

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY :
:
Proposed tariffs filed pursuant to Article IX of :
the Public Utilities Act defining a competitive :
supply procurement process and, pursuant :
to Section 16-112(a) of the Act, establishing :
a market value methodology to be effective :
post-2006; providing for Power Purchase :
Options and for recovery of transmission :
charges post-2006; and enabling :
subsequent restructuring of rates and :
unbundling of prices for bundled service :
pursuant to Sections 16-109A and 16-111(a) :
of the Act. :

No. 05-0159

**PROPOSED ORDER
OF COMMONWEALTH EDISON COMPANY**

October 14, 2005

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ORDER

By the Commission:

I. EXECUTIVE SUMMARY

Procedural History

On February 25, 2005, Commonwealth Edison Company (“ComEd”) filed its Ill. C. C. No. 4, Original Sheet Nos. 244 through 303; 6th Revised Sheet No. 151.1; 8th Revised Sheet No. 151.13; and 7th Revised Sheet No. 151.14, (collectively, the “Procurement Tariffs” or the “Procurement Tariff Sheets”). This tariff filing embodied a proposal to implement, and use in setting retail rates under the Commission’s jurisdiction, the results of a wholesale competitive power procurement process by establishing Rider CPP, – Competitive Procurement Process (“Rider CPP”), Rider PPO-MVM – Power Purchase Option (Market Value Methodology (“Rider PPO-MVM”), and Rider TS-CPP - Transmission Services (Competitive Procurement Process) (“Rider TS-CPP”), and by revising Rider PPO-MI – Power Purchase Option (Market Index) (“Rider PPO-MI”). The tariff filing was accompanied by direct testimony and other exhibits.

Notice of the proposed tariff changes was posted in ComEd’s business offices and published in a secular newspaper of general circulation in ComEd’s service area, as evidenced by publisher's certificates, in accordance with the requirements of Section 9-201(a) of the Public Utilities Act (the “Act”), 220 ILCS 5/9-201(a), and the provisions of 83 Ill. Adm. Code Part 255.

The Illinois Commerce Commission (the “Commission” or “ICC”) issued a Suspension Order on March 9, 2005, suspending the Procurement Tariff Sheets to and including July 24, 2005, and thereafter, issued a Resuspension Order on July 13, 2005, suspending the proposed tariffs to and including January 24, 2006.

Pursuant to notice duly given in accordance with the law and the rules and regulations of the Commission, a pre-hearing conference was held in this matter before the duly authorized Administrative Law Judge (the “ALJ”) of the Commission, at its offices in Springfield, Illinois, on April 18, 2005. Ten days prior, notice of the prehearing conference had been provided by the Chief Clerk of the Commission to municipalities in ComEd’s service area in accordance with the requirements of Section 10-108 of the Act, 220 ILCS 5/10-108. An additional hearing conference was held before the ALJ at the Commission’s Springfield office on August 24, 2005.

Petitions to Intervene were filed on behalf of the Attorney General of the State of Illinois (the “Attorney General” or the “AG”); Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Public Services Company d/b/a Ameren CIPS, and Illinois Power Company d/b/a AmerenIP, (styled collectively as “Ameren Companies”); Ameren Energy Marketing Company (“AEM”); BlueStar Energy Services, Inc. (“BlueStar”); Building Owners and Managers Association of Chicago (“BOMA”); the Citizens Utility Board (“CUB”); City of Chicago (the “City”); Constellation Energy Commodities Group, Inc. (“CCG”); Constellation NewEnergy, Inc. (“New Energy”); the Cook County State’s Attorney’s Office (“CCSAO”) (collectively, CUB and CCSAO are “CUB-CCSAO”); Direct Energy Services, LLC (“DES”); United States Department of Energy (“DOE”); Dynegy, Inc. (“Dynegy”); the Environmental Law & Policy Center (“ELPC”); Electric Power Supply Association (“EPSA”); Illinois Energy Association (“IEA”); Abbott Laboratories, Inc., Caterpillar Inc., Daimler Chrysler Corporation, Cognix Corporation, Enbridge Energy LLP, Ford Motor Company, and Motorola, Inc., styled collectively as the “Illinois Industrial Energy Consumers” (“IIEC”); J. Aron & Company (“J. Aron”); MidAmerican Energy Company (“MidAmerican”); Midwest Generation EME, LLC (“Midwest Gen”); Morgan Stanley Capital Group, Inc. (“MSCG”); Midwest Independent Power Suppliers (“MWIPS”); Peoples Energy Services Corporation (“PES”); Reliant Energy, Inc. (“Reliant”); Local Unions 15, 51, and 702, International Brotherhood of Electrical Workers, AFL-CIO (collectively, “Locals 15, 51, 702, IBEW”); Sempra Energy Solutions (“SES”); U.S. Energy Savings Corporation (“USESC”) (collectively, DES and USESC are “DES-USESC”) (collectively, New Energy, DES, MidAmerican, PES, and USESC are the “Coalition of Energy Suppliers” or “CES”) (collectively, all of the foregoing parties are the “Intervenors”).

Evidentiary hearings were held from August 29-September 2, September 6-9, 12, 14, and 20, 2005, at the offices of the Commission in Springfield, Illinois. At the evidentiary hearings, ComEd, the Staff of the Commission (“Staff”), the AG, BOMA, CES, CNE, CUB-CCSAO, CCG, DES-USESC, Dynegy, IIEC, Midwest Gen, PES, and the DOE entered appearances and presented testimony, either by live witness(es) or by affidavit. Appearances were also entered for J. Aron, MSCG, the City, and MWIPS, although they

did not submit testimony. At the conclusion of the hearings, on September 20, 2005, the ALJ marked the record "Heard and Taken."

The following witnesses testified on behalf of ComEd: Frank M. Clark, Jr., Executive Vice President and Chief of Staff, Exelon Corporation ("Exelon"), and President, ComEd; Elizabeth A. Moler, Executive Vice President for Government and Environmental Affairs & Public Policy, Exelon; William P. McNeil, Director of Regulatory Strategy, ComEd; Chantale LaCasse, Ph.D., Vice President, National Economic Research Associates, Inc. ("NERA"); Steven T. Naumann, P.E., Vice President of Wholesale Market Development, Exelon; Michael M. Schnitzer, Director, NorthBridge Group, Inc; Lawrence S. Alongi, Manager of Distribution Rate Design and Administration, ComEd, and Paul R. Crumrine, Director of Regulatory Strategies & Services, ComEd (jointly); William W. Hogan, Ph.D., Lucius N. Littauer Professor of Public Policy and Administration, the John F. Kennedy School of Government of Harvard University, