

Mr. Fagan also argued that the bid mitigation rule would not apply when transmission constraints were binding, but there is an exception in place for those constraints. (Fagan Reb., CUB-CCSAO Ex. 3.0, 8:172–10:206). In fact, however, these situations pose no risk to the market. As Mr. Naumann explained, the exceptions apply only where FERC has determined that no generator could exercise market power. (Naumann Sur., ComEd Ex. 23.0, 12:254–265, 24:524–555). The PJM Market Monitoring Unit’s 2004 *State of the Market Report* explains in detail that the mitigation mechanism is important but that it is seldom necessary to apply the offer caps, and that they have little direct effect on net revenues. (Hogan Reb., ComEd Ex. 16.0, 21:462–22:465).

Dr. Rose argued that PJM’s bid mitigation does not adequately protect customers because “the capped units receive the higher of the market price or their offer price cap.” (Rose Dir., AG Ex. 1.0, 20:6–7). Dr. Rose misunderstands the function of the offer cap. Market prices in PJM are correctly set by the offers of marginal units. If the capped unit is the marginal unit, its mitigated bid defines the market price; if another unit is the marginal unit, that unit’s bid defines the market price. The offer cap simply prevents the mitigated unit from exploiting its location in relation to a constraint. (Hogan Reb., ComEd Ex. 16.0, 23:505–24:518). Dr. Rose also claimed that mitigation cannot be protecting customers adequately because its use has been declining. (Rose Dir., AG Ex. 1.0, 20:9–12). As Dr. Hogan pointed out, however, declining use of mitigation by PJM simply indicates a declining number of situations in which transmission constraints arise that require bids to be mitigated. (Hogan Reb., AG Ex. 1.0, 24:519–25:536).

## **2. PJM Market Monitoring Unit (“MMU”).**

PJM has a very active Market Monitoring Unit (MMU) that continually monitors the operation of the market for potential exercises of market power or other attempts at manipulation

or gaming. The MMU has a staff of more than 16 full-time professional employees. The MMU continuously monitors the functioning of the market and makes periodic reports on its operations. The MMU has tools to prevent physical or economic withholding of generation to drive up prices. The MMU detects physical withholding by reviewing forced outages or deratings and detects economic withholding by reviewing bids against cost information. (Naumann Dir., ComEd Ex. 5.0, 21:456–468). If the MMU identifies a problem it generally discusses the issue informally with the market participants involved, which is itself effective in ending behavior the MMU questions. If this does not yield results, the MMU issues a Demand Letter requesting the market participant to desist and provides copies to FERC and relevant state regulator(s). FERC also has authority to monitor the PJM markets and has established protocols to work with the MMU to ensure that FERC can exercise its statutory authority to ensure that rates are just and reasonable. The MMU must report to FERC all instances where it has reason to believe a market violation has occurred. (Naumann Sur., ComEd Ex. 23.0, 21:451–22:473).

Dr. Rose argued that the PJM MMU is not very effective because it does not invoke remedies very often. (Rose Dir., AG Ex. 1.0, 11:7–12:14). As Dr. Hieronymus pointed out, however, this is like arguing umbrellas do not deflect rain in the desert. The MMU's 2004 *State of the Market Report* is replete with evidence that prices in PJM are at very competitive levels. If there are times when market power could theoretically be exercised, knowledge that such attempts could be defeated by the market rules prevents the attempts. If a police car is stationed at an intersection all day and no traffic arrests ensue, that does not mean the police presence has failed to prevent drivers from infringing the law. (Hieronymus Reb., ComEd Ex. 15.0, 25:507–515).

### **3. Proposed Illinois Market Monitor.**

Dr. Steinhurst proposed that a separate Illinois Market Monitoring Unit be established that would review the effectiveness and competitiveness of the PJM market structure and have access to confidential market data to detect actual and potential market power and take action to prevent or eliminate abuse. (Steinhurst Dir., CUB-CCSAO Ex. 2.0, 44:1008–1010). In effect, Dr. Steinhurst proposes an Illinois entity to review whether the PJM MMU is performing its job. (Naumann Reb., ComEd Ex. 14.0, 21:437–438). The first problem with this proposal is that there is no source of authority — and Dr. Steinhurst suggests none — for an Illinois entity to monitor transactions in wholesale power markets in interstate commerce, transactions that are by federal statute subject to the exclusive jurisdiction of the FERC. The FERC has stated emphatically: “We recognize that states are concerned regarding the proper regulation of wholesale markets. We disagree, however, that state commissions can serve as co-regulators with regard to wholesale energy markets.” *Midwest Independent Transmission System Operator*, 111 FERC ¶ 61,448 at P 41 (2005). The second problem with the proposal is that for the reasons explained above there is no need for this duplicative function, already performed adequately by the PJM MMU and the FERC.

### **K. Other Competitive Market Issues.**

Dr. Rose opines that the pending Exelon/PSEG merger, already approved by the FERC, would have a “material impact on the development of wholesale markets across the country” and that FERC did not comprehensively address these competitive impacts. (Rose Reb., AG Ex. 3.0, 2:13–7:11). Dr. Rose adduces no evidence for these vague allegations, and they are simply irrelevant to this proceeding. Dr. Hieronymus, who was the Applicant’s principal market power witness in the FERC proceeding, notes that no party to that proceeding presented evidence that

the merger would have competitive implications in Illinois; the focus of the proceeding was on combining generation fleets in New Jersey and Pennsylvania. (Hieronymus Sur., ComEd Ex. 24.0, 23:479–494).

Dr. Rose also seeks to create a false issue by suggesting that FERC erred in not requiring a behavioral analysis of strategic bidding in approving the merger. The FERC rejected the argument that a behavioral analysis was needed for two reasons. First, the structural analysis used in the Department of Justice/Federal Trade Commission *Merger Guidelines* conveys information about the likelihood of the exercise of unilateral market power as well as coordinated market power. Second, Applicants proposed to divest a large amount of generating units, including units that protestors argued could be used to engage in strategic bidding. The divestiture will restore competition to the pre-merger level and thus the merger, as mitigated, will not harm competition. *Exelon Corporation and Public Service Enterprise Group*, 112 FERC ¶ 61,011 at P 131 (2005). Dr. Rose claimed FERC was wrong because the *Merger Guidelines* state that “market share and concentration data provide only the starting point for analyzing the competitive effects of a merger.” (Rose Reb., AG Ex. 3.0, 3:9–4:21). Unfortunately, Dr. Rose failed to understand the *Guidelines*, in which the quoted sentence means that even if a merger *fails* structural screens the applicant can overcome the presumption of adverse competitive effects. (Hieronymus Sur., ComEd Ex. 24.0, 24:512–524). In any case, the DOJ Antitrust Division is investigating the merger, as it is required to do by law, and will make its own evaluation of potential effects on competition. (Hieronymus Sur., ComEd Ex. 24.0, 25:530–535).

## **V. Auction Design Issues**

### **A. General Effectiveness and Suitability**

#### **1. ComEd Addressed the Supply Needs of Customers Through the Transition Period and Planned for the Post 2006 Period as Well**

Since the enactment of the 1997 Restructuring Law, ComEd has made arrangements to assure reliable supply for customers through the transition period. (Hogan Reb., ComEd Ex. 16.0, 6:120–123). Beginning in 2001 after the divestiture of ComEd’s generation assets, supply was provided by Exelon Generation under a power purchase agreement, its full requirements features initially extending through 2004 and later revised to apply through the end of 2006. (Hieronymus Sur., ComEd Ex. 24.0, 27:595–28:605)

Long before the expiration of the existing power purchase agreement, ComEd began to consider available alternatives to procure supply in 2007 and subsequent years. For example, in 2003, in connection with a plan to acquire Illinois Power, ComEd proposed to acquire supply for both utilities through a long-term agreement with Exelon Generation. (Clark, Tr. 159; Juracek, Tr. 263). At the time, ComEd believed that the proposal was in the best interests of customers and other affected parties and, while presenting some legal and regulatory issues, was capable of being implemented. Despite its considerable merits, the proposal met with opposition, and ultimately had to be abandoned.

The experience with ComEd’s efforts to make early post-2006 supply arrangements indicated that some stakeholders in Illinois did not favor approaches that relied upon a long term power purchase agreement with Exelon Generation. It also suggested that unilateral efforts by ComEd to address the post 2006 supply issue were likely to be less successful than a proposal that emerged after a process in which the views of stakeholders could be explored and considered. As a result, ComEd went “back to the drawing board,” and broadened its

consideration of acquisition alternatives to include available methods for acquiring supply through the wholesale markets. (Clark, Tr. 159; Juracek, Tr. 264).

At about the same time, the Illinois Commerce Commission recognized the need for a coordinated approach to post 2006 supply issues and launched the Post 2006 Initiative to provide a framework for considering available alternatives. (ComEd Ex. 1.1). Reinforcing the message from ComEd's unsuccessful efforts in 2003 to put post 2006 supply arrangements into place, the Commission's Post 2006 Initiative discouraged implementation of unilateral procurement plans in favor of a process that would enable all stakeholders to express their views.

## **2. ComEd Followed the Commission's Direction, Participating Actively in the Post 2006 Initiative**

ComEd cooperated fully with the Commission's Post 2006 Initiative, complying with the request to proceed in a collaborative manner with stakeholders. (ComEd Ex 1.1). The process was lengthy and intensive. (Steinhurst, Tr. 498–499). ComEd participated actively throughout the effort, considering presentations on a wide variety of procurement “scenarios” and assessing, along with other stakeholders, the advantages and disadvantages of each option. (O'Connor, Tr. 193–197). As a result of this work, eighteen characteristics of an ideal procurement process were identified that could serve as benchmarks for evaluating alternatives.

The December 2, 2004 Final Staff Report on the Post 2006 Initiative summarizes the assessment of procurement alternatives and expresses the view that a vertical tranche auction “is expected to come the closest to possessing the majority of those eighteen desirable characteristics.” (ComEd Ex. 1.2, 3) Consistent with the goal of the effort, the report provides guidance and direction to utilities regarding the conduct of their supply acquisition activities. Specifically, it recommends that “Large Illinois utilities that do not own significant generation

resources should be encouraged to procure their electricity via a vertical tranche auction, as exemplified in Scenario 1 of the Procurement Workshop Report.” (ComEd Ex. 1.2, 18).

In filing its tariffs in this case, ComEd has followed the guidance and direction provided in the December 2, 2004 Final Staff Report from the Post 2006 Initiative. As ComEd President Frank Clark testified, “What ComEd has been attempting to do is to meet its obligation to provide reliable electricity at reasonable cost to our customers....” (Clark, Tr. 108–109). Toward that end, ComEd has “participate[d] in any and every forum where this debate has been on going for the last year and a half...” (Clark, Tr. 109). The Commission’s Staff ultimately issued its recommendation, supported by the work of the Post 2006 Initiative, and ComEd agreed with it.

The Illinois Auction proposal that would be used to acquire supply for customers is a vertical tranche auction — the procurement method recommended in the Final Report. The Illinois Auction is a reasonable and prudent approach to acquiring supply for customers beginning on January 1, 2007. It best meets the eighteen characteristics of an ideal procurement process identified during the Commission’s Initiative. No other method has been proposed by any party that better meets those criteria. As Dr. Hieronymus summarized, “I don’t know of a better way from a consumer’s perspective to procure power than by a Commission-approved auction.” (Hieronymus, Tr. 1025). Dr. Hogan concurred, stating “I think the auction design that’s proposed by ComEd is completely reasonable and very good.” (Hogan, Tr. 1167). Dr. O’Connor agreed, testifying that residential customers will be “getting the benefit of what ought to be expected to be intense competition at the wholesale level through a transparent mechanism for the opportunity to serve their load.” (O’Connor, Tr. 200). In summary, Mr. Clark testified that ComEd believes the Illinois Auction “is the best method,” “is a method that is transparent,”

“is a method that I believe meets all the criteria ... established on consensus during the workshop process,” and “best complies with the intent as I understand it of the Illinois restructuring law.” (Clark, Tr. 138, 212–213).

At the conclusion of his testimony, Mr. Clark emphasized these characteristics of the Illinois Auction and ComEd’s reasons for proposing this procurement process:

The Illinois Restructuring Law of 1997 contemplates, fully expects and endorsed that the best way to secure supply long term for all customers in Illinois was through some type of a competitive market price, market base process. Since 1997 we have seen the market ...evolve in Illinois primarily and almost exclusively ... at this point by the commercial and industrial customers. The contemplation, however, is the benefits of competition over the long run should be made available to all customers. I know of no better way of bringing the benefits long term into the residential class than providing an opportunity for bidders ... [to] compete ... for the load of the ComEd customers.... [T]he reverse auction process ... ought to constantly push that price down until it clears at the lowest possible price that would be passed onto those customers. In ... canvassing a number of states, in going through the process at workshops and seminars at the Illinois Commerce Commission, through our own internal review, I know of no better process to provide long term competitive pricing, market base pricing, to our customer class than the proposal that we are submitting to this Commission.

(Clark, Tr. 213–214).

### **3. Most Parties Support the Illinois Auction and its Auction Design Features**

The Illinois Auction has received widespread support from the parties to this proceeding. (Juracek Reb., ComEd Ex. 9.0, 2:30–41). For example, Dr. David Salant testifying on behalf of the Staff stated that the auction process “is an efficient mechanism for procuring supply to serve ComEd’s load at the best possible cost.” (Salant Dir., ICC Staff Ex. 1.0, 5:115–116). Frank C. Graves, testifying for Midwest Generation, noted that competitive procurement benefits ratepayers because “Competition is widely acknowledged by economists to produce the lowest reasonable prices to consumers, while ensuring that suppliers assume the risk of investment,

financing, and operating decisions.” (Graves Dir., MW Gen Ex. 1.0, 2:40–42). Barry Huddleston of Dynegey, Inc. commented that the auction “permits many potential suppliers to compete to supply needed resources, and thereby brings with it the substantial benefits of competition to the ultimate prices the utilities will have to pay for wholesale supply.” (Huddleston Dir., DYN Ex. 1.0, 5:101–103). Michael D. Smith of Constellation Energy Commodities Group, Inc. commented that “the Illinois Auction Structure proposed by ComEd incorporates the serious and thoughtful consideration provided by numerous stakeholders with differing interests during the Procurement Working Group discussions.” (Smith Dir., CCG Ex. 1.0, 2:61-3:64). James Steffes of Direct Energy Services, LLC emphasized that “an auction is a procurement approach that is fair, objective and efficient for both buyers and sellers in ComEd’s service territory at this time.” (Steffes Dir., DES / USESC Ex. 1.0, 11:240–241).

One party, IIEC, notes that it “has not opposed ComEd’s auction and ratemaking proposal in testimony,” but raises issues about some of the details of the process. (Dauphinas Reb., IIEC Ex. 5.0, 2:36–3:37). A few parties have opposed the auction entirely, and their reasons for doing so will be addressed in later sections of this brief. It is noteworthy, however, that even witnesses for opponents of the process, such as Harvey Salgo testifying for the Illinois Attorney General, acknowledge that a genuinely competitive process implemented properly would put downward pressure on prices. (Salgo, Tr. 731). The Illinois Auction is just such a process. As ComEd President Frank Clark assured the Commission during his testimony, ComEd “will do the best that we can to participate in a process that will keep those costs as low as they could possibly be....” (Clark, Tr. 114).

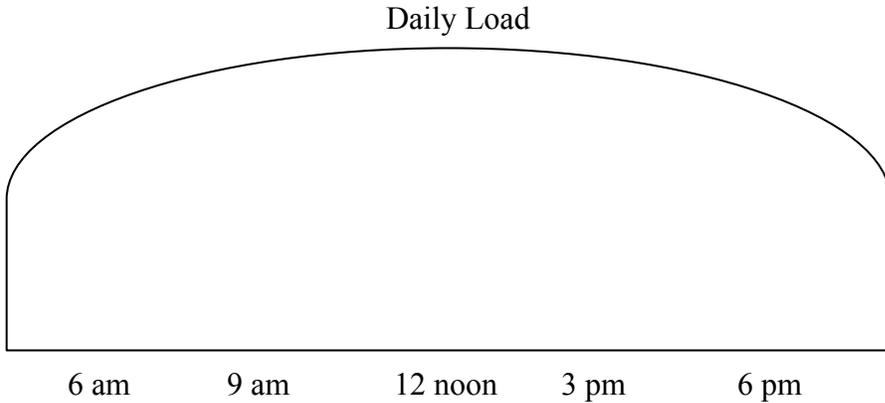
### **A. Full Requirements Product**

Those who support the Illinois Auction have not disputed that use of a full requirements product frees customers from numerous risks that suppliers will assume. This is a significant advantage of the proposal, and is a central feature of the recommendation in the Staff's Final Report. (Juracek Reb., ComEd Ex. 9.0, 22:523-23:532; Hogan Sur., ComEd Ex. 25.0, 12:247–14:290). Because of its importance as an auction design feature and its significance in assessing related issues that have been raised by other parties, the meaning of a full requirements product bears some examination.

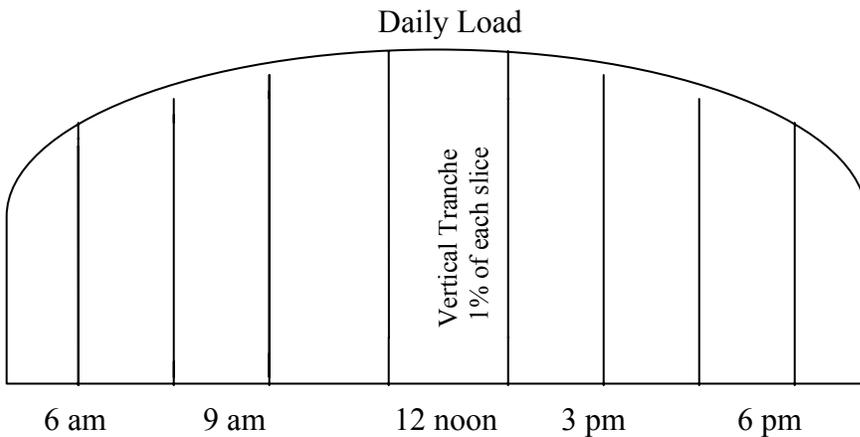
One way to visualize the difference between a full requirements product and alternative products is to start with an image of a utility's load, which varies from time to time. Load varies because retail customers require more energy in some months of the year than in others, require more energy within peak periods of a given month than in off-peak periods, and have needs that vary from hour to hour based on weather conditions and other factors. (Schnitzer Dir., ComEd Ex. 6, 10). In addition, ComEd's retail access tariffs offer customers choice in their selection of providers, which introduces further variability in the demand for generation services. (McNeil Dir., ComEd Ex. 3.0, 37:796–39:839). Because of the variability of demand, a utility's load during a given day, for example, will ordinarily be low in the early morning, rise during the day and decline again at night, as roughly depicted on the following graph<sup>11</sup>:

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<sup>11</sup> This Chart, and those that follow, are presented for illustrative purposes only, are not to scale, and are not intended to represent actual load or generation components on any particular day or date.



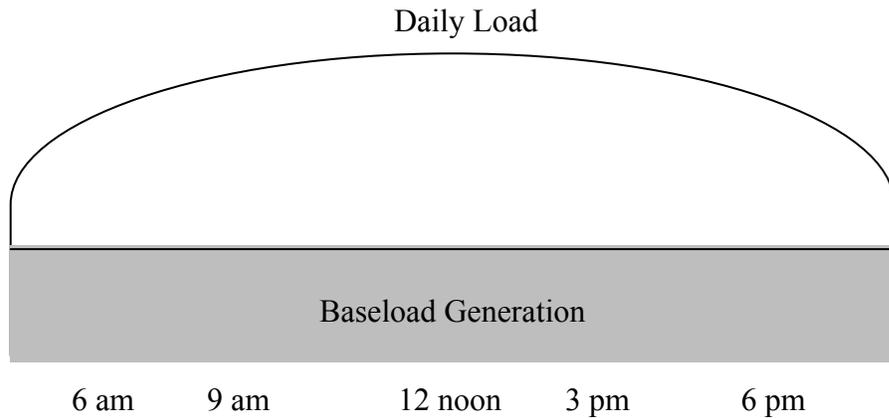
Using this image of the daily variability of demand, the nature of a full requirements product can be seen by dividing the graphed area vertically.



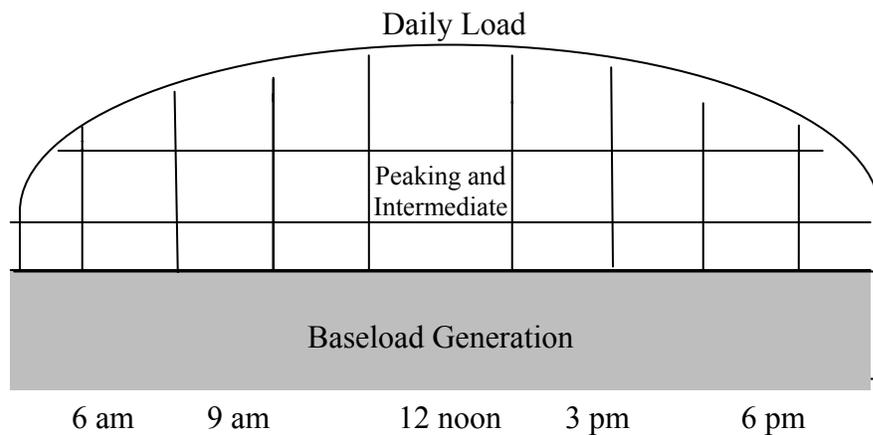
The Final Report’s recommendation that large utilities use a “vertical tranche” auction refers to an auction in which suppliers compete to provide a set percentage of each vertical slice of the utility’s load, for example 1% as depicted on the foregoing chart. As can be seen from the chart, the amount of energy to be supplied during a particular day will vary, with the 1% share requiring more energy to fill the large slice in peak periods during the middle of the day than to fill the smaller slice in off-peak periods early or late in the day. Similarly, the amount of energy to be supplied during high-usage summer months will be greater than during lower usage winter months. “Electricity at midnight in April is completely different from electricity at noon on a hot

August day.” (ComEd Ex. 16.1). The full requirements feature of the Illinois Auction design means that the product being acquired is variable rather than fixed in amount. The supplier agrees to provide a share of the utility’s full requirements throughout the term of the agreement, even though the amount of energy required at some times of day and some months of the year will be significantly greater and more costly than at other times and months. (Naumann Dir., ComEd Ex. 5.0, 8:166–9:185; Hieronymus Sur., ComEd Ex. 24.0, 20–22).

The full requirements product feature shifts the volumetric risks posed by variations in demand from customers to suppliers. (McNeil Dir., ComEd Ex. 3.0, 37:805–808). These risks can be visualized by using the same graph of daily utility load and focusing on the different types of generation resources that are needed to supply full requirements throughout a particular day. The first type of resource is referred to as “baseload” generation. (ComEd Ex. 16.1). It is produced by large power plants that run 24 hours each day, 7 days a week for most of the year to meet the continuous needs for energy that will be required even during lower-usage, off-peak hours. (Huddleston, Tr. 1047–1048). It is depicted as a horizontal bar at the bottom of the following load graph. Nuclear power plants are one source of baseload generation that can meet a utility’s need for this bottom bar of the daily load graph. As can be seen from the chart, baseload generation is not sufficient, by itself, to satisfy a utility’s full requirements.



Significant additional generation resources are necessary to “fill in” the remainder of the daily load graph. These resources, referred to as intermediate and peaking capacity, are depicted by the horizontal bars on the graph.



Nuclear generating plants cannot satisfy these needs efficiently because they run continuously, generating the same amount of energy throughout the day. (Clark, Tr. 211–212) (Collins, Tr. 166; agreeing that a bidder could not supply a vertical tranche “with only its baseload resources.”) (O’Connor, Tr. 240; “If you’re going [to] fill a tranche, you’ve got to be prepared to fill in everything....” “that’s something other than merely the baseload that is provided by the nuclear”) (McNeil, Tr. 548 “They’ll need other forms of generation in order to provide full

requirements.”) (Fagan, Tr. 334). A supplier of full requirements service, therefore, must have intermediate and peaking generation resources to fill in the portion of a utility’s requirements that exceed the baseload amounts. (Hieronymus, Tr. 1040; Hogan, Tr. 1094; Collins, Tr. 165–166; Huddleston, Tr. 1047-1048).

The amount of intermediate and peaking capacity that will be necessary on a particular day or in a given month cannot be predicted with certainty and depends on factors such as time of day, time of year, weather variations and customer decisions to switch to alternative suppliers. A full requirements supplier must make arrangements to meet the varying levels of demand throughout the year. The way in which those resources are obtained and assembled in a flexible portfolio involves significant risk. (Schnitzer Dir., ComEd Ex. 6.0, 9:224–11:249; Naumann Dir., ComEd Ex 5.0, 25:555-26:567; Kahal, Tr. 721–722). Acquiring too much generation may result in losses when excess capacity must be sold at times when prices may be lower. Acquiring too little may result in losses when insufficient capacity is available, requiring purchases when prices are high. In addition, other risks are presented by changes in fuel costs, outages at generating plants and locational price differences, all of which need to be addressed through various hedging strategies. When utilities are forced to assemble such a portfolio, the risks and costs from all of these factors, including acquiring too much or too little generation, fall on customers. When suppliers assume those risks by agreeing to provide a full requirements product, customers receive and pay for the supply they need when they need it, and have no additional financial obligation or exposure. (Schnitzer Dir., ComEd Ex. 6.0, 21:481–22:499). In addition to mitigating customers' risks, the auction of full requirements products will lower prices for customers. By soliciting supply in the form of a full requirements product, suppliers compete on the basis of the lowest cost means to tap into the wholesale market and manage risks

on behalf of ComEd's customers. This extra level of competition will lower prices for customers.

The full requirements feature of the Illinois Auction design is therefore a key advantage of this procurement approach. The benefits it provides are widely recognized and those parties who support the auction proposal have raised no issue concerning this fundamental aspect of the process. (LaCasse Dir., ComEd Ex. 4.0, 24:536–560; Crumrine, Tr. 859; Schnitzer, Tr. 967–968).

## **B. Multiple Round Descending Clock Format**

### **1. General Effectiveness and Suitability**

A basic feature of the New Jersey auction process is its reliance on multiple rounds of bidding during which the price for products “ticks down” until supplier bids for all products are equal to the full requirements being procured. The multiple round, descending clock format is a transparent process that enables bidders to compare the prices of the various products in the auction and to continuously evaluate their bids with the benefit of information provided during the progress of the auction. Dr. Hieronymus testified that “it is an excellent way of extracting the market price.” (Hieronymus, Tr. 1022–1023 ). As Dr. Chantale LaCasse explains in her testimony, the use of this auction format is supported by successful experience and by academic and professional literature supported by extensive research concerning auction design. (LaCasse Dir., ComEd Ex. 4.0, 11:234–13:285, 26:604–27:638). “It drives the price down until suppliers are no longer willing to sell at that price and reveals only the bidders that are willing to sell at the lowest possible price.” (McNeil, Tr. 561).

Supporters of the Illinois Auction recognize the benefits of the multiple round, descending clock format and have proposed no modification of this feature of the auction design. It is an integral aspect of the proposal that will benefit customers by driving prices down.

## **2. Load Caps**

The Illinois Auction design includes a number of competitive safeguards that serve the goal of maximizing the competitiveness of the auction, and of obtaining supply for customers at prices that are competitive and reflective of market conditions. The load cap is one of these competitive safeguards. The load cap limits the number of tranches of each product that a single bidder can bid and win in the auction. This limits the influence that any one bidder can have on the results of the auction and also limits the utility's exposure to any one particular supplier, and thus shields the utility and its customers from risk.

ComEd initially proposed that the load cap be set at a 50% level. (McNeil Dir., ComEd Ex. 3.0, 46:1010–48:1038). In the direct testimony of the Staff and Intervenors, a number of conflicting suggestions were made on the subject of load caps. Mr. Collins on behalf of IIEC suggested that no load cap be imposed. (Collins Dir., IIEC Ex. 3.0, 5:92–13:291). Mr. Graves testifying for Midwest Generation proposed a 33% cap. (Graves Dir., MW Gen Ex. 1.0, 13:268–280, 17:349-18:373, 19:404–20:416). Dr. Salant and Prof. Sibley on behalf of the Staff suggested that a load cap be set “lower than 50 percent” and Dr. Salant proposed a level between 25 and 35%. (Salant Dir., ICC Staff Ex. 1.0, 60:1360-68:1548; Sibley Dir., ICC Staff Ex. 2.0, 23:4–29:545).

Dr. LaCasse reviewed and evaluated these proposals in her rebuttal testimony and identified the factors that she considered in her evaluation. Her conclusion was that a load cap between 33% and 50% would be effective and would provide a good balance amongst the factors

she used for her review. (LaCasse Reb., ComEd Ex. 11.0, 21:510–38:905). Based on the views of the Staff and other parties and taking into account the recommendation of Dr. LaCasse, ComEd modified the load cap proposal in its rebuttal testimony, decreasing the cap level from 50% to 35%. (McNeil Reb., ComEd Ex. 10.0, 4:56–72, 24:500–25:507). The 35% level falls within the range recommended by Dr. LaCasse and responds to the requests by Dr. Salant, Professor Sibley and Mr. Graves for a load cap lower than 50%.

ComEd’s revised load cap proposal met the concerns of all parties who had commented on this issue, with one exception. IIEC continues to advocate that no load cap be imposed and that this competitive safeguard feature of the Illinois Auction proposal be eliminated. The 35% load cap performs important functions that are recognized by the Staff and the majority of the parties. “Smaller participants are more likely to be involved. You’ll have more diversity of viewpoint... . That’s likely to result in lower prices.” (Graves, Tr. 1190). IIEC’s lone opposition to this safeguard is based on the speculative assertion that higher costs might result from a load cap under certain circumstances. Yet Mr. Collins acknowledged on cross examination that different hypotheticals could be constructed under which the absence of a load cap would produce higher prices. (Collins, Tr. 151). The parties to this proceeding recognize, and ComEd agrees, that the benefits of the load cap outweigh any theoretical disadvantage on which IIEC’s opposition is based.

### **3. Starting Prices**

The starting prices for products in the auction will be established by the Auction Manager in consultation with the ICC Staff and ComEd. (LaCasse Sur., ComEd Ex. 19.3). The prices will fall within the maximum and minimum starting prices provided to qualified bidders in connection with submission of their Part 2 applications to participate in the auction. The Part 2

applications must include indicative offers from prospective bidders indicating the number of tranches they would be willing to serve at the maximum and minimum prices. This information is then taken into account in setting the starting prices. (ComEd Ex. 19.3).

#### **4. Bid Decrements**

The size of the reductions in price from round to round in the auction are determined by a formula taking into account the amount of “excess” supply for the particular product. Products that attract more supplier interest and therefore have more excess supply experience larger price reductions. Those that have garnered less interest have smaller price reductions.

Dr. Salant initially proposed that the formula for determining “bid decrements” be concealed from bidders to avoid efforts to “game” the auction. Based on her experience with the New Jersey auction, Dr. LaCasse noted that depriving bidders of any information about the decrement formula would have certain drawbacks and devised an alternative approach to avoid those difficulties while still addressing Dr. Salant’s concerns. (LaCasse Reb., ComEd Ex. 11.0, 83:1963–88:2064; ComEd Exs. 11.4 and 11.7).

In his rebuttal testimony, Dr. Salant discussed Dr. LaCasse’s alternative approach, stating that it “provides a good structure for setting bid decrements.” (Salant Reb., ICC Staff Ex. 11.0, 8:166–167). Dr. Salant supported ComEd’s proposal to work with the Staff to develop the formula fully, and concluded by observing that “I recommend approval of ComEd’s proposal with respect to the bid decrement formula.” (Salant Reb., ICC Staff Ex. 11.0, 8:173–174).

#### **5. Auction Volume Reductions**

The Illinois Auction design, like the New Jersey auction system, provides for volume reductions by the Auction Manager in the event that interest in the auction by suppliers is not as high as expected. If interest is not sufficient, the auction volume is reduced to ensure

competitive prices at the auction, and the remainder of the volume is procured on PJM-administered markets. As Dr. LaCasse has explained, provision is made for volume reductions as a safety net to ensure that prices resulting from the auction are competitive. (LaCasse Reb., ComEd Ex. 11.0, 39:931–935).

Dr. Salant proposes that the Auction Manager also be provided discretionary volume adjustment power for the purpose of exerting pressure on suppliers who, he submits, may have limited options to sell in other markets. Dr. LaCasse responds to this suggestion in detail in her rebuttal testimony, disagreeing that volume adjustments can or should be used for this purpose. (LaCasse Reb., ComEd Ex. 11.0, 40:952–41:988):

I believe that the auction volume guidelines have a single role. And that role is to be a safety net in case the interest at the auction is not as high as expected.... I believe that it is only in the case where there is clearly insufficient interest that there should be a consideration of reducing the volume in the auction and thereby exposing customers to the volatility of the spot market.

In contrast, Dr Salant testifies as follows (Salant Dir., ICC Staff Exhibit 1.0, 26:583–589):

ComEd’s CPP proposal also does not recognize the fact that ComEd has market power as a buyer in the auction. Some suppliers will have limited options outside of the auction to sell their generation resources, except in day-ahead and real-time markets. The volume adjustments, discussed in more detail in Section 6, provide the Auction Manager with the ability to not only mitigate the potential impact of supplier market power, but to exert pressure on suppliers who may have limited options for selling their generation resources in other energy markets.

Dr. Salant, at this point, does not make a concrete proposal regarding the auction volume guidelines, but he describes the approach that he would take. I certainly disagree with the way Dr. Salant seems to approach the auction volume guidelines. The notion that reducing the volume at auction could mitigate wholesale market power does not seem logical. Reducing the volume procured through auction does not of course reduce the volume that ComEd will ultimately need to procure through the wholesale market to serve its default customers’ load. If volume is reduced at the auction, it is procured via PJM wholesale markets. Reducing the auction volume does not mean reducing overall demand.

Dr. Salant appears to believe that these auction volume guidelines are ComEd's strategy for a battle of wits between ComEd with supposedly market power on the buying side, and the sellers, who are presumed to have market power on the selling side. The true stakes — whether a portion of the supply must be procured in the spot market and whether ratepayers are exposed to this additional price volatility — are too high to approach the auction volume guidelines as such a battle of wits.

(LaCasse Reb., ComEd Ex. 11.0, 39: 933–935, 40: 941–966).

In short, volume adjustments would not address whatever concerns motivate Dr. Salant's recommendation because bidders would continue to have broad opportunities to sell generation in other available markets. On the other hand, volume adjustments impose significant risks on customers, exposing them to spot market pricing for the entire amount of any reduction in auction volume. The absence of any benefit from Dr. Salant's proposal together with the distinct disadvantage that would result from it strongly support rejection of this modification of the Illinois Auction design.

## **6. Portfolio Rebalancing**

Dr. Salant additionally suggests that the volume reduction power be used to readjust the individual auction product volumes, increasing volume for products with excess supply and decreasing it for products with limited supply offers. Dr. LaCasse addresses this proposal as well, explaining that it disregards the dynamic nature of the auction process in which switching among products is anticipated and expected so that initial interest in particular products does not always reflect the ultimate distribution of bids. (LaCasse Reb., ComEd Ex. 11.0, 53:1261–54:1284). Moreover, adjusting relative percentages of total requirements among various products during the auction would destroy the careful balance between price and stability that the choice of durations was intended to achieve. For these and other reasons explained by Dr.

LaCasse, she recommends that this second volume reduction proposal be rejected as it is likely to be harmful to the auction process.

## **7. Association and Confidential Information Rules**

The Illinois Auction design includes detailed association and confidential information rules comparable to those that have been used in New Jersey. (ComEd Ex. 19.3). The rules ensure the independence of bidders. Strict confidentiality rules prevent collusion among bidders and prevent any one bidder from gaining advantage in the auction through better information about its competitors. (LaCasse Dir., ComEd Ex. 4.0, 32:757–760).

In addition to these rules, Staff witness Salant suggests that bidders be required to disclose any full requirements agreements with wholesale suppliers that are contingent on the outcome of the auction. (Salant Reb., ICC Staff Ex. 11.0, 31:693–702). Dr. LaCasse explains that this proposal conflicts with the approach taken in the successful New Jersey auctions, would require bidders to disclose sensitive business information that, in her experience, they would be reluctant to provide, and could chill participation in the auction. (LaCasse Reb., ComEd Ex. 11.0, 49:1160–52:1238). The suggested disclosure is not necessary to enforce the load cap because the load cap is not designed to and does not restrict wholesale suppliers who are not participating in the auction from selling energy forward to auction participants. (LaCasse Reb., ComEd Ex. 11.0, 50:1192–1201).

Dr. LaCasse explained her reasons for believing that Dr. Salant’s suggested disclosure is unnecessary and unwise:

Dr. Salant believes that a situation where a wholesale supplier contracts to supply several independent bidders must be stopped because it allows the wholesale supplier to “circumvent the purpose of the load cap” (Salant Dir., ICC Exhibit 1.0, 82: 1856) and because it is a “collusive arrangement” (Salant Dir., ICC Exhibit 1.0, 82: 1849). Most emphatically, the situation considered by Dr. Salant does not circumvent the purpose of

the load cap and is not a collusive arrangement on its face. First, the purpose of the load cap is explained in great detail earlier in this testimony and it certainly does not include limiting a wholesale supplier who is not participating in the auction from selling its energy forward, to auction participants or to anyone else. Second, a collusive arrangement is an agreement among several parties to act in concert for the purposes of keeping prices higher than they would be if they were to compete with each other. If the bidders that have purchased products from the same wholesale supplier were communicating with each other while participating in the auction, it would be collusion. However, bidders will, under the Associations and Confidential Information rules, certify that they will have no such communication. If these bidders were communicating with the wholesale supplier, so that the wholesale supplier would serve as a conduit to guide the behavior of the bidders toward a coordinated outcome, it would be collusion. However, again, bidders will, under the Associations and Confidential Information rules, certify that they will have no such communication. If the wholesale supplier had the ability to specify contract provisions to ensure that bidders would bid to a coordinated outcome, the wholesale supplier again could be serving as a conduit for collusion. However, again, bidders will, under the Associations and Confidential Information rules, certify that their supply arrangements do not contain provisions that direct their behavior in the auction. If each bidder was aware that the others also had contracts with the same wholesale supplier, although this would not be collusion, it could certainly bias the competition at the auction since these bidders would have superior information about each other. However, bidders will, under the Associations and Confidential Information rules, certify that they have no such knowledge.

(LaCasse Reb., ComEd Ex 11.0, 50: 1189–51: 1217).

The association and confidential information rules already address and require disclosure of any collusive arrangements, such as provisions that would entitle a wholesale supplier to direct a participant's bidding in the auction. (LaCasse Reb., ComEd Ex. 11.0, 51:1217–1224).

As Dr. LaCasse explained:

... the Association and Confidential Rules are designed to foresee and minimize the possibility of collusion. A situation in which a wholesale supplier competes with other wholesale suppliers to provide various auction participants with wholesale products is not a collusive arrangement. There is no reason to believe that this situation does anything except facilitate competition for the auction product as the wholesale supplier more widely disseminates its wholesale supplies. And therefore there is no reason to believe that additional disclosures under the

Association and Confidential Information Rules are required to deal with this situation.

(LaCasse Reb., ComEd Ex 11.0, 51: 1217–1224).

Not only are the proposed disclosure unneeded, but Dr. LaCasse believes that they would be harmful to the auction process:

I firmly believe that requiring these additional disclosures, even if these disclosures are protected, can only have a negative impact on the Auction Process. I believe that bidders will at best be reluctant to reveal their sources of supply and the Auction Manager would have no authority to require disclosure from a wholesale supplier that is not participating in the auction. Any contractual arrangements will be considered extremely sensitive business information. It will be unclear to bidders — as it is to me — what would be done with this information or how it could be effectively used to promote competition in the auction. Such disclosure requirements, if properly structured will have a chilling effect on participation as bidders will refuse to provide sensitive business information. Such disclosure requirements, if improperly structured, may well simply increase supplier costs as suppliers enter into more complicated contracts to avoid the need to disclose. The ultimate consequence on the auction of one or both of these effects of adding the disclosure requirements is to reduce competition or increase costs to suppliers, both of which can be expected to have a negative effect on price.

(LaCasse Reb., ComEd Ex 11.0, 51: 1225–1239).

Because there is no need for the additional disclosure suggested by Dr. Salant and because Dr. LaCasse believes it would have a negative impact on the auction process, ComEd has not incorporated this suggestion in the Illinois Auction proposal. (LaCasse Sur., ComEd Ex. 19.0, 57:1235–70:1302).

## **8. Tranche Size**

One of the issues that must be decided when conducting a vertical tranche auction is the size of the tranches on which suppliers will bid. In the New Jersey basic generation services auctions, tranche sizes have been determined by dividing a utility's peak load into percentage slices of approximately 100 MW. (LaCasse Dir., ComEd Ex. 4.0, 24:561–25:580). The actual

amount of load to be served will vary for the reasons described in the full requirements section of this brief. However, the percentage of peak load method and the 100 MW standard provide a means for specifying a basic unit that suppliers will agree to provide.

In ComEd's direct testimony, it proposed to follow the New Jersey approach, having suppliers bid to provide a percentage of peak load approximating 100 MW. (McNeil Dir., ComEd Ex. 3.0, 20:453–458). Tranches of 100 MWs are large enough to enable suppliers to utilize standard 50 MW wholesale products when assembling a portfolio to meet their obligations. On the other hand, 100 MW tranches are also small enough to attract smaller suppliers, thereby facilitating broad participation in the procurement process.

In his direct testimony, Staff witness David Salant suggested the use of a tranche size smaller than 100 MW. (Salant Dir., ICC Staff Ex. 1.0, 52:1173–54:1217). After consulting Dr. Chantale LaCasse, who has served as Auction Manager for the New Jersey auctions, ComEd agreed to revise its proposal to establish a tranche size of approximately 50 MW. (McNeil Reb., ComEd Ex 10.0, 26:530–536; LaCasse Reb., ComEd Ex. 11.0, 48:1151–49:1156). Dr. Salant agreed that ComEd's revised 50 MW tranche size was acceptable. (Salant Reb., ICC Staff Ex. 11.0, 15:327–335). The change to a 50 MW tranche size addresses the only issue that has been raised by any party concerning this aspect of the auction design.

## **9. “Price Taker” Proposal**

In his direct testimony, Dr. Salant suggested that the Illinois Auction proposal be revised to include a “price taker” feature under which a supplier could elect not to participate in the auction directly, but announce its willingness to supply a specified portion of load (which could exceed the load cap applicable to auction bidders) at the auction clearing price. (Salant Dir., ICC Staff Ex. 1.0, 66:1491–69:1571). Dr. LaCasse responded to this proposal in her rebuttal

testimony, explaining that it would negate the advantages of an open auction, that the resulting auction volume reduction would deter participation by other suppliers (and would increase default risk by the price-taking supplier, who would be committed to providing supply at a price it could not influence), and pointing out that a price taker experiment in Connecticut failed and was abandoned for future auctions. (LaCasse Reb., ComEd Ex. 11.0, 41:989– 47:1125). In his rebuttal testimony, Dr. Salant did not list the price taker suggestion as one of the revisions that the Staff considered to be necessary, although Dr. Salant did discuss a few of the many arguments raised by Dr. LaCasse in opposition to it. Dr. LaCasse has considered Dr. Salant’s additional comments and continues to believe that the price taker proposal would be harmful to the auction process. (LaCasse Sur., ComEd Ex. 19.0, 70:1528–73:1593).

Midwest Generation, a potential supplier in the Illinois Auction, has also addressed Dr. Salant’s price taker proposal, concluding that it would deter participation. (Graves Reb., MW Gen Ex. 2.0, 4:84–92). Given the importance of the open auction process and its ability to encourage wide participation to achieve low market prices for customers, the price taker feature, which would jeopardize these fundamental advantages of the auction, should be rejected.

## **10. Other Format Concepts and Issues**

### **a. Detailed Auction “Task Plan” Suggestions**

Staff witness Dr. Salant proposed a number of detailed auction procedures that he groups under the heading of “task plan” recommendations. (Salant Reb., ICC Staff Ex. 11.0, 37:842–45:1020). Following Dr. Salant’s direct testimony, Dr. LaCasse addressed many of the requests for additional forms, rules and procedures that had been raised by Dr. Salant, attaching lengthy exhibits to her rebuttal testimony reflecting a very significant level of detail about the process. (ComEd Exs. 11.1–11.7). She made further revisions to those documents and provided them as

exhibits to her surrebuttal testimony. (ComEd Exs. 19.1–19.6). Additional forms are provided as attachments to the rebuttal testimony of William McNeil. (ComEd Exs. 10.1 (as revised in ComEd Ex. 19.6); ComEd Ex. 10.2).

Dr. LaCasse has reviewed Dr. Salant’s requests for even more detail in her surrebuttal testimony, and has accepted many of his suggested changes to ComEd Ex. 10.1, the Staff Report concerning auction results. (LaCasse Sur., ComEd Ex. 19.0, 76:1655–78:1701). However, with respect to the remaining “task plan” suggestions, Dr. LaCasse concludes that the modifications would be counterproductive and potentially harmful. (LaCasse Sur., ComEd Ex. 19.0, 73:1600–74:1617). The highly detailed process outlined in the testimony and exhibits of Mr. McNeil and Dr. LaCasse is clearly adequate for the Commission’s purposes in this proceeding. Immersing the Commission into even more details, as suggested by Dr. Salant, would result in micro-management that Dr. LaCasse believes is completely unnecessary and would be harmful to the process.

#### **b. Price Cap Proposal**

Prof. Reny testifying on behalf of the Attorney General’s office suggests that price caps be established for individual bidders in the Illinois Auction at levels relating to their respective costs of providing service. (Reny Reb., AG Ex. 4.0, 4:7–6:10). On cross examination, Prof. Reny acknowledged his lack of experience and knowledge in the subject matter of this proceeding, admitting that he had “no experience in electricity markets,” did not consider himself to be “an expert in the particular market for wholesale electricity,” did not consider himself to be “an expert in the assembly and formulation of the products which are traded on wholesale electricity markets,” had “never designed an auction for the procurement of wholesale

electricity,” and had never “designed any sort of competitive procurement mechanism for wholesale electricity.” (Reny, Tr. 1001:9–1002:6; 1006:1–20).

He also acknowledged that he was not making a specific proposal that could be implemented. Significantly, he admitted that he could:

offer no specific proposal as to how the Commission would periodically set price caps for auction suppliers in proceedings prior to each auction as discussed in his testimony.

(Reny, Tr. 1012:2–6).

He also admitted that his proposal would require information about the costs of each supplier and that he did not know whether the Commission had that information or had any way to obtain it.

(Reny, Tr. 1012:7–1013:18).

Prof. Hogan, an expert in electricity markets, responds to Professor Reny’s proposal, explaining that it incorrectly assumes that bidders can be forced to sell for less than market prices, does not reflect that there are alternatives available to sell outside the auction, depends upon the existence of accurate knowledge of supplier costs, and, even if these obstacles could be overcome, would be short sighted because it would discourage investment in the Illinois electricity sector. (Hogan Sur., ComEd Ex. 25.0, 22:482–494). As Prof. Hogan notes:

In essence, Professor Reny answers a fairly straightforward question: is there a way to force sellers to accept prices lower than the market price? His answer appears to have the following logic (paraphrasing): if we had a situation in which the sellers had very limited options of how/where to sell their power, and if a buyer had substantial market power, the buyer could force sellers to accept lower prices. That appears to be the thrust of his testimony.

Importantly, Professor Reny does not answer any of the further questions the Commission might have upon reading this testimony. For example: (1) Does Professor Reny describe the current condition of sellers in the region? (2) Does ComEd have the market power described in his testimony? And (3), even if the answers to (1) and (2) were “yes,” would it

be good public policy for ComEd to exercise monopsony power to force sellers to accept prices lower than market?

(Hogan Sur., ComEd Ex 25.0, 22: 482–494).

Addressing the questions that Prof. Reny failed to consider, Prof. Hogan explains why the price cap concept cannot be implemented and offers no benefits to customers. First, with respect to Prof. Reny’s suggestion that sellers have limited options, Prof. Hogan states that the facts are quite to the contrary:

Sellers in the region can sell to buyers other than ComEd, such as load-serving entities in other parts of PJM and MISO. Sellers can also sell directly into the PJM (or MISO) spot markets. They do not have to sell directly or exclusively to ComEd.

(Hogan Sur., ComEd Ex 25.0, 23:495–497).

