

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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

**INITIAL BRIEF OF ILLINOIS INDUSTRIAL ENERGY CONSUMERS**

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## **INITIAL BRIEF OF ILLINOIS INDUSTRIAL ENERGY CONSUMERS**

A diverse group of large industrial electricity consumers, Abbott Laboratories, Inc., Caterpillar Inc., Ford Motor Company, Daimler Chrysler Corporation, Enbridge Energy LP, Cognis Corporation, and Motorola, Inc., are participating in this case as the Illinois Industrial Energy Consumers (“IIEC” or “IIEC Companies”). Pursuant to Section 200.800 of the Rules of Practice of the Commission (83 Ill. Adm. Code Part 200.800) and the briefing schedule set by the Administrative Law Judge (“ALJ”), the intervenors named above present their Initial Brief in this docket for the Commission’s consideration.

This evidentiary proceeding investigates the propriety of proposed tariffs, filed by Commonwealth Edison Company (“ComEd”), to implement a competitive wholesale auction to procure electricity supply and to “translate” the auction results into tariffed retail rates. ComEd seeks Commission preapproval of both the procurement process and the tariff rates resulting from the proposed automatic ratemaking “translations.” (The tariffs do not contain actual rates.) IIEC’s Initial Brief addresses selected factual and legal issues<sup>1</sup> raised by ComEd’s proposals, the evidence of record, applicable provisions of the Public Utilities Act (“Act” or “PUA”), (220 ILCS 5/1-101 et seq.) and relevant Illinois and federal case law.

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<sup>1</sup>This Brief is organized in accordance with the Brief Outline approved by the ALJ, using all those elements of the outline relevant to IIEC’s positions and arguments in this proceeding with additional sub-captions included in the approved outline for the sake of IIEC’s arguments.

## I.

### INTRODUCTION

On February 26, 2005, ComEd filed proposed tariff sheets that define (a) an auction process for acquiring electricity supply for ComEd's bundled service offerings and (b) a ratemaking process that uses the results of the auction and a series of formulae to set rates for customers served under its regulated retail tariffs. ComEd seeks Commission approval of the entire collection of proposed tariffs -- those relating to the auction process, and those describing the process by which ComEd would set rates after its auctions. ComEd also seeks a Commission predetermination that whatever retail rates result from the combined auction and ratemaking processes will be just and reasonable, so that:

[t]he Company shall not be required to obtain any consent or other approval, whether prospective, contemporaneous, or retrospective, from the ICC or any other entity in order to issue bills containing such retail supply charges or in order to collect such retail supply charges. (Alongi and Crumrine ComEd Ex. 7.1, Proposed Ill. C. C. No. 4, Original Sheet No. 269).

In its Suspension Order entered March 9, 2005, the Commission suspended the proposed tariffs and ordered "without answer or other formal pleadings," commencement of "a hearing concerning the propriety of the proposed tariff sheets to implement a competitive procurement process." (Suspension Order March 9, 2003 at 1).

IIEC Companies in this proceeding are not endorsing or opposing the auction process, that is the primary subject of this proceeding. They have made certain recommendations to the Commission assuming, for the purpose of their presentations, implementation of some version of an auction for power procurement is used by ComEd. However, IIEC does have concerns about the auction process as proposed by ComEd. Those concerns have caused IIEC to recommend

that the Commission provide for a formal annual review of the auction process to consider, among other things, whether the process, or some other approach to power acquisition, has in fact produced a lower supply cost for ComEd's end use customers.

The Commission must keep in mind that, ultimately, the resolution of the power procurement issues, and the approval of the associated product offerings will, directly or indirectly, affect the price that ComEd's largest customers pay for electrical power and energy. ComEd's largest customers likely will be affected to a greater degree by the Commission's decision in this case. ComEd's larger customers are a fundamental and important part of the economy of northern Illinois. They employ tens of thousands of residential customers affected by the ComEd proposal. Indeed, in many instances, the ability of these residential customers to pay for electricity may be directly related to their ability to remain employed in some capacity by larger consumers of electricity or other businesses serving those large consumers. Therefore, the Commission cannot and should not consider only the desires and needs of the smallest customers in the ComEd service territory and/or the interest of ComEd and its parent, Exelon, to the exclusion of the needs and desires of larger customers.

Further, the Commission should not establish policies that artificially promote competition "for competition's sake." Such policies would work to the detriment of the very customers competition is supposed to benefit.<sup>2</sup> In this proceeding, the Commission should give careful consideration to the needs and desires of these larger customers, as well as those of smaller customers.

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<sup>2</sup>See ComEd Ex. 1.2 - Post 2006 Staff Report at 36, where Staff stated: "Staff views competition as a means to increase efficiency and lower costs to customers, not as an end in itself. Creating competition by artificially raising the cost of utility services is an anathema to this principle."

To assist the Commission in that regard, IIEC has presented the testimony of Mr. Robert R. Stephens, Mr. James R. Dauphinais and Mr. Brian C. Collins of the firm of Brubaker & Associates, Inc. These gentlemen and their firm have extensive experience in the areas of energy procurement and public utility regulation providing services to industrial and institutional customers, and on occasion, state regulatory agencies. The firm provides analysis of energy procurement options based on consideration of prices and reliability as related to the needs of their clients, and it prepares rate, feasibility, economic and cost of service studies relating to energy and utility services. They also have prepared depreciation and feasibility studies relating to utility service, assisted in contract negotiations for utility services, and provided technical support to legislative activities. (See IIEC Ex. 1, App. A at 2:595-603).<sup>3</sup>

Mr. Stephens and Mr. Collins have been members of the Illinois Commerce Commission Staff, working in various areas of the utility business, and both hold engineering and MBA degrees. Mr. Dauphinais has previously been employed by Northeast Utilities and represented Northeast on the New England Power Pool Stability Task Force. He was responsible for the day-to-day administration of Northeast Utilities Open Access Transmission Tariffs and has presented testimony before numerous state commissions and the Federal Energy Regulatory Commission (“FERC”). (See IIEC Ex. 1 App. A; IIEC Ex. 2, App. A; and IIEC Ex. 3, App. A).

IIEC Companies in this proceeding have made several carefully considered, specific recommendations to the Commission. They addressed ComEd’s failure to offer a fixed priced product to customers with demands of 3 MW and over. They recommend the Commission, as a

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<sup>3</sup>When citing prefiled testimony in this Initial Brief, IIEC has provided citations to the page number in format of “Page(s):Line(s) or Page:Line-Page:Line.” References to the transcript in ComEd 05-0159 will be designated as “Tr.\_\_\_\_\_,” references to the Joint Transcripts in ComEd 05-0159 and Ameren 05-0160, et al., will be designated as “Jt. Tr.\_\_\_\_”.

condition of approval of the auction process, to the extent such approval is given, direct that ComEd offer 3 MW and over customers the opportunity to purchase an annual fixed price product comparable to the product it proposes to offer to customers in the 1 to 3 MW range. IIEC recommends that a separate auction segment be established for this 3 MW and above customer class to recognize the significant differences in load profile associated with this group.

To help mitigate some of the load risk to potential auction suppliers and thereby reduce costs to customers, IIEC recommends that customers eligible for the annual fixed price product, in the segment that includes customers with demands of 3 MW and over, advise ComEd, prior to any auction, of their interest in becoming eligible for that product.

ComEd should be required to include a capacity component in retail rates for any fixed price product offered to customers with an electric demand of 1 MW or more, in order to recognize the benefits of load factor on overall customer costs. The capacity component should be based on the capacity price associated with the hourly priced product, which ComEd originally proposed be offered to customers 1 MW and over.

Because a one year fixed price option may not satisfy the needs of large 3 MW and over customers, IIEC also recommends that a multi-year product be established for those customers.

Assuming an auction process is approved for ComEd, and in order to maximize the competitiveness of the auction, IIEC Companies support a single auction for ComEd and the Ameren Companies.<sup>4</sup>

They further recommend that as a condition of approval of the auction process, the

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<sup>4</sup>Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Public Service Company d/b/a AmerenCIPS and Illinois Power Company d/b/a AmerenIP in Commission Dockets 05-0160, 05-0161 and 05-0162 (Consolidated) (the “Ameren Companies” or “Ameren”), have also proposed an auction process similar to the ComEd auction process.

Commission direct ComEd to work with Ameren, PJM and the Midwest Independent System Operator (“MISO”) to develop a single common deliverability test for capacity and network generation resources within the combined PJM and MISO footprint for delivery of power within the combined ComEd and Ameren load zones within the State of Illinois. ComEd should report the status of that effort to the Commission every ninety (90) days until the common deliverability test is in place for MISO and PJM.

ComEd also should be required to modify Rider CPP to bill self-generation customers, electing the ComEd hourly price service, for capacity on a per kW-day basis. In the alternative, ComEd should develop (as required by law) capacity charges that (a) reflect the very low probability that all self generating customers will experience outages at the same time, or at the time of the system peak, or both, and (b) that reflect their ability to commit to performing maintenance during nonsummer months.

IIEC Companies recommend that consistent with the Commission’s express desire to encourage energy efficiency and demand response programs, customers taking ComEd’s fixed price product be allowed to participate in both of PJM’s Non-Alternative Load Management (“Non-ALM”) demand response programs through PJM members and PJM curtailment service providers.

ComEd also should be required to continue its proposed CPP-H Auction for hourly pricing customers until the PJM reliability pricing model (“RPM”) centralized capacity market or an equivalent is in operation and the Commission concludes that such an approach will produce a lower capacity cost for end use customers than securing capacity through the CPP-H Auction process.

IIEC also recommends that the CPP-H Auction and hourly pricing proposals be modified to ensure that hourly pricing customers, meeting the PJM Alternative Load Management (“ALM”) interruptibility requirements, obtain the benefit of the ALM capacity credits associated with their load and not required to purchase unneeded capacity under the ComEd Hourly Pricing Proposal.

IIEC recommends that initial auctions conducted by ComEd (and Ameren) be conducted in September 2006. Holding the auction in September will provide a more accurate price, with a lower risk premium.

IIEC opposes the use of a load cap. The purpose for which load caps are proposed are covered by other measures that ComEd asserts are adequate and effective. This proposed remedy for market and process deficiencies is not certain to have any effect. Use of a load cap, if it has any effect at all, will serve to raise auction prices.

Finally, because of their concerns about the auction process itself, IIEC Companies recommend the Commission, to the extent it approves an auction, conduct a formal review on an annual basis to determine whether any approved auction process or any version of that process or some other process is the most appropriate means for acquiring the lowest cost supply of power available in the market for all end use customers.

### III.

#### LEGAL ISSUES

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

The Illinois Electric Service Customer Choice and Rate Relief Law (the “Customer Choice Law”) was adopted by the Illinois General Assembly in 1997 and signed into law on December 15, 1997. (220 ILCS 5/16-101 et seq). Under the Customer Choice Law, utilities are required to offer delivery service, so that end-use customers could choose suppliers, other than the electric utility, for their electric power and energy requirements. (220 ILCS 5/16-104).

Base rates were frozen for all customers. (220 ILCS 5/16-111(a)). Rates were reduced by 20% for residential customers in the ComEd service territory. (220 ILCS 5/16-111(b)). Also, utilities were given the option to avoid the rate decrease and rate freeze but if they did they were required to file biennial rate case proceedings without regard to whether the filing would produce a rate increase or decrease. (220 ILCS 5/16-101(b)). ComEd obviously elected to accept the rate freeze and rate decrease.

Also, utilities were given the option to reorganize and restructure their businesses and the right to collect transition charges to allow them to collect the cost of investments they believed would be stranded or otherwise unrecoverable, if customers were allowed to choose a supplier other than an electric utility. (220 ILCS 5/16-108(f) and 16-111(g)).

To allow utilities to respond to compete with third party suppliers, the General Assembly granted the utilities the right to request that the Commission declare a tariffed service or services competitive. (220 ILCS 5/16-113). Utilities on the other hand, were required to “. . . continue offering to retail customers each tariff service that it offered as a distinct and identifiable service

on the effective date of the Amendatory Act of 1997 until the service. . .” was declared competitive or abandoned. (220 ILCS 5/16-103(a)).

Pursuant to Section 16-111(g) of the Act, ComEd voluntarily sold its fossil generating capacity to Midwest Generation EME, LLC., and transferred its nuclear generating capacity to its affiliate, Exelon Generation. Commonwealth Edison Company, 1999 Ill. PUC Lexis 551, 194 PUR 4th 149 (Aug. 3, 1999); Commonwealth Edison Company, 2000 Ill. PUC Lexis 667 (Aug. 17, 2000).

In its adoption of the Customer Choice Law, the General Assembly expressed the intention that all customers benefit, in an equitable and timely fashion, from “lower costs” of electricity that would result from “retail and wholesale” competition. (220 ILCS 5/16-101A(e)). The General Assembly intended that the “. . . competitive wholesale and retail market . . .” benefit “all Illinois citizens.” (220 ILCS 5/16-101A(d)). To that end, the Legislature intended the Commission to act to promote the development of an effectively competitive electricity market, which would operate efficiently and which would be equitable to all Illinois consumers. The legislature intended that there were to be sufficient protections in place to ensure that “. . . all customers continued to receive safe, reliable, affordable, and environmentally safe electric service.” (220 ILCS 5/16-101A(d)).

The retail market in the ComEd service territory has not developed in a manner that ensures “all citizens” in the ComEd service territory will receive the benefits of effectively competitive wholesale and retail markets. The ComEd proposal in its present form does not allow all of its customers (citizens of the State of Illinois) to benefit from the wholesale and retail markets. Nor does it permit all customers (citizens of the State of Illinois) to benefit from the

lower cost of electricity derived from retail and wholesale competition. ComEd specifically proposes to deny its largest customers (3 MW and over) access to the lowest discoverable wholesale price, which it claims will be produced by its recommended auction process. It does so simply because “. . . it does not choose to offer it.” (McNeil Reb. ComEd Ex. 10.0 at 57:1240). ComEd has elected, ironically, pursuant to the “Customer Choice Law,” to “force” its larger customers to purchase electric power and energy from retail electric suppliers by denying them any electric energy service from ComEd except the volatile and expensive hourly pricing service.

#### **IV.**

#### **SUFFICIENCY OF THE COMPETITIVE MARKET**

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

Illinois customers, and particularly large customers, currently are not getting full benefits of a competitive retail market. This is illustrated by the wide disparity between the number of Retail Electric Suppliers (“RESs”) serving customers in the ComEd territory and the number of potential wholesale suppliers who might participate in the proposed auctions. Specifically, only eight RESs operated in the ComEd territory in 2004, including ComEd’s affiliate, while more than 30 wholesale suppliers might participate in the proposed wholesale auctions. (Stephens Dir. IIEC Ex. 1 at 5:88-92). The Post 2006 Staff Report suggests there were only seven active RESs in the ComEd service area in 2004. (Clark ComEd Ex. 1.2 at 38). The struggles and uncertainties associated with potential RESs getting certification by the ICC are well documented. While there are eighteen suppliers shown as certified on the Commission’s website, within the last two years at least two applications have been denied, and at least four additional

applications have been withdrawn due to the Applicant's inability to show compliance with the reciprocity clause. (Stephens Jt. Tr. 79-80, 105-106).

On January 23, 2003 because of concerns about the development of the retail market in the ComEd service area, the Commission initiated a proceeding to monitor the on-going development of the marketplace for 3 MW and over customers in the ComEd service territory. (See Illinois Commerce Commission, On Its Own Motion, Proceeding to Monitor the On-Going Development of the Marketplace for Commonwealth Edison Customers, ICC Dkt. 03-0056, Order, January 23, 2003, 2003 Ill.PUC Lexis 370). By initiating this proceeding the Commission intended to track the nature of the competitive market on a going-forward basis. (Interim Order, Commonwealth Edison Company, ICC Dkt. 02-0479, November 14, 2002 at 78, 2002 Ill. PUC Lexis 1088, 195-196). The Staff of the Commission was directed to file a report on the development of the market. Staff did file such a report. Staff concluded there was a lack of significant movement from the bundled service option to the delivery service option between 2002 and 2003. (Stephens Dir. IIEC Ex. 1 at 9:200 - 10:209). The December 2003 Staff Report demonstrated there was little overall change in the number of customers served by retail electric suppliers ("RESs"). (Stephens Dir. IIEC Ex. 1 at 11:230-247). Switching statistics have changed little since the time of the Staff Report. (Stephens Dir. IIEC Ex. 1 at 10:202-11:247). In terms of the total numbers non-residential customers served by RESs in the ComEd service area, the market has been in decline since 2002 (the year of the competitive declaration case). Declining from 12507 customers to 10,339 customers. (Clark ComEd Ex. 1.2 at 38). As indicated in the testimony of the Coalition of Energy Suppliers ("CES") witness Dr. Phil O'Connor and by further information adduced through cross-examination, the retail supplier

market, while modest in Illinois, expanded in the period 2001 through 2004. However, it has retracted in 2005. (See O'Connor CES Ex. 1.7; O'Connor Jt. Tr. 219-220; IIEC Cross Ex. 2). This suggests an immature and fragile market.

With respect to the retail market for customers larger than 3 MW, the evidence in this case indicates that insufficient competition exists to obviate the need for a fixed price product from ComEd. For example, DOE witness Swan recounts the long and tortuous history of DOE's experience in trying to establish a competitive supply arrangement. (Swan Dir. DOE Ex. 1.0 at 7:157-10:227). As of March 2005, less than half of the electricity consumption of customers with loads greater than 10 MW was provided through RES service, while the 3-6 MW class and the 6-10 MW classes showed the percentage of customer load served by RES supply at 57% and 64%, respectively. (Stephens Dir. IIEC Ex. 1 at 7:145-152). Even these percentages are, in part, a function of the fact that utility supply to these customers was declared competitive (and thus no longer offered to new or returning customers) and of inducements offered by ComEd to customers to favor RES supply over bundled service and PPO supply. (Stephens Dir. IIEC Ex. 1 at 7:152-155).

In summary, in the segment of the retail supply market that many consider to be the one in which retail suppliers are most likely to compete, the level of retail supplier activity has been unimpressive. IIEC believes this is no doubt due, at least in part, to the existence of the Reciprocity Clause which has stymied the development of a fully open competitive retail supply market. (220 ILCS 5/16-115(d)(5)). Until the retail market conditions improve sufficiently for a competitive market which provides "economically viable" options to all customers, it is important to ensure that the utility provides an avenue to the more competitive wholesale supply

market. IIEC will discuss this need further in Section V.I.3., below.

## V.

### AUCTION DESIGN ISSUES

#### C. Multiple Round Descending Clock Format

##### 2. Load Caps

##### a. Fifty Percent (50%) Load Cap

ComEd proposes to use a declining clock vertical tranche auction to procure the power supply necessary to meet its customers' demand for electricity. If ComEd's auction procurement plan is approved by the Commission, ComEd proposes to impose a load cap -- a maximum number of tranches that a bidder can bid on and win -- as an element of the auction rules. (McNeil Dir. ComEd Ex. 3.0 at 47:1011-1022). The announced purpose of the load cap is to limit the direct participation of potential suppliers as winning bidders in the auction to supply electricity for the utility's bundled service customers. (*Id.* at 47:1011-1012). IIEC opposes imposition of this artificial barrier to open competition and supply at the lowest prices.

ComEd's original proposal set the proposed load cap at 50%. (McNeil Dir. ComEd Ex. 3.0 at 47:1011-1013; LaCasse Dir. ComEd Ex. 4.0 at 50:1176). Thus, the cap would prevent any single supplier from winning contracts to supply more than 50% of the auctioned load (expressed in number of tranches) -- even if its bid would result in substantially lower prices to ComEd and its retail bundled service customers. (Collins Dir. IIEC Ex. 3 at 7:131-140; Hogan Dir. ComEd Ex. 8.0 at 51:1084-1086).

One consequence of restricting auction competition through the imposition of an auction load cap would be that efficient suppliers, able and willing to provide large quantities of

electricity at prices lower than their competitors, would be artificially constrained in the amount of low-cost power and energy they would be allowed to supply. (Collins Dir. IIEC Ex. 3 at 9:171-173). A predictable consequence of such limitations would be a higher than necessary auction clearing price and thus a higher price to consumers with load caps even if such suppliers sold their “excess” supplies to other bidders, retail customers would not be supplied at the lower cost otherwise available. Those efficient, lower priced supplies could only be provided through a winning “middleman-bidder” who would impose its own markup on the low-price supply. (Collins Reb. IIEC Ex. 6 at 10:200-203; McNeil Tr. 623). IIEC’s concern about the effect of load caps on consumer prices is neither novel nor unique to large consumers. ComEd itself reported that this has generally been a concern of customer groups. (IIEC Cross Ex. 3 (IIEC 1.07)).

For its part, ComEd defended load caps as serving three functions that ComEd witness Mr. William McNeil described as “crucial to promoting” its objective of having the auction format “function correctly.” (McNeil Dir. ComEd Ex. 3.0 at 47:1024). The identified functions were “attracting non-incumbent suppliers,” “diversif[ying] credit and . . . performance risks,” and “prevent[ing] gaming of the auction.” (McNeil Dir. ComEd Ex. 3.0 at 47:1026-1033). Mr. McNeil discussed the first two functions. Dr. Chantale LaCasse discussed the third. (*Id.*).

Other defenders of load caps offered a variety of arguments. Their arguments, and those of ComEd, all fall into one or more of only three descriptive categories:

- attempts to compensate for market deficiencies;
- attempts to provide an appearance of the “robust competition” the auction proposal depends on “to function correctly;” or (McNeil Dir. ComEd Ex. 3.0 at 47:1024).
- attempts to compensate for weaknesses in the auction process.

In all these arguments defending load caps, the price to consumers is addressed only indirectly, if at all. Consumers seek the lowest prices for supply, without an artificial load cap to benefit less efficient suppliers.<sup>5</sup> Consumers who will pay rates based on an auction process apparently have voiced precisely this concern, favoring acquisition of as much low price supply as possible. (IIEC Cross Ex. 3, (IIEC 1.07)). In sharp contrast, ComEd reports that “[s]uppliers . . . were typically in favor of load caps at lower levels . . . .” (IIEC Cross Ex. 3 (IIEC 1.07)). It is not surprising that parties who stand to benefit from higher auction prices or constrained competition would favor ComEd’s load cap proposal.

The Commission Staff expressed considerable concern about the competitiveness of the underlying markets on which the auction would apply. (*See generally* Sibley Dir. Staff Ex. 2.0). Accordingly, Staff sought to limit the participation of large bidders. (*See e.g.*, Salant Dir. Staff Ex. 1.0 at 8:170; Sibley Dir. Staff Ex. 2.0 at 24:439-25:448). At the same time, Staff’s expert acknowledged the negative effects of load caps, cautioning – as does Mr. Collins – first, that a “load cap” by reducing the supply that a large bidder can provide, potentially makes the auction less competitive. (Sibley Dir. Staff Ex. 2.0 at 25:454) and, second, that “if a load cap causes low-cost generation capacity to be excluded from the auction in favor of higher cost generation, then the auction price could be adversely affected. (*Id.* at 25:463-26:465).” Mr. Sibley therefore advises that “when setting the level of the load cap, one should take care to not exclude low-cost capacity from the auction.” (*Id.* at 25:462).

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<sup>5</sup>ComEd and others supporting load caps assert that participation by more entities will lead to lower prices. (*See, e.g.*, Graves Dir. MWG Ex. 2.0 at 7:158). However, they do not explain how load caps will attract lower-cost bidders -- who can profitably provide supply at lower prices -- that are not already participating in the auction. Rather, their argument that load caps will produce lower prices is premised on the idea caps will eliminate either abuses of market power or auction design defects that otherwise would permit higher prices.

ComEd suggests that a load cap is needed to encourage the participation of more suppliers in the auction, promoting robust competition. (McNeil Dir. ComEd. Ex. 3.0 at 47:1026). However, Staff witness Dr. Salant testified that an auction was conducted for one of the New Jersey utilities with no load caps. He testified further that the “no load cap” auction was a “success,” just like the capped auction of other utilities in that State. (Salant Jt. Tr. 1062-1063). The New Jersey utility involved had a relatively small load. (Salant Jt. Tr. 1061-1062). Presumably, ComEd’s load, which is relatively large, would be even more attractive to potential bidders.

IIEC supports participation by as many suppliers as can reliably and economically provide supply. However, IIEC disagrees that a load cap is the way to promote robust competition in the auction. The fact an auction may have more bidders does not mean there will be more low-cost or low price suppliers competing in the auction. Even if a load cap encouraged a larger number of suppliers to participate, elimination of low-price or low-cost bids via the load cap, nonetheless, will reduce the competitiveness of the auction, and in turn increase the auction clearing price. (Collins Dir. Ex. 3 at 13:279). Dr. Salant agrees that lower cost bidders will bid more aggressively in the auction (Salant Jt. Tr. 1087).

However, Dr. Salant’s price-taker proposal does not, as he suggests, preserve the benefits of unfettered (no load cap) competition in the proposed auction. While the proposal permits low-cost bidders to participate at any supply level, the low-cost bidders would not know whether the final auction clearing price for their price-taker tranches would cover the cost to supply those tranches. This practically precludes bidders from offering price-taker tranches in the first instance. In addition, the aggressive binding of low-cost supplies is lost. Therefore, the price

taker proposal does not necessarily preserve the benefits on a no load cap option.

Like ComEd, Midwest Generation EME, LLC (“MWG”) witness Mr. Graves focused on the effect that the actions of large suppliers like ComEd could have in a singular auction market for full requirements products unique to ComEd. Mr. Graves optimistically predicted that load caps would encourage smaller suppliers to bid and increase the number of suppliers (Graves Jt. Tr. 1178 9:198-10:208). Mr. Graves agrees in his discussion of the Staff price taker proposal, which like load caps reduces the amount of load a bidder can bid on and win, stating: “bids may be increased due to the loss of economies of scale in servicing the few tranches one might win.” (Graves Reb. MWG Ex. 2.0 at 4:90).<sup>6</sup> Mr. Graves also acknowledges that there is no necessary correlation between the small and medium size bidders attracted by load caps and low bid prices that would benefit customers. (Graves Jt. Tr. 1178-1179).

Dr. LaCasse concedes that a load cap could result in ComEd customers paying more for power (LaCasse Jt. Tr. 978). Even as to financial bidders, a restrictive load cap could exclude the lowest cost risk manager from participating fully in the auction, thereby resulting in higher auction prices (LaCasse Reb. ComEd Ex. 11.0 at 30:718-719). Marketers and traders with superior risk management capabilities, like generation owners, may elect to skip Illinois’ auction if the number of tranches they are permitted to bid on and win is too low to be profitable or efficient. (Collins Reb. IIEC Ex. 6 at 8:156).

It should be beyond dispute that the level of participation by efficient, low-cost or low-price suppliers should not be curtailed for the sake of an appearance of competition. In any case, as to market power problems and other market weakness, Dr. LaCasse testified that “[a] measure

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<sup>6</sup>At the same time, Mr. Graves predicts lower auction prices as a result. (Graves Reb. MWG Ex. 2.0 at 7:159).

imposed on bidders at the auction is not going to change the realities of the wholesale markets.” (LaCasse Reb. ComEd. Ex. 11.0 at 36:872).

Thus, according to its proponents, the load cap is a remedy for certain market or auction weaknesses. However, it is doubtful that load caps will provide the corrective effects described by proponents. Moreover, the objectives described above, which the defenders of load caps offer as support for their proposals, actually have a different effect. The need for such market intrusions and process “fixes” should instead cause the Commission to wonder: If Illinois’ markets and the auction process are as fragile as described in defense of load caps, should it commit Illinois consumers (almost irrevocably) to the auction process ComEd proposes without a formal annual review? (IIEC examines this question further in its comments on the need for a formal Commission review process.)

**b. Thirty-five percent (35%) load cap**

In response to the comments of other parties regarding its load cap proposal, ComEd revised the proposal. ComEd’s revised auction rules would impose a lower 35% load cap -- further constraining the unfettered operation of market forces. (McNeil Reb. ComEd Ex. 10.0 at 24:502-503). In determining that a load cap of 35% was appropriate, ComEd relied on the opinion of Dr. LaCasse. (McNeil Reb. ComEd Ex. 10.0 at 24:488-490).

In her rebuttal testimony, ComEd witness Dr. LaCasse presents her evaluation of the various load cap proposals offered in the testimonies of Staff and intervenors, describing how she assessed higher and lower load caps and their effects on her balance of the associated benefits and costs. (LaCasse Reb. ComEd Ex. 11.0 at 24:516-588). Dr. LaCasse’s opinion was

based on four evaluation criteria: effect on participation; controlling gaming through overstatements of interest; limiting bidders' influence on auction results; and diversification of supplier risk. (LaCasse Reb. ComEd Ex. 11.0 at 24:577). Her evaluation was entirely qualitative and subjective. She conducted no quantitative analyses or auction simulations to support her conclusions.<sup>7</sup> (LaCasse Jt. Tr. 908; IIEC Cross Ex. 3 (IIEC 6.05, 6.06, 6.11)).

Based on her qualitative, subjective evaluation, Dr. LaCasse concluded that:

- The load cap is unlikely to limit the participation of bidders in the auction;
- The load cap imposes needed discipline on bidders' ability to over-represent the amount of supply they wish to bid into the auction;
- The load cap appropriately limits the influence that any one bidder can have on the results of the auction; and
- The load cap serves to limit ComEd's and ultimately customers' exposure to any one supplier.

As Mr. Collins demonstrated in his rebuttal, these conclusions are unsupported and detrimental to the interests of consumers. (Collins IIEC Reb. Ex. 6 at 5:89-11:215).

With respect to the IIEC's specific proposal that no artificial limitations be placed on auction bidders, Dr. LaCasse asserts that such unfettered competition in the singular market for a ComEd full requirements product (the proposed auction) will not achieve her subjective balance of benefits and costs. (LaCasse Reb. ComEd Ex. 11.0 at 29:694-698). Each of the purported benefits Dr. LaCasse attributes to the proposed load caps has been shown to be without substantive foundation in the record. The following discussion examines Dr. LaCasse's four conclusions.

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<sup>7</sup>Dr. LaCasse has not undertaken any effort to determine (objectively) the magnitude of the costs or the benefits associated with load caps in the auction. (LaCasse Jt. Tr. 908).

First, it should be noted that Dr. LaCasse has not explained why only these four factors were evaluated. Dr. LaCasse also acknowledges that “a lower load cap could impose costs in terms of limiting participation, and these costs are weighed against the potential benefit in terms of limiting overstatement of interest, curbing influence on the auction results, and diversification of supplier base.” (LaCasse Reb. ComEd Ex. 11.0 at 28:678). However, Dr. LaCasse has not disclosed the weighting she gave to each of these factors in her evaluation, although, when asked, Dr. LaCasse conceded that it is not possible to predict which of the factors will have the largest impact on auction clearing prices. (IIEC Cross Ex. 3, (IIEC 6.06)).

In regard to Dr. LaCasse’s first factor considered, namely the likelihood of a load cap limiting participation in the auction, no witness has disputed that a load cap might prevent efficient suppliers (who are able to offer the lowest bid prices) from offering into the auction the maximum number of tranches that they could serve at a low price. (See e.g., Hogan Dir. ComEd Ex. 8.0 at 51:1084-1086). The result of a load cap that excluded supply from more efficient suppliers would be higher auction prices and thus higher prices to ComEd’s end use customers. This is an undesirable outcome directly at odds with the stated purpose of the auction process. (Clark Dir. ComEd Ex. 1.0 at 15:342).

Moreover, to the extent that Dr. LaCasse is correct that the load cap is unlikely to limit the participation of bidders in the auction, the load cap is of limited usefulness. Thus the alleged benefit of load caps associated with limiting the participation of large bidders may not be achieved. However, the cost associated with artificially limiting the market forces, on which the auction is purportedly based, will still be imposed on customers.

Dr. LaCasse's second conclusion was that load caps would prevent bidders from overstating their interest in supplying ComEd's needs. Dr. LaCasse concedes that any bidder could over-represent its interest within the load cap. That is, unless the bidder, seeking to game the auction, by over representing its interest wanted to bid more than the capped number of tranches, its use of that gaming strategy would not be affected by the cap. (LaCasse Dir. ComEd Ex. 4.0 at 62:1475-1477). Midwest Generation witness Frank Graves agrees (Graves Reb. MWG Ex. 2.0 at 8:165-166). As for larger bidders expressing a level of interest in excess of the load cap, ComEd has not presented anything other than Dr. LaCasse's unsupported opinion that the possible costs (excluding low-price supply, artificial limits on the competitive process) are exceeded by any benefits.

For an auction process dependent on robust competition to operate correctly (McNeil Dir. ComEd Ex. 3.0 at 48:1024) the presumption should be in favor of unfettered competition. As Staff witness Dr. Salant testified, it is never desirable (in the absence of anti-competitive behavior) to exclude efficient suppliers from the auction. (Salant Tr. 1077). ComEd has not offered a compelling justification for imposition of artificial, and largely arbitrary, load caps for the market. (Collins Dir. IIEC Ex. 3 at 8:163; Salant Tr. 1072).

With respect to Dr. LaCasse's third point, limiting the influence of bidders, IIEC disagrees with Dr. LaCasse's assertion that limiting an efficient bidder's objective influence on the market forces of the auction is desirable or appropriate. IIEC witness Mr. Collins testified:

By establishing a load cap, ComEd's proposal would limit the amount of supply that a very efficient bidder could offer into the auction and compete with the supply of others. Limiting this efficient bidder's objective influence on the market forces of the auction would be inappropriate and result in higher market prices. In other words, limiting the number of competing supply tranches

reduces the competitiveness of the auction and will likely raise and certainly not lower, the prices resulting from the auction.

(Collins Dir. IIEC Ex. 3 at 9:171).

Higher auction prices will result in higher costs for ComEd's customers. Dr. Salant agreed with Mr. Collins on this point. (Salant Jt. Tr. 1077). Mr. Collins' position also has the endorsement of common sense.

ComEd has also proposed that the auction manager be required to limit the amount of information to bidders regarding excess supply remaining in the auction to address the same concern. If the Commission adopts that ComEd proposal, which the utility has not said is inadequate for its purpose, a load cap is not needed to limit the ability of bidders to improperly influence the auction. Indeed, Dr. LaCasse testified on cross-examination that because of ComEd's proposal to limit the amount of information available to bidders regarding excess supply remaining in the auction, bidders will be unable to profitably withdraw tranches from the auction and thereby manipulate auction prices. ( LaCasse Jt. Tr. 785).

With respect to Dr. LaCasse's fourth criterion, IIEC disagrees that a load cap is needed to limit credit or performance exposure to any supplier. The credit requirements ComEd proposes as an integral part of the auction process are specifically designed to address these risks. Financial requirements, not load caps, are the standard measures to limit the risks of supplier default associated with competitive supply. ComEd identifies its credit and collateral requirements as the primary protection against credit risk and supplier nonperformance. (Collins Dir. IIEC Ex. 3 at 12:263-266). Staff's expert Dr. Salant, like ComEd, also argued for having both load caps and financial guarantees. Like ComEd, Dr. Salant did not rely on any quantitative analysis regarding the need for any particular level of load cap. Yet, Dr. Salant defines the

question of the appropriate load cap level in the proposed auction process – 100% (no load cap) or 35% (ComEd’s proposal) – as a quantitative one. The record contains no quantitative support for the proposed 35% load cap, or for any load cap at all. Dr. Salant conceded that the need for load caps in the presence of ComEd’s proposed financial guarantees was a quantitative question that he (and presumably ComEd as well) could not answer without performing quantitative studies. Dr. Salant testified:

A. Qualitatively, yes, I looked generally at the load caps and the financial guarantees.

Q. And did you find the financial guarantees adequate to protect against the risks they were designed to cover?

A. . . . As I said, I made a qualitative assessment, so qualitatively, there should be load caps. Qualitatively, there should be financial guarantees. . . . Quantitatively what the levels would be requires quantitative analysis.

Q. Would the financial requirements standing alone be adequate to cover the financial risk they were designed to cover?

A. Absent quantitative analysis, I can’t give you the calculations of whether that’s adequate or not. That’s a quantitative question.

(Salant Tr. 1072-1073).

Dr. LaCasse also sees setting a load cap as “a question of balance.” (LaCasse Reb. ComEd Ex. 11.0 at 25:603). And, although she concedes that she did no quantitative work in setting her proposed load cap (LaCasse Jt. Tr. 908), she made a distinctly quantitative adjustment in her load cap proposal – lowering it from 50% to 35% – while still offering only subjective qualitative opinions as support for any load caps at all.

Dr. LaCasse admits the proposed credit requirements are “designed to provide adequate

financial resources that consumers are not deprived of supply in the event of a supplier default of any kind.” (LaCasse Jt. Tr. 908, 910, emphasis added). Further, since a large bidder subject to the cap could nonetheless sell power to other auction participants, the risk of supplier default remains. (Collins Dir. IIEC Ex. 3 at 12:252-266). A load cap at any level would be ineffective in mitigating that default risk. ComEd has not provided a compelling reason why a load cap is needed in addition to credit requirements to protect against default risk.

There is a stark irony in ComEd’s proposal to curtail competition through load caps in an effort to remedy deficiencies in an allegedly robust market, a process that purports to rely on, and to share the benefits of, an allegedly robust, competitive marketplace.<sup>8</sup> Load caps should be unnecessary to achieve any of the objectives offered as justifications by ComEd and others. If the concerns about the possible exercise of market power are so serious as to require affirmative market interventions like load caps, then there is a real question whether there is adequate competition in the market to justify the total reliance on market forces that the auction proposal requires. If there is not such concern, then the imposition of load caps is a gratuitous market intrusion that benefits only suppliers, at the expense of consumers. That is not what the legislature intended or contemplated when it mandated that the transition to competition benefit all consumers equitably. (*See* 220 ILCS 5/16-101A(d)(e)).

The Commission has determined in cases since the adoption of the Customer Choice Law that it is the policy of the State of Illinois that all supply options should be considered in order to determine how utilities should meet their customers’ demands for service in the least cost

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<sup>8</sup>According to ComEd: “The auction format proposed herein depends on robust competition in order to function correctly and there are three aspects of the load caps that are crucial to promoting this result.” (McNeil Dir. ComEd Ex. 3.0 at 48:1024).

fashion. (See ICC On Its Own Motion v. Central Illinois Light Company, 2000 Ill. PUC Lexis 963 at 65). In evaluating the need for load caps the Commission should consider whether they will enable ComEd's ability to meet demand in a least cost fashion. IIEC believes they will not. Load caps should be rejected in this case for the reasons stated above.

ComEd, Staff, and Midwest Generation -- the principal advocates for load caps -- have not shown that any load cap is more beneficial than harmful to the results of the auction. A 35% load cap would be more harmful to open competition (and potentially auction clearing prices) than ComEd's 50% load cap proposal. The Commission should reject the artificial barrier to full competition represented by the proposed load cap.

#### **F. Date of Initial Auction**

If an auction is approved, the initial auction should be held in September 2006, as proposed by ComEd. After the exchange of views inherent in the filing of written direct and rebuttal testimonies, all parties except one appear to either support or not oppose a September 2006 date for ComEd's initial auction. The single dissenter from that date is the CES, which argues for a May 2006 auction. In IIEC's view, there is no compelling reason for advancing the initial auction to a point in time more than one-half year before the winning bidders will be required to supply power, with the concomitant increase in risk and price.

The IIEC companies and other consumers would have to absorb any price premium attributable to the risks of changes in future market prices. Any such premium can be reduced by an auction date closer to the time when supplies must be provided. For this and the other reasons detailed below, IIEC supports the September 2006 auction date if an auction is approved.

ComEd witness William McNeil offered the following reasons for ComEd's choice of September 2006 as the date of its initial auction:

- It provides sufficient time for the Auction Manager to set up the process, advertise to potential suppliers, and provide training to suppliers, and
- It is closer to the time of actual delivery and therefore delivers a more accurate price.

(McNeil Dir. ComEd Ex. 3.0 at 33:711-715).

IIEC witness Brian Collins concluded that ComEd's rationale for an initial auction date of September 2006 was reasonable. (Collins Dir. IIEC Ex. 3 at 3:36). Further, IIEC supported simultaneous initial auctions for both ComEd and Ameren in September 2006 (Collins Dir. IIEC Ex. 3 at 5:90-91).

Staff originally proposed a July 2006 initial auction date. (Schlaf Dir. ICC Staff Ex. 5.0 at 21:480). Both CES and Constellation Energy Commodities Group ("CCG") originally recommended a May 2006 initial auction date. (Bohorquez and Bollinger Dir. CES Ex. 2.0 at 4:56; Smith Dir. CCG Ex. 1.0 at 4:124-133).

In Mr. McNeil's rebuttal testimony, he reported that ComEd and Ameren had agreed on setting the initial auctions for both companies during the first ten days of September 2006. (McNeil Reb. ComEd Ex. 10.0 at 28:575-577). After reviewing ComEd's rebuttal testimony, Dr. Schlaf revised Staff's position on this issue to support an early September auction date. (Schlaf Reb. ICC Staff Ex. 13.0 at 2:59-60). CCG stated it would not oppose a September 2006 initial auction date. (Smith Reb. CCG Ex. 2.0 at 2:38).

CES, however, maintained its advocacy for a May 2006 initial auction in rebuttal testimony, but indicated a willingness to accept Staff's original proposal for a July 2006 initial

auction. (O'Connor Reb. CES Ex. 4.0 at 10:229-236). CES provided three reasons for an earlier initial auction: first, it provided customers more time to evaluate their choices; second, time is needed to implement a process that is new and untried in Illinois; and third, an early deadline would advance certainty in the environment for customer decisions. (O'Connor Dir. CES Ex. 1.0 at 10-11:207-246).

Though CES states that "customers should be the main focus of this proceeding" (O'Connor Dir. CES Ex. 1.0 at 10:207), the longer period for which it argues also coincides with the interests of retail energy suppliers. The longer period for customer decisions also provides a longer period for RES marketing.

In addition, a May 2006 initial auction date would cause bidders to split their efforts between preparing supply arrangements for the summer peak season in 2006 and preparing for participation in the Illinois auctions. (Collins Dir. IIEC Ex. 3 at 4:76-78). A September 2006 initial auction date would allow bidders to focus their efforts on a single task -- preparing bids for the Illinois auction.

Also, the September 2006 date is a more advantageous date because an auction closer to the time of physical delivery would produce a more accurate price. (Collins Dir. IIEC Ex. 3 at 5:83-87). Reducing the time gap between the auction and actual physical delivery of power reduces bidders' uncertainty in their market pricing forecasts and any associated risk premium. This reduction of forecast uncertainty allows bidders to offer bids that better reflect market conditions at the time of physical power delivery. (*Id.*).

A September 2006 initial auction should reduce bidders' risk premiums, yielding more accurate auction prices than an initial auction date of May 2006. These desirable results from a

customer point of view are adequate reason for the Commission to adopt the consensus September 2006 date for initial auctions.

**G. Common v. Parallel Auction**

**3. Between ComEd and Ameren Products**

IIEC supports the notion of a common auction between the ComEd and Ameren territories, should an auction process be approved in this case. IIEC believes that since the load zones would not be bifurcated into two separate auctions, lower market clearing prices would result from a joint auction because the auction would be more competitive in both load zones. (Dauphinais Dir. IIEC Ex. 2 at 4:85-94). However, as will be discussed in greater detail in Section, V.G.4 below, disparities such as the lack of a single common deliverability test, serve to bifurcate the auctions and tend to make them less competitive, as bidders are unlikely to switch their bids between load zones during auction rounds with such market bifurcation. (Dauphinais Dir. IIEC Ex. 2 at 6:125-137). The existence of these disparities will deprive customers of the full benefit of a common auction.

Beyond the lack of a common deliverability test, another disparity between the ComEd and Ameren auctions is in the nature of the auction segments, with differing load profiles for the annual fixed-price products. The current ComEd annual product auction (CPP-A) recommendation is to put to auction the load of customers in the 400 kW through 3 MW class in one auction. (McNeil Sur. ComEd Ex. 18.0 at 25-26:558-565). Within this customer class, some customers will be automatically migrated to the annual product, while others will be automatically migrated to ComEd's proposed hourly rate. (McNeil Sur. ComEd Ex. 18.0 at

26:569-572). In stark contrast to the ComEd proposed class definition, in Docket No. 05-0160, et al., the Ameren Companies have proposed for their annual auction (BGS-LFP) to cover all customers 1 MW and above, (Schlaf Dir. Staff Ex. 5.0 at 10:228-232; O'Connor Reb. CES Ex. 4.0 at 23:493-496 and 25:531-545). The Ameren class could potentially include customers with demands of tens or even hundreds of megawatts of load. Because these annual segment customer classes are potentially so radically different in terms of load profile, load factor and their propensity to migrate to and from the annual product, it is unclear how auction suppliers could, as a practical matter, readily "switch" their bids from one auction to the other. The cost of providing a full requirements product for these customer segments can differ markedly. (*See* Clark ComEd Ex. 1.2 at 25). This makes switching less likely.

While ComEd has totally ignored this practical aspect of its auction design, the Commission should take steps to promote comparable customer segments between the Ameren and ComEd auctions, to facilitate switching between the auctions and thereby to derive the full competitive benefits offered by a combined auction. As will be discussed in Section V.I.3., below, IIEC recommends a separate auction segment for customers with demands greater than 3 MW (in conjunction with its proposal for ComEd to provide an annual fixed-price product to such customers).

#### **4. Common Deliverability Test**

MISO and PJM each perform a test to determine whether capacity resources are deliverable to aggregate load in their respective footprints. (Dauphinais Dir. IIEC Ex. 2 at 6:140-141). The respective tests are designed to identify generating resources that are deliverable, as

capacity and “Network Resources,” to load within the footprint of the particular RTO without the need for case-by-case transmission studies by the RTO. IIEC believes that if customers are to receive the full benefit of having ComEd (and the Ameren Companies) conduct a single auction and to facilitate the ability of bidders to switch between ComEd and Ameren fixed price products, ComEd (and the Ameren Companies) should be directed to work with one another, as well as with MISO and PJM to develop a single common deliverability test for resources in the combined PJM-MISO footprint to load within the ComEd and Ameren service areas within the State of Illinois. IIEC explains its position more fully below.

In its rebuttal testimony, ComEd modified its auction proposal so that bidders of fixed-priced products can switch between the ComEd and Ameren fixed-priced product auctions between rounds, and bidders of hourly-priced products can switch between the ComEd and Ameren hourly-priced product auctions between rounds. (Juracek Reb. ComEd Ex. 9.0 at 11:240-246). Such switching, in theory, would contribute to additional participation and liquidity in the auctions. (Schnitzer Dir. ComEd Ex. 6.0 at 32:735-746). If this theory were realized, it would result in lower market clearing prices because the auctions would be more competitive in both load zones, since the ComEd and Ameren load zones would not be bifurcated into two separate auctions. (Dauphinais Dir. IIEC Ex. 2 at 4:87-91). However, there are hurdles to switching that prevent the full realization of this theoretical benefit.

There is a disparate treatment of capacity resources in the MISO versus those in PJM for service to ComEd load in PJM. There is also disparate treatment of capacity resources in PJM versus those in MISO for service to Ameren load in MISO. Specifically, MISO and PJM separately perform a test for capacity resources to determine whether those resources are

deliverable to aggregate load in their respective footprints. The tests are not the same. In addition, for a capacity resource in one RTO to be deemed deliverable to load in the other RTO, firm point-to-point transmission service must be requested from the capacity resource to the boundary with the other RTO. In addition, case-by-case transmission studies that can be lengthy (at least 60 days) and costly (on the order of tens of thousands of dollars) may be required both within the RTO in which the capacity resource is located and in the RTO where the load is located. Furthermore, even if these studies show that the resource is deliverable for one auction, the inter-RTO deliverability finding would not apply in the other auction. New studies would be needed for future auctions.

These hurdles make it cumbersome and expensive for bidders to rely on capacity resources in the MISO for the ComEd auctions and on capacity resources in PJM for the Ameren auction. Thus, bidders will be inclined to rely on resources inside PJM for the ComEd auction and on resources inside MISO for the Ameren auction. (Dauphinais Dir. IIEC Ex. 2 at 6:140-158).

It is unlikely, in the auctions as proposed, there will be much switching by bidders between the ComEd and Ameren auctions due to the aforementioned lack of interchangeability of capacity resources between the ComEd and Ameren load zones. (Dauphinais Dir. IIEC Ex. 2 at 7:162-164 and Dauphinais Reb. IIEC Ex. 5 at 8:167-172). Therefore, ComEd's proposed modification to allow bidders during rounds to switch between the ComEd and Ameren auctions is of limited value and will not provide end use customers with the full benefit of a joint auction unless this resource interchangeability issue is resolved. (Dauphinais Dir. IIEC Ex. 2 at 9:193-197 and Dauphinais Reb. IIEC Ex. 5 at 8:172-173).

To resolve the resource interchangeability issue such that bidder switching becomes more practical, a single common deliverability test, for capacity resources located within the combined footprint of PJM and MISO to the combined ComEd and Ameren load zones, needs to be implemented. (Dauphinais Dir. IIEC Ex. 2 at 8:179-182). As a condition of approval of its Illinois Auction Proposal ComEd should be required to work with Ameren, PJM and the MISO to remove, as soon as practicable, those impediments that preclude a single common market starting with the implementation as soon as practical of a single common deliverability test for the delivery of resources in the combined PJM and MISO footprint to the combined load zones of ComEd and Ameren in Illinois. In addition, ComEd should be required to report on the status of the development of a single common deliverability test within 90 days of a Commission order in this proceeding and every 90 days thereafter until the single common deliverability test is implemented. (Dauphinais Dir. IIEC Ex. 2 at 2:34-57).

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

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

- i. The existing competitive service declaration should not be determinative of whether ComEd offers fixed-price service to customers  $\geq 3$  MW.**

ComEd proposes to offer only hourly price service to customers for whom service has been declared competitive. Currently, this applies to customers formerly taking Rate 6L service that are  $\geq 3$  MW in demand. This group is referred to by ComEd as the “Competitively Declared Customer Group.” For reasons discussed hereinafter, IIEC does not believe that having only an hourly energy price option will be a sufficient utility default option for any customer group,

including customers 3 MW and greater. That single, price-volatile, option does not allow customers to enjoy the full benefits of the available competitive markets. (Stephens Dir. IIEC Ex. 1 at 4:65-79).

In Docket No. 02-0479, ComEd's Petition to Declare Service Competitive for 3 MW and Larger Customers went into effect by operation of law. In its Interim Order of November 14, 2002, the Commission concluded that:

[C]ompetitive conditions in the ComEd service territory for Rate 6L customers 3 MW and greater exist in considerable degree; however, there are sufficient concerns about recent developments that cause the Commission to refrain at this time from either granting or denying ComEd's petition; . . . In recognition of many of the intervenors' arguments concerning future possibilities that could lead to a decrease in competition for this particular customer segment the declaration will take effect by operation of law. (Interim Order, Docket No. 02-0479 at 79).

Because of its concerns related to the competitiveness of the market for this customer group, the Commission opened Docket No. 03-0056 in order to collect information from ComEd and RESs and to monitor the ongoing development of the marketplace. In its findings in initiating that docket, the Commission recognized:

. . . that a full picture of the competitive nature of the ComEd marketplace depends on the numbers of customers actually being served by all providers of electricity and the prices customers are actually paying for electric power and energy, . . . . (Order Initiating Proceeding, Docket No. 03-0056, January 23, 2003, at 6).

In its order in Docket 02-0479, the Commission did not find that the retail market for Rate 6L type services was in fact competitive. Indeed, by not granting ComEd's petition outright, the Commission clearly expressed reservations about the competitive market options related to this customer group. Staff reported to the Commission on the competitiveness of the

market for this customer group in Docket 03-0056 in December 2003. In its report, Staff reached a number of conclusions including the following:

- The portion of customers on delivery service of some kind or on bundled service has changed little.
- The market did see an increase in the market share of unaffiliated retail suppliers among customers 3 MW and larger; however the lack of significant movement from bundled service to delivery service options between 2002 and 2003 maintains the concern that RCDS options may not be economically viable alternatives to some portions of the 3 MW and larger customer group.
- This concern is particularly related to those that have taken service via certain riders.

(Stephens Dir. IIEC Ex. 1 at 10:202-211).

Staff goes on to describe the impacts that the Market Value Index docket (Docket No. 02-0656) should have on switching statistics:

The changes coming from the final order in Docket 02-0656 should generally promote RES service as a customer choice, all else held equal. The multi-year CTC is designed to reduce the price risk of customers taking long-term service with RES relative to what was available with ComEd's original year-to-year CTC calculation. The modifications to the MVI calculations were also designed to make RES service more attractive than other RCDS options. In particular, both changes are expected to reduce the number of customers taking PPO service. In addition, customers opting for the multi-year CTC forfeit the PPO option for the duration of their CTC arrangement.

(Stephens Dir. IIEC Ex. 1 at 10:214-224 citing to "Staff of the Illinois Commerce Commission's Initial Market Monitoring Report, December 2003," Docket No. 03-0056, at page 2).

The concerns expressed by the Commission and its Staff in Docket 03-0056 about the retail market in the ComEd service area, remain concerns today. IIEC has produced evidence in this case which demonstrates that since the time of the Staff report in Docket No. 03-0056, there

has been little overall change in the number of customers 3 MW and larger who are taking RES supply. (Stephens Dir. IIEC Ex. 1 at 10-11:225-247). This demonstrates a stagnation in movement from bundled rates to third party supply. This can be a sign the market is failing to provide reasonable alternatives to industrial consumers, as the Commission Staff indicated in its December 2003 Report:

. . . times of stagnation in bundled rate desertions, concurrent with a decrease in the proportion of customers on unaffiliated supply alternatives, and a net reduction in customers in the affected class, would provide initial indications that the retail delivery services market might be failing to provide viable alternatives to ComEd or ComEd affiliated service. [Emphasis added]

(Stephens Dir. IIEC Ex. 1 at 11-12:248-264).

Staff revisits the issue generally in its Post 2006 Report where it states:

Staff also suggests that, even if Section 16-113 is not eliminated or modified, a reasonable means to address this problem could be found through the auction process if utilities were to include competitive customers in their auctions. Since a main characteristic of the typical auction process is that utilities simply pass the costs of electricity directly through to customers and recover all costs for administering the auction, it does not appear that a utility could be financially harmed by offering electricity procured through an auction to competitive customers. An ancillary benefit of this policy is that the price derived from the auction could serve as the benchmark against which a competitive customer could compare prices offered by alternative suppliers.

(Clark ComEd Ex. 1.12 at 49).

The existence of the competitive declaration (by operation of law) should not be determinative of whether or not a fixed-price product should be offered to customers in any event. In this case, ComEd has not even acknowledged an obligation to offer the hourly service which it proposes to offer. (Stephens Dir. IIEC Ex. 1 at 6-7:126-142). ComEd has already proposed to offer a service

to 3 MW and larger customers; it has simply chosen the wrong service to offer.

Customers generally, and 3 MW and larger customers specifically, have not found hourly priced service useful or economic for their electric supply needs. As of June 7, 2005, ComEd had only 63 customers on Rate HEP service (out of thousands of eligible customers) most of which (54) are taking service under Rate HEP only because they had defaulted to HEP service upon expiration of some other rate option under which they were taking service. Of the customers that are 3 MW and above, only three were taking Rate HEP service. (Stephens Reb. IIEC Ex. 4, Sch. 1).

Further, the declaration of service as competitive through operation of law should not be determinative on whether or not ComEd offers a fixed-price service to customers greater than 3 MW, because ComEd only petitioned to have service provided under Rate 6L declared competitive. (See Commonwealth Edison Company, Petition for Declaration of Service Currently Provided Under Rate 6L to 3 MW and Greater Customers as Competitive, ICC Dkt. 02-0479, Order, April 23, 2003 at 1). Rate 6L service is significantly different from the annual fixed-price service proposed in this proceeding. IIEC highlighted several significant differences, including the following:

- The one-year product is not a bundled service, but a supply option that would be used with unbundled delivery service.
- Prices for the one-year product are subject to change each year.
- Prices for the one-year product are market based.
- There will only be one brief (30 day) period each year for customers to elect the one-year product service.
- Customers will not be allowed to leave the one-year product service on short notice as they are allowed under Rate 6L.

- The one-year product does not distinguish between customers with and without electric heating and light service.
- The one-year product would not have a cap on the maximum charge per kWh.

(Stephens Dir. IIEC Ex. 1 at 12:265-281).

The point about prices for the one-year product being market based is particularly relevant. Unlike the proposed annual fixed-price auction product, which ComEd says will be based on market price, current rates are below market price. ComEd further agrees that in a post-2006 environment below market priced products, such as Rate 6L, will not be available. (McNeil Tr. 583-584). ComEd chose to have Rate 6L service declared competitive in 2002 (and subsequently closed the rate). To the extent ComEd was concerned about providing power at something below market prices, such concern does not exist in the post-2006 environment. Thus any declaration related to Rate 6L service should have no bearing on whether ComEd provides a different service to 3 MW and over customers. Indeed, on cross-examination, ComEd witness McNeil admitted that ComEd did not even consider whether there was a need for fixed-price products by such large customers, but relied primarily on the fact a service (Rate 6L service) had been declared competitive (by operation of law) for those customers. (McNeil Tr. 582-583).

Ultimately, as will be explained in greater detail in Section V.I.3.ii below, ComEd as a wires-only company should be indifferent as to whether or not it offers power to customers through the fixed-price auction product or if RESs supply the power, as the President of ComEd, Frank Clark, agreed. (Clark Tr. 193-195). Under its proposal, the various risks associated with supplying customer groups power would be borne by the auction participants, not ComEd. ComEd would fully recover the auction costs, including an opportunity for true-ups of

mismatches and payments and supply costs. (Stephens Dir. IIEC Ex. 1 at 14:310-313). As a wires-only company, earning revenue based on the amount of power it delivers, ComEd should be interested in its customers getting access to the lowest power costs available. Economic concepts suggest that for price sensitive products, the lower the price of a product the greater the demand and hence the greater potential for higher delivery service revenue. (Stephens Dir. IIEC Ex. 1 at 14:314-318). In cross-examination, ComEd witness Mr. Clark agreed with these concepts as well. (Clark Tr. 195-196).

For the reasons stated above, the Commission should as a condition of the auction direct ComEd to provide an annual fixed-price option to customers pursuant to an annual auction. If the Commission believes it is prohibited legally from doing so because ComEd's petition to declare Rate 6L service competitive was allowed to take effect by operation of law, the Commission should immediately reopen Docket No. 02-0479 for the purpose of ruling on (and explicitly denying), the petition for competitive declaration so that it is not a barrier to all customers obtaining the full benefit of the competitive wholesale market as intended by the General Assembly. (*See* 220 ILCS 5/16-101A(d)).

**ii. Proposed One-Year Fixed-Price Auction Product for Customers  $\geq$  3 MW**

IIEC and every other party in this case representing the interests of large commercial and industrial customers agree that a fixed-price product is needed for customers 3 MW and over. Access to the wholesale supply market via the ComEd auction is necessary to provide customers the full benefit of a competitive market because of the current state of the retail market. As noted previously there are in excess of 30 wholesale suppliers who might participate in the

auctions. In contrast there are only seven or eight RESs (including ComEd's affiliate Exelon Energy) were active as RESs in the ComEd territory in 2004. (Stephens Dir. IIEC Ex. 1 at 4-5:85-95; Clark ComEd Ex. 1.2 at 38). Failure to provide such a product to 3 MW and over customers denies many of those customers access to a wholesale market with numerous suppliers and forces them to seek essential electric service in a market with a limited number of retail suppliers. The Illinois General Assembly intended that all citizens, including 3 MW and over customers, benefit from the wholesale and retail markets. (220 ILCS 5/16-101A(d)).

As mentioned above, other parties representing large consumers similarly acknowledge the need for a fixed-price service. For example, Department of Energy (DOE) witness Swan states:

The Company seems to assume in its filing that, just because these customers are large, and because the Commission allowed these customers to be declared "competitive" through force of law, that all of these customers will be able to obtain necessary hedging contracts with RESs at reasonable prices. However, there may be some large customers who find it difficult to obtain reasonable fixed-priced annual contracts, and other customers may find themselves in situations where they must rely on volatile hourly pricing for several months at a time. DOE believes that a better solution would be for ComEd to offer some form of fixed-priced POLR service to these large customers, as described by [DOE witness] Mr. Kahal, in addition to the HEP offering. (Swan Dir. DOE Ex. 1.0 at 6:121-131).

Mr. Swan then goes on to detail the difficulties that DOE facilities had trying to contract with third-party suppliers on several occasions within the open access period in Illinois. (Swan Dir. DOE Ex. 1.0 at 7-10:157-227).

Similarly, DOE witness Kahal describes as follows:

An hourly price service option, by itself, will not fully meet the needs of large customers. It is in the public interest for ComEd to provide a fixed-price POLR, as well [as] an hourly price offering, for these

large customers. Any fixed-price service should be offered on reasonable terms, incorporating the competitive market cost of the power supply. (Kahal Dir. DOE Ex. 2.0 at 6:123-127).

Similarly, the Building Owners and Managers Association (“BOMA”), representing large commercial properties in the ComEd area states as follows:

The Commission should require ComEd to have a tariff that contains fixed prices for one year periods post-2006 for customer classes that have been declared competitive (i.e., customers with Peak monthly demands greater than 3 megawatts). (Brookover & Childress Dir. BOMA Ex. 2.0 at 6:126-129).

Finally, Staff acknowledges the need for such service in its report issued subsequent to the Post 2006 Workshops of last year. In its report, the ICC Staff recommends the following:

Competitive customers should be permitted to obtain service at the fixed rates available to non-competitive customers. (Clark ComEd Ex. 1.2 at 49).

\* \* \*

Staff believes that price stability is an important consideration for all ratepayers large and small. (*Id.* at 26).

Although Staff did not address this issue in its direct testimony, Staff witness Schlaf acknowledged the need in his rebuttal testimony, stating that Staff does not oppose the proposals of IIEC and DOE for fixed-price service for customers 3 MW and larger. (Schlaf Reb. ICC Staff Ex. 13.0 at 17:411-414). Dr. Schlaf goes on to explain the advantages of these proposals. He indicated that the existence of this option would assure customers they would not be subject to real-time pricing, if they do not find an acceptable deal from a RES. He also opined that customers could be confident that the price derived from the auction would be the maximum rate they would have to pay. This is because the auction-derived rate would represent the “price-to-beat,” even though the price of the service would likely be relatively high due to the risk

premium that suppliers might add to their bids. (Schlaf Reb. ICC Staff Ex. 13.0 at 17:414-421). Dr. Schlaf noted that since many customers with peak demands of 3 MW and above have remained on ComEd service through the many years that RES service has been available, it is reasonable to conclude that a significant number of bundled customers would prefer to remain on ComEd service after the transition period ends. (Schlaf Reb. ICC Staff Ex. 13.0 at 18:442-449).

Finally, Staff agrees that holding an additional auction for 3 MW and above customers would not harm ComEd or other customers since, as a delivery-only company, ComEd should be indifferent as to which supply options are chosen by its customers and that any costs related to the auction could be paid by all customers in the 3 MW and above demand class. (Schlaf Reb. ICC Staff Ex. 13.0 at 19:472-475).

ComEd's rationale for opposing the provision of the fixed annual price service to customers 3 MW and larger is presented in the rebuttal testimony of ComEd witness McNeil and boils down to the following points:

- "We don't have to and we don't want to."
- Offering a fixed-price service to these customers would retard competitive retail market development.

With respect to the first argument, ComEd's actual statement is "ComEd has no obligation to provide such service to these customers and does not choose to offer it." (McNeil Reb. ComEd Ex. 10.0 at 57:1239-1240). While ComEd should be indifferent to offering this service, it is not. However, ComEd is, unfortunately, indifferent to the needs and desires of its

largest customers.<sup>9</sup> As described in Section IV.C., above, comparative retail market conditions for customers 3 MW and greater clearly do not provide options for all 3 MW and above customers and, as indicated by the decrease in competitive activity in 2003-2005 it appears that the competitive retail market as a whole may be contracting.

With respect to the second argument, the suggestion that offering a fixed price product to 3 MW and over customers would retard the development of a competitive market is disingenuous. ComEd has previously claimed that a highly competitive market already exists for this customer group. For example, in her direct testimony in Docket No. 02-0479, ComEd witness Arlene A. Juracek stated that: "...service to this customer segment is, in fact, already highly competitive." (*See* Stephens Reb. IIEC Ex. 4 at 7:153-154, footnote 2). In addition, in this case ComEd President Mr. Clark agreed that ComEd's offering of power and energy to end-use customers 3 MW and over has not impaired the development of the retail market. (Clark Tr. 205). Moreover, the development of the market ComEd believes is "robust" occurred at a time when available ComEd services included bundled service rates and the power purchase option service, both of which could be valued "under market," according to ComEd witness McNeil. (Stephens Reb. IIEC Ex. 4 at 7:154-157, McNeil Tr. 583-584). In contrast, Mr. McNeil opined that suppliers "would be likely to incorporate very large risk premiums into the fixed CPP products for greater than 3 MW customers" and even goes on to suggest that the risk premiums would still be very high even if the product incorporates IIEC's proposal to require customers

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<sup>9</sup> ComEd's indifference is especially ironic in this case. On the one hand, ComEd is doing everything it can to limit its exposure to any supply cost risk whatsoever. On the other hand, ComEd has no problem at all in exposing 3 MW and over customers to substantial supply cost risk in a market characterized by relatively few active suppliers with only a volatile hourly price option available from ComEd.

with demands greater than 3 MW to prequalify their load. (Stephens Reb. IIEC Ex. 4 at 7:164-169). Hence, ComEd's argument that offering this service will negatively impact the competitive retail market is without merit.

In addition, as explained in IIEC testimony, if the wholesale procurement process employed by ComEd were to provide the better avenue to benefits of competition than the less competitive retail market, then the 3 MW and over customers should not be barred from using this avenue, even if it were to have some effect on retail market development, which it will most likely not. (Stephens Reb. IIEC Ex. 4 at 8:173-176). To do otherwise would subvert the goals of the Customer Choice Law to ensure "(a)ll consumers must benefit in an equitable and timely fashion from the lower costs for electricity that result from retail and wholesale competition . . ." (220 ILCS 5/16-101A(e)).

IIEC explained in testimony how the offering of this service would not harm ComEd (as discussed above). It would not harm other customers, since under IIEC's proposal, the 3 MW and above segment would be separated from the remaining customer load. Finally, it would not harm development of the competitive retail market. (Stephens Dir. IIEC Ex. 1 at 14-17:308-381). However, it is important to customers in that group because it will provide a ceiling under which retailers must operate and thus will provide discipline to the market in the event a sufficient number of competitors are not disciplined through market forces. (Stephens Dir. IIEC Ex. 1 at 17-18:382-395). This type of market discipline is acknowledged by ComEd witness LaCasse when she explained, in response to data requests, how the ComEd auction proposal achieves the objective of an efficient retail market. She stated, in part:

The ComEd proposal promotes the objective of obtaining reliable supply at competitive market prices and the proposal translates

these competitive market prices into retail rates. The retail rate against which a given class of customers will evaluate competitive offers from RESs is established and known in advance and it is set at a market level that includes all wholesale supply costs and risks. This encourages an efficient decision between the service provided by ComEd and the service of a RES, and thus promotes efficient retail competition. The ComEd proposal also contributes to the development of retail markets by promoting wide participation in the auctions.

(Stephens Reb. IIEC Ex. 4 at 8:177-196).

Staff made similar comments in its Post 2006 Report suggesting: “The price derived from the auction could serve as a benchmark . . .” to compare prices offered by RESs. (*See* Clark, ComEd Ex. 1.2 at 49).

IIEC agrees with Dr. LaCasse’s comment as well as Staff’s comments. Providing customers with a fixed price product set at a market level will allow customers to evaluate competitive offers from retail electric suppliers and encourage efficient decisions and thus promote efficient retail competition. IIEC’s proposal to have ComEd offer a fixed price service to 3 MW and over customers will accomplish this same purpose. IIEC would note that one of the goals of the Illinois General Assembly in adopting the Customer Choice and Rate Relief Law was to promote efficient retail competition. (220 ILCS 5/16-101(d)). Thus, IIEC’s proposal is fully consistent with that goal. ComEd witness McNeil also argued that other states that conduct auctions currently do not offer fixed-price service for large customers. (McNeil Reb. ComEd Ex. 10.0 at 58:1262-163). However, this fact fails to acknowledge that these other states (New Jersey, Maryland and Pennsylvania) do not have the kind of reciprocity requirement that exists in Illinois and which contributes to the small number of competitive retail suppliers in Illinois. Consequently, in the New Jersey, Maryland and Pennsylvania retail markets for commercial and

industrial supply there are 17, 41 and 41 active retail marketers, respectively. (Stephens Reb. IIEC 4 at 10:220-228). Further, as adduced through cross-examination, both Maryland and New Jersey provided this fixed price service to large customers in the early days of the auction. (O'Connor Jt. Tr. 225-226 and Kahal Tr. 727-728). In Illinois, ComEd doesn't want to offer the service even for the initial auction.

ComEd is capable of offering a fixed price product to 3 MW and over customers. Such a product would not be the same as the Rate 6L service, which ComEd was allowed to declare competitive by operation of law. ComEd needs to provide such service because the current retail market does not provide viable options for all 3 MW and above customers. Therefore, ComEd should provide or be compelled to provide this product offering as a condition of the auction. The offering of the product will not impair the development of an efficiently competitive market. Indeed, as mentioned above, ComEd's President has clearly testified that the existence of the PPO and Rate 6L did not impair the development of the retail market in the first instance. Also, ComEd's primary witnesses in this case have testified, in support of ComEd's auction proposal, that offering fixed priced products to ComEd's end-use customers through an auction proposal that establishes prices set at a market level will, in fact, promote efficient retail competition. This is exactly what the IIEC proposal does for 3 MW and over customers. Therefore, IIEC's proposal should be adopted.

### **iii. Separate Auction Segment for $\geq$ 3 MW Customers**

There are three reasons why the load associated with 3 MW and greater customers should be subject to a separate auction or auction segment. First, a separate auction or auction segment

would promote uniformity between the ComEd and Ameren products, as described above in Section V.G.3. As discussed, without some coordination of the load characteristics subject to auction, the benefits of suppliers switching bids between auctions could be lost or severely limited.

Second, a separate auction or auction segment would recognize the fact that the load characteristics of the customers in the 3 MW and larger range may be significantly different from the customers in the 1-3 MW range (as originally proposed by ComEd) or the expanded 400 kW to 3 MW range (as proposed by ComEd in surrebuttal). (Stephens Dir. IIEC Ex. 1 at 20:446-449, McNeil Sur. ComEd Ex. 18.0 at 23:449-502).

Third, for suppliers associated with the 3 MW and larger customer group, there may be load risk (the risk the actual load will vary from the projections used for the auction). IIEC agrees with the concept outlined in DOE witness Kahal's testimony. There he expressed the belief that it is important to keep the procurement for 3 MW and above customer loads separate due to the potential risk of cross-subsidization. He avers that the problem is avoided if procurement for the 3 MW and above customers is kept separate. (Kahal Dir. DOE Ex. 2.0 at 15-16:320-326).

This separate solicitation for the 3 MW and larger customer loads could be done in an auction form at the same time as the other CPP auction segments, although a properly designed RFP could also work. (Stephens Dir. IIEC Ex. 1 at 20:450-455).

ComEd acknowledges IIEC's request for a separate solicitation for supply for the 3 MW and greater customers. ComEd did not provide any specific objection to it or any argument against such a concept if a fixed price product is offered to 3 MW and over customers in the first

instance. (*See* McNeil Reb. ComEd Ex. 10.0 at 56-59:1219-1287). Accordingly, the Commission should approve a separate solicitation for the 3 MW and larger customers as recommended by IIEC.<sup>10</sup>

**iv. ComEd Should Offer a Multi-Year Auction Product to Large Customers**

IIEC recommends that a solicitation for a multi-year product should be considered in addition to the one-year product for customers subject to the CPP-A (annual) auction. Large customers, such as IIEC members, have a desire for a multi-year product, which will not be available under a strictly annual approach. (Stephens Dir. IIEC Ex. 1 at 24:523-527). ComEd proposes to offer to smaller customers a blended product, which moderates price volatility by replacing only a portion of the supply each year so customers will not feel the full year-to-year movement due to the product blending. (McNeil Dir. ComEd Ex. 3.0 at 24:525-531). Consequently, large customers are subject to much greater risk under the ComEd proposal than would be smaller customers.

IIEC recommends the same general procedures be used for a multi-year product as are used for a one-year fixed product; that is, the product would be bid each year based on load that has prequalified for service (see Section V.I.3.v. below). Customers would then have a limited enrollment period once prices are known and must commit to the full multi-year term. (Stephens Dir. IIEC Ex. 1 at 24:527-531). Such a multi-year product could provide benefits to customers who are unable to obtain satisfactory multi year offers in the retail market. Auction bidders

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<sup>10</sup> Similar arguments will be made in the Ameren case, Docket No. 05-0160, et al., for the purpose of load uniformity between the auctions.

would benefit through the greater load and revenue certainty that would be afforded through a multi-year product vis-à-vis a one-year offer. (Stephens Dir. IIEC Ex. 1 at 25:545-548).

Finally, a multi-year product would not be detrimental to ComEd as it would still be able to pass through all supply costs, with the opportunity to reconcile costs with charges. Further, to the extent there is an incremental cost to ComEd to administer a multi-year product solicitation, this cost would be borne by the customers eligible for the multi-year product, either directly or through the auction process. (Stephens Dir. IIEC Ex. 1 at 24-25:537-555). IIEC also notes that this product is comparable to the primary product produced by the ComEd auction process. The availability of this product will lead to efficient retail competition according to Dr. LaCasse, ComEd's primary expert witness in this case. (*See* Section V.I.3.ii. above citing LaCasse response to Data Requests referenced in IIEC Ex. 4 at 8:187-196).

IIEC recognizes that a multi-year product, while important in the initial period, may not need to be permanent in nature. Over time, it may become clear that the multi-year product is relatively unattractive to customers compared to third-party supply and as such, they may not elect to even prequalify for the product. If no customer has elected to prequalify or take the product for a number of auction cycles, such as three, it may be appropriate to discontinue the multi-year product offering. (Stephens Dir. IIEC Ex. 1 at 25:556-561). But, such an offering is necessary at this time.

**v. Prequalification of Large Loads Will Enhance Auction Efficiency**

As mentioned in Section V.I.3.iii. above, because of the nature of relatively large loads, fixed price supply for the 3 MW and above customer segment may prove relatively costly. This

is particularly true given the potential for load risk (the risk that actual load will vary from the projection used for the auction). (Stephens Dir. IIEC Ex. 1 at 20:449-452). IIEC has proposed a method to mitigate this load risk by enhancing the certainty associated with the load profile of these customers in aggregate. IIEC proposed to do this by requiring customers in this group to “prequalify” their load for the auction.

The IIEC approach would prevent customers, precluded from electing the fixed-price service for any reason, or otherwise not interested in being a part of the auction, from exacerbating the load risk to the detriment of other customers in the class. (Stephens Dir. IIEC Ex. 1 at 21:458-468). Stated simply, suppliers will not have to worry with load they know in advance they will not need to serve.

This prequalification would not be a commitment to take the ultimate fixed-price offer, as the pricing will not be known at that point. Rather, it will be an affirmative indication of eligibility. If a customer does not prequalify its load, ComEd will not need to include that load in the customer group for the fixed-price auction. This should provide greater load certainty to suppliers and allow them to bid more efficiently. (Stephens Dir. IIEC Ex. 1 at 21:471-476). Such a prequalification requirement would not place an undue burden on customers. They would not be asked to commit to purchase power at an unknown price. It would not place an undue burden on ComEd to police customer eligibility, since a customer would have to intentionally misrepresent its status if it were not actually eligible to receive the service. More importantly, this simple prequalification step should reduce load risk for the bidders and make ComEd’s auction more efficient without undue impact on any party. (Stephens Dir. IIEC 1 at 22:477-492). ComEd acknowledges that this step would serve to reduce load risk and did not offer any

specific objection to the IIEC proposal for prequalification. (McNeil Reb. ComEd Ex. 10.0 at 58:1258-1261). No other party in the case directly opposed IIEC's recommendation in their direct or rebuttal testimony.

Although IIEC does not believe its proposal to require customers to prequalify their load will completely eliminate all load risk, it will reduce such load risk which in turn should yield lower auction prices. (Stephens Jt. Tr. 76-77). The IIEC proposal should be adopted.

#### **4. Demand Charge Component for $\geq 1$ MW customers**

IIEC recommends the isolation of a demand charge component for customers subject to the CPP-A annual auction segment. Energy-only prices, as apparently contemplated by ComEd, would not fully recognize the benefits of load factor in overall customer cost. (Stephens Dir. IIEC Ex. 1 at 22-23:503-504). IIEC recommends that the energy price resulting from the CPP-A auction be modified to isolate a capacity component, which can then be charged on a per kW basis, with the remainder of the auction price being charged on an energy basis. This capacity charge would not be an adder to the auction price. (Stephens Dir. IIEC Ex. 1 at 23:504-508). ComEd proposes to perform a separate capacity auction for use with the hourly price product (associated with the CPP-H segment), or it will use the PJM capacity market once it is sufficiently developed and approved. Because these capacity values will be readily available, they would provide the most straightforward approach for use in developing the demand charge component in the ultimate customer prices. (Stephens Dir. IIEC Ex. 1 at 23:513-519).

Neither ComEd nor any other party in the case has specifically objected to this rate design feature in their testimony. It should be adopted by the Commission for the reasons stated above.

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

If the PJM Reliability Pricing Model (“RPM”) or a functionally equivalent model is in place before 2007, ComEd proposes to purchase capacity for hourly pricing customers from PJM’s centralized markets. If the PJM RPM or a functionally equivalent model is not in place before 2007, ComEd intends to conduct its proposed CPP-H auction to procure supplies for hourly pricing customers. (McNeil Dir. ComEd Ex. 3.0 at 26:562-576). ComEd’s proposal for conducting the CPP-H auction also provides for discontinuation of the auction if the PJM RPM or a functional equivalent model becomes operational during or after 2007. (Alongi and Crumrine Dir. ComEd Ex. 7.0 at 49:1102-1114).

PJM filed its proposed RPM with the FERC on August 31, 2005 in Docket Nos. ER05-1410-000, et al. PJM has proposed an effective date of June 1, 2006 for the RPM. The proposal has encountered substantial opposition from the PJM membership. The PJM Staff was unable to even obtain a simple majority endorsement of the proposal from the PJM Members Committee. (Dauphinais Dir. IIEC Ex. 2 at 15:332-336). Due to this opposition, there may be a number of protests to filing made with the FERC, and the FERC may make significant modifications to the proposal if it approves it. (Dauphinais Jt. Tr. 137). ComEd witness Mr. Naumann also acknowledged the proposal could be modified by the FERC. (Naumann Tr. 1081).

At this time, it is not clear what changes the FERC may make in the PJM RPM proposal.

Therefore, it is impossible for the ICC to determine whether the procurement of capacity for hourly pricing customers through a centralized capacity market is a lower cost approach than conducting ComEd's proposed CPP-H auction. The Commission should require ComEd to implement and maintain its proposed CPP-H auction until such time as the proposed PJM RPM centralized capacity market is operational and ComEd demonstrates to the ICC that procurement through the centralized capacity market approach is a just and reasonable approach for acquiring the capacity necessary to serve hourly pricing customers.

ComEd witness Mr. Naumann indicated that if the FERC accepts the centralized capacity market of the PJM RPM, the ICC must accept the rates, terms and conditions as just and reasonable. (Naumann Sur. ComEd Ex. 23.0 at 32:707-710). Mr. Naumann further indicates that IIEC witness Mr. Dauphinais appears to be advocating hourly pricing customers be "carved out" of the PJM RPM. (Naumann Sur. ComEd Ex. 23.0 at 32:712-719).

Mr. Naumann misunderstands IIEC's position. IIEC does not dispute that if the PJM RPM is accepted in some form, the capacity requirements of the PJM RPM will need to be met for hourly pricing customers. However, depending on its final form as accepted by FERC, there may be several different ways to meet the requirement other than simply acquiring the capacity in the centralized market part of the PJM RPM proposal. (Dauphinais Jt. Tr. 131-134). Mr. Naumann himself admitted that at a minimum a bidder in the ComEd auctions could itself obtain capacity rights and bid that capacity into the PJM RPM centralized capacity market to effectively hedge its capacity obligation for the tranches it serves. In addition, he admitted that regardless of whether they self-supplied capacity, as described above, or simply accepted the PJM RPM centralized capacity market clearing price, he would assume the supplier would reflect the cost

for capacity under the PJM RPM requirements in its bid in the ComEd auctions. (Naumann Tr. 1079-1080).

If the PJM RPM is approved by the FERC in some form, under the filed rate doctrine<sup>11</sup> ComEd will have to conform to the requirements of the final PJM RPM requirements. However, if the final PJM RPM provides more than one way to meet the PJM RPM requirements, ComEd will have a choice in regard to how to meet the PJM RPM requirements for serving its hourly pricing customers. Under the *Pike County* exception to the filed rate doctrine, the ICC has the authority to review the prudence of ComEd's choices.

The Pike County exception to the filed rate doctrine was established in Pike County Light & Power Company v. Pennsylvania Public Utility Commission, 77 Pa.Commw 268, 465A.2d 735 (1983). The subject of the appeal there was a ruling of the Pennsylvania Public Utility Commission that a utility's reliance on a particular wholesale supplier as a source of power amounted to an abuse of management discretion because alternative, more economical sources of supply were available.

The Pike County case involved a claim for recovery of purchased power expenses in a situation where the utility bought all the energy it sold at retail from a New York company. Pike County's purchases were in the form of rates approved by FERC. Though the Pennsylvania Court acknowledged any attempt by the public utility commission to regulate the rates in the agreement between the utility and its supply company would be preempted, under the Federal

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<sup>11</sup>The filed rate doctrine is a rule of federal preemption which prohibits state utility commissioners from trapping FERC approved wholesale costs imposed on the utility under FERC mandated rates. (See General Motors Corp. v. ICC, (1991) 143 Ill. 2d 407, 574 N.E.2d 650).

Power Act of 1935, which established exclusive federal regulation over matters relating to transmission of electric energy in interstate commerce, Congress expressly reserved other powers for the states. The Pennsylvania Court found:

The FERC focuses on Orange & Rockland to determine whether it is just and reasonable *for that company to charge* a particular rate, but makes no determination of whether it is just and reasonable *for Pike to incur* such a rate as an expense. The PUC focuses on Pike and its cost of service data to determine whether it is reasonable for Pike to incur such costs in the light of its available alternative. So while the FERC determines whether it is against the public interest for Orange & Rockland to charge a particular rate in light of its costs, the PUC determines whether it is against the public interest for Pike to pay a particular price in light of its alternatives. The regulatory functions of the FERC and the PUC thus do not overlap, and there is nothing in the federal legislation which preempts the PUC's authority to determine the reasonableness of a utility company's claimed expenses. In fact, we read the Federal Power Act to expressly preserve that important state authority.

(*Id.*, 465 A.2d at 738).

Subsequently, in Pennsylvania Power Company v. Pennsylvania Public Utility Commission, 127 Pa.Comm. 97; 561 A.2d 43 (1988) Pike County was further explained:

The difference between Nantahala and Pike County Light & Power, is apparent. In Nantahala the state commission's refusal to abide by FERC's express allocation of cheap power had the effect of trapping FERC-mandated costs because the utility had no other source of cheap power available to it. In Pike County Light & Power the rate at which the utility bought from its parent was set by FERC, but the agreement to purchase at the rate was completely voluntary. FERC did not mandate the purchase; hence the PUC was free to consider whether Pike's decision to buy at that FERC-approved rate was justified, in light of the availability of alternative sources of cheaper power.

(*Id.*, 561 A.2d at 51).

In the Pennsylvania Power Company case, the court found the utility's decision to enter into the sale and buy back agreement with another utility, though approved by the FERC, was completely voluntary. Therefore, the court affirmed the public utility commission's finding that the agreement to purchase the quantity of power at the FERC approved rate was unreasonably excessive when lower cost power was readily available elsewhere.

The Pike County decision has been relied upon by Illinois courts, for the proposition that the Illinois Commerce Commission can review the prudence of the utility's decision, to enter into a particular contract or provide service under a FERC approved rate, when other choices and alternatives are available to the utility.

The Illinois Supreme Court has acknowledged the doctrine of federal preemption known as the filed rate doctrine, would not bar a consideration of the prudence of a utility in its supply acquisition decision in appropriate circumstances:

Without deciding the issue, the Supreme Court has acknowledged the exception to the filed rate doctrine articulated in Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n (1983), 77 Pa. 268, 273-74, 465 A.2d 735, 737-38, and Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n (1980), 4 Kan. App. 2d 674, 679-80, 610 P. 2d 121, 127. Under that exception, States retain the authority to review the prudence of a distributor's actions in incurring FERC-approved supply charges when the distributor had a choice whether to incur the charge. (Mississippi Power, 487 U.S. at 373-74, 101 L. Ed. 2d at 339-40, 108 S. Ct. at 2440; Nantahala, 476 U.S. at 972, 90 L. Ed. 2d at 958, 106 S.Ct. At 2359-60.) For example, a State regulatory agency could find that purchase of a particular quantity of power from a particular source was unreasonable if lower cost power was available elsewhere, even if the cost of the purchased power had been approved by FERC and therefore deemed reasonable. Mississippi Power, 487 U.S. at 373, 101 L. Ed. 2d at 340, 108 S. Ct. at 2440; Nantahala, 476 U.S. at 972, 90 L. Ed. 2d at 958, 108 S. Ct. at 2360.

(General Motors Corporation v. Illinois Com.Comm'n., 143 Ill 2d 407, 574 NE 2d 650, 658 (1991)).

In United Cities Gas Company v. Illinois Commerce Commission, 163 Ill.2d 1, 643 N.E.2d 719 (Ill.1994), United Cities Gas appealed a decision of the Commission regarding its reconciliation of revenues in a PGA proceeding. In the United Cities case, rates charged by the United Cities Gas pipeline supplier, Texas Eastern Transportation Corporation, were at issue. Those rates were regulated by the FERC as were the contracts between the gas utilities and pipeline suppliers. United Cities Gas and Texas Eastern had entered into a long term contract, which contained a demand/commodity rate schedule, approved by FERC, under which United Cities Gas was required to pay both a commodity charge as well as a demand charge. The Texas Eastern demand charge was made by projecting the anticipated maximum daily demand for gas in each of the United Cities Gas service areas covered by the contract, and then multiplying that figure by the demand rate. United Cities Gas made its own internal apportionment of the total amount of the demand charge to the customers, in the areas served under the Texas Eastern contract, proportionate to the estimated maximum peak day demand for gas in each service area. United Cities Gas allocated 42% of the total demand charge to its Illinois service territory and 58% to service territory in Tennessee.

Subsequently, in a Tennessee proceeding, United Cities Gas revised its allocation percentages, lowering the percentage allocation to the Illinois service territory to 28% of the total demand charge. However, in the Illinois proceeding, United Cities Gas argued the allocation to Illinois should remain at 42%. The Illinois Commerce Commission Staff argued that the percentage attributable to the Illinois service territory should be 28%. The Commission adopted the Staff recommendation, and the utility appealed. One of the arguments raised by the utility was that the Commission Order “traps” the demand costs in violation of the “filed rate doctrine.”

The Illinois Supreme Court stated:

. . . the Commission did not rule that the Texas Eastern demand rate, which was approved but not mandated by FERC, was excessive or unreasonable. Rather, it was the percentage of that rate which United Cities allocated to its Illinois customers that the Commission did not approve. The filed rate doctrine does not require the Commission to allow United Cities to charge Illinois customers for costs exceeding those which are properly and prudently allocable to them. Had United Cities properly tracked its customers and sales, and updated the allocation percentages assigned in 1984, it would not face the potential of recovering less than 100% of its total costs of providing gas to its Tennessee and Illinois customers.

*(Id., 643 N.E.2d at 732).*

Thus, both Federal law and Illinois law permit the Commission to determine if a utility with supply options has acted prudently and reasonably in its supply activities, even if it pays a FERC approved rate or acquires its supply under FERC approved procedures.

The Commission is empowered to consider the prudence of ComEd's supply decisions in regard to its acquisition of capacity for the hourly product. There is no way for the ICC at this time to know the final form of the PJM RPM. Therefore, ComEd should not be permitted to deviate from the proposed CPP-H auction for hourly pricing customers until such time the PJM RPM is operational and ComEd has made a showing that its proposed deviation from the CPP-H auction is prudent to the extent other capacity supply options or approaches are available.

## **L. Regulatory Oversight and Review**

### **1. Nature of Commission review before, during and after the Auction**

The IIEC Companies will not address all aspects of the proposals for Commission review of auction processes and results. The focus of the following discussion is the nature of the

Commission's commitment to and evaluation of the auction process. Briefly, the IIEC Companies' position is that the Commission should not commit itself and consumers irrevocably to a barely tested procurement process and that there should be a formal process to review the successes and failures of that process and its various components.

The IIEC Companies submit that only a firm schedule of formal proceedings will provide the necessary framework to assure broad stakeholder participation, effective fact gathering and a full record for Commission consideration. There should be a full formal Commission consideration of fundamental issues respecting the proposed novel process for determining consumer rates for regulated services, and a mechanism for revisiting reliance on the proposed auction processes if they do not work as advertised.

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

As part of its procurement auction proposal, ComEd proposes that Commission oversight of any approved process take the form of annual informal workshops of stakeholders. ComEd's annual workshop process is described in the direct testimonies of ComEd witnesses William McNeil and Dr. Chantale LaCasse. (McNeil Dir. ComEd Ex. 3.0; LaCasse Dir. ComEd Ex. 4.0). As proposed by ComEd, the workshops could be conducted under the leadership of the Commission Staff after the completion of each auction. (McNeil Dir. ComEd Ex. 3.0 at 61:1327-1328).

Under ComEd's original proposal, formal reviews by the Commission would be conducted only if the Commission opened a formal proceeding on its own motion or in response to a filing under its rules. (McNeil Dir. ComEd Ex. 3.0 at 63:1373-1378). In apparent

recognition of the need for a formal review process, in rebuttal testimony, ComEd modified its oversight proposal to incorporate a periodic formal review of the auction process, held every three years. (McNeil Reb. ComEd Ex. 10.0 at 34:705, 716-718).

It is IIEC's position that the novelty of the proposed auction process and the determinative ratemaking effect of the auction results (under the ComEd proposal) requires a formal review process each year for the reasons in Section V.L.4 below. The review would be a docketed proceeding that affords opportunities for ratepayer participation comparable to those available in other ratemaking proceedings. In addition, each docketed proceeding should be held before the next auction. ComEd's informal workshops -- if they are held -- provide no assurance that proposals for either fundamental or modest changes will be addressed by the Commission on the basis of all relevant facts and in a timely manner.

Note that under IIEC's proposal, informal annual workshops would not be precluded. However, IIEC submits that informal workshops alone are an inadequate review mechanism for an auction process that will determine the largest component of customer bills.

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

As noted above, IIEC submits that given the novelty of an auction process in Illinois' unique environment and the determinative ratemaking effect of the auction results requires a formal review process each year. (Collins Dir. IIEC Ex. 3 at 14:311). The docketed proceeding, held before each auction would afford opportunities for ratepayer participation like those in other ratemaking proceedings. Each such proceeding would:

- determine whether an auction should be authorized for another annual period;

- consider all aspects of the pre-approved procurement process, including such fundamental issues as the advisability of continued reliance on an auction, the structure of the auction, and automatic “translation” of auction results; and
- assure a timely Commission order on changes and continuation of the auction. (*See Collins Dir. IIEC Ex. 3 at 15:328-332*).

IIEC’s position, and the reasons supporting it were presented in the direct and rebuttal testimonies of IIEC witness Collins. (*Collins Dir. IIEC Ex. 3; Collins Reb. IIEC Ex. 6*).

The reasons for the alternative review process proposed by IIEC are basic and well-supported in the evidentiary record. First, there is the novelty of the process. While ComEd characterizes the auction proposal as a “*proven technique*” and “*tried and tested process*” (*McNeil Dir. ComEd Ex. 3.0 at 2:42 and 14:319; Clark Tr. 185*), there have only been five such auctions for electricity -- ever. (*Salant Tr. 1060*). In addition, the circumstances that prevailed during the auctions in New Jersey, a state in which most of those auctions were held, are not necessarily constant or common to other states. There is no proof of how the process will operate in Illinois’ different environment or in unfavorable market circumstances.

Moreover, the New Jersey Board of Public Utilities (NJBPU) requires annual proceedings, even after several years’ experience with the auction process. Utilities are required annually to submit proposals for their procurement of power supply. Other parties can present alternative proposals or suggest improvements in the previous years’ auction process. (*Collins Dir. IIEC Ex. 3 at 14:300-308*). New Jersey also regularly considers the fundamental issues respecting the auction process -- including, each year, whether another auction should be approved as the procurement mechanism for the following year. And, each year the NJBPU decides whether to continue the auction process.

There is little reason for Illinois to commit itself to an auction mechanism, which is untried in Illinois, more firmly than New Jersey has seen fit to do. The Commission should not irrevocably enter into a novel process which has not been tested for any extended period, not tested at all in Illinois, and never challenged by unfavorable circumstances or the market concentration concerns that exist in Illinois. An annual review of the need for, structure of, and operation of the auction/ratemaking process is a reasonable course. (Collins Dir. Ex. 3 at 15:334-338). The IIEC proposal has the added benefit of acting as a sunset provision in reserve if the auction produces adverse consequences.<sup>12</sup>

The success of any regulatory oversight process the Commission defines will depend heavily on the participation of stakeholders other than the utilities, including consumers. Without their input, the operation of the processes cannot be comprehensively evaluated. Workshops alone are unlikely to be adequate to that critical task. As ComEd has acknowledged (Juracek Tr. 425), the controversy over the use of prior workshop discussions may diminish the willingness of some stakeholders to engage in future workshops. Concerns expressed about prior workshops include how workshop discussions will be used, whether participants' positions will be presented to the Commission as they were expressed or filtered through a third party. (*See* Attorney General, et al., Motion in Limine to Exclude Testimony Regarding Post 2006 Workshops, Aug. 23, 2005).

In addition, workshop processes, which are not covered by the Commission's rules of practice, do not assure that either participants or the Commission will have access to all relevant information. In addition, ComEd's proposal would apparently allow a third party to determine

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<sup>12</sup> IIEC recognizes that existing wholesale supply contracts from previous auctions would need to be honored (Collins, Dir. IIEC Ex. 3 at 15: 318-325).

the need for a formal review by the Commission in a fashion that excludes the input of customers. (*See* McNeil Sur. ComEd Ex. 18.0 at 40:881-885).

Finally, there is the reality that no one can confidently predict how the process will work in Illinois. Will the auction really produce the lowest available prices? Will the market concentration and legal issues unique to Illinois produce unacceptable effects on the auction or the resulting rates? ComEd criticizes IIEC's proposal as unnecessary, costly, and impractical. ComEd's arguments, however, are neither persuasive nor consistent with the facts as ComEd acknowledges them. ComEd witness Ms. Juracek responded to the expressed need for a formal proceeding by observing that the ComEd proposal does not prevent the Commission from opening a docketed proceeding to investigate the utility's tariffs. (Juracek Sur. ComEd Ex. 17.0 at 28:632-634). The Company argues further that the IIEC proposal is unnecessary because parties may file a complaint or take other action as contemplated by the PUA whenever it so chooses. (McNeil Reb. ComEd Ex. 10.0 at 34:711-712). However, a petition to the Commission to open a formal investigation may not be successful, especially if opposed by the utility. A complainant would bear the burden of proof in a complaint proceeding, (*See* 220 ILCS 5/10-107 and 10-110), even though under the confidentiality restrictions ComEd proposes as part of the auction process it could be denied access to information needed to support such a complaint. (*See* ComEd Ex. 7.1 (Rider CPP) at Sheet Nos. 255, 258 and 268; McNeil Tr. 604).

ComEd asserts that an annual review of the auction process would be costly. (Juracek Sur. ComEd Ex. 17.0 at 27:614-615). Customer payments for electricity acquired through the proposed auction will be substantial. (ComEd's revenues from customers for electricity supply are \$3.5 billion. (Clark, Tr. 126).) The expense of an annual review to assure customers that the

prices they pay are least cost, should be small in comparison (Juracek Tr. 421-422), and well worth the cost. In any case, ComEd acknowledges that it could recover these expenses from its customers. (Juracek Tr. 421). ComEd also asserts that completing a formal review in a timely manner would be difficult. But, ComEd has admitted that the Commission could review the auction process on a schedule that consumes substantially less than 11 months. (Juracek Tr. 426).

The Company's arguments portraying the IIEC's proposal for an annual review of the ComEd auction process as unnecessary, costly, and inconvenient should be rejected. Any process approved by the Commission should incorporate, in addition to mechanisms that allow the process to succeed, mechanisms that assure that if the process falters or fails, it "fails softly." The regular formal reviews proposed by IIEC are such a mechanism. With a requirement for annual formal proceedings, the Commission and consumers can be assured that any design defects, operational difficulties, or fundamental miscalculations will be quickly identified and addressed in a timely manner by the Commission. ComEd suggests that needed changes can be made in 45 day tariff filings. But, absent a proceeding that yields a record to support a Commission order for such a filing, only ComEd can choose to file such tariffs incorporating changes proposed by others.

Given these facts, the Illinois Commission should not – as the ComEd proposal essentially requires – commit itself to the auction process without a prescribed, well-defined, formal process to review the successes or problems of auction procurement.

## **VII.**

### **TARIFF AND RATE DESIGN ISSUES**

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

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

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

###### **i. Duration of Window**

IIEC supports ComEd's proposed 30-day enrollment window for customers electing service under ComEd's annual fixed-price product. Proposals by certain parties related to expanding the 30-day sign up window for the annual fixed-price product to 75 days should be rejected. As acknowledged by several other witnesses, this expansion of the sign up period will increase risk to potential suppliers and in turn increase auction prices. Thirty days represents a reasonable balance of the competing interests of offering customers time to make decisions on competitive supply options and keeping the bid price premiums to a minimum. IIEC notes that another customer group in this proceeding representing very large customers also recommends approval of ComEd's proposed 30-day enrollment window. (Kahal Dir. DOE Ex. 2.0 at 18:389-392).

ICC Staff witness Schlaf analyzed this issue carefully in this docket. He recommended the 30-day enrollment window. (Schlaf Dir. ICC Staff Ex. 5.0 at 5-6:124-137). Dr. Schlaf analyzed the cost impact of extending the enrollment window beyond 30 days and concluded that 30 days remained appropriate for the initial auction. (Schlaf Reb. ICC Staff Ex. 13.0 at 4-7:95-161).

IIEC supports the 30-day sign up window because the evidence in this docket clearly indicates that a longer signup window would produce a risk premium from suppliers which would in turn increase auction prices. This is confirmed by ComEd witness McNeil who stated:

(S)uppliers will require greater compensation (i.e., price premiums) for the costs associated with their risks if the rate is held open for a longer time period.... (McNeil Reb. ComEd Ex. 10.0 at 54:1180-1182).

Similarly, Ameren witness James C. Blessing, a utility expert and a witness in the Ameren procurement case, states in his rebuttal testimony that:

(I)ncreasing the open enrollment period from 30 to 75 days and, as a result, asking the [annual fixed-price] Suppliers to hold their price open for an additional 45 days will increase the resulting auction price for the [annual fixed-price] product. (*See* Stephens Reb. IIEC Ex. 4 at 12:260-263, footnote 11).

ComEd witness McNeil goes on to further explain, with numerical analysis related to market price volatility, why suppliers will recognize the additional risk they are taking, by holding out a price over a longer window while market prices are moving against the fixed price. (McNeil Sur. ComEd Ex. 18.0 at 37-38:811-845). This potential for price increase is also acknowledged by two potential auction participants at the wholesale level, namely Constellation Commodities Group witness Smith (Smith Dir. CCG Ex. 1.0 at 3) and by Dynegy witness Huddleston (Huddleston Tr. 1041-1042). Also, IIEC witness Stephens indicated in cross-examination that numerical analysis conducted within his firm indicated a similar price premium associated with expanding the 30-day window, although IIEC did not offer the numerical analysis itself as evidence in the case. (Stephens Jt. Tr. 57-60).

Certain competitive retail electric suppliers have advocated an expansion of the 30-day window to 75 days. Their rationale for doing so was made clear in the cross-examination of ICC

Staff witness Mr. Schlaf. Mr. Schlaf testified as follows:

Q: And isn't it also that the longer the enrollment window, the more opportunity for there to be price changes in market?

A: There will be price changes with an additional enrollment period, that is true.

Q: How does that advantage the RES?

A: It is possible, especially in areas where there is little competition, that a higher auction price perhaps due to an increased enrollment period might make it easier for RESes to make offers to customers.

(Schlaf Tr. 1349).

CES and BOMA have supported their request for a 75 day window, by comparing the sign up window for the fixed-price product with the current 75-day sign up window that applies to ComEd's PPO service. (O'Connor Dir. CES Ex. 1.0 at 25:555-558; Childress & Brookover Dir. BOMA Ex. 2.0 at 25:535-26:551). As explained by IIEC witness Stephens, the comparison of the annual fixed-price product to PPO is misplaced:

PPO prices are administratively determined, based on limited snapshot views of wholesale market conditions. Such prices do not result from direct solicitations of retail power supply by ComEd, where power is actually procured and resold to customers, as would be the case in the CPP auction. In many cases, the wholesale transactions used to set PPO prices may have nothing to do with ComEd load. In contrast, the annual fixed-price option in this case is an actual power supply offer, which wholesale suppliers take on risk to provide. (Stephens Reb. IIEC Ex. 4 at 13:271-278).

IIEC also notes that the length of the PPO sign up window has no effect on PPO prices:

It would not matter if the signup window was one day or 365 days for PPO, since none of the wholesale providers are actually seeking to serve ComEd customers via the PPO rate. In fact, prior to the most recent market value index case, ComEd made PPO

election periods open for much longer periods of time. (Stephens Reb. IIEC Ex. 4 at 13:280-283).

ICC Staff witness Schlaf stated in cross-examination that some number of days between 30 and 75, such as 40 or 45, would be a compromise between the two positions. (Schlaf Tr. 1339-1340). However, he ultimately confirmed that he would not have a problem if the Commission adopted the 30 day enrollment window. (Schlaf Tr. 1348).

Hence, the record is well established that expanding the enrollment window beyond 30 days will very likely increase auction prices, as suppliers account for additional risk in making their offers in the auction. As indicated above, the large customers in this docket, IIEC and DOE have indicated a preference for the 30-day window with the lower price premiums compared to a longer window which will increase the auction prices. The Commission should adopt a 30 day enrollment window. If for any reason the Commission determines a longer enrollment window is needed for small customers, the 30 day enrollment window should apply to larger customers (3 MW and over).

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

ComEd proposes to serve self-generation customers with hourly price service. According to ComEd, self-generation customers would include non-residential customers with generation capacity on their premises of 100 kW or greater utilizing such generation for any purposes other than emergency purposes, including independent power producers and Qualifying Facilities. (Alongi and Crumrine Dir. ComEd Ex. 7.0 at 41:933-937). ComEd has indicated that in its delivery service rate case filing, demand charges for hourly pricing customers, including self-generation customers, will be applied for each month in which a customer is receiving capacity

through the CPP-H auction. The charge will be a per kW-month charge based on each customer's load as established during the previous summer. (Alongi and Crumrine Reb. ComEd Ex. 13.0 at 28:600-604 and Crumrine Tr. 812). ComEd has further clarified that hourly pricing customers' per kW-month charges are set during the five highest peaks in PJM during the previous summer. (Alongi and Crumrine Sur. ComEd Ex. 21.0 at 16:350-354 and Crumrine Tr. 815-817).

As noted above, Qualifying Facilities under the Public Utilities Regulatory Policies Act of 1978 (PURPA) are considered self-generation customers under ComEd's proposal. They would be assessed monthly charges based on their demand at the time of the five highest peaks in PJM for the previous summer, as discussed above. However, FERC regulations related to PURPA require that for qualifying facilities:

The rate of sales of back-up power or maintenance power:

- (1) Shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, or during the system peak, or both; and
- (2) Shall take into account the extent to which scheduled outages of the qualifying facilities can be usefully coordinated with scheduled outages of the utility's facilities.

(Section 292.305(c) of Title 18 of the Code of Federal Regulations).

In addition, self-generating customers generally have a very low load factor. They generally only draw energy from the utility during limited periods of the year, which are mostly confined to maintenance outages taken during off-peak times of the year. Capacity charges for self-generation customers should reflect their ability to schedule generation maintenance during off-peak periods of the year and the low probability of outages during peak system load

conditions or simultaneous with other self-generators' outages. ComEd's existing Rate 18 – Standby Service (*See* IIEC Ex. 2, Sch. 1) is an example of a rate that is intended to reflect these PURPA principles. (Dauphinais Dir. IIEC Ex. 2 at 10-11:220-235).

IIEC recommends the ICC require ComEd to modify its proposed Rider CPP provisions for hourly pricing customers to either:

- Bill self-generating customers taking hourly pricing service for capacity on a per kW-day basis on those days energy is actually taken from ComEd; or
- Adjust self-generating customer capacity charges through a rate translation process to reflect the low likelihood that all such customers will experience generation outages at the same time, at the time of system peak, or both, and their ability to commit to performing generation maintenance during off-peak periods of the year.

(Dauphinais Dir. IIEC Ex. 2 at 11:248-256).

Under the per kW-day approach, self-generation customers only pay for capacity on days on which they draw energy from the utility. IIEC witness Dauphinais testified this properly avoids having these customers pay for capacity when they are not placing a demand on the system. He also testified this is consistent with the fact that it is unlikely forced outages for one standby customer will occur at the same time as forced outages for other standby customers or at the system peak, or both. (Dauphinais Dir. IIEC Ex. 2 at 12:263-268). Moreover, he indicated that the hourly pricing of energy for these customers acts as a very strong incentive for self-generating customers to adequately maintain their self-generation facilities to minimize the risk of forced outages when demand for capacity is high and to perform maintenance outages during periods when the demand for capacity is low. This incentive derives from the fact the hourly energy prices will be based on PJM Locational Marginal Prices (LMP) that can be \$1,000 per

MWh (i.e., \$1 per kWh) or higher, during periods when capacity is in great demand. (Dauphinais Reb. IIEC Ex. 5 at 11:238-245). ComEd witness Crumrine agreed the potential price level for energy during peak periods provides a considerable economic incentive for self-generators to avoid outages during peak periods. (Crumrine Tr. 810). Mr. Dauphinais also noted that the per kW-day capacity charge approach is consistent with that proposed by the Ameren Operating Companies in Docket Nos. 05-0160, 05-0161 and 05-0162 for their self-generating customers. (Dauphinais Dir. IIEC Ex. 2 at 12:268-270).<sup>13</sup>

Messrs. Alongi and Crumrine argued that under the ComEd proposal the impact on a self-generation customer who had experienced the “misfortune” of an outage on one of the five summer peak days used to set capacity charges would be mitigated by good performance on the other four days. They also argued such a customer’s “misfortune” for five times in one summer would create new expectations and financial expectations for CPP-H auction suppliers, and, ultimately ComEd during the following year. They also asserted ComEd is merely attempting to assess costs incurred to the cost causer under its proposal. (Alongi and Crumrine Sur. ComEd Ex. 21.0 at 16:350-358).

Despite these assertions, Mr. Crumrine has admitted the self-generation customer’s demand charge under ComEd’s proposal would not be based on the calculated probability of that self-generation customer experiencing an outage during a particular period. (Crumrine Tr. 815). Moreover, Mr. Dauphinais has demonstrated that ComEd’s proposal basically exposes self-

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<sup>13</sup> It is also worth observing that service to cogeneration and self-generation customers under Rate 18 has never been declared competitive by operation of law or otherwise and that ComEd has the obligation to offer the same tariffed service to these customers that was offered to them at the time the Customer Choice Law was adopted. (220 ILCS 5/16-103(a)). IIEC’s proposal is consistent with the tariffed services these customers have received in the past; ComEd’s proposal is not.

generation customers to exorbitant capacity charges if they have the misfortune of having a forced outage during one of the five hours that are used to determine capacity responsibilities within PJM. (Dauphinais Jt. Tr. 135-136). He also suggested that ComEd's proposal fails to recognize self-generating customers as a group are very unlikely to simultaneously experience outages during the system peak. Individual customers under the ComEd proposal are not given the benefit of group diversity. A just and reasonable capacity charge for these customers would recognize the costs of covering the risk of a forced outage by any one of them during the period capacity obligations are set. (Dauphinais Reb. IIEC Ex. 5 at 10:220-226).

ComEd should be required to adopt the per kW-day billing approach for demand for hourly pricing customers, including self-generation customers, as Ameren has done in Docket Nos. 05-0160 et al. If the ICC chooses not to require ComEd to do so, the ICC should require ComEd to adjust self-generating customer capacity charges through a rate translation process to reflect the low likelihood that all such customers will experience generation outages at the same time, at the time of system peak, or both, and the ability of such customers to commit to performing generation maintenance during off-peak periods of the years.

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

ComEd's auction does not explicitly provide for demand response through interruptible electric service. Instead, ComEd apparently intends to simply continue its existing Rider CLR – Capacity-Based Load Response and System Reliability Program. (Dauphinais Dir. IIEC Ex. 2, Sch. 5) and Rider VLR – Voluntary Load Response and System Reliability Program (Dauphinais Dir. IIEC Ex. 2, Sch. 2). IIEC witness Mr. Dauphinais notes demand response is critical for

mitigating very high market prices and maintaining supply adequacy during periods when supply adequacy is very tight. (Dauphinais Dir. IIEC Ex. 2 at 14:306-308). No ComEd witness has disputed this in this case. Indeed, the Commission itself has made clear its intent to encourage energy efficiency and demand response programs. (See e.g., Nicor Dkt. 04-0779, Final Order, Sept. 20, 2005 at 192-193).

PJM offers an Active Load Management (ALM) Credit Program, an Emergency Load Response Program and an Economic Load Response Program (the latter two collectively being the “non-ALM Programs”). Mr. Dauphinais testified the ALM Credit Program is best applied in the context of hourly pricing where capacity and energy can be clearly separated. He also reasoned that non-ALM Programs are better applied to customers taking service at a fixed price, since these customers are generally shielded from real-time locational marginal prices. (Dauphinais Dir. IIEC Ex. 2 at 12:280-286).

**a. ALM Demand Response**

The PJM West Reliability Assurance Agreement provides an ALM credit for interruptible load that meets certain requirements as delineated in Section A of Schedule 5.2 of the Agreement. (Dauphinais Dir. IIEC Ex. 2, Sch. 3). If an interruptible load meets the ALM requirements it is provided an ALM credit against its capacity obligations equal to the MW value of the ALM load times the PJM ALM factor. For example, for 2006/2007, the PJM Staff has proposed an ALM factor of 0.954. (Dauphinais Dir. IIEC Ex. 2 at 16-17:367-376).

IIEC observes ComEd apparently intends to retain its existing Rider CLR for the PJM ALM program. However, Rider CLR is inefficient in that it requires customers first to purchase

unnneeded capacity, and then only provides a credit based on the most recent PJM-operated capacity credit auction. It would be much more efficient to simply forego acquiring capacity for that portion of customer load covered by a PJM ALM credit in the first instance. (Dauphinais Dir. IIEC Ex. 2 at 17:394-18:400).

Mr. Dauphinais indicated there are two problems with the Rider CLR approach proposed by ComEd. First, customers are compelled to buy capacity they do not require. Second, there is a risk that Rider CPP capacity charges paid upfront (less ancillary service and other PJM charges) will not be equal to the refund customers receive back under Rider CLR (Dauphinais Reb. IIEC Ex. 5 at 14:297-301). ComEd witness Mr. McNeil did not dispute the cost of capacity to the customers under the CPP-H rate that may or may not be equal to the credit that is returned through Rider CLR. (McNeil Tr. 592 and 593). Furthermore, Mr. McNeil testified he knows of no way to quantify the difference between the Rider CLR credit and the cost included in the CPP-H price (McNeil Tr. 593).

In addition, ComEd witness Mr. Crumrine did not dispute there may be a difference between the Rider CLR credit and the capacity portion of CPP-H demand charges. While he discounted the size of the difference, neither he nor anyone else at ComEd performed a study to quantify the magnitude of the difference (Crumrine Tr. 823-824).

To address his concerns associated with ALM demand response, Mr. Dauphinais initially recommended ComEd modify the CPP-H supplier contract such that only the portion of customer load not covered by ALM capacity credits would be treated as firm load subject to capacity charges. Because neither ComEd nor the CPP-H suppliers would be required to carry any capacity for the portion of customer load covered by the ALM capacity credit, the portion of

customer load covered by the ALM credit would not have a capacity charge associated with it and would be interruptible by PJM pursuant to the ALM program. Any PJM penalties incurred due to the failure of a customer to interrupt service when notified would be directly assignable to the customer. (Dauphinais Dir. IIEC Ex. 2 at 17:377-390).

Subsequently, Mr. Alongi and Mr. Crumrine expressed concerns about Mr. Dauphinais' proposal. Specifically, they alleged that because CPP-H demand charges include ancillary services and other PJM charges in addition to capacity charges, the ALM credits would not offset the CPP-H capacity charges. (Alongi and Crumrine Reb. ComEd Ex. 13.0 at 30:652-31:656). In response, Mr. Dauphinais simplified his proposal. He recommended ComEd procure all energy and ancillary services, for the ALM credited portion of customer load, directly from PJM since capacity is not required to serve this portion of customer load (Dauphinais Reb. IIEC Ex. 5 at 13:291-14:301). ComEd would simply pass on to the customer the charges PJM assesses to serve this customer, including any PJM penalties associated with the customer failing to interrupt when called upon to do so by PJM (*Id.*). Under the proposal, the customer would have to designate in advance the ALM credited load as first through the meter, last through the meter or a percentage of total customer load consistent with the split load designation options already provided for under ComEd's existing Rate RCDS. (Dauphinais Reb. IIEC Ex. 5 at 14:302-15:333).

IIEC's modified proposal parallels ComEd's post-PJM RPM proposal for hourly pricing service. Under that proposal, after the implementation of the PJM RPM, ComEd would procure all hourly pricing customer needs from PJM directly. IIEC's modified proposal also eliminates the need for ComEd to procure and then resell capacity that was not needed in the first place.

The Commission should require ComEd to modify its proposal to conform with IIEC's recommended approach for ALM demand response for hourly pricing customers.

**b. Non-ALM Demand Response**

As discussed above, in addition to the ALM credit program, PJM has an emergency load response program and an economic load response program. These are the non-ALM programs. It is IIEC's primary recommendation that customers with demands of 3 MW and higher, taking fixed price bundled service, be allowed to participate directly in load response and economic load response programs through PJM members or a PJM Curtailment Service Provider. (Dauphinais Dir. IIEC Ex. 2 at 14:310-313). These programs are better applied to customers taking the fixed price service since these customers are protected from real-time locational marginal prices. (Dauphinais Dir. IIEC Ex. 2 at 13:284-286).

The economic load response program allows load participating in the program to reduce demand in return for receiving the applicable locational marginal price for the demand reduction. (Dauphinais Dir. IIEC Ex. 2 at 13:293-296). During a PJM emergency, the emergency load response program pays to loads nominated in advance the higher of the applicable locational marginal price or \$500 per MWh, whichever is greater. (Dauphinais Dir. IIEC Ex. 2 at 13:287-292).

Demand response is critical for mitigating very high market prices and maintaining supply when supply adequacy is tight. Ordinarily, there is no incentive for these customers to curtail demand. The PJM economic response program provides these customers with the incentive to curtail demand when it is needed. This benefits all customers purchasing power at

market prices including ComEd's hourly price customers. (Dauphinais Dir. IIEC Ex. 2 at 14:304-310). All 3 MW and over customers taking bundled service from ComEd should be given the opportunity to participate directly in the PJM emergency load response program and the economic response program. Allowing customers to directly participate in the PJM economic response program would be consistent with the Commission's recent expression of interest in energy efficiency and demand response programs. (See IIEC Resolution Dkt. 05-0437, RE: Governor's Sustainable Energy Plan, July 19, 2005).

## **X.**

### **CONCLUSION**

IIEC Companies, for the reasons stated herein, respectfully request:

1. The Commission require the implementation of an annual process to formally review the results of, and the continued desirability of, any auction process approved in this proceeding;
2. To the extent the Commission approves an auction process in this proceeding, it rejects the use of a load cap;
3. To the extent an auction is approved in this proceeding, the initial auction be conducted in September 2006;
4. To the extent an auction is approved in this proceeding, that as a condition of such approval, the Commission requires ComEd to offer customers 3 MW and over a one year fixed price product;
5. To the extent an auction is approved in this proceeding, the Commission require ComEd to offer 3 MW and over customers a blended price multi year product similar to that offered to other customers;
6. To the extent an auction is approved, require a separate auction segment be established for the 3 MW and over customer class;

7. To the extent an auction is approved, require ComEd to incorporate in its tariffs a provision to allow 3 MW and over customers to advise ComEd, prior to any auction, of their interest in becoming eligible for a fixed priced product;
8. To the extent an auction is approved, require ComEd to include a capacity component in its retail rates for any fixed price product offered to customers with electrical demands of 1 MW or more;
9. To the extent an auction is approved, approve ComEd's request to hold its auction at the same time Ameren holds its auction;
10. To the extent an auction is approved, direct ComEd to work with Ameren, PJM and MISO to develop a single common deliverability test for capacity and network resources located within the combined PJM and MISO footprint for the delivery of power to the combined ComEd and Ameren load zones within the State of Illinois and to report on the status of that effort to the Commission every 90 days;
11. To the extent an auction is approved, require ComEd to modify Rider CPP to bill self-generation customers electing the ComEd hourly product for capacity on a per kW-day basis consistent with the Ameren approach or, in the alternative, require ComEd to develop capacity charges that reflect the low probability that all self-generating customers will experience outages at the same time, or at the time of system peak, or both, and their ability to commit to performing maintenance during non-summer months;
12. To the extent an auction is approved, allow customers taking ComEd's fixed price product to directly participate in both of PJM's non-alternative load management demand response programs directly through a PJM member or PJM curtailment provider;
13. To the extent an auction is approved, require ComEd to continue the use of the CPP-H auction for hourly pricing customers until the PJM reliability model centralized capacity market, or an equivalent, is in operation and ComEd has demonstrated that it is prudent and reasonable to forego the CPP-H auction process; and
14. To the extent an auction is approved, modify the CPP-H auction and hourly pricing proposals to ensure hourly pricing customers meeting the PJM alternative load management interruptibility requirements obtain the benefits of the ALM capacity credits associated with their load, and not be required to purchase capacity they do not need.

Respectfully submitted,

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