With respect to the assumption that ComEd has substantial market power as a buyer, he explains that:

The fact that sellers in the region can sell into the PJM/MISO spot markets and/or to other load-serving entities in the PJM/MISO markets means that ComEd is not the sole buyer of forward hedges. There has been no evidence provided that ComEd has or could successfully exploit market power in the forward market.

(Hogan Sur., ComEd Ex 25.0, 23: 500–503).

Finally, with respect to the question of public policy, Prof. Hogan states:

If the approach has been offered under the assumption that it would benefit consumers, the assumption is short sighted, and the approach should be rejected as a matter of principle. Even if market power could be exercised to force sellers to sell power forward at below market prices, any “advantage” to consumers would be short lived. Potential investors would have concerns about the climate for investments in the Illinois electricity sector because of the higher risks of not earning reasonable returns on investments. Eventually, the investment community’s reluctance to invest, not only in new plants but also in maintaining existing facilities (or bringing them into compliance with environmental laws), could induce lower investment in the electricity infrastructure in Illinois, lower levels of reliability, and lower levels of environmental compliance.

(Hogan Sur., ComEd Ex 25.0, 25: 537–546).

Another expert in this area, Dr. LaCasse, also reviewed Prof. Reny’s testimony, showing that it describes very general principles that apply in different circumstances when specific conditions are satisfied, but that it does not address the situation facing the Commission in this case and offers no specific process or proposal that could be used to procure supply for ComEd’s customers. (LaCasse Sur., ComEd Ex. 19.0, 100:2210–106:2338).

### **C. Clearing Price: Uniform vs. Pay-as-Bid**

One party, BOMA, has proposed a fundamental change in the auction design that would render it unworkable. (Laffer Dir., BOMA Ex. 1.0, 6:134–17:387). The change, while presented as an enhancement that would improve the chances of achieving lower prices for customers, actually conflicts with basic features of the auction design. It would eliminate the transparency that drives down supplier bids through multiple auction rounds, would pose a significant risk of gaming to defeat the purpose of the auction and would increase the risk that products in the auction end up undersubscribed.

The proposed modification to the auction design would provide for auction rounds in which the price of each product would tick down by uniform amounts. Suppliers would submit bids in each round for auction products without having any information about the total volume of bids in the auction as a whole or for any particular product. The auction would continue until all prices declined to a level at which no supplier was willing to bid. The winning bidders would then be selected starting with the lowest prices bid and working upward until the necessary requirements for each product had been procured. BOMA contends that this “pay-as-bid” proposal offers the prospect of achieving lower prices than are possible under the Illinois Auction’s uniform clearing price auction design.

The testimony of Dr. LaCasse demonstrates that the pay-as-bid modification to the Illinois Auction is not workable and is not supported by professional literature. (LaCasse Reb., ComEd Ex 11.0, 64:1506–76:1797; LaCasse Sur., ComEd Ex. 19.0, 22:450–40:854). Among other things, the modification would eliminate one of the principal benefits of the descending clock auction format — the open provision of round-by-round information about the volume of bids as compared to auction requirements that encourages suppliers to continue bidding to compete for the right to provide supply. As Dr. LaCasse testified:

Dr. Laffer’s proposal is nothing more or less than a sealed bid auction. Without dynamic information feedback, a multiple round structure is a complication without a purpose. A bidder who keeps bidding as the price ticks down lower and lower could very well be bidding only against himself. Rather than bidders reducing the quantities of each product as prices tick down, bidders may as well submit individual supply schedules under a sealed-bid format.

Dr. Laffer’s proposal foregoes all the benefits of an open auction format. ... 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 open auction is ideally suited to the procurement of different products and can be expected to lead to the efficient allocation of the supply responsibility over ComEd’s different products. The auction format maximizes the possibility that each and every one of these products will be fully subscribed. The open auction format is transparent in that 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.

(LaCasse Reb., ComEd Ex. 11.0, 74: 1751–75: 1768).

There are strong indications that a transparent process in which such information is available will affect bidder behavior tending to result in more aggressive bids and therefore lower prices.

Dr. Laffer incorrectly assumes that suppliers will bid the same amounts whether an auction is pay-as-bid or is settled at a clearing price. Instead, what is true is that bidders respond to the incentives of the situation, and

the incentives for the two types of auctions are different. The way a bidder bids is driven by balancing two opposing considerations: bidding low enough to win, and bidding high enough to cover its costs and make a profit. In a uniform auction, bidding a low price has a big upside in that it increases the chances that the bidder will win. Bidding low does not have a big downside because the bid does not necessarily affect how much the bidder will be paid for its supply given that the bidder's payment is determined by the clearing price. In a pay-as-bid auction, bidding a low price has the same upside in terms of increasing the chances of winning a bidder. But bidding low has a much bigger downside because every dollar that is shaved off the bid is a dollar that is shaved off the price paid to the bidder. When balancing the upside and downside of bidding a low price, a bidder in a uniform price auction will bid lower.

When Dr. Laffer's erroneous assumption that suppliers will bid the same amounts whether an auction is pay-as-bid or is settled at a clearing price is corrected, the benefit of a pay-as-bid auction format evaporates.

(LaCasse Reb., ComEd Ex. 11.0, 67:1592–68:1608). In other words, the pay-as-bid approach would have suppliers acting as silos in which submitted bids would be no different than if there had never been an auction, multiple rounds or a descending clock structure.

The elimination of round-by-round information as proposed under the pay-as-bid modification also prevents bidders from seeing the relationship between demand and likely price for one product as compared with another. Unlike under the Illinois Auction, buyers would have no information on which to base a decision to switch bids from one product that attracted significant interest (and therefore lower prices) to another that had generated fewer bids (and offered a higher price). The Illinois Auction is designed to encourage such comparisons and switching among products to ensure that the lowest prices for all products are achieved and that all products are fully subscribed. (LaCasse Reb., ComEd Ex. 11.0, 74:1749–75:1782; LaCasse Sur., ComEd Ex. 19.0, 35:755–36:775; Hogan Sur., ComEd Ex. 25.0, 20:430–21:462). This feature of the auction is particularly important in a statewide auction in which products from multiple utilities will be involved. The proposed pay-as-bid modification raises much higher risk

that individual products will go undersubscribed or that pricing of certain products will be higher than they would have been if information about relative bidder interest had been made available.

Dr. Laffer's pay-as-bid proposal does nothing to ensure that all the products in the auction will be fully subscribed. In the ComEd proposed auction, if a product has less interest at the beginning of the auction, its price will not tick down, while the prices of the others products will. This will induce bidders to switch their tranches into the higher price product. For this balancing mechanism to operate, bidders must be provided relative price information—that is, bidders must be able to see that interest in a product, and they see this because a price differential opens between a less popular product and another one. An important part of how bidders in the ComEd auction can revise their bidding strategies is in changing the mix of products that they are offering in response to the information that they get through the auction. This balancing mechanism is completely absent from the Laffer pay-as-bid proposal. Bidders do not have relative price information and do not have any information concerning the relative interest in one product versus another. Bidders cannot react to information they do not have. Bidders will not revise their product offering as the auction progresses. This can only be to the detriment of customers. It makes the possibility that a product will not be sufficiently subscribed in the auction—for example, there could be fierce competition for the CPP-A product while the number of tranches bid on the CPP-B products could fall short of requirements. This would require ComEd to procure the missing supply in the spot market, which would be expected to raise cost and price volatility for customers.

(LaCasse Sur., ComEd Ex. 19.0, 33: 703–34: 722).

A variant of the pay-as-bid modification introduced in BOMA's rebuttal testimony would present yet another problem, permitting suppliers to game the auction in a way that would not be possible under the Illinois Auction proposal. (Parece Sur., ComEd Ex. 20.0, 1:19–3:71; LaCasse Sur., ComEd Ex. 19.0, 30:644–37:782). This variant would offer bidders the right to drop out of the auction during any round and reenter during a later round when bidding was still taking place. (Laffer Reb., BOMA Ex. 3.0, 2:24–3:47). As Dr. LaCasse explains, the Illinois Auction limits artificial withdrawal of tranches by prohibiting reentry. (LaCasse Sur., ComEd Ex. 19.0, 34:713–728). A bidder seeking to withdraw supply in an effort to influence pricing would be unable to do so under the Illinois Auction because withdrawn supply could not

thereafter be sold in the auction. Under the pay-as-bid variant, no such limitation would exist and numerous gaming opportunities would be presented.

Dr. Laffer has provided bidders a single opportunity for bidders to learn information: they learn information by withdrawing all their tranches and then coming back into the auction. There is little or no cost from doing so at the earliest opportunity. Let's say in round 1 the price for each product is \$75/MWh and all bidders submit bids for their full eligible amount. What does a bidder lose from withdrawing all his tranches in round 2? If nobody else bids either, the bidder will be assigned tranches at the highest price in the auction. If someone else bids, the bidder has not lost anything, as the bidder will have another opportunity to bid. I see a very clear gaming opportunity here that takes bidders away from bidding on the basis of the opportunity cost of their participation in the auction. And I see at least the possibility of a disastrous outcome, where all bidders — in trying to get information at the same time — all withdraw all their tranches and stop the clock at a very high price. I am not saying this will happen, but if each bidder sees there is little to no cost to such a strategy, there is always a chance that all bidders would make the attempt in the same round, well before market prices were reached. The same incentives are not present in the ComEd proposed auction. If a bidder withdraws his tranches, he cannot come back in. There is a high cost to withdrawing tranches because doing so is an irrevocable decision. Bidders will not withdraw their tranches just to get information and risk precipitating an unacceptable outcome.

(LaCasse Sur. ComEd Ex. 19.0, 31: 665–32: 682).

Finally, the pay-as-bid modification to a multiple round, descending clock auction has never been used in any jurisdiction in this country to procure supply for electric utility customers. Its proponent, Dr. Laffer, acknowledges that he has never designed or run or participated in any way in an auction for electric supply, let alone in the variant of the auction that he proposes. (Laffer, Tr. 366 ). Dr. LaCasse notes that:

In two BGS Auction proceedings in New Jersey, the Ratepayer Advocate submitted the same recommended auction format for consideration by the New Jersey Board of Public Utilities (“Board”). Each time, the Board rejected the recommendation. The Board cited the fact that a pay-as-bid approach offered no prospects of better prices for customers while removing some of the key benefits of the clock auction format used in New Jersey (Board Order dated 10/22/2003, Docket No. EO03050394, pp. 6–7).

(LaCasse Reb. ComEd Ex. 11.0, 66: 1552–1558).

In summary, there are no benefits that would result from the unproven pay-as-bid modification and there are significant disadvantages that would result, raising prices for customers and risking under-subscription that would force resort to alternative procurement methods for one or more products.

#### **D. Auction Management**

##### **1. Auction Manager**

The Illinois Auction would be administered by an independent third-party Auction Manager, performing a wide variety of functions necessary to successfully complete the procurement process. (McNeil Dir., ComEd Ex. 3.0, 5:94–7:159). ComEd and Ameren discussed the desirability of having a single Auction Manager to conduct the auctions to procure supply to serve their customers, and are jointly proposing that Dr. Chantale LaCasse be retained for that purpose. Dr. LaCasse is recognized as an expert on auctions, has extensive experience in this area and has acted as Auction Manager for each of the New Jersey Basic Generation Service auctions. She has wide ranging background with the design and conduct of such auctions and is highly qualified to serve in this important capacity. (McNeil Dir., ComEd Ex. 3.0, 28:608–29:605).

##### **2. Role of ComEd**

Although ComEd will retain the Auction Manager, the Auction Manager will conduct the auction independently in accordance with procedures approved by the Commission, and not under the direction of ComEd.

### **3. Role of Staff**

The ICC Staff will have a major role in all aspects of the auction process, ensuring that the Commission-approved process is followed and that the interests of customers are protected. In addition to its involvement throughout the process, the Staff will submit a formal report to the Commission following each auction. The report will provide an independent assessment as to whether the auction was conducted fairly and appropriately and all necessary actions to ensure the competitiveness and integrity of the process were taken. (McNeil Reb., ComEd Ex. 10.0, 19:381–20:396). The Staff will also highlight any issues or concerns for consideration by the Commission and will include recommendations regarding further action. (McNeil Reb., ComEd Ex. 10.0, 19:381–20:391). A proposed format for the Staff’s report is included in the record as ComEd Ex. 10.1 (as revised in ComEd Ex. 19.6).

### **4. Representation of Consumer Interests / Separate Consumer Observer**

ComEd and other supporters of the Illinois Auction agree that the interests of customers are important and should be considered at all stages of the auction process. Concern for customer interests has played a major role in the development of the auction proposal, shaping many of the provisions that are reflected in ComEd’s tariffs. The auction design provides for significant regulatory oversight by the ICC and its Staff, which will be present at all phases of the process to assure that the interests of customers are promoted and protected. (McNeil Dir., ComEd Ex. 3.0, 60:1316–64:1395; McNeil Reb., ComEd Ex. 10.0, 33:684–36:752).

Notwithstanding these protections, the Attorney General, Cook County and CUB express concern about the ability of the ICC Staff to represent customers and propose that the auction design incorporate a separate consumer advocate to perform that function. ComEd welcomes the ICC Staff’s willingness to perform oversight functions on behalf of customers and is confident

that the Staff is fully capable of doing so. The auction design provides for the preparation of a report by the Staff following the conduct of each auction that will provide an independent view for the Commission on issues of significance to customers. The extensive role that the ICC Staff has undertaken makes the addition of a separate consumer advocate unnecessary and duplicative. (McNeil Reb., ComEd Ex. 10.0, 31:651–32:664).

#### **E. Date of Initial Auction**

In order for supply arrangements to be in place by January 1, 2007, the initial auction must occur sometime in 2006. ComEd proposed that the initial auction be conducted in September, 2006 — a date that is sufficiently close to the period in which supply will be provided to avoid potential risk premiums that might arise from a longer lag time between the auction and the flow of energy. (McNeil Dir., ComEd Ex. 3.0, 33:708–715). A September date also provides adequate lead time for customers to make decisions about alternative supply options.

The Coalition of Energy Suppliers (“Coalition” or “CES”) strongly supports the Illinois proposal, but advocates a May, 2006 date for the initial auction. (O’Conner Dir., CES Ex. 1.0, 6:128–130). The May, 2006 date had been proposed by Ameren to address circumstances in the MISO environment that it believed favored the earlier date.

In its testimony, the Commission’s Staff emphasized the need for a joint auction that would procure supply for the customers of ComEd and Ameren at one time. (Salant Dir., ICC Staff Ex. 1.0, 7:157–160). A joint auction, which was also favored by ComEd and Ameren, required that a common date be selected. Toward that end, ComEd and Ameren addressed the issue and ultimately agreed that the initial auction should be conducted during the first ten days of September, 2006. (McNeil Reb., ComEd Ex. 10.0, 26:545–28:581). The Staff supports this

agreement and concurs with the decision to conduct the first auction at that time. (Salant Reb., ICC Staff Ex. 11.0, 12:263–14:304).

ComEd considered the Coalition’s continued advocacy of a May 2006 auction date, but concluded that the advantages of the September 2006 process to which both Ameren and ComEd have agreed outweigh any arguments that have been advanced in favor of a May date. In addition, ComEd believes that the lengthy delay between a May auction and the January, 2007 flow of energy could result in increased risk premium costs for customers that are avoidable by conducting the auction in September 2006. IIEC witness Brian Collins notes that “[h]olding both the ComEd and Ameren auction in September 2006 gives more time to lay the groundwork for the auction process” and agrees that “an auction closer to the time of physical delivery will produce a more accurate price.” (Collins Reb., IIEC Ex. 6.0, 3:43–50; Collins, Tr. 160). ICC Staff witness, Dr. Schlaf, agrees, stating:

Staff would support an early September 2006 auction date. A September 2006 auction date would give the Auction Manager the maximum time after the Commission enters the Order in this proceeding to complete the various tasks that will need to be finished prior to the auction , including testing of, and practice with, the software that bidders and the Auction Manager will use during the auction.

(Schlaf Reb., ICC Staff Ex. 13.0, 16: 391–396).

## **F. Common Versus Parallel Auction**

### **1. Among Fixed-Price Products and Hourly Products**

A key feature of the transparent Illinois Auction process is that it enables bidders to assess the relative demand for products and adjust their bidding strategy during the auction to take into account that information. Starting prices for individual products, such as the 3-year product and the 5-year product, may “tick down” by different amounts from round to round, with larger reductions in price for products that have attracted greater interest from suppliers. As

bidders observe higher prices for some products for which less supply is competing, they may switch their bids to those products, causing the prices of the less favored products to decline as well. (LaCasse Dir., ComEd Ex. 4.0, 26:606–29:682).

In ComEd’s direct testimony, it proposed that switching by bidders be permitted among the fixed price products serving ComEd’s customer load. (McNeil Dir., ComEd Ex. 3.0, 28:600–601).

## **2. Between Fixed-Price and Hourly Products**

Dr. Salant’s testimony suggested that the auction rules also provide for switching between fixed price and hourly products. (Salant Dir., Staff Ex. 1.0, 27:615–47:1058). Dr. LaCasse responded to that recommendation, explaining that the fixed and hourly products are not good substitutes for each other and that switching between them would not be appropriate or effective. (LaCasse Reb., ComEd Ex. 11.0, 61:1448–62:1460). Andrew Parece, Auction Monitor for the first New Jersey basic generation services auction, likewise concluded that switching between these products would present risks of additional costs, complexity and potential for strategic bidding behavior that may be detrimental to the auction. (Parece Reb., ComEd Ex. 12.0, 35:746–38:797).

ComEd followed the advice of Dr. LaCasse and Mr. Parece and has not provided for switching between fixed and hourly products. In his rebuttal testimony, Dr. Salant notes that “the potential benefits of combining the fixed price and hourly price contracts into a single auction are relatively small” and, therefore, accepted ComEd revised approach to product switching, recommending approval of the proposal “even though the fixed price and hourly products are auctioned separately.” (Salant Reb., Staff Ex. 11.0, 11:239–242).

### **3. Between ComEd and Ameren Products**

Dr. Salant urged that the auction rules provide for switching between the fixed price products of ComEd and Ameren. (Salant Dir., ICC Staff Ex. 1.0, 27:615–47:1058). Having reached agreement with Ameren (prior to the filing of rebuttal testimony) on a common date for the initial auction, ComEd responded favorably to Dr. Salant’s suggestion and proposed in Mr. McNeil’s testimony that the auction provide for switching between ComEd and Ameren fixed price products. (McNeil Reb., ComEd Ex. 10.0, 28:583–30:616). ComEd also proposed that switching be permitted between the hourly products of ComEd and the hourly products of Ameren.

ComEd Ex. 11.5 (b) is a diagram showing the fixed and hourly price products of ComEd and Ameren to be included in the Illinois Auction divided between the Fixed Price Section (within which switching is permitted) and the Hourly Price Section (within which switching is also permitted).

#### **G. Contract Durations for Blended, Fixed Price Product**

##### **1. Proposed Blends for Residential and Small Commercial Customer Supply**

Another feature of the Illinois Auction that has received broad support is the use of a blend of contract durations to acquire supply for residential customers. Under the Illinois Auction proposal, supply for ComEd’s residential customers will be provided under agreements with a series of staggered 1, 3 and 5 year contract terms. (McNeil Dir., ComEd Ex. 3.0, 23:515–25:532). The Staff’s Final Report discussed the ways in which the goals of rate stability and market based pricing can be balanced through separate products designed for different customer groups, giving as one example the possibility of offering “a relatively stable product for small customers based on overlapping multi-year full requirements contracts with suppliers....”

(ComEd Ex. 1.2). Such a product, Staff suggested “enables the utility to provide a market-based but significantly stable price for small customers.” (ComEd Ex. 1.2, 15). ComEd’s blended 1, 3 and 5 year contract product for residential customers complies with the Staff’s guidance, making a relatively stable product available to provide supply for residential customers. (McNeil Dir., ComEd Ex. 3.0, 25:540–26:549).

Although the benefits of a blended product using staggered contract terms for residential customer supply were widely accepted, a few conflicting suggestions were made for changes in the blend of contract durations.

## **2. 5-year Agreements**

Dr. William Steinhurst, testifying on behalf of the Citizens Utility Board, suggested that the number of 5-year agreements in the blend be increased and that the percentage of 1-year contracts be decreased. (Steinhurst Dir., CUB Ex. 2.0, 27:617–28:647). In support of his approach, Dr. Steinhurst noted that these changes could reduce the percentage of ComEd’s total load that would be included in annual auctions after the initial procurement from 40% to approximately 34%. (Steinhurst Dir., CUB Ex. 2.0, 28:635–641).

In contrast, James Steffes, testifying on behalf of Direct Energy Services, LLC and U.S. Energy Savings Corp., opposed the inclusion of contracts longer than one year in the blended supply portfolio. (Steffes Dir., DES / USESC Ex. 1.0, 8:160–166). He argued that longer term agreements may result in higher default service prices, and could contribute to demand side management and environmental problems.

These differing views about the use of 5-year agreements illustrate the trade offs that are involved in developing a blended product to provide supply for residential customers. The position advocated by Mr. Steffes in the interest of avoiding potentially higher costs associated

with longer term agreements would leave customers with nothing but relatively short term supply contracts, eliminating the stability that 5-year agreements provide. The suggestion advanced by Dr. Steinhurst in the interest of reducing the volume in later auctions would weight the portfolio more heavily toward long term agreements, aggravating the concern expressed by Mr. Steffes about possible premiums. After considering the suggestions of all parties, including the support of the Staff and others for the proposed mix of 1, 3 and 5 year agreements, ComEd believes that the percentage of 5-year contracts in the blended portfolio initially suggested in the tariffs strikes the right balance between stability and price responsiveness.

### **3. 3-year Agreements**

Wayne Bollinger, Director of Energy Supply for Peoples Energy, testified that he would like to see “all 5-year and 3-year contracts eliminated from the portfolio supply for customers with demands of 25 kW to 400 kW.” (Bollinger Dir., PES Ex. 1.0, 8:149–9:152). This proposal, while focusing on a particular customer group, presents the same disadvantage as the suggestion from Mr. Steffes. It would confine customers with demands between 25kW and 400kW to relatively short term supply arrangements, depriving them of the stability that can be provided through the use of a blend that includes 3 and 5-year contracts. ComEd believes that this customer group would benefit from the added stability offered by the blended product, and concludes that Mr. Bollinger’s suggestion to eliminate that protection is not in the best interests of these customers.

### **4. 1-year Agreements**

Dr. Harvey Salgo expressed concern on behalf of the Illinois Attorney General about the use of longer terms agreements and the potential risk premiums that suppliers may require under such contracts. (Salgo Dir., AG Ex. 2.0, 18:11–19:21). Like the proposals of Mr. Steffes and Mr.

Bollinger, Dr. Salgo's position would sacrifice stability for price responsiveness. ComEd does not believe his approach recognizes the extent to which customers benefit from stable prices for supply.

In summary, ComEd considered each of the competing suggestions to increase and to decrease reliance on 3 and 5 year agreements described in Sections 2 through 4 and concluded that the proposed blended portfolio of 1, 3 and 5 year contracts strikes an appropriate balance. (McNeil Dir., ComEd Ex. 10.0, 36:766–49:1054). It makes market based and relatively stable prices available to residential and small commercial customers, as recommended in Staff's Final Report. Even Mr. Bollinger, who sought to eliminate 5 and 3 year agreements entirely, acknowledges that they add an element of stability to the overall rate. (Bollinger, Tr. 918–919). The interest of customers in having at least a modicum of price stability in their supply arrangements, while still providing price responsiveness, strongly favors the use of a blended portfolio, and the mix proposed by ComEd provides the best solution and furthers the goals advanced in the Staff's Final Report.

#### **5. Percentage of Supply Acquired at Subsequent Auctions**

The staggered term structure limits acquisition volume after the initial auction to 40% of ComEd's load. (McNeil Reb., ComEd Ex. 10.0, 39:838–40:851). While Dr. Steinhurst's proposal would reduce this percentage slightly, there would be a cost associated with doing so. Greater reliance on 5-year agreements would tend to increase prices paid by customers for their blended portfolio. Although inclusion of 5-year agreements is beneficial in terms of providing stability, ComEd believes that increasing the proportion of 5-year agreements to achieve a small reduction in the annual volume procured in subsequent auctions is not advisable.

## **H. Fixed Price Auction Product and Tariffed Services for Larger Customers**

### **1. Nature of Auction Product and Tariffed Services for 1–3 MW Customers**

ComEd's initial proposal contemplated that supply for customers with peak demands between 1 MW and 3 MW would be procured through agreements with 1-year terms. The 1-year term of the fixed price product for this customer group has remained unchanged.

### **2. Nature of Auction Product and Tariffed Services for 400 kW–1 MW Customers**

ComEd's initial proposal envisioned that supply for 400 kW to 1 MW customers would be procured in the 1, 3 and 5 year blended auction that also served residential customers. A number of parties, including the Coalition, argued that the 1-year fixed price product should also be the supply source for customers with demands between 400 kW and 1 MW.

After considering the views expressed by the Coalition and the Staff, ComEd revised its proposal to include supply for 400kW to 1 MW customers in the 1-year fixed price auction segment, rather than in the blended auction segment (subject to a resolution of the opt in / opt out issue described in section VII (B)(4)(a)(ii)). (McNeil Sur., ComEd Ex. 18.0, 19:415–21:460). That change had the collateral effect of eliminating the need for the migration adjustment factor initially proposed by ComEd to account for the different propensity of 400 kW to 1 MW customers to switch suppliers as compared with residential customers. (McNeil Sur., ComEd Ex. 18.0, 20:435–449, 35:780–786; Alongi-Crumrine Sur., ComEd Ex. 21.0, 12:254–13:276; Alongi-Crumrine, Tr. 774–775; Spilky / Domagalski, Tr. 576–577 ). As a result of ComEd's revised proposal, there is now widespread agreement on appropriate supply terms for customers with peak demands between 400 kW and 3 MW. As Dr. O'Connor testified on behalf of the

Coalition, ComEd has “come back with a variation on [the Coalition’s proposal for 400kW to 1 MW customers] that I think overall makes very good sense.” (O’Connor, Tr. 250).

### **3. Treatment of Customers ( $\geq$ 3MW) Taking Services Subject to a Competitive Declaration**

The one area in which disagreement remains relates to customers with peak demands in excess of 3 MW. Service to these customers is subject to a competitive declaration that became effective by operation of law in 2003. Given that competitive declaration, the legal status of these customers with respect to ComEd service obligations is different from the status of other customers. ComEd is not required to offer tariffed commodity service that is subject to a competitive declaration—a legal distinction that recognizes the competitive alternatives that are available to this customer group.

Despite the different legal status of tariffed service for the over 3MW group of customers, various parties, including BOMA, the Department of Energy, IIEC and the Staff, advocate inclusion of this customer group in the 1-year fixed price supply auction. ComEd understands that the Commission cannot require this change for customers whose service is subject to a competitive declaration, and that the proposals by these parties are in the nature of requests that ComEd voluntarily extend the 1-year fixed price auction to include customers who have no legal right to be included.

ComEd considered these suggestions, but determined that the line between customers whose service is subject to a competitive declaration and those who are not should be respected. There are already RESs in Illinois offering service to this customer group. (McNeil, Tr. 581). Although Department of Energy witness Dale Swan indicated that a large federal government customer received few, if any, responses to requests for proposals from retail suppliers, cross examination suggested that the terms of the RFP were responsible for the outcome because they

included onerous provisions, such as a section entitling the customer to terminate the agreement for its sole convenience at any time—a provision that Mr. Swan testified “is included in all government RFPs.” (Swan, Tr. 692).

The customers in the over 3 MW category have alternative sources of supply if they agree to reasonable commercial terms. “Those customers do have access and are using an equivalent service acquired through the market.” (O’Connor, Tr. 203) (McNeil, Tr. 588–591). ComEd is not proposing to confine them to those sources. ComEd will continue to offer bundled service to customers with over 3 MW in demand, but the service would be supplied through hourly energy purchases. (McNeil Sur., ComEd Ex. 18.0, 44:968–971). That is not simply a disfavored option. For example, Mr. Stephens acknowledged that, on an annual basis, it is possible that the hourly product that will be available to over 3 MW customers could be less costly than the annual product they are asking ComEd to provide. (Stephens, Tr. 90).

IIEC’s proposal, in the words of Dr. O’Connor, “would have the practical effect of rescinding the competitive declaration...” (O’Connor, Tr. 202). The Commission should reject the recommendation to do so.

### **I. Continuation of CPP-H Auction**

The Illinois Auction design provides for ComEd to acquire supply for its largest customers through the hourly CPP-H auction until the PJM reliability Pricing Model or a functionally equivalent model is in place in PJM. Mr. Dauphinais expressed concern that ComEd might discontinue the CPP-H auction before the PJM alternative become operational. (Dauphinais Dir., IIEC Ex. 2.0, 14:317–16:362).

ComEd provided assurances in its rebuttal testimony that it would continue to conduct the CPP-H auction until the PJM Reliability Pricing Model has been filed with and approved by

FERC, and the PJM forward centralized capacity auction is in effect. (Naumann Reb., ComEd Ex. 14.0, 20:423–429).

## **J. Contingencies**

### **1. Volume Reduction**

As discussed in Section V B(6), the Illinois Auction design provides for volume reductions by the Auction Manager in the event that interest in the auction by suppliers is not as high as expected. In this contingency, volume reductions serve as a safety net to ensure that prices resulting from the auction are competitive. (LaCasse Reb., ComEd Ex. 11.0, 39:931–940). The Auction Manager will make an assessment of the competitiveness in the auction at the indicative offer stage, and in the first round of the auction. If the assessment indicates that the level of interest from suppliers is not sufficient to provide assurances of a competitive result, the Auction Manager can cut back the volume to be procured. The volume cutback means that a larger number of tranches bid will be chasing a smaller number of tranches of available load, ensuring a more competitive bidding environment. (LaCasse Reb., ComEd Ex. 11.0, 27: 651–658)

### **2. Supplier Default**

In the event that a supplier selected through the auction process defaults, the process provides for replacement power to be procured in one of three ways — through the PJM markets, through an RFP-type solicitation process or through another auction. The method used would depend on the length of the remaining term of the affected contract and the percentage of ComEd’s total retail load involved. (McNeil Dir., ComEd Ex. 3.0, 53:1163–56:1233).

### **3. ICC Rejection**

In the event that the ICC rejects the auction results, acquisition of supply from the prevailing bidders would not proceed. A process involving the ICC Staff, the Auction Manager and ComEd would be initiated promptly to determine whether the reasons for the rejection could be remedied by conducting another auction. If another auction could not be conducted, a one-year interim procurement plan would be put in place until the next annual auction with the approval of the Commission. Any requirements needed to meet customer needs prior to the time that an interim plan could be implemented would be procured through PJM administered markets. (McNeil Dir., ComEd Ex. 3.0, 56:1234–57:1253).

### **4. Subsequent Prudence Reviews of Actions in Response to Contingencies**

In the event that replacement power must be procured as a result of a supplier's default, ComEd will file a detailed report with the Commission concerning the default and the actions that ComEd took to replace the power lost as a result of the default. In the event that ComEd's actions caused the supplier to default, those actions would be subject to a prudence review and a determination whether any additional costs resulted from ComEd's decisions. (McNeil, Tr. 565).

If the Commission rejects the auction results and an interim supply plan has to be implemented with Commission approval, the entire plan would be subject to review by the Commission for prudence prior to its implementation. (McNeil, Tr. 566).

## **K. Regulatory Oversight and Review**

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

The testimony of many witnesses has addressed the role that the Commission should play in determining the prudence of the Illinois Auction. ComEd understands that the Commission

must conclude that acquisition through the process is prudent and thus that the resulting costs are prudently incurred. For that reason, ComEd has presented a detailed description of the auction methodology and procedures, which, together with the extensive comments and recommendations of other parties to this proceeding, provide a complete record on which the Commission can base its decision.

With respect to the proposed auction process, the time to determine prudence is now, before the process has been implemented. The decisions about the overall approach and the details of its execution should be considered in advance, when changes can be made to reflect the Commission's judgment about how best to proceed. This proceeding offers the ideal opportunity for the Commission to accomplish precisely what prudence review is intended to provide—a review of the decision that Illinois utilities are making about procurement of supply for customers based on the facts that are available at the very time the decision must be made.

The Commission has explained the nature and scope of its prudence review, stating that “the term ‘prudent’ is defined as exercising good judgment or common sense,” and adopting the following standard for making prudence determinations:

Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.

Imprudence cannot be sustained by substituting one's judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being ‘imprudent’.

(Order, Docket 84-0395, **DATE?**).

The Illinois Appellate Court has agreed with this formulation of the standard, stating that “the Commission’s interpretation of prudence is logical and supported by the parameters of the statute.” BPI v. Illinois Commerce Commission, 279 Ill. App. 3d 834, (1st Dist 1996).

Review of the prudence of the auction process should not take place after the auction has occurred, for several reasons. First, hindsight review is impermissible in a prudence review; any new facts that became available at that time would not be appropriate for consideration. Second, the utility does not make any decisions during the course of the auction that would subject it to review of the prudence of the auction process. Third, it would be too late to implement any recommendations that the Commission concluded were meritorious. Finally, it is essential from a commercial point of view to limit the post-auction review period to two days. (Schnitzer Dir., ComEd Ex. 6.0, 27:621–30:696).

The factors that should be considered by the Commission have all been explored in detail in this proceeding. The Commission has before it the Final Report of the Post 2006 Initiative to Illinois Governor Blagojevich, which concludes that “the State’s largest electric utilities that no longer own generation must procure power in the wholesale market.” (ComEd Ex. 1.1). It has the recommendation in the Staff’s Final Report that “Large Illinois utilities that do not own significant generation resources should be encouraged to procure their electricity via a vertical tranche auction, as exemplified in Scenario 1 of the Procurement Workshop Report.” (ComEd Ex. 1.2, 18). It has a specific proposal, supported by extensive expert testimony, that follows Staff’s recommendation and outlines all of the relevant procedures of a vertical tranche auction to procure supply for ComEd’s customers. It has exhaustive reviews by other parties of ComEd’s proposal, together with revisions to the proposal adopted by ComEd in response to suggestions that have been made. It has the opportunity to consider each of the issues raised in

this proceeding concerning the process, as described in this brief, and to resolve any remaining disagreements about the best approach to be followed. That is the path the Commission should take, and ComEd submits that it should determine that the Illinois Auction is a prudent and reasonable method to acquire supply to serve customers needs.

Witnesses for the few parties opposing the Illinois Auction have essentially conceded in testimony that the use of a vertical tranche auction to acquire supply for customers in the wholesale market is not imprudent. Dr. Steinhurst, testifying for CUB and Cook County, agreed that there is nothing inherently unjust or unreasonable about ComEd buying energy at wholesale. (Steinhurst, Tr. 482). He acknowledged that ComEd and most other utilities around the country have done that for years. (Steinhurst, Tr. 482). Harvey Salgo, testifying for the Illinois Attorney General, agreed. (Salgo, Tr. 723–724).

Dr. Steinhurst also admitted that, if ComEd prudently acquired supply and used it to serve customer load, the costs it incurred “would be recoverable from all the different customer classes.” (Steinhurst, Tr. 486). Mr. Salgo acknowledged this as well. (Salgo, Tr. 727–729).

Dr. Steinhurst also agreed that there is nothing in his testimony expressing the view that a competitive procurement process in general or an auction are imprudent per se. (Steinhurst, Tr. 486–487). Once again, Mr. Salgo shared this view. (Salgo, Tr. 729–731).

Finally, Both Dr. Steinhurst and Mr. Salgo agreed that, if ComEd procured power for its customers using a competitive procurement process that the Commission determined was prudent and did not result in any costs that were not entitled to be recovered under traditional ratemaking, ComEd would be entitled to recover the resulting costs in its rates. (Steinhurst, Tr. 489–490) (Salgo, Tr. 729–731). That is all that ComEd is asking the Commission to do in this proceeding.

The Commission should review the detailed record describing the Illinois Auction process and procedures and should determine that the process is a prudent and reasonable means to acquire supply for customers. After reaching that determination, the Commission should approve ComEd's tariffs providing for the costs of the procurement to be recovered from customers, as Dr. Steinhurst and Mr. Salgo concede is appropriate when a prudent procurement method is employed.

## **2. Post Auction Commission Review Of Results**

As in New Jersey, the Commission will conduct an immediate review of the auction and will determine whether to accept the results or commence an investigation. In the course of that review, Mr. McNeil made clear in his testimony that “[t]he company’s proposal doesn’t in any way limit the Commission’s ability to review all the information it has available to it.” (McNeil, Tr. 504).

To the extent that parties have advocated that review of the prudence of the procurement process should take place after the auction when the prices that resulted from it are known, Mr. McNeil’s response during the hearing provides compelling reasons why that approach is not appropriate. As he explained:

I don’t understand a prudence review to be a prudence review of prices. It’s prudence of the utility’s decisions that it makes in the course of doing its business. So in the auction, in this particular proposal, the utility is not running the auction. We’re not making the decisions in the auction. We’re asking for prudence review of the process up front and then the opportunity to review that after the fact, but I don’t know what decision the utility made during the course of the auction that would subject that to prudence review.

(McNeil, Tr. 551–552). Insofar as ComEd may be required to make decisions if it becomes necessary to implement contingency plans, ComEd has recognized that the prudence of those decisions could be considered by the Commission. (McNeil, Tr. 564–568). However, “the

prudence of the entire competitive process, the design, the rules that we're proposing that govern the conduct of the auction" should all be decided in this proceeding, not during the post-auction review of results. (McNeil, Tr. 559).

### **3. Post-Auction Workshop Process**

After each auction, a well-designed post-auction workshop process will take place, enabling parties to assess the need for improvements and any response to address lessons learned from the process. (McNeil Dir., ComEd Ex. 3.0, 60–61).

### **4. Formal Proceeding(s) to Consider Process**

Once every three years, a formal proceeding will be conducted to review the procurement experiences during a multi-year period, determining whether changes in the process or details of the approach should be considered. (McNeil Reb., ComEd Ex. 10.0, 34–35).

IIEC witness Collins suggests that the Commission conduct a formal proceeding every year to review the results of the auction, the prices paid and alternative procurement strategies. (Collins Dir., IIEC Ex. 3.0, 14–16). Such annual proceedings are unnecessary because, as described above, the Illinois Auction proposal already incorporates all of the post-auction review that is required or desirable. (McNeil Dir., ComEd Ex. 3.0, 60–64; McNeil Reb., ComEd Ex. 10.0, 33–36; Juracek Sur., ComEd Ex. 17.0, 26–28; McNeil Sur., ComEd Ex. 18.0, 39–41). The Commission will conduct an immediate review of the auction results; post auction workshops will take place to explore possible improvements to the process, and formal proceedings will be initiated every three years.

### **5. Other Processes and Proceedings**

In addition to the specific review proceedings and workshops to consider auction issues, the Commission will retain its powers to initiate whatever investigations or proceedings it sees fit

under the provisions of the Public Utilities Act. Mr. McNeil emphasized the significant regulatory oversight that is built into the process: “There’s oversight clearly before the auction in all the activities leading up to the actual auction itself, and then there’s staff oversight in the auction, and there’s staff involvement in the post auction workshop process.” (McNeil, Tr. 607).

## **6. Summary**

All of these features of the Illinois Auction proposal provide for regulatory oversight and review of the process and its effectiveness. (Clark, Tr. 200–201). They do so in a flexible, multi-faceted way. As Mr. McNeil explained, “we’ve proposed a formal process every three years and every year to have a workshop process which essentially accomplishes the same objective as what they do in New Jersey.” (McNeil, Tr. 601). There is no need for an additional annual docketed proceeding of the type proposed by Mr. Collins. However, if the Commission concludes at any time that a formal proceeding is necessary, Mr. Collins concedes that the proceeding could be initiated. (Collins, Tr. 171). As Mr. McNeil confirmed, “The Commission certainly retains their rights to open investigations and make changes they may see fit, and the parties retain their rights to petition the Commission to open those investigations if the workshop process didn’t produce a result that everybody could agree to.” (McNeil, Tr. 603). Providing for a mandatory annual proceeding under these circumstances serves no purpose and would be wasteful of Commission resources.

### **L. Supplier Forward Contracts**

#### **1. Uniformity in General**

ComEd proposed the use of a uniform supply contract to eliminate negotiations over non-price terms and to permit supplier offers to be compared directly on the basis of price. (McNeil Dir., ComEd Ex. 3.0, 41). Use of a standard contract also enables bidders to become familiar

with the details of the transaction well in advance of the conduct of the auction and provides them with an opportunity to resolve any questions or uncertainties before the process begins. Eliminating uncertainties and having all bidders addressing identical terms and conditions enhances the competitiveness of the auction and provides the best means to achieve the lowest expected market price for the products procured under this proposal for customers.

The proposed Supplier Forward Contracts were largely modeled on the form of agreement used with suppliers in the New Jersey Basic Generation Service auction. Most of the initial changes to provisions in the New Jersey Agreement were made to reflect differences between New Jersey and Illinois restructuring rules. To ensure that potential suppliers had an opportunity to comment on and suggest changes to the agreement, ComEd held public meetings with potential suppliers, solicited suggestions and incorporated numerous modifications to address issues that were raised. (McNeil Dir., ComEd Ex. 3.0, 41–44).

## **2. Credit Requirements**

Adequate supplier credit requirements are important because they serve to protect customers from the costs and risks of supplier default, particularly at times when the market price increases after the contract is executed, and the contract price becomes lower than the market price. At such times, supplier default would be expensive for customers, because they would have to replace the contracted power with higher priced power from the market. (Schnitzer Dir., ComEd Ex. 6.0, 20: 468–473).

The Supplier Forward Contracts include well designed credit requirements. Suppliers can qualify for unsecured credit lines based on their own credit ratings and balance sheet strength or those of a guarantor. In addition, suppliers are required to post collateral for any exposure amounts in excess of their unsecured credit lines. Because energy prices change from time to

time, the exposure amount is determined through a mark-to-market mechanism designed to capture the effect of energy price fluctuations on the incremental cost of replacement supply.

The New Jersey supplier agreement also includes base credit requirements, and ComEd initially incorporated that feature in the draft contract discussed with suppliers. However, concerns were raised that the base credit requirements were too onerous, particularly for non-investment grade suppliers, and would discourage participation in the auction. (Schnitzer Dir., ComEd Ex. 6.0, 25). Faced with these concerns and the prospect that a more competitive price with adequate customer protections could be achieved if the base credit requirement were eliminated, ComEd agreed to dispense with the base requirement feature. (Schnitzer Dir., ComEd Ex. 6.0, 65; Juracek Reb., ComEd Ex. 9.0, 46–48). That decision was a reasonable compromise serving the best interests of customers.

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

Throughout the discussions with suppliers prior to the filing of this proceeding, ComEd accepted many suggestions for modifications to the proposed supplier forward contract. Additional suggestions were made in testimony that ComEd has also agreed to incorporate. Those clarifications and modifications are described in the rebuttal testimony of Arlene Juracek. (Juracek Reb., ComEd Ex. 9.0, 29–30). ComEd does not believe that there are any continuing issues presented by these changes that have not been incorporated in the agreements.

With respect to a few changes proposed by Mr. Huddleston and Mr. Dauphinais, ComEd has included modifications that address issues raised, but that do not track in all respects the proposed revisions requested. (Juracek Reb., ComEd Ex. 9.0, 31–35). With respect to those changes, ComEd believes that it has been responsive, has made appropriate modifications and

that there are valid reasons, explained by Ms. Juracek, for not including all of the language suggested by the witnesses.

Finally, a few changes, dealing with issues raised in rebuttal testimony and other matters, will be included in the agreements, as described in the surrebuttal testimony of Arlene Juracek. (Juracek Sur., ComEd Ex. 17.0, 32–34, 41–42). Similarly, in the continuing effort to achieve as much uniformity as possible between the ComEd and Ameren agreements, some changes have been made to reflect the results of those efforts. (Juracek Sur., ComEd Ex. 17.0, 34–35; Juracek Sur., ComEd Ex. 17. 3).

A copy of the Supplier Forward Contract for the CPP-B auction with revisions accepted by ComEd is attached to the surrebuttal testimony of Ms. Juracek as ComEd Exhibit 17.3.

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

Although significant progress was made in achieving agreement on modifications and clarifications to the supplier forward contracts, a small number of issues remain. Several changes have been proposed that ComEd cannot accept for reasons that are described in Ms. Juracek’s testimony. (Juracek Reb., ComEd Ex. 9.0, 36–45; Juracek Sur., ComEd Ex. 17.0, 33, 36–40). Because the nature of the proposed changes and ComEd’s reasons for rejecting them are somewhat technical and are already described in Ms. Juracek’s testimony, they will not be repeated here, and ComEd relies upon the explanation of its position provided in the testimony.

#### **M. Other Auction Design Issues**

There are no other auction design issues that ComEd believes require discussion. However, ComEd will respond in its reply brief to any topics that may be raised by other parties.

## **VI. Procurement Processes Alternatives**

### **A. Active Portfolio Management**

Three parties, the Illinois Attorney General, Cook County and CUB, recommend that ComEd engage in active portfolio management to provide supply for customers. Although the proposal is not described in any detail, the active portfolio management approach would require ComEd to acquire a portfolio of baseload, intermediate and peaking generation resources, together with any associated hedges (for risks such as customer switching, fuel price, outages and locational price differences), sufficient to provide full requirements supply for customers. It would impose the costs and risks of assembling such a portfolio on ComEd's customers, rather than on suppliers. It would rely on the judgment of one party — ComEd — to assemble the necessary portfolio instead of relying on multiple suppliers, each of whom might employ different strategies and techniques to meet the variable demands of customers but all of whom are participating in a transparent, structured process in which market forces operate to keep costs down..

Dr. Steinhurst suggests that active portfolio management by ComEd would make it possible to use a variety of products that are uniquely available to it. However, as explained in the surrebuttal testimony of William McNeil, the same products are available to suppliers bidding in the auction. (McNeil Sur., ComEd Ex. 18.0, 6–9). Whether and how to use such products are questions that would be considered by each of the bidders and the resulting diversity of solutions would provide assurance that only the most effective alternatives for meeting customer needs would be selected. (Hogan Sur., ComEd Ex. 25.0, 11–15; Hieronymus, Tr. 1012)). “We believe this is the best way because the risk is being managed by those entities that are able to do it at the lowest possible cost.” (McNeil, Tr. 520).

Reliance on a number of sophisticated suppliers to arrive at the best supply approach will not only achieve a better result, but it will eliminate the risk of huge losses that can arise when a utility undertakes unilateral responsibility for supply decisions. As the surrebuttal testimony of Mr. McNeil describes, active portfolio management can leave a utility with long term, fixed volume contracts that are no longer needed if customers switch to alternative suppliers. (McNeil Sur., ComEd Ex. 18.0, 12). The costs of such contracts must then be spread over a shrinking pool of customers, driving rates up. As Mr. Schnitzer explained, active portfolio management is a “very difficult process” that has been proven in Illinois and other jurisdictions to increase customers’ costs. (Schnitzer, Tr. 978). Dr. Steinhurst admitted that, under the Vermont long range planning process that he oversaw, electric rates were “well above the national average.” (Steinhurst, Tr. 469–470). The Illinois Auction and its full requirements product will free ComEd's customers from significant risks inherent in the active portfolio management approach. “[S]uppliers will provide a fixed price for doing all that risk management service as opposed to the company managing those risks and ultimately customers bearing those risks as events change.” (McNeil, Tr. 513).

Dr. Steinhurst also suggests that ComEd could extract better offers from suppliers as an active portfolio manager than will result from the auction process, but there is no basis for reaching any such conclusion. ComEd has no special bargaining position that would generate below market offers from suppliers. Bidders in the auction and suppliers outside an auction would both consider available opportunities to sell in the marketplace. (McNeil Sur., ComEd Ex. 18.0, 13–14). As Dr. Laffer acknowledged on cross examination, suppliers have numerous opportunities to sell in the energy markets. (Laffer, Tr. 374–375). They would have no reason to sell at below market prices to ComEd, regardless of the procurement process chosen. (Collins,

Tr. 168). As Mr. McNeil testified, “The bidders in the auction or in any competitive process are not bidding their costs. They’re bidding their expectation of their opportunity cost or their view of what their power would be worth in whatever the market opportunity is.” (McNeil, Tr.620). Arlene Juracek, Vice President of Energy Acquisition for Exelon Energy Delivery, emphasized that “ there is an open market where suppliers have many opportunities to sell; they have absolutely no reason or incentive to sell below what they could” receive in the market. (Juracek, Tr. 255). The choice of the Illinois Auction process, far from raising prices as compared to active portfolio management, is likely to reduce them through the transparent, dynamic descending clock mechanism that tends to drive prices down. (LaCasse Reb., ComEd Ex 11.0, 13–16).

The active portfolio management approach was one of the procurement scenarios considered during the Commission’s Post 2006 Initiative. (Clark Dir., ComEd Ex. 1.4). The Staff’s Final Report did not recommend that ComEd pursue this approach, with good reason. (Clark Dir., ComEd Ex. 1.2). The significant benefits of the Illinois Auction proposal would be lost and major new risks would be imposed on customers under an active portfolio management approach.

## **B. Request for Proposal**

ComEd does not believe that any party is contending that supply for customers should be acquired through a request for proposal (“RFP”) process. The RFP process was one of the alternatives considered during the Post 2006 initiative, but the Staff’s Final Report rejected that option, recommending instead that large utilities use a vertical tranche auction. (Clark Dir., ComEd Ex. 1.2, 3). ComEd evaluated the RFP process and likewise concluded that the Illinois

Auction was the preferable procurement approach. In his direct testimony, Mr. McNeil explained some of ComEd's reasons for reaching this conclusion:

We feel there are certain practical advantages to utilizing the auction process as opposed to the RFP process. First, and probably most importantly, the descending clock auction process provides the transparency that suppliers need to efficiently bid on the tranches. The clarity of price signals and the ability for suppliers to modify their bids requires bidders to aggressively bid in order to win. To put it another way, the auction constitutes a market in which suppliers compete in an open process that permits ComEd to obtain the supply needed to serve its customers at the lowest expected market prices. These aspects of the auction process cannot be fully duplicated in a RFP process. Second, from my experience during the ICC's Post 2006 Initiative, it appears that suppliers are attracted to such auctions because of the transparency of the process. This provides more certainty, relative to a RFP process, that we will obtain sufficient levels of competition to make the process work. Third, the auction process more easily accommodates multiple products as opposed to a RFP process as the bidders all can see what products are being sold and at what current prices and can quickly modify their offerings to arbitrage price differences. Because one of the key features of the proposal is to use multiple products to help mitigate short-term price risk, the descending clock auction process was a natural choice. Finally, it is important to note that ComEd did not choose this process on its own. We hired Dr. LaCasse to provide us with a recommendation based on her substantial experience in the field, and she recommended the descending clock auction process.

(McNeil Dir., ComEd Ex. 3.0, 32–33).

For these and the other reasons described in this brief, ComEd believes that the Illinois Auction is a better means to acquire supply for customers than the RFP process, and that the Commission should endorse use of the vertical tranche auction approach

### **C. Affiliate Contract**

During the Commission's Post 2006 Initiative, one of the procurement scenarios addressed by the stakeholders was the use of sole source agreements with affiliates of Illinois utilities. Only four advantages were identified that would result from reliance on affiliate purchases, whereas this alternative involved sixteen important disadvantages. (ComEd Ex. 1.4).

The absence of support for this approach and legal impediments addressed below and in the testimony of Elizabeth Moler (Moler Dir., ComEd Ex. 2.0, 8:177–10:222), undoubtedly contributed to the decision by the Commission’s Staff to reject this alternative in its Final Report.

However, there is one aspect of affiliate contracting that does play a significant role in the Illinois Auction proposal. ComEd has attempted to design a competitive procurement process that facilitates the participation of as many suppliers as possible. Adopting a process that will not exclude Exelon Generation, but rather encourages its participation as a potential low bidder, is therefore a desirable goal. Because Exelon Generation is affiliated with ComEd, additional requirements apply under federal law to any power purchase agreement (“PPA”) between the companies, as explained by Elizabeth Moler, former Chair of the Federal Energy Regulatory Commission, in her direct testimony:

FERC requires the parties to show by objective market value criteria that the terms of the PPA are reasonable. In its *Edgar* decision in 1991 — which I voted on and supported — FERC set forth three criteria by which the applicant could make such a showing: (1) evidence of direct competition between the affiliated supplier and non-affiliated suppliers; (2) comparable sales by the affiliated supplier to non-affiliated purchasers; and (3) benchmark evidence of sales involving other parties. FERC has recently reiterated the importance of the *Edgar* criteria and has applied them to numerous affiliate transactions.

(Moler Dir., ComEd Ex. 2.0, 8:181–9:188). This is also consistent with the 1997 Law which allowed for affiliate sales of wholesale power. 220 ILCS 5/16-111(g).

The Illinois Auction includes the features that FERC requires under the *Edgar* standard:

The best evidence that a utility is paying a fair price to its affiliated supplier under a PPA is evidence that the utility chose the affiliate after comparing its offer to the offers of competing suppliers and found it to be the lowest-cost offer. Such evidence can be supplied by a Request for Proposals, which is the basis of the Maryland process. Even stronger evidence, however, is supplied by a competitive auction process that is approved by a regulatory authority and run by an independent party, such as the process that ComEd is proposing. This open procurement process was pioneered in New Jersey, with the Basic Generation Service (or

“BGS”) auction and has received very favorable reviews. Such a process maximizes the transparency of the procurement decision. All bidders compete on an equal footing and the price is set by the forces of supply and demand. There is no way for the utility to favor its affiliate in such a process.

(Moler Dir., ComEd Ex. 2.0, 9:192–203). A clear advantage of the Illinois Auction is therefore its facilitation of the widest possible participation of all potential suppliers, including affiliated generation companies, in the process used to acquire supply for customers.

#### **D. Other Competitive Procurement Mechanisms**

The foregoing are a few of the alternative procurement methods that have been discussed in arriving at the conclusion that the vertical tranche auction offers the greatest benefits for customers. As described in this brief, ComEd, the Commission’s Staff and the other participants in the Post 2006 Initiative did not confine their analysis to a limited group of options. They considered a broad range of alternative scenarios and variants of those scenarios. They analyzed the advantages and disadvantages of each approach. The effort was lengthy and detailed, providing a searching review of the available options. The result and the reasons for it have been outlined here. As the Staff’s Final Report summarized, utilities like ComEd that own no generation should procure supply through a vertical tranche auction. ComEd agrees with that conclusion, and the process described in ComEd’s tariffs is consistent with it. Nothing that has been presented in this proceeding or in any other forum provides any basis for reaching a different outcome or for proposing any other procurement approach.

#### **E. Other Competitive Processes Alternatives**

For all of the reasons described in this Brief, there are no other competitive processes that warrant further consideration as alternatives to the vertical tranche auction proposal.

## **VII. Tariff and Rate Design Issues**

### **A. General Tariff and Rate Design Issues**

ComEd's proposed tariffs and tariff amendments are just and reasonable for customers as well as the utility and its shareholders. 220 ILCS 5/9-201(c); *Business and Professional People for the Pub. Interest v. Illinois Commerce Comm'n*, 146 Ill. 2d 175, 208, 585 N.E.2d 1032, 1045 (1991). (E.g., Clark Dir., ComEd Ex. 1.0, 15:342–347; Alongi / Crumrine Dir., ComEd Ex. 7.0, 1:13–4:77, 4:79–6:113).

ComEd initiated this proceeding by filing three new tariffs and certain tariff amendments: (1) Rider CPP, (2) Rider PPO-MVM-Power Purchase Option (Market Value Methodology) (“Rider PPO-MVM”), (3) Rider TS-CPP-Transmission Services (Competitive Procurement Process) (“Rider TS-CPP”), and (4) revised sheets of the existing Rider PPO-Power Purchase Option (Market Index) (“Rider PPO-MI”). (Alongi / Crumrine Dir., ComEd Ex. 7.1, 7.2, 7.3, and 7.4)

ComEd's proposed tariffs and tariff amendments serve five important purposes: (1) they accurately “translate” the results of the proposed CPP auctions into retail Supply Charges, without markups;<sup>12</sup> (2) they ensure, for the benefit of customers and the utility, the accuracy of cost recovery in relation to those Supply Charges and to the associated Accuracy Assurance Factor charges or credits; (3) they establish, in detail, the requirements for passing costs through those charges; (4) they establish, for purposes of the PPO, accurate market value energy charges; and, (5) they apply to bundled electric service rates a proven mechanism for accurately passing

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<sup>12</sup> The Commission's Post-2006 Initiative's Rates Working Group, in its Final Report, determined that, given a full requirements auction, “utilities should pass through, with no ‘mark-ups’ or ‘return on’, the costs of the commodity itself.” (Alongi / Crumrine Dir., ComEd Ex. 7.0, lines 369-372) (quoting “The Post 2006 Initiative: Final Report [of the] Rates Working Group”, ComEd Ex. 1.5, at page 16). ComEd agreed, and it structured Rider CPP to incorporate that concept. (Alongi / Crumrine Dir., ComEd Ex. 7.0, lines 372–373).

through costs incurred under FERC-jurisdictional transmission tariffs. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, 1:13–4:77, 4:79–6:113).<sup>13</sup>

ComEd’s proposed tariffs, in particular Rider CPP and Rider PPO-MVM, have been revised to make improvements and to clarify language over the course of this Docket. As ComEd previously has stated, ComEd found the direct and rebuttal testimony of Staff and those intervenors that chose to address tariff-related issues to be generally supportive and constructive, and ComEd was able to accept, or to accept with modifications, numerous proposals made by Staff and intervenors. (*E.g.*, Alongi / Crumrine Reb., ComEd Ex. 13.0, 2:40–3:59; Alongi / Crumrine Sur., ComEd Ex. 21.0, 2:43–3:67) A list of revisions agreed to or proposed by ComEd is set forth in Exhibit 1 hereto.

The provisions of proposed Rider CPP relating to the design and implementation of the proposed CPP auctions generally already have been discussed, directly or indirectly, in earlier Sections of this Initial Brief, especially Section V. ComEd has shown in those Sections that the proposed CPP auctions that would be implemented through ComEd’s tariff proposals are supported by the evidence and are just and reasonable. This Section VII, in accordance with the ALJ’s approved briefing outline, addresses the remaining tariff and rate design issues.

ComEd’s proposed tariffs and tariff amendments, as agreed by ComEd to be revised during the course of this proceeding, are just and reasonable for customers as well as the utility and its shareholders. They are supported by the evidence in the record. They should be approved.

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<sup>13</sup> The amendments to Rider PPO-MI extend it by exactly one day in order to avoid an anomaly under slightly unsynchronized provisions of the Act. (Alongi / Crumrine Dir., ComEd Ex. 7.0, lines 66-69, 524-529). No party has opposed that extension.

## **B. Matters Concerning Rider CPP**

### **1. Rider CPP-Organization**

The Commission should approve the organizational structure of proposed Rider CPP, as revised by ComEd in its rebuttal testimony to reflect suggestions made in Staff's direct testimony. ComEd and Staff are in accord on this subject. No intervenor has submitted any testimony on this subject.

ComEd witnesses Lawrence Alongi and Paul Crumrine discussed and supported the organizational structure of proposed Rider CPP in their direct testimony. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, 38:867–39:885; Alongi / Crumrine Dir., ComEd Ex. 7.1). Staff witness Cheri Harden proposed certain organizational changes in Rider CPP. (Harden Dir., Staff Ex. 7.0, 4:89–7:138, and Sch. 7.1). Messrs. Alongi and Crumrine generally accepted Ms. Harden's proposals on this subject, but proposed certain modifications. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 5:93–7:139). Ms. Harden then accepted those modifications. (Harden Reb., Staff Ex. 19.0, 1:7–3:62, and Sch. 19.1). Thus, there are no open issues on this subject. (Alongi / Crumrine Sur., ComEd Ex. 21.0, lines 5:107–6:120).<sup>14</sup>

### **2. Rider CPP-Definitions**

#### **a. Customer Supply Group Definitions**

The Commission should approve the Customer Supply Groups defined in proposed Rider CPP, subject to a one-word conforming change in the definition of the Large Load Customer

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<sup>14</sup> ComEd has noted that it plans eventually to propose to move all definitions in the Definitions part of Rider CPP to ComEd's Terms and Conditions. (Alongi / Crumrine Reb., ComEd Ex. 13.0, lines 107-110) ComEd and Staff agree that the appropriate time to consider such a relocation is not now, however, but rather when it is before the ICC. (Harden Reb., Staff Ex. 19.0, lines 20-30; Alongi / Crumrine Sur., ComEd Ex. 21.0, lines 111-115)

Supply Group. Neither Staff nor any intervenor has submitted any testimony proposing different or alternative Customer Supply Groups definitions.<sup>15</sup>

ComEd witnesses Messrs. Alongi and Crumrine explained and supported the Customer Supply Groups defined in proposed Rider CPP. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, 40:899–42:957; Alongi / Crumrine Dir., ComEd Ex. 7.1, Original Sheet Nos. 248–249).

As is discussed elsewhere in this Initial Brief in more detail, ComEd, in its surrebuttal testimony, in light of certain Staff and intervenor direct and rebuttal testimony, proposed an integrated “package” of three auction / rate design changes: (1) moving the Large Load Customer Supply Group from the CPP-B auction segment to the CPP-A auction segment (*see* Section V.I.2 of this Initial Brief), (2) changing the CPP-A enrollment window from an “opt in” to an “opt out” window of 30 days (*see* Section VI.B.4.a.i and ii), (3) eliminating the Migration Risk Factor component from the CPP-B translation formulae (*see* Section VII.B.6.a).

If the Large Load Customer Supply Group is moved from the CPP-B auction segment to the CPP-A auction segment, then, in the last sentence of the definition of that Group, the word “Blended” should be changed to “Annual”. (*See* Alongi / Crumrine Dir., ComEd Ex. 7.1, Original Sheet No. 249).

#### **b. Peak and Off-Peak Period Definitions**

The Commission should approve the proposed compromise of using ComEd’s existing Peak and Off-Peak period definitions, with the North American Electric Reliability Council

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<sup>15</sup> Staff’s rate mitigation proposal, to which ComEd has agreed, discussed in Section VII.D.1 of this Initial Brief, does not require any change in the definition of any Customer Supply Group. (*E.g.*, Alongi / Crumrine Reb., ComEd Ex. 13.0, lines 142-146, 1183-1185; Alongi / Crumrine Sur., ComEd Ex. 21.0, lines 123-127). BOMA’s non-residential space heating customer rate mitigation proposal, which ComEd opposes, discussed in Section VII.D.3, while unwarranted, also does not require any change in the definition of any Customer Supply Group. (*E.g.*, Brookover / Childress Dir., BOMA Ex. 2.0, lines 112-114; Brookover / Childress Reb., BOMA Ex. 4.0, lines 122-127).

(“NERC”) holidays, in the “translation” formulae for calculating the time of use Supply Charges under Rider CPP and in defining those charges. Otherwise, the Commission should approve ComEd’s original proposal to employ new Peak and Off-Peak period definitions in the “prisms” and in defining those charges.

Every party that has addressed the subject in this Docket has indicated that it agrees that the Supply Charges calculated under Rider CPP should differentiate between Peak and Off-Peak periods for certain Customer Supply Groups in order to reflect cost-causation and send appropriate price signals, i.e., to reflect that Peak prices generally are higher than Off-Peak prices. The only disputed issue here is which set of definitions to use.

ComEd originally proposed new Peak and Off-Peak period definitions for purposes of the time of use Supply Charges calculated under Rider CPP that would conform both the prisms and the retail rate structure with the commonly used definitions in the wholesale market, thereby enhancing the transparency of, and simplifying, the Supply Charges calculations. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, 46:1045–47:1061; Alongi / Crumrine Dir., ComEd Ex. 7.1 at Original Sheet No. 247).

Staff and BOMA opposed, on different grounds, the new Peak and Off-Peak period definitions, and urged the use of existing definitions. (*E.g.*, Lazare Dir., Staff Ex. 6.0, 34:754–39:874; Brookover / Childress Dir., BOMA Ex. 2.0, 20:422–23:486).

ComEd and Dynegey, in rebuttal, supported the new Peak and Off-Peak period definitions for the above reasons and on additional grounds. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 7:148–10:215; Huddleston Reb., DYN Ex. 1.2, 13:283–292).

ComEd, in surrebuttal, stated: “In the interest of further narrowing the outstanding issues in this proceeding, ComEd is willing to use the existing peak and off-peak period definitions,

with the North American Electric Reliability Council holidays, for purposes of determining and applying Supply Charges pursuant to Rider CPP and to reflect such changes as part of a compliance filing ordered in the instant proceeding. However, in doing so, we reserve the right to raise this issue again in subsequent proceedings.” (Alongi / Crumrine Sur., ComEd Ex. 21.0, 6:133–7:138).

ComEd remains of the view that it is a reasonable compromise at this time to continue to use the existing Peak and Off-Peak period definitions, with the NERC holidays. Otherwise, ComEd’s original proposal to employ new Peak and Off-Peak period definitions should be adopted, for the reasons established in the evidence submitted by ComEd and Dynegy, respectively.

### **3. Rider CPP–Specification of Competitive Procurement Process**

The Commission should approve the Competitive Procurement Process part of Rider CPP, subject to such conforming changes as are needed to effectuate the Commission’s determinations on the issues that have been raised regarding the design and implementation of the proposed CPP auctions, discussed elsewhere in this Initial Brief.

In brief, the Competitive Procurement Process part serves to: (1) note the role of the CPP auctions in establishing pricing; (2) describe key elements of the CPP auctions from a ratemaking perspective; (3) describe the respective responsibilities of certain participants in the CPP auctions, such as the independent Auction Manager; (4) address certain documents and information provided to prospective bidders and the ICC, including the “load caps”, association criteria, and credit requirements set forth in those documents; and (5) set forth the “CPP Timeline”. (Alongi / Crumrine Dir., ComEd Ex. 7.0, 47:1063–50:1135; Alongi / Crumrine Dir., ComEd Ex. 7.1 at Original Sheet Nos. 250–269).

The open questions with regard to this part (apart from two limited exceptions)<sup>16</sup> are entirely derivative, in that what is at issue here simply is what conforming changes will be needed to implement the Commission’s decisions on those CPP auction design and implementation issues that affect the language of this part. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 10:217-11:226; Alongi / Crumrine Sur., ComEd Ex. 21.0, 7:144–154). As in other Dockets, ComEd will prepare a compliance filing consistent with the Commission’s final Order, and Staff will have the opportunity to review that filing and note any concerns that Staff may have with the filing. ComEd notes that it should be given at least ten business days after the entry of the final Order to submit its compliance filing, and that Staff should be afforded a reasonable amount of time to review the compliance filing before the tariffs and tariff amendments become effective. (Alongi / Crumrine Sur., ComEd Ex. 21.0, lines 92–98)

#### **4. Rider CPP–Retail Customer Switching Rules**

##### **a. Enrollment Window**

ComEd proposes to acquire 1-year, fixed price supply for CPP-A eligible customers. Because these customers may choose to pursue other service alternatives, some procedures are necessary to determine which customers will be supplied through the CPP-A auction. ComEd has proposed that eligible customers have a 30-day enrollment window following the auction within which customers who were not previously taking bundled service from ComEd would

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<sup>16</sup> The two limited exceptions are as follows. First, certain issues relating to whether an eligible customer must “opt in” in order to take to CPP-A service, and the period in which the customer must / may choose to “opt in” or, alternatively, “opt out”, involve (in part) certain language of the CPP Timeline section of the Competitive Procurement Process part of Rider CPP. In accordance with the ALJ’s approved briefing outline, ComEd addresses those issues in Section VII.4.a.i and ii of this Initial Brief. Second, certain issues that have been raised with regard to reporting by ComEd and to Staff and Commission review of Supply Charges and Accuracy Assurance Factors also involve (in part) certain other language of the CPP Timeline section of the Competitive Procurement Process part. In accordance with the ALJ’s approved briefing outline, ComEd discusses those issues in Section VII.B.9.

have the opportunity to “opt-in” to the CPP-A fixed price service. Following discussions with other parties who expressed views about the appropriate length of the enrollment window, ComEd has agreed to modify its proposal to provide for a 50-day enrollment window in the first auction year and a 45-day window in all subsequent auction years. ComEd has also addressed how customers will be supplied if they take no action — that is, whether CPP-A supply will be their default service from which they can “opt out” or whether it will be an elective service to which they must “opt in.” The parties have raised various issues about these subjects, which are addressed in this section.

**i. Duration of Window**

BOMA and the Coalition argue that the 30-day enrollment period for PPO and delivery service customers to “opt in” to bundled service supplied through the CPP-A auction is too short and should be extended to 75 days to provide more time for customers to make decisions about their supply alternatives. (Childress / Brookover Dir., BOMA Ex. 2.0, 25:535–26:551; O’Connor Dir., 24:536–28:606). ComEd supported the 30-day enrollment window because of concern that a longer period would increase the costs customers pay for supply. Suppliers who bid in the auction will take into account that customers have the right to choose between auction-procured supply and alternative arrangements. The fixed price the auction bidders offer, therefore, constitutes a “call” option, enabling customers to consider alternatives while auction bidders are forced to hold open a firm price for supply, which customers may or may not choose to accept. The cost of making that option available for 30 days will be priced into the bids. By extending the length of the option to 75-days, the risk to suppliers increases and the increased cost associated with the option will cause the auction bids to rise in response. IIEC witness Robert Stephens expresses this view, stating that: “It is natural for the increase in risk to translate directly into an increased clearing price in the auction....” (Stephens, Tr. 59).

The length of the enrollment period is a matter of judgment on which reasonable people can have different views. The challenge is to strike the right balance between providing customers time within which to make decisions and avoiding the high premium that would result if suppliers were forced to hold out fixed price call options for long periods of time. As Mr. McNeil summarized, “we’re balancing trying to give customers time to make their decisions with trying to keep the risks that we’re putting into the product as small as possible.” (McNeil, Tr. 495). After discussing the issue at length in an effort to reach a compromise solution, the Coalition of Energy Suppliers and ComEd have agreed that a 50-day enrollment window in the first auction year, when customers are becoming accustomed to the new procurement environment, is appropriate, and that, for all subsequent years, a 45-day window is adequate.

In addressing this issue, ComEd has attempted to maximize the flexibility and choices available to customers. For example, customers in the CPP-A eligible group on Rate 6, Rate 6L, and Rate 24 will automatically be migrated to the annual default rate on January 2, 2007. (McNeil Sur., ComEd Ex. 18, lines 569–570). However, they need not remain for a full term. They will be free to switch to delivery service and obtain supply service from a RES with only 7 days notice, enabling them to exercise choice if and when they are ready to do so. (McNeil Sur., ComEd Ex. 18, lines 581-583). Even those customers who would become subject to the full term requirement by opting into CPP-A supply are not limited to 50 (and later 45) days within which to begin and complete their analysis of their service options. They can canvas the retail supplier service market in advance of the auction, preparing themselves to evaluate the auction results. When the results become known, the advance preparation will assist them in making an informed service decision within the applicable enrollment window.

## **ii. Opt In vs. Opt Out**

ComEd initially proposed that the one-year fixed price product would be an optional service available to 1–3 MW customers who would be required to choose this alternative by “opting in” during an enrollment window period each year. The expansion of the one-year product to include customers with demands between 400 kW and 1 MW caused ComEd to evaluate whether the product should continue to be provided only to customers who affirmatively elected it or whether it should be a default product, provided to customers unless they chose to “opt out.”

In its surrebuttal testimony, ComEd proposed a solution providing for both opt in and opt out features for the one-year product depending upon the existing service taken by the eligible 400 kW to 3 MW customers. For customers taking bundled service under Rate 6, Rate 6L or Rider 24, the one-year product would be the default service, from which customers could “opt out” if they chose. For customers taking delivery services and RES supply, the one-year product would be an optional service that could be elected by opting in within the designated enrollment window.

ComEd explained the considerations that resulted in this approach in Mr. McNeil’s surrebuttal testimony. (Mc Neil Sur., ComEd Ex. 18.0, 19:412–34:766). The Coalition, which strongly endorsed inclusion of 400 kW to 1 MW customers in the one-year product category, agreed with the suggested resolution of the opt in / opt out issue. (O’Connor, Tr. 250).

### **b. Other Switching Rule Issues**

The Commission, with regard to the Retail Customer Switching Rules part of Rider CPP, is presented with four additional issues, two of which relate to CPP-H service and two of which relate to CPP-A service: (1) whether “new accounts” that are eligible for CPP-A service should

be allowed to elect to take CPP-A service outside of the enrollment window; (2) whether “successors accounts” to existing customers that were eligible for, but elected not to take, CPP-A service should be allowed to elect to take CPP-A service outside of the enrollment window; (3) how much advance notice a CPP-H customer should be required to give to ComEd before terminating that service; and (4) whether a CPP-H customer should be allowed to request to be switched off of that service on an “off-cycle” basis (i.e., on a date other than the customer’s regularly scheduled meter reading date).

The Commission should approve ComEd’s proposed clarifications of, and compromises on, those issues, discussed below, which permit customers to switch on reasonable terms without imposing unwarranted and excessive risks and administrative burdens on ComEd and, potentially, additional burdens on Staff and the Commission.

**i. The CPP-A Issues.**

With regard to the two issues related to CPP-A service, ComEd is willing to agree to permit new accounts that are eligible for CPP-A service to elect to take CPP-A service outside of the enrollment window, provided that the definition of new accounts does not permit “successor accounts” to existing customers that were eligible for, but chose not to take, CPP-A service, to elect to take CPP-A service outside of the enrollment window. That compromise also is reasonable and equitable and it, too, should be approved.

Staff, in direct testimony, proposed that new customers that would otherwise be eligible for CPP-A service should be permitted to take CPP-A service outside of the enrollment window. (Schlaf Dir., Staff Ex. 5.0, 9:201–13:294).

ComEd, in rebuttal testimony, stated that it was willing to accept Staff’s proposal, provided that “successor accounts” — which could include customers that simply changed their name on their account — should not be permitted to elect to take CPP-A service outside of the

enrollment window unless the existing customer already was taking CPP-A service. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 12:243–256).

Staff, in rebuttal testimony, agreed that its proposal should not apply to customers that had changed their corporate name, but took the position that it should apply to customers at an existing location under new ownership. (Schlaf Reb., Staff Ex. 13.0, lines 80–91).

While ComEd appreciates Staff’s attempt in its rebuttal testimony to draw a workable distinction, Staff did not do so, apparently due to a misinterpretation of ComEd’s rebuttal testimony. ComEd’s concern is not with existing customers legally changing their corporate name, but rather much more broadly with customers simply changing the name on their account and then claiming the right to be treated as a “new” customer. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 11:226–241; *see also* Alongi / Crumrine Reb., ComEd Ex. 13.0, 12:246–251). In the event of such a name change on the account, which may or may not reflect an actual change in ownership or an actual change in a corporate name, it would be costly and burdensome for ComEd to have to implement the internal processes that would be needed in order to determine whether a successor account actually involves new ownership. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 11:230–239). Staff’s witness, on cross-examination, appeared to indicate that he was in accord with the position expressed in ComEd’s surrebuttal testimony, but it is unclear whether he meant only that he agrees with ComEd as to successor accounts that do not involve actual changes in ownership. (*See* Schlaf, Tr. 1349–1350).

Were Staff’s proposal as formulated in its rebuttal testimony to be adopted, that would mean ComEd would have to incur the burden and costs of such investigative processes. That ultimately would redound to the detriment of customers in future rates. Moreover, a customer

might dispute ComEd's conclusion, and that could lead to informal or formal complaints and thus to imposing burdens on Staff and the Commission as well.

While ComEd is willing to accept permitting new accounts that are eligible for CPP-A service to elect to take CPP-A service outside of the enrollment window, and to permit successor accounts to elect to take CPP-A service outside of the enrollment window where the existing account is taking CPP-A service, ComEd believes that the evidence does not warrant exempting successor accounts from the enrollment window that is applicable to all other existing customers where the existing account is not taking CPP-A service, and that any theoretical benefits of creating the latter special exemption as to successor accounts that involve actual changes in ownership would be outweighed by the burdens and costs of requiring ComEd to investigate and distinguish among different types of successor accounts. Thus, for each of these reasons, ComEd believes that Staff's proposal should be limited to new accounts, and should exclude successor accounts. ComEd requests that its compromise proposal be approved.

**ii. The CPP-H Issues.**

With regard to the two issues related to CPP-H service, ComEd is willing to agree to reduce the advance notice period for termination of CPP-H service to the seven calendar days advance notice required under the existing Direct Access Service Request ("DASR") rules relating to delivery services (*see* Rate RCDS-Retail Customer Delivery Service, 1st Revised Sheet No. 132), provided that the termination of service occurs only on the customer's normally scheduled meter reading date. That compromise is reasonable and equitable, and it should be approved.

ComEd originally proposed that CPP-H customers be required to give 60 days advance notice before terminating service. (McNeil Dir., ComEd Ex. 3.0, 37:796–39:839; Alongi / Crumrine Dir., ComEd Ex. 7.0, 50:1137–51:1146; Alongi / Crumrine Dir., ComEd Ex. 7.1,

Original Sheet No. 273). ComEd proposed a 60 day notice period in order to balance two different, and in this case competing, interests of customers flexibility in switching and lower prices. (McNeil Dir., ComEd Ex. 3.0, 38:830–39:839). Customers’ interests conflict here because the greater the switching flexibility, the more the uncertainty faced by wholesale suppliers, and thus the greater the risk that the suppliers will add an increment to their auction bids due to that uncertainty. (*Id.*).

Staff and CES argued for a different balance, however, proposing that CPP-H customers be allowed to terminate that service under the existing DASR rules relating to delivery services. (Schlaf Dir., Staff Ex. 5.0, 13:298–16:351; O’Connor Dir., CES Ex. 1.0, 25:541–544; Domagalski / Spilky Dir., CES Ex. 3.0, 22:485–23:495). No other intervenor submitted direct testimony on this subject.

ComEd responded that it was willing to permit CPP-H customers to terminate that service under the existing DASR rules, provided that such terminations occurred only on the customer’s normally scheduled meter reading date, because off-cycle switching would impose substantial unwarranted administrative burdens and costs on ComEd. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 11:237–12:242).

Only Staff submitted rebuttal testimony opposing ComEd’s proposed compromise. (Schlaf Reb., Staff Ex. 13.0, 9:201–217). CES noted but did not express any objection to the proposed limitation to on-cycle switches. (Domagalski / Spilky Reb., CES Reb. 6.0, 12:560–563). No other intervenor submitted rebuttal testimony on this subject.

Staff’s opposition failed to take into account that there may be far greater interest on the part of customer agents (General Account Agents) in having customers move on to and off of CPP-H service in the post-transition period, which would mean that off-cycle switching could be

far more burdensome and costly for ComEd after 2006 than Staff's position assumed. In particular, RESs acting as General Account Agents "could potentially drop hundreds of customers and pick them back up on a calendar month basis or potentially even drop customers and pick them back up within as little as two weeks. ComEd should not have the administrative burden placed on it to deal with such a situation." (Alongi / Crumrine Sur., ComEd Ex. 21.0, 8:175–10:211). Staff's witness acknowledged, on cross-examination, that, depending on price movements, switching in relation to CPP-H service may increase. (Schlaf, Tr. 1352–1353).

The burdens and costs that would result from permitting off-cycle switching in relation to CPP-H service are concrete, not abstract. ComEd also would incur extra work and costs in its "back office", such as the work to coordinate with customers, manual interventions in information systems, work to coordinate with the billing system, etc. (Alongi / Crumrine, Tr. 771–772). Although in theory an off-cycle switching fee could be set that would enable ComEd to recover from CPP-H customers that switch off-cycle the costs of the additional burdens imposed on ComEd (Alongi / Crumrine, Tr. 772–773), no such fee has been proposed in this Docket.<sup>17</sup>

While ComEd is willing to accept switching in relation to CPP-H service on the general DASR timeline, ComEd believes that the case for permitting off-cycle switching in relation to CPP-H service has not been made, and that the disadvantages of permitting off-cycle switching here clearly outweigh any benefits. ComEd requests that its compromise proposal be approved.

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<sup>17</sup> Staff noted that ComEd's existing delivery services tariff has in place an off-cycle switching fee, stated that that fee "presumably" is adequate, and stated that if the fee is not adequate then "ComEd could seek to change the fee at the appropriate time." (Schlaf Reb., Staff Ex. 13.0, 9:211-217 and footnote 9; *see* Rate RCDS - Retail Customer Delivery Service, 4th Revised Sheet No. 122, 3rd Revised Sheet No. 133). If the Commission were to direct that ComEd permit off-cycle switching in relation to CPP-H service, then ComEd would request that the Order also state or indicate that ComEd may apply an off-cycle switching fee to such switching subject to its being supported and reviewed in ComEd's pending (ICC Docket 05-0597) and future rate cases.

## **5. Rider CPP–Limitations and Contingencies**

The Commission should approve the Limitations and Contingencies part of Rider CPP subject to such conforming changes as are needed to effectuate the Commission’s determinations on the issues that have been raised regarding contingent scenarios, discussed in Section V.K.1, 2, and 3 of this Initial Brief, and to the Commission’s determinations regarding Staff’s and ComEd’s joint proposal relating to Commission review in certain contingent scenarios, discussed in Section VII.B.9.

In brief, the Limitations and Contingencies addresses the contingent competitive procurement processes to be used in the event of auction under subscription or default under an SFC resulting from an auction. (Alongi / Crumrine Dir., ComEd Ex. 7.0, 39:881–883, 51:1148–1154; *see also, e.g.*, McNeil Dir., ComEd Ex. 3.0, 2:24–25, 4:82–84, 52:1128–57:1253; McNeil Dir., ComEd Ex. 3.5).

The open questions with regard to this part, in relation to the contingent processes as such, are entirely derivative, in that they simply are what conforming changes will be needed to implement the Commission’s decisions on those processes. Again, as in other Dockets, ComEd will prepare a compliance filing consistent with the Commission’s Order, and Staff will have the opportunity to review that filing.

## **6. Rider CPP-Translation to Retail Charges**

ComEd proposed detailed “translation” formulae (also referred to as “prisms”) to accurately “translate” the results of the CPP-B and CPP-A auction segments and the potential CPP-H auction into retail Supply Charges, without mark-ups, for each Customer Supply Group, as applicable. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, 2:21–31, 51:1156–65:1461).

As Messrs. Alongi and Crumrine explained, “the ‘translation’ methodology serves to develop ratios that reflect the cost-causation contribution of each Customer Supply Group to the auction (segment) relating to that group, in each auction cycle[.]” (Alongi / Crumrine Dir., ComEd Ex. 7.0, 52:1165–1167). The ratios take into account usage (including demands), time of use (peak, off-peak periods), seasonality (summer, and nonsummer periods), and transmission and distribution line losses; and the ratios also take into account forward market costs for electric energy and generation capacity, estimated ancillary transmission services, and costs associated with migration risks. (*Id.* at 52:1168–1173). The methodology applies the ratios to a load weighted average of the clearing prices resulting from the applicable auction (segment), taking into account seasonal supplier payment differences, in order to arrive at the retail Supply Charges for the monthly billing periods in which the charges will be applicable. (*Id.* at 52:1174–1178).

The translation methodology does not add any mark-up to the prices in the SFCs resulting from the auctions; each “prism” simply allocates to Customer Supply Groups in a manner that reflects cost-causation of the prices in the SFCs. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, 39:892–40:897, 61:1377–62:1382; Alongi / Crumrine Reb., ComEd Ex. 13.0, 13:269–14:292, 22:461–466).

There have been only four issues raised in this Docket with regard to the specifics of the translation formulae: (1) the definitions of peak and off-peak periods, (2) the use of the Migration Risk Factor in the “prism” for calculating CPP-B service Supply Charges, (3) the use of forwards in the translation formulae, and (4) whether the translation formulae should be modified for CPP-H service. In accordance with the ALJ’s approved briefing outline, the first issue is discussed in Section VII.B.2.b of this Initial Brief, and the fourth issue is discussed in

Section VII.B.10. The second and third issues appear to have been resolved, subject to the Commission's determination, as explained in the following two subsections.

**a. Customer Supply Group Migration Risk Factor**

The Commission should approve the elimination of the Migration Risk Factor from the translation methodology for calculating the CPP-B service Supply Charges, if, and only if, the Commission approves the integrated “package” of three rate design changes referenced in preceding subsections of this Initial Brief. Otherwise, the Commission should approve ComEd's original proposal to employ the Migration Risk Factor in that “prism.”

ComEd originally proposed to include a Migration Risk Factor in the translation methodology for calculating CPP-B service Supply Charges, at a time when ComEd was proposing that the Large Load Customer Supply Group would be part of the CPP-B auction segment. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, 42:958–44:997, 55:1239–62:1382; Alongi / Crumrine Dir., ComEd Ex. 7.6). The Large Load Customer Group had by far the greatest migration risk impact per MWh, more than twice that of the next most significant Group. (Alongi / Crumrine Dir., ComEd Ex. 7.0, 61:1367–1375). Residential customers had the lowest impact. (*Id.*).

CES, in its direct testimony, supported the concept of a Migration Risk Factor but proposed revisions to the Migration Risk Factor that would likely result in a greater allocation of costs to non-residential customers and a lesser allocation of costs to residential customers. (O'Connor Dir., CES Ex. 1.0, 28:608–669; Domagalski / Spilky Dir., CES Ex. 3.0, 4:81–15:313).

In contrast, Staff and BOMA, in their respective direct testimony, recommended the elimination of the Migration Risk Factor, on various grounds. (Lazare Dir., Staff Ex. 6.0, 25:569–30:666; Brookover / Childress Dir., BOMA Ex. 2.0, 15:307–19:401).

ComEd, in rebuttal testimony, continued to support its original proposal, while CES, Staff, and BOMA adhered to their respective positions (CES elaborated upon and revised its proposal in certain respects). (Alongi / Crumrine Reb., ComEd Ex. 13.0, 13:269–24:518; O’Connor Reb., CES Ex. 4.0, 5:97–602, 28:595–3:724; Domagalski / Spilky Reb., CES Ex. 6.0, 1:19–2:26, 2:40–9:191; Lazare Reb. Staff Ex. 13.0, 6:120–13:309; Brookover / Childress Reb., BOMA Ex. 4.0, 8:163–12:262). (*See also* ComEd Cross Ex. 6 (DOE data request response indicating that wholesale suppliers are likely to price the value of call options in auction bids)).

As is noted in the other sections of this Initial Brief, ComEd, in surrebuttal, in light of certain Staff and intervenor direct and rebuttal testimony, proposed an integrated “package” of three auction / rate design changes, two of which were to move the Large Load Customer Supply Group out of CPP-B and into CPP-A and to eliminate the Migration Risk Factor from the translation methodology for CPP-B. As ComEd has explained, in the interests of narrowing the issues, it is willing to accept the elimination of the Migration Risk Factor in that scenario. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 12:254–259). As ComEd further stated:

The movement of the Large Load Customer Group to the CPP-A Auction Segment would eliminate most of the migration risks from the CPP-B Auction segment. While some risks would remain, they would be diminished, and, accordingly, in the interests of compromise, ComEd is willing to accept the elimination of the migration risk factor from the translation mechanism in the CPP-B service in that circumstance.

(Alongi / Crumrine Sur., ComEd Ex. 21.0, 12:260–264).

If that integrated proposal were not to be approved, however, then ComEd's formulation of the Migration Risk Factor (not that of CES) should be incorporated within the CPP B translation methodology.

If, however, the Customer Supply Groups that comprise the CPP-B Auction Segment remain the same Groups that ComEd originally proposed to be included in that segment, then ComEd believes that the migration risk factor in relation to the CPP-B retail translation mechanism should be approved as originally proposed, for the reasons we have indicated in our earlier testimony. In that scenario, while the migration risk adjustment does not perfectly estimate the supplier risk premium resulting from migration risks within the CPP-B Auction Segment, it remains the case that ComEd's original proposal is a more reasonable mechanism to assign the associated costs in accordance with cost causation principles than either the proposed modified version or having no such factor at all. In that instance, having no such factor at all would cause the residential and very small commercial customers to bear the rate impact of costs for which they are not the cause.

(Alongi / Crumrine Sur., ComEd Ex. 21.0, 12:265–13:276).

#### **b. Market Cost Information–Market Energy Costs**

The Commission should approve ComEd's use of forward price information in the translation formulae. ComEd proposes to use, within the Market Cost Information component of the formulae, forward prices for electricity delivered into the Northern Illinois Hub ("Ni-Hub"), by peak and off-peak period, for each month for which retail Supply Charges are being determined. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, 62:1388–1395).

Staff originally proposed to substitute data based on locational marginal prices ("LMPs") (Lazare Dir., Staff Ex. 6.0, 30:677–32:727), but, after ComEd supplied additional data regarding the relative merits of the two approaches (Alongi / Crumrine Reb., ComEd Ex. 13.0, 24:520–27:574), Staff withdrew its proposal and supported ComEd's proposal. (Lazare Reb., Staff Ex. 14.0, 14:311–15:333).

ComEd notes that the AG conducted extensive cross-examination of Staff’s witness on this subject. (Lazare, Tr. 1243, *et seq.*). However, Staff’s witness ultimately confirmed that Staff still supported ComEd’s proposal. (Lazare, Tr. 1262–1263). The only other witness to testify on this subject also supported ComEd’s proposal. (Huddleston Reb., DYN Ex. 1.2, 13:273–282). Thus, no witness is advocating use of LMPs. ComEd’s proposed use of forward price data in the translation formulae should be approved.

### **7. Rider CPP-Supply Administration Charge**

ComEd’s proposed Supply Administration Charge is found not in proposed Rider CPP, but rather in proposed Rider PPO-MVM. In accordance with the ALJ’s approved briefing outline, the charge, therefore, is addressed in Section VII.C.2 of this Initial Brief.

### **8. Rider CPP-Accuracy Assurance Mechanisms**

The Commission, with regard to the Accuracy Assurance Mechanisms (“AAM”) part of Rider CPP, is presented with a large number of issues, some substantive and some not.<sup>18</sup> ComEd and Staff are the only parties to have submitted evidence on those issues as such.

The AAM part of Rider CPP is intended to ensure accurate cost recovery, which benefits customers and the utility alike. The AAM part provides for a monthly charge or credit (depending on the underlying calculations applicable to any given month) called the Accuracy Assurance Factor (“AAF”). (ComEd Ex. 7.1, Original Sheet Nos. 291–294). The AAF in turn is composed of two factors, the Customer Demand and Usage (“CDU”) Factor and the Contingency Factor (“CF”). (*Id.*). “The CDU Factor serves to balance the amounts billed to retail customers taking ComEd supply service with payments made to suppliers as a function of

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<sup>18</sup> Please note that certain related issues involving the Limitations and Contingencies part of Rider CPP and the CPP Timeline section of the Competitive Procurement Process part of Rider CPP are discussed in Section VII.B.9 of this Initial Brief.

the contract terms and prices determined in accordance with Rider CPP, and based on changes in retailers' customers usage and demands. The need for this factor stems from the fact that there will be differences between retail customers' actual demands and usage and the historical retail customer demand and usage data used in developing the wholesale to retail translation ratios.” (Alongi / Crumrine Dir., ComEd Ex. 7.0, 66:1470–1476). The CF “addresses the Company’s net costs in the event of use of the contingent wholesale market competitive procurement processes” provided for in the Limitations and Contingencies part of proposed Rider CPP. (*Id.*, 67:1498–1499; *see also id.*, 67:1500–68:1513). Rider CPP provides for ComEd’s submitting to the ICC, on a monthly basis, informational filings regarding the AAF and the underlying data and calculations. (*Id.*, 68:1514–1518).

Staff raised three kinds of issues relating to the AAM part: (1) verification issues, (2) formulae and calculations issues, and (3) clarification issues. (*See, e.g.*, Alongi / Crumrine Reb., ComEd Ex. 13.0, 32:679–682). ComEd believes that its positions amply and clearly address all real concerns on each category of issues.

The Commission should approve those resolutions of AAM part issues as to which Staff and ComEd are in agreement, and it also should approve ComEd’s final positions on the remaining open issues. Many of the AAM part issues have been resolved by ComEd and Staff, subject to the Commission’s determination, as Staff has acknowledged (*e.g.*, Selvaggio Reb., Staff Ex. 16.0, 2:23–4:108; Knepler Reb., Staff Ex. 18.0, 11:234–12:258; Selvaggio, Tr. 1117; Knepler, Tr. 1208–1211), and as is discussed below. The agreed resolutions, and ComEd’s positions on the remaining issues, are supported by the evidence in the record and are just and reasonable.

**a. Issues That Have Been Resolved.**

As indicated above, numerous issues relating to the AAM part of Rider CPP have been resolved, subject to the Commission's approval. Some of those items, including many proposed minor language changes, are not substantive, and ComEd does not believe that it is necessary or useful to discuss those items in the body of this Initial Brief. (Please see Exhibit 1 hereto.) ComEd's compliance filing will reflect those items, assuming that to do so would be consistent with the Commission's final Order.

ComEd, accordingly, will briefly discuss the ten substantive issues relating to the AAM part that have been resolved and that it believes should be noted here. First, Staff and ComEd have reached an accord on ComEd's conducting an annual internal audit of costs and recoveries under Rider CPP and ComEd's filing a copy of the report to Staff by April 30th of each year. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 33:705–710; Alongi / Crumrine Reb., ComEd Ex. 13.1; Knepler Reb., Staff Ex. 18.0, 2:30–32, 12:259–13:280, 16:351–355; Alongi / Crumrine Sur., ComEd Ex. 21.0, 32:737–747; Knepler, Tr. 1210–1211). This proposal is supported by evidence in the record and should be approved.

Second, Staff and ComEd also have reached an accord on ComEd's filing with the Staff, by April 30th of each year, an annual report that summarizes the operation of the AAM part for the previous year. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 32:686–33:704; Alongi / Crumrine Reb., ComEd Ex. 13.1; Knepler Reb., Staff Ex. 18.0, 11:234–238; Alongi / Crumrine Sur., ComEd Ex. 21.0, 32:737–747; Knepler, Tr. 1208–1211). This proposal is supported by evidence in the record and should be approved.

Third, ComEd's current understanding is that Staff is amenable to working out the details of the format and content of ComEd's monthly informational filing setting forth the AAFs. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 33:711–36:765; Alongi / Crumrine Reb., ComEd Ex.

13.1; Knepler Reb., Staff Ex. 18.0, 5:105–10:204, 16:336–344; Alongi / Crumrine Sur., ComEd Ex. 21.0, 23:509–517, 31:710–727, 33:764–767). The timing of the monthly filings is disputed in certain respects, however, and, thus, is discussed further below.

Fourth, ComEd’s understanding is that Staff no longer disputes ComEd’s identification of the particular expense and revenues Accounts within the Uniform System of Accounts (the “USoA”) that should be used to record the components of the AAF calculations. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 36:766–38:804; Alongi / Crumrine Reb., ComEd Ex. 13.2 Revised; Alongi / Crumrine Sur., ComEd Ex. 21.0, 40:913–928; Waden Sur., ComEd Ex. 22.0, 4:67–11:227; Selvaggio, Tr. 1123–1128). Certain issues relating to the Commission’s approval of the Accounts and of sub-Accounts are disputed, however, and, accordingly, they are discussed further below.

Fifth, ComEd, in its rebuttal testimony, agreed to modify language of the AAM part to clarify that certain components of the formulae therein are calculated on an accrual basis, in accord with Staff’s preference. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 40:863–866, 41:877–880, 43:933–937; Alongi/Crumrine Reb., ComEd Ex. 13.1; Selvaggio Reb., Staff Ex. 16.0, 2:29–31, 2:48–50, 3:97–99).

Sixth, ComEd, in its surrebuttal testimony, accepted Staff’s proposal that ComEd use forecasts in the CDU Factor and CF formulae denominators, with some limited conforming and related language changes that are appropriate and that, as far as ComEd knows, are not contested by Staff. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 32:748–33:767).

Seventh, ComEd and Staff are in partial agreement on the addition of a factor to the CDU Factor and CF calculations — referred to by ComEd as “Factor A” and by Staff as “Factor O” —

to reflect adjustments for refunds or additional collections, but ComEd and Staff differ in part on both the substance and the name of this factor, which, accordingly, are discussed further below.

Eighth, ComEd, in its rebuttal testimony, accepted Staff's proposal to add interest components to the CDU Factor and the CF. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 42:900–905; Selvaggio Reb., Staff Ex. 16.0, 3:65, 4:108). An issue relating to the definition of the time when interest runs, which is related to the remaining dispute regarding the substance of Factor A, remains open and, accordingly, is discussed further below.

Ninth, ComEd clarified that it does not propose to include supply-related uncollectibles expenses in the balancing provided for in the AAM part, addressing a Staff concern. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 36:833–845; Waden Sur., ComEd Ex. 22.0, 8:172–9:196).

Finally, tenth, ComEd clarified that it does not intend to bill the AAF on a prorated basis, addressing another Staff concern. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 33:768–34:792).

**b. Issues That Remain Open.**

ComEd believes that there are four remaining open issues, some with more than one aspect, with regard to the AAM part. The Commission should approve ComEd's positions on these issues. ComEd's positions are supported by the evidence in the record and are just and reasonable.

First, the Commission should approve ComEd's proposal to make its monthly informational filings setting forth the AAFs no later than the third business day before the monthly billing period in which the AAFs will be applicable. (Alongi / Crumrine Dir., ComEd Ex. 7.0, 68:1514–1518; Alongi/Crumrine Dir., ComEd Ex. 7.1, Original Sheet Nos. 269, 291).

Staff, in its direct testimony, proposed that the filings should be postmarked by the twentieth day of the month before the monthly billing period in which the AAFs will be

applicable. (Knepler Dir., Staff Ex. 10.0, 5:90–91). Staff further proposed that if an informational filing were to be submitted after the twentieth day, then it would be accepted only if it corrected an informational filing that was filed by that deadline for the same month. (*Id.* at 5:91–94). Staff also argued that if an informational filing did not meet those timing criteria, then it would be accepted only if filed as a special permission filing under 220 ILCS 5/9–201(a) and 83 Illinois Administrative Code Part 255. (Knepler Dir., Staff Ex. 10.0, 5:94–96). Staff, in its rebuttal testimony, adhered to those criteria and that legal position, and offered the possible revision of changing the AAF determination from one made over two months to one made over three months to give ComEd more time to prepare the filings. (Knepler Reb., Staff Ex. 18.0, 6:127–7:141).

While this disagreement might seem like a “detail”, the unfortunate fact is that Staff’s position, if it were adopted, would unnecessarily cause serious practical problems for customers as well as the utility. As ComEd stated in its rebuttal testimony:

Based on ComEd’s current monthly accounting close process and the availability of the components of the calculation, we believe that ComEd’s proposed deadline (three business days prior to the start of the next monthly billing period) represents a realistic timeframe in order to: (1) perform the three AAF calculations; (2) process the necessary changes in its billing system for the next month; and (3) complete the required submission to the ICC. To submit the AAF informational filing any sooner may well have the unintended effect of undermining ComEd’s (and Staff’s) efforts to ensure the accuracy of such calculations. Because of the importance of accurately billing its customers, ComEd needs to extensively test any changes in rates in its billing system prior to the first billing day of the cycle. Consequently, there would be insufficient time to re-process and re-test any changes made after twentieth of the calendar month. Once changes to rates are entered into the billing system, adjustments to those rates likely could not be processed and tested until the next billing cycle/month because the testing process must be completed before subsequent changes could be incorporated. Thus, a filing deadline of the twentieth of the calendar month would not create sufficient time for the error correction process Staff’s proposal contemplates.

This is not to suggest, however, that any such error will never be corrected. Rather, in the unlikely event of such an occurrence, it will be corrected in the subsequent monthly AAF calculation. Moreover, ComEd will implement processes that will result in accurate monthly AAF calculations, thereby minimizing the likelihood of such an occurrence.

(Alongi / Crumrine Reb., ComEd Ex. 13.0, 34:730–35:751).

ComEd, in its surrebuttal testimony, further demonstrated that Staff's position is unwarranted, impractical, and detrimental for customers and the utility.

Although Mr. Knepler offers this as a compromise, ComEd cannot accept his proposal to extend the lag period to three months. In light of the fact that the purpose of the AAF is to balance the several billions of dollars of revenues and expenses that will be incurred annually, ComEd has proposed a process that would minimize the lag to the shortest period practicable (*i.e.*, a two month lag). We believe it is important for both customers and ComEd to reflect the appropriate charge or credit through the AAF in as timely a fashion as possible. Therefore, ComEd believes it would be inappropriate to inject an additional month's delay into the process. Furthermore, as ComEd witness Kevin Waden discusses in his surrebuttal testimony (ComEd Ex. 22.0), ComEd and Exelon Corporation controls for the calculation and implementation of the AAFs will ensure that customer bills reflect the appropriate factors. As we indicated in our rebuttal panel testimony, such processes will result in accurate monthly AAF calculations, thereby minimizing the likelihood of such an occurrence (ComEd Ex. 13.0, 749–750) and eliminating the need for lengthy Staff reviews of the monthly informational filings.

(Alongi / Crumrine Sur., ComEd Ex. 21.0, 31:714–727).

ComEd also showed that Staff's proposal regarding special permission filings was impractical, inconsistent with the informational filing process for other Commission-approved formula rates, such as Rider PPO-MI, are potentially burdensome for both the Commission and the utility and, worst of all, potentially could force delays in the implementation of monthly AAFs, thereby jeopardizing rate stability. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 35:752–36:765).

ComEd does not believe that there is any legal basis in the provisions that Staff's witness cited, 220 ILCS 5/9–201(a) and 83 Illinois Administrative Code Part 255, that mandate Staff's proposed requirement of special permission filings.

For each of the above reasons, ComEd's proposed due date should be approved, and Staff's position regarding special permission filings should not be adopted.

Second, the Commission should reject Staff's extraordinary proposal for further contested proceedings and for Commission review of ComEd's identification of the Accounts that should be used to record the components of the AAF calculations, and of the specific sub-Accounts that ultimately will be created for use in those calculations. (Selvaggio Reb., Staff Ex. 16.0, 5:129–8:213). Staff's unprecedented position is unwarranted and unreasonable.

As ComEd explained in its rebuttal testimony:

Staff's proposal appears to reflect its concern regarding the way in which the costs and revenues will be captured within ComEd's books and records and Staff's ability to perform audits. Although we are not accountants, it should also be noted that ComEd does not anticipate any changes in the current method of accounting as required by Generally Accepted Accounting Principles and the FERC's Uniform System of Accounts. Therefore, ComEd has identified in ComEd Ex. 13.2 [Revised] which FERC Accounts will be the umbrella accounts that are expected to house the information that will be used to calculate the AAF. The underlying data within the FERC Accounts will be kept on a detailed basis (e.g., sub-accounts) to allow for specific identification. Based upon the structure of the proposed auction process, ComEd intends to track the cost components of the AAF algorithms by supplier. ComEd will also track the supplier information in further detail by product and, perhaps, by tranche. ComEd commits to maintaining the records that will impact the AAF calculations in sufficient detail such that they will be readily auditable by Staff.

It is also our understanding that, for general ledger control purposes, these sub-accounts will not be created until they can be specifically assigned and will actually be needed. The sub-accounts cannot be specifically assigned until after the first auction is completed, when the number of suppliers is determined and other information that may be relevant is known. Also, these sub-accounts will not be used until after the auction process, so from a control perspective, by waiting to open these accounts,

ComEd will avoid the possibility of inadvertently using a dormant account.

For the foregoing reasons, ComEd submits that Staff's proposal for ComEd to provide a comprehensive list of detailed accounts and sub-accounts for Staff's review and approval within thirty days of the completion of the instant proceeding is not an appropriate mechanism to accomplish Staff's goals. Nevertheless, as stated above, ComEd has identified which FERC Accounts will be the umbrella accounts that are expected to house the information that will be used to calculate the AAF and provides that information as ComEd Ex 13.2 [Revised]. In addition, ComEd will meet with Staff when the necessary information is available and ComEd has determined the appropriate sub-accounts in order to facilitate Staff's understanding and review of the decisions that ComEd made in setting up such accounts.

(Alongi / Crumrine Reb., ComEd Ex. 13.0, 35:744–38:804) (footnote omitted; bracketed references added).

ComEd also submitted the detailed surrebuttal testimony of Kevin Waden, C.P.A., Exelon Energy Delivery Company's Director of Financial Reporting and Accounting Research, ComEd Ex. 22.0, responding to Staff's proposal, demonstrating that ComEd has identified the correct Accounts in ComEd Ex. 13.2 Revised in accordance with the USoA, establishing that it is inappropriate and detrimental from an accounting and internal controls perspective to create the sub-Accounts prematurely (before the CPP auctions) as Staff proposes, and otherwise showing that Staff's proposal is unjustified, inappropriate, and detrimental. (Waden Sur., ComEd Ex. 22.0, 1:17–2:34, 4:68–8:171). Moreover, as indicated earlier, Staff apparently does not now dispute ComEd's identification in ComEd Ex. 13.2 Revised of the particular Accounts that should be used to record the components of the AAF calculations.

Mr. Waden, on redirect examination, provided further information that demonstrates the extraordinary and anomalous nature of Staff's position here.

Q. Mr. Waden, what is the Uniform System of Accounts?

A. The Uniform System of Accounts is established by the Federal Energy Regulatory Commission, and it establishes all of the different Accounts that are kind of buckets if you will for the non-accountants in the room where a company is required to record expenses, revenues, assets and liabilities on its income statement or balance sheet.

Q. Does the Uniform System of Accounts specify sub-Accounts?

A. In limited cases it does but normally it does not.

Q. How many sub-Accounts does ComEd have in its accounting system?

A. I don't have an exact figure but it's several hundred.

Q. How many of them were the product of a formal proceeding before either the FERC or the ICC?

A. None to my knowledge.

(Waden, Tr. 872–873). Staff's extraordinary proposal should be rejected.

Third, as noted above, ComEd and Staff are in partial agreement on the addition of a factor to the CDU Factor and CF calculations — referred to by ComEd as “Factor A” and by Staff as “Factor O” — to reflect adjustments for refunds or additional collections, but ComEd and Staff differ on both the substance, in two respects, and the name of this factor. The gist of the first substantive dispute is simple. Staff wishes Factor A to be limited to adjustments made pursuant to a Commission Order. (Selvaggio Reb., Staff Ex. 16.0, 17:423–424, 17:439–448). ComEd believes, however, that, for obvious practical reasons, Factor A should cover both adjustments made based on the utility working with Staff to resolve disputed issues without a formal Commission proceeding and adjustments made pursuant to a Commission Order. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 38:816–40:851; Alongi / Crumrine Sur., ComEd Ex. 22.0, 28:644–29:670, 29:677–30:686). To assume, or require, that all such disputed issues be resolved through formal proceedings, when they might well be resolved by Staff and ComEd working together and reaching an accord, would be unnecessary, overly litigious, and administratively

burdensome on ComEd, Staff, and the Commission, and potentially other stakeholders, and it could unnecessarily delay, possibly for extended periods, the correction of errors, which may have significant adverse consequences for customers and the utility. This subject is discussed further below, with regard to Staff's proposal for automatic annual docketed reconciliation proceedings, in Section VII.B.9 of this Initial Brief.

The gist of the second substantive dispute relating to Factor A also is simple. ComEd proposed that Factor A permit ComEd to amortize adjustments over multiple effective periods with interest (interest is included because Staff proposed it, as noted earlier). (Alongi/Crumrine Reb., ComEd Ex. 13.1, Original Sheet No. 292). Staff objected, arguing that the only Commission should determine the amortization period. (Selvaggio Reb., Staff Ex. 16.0, 18:464–19:470). Staff's position assumes, however, that all possible Factor A adjustments will be litigated to a final Order in front of the Commission, a proposition with which ComEd does not agree, as stated above. ComEd's proposed language should be approved, unless the Commission determines that the sole method of dealing with such disputed issues should be a contested case before the Commission. (Alongi / Crumrine Sur., ComEd Ex. 22.0, 30:687–693).

The disagreement over the name of Factor A / Factor O reflects the underlying substantive dispute regarding whether the sole method of dealing with Factor A adjustments should be a contested case before the Commission. Staff prefers "Factor O" because "O stands for ordered, and opposes "Factor A" because it is a term in 83 Illinois Administrative Code Part 525, Section 525.50, relating to purchase gas adjustment ("PGA") clauses. (Selvaggio Dir., Staff Ex. 8.0, 16:425–435; Selvaggio Reb., Staff Ex. 16.0, 17:431–438). ComEd disagrees with the former, as indicated above, and does not believe there is any actual likelihood of confusing it with a gas utility with a PGA clause. ComEd believes that "A" for adjustment makes the most

sense, but is willing to accommodate Staff by using another letter if there truly is a confusion concern, provided that it should not be “O” unless the Commission approves Staff’s underlying substantive position on resolving all such matters through Commission Orders. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 29:677–30:686).

Finally, fourth, if the Commission agrees that informal as well as formal resolution of issues relating to possible Factor A adjustments are appropriate, then the Commission also should approve ComEd’s position that the interest component of Factor A should run from when the erroneous AAF was applied through when it was corrected. (Alongi / Sur, ComEd Ex. 21.0, 29:663–673). Staff’s position, that interest should run only from the date of the Commission Order through the correction of the AAF (Selvaggio Reb., Staff Ex. 16.0, 18:457–463) assumes Staff’s view regarding the sole method of dispute resolution here and, also, would seem to be inconsistent with the rationale for an interest component.

### **c. Accounting reconciliations**

Please *see* the following Section of this Initial Brief.

## **9. Rider CPP–Subsequent Review / Contingencies**

The Commission is presented with four related issues relating to the review of charges, of the calculation of charges, and of accounting under Rider CPP: (1) general issues regarding the subject of additional (retrospective) “prudence review”; (2) Staff’s and ComEd’s joint proposal relating to review of Supply Charges and AAFs, which involves proposed language for the CPP Timeline section of the Competitive Procurement Process part of Rider CPP; (3) Staff’s and ComEd’s joint proposal relating to review in certain contingent scenarios, which involves proposed language for the Limitations and Contingencies part of Rider CPP; and (4) Staff’s revised (i.e., expanded) proposal for automatic annual docketed reconciliation proceedings under

Rider CPP, Rider PPO-MVM, and Rider TS-CPP. In accordance with the ALJ's approved briefing outline, the first of those four subjects is addressed (primarily) in Section V.L.1 and 2 of this Initial Brief. The other three subjects are discussed here.

First, the Commission should approve Staff's and ComEd's final revised proposal regarding review of Supply Charges and AAFs, which involves proposed language for the CPP Timeline section of the Competitive Procurement Process part of Rider CPP, on Original Sheet No. 269.<sup>19</sup> Staff and ComEd each presented testimony on the appropriate scope of Commission review of computational errors and incorrect inclusion of costs in calculating Supply Charges and AAFs. (Knepler Dir., ICC Staff Ex. 10.0, 2:27–4:66; Alongi / Crumrine Reb., ComEd Ex. 13.0, 31:669–35:751; Knepler Reb., ICC Staff Ex. 18.0, 2:34–5:104 Alongi / Crumrine Sur., ComEd Ex. 21.0, 20:427–23:517; Knepler, Tr. 1208). In brief, Staff's and ComEd's proposed language permits, among other things, Commission review of calculations of Supply Charges and AAFs and of whether ComEd has included only those costs authorized to be included by the Commission's Order in this Docket, and also permits appropriate relief, including refunds, as stated more specifically in that language. Staff's witness confirmed that the final proposed language is appropriate. (Knepler, Tr. 1208). The final proposed language is supported by the evidence in the record, is just and reasonable, and should be approved.

Second, the Commission also should approve Staff's and ComEd's final revised proposal regarding review in certain contingent scenarios. In brief, the additional language, which is found in ComEd Cross Ex. 11, requires ComEd to provide reports to Staff, and provides an opportunity to review, informally and, on the Commission's own motion or upon complaint, formally, actions and omissions taken by ComEd, when ComEd procures full requirements

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<sup>19</sup> The proposed language is set forth in the Stipulation filed in this Docket on August 31, 2005.

electric supply under the Limitations and Contingencies part, when not due to an under subscription or a volume reduction, as stated more specifically in that language.

Staff and ComEd each submitted proposals on this subject. Staff, in its direct testimony, made a proposal relating to reporting and review under the Limitations and Contingencies part of Rider CPP, but did not propose specific tariff language. (Schlaf Dir., Staff Ex. 5.0, 20:457–461). ComEd, in its rebuttal testimony, indicated that it was willing to accept what it understood to be the intention and scope of Staff’s proposal, with certain limitations, but it found the proposal to be unclear and potentially over-inclusive in certain respects, and ComEd, accordingly, proposed certain modifications of Staff’s proposal, to be effectuated through specific proposed tariff language found in ComEd Ex. 13.1 at Original Sheet No. 274. (Juracek Reb., ComEd Ex. 9.0, 16:355–369; McNeil Reb., ComEd Ex. 10.0, 66:1442–69:1499; Alongi / Crumrine Reb., ComEd Ex. 13.0, 12:258–13:266; Alongi/Crumrine Reb., ComEd Ex. 13.1 at Original Sheet No. 274). Staff, in its rebuttal testimony, expressed certain questions and concerns regarding ComEd’s proposed modifications and language. (Schlaf Reb., Staff Ex. 13.0, 10:218–230) ComEd, in its surrebuttal testimony, responded. (McNeil Sur., ComEd Ex. 18.0, 40:887–41:903).

ComEd and Staff continued to work to achieve an agreed resolution that was supported by evidence in the record and just and reasonable. ComEd and Staff eventually proposed the additional compromise language that appears in ComEd Cross Ex. 11, and which would be added as the last paragraph of the Limitations and Contingencies part on Original Sheet No. 274 of Rider CPP. The additional language addresses the concerns raised by Staff and provides for more expansive reporting and Commission review not only than ComEd originally proposed but also than ComEd supported in its rebuttal testimony. Staff’s witness confirmed that Staff’s and ComEd’s final revised proposed additional language is supported by Staff and is reasonable.

(Schlaf, Tr. 1353–1354, 1355, 1356–1357).<sup>20</sup> The final language is supported by the evidence in the record, is just and reasonable, and should be approved.

Finally, third, the Commission should reject Staff’s revised (expanded) proposal for automatic annual docketed reconciliation proceedings under Rider CPP, Rider PPO-MVM, and Rider TS-CPP. Staff’s revised proposal is unwarranted and is unnecessarily burdensome on stakeholders, ComEd, Staff, and the Commission.

Staff originally proposed automatic annual docketed proceedings to reconcile electric power and energy costs with recoveries under Rider CPP. (Knepler Dir., Staff Ex. 10.0, 2:23–24, 6:127–9:200). The stated purposes were “[r]eviewing the cost mechanism on an annual basis to ensure that the Company’s process is effective” and “[c]orrecting omissions, errors, or misclassifications of cost[.]” (*Id.*, 7:130–132).<sup>21</sup> Staff, in its rebuttal testimony, not only adhered to that proposal but also, with no real explanation (rationale), proposed to expand it to Rider PPO-MVM and Rider TS-CPP. (Knepler Reb., Staff Ex. 18.0, 2:25–27, 10:206–11:232, 14:290–309, 15:313–321).

ComEd agrees that, if Staff, another interested party, or the Commission itself were to identify a valid basis for conducting a formal proceeding to investigate the reconciliation of costs and recoveries, and of whether the correct costs were included when calculating Supply Charges or AAFs, then Rider CPP would permit the Commission to do so, as has been confirmed by

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<sup>20</sup> The AG and the CUB, neither of which submitted rebuttal testimony on either Staff’s original proposal or ComEd’s rebuttal counter-proposal, nonetheless each conducted extensive cross-examinations of Staff’s witness on the subject of Staff’s and ComEd’s final revised proposal. (Tr. 1358, *et seq.*; Tr. 1376, *et seq.*). The additional testimony adduced on that cross-examination further illustrated and established that the final revised proposal is a reasonable compromise supported by the evidence in the record.

<sup>21</sup> The Staff witness who presented this proposal in direct testimony incorporated in it at that time a third purpose, review of the prudence of procurement in certain contingency scenarios supported by a different Staff witness, discussed above. (Knepler Dir., Staff Ex. 10, 7:133-135). That third part of this proposal later was superseded, however, by the proposed resolution of that third subject, discussed above.

Staff's and ComEd's final revised proposal regarding review of Supply Charges and AAFs, discussed above. (*E.g.*, Alongi / Crumrine Sur., ComEd Ex. 21.0, 24:550–25:555). Indeed, ComEd made an additional proposal along these lines in its rebuttal testimony, as discussed further below.

ComEd does not believe, however, that any valid basis has been shown for conducting automatic annual docketed reconciliation proceedings. The evidence instead shows that such automatic proceedings are not warranted and would impose unnecessary burdens on stakeholders, ComEd, Staff, and the Commission. As ComEd stated in rebuttal testimony:

Second, in light of ComEd's willingness to maintain its records in sufficient detail to accommodate audits; to submit the results of internal audits annually; to file annual reports (verified by an officer of ComEd); and, as discussed further below, ComEd's acceptance of Staff's proposal regarding the payment of interest, ComEd believes that the proposed annual docketed proceedings would be unnecessary, overly litigious, and administratively burdensome on the Commission, ComEd and other stakeholders. With the necessary information in hand, Staff can discuss and seek to resolve the subject with ComEd and, if Staff is unable to resolve the subject, advise the Commission as to the need for an investigation. ComEd believes that it is very unlikely that Staff and ComEd could not resolve any computational issue relating to the calculation of AAFs. Furthermore, to ensure that a robust review of ComEd's calculations is regularly performed absent a docketed proceeding, ComEd also proposes that, as part of its final order in this proceeding, the Commission formally direct Staff to (1) review the information supplied by ComEd annually and (2) within six months, issue a report to the Commission regarding its findings, including a recommendation regarding the need, or lack thereof, for a formal Commission investigation.

(Alongi / Crumrine Reb., ComEd Ex. 13.0, 38:821–39:837).

Staff's rebuttal testimony presented no persuasive response. Staff asserted that the Procurement Working Group's goal of "transparency" somehow supported Staff's proposal (Knepler Reb., Staff Ex. 18.0, 10:216–221), but that assertion is not logical or reasonable on its face. Moreover, Staff's assertion overlooks that the formulae for the calculation of the Supply

Charges and the AAFs, and the monthly and annual informational filings and reports that will be filed by ComEd, as well as other information, all provide transparency without the need for an automatic proceeding. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 23:513–517).

Staff’s rebuttal testimony also asserted that IIEC witness Mr. Collins’s direct testimony “states that New Jersey requires annual proceedings, not just workshops or open forums advocated by ComEd in this case. (Collins Dir., IIEC Exhibit 3, 14:300–15:325).” (Knepler Reb., Staff Ex. 18.0, 10:221–11:225) Mr. Collins’ referenced testimony is not relevant here because it addresses an entirely different subject than reconciliations.

In fact, the words “reconcile” and “reconciliation” do not even appear in ... Mr. Collin’s direct testimony, nor anywhere else in his testimony for that matter. In fact, it is our understanding that the New Jersey utilities do not annually reconcile their equivalents of the AAF through docketed proceedings. What Mr. Collins is speaking to ... is a completely different issue (*i.e.*, the administrative process for refining the auction process itself).

(Alongi / Crumrine Sur., ComEd Ex. 13.0, 23:522–527).

Staff’s rebuttal testimony ignored ComEd’s additional alternative proposal, under which Staff each year, after it receives ComEd’s annual reports, would recommend whether a formal proceeding should be initiated.

Q. Has Staff responded to ComEd’s alternative proposal to ensure that a robust review of ComEd’s calculations is regularly performed absent a docketed proceeding?

A. No. In our rebuttal testimony, ComEd proposed that, as part of its final Order in this proceeding, the Commission formally direct Staff to (1) review the information supplied annually by ComEd; and (2) within six months, issue a report to the Commission regarding Staff’s findings, including a recommendation regarding the need, or lack thereof, for a formal Commission investigation. (*See* ComEd Ex. 13.0, lines 831–837). Staff has not proffered any explanation as to why ComEd’s proposal is unreasonable or what benefits would be obtained by automatically holding annual docketed proceedings, regardless of whether or not they are needed.

The closest Staff comes to responding to ComEd's proposal is to note that the Ameren utilities have agreed to such proceedings and that such proceedings would provide stakeholders a forum for expressing their concerns and settling disputes. (Knepler Reb., Staff Ex. 18.0, lines 226–232). ComEd cannot speak to the positive and negative considerations that the Ameren utilities may or may not have considered on this particular subject, nor to whether or to what extent they are comparable to those applicable to ComEd. We can only say that ComEd simply does not find it in the best interest of the Commission, the utility, and, more importantly, its customers, to conduct such an unnecessarily burdensome process each year whether or not the need to do so has been reasonably demonstrated. In conclusion, it should be noted, that Staff is the only party that has heretofore entered testimony on this subject and no other party has denied, much less refuted, the reasonableness of ComEd's proposal.

(Alongi / Crumrine Sur., ComEd Ex. 21.0, 23:528–24:549).

Finally, ComEd, in its surrebuttal testimony, pointed out that Staff's belated and unsupported expansion of its proposal to Rider PPO–MVM and Rider TS–CPP simply does not make sense. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 26:610–28:643). All of the costs that Staff proposes to reconcile in Rider PPO–MVM are costs calculated in determining the Supply Charges in Rider CPP that are incorporated in Rider PPO–MVM. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 27:616–620; Alongi/Crumrine Dir., ComEd Ex. 7.2, Original Sheet No. 296).<sup>22</sup> Staff's proposal also is unwarranted as to the proven approach adopted in Rider TS–CPP.

As we indicated in our direct panel testimony, the formula proposed in Rider TS–CPP is based on the formula that is used to determine the Transmission Services Charge (“TSC”) in existing Rider TS–Transmission Services, 5th Revised Sheet No. 2171, *et seq.* (“Rider TS”). (Alongi/Crumrine Dir., ComEd Ex. 7.0, 71:1582–1583). This tariff, which was approved in the March 28, 2003, final Order in ICC Docket No. 01-0423 and has been in operation since the June 2004 monthly billing period, the TSC determined pursuant to its provisions is currently applicable to the almost 15,000 customers on PPO today and to customers taking short-term supply service under Rider ISS–Interim Supply Service.

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<sup>22</sup> Rider PPO–MVM also includes the supply-related uncollectibles costs adjustment to the Supply Charges, discussed in Sections VII.C.1, VII.B.8 and VII.D.6 of this Initial Brief, but Staff has not proposed or supported reconciling those costs. Indeed, as noted in Section VII.B.8, ComEd has clarified that it does not propose to include supply-related uncollectibles expenses in the balancing provided for in the AAM part of Rider CPP, addressing a Staff concern.

Rider TS does not contain any provisions requiring annual reconciliation proceedings, nor were any called for during the proceeding in which it was approved. Moreover, Staff has offered no explanation of why such proceedings are warranted with respect to Rider TS-CPP. Thus, ComEd objects to such a requirement being imposed on Rider TS-CPP.

(Alongi / Crumrine Sur., ComEd Ex. 21.0, 27:631–28:643). Staff’s proposal for automatic annual docketed reconciliation proceedings lacks merit as to Rider CPP, Rider PPO-MVM, and Rider TS-CPP, and should not be approved.

#### **10. Alternative Proposals re Service to Self-Generation Customers**

The Commission should reject IIEC’s recommendation (Dauphinais Dir., IIEC Ex. 2, 9:198–12:277) that ComEd either (1) charge self-generating customers on a dollars and cents per kilowatt-day basis (e.g., \$X.XX/kW-Day) or (2) create a new translation process for self-generating customers. Those alternative proposals each are without merit.

ComEd, in its rebuttal testimony, demonstrated numerous flaws of the IIEC’s proposal, including IIEC’s reliance upon mistaken interpretations / assumptions, and showed that ComEd’s approach is consistent with the determination of the auction suppliers’ capacity obligations for each of ComEd’s bundled service customers under PJM and, in turn, ComEd’s financial responsibilities under the CPP-H Supplier Forward Contract. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 28:596–29:611).

ComEd, in its surrebuttal testimony, pointed out the continuing and new deficiencies of IIEC’s rebuttal testimony on this subject, such as IIEC’s expressing concern about the impact of a customer’s experiencing a single forced outage under peak load conditions, while ignoring the fact that in the wholesale markets administered by PJM, the impact of any single outage on one of the five peak days would be mitigated by good performance on the other four days, and IIEC’s proposing to socialize the total capacity cost of self-generating customers amongst all self-

generating customers, including forcing it on independent power producers, by allocating the aggregate capacity obligation for the group on a pro rata basis to each individual customer, which is tantamount to a self-insurance scheme, a scheme that such customers could voluntarily enter into if they choose, but which should not be imposed on them by Commission fiat. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 15:326–17:371). IIEC’s proposals should not be adopted.

**11. Alternative Proposals re Interruptible Service  
(ALM and Non-ALM Demand Response)**

IIEC witness James Dauphinais recommends that ComEd provide an active load management (“ALM”) credit to the capacity billing units for hourly pricing customers who meet PJM ALM requirements. (Dauphinais Reb., IIEC Ex. 5, 12:264–15:333). His proposal would address the issue by splitting supply procurement for CPP-H load into two segments—ALM and non-ALM supply. There is no need to introduce the complexity that such an approach would involve because ComEd’s proposal already assures that customers who participate in PJM active load management will receive full credit for doing so. As explained in the surrebuttal testimony of William McNeil, ComEd’s Rider CLR compensates customers directly for curtailable capacity credit, making the modification suggested by Mr. Dauphinais unnecessary. (McNeil Sur., ComEd Ex. 18.0, 41:905–42:926; Crumrine, Tr. 820–824).

**C. Matters Concerning Proposed Rider PPO-MVM**

**1. Supply Charge**

The Commission is presented with two issues relating to the Supply Charges in Rider PPO-MVM. First, ComEd and Staff have agreed on revised clarifying tariff language relating to the Supply Charges in Rider PPO-MVM. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 48:1033–49:1075; Struck Reb., Staff Ex. 17.0, 7: 138–142; Alongi / Crumrine Sur., ComEd

Ex. 21.0, 40:938–943). That uncontested language is supported by the evidence in the record, is just and reasonable, and should be approved.

Second, Staff, in rebuttal testimony, raised the question of whether the Supply Charges adjustment for supply-related uncollectibles costs should be moved from the Supply Charges into a new charge or into the Supply Administration Charges. (Struck Reb., Staff Ex. 17.0, 7:146–8:169). Staff’s concerns were based primarily on a misunderstanding that ComEd was proposing that those costs would flow through the AAFs, a misunderstanding that has been dispelled, as discussed in Section VII.B.8 of this Initial Brief. Thus, there is no need for Staff’s proposal. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 40:913–928). Staff’s witness confirmed that, with that cleared up, he thought it might be helpful, but it is not essential, to break out these costs in a separate charge. (Struck, Tr. 1186–1187). ComEd does not believe that any tangible benefit has been identified that would warrant creating a new, separate charge.

## **2. Supply Administration Charge**

The Commission is presented with two issues (one of which should not be addressed in this Docket) relating to the Supply Administration Charges in Rider PPO-MVM. First, ComEd and Staff have agreed on revised clarifying tariff language relating to those charges. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 46:992–47:1031; Struck Reb., Staff Ex. 17.0, 3:55–4:93; Alongi / Crumrine Sur., ComEd Ex. 21.0, 39:908–912). That uncontested language is supported by the evidence in the record, is just and reasonable, and should be approved.

Second, CES and CUB/CCSAO have made various general recommendations regarding how the Supply Administration Charges should be calculated and assessed. (*See* O’Connor Dir., CES Ex. 1.0, 7:154–8:163; Domagalski / Spilky Dir., CES Ex. 3.0, 15:315–21:455; Steinhurst Dir., CUB/CCSAO Ex. 2.0, 25:584–585, 33:759–34:784; Domagalski /

Spilky Reb., CES Ex. 6.0, 18:453–458). Those proposals are premature, and they should not be approved. The language regarding these charges in Rider PPO-MVM is placeholder language, because the actual charges are to be determined in ComEd’s rate case, which now is pending as ICC Docket 05–0597; and, thus, the issues sought to be raised by CES and CUB/CCSAO are appropriately dealt with in that Docket, not here. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 45:970–46:991; Alongi / Crumrine Sur., ComEd Ex. 21.0, 38:889–39:907).<sup>23</sup>

**3. Retention of a Market Index Tariff Such as Those Currently Effective or a Neutral Fact Finder Tariff, in Addition to the Auction-Based Determination of Market Value**

The Commission should reject BOMA’s proposal that Rider PPO-MI should not be replaced by Rider PPO-MVM, and that ComEd should be required to continue to offer Rider PPO-MI or an equivalent rider based on the “neutral fact finder” (“NFF”) methodology. (See Brookover / Childress Dir., BOMA Ex. 2.0, 20:419–421; Brookover / Childress Reb., BOMA Ex. 4.0, 14:295–298).

BOMA’s proposal is entirely without merit, as demonstrated in ComEd’s rebuttal testimony, Staff’s rebuttal testimony, and ComEd’s surrebuttal testimony. For example, as stated in ComEd’s rebuttal testimony:

Q. Do you agree with [BOMA’s] recommendation?

A. No. As we stated in our direct panel testimony, given the fact that ComEd no longer owns generation facilities and it is proposing a competitive procurement process in this proceeding, ComEd’s actual costs and the costs that are determined through this proposed process are one and the same. (See ComEd Ex. 7.0, lines 441–451). Therefore, the market value and ComEd’s costs converge which, logically, means that the two post-transition period PPO offerings also converge. (*Id.*). Further, we have already provided an explanation as to why ComEd’s proposal is beneficial from a ratemaking viewpoint. (See, e.g., *id.*, lines 454–

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<sup>23</sup> Please see also Section VII.D.7 of this Initial Brief.

468). In addition, the Commission has previously recognized shortcomings in the NFF process. *E.g., In re Commonwealth Edison Co., et al.*, Docket 00-0259, page 155 (Order on Reopening April 11, 2001). Those shortcomings remain true today. The Commission should reject those witnesses' proposal and approve the use of Rider-MVM as proposed in our direct testimony.

Q. How do you respond to Messrs. Brookover and Childress' assertion that a Rider PPO-MI, designed as they propose, would serve as a check on the competitive procurement process proposed in this proceeding? (Brookover / Childress Dir., BOMA Ex. 2.0, lines 416–418).

A. We find this assertion without merit. If the Commission approves a competitive procurement process at the conclusion of this docket, we cannot understand why the Commission would place a “check” on a process that it has already determined will provide a competitive outcome. (*See also Zuraski Dir.*, Staff Ex. 3.0). One “check” on this process is the process itself and the associated rules, design, and Commission oversight as described elsewhere in ComEd's filing. An additional “check” is provided by the competitive retail market in which BOMA customers will be able to seek offers from RESs that will also reflect market conditions and provide the sort of “check” that BOMA seeks.

(Alongi / Crumrine Reb., ComEd Ex. 13.0, 50:1092–51:1116). (*See also Zuraski Reb.*, Staff Ex. 12.0, 26:570–33:732 (noting numerous additional problems with BOMA's proposal); Alongi/Crumrine Sur., ComEd Ex. 21.0, 41:945–42:965). BOMA's proposal is unjustified and detrimental, contrary to the evidence in the record, and should not be approved.

## **D. Other Matters**

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

The Commission should approve Staff's rate increase (bill impacts) mitigation proposal, which relates to the CPP-B auction segment (i.e., to all residential customers and most commercial and industrial customers), as that proposal has been clarified and revised in rebuttal testimony. (Lazare Dir., Staff Ex. 6.0, 8:174–23:525; Juracek Reb., ComEd Ex. 9.0, 17:370–

377, 586–618; Alongi / Crumrine Reb., ComEd Ex. 13.0, 51:1119–55:1205; Lazare Reb., Staff Ex. 14.0, 15:337–16:358; Alongi / Crumrine Sur., ComEd Ex. 21.0, 42:968–43:995).

In brief, Staff’s proposal as clarified in rebuttal testimony, would mitigate bill impacts as follows:

Under Mr. Lazare’s proposal, if the overall average increase for customer groups with access to the CPP-B auction segment is 13.[33]% or less, the largest overall bill increase any one customer group<sup>12/</sup> in CPP-B auction segment would receive is 20%, because at this point the 20% maximum overall bill increase and the 150% of system average overall bill increase are equivalent ( $20\%/1.50=13.33\%$ ). ... For average overall increases above 13.33% the maximum overall bill increase any class would receive is 1.5 multiplied by the system average overall bill increase for the CPP-B auction segment. We take this proposal to mean the following:

- if a customer group’s overall bill increase is less than either constraint it would receive an unconstrained increase;
- if a customer group’s overall bill increase is greater than the maximum of the two constraints, before application of the constraint, then it would receive an increase capped at the maximum of 20% or 1.5 multiplied by the CPP-B average overall percentage increase;
- if a customer group’s overall increase is greater than the minimum of the two constraints, but less than the maximum of the two constraints, that group would receive an unconstrained increase.

<sup>12/</sup> Mr. Lazare refers to the “customer groups.” We understand his proposal to apply to individual rate classes. (See Lazare Dir., Staff Ex. 6.0, lines 489–496).

Mr. Lazare states that this adjustment process would occur “after all components of the bundled ratemaking process are complete.” (Lazare Dir., Staff Ex. 6.0, lines 484–485). He proposes that a calculation would occur comparing the current and post 2006 bills for each customer group. If any of the proposed increases are constrained based on the parameters identified above, the excess revenue would be reallocated on an equal percentage to the remaining customer groups. This process will be repeated until all remaining revenue shortfall is allocated. (*Id.*, lines 488–496).

(Alongi / Crumrine Reb., ComEd Ex. 13.0, 51:1128–52:1146, 52:1149–1155) (footnote in original); *see also* Lazare Reb. Staff Ex. 14.0, 15:337–16:358).

Staff's proposal, as clarified and revised in rebuttal testimony, also includes applying the above mitigation criteria to residential space heating customers as a subgroup of the Residential Customer Supply Group. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 53:1177–54:1193; *see also* Lazare Reb. Staff Ex. 14.0, 15:337–16:358).

No intervenor has submitted evidence that warrants rejecting Staff's proposal. CCG and Dynegy, in rebuttal testimony, expressed certain questions / concerns regarding certain details of Staff's proposal, but ComEd in surrebuttal explained how those items can be addressed. (Alongi / Crumrine Sur., ComEd Ex. 21.0, 42: 975–43:986). BOMA has proposed a rate increase mitigation proposal relating to Rider 25 — non-residential space heating — customers, one that BOMA proposes should supersede Staff's proposal as to such customers. In accordance with the ALJ's approved briefing outline, BOMA's proposal is discussed in Section VII.D.3 of this Initial Brief. As the discussion there indicates, BOMA's proposal provides no valid basis for rejecting Staff's proposal, whether in whole or in part. No other intervenor has submitted any evidence regarding Staff's proposal. Staff's proposal, as revised in rebuttal testimony, is supported by the evidence in the record, is just and reasonable, and should be approved.

## **2. Elimination of Rider ISS**

The Commission should reject BOMA's request that the Commission order ComEd to continue to offer service under Rider ISS-Interim Supply Service ("Rider ISS") as a separate service after the end of the transition period. (*See* Brookover / Childress Dir., BOMA Ex. 2.0, 26:558–561; Brookover / Childress Reb., BOMA Ex. 4.0, 21:467–471).

BOMA's proposal is beyond the scope of this Docket, but, in any event, it is without merit and inappropriate. As ComEd stated, in rebuttal testimony:

This subject is not before the Commission. ComEd has not filed to cancel or modify Rider ISS, and BOMA has not proposed any change in Rider ISS.

That being said, it should be noted that Rider ISS will no longer be needed or appropriate in the post 2006 period. Rider ISS as it has been structured during the transition period is a service that is being voluntarily provided by the utilities. ComEd is not willing to provide that service in the same manner that it has in the past. In addition, a separately structured Rider ISS is no longer necessary or appropriate because the post 2006 bundled electric service rates will provide the necessary service that Rider ISS provides today. The Commission should reject BOMA's proposal on this issue. In addition, the retail customer switching rules as proposed in Rider CPP, provide an exception to the twelve-month hold on bundled electric service related to the CPP-B Auction Segment in the circumstance that a customer is switched from delivery service to such bundled service as a direct result of the customer's RES ceasing to do business as a RES in ComEd's service territory. Moreover, all customers may elect bundled electric service related to the CPP-H Auction that provides termination provisions that effectively provide for a much shorter term of service.

(Alongi / Crumrine Reb., ComEd Ex. 13.0, 55:1217–56:1232). (*See also* Alongi / Crumrine Sur., ComEd Ex. 21.0, 43: 997–44:1017).

No other party submitted evidence in support of BOMA's proposal. Moreover, the Commission lacks the jurisdiction and authority to require ComEd to continue to offer Rider ISS, a voluntary service, as a separate service in the post-transition period. 220 ILCS 5/16-103(e). BOMA's proposal should not be approved.

### **3. Non-Residential Electric Space Heating Customers**

The Commission should reject BOMA's proposal for rate mitigation relating to Rider 25 — for non-residential electric space heating — customers, under which they would be exempted from distribution facilities charges in ComEd's delivery services tariffs, i.e., receive free delivery service for eight out of twelve months. (*See* Brookover / Childress Dir., BOMA Ex. 2.0, 14:291–15:304; Brookover / Childress Reb., BOMA Ex. 4.0, 6:128–8:161).

BOMA's proposal, especially in terms of the relief that BOMA seeks, which involves amending or establishing delivery services tariffs not before the Commission, is beyond the scope of this Docket, but, in any event, it is without merit and inappropriate, for several reasons.

First, it is completely inappropriate to deal with supply-related rate impacts by adjusting the delivery rates for any customer or group of customers. Mr. Lazare's proposal recognizes this fact and already proposes a mechanism by which certain rate impacts would potentially be mitigated. ...

Third, Rider 25 was created under the previous vertically integrated utility structure and was designed based on facts that are no longer relevant. In the post-transition period and even today because ComEd owns no generation, ComEd, as the distribution utility, no longer has an internal cost structure associated with the generation of electricity using its own assets. In the previous structure, Rider 25 was designed to reflect the relatively low costs of ComEd's generation capacity and energy in the non-peak seasons. This same cost structure does not generally hold for a distribution-only utility.

Last, exempting customers from a distribution facilities charge would send an inaccurate price signal regarding the cost of distribution capacity. Distribution systems are generally designed to meet local peak usage and not for the system as a whole. Commercial electric space heating customers frequently have higher demands in the winter than the summer because of their use of electricity for space heating. Therefore, sending the signal that distribution capacity has no cost (i.e., providing it for free) in non-summer periods is inaccurate. We need to be very clear on what BOMA is requesting here. They ask that Rider 25 customers be given free delivery for eight of the twelve months. We find this to be inappropriate and inconsistent with cost-causation.

(Alongi / Crumrine Reb., ComEd Ex. 13.0, 56:1241–1244, 57:1252–58:1268). (*See also* Alongi / Crumrine Sur., ComEd Ex. 21.0, 44:1019–46:1059) (also showing the lack of merit of BOMA's alternative proposal that a separate subgroup for Rider 25 customers should be created within the confines of Staff's rate impact mitigation proposal).

BOMA cross-examined Staff's bill impact mitigation witness at some length on the subject of BOMA's proposal, but Staff's witness indicated, among other things, that BOMA's proposal would more appropriately be considered in ComEd's rate case, not the instant Docket, and that he was not in a position to support BOMA's proposal or its alternative proposal. (Lazare, Tr. 1232–1239). BOMA's proposal, and its alternative proposal, should not be adopted.

#### **4. DASR Procedures in Anticipation of Serving New Customer Facilities**

The Commission does not appear to be presented with any open issue on this subject. CES asked that ComEd clarify the procedures for a RES to “DASR” a new customer account in anticipation of serving their load requirements when the account and meter numbers are not yet assigned. (Domagalski / Spilky Dir., CES Ex. 3.0, 27:597–600). In response, ComEd committed to fully specifying its proposal in the upcoming rate case, such that RESs will have a full understanding of the DASR rules and processes well in advance of the first auction. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 58:1275–1277). CES accepted that resolution. (Domagalski / Spilky Dir., CES Ex. 6.0, 25:555–559).

#### **5. Recategorizing Certain Condominium Customers as Non-Residential Customers**

The Commission should approve CES’ proposal to recategorize certain condominium customers as non-residential for purposes of the Customer Supply Group definitions in Rider CPP. (Domagalski / Spilky Dir., CES Ex. 3.0, 25:549–553). ComEd does not oppose that proposal, and it is appropriate. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 58:1284–1286).

#### **6. Treatment of Uncollectibles**

*Please see* Sections VII.B.8 (relating in part to supply-related uncollectibles costs and AAFs) and VII.C.1 and 2 (relating in part to supply-related uncollectibles costs and Supply Charges and Supply Administration Charges) of this Initial Brief.

#### **7. Credit Risk and Other Administrative Costs**

The Commission should not approve CES’ proposal that ComEd recover certain additional costs from customers through some charge for specific credit costs and other administrative costs in relation to CPP-H service. (*See* Domagalski / Spilky Dir., CES Ex. 3.0,

23:497–24:533; Domagalski / Spilky Reb., CES Ex. 6.0, 18:469–11:526). CES’ proposal in effect is an additional premature attempt to address in this Docket what costs should go into the CPP-H Supply Administration Charges, akin to those discussed in Section VII.V.2 of this Initial Brief, and the proposal is not justified, in any event. (Alongi / Crumrine Reb., ComEd Ex. 13.0, 60:1322–1324; Alongi / Crumrine Sur., ComEd Ex. 21.0, 46:1061–47:1081).

## **8. Integrated Distribution Company Issues**

The Commission should not approve CES’ proposal for a separate formal proceeding for the consideration of any new ComEd communication materials related to the procurement process because ComEd is an Integrated Distribution Company (“IDC”). (*See* Domagalski / Spilky Dir., CES Ex. 3.0, 20:441–445; Domagalski / Spilky Reb., CES Ex. 6.0, 11:529–537). CES does not cite any experience in the over three years since ComEd became an IDC that warrants the proposal. Moreover:

As a Commission-approved IDC, ComEd is fully cognizant of the restrictions regarding marketing and attempts to retain customers that are imposed upon it — and of the strict “three-strikes and you’re out” provision, which if violated could require ComEd to functionally separate. ComEd will continue to take the necessary measures to ensure that its actions comport with the restrictions set forth in the Commission’s rule. (*See, e.g.*, 83 Illinois Administrative Code Sections 452.240 and 452.320). A formal Commission proceeding to evaluate, and to litigate, the contents of proposed communication tools would be burdensome and unworkable.

(Alongi / Crumrine Sur., ComEd Ex. 21.0, 47:1088–1095).

CES simply has not made the case for requiring other stakeholders, ComEd, Staff, and the Commission to undertake the burdens and costs associated with such a Docket.

## **VIII. Conclusions and Mixed Legal / Factual Issues**

### **A. Legality of Rider CPP**

For the reasons discussed in Section III and the factual sections of this brief, ComEd submits that the Commission has authority to approve Rider CPP and that the evidence shows that Rider CPP complies with all applicable legal requirements. ComEd will address in its reply brief any additional issues concerning the legality of Rider CPP that may be discussed by other parties.

### **B. Legality of Rider PPO-MVM**

For the reasons discussed in Section III and the factual sections of this brief, ComEd submits that the Commission has authority to approve Rider PPO-MVM and that the evidence shows that Rider PPO-MVM complies with all applicable legal requirements. ComEd will address in its reply brief any additional issues concerning the legality of Rider PPO-MVM that may be discussed by other parties.

### **C. Issues Concerning Compliance of Auction Process Details with Illinois Law**

ComEd believes that the auction process complies with Illinois law, and has no additional issues to raise at this time. ComEd will address in its reply brief any additional issues concerning compliance of the auction process with Illinois law that may be discussed by other parties.

### **D. Other Conclusions and Mixed Legal / Factual Issues**

ComEd has no other conclusions and mixed legal/factual issues to discuss at this time, but will address in its reply brief any issues that may be discussed by other parties.

**IX. Other Issues**

**A. Renewable Energy and Energy Efficiency Issues (Not Already Addressed Above)**

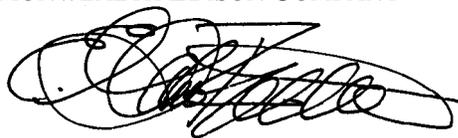
The Illinois Auction proposal meets the eighth consensus attribute identified during the Commission's Post 2006 Initiative because, as explained in the direct testimony of William McNeil, it is sufficiently flexible to permit incorporation of renewable resource requirements. (McNeil Dir., ComEd Ex. 3.0, 14:299–307.). ComEd has no additional issues relating to this topic to raise at this time, but will address in its reply brief any issues that may be discussed by other parties.

**B. Additional Other Issues**

ComEd has no additional other issues to raise at this time, but will address in its reply brief any issues that may be discussed by other parties.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY



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DATED: October 7, 2005

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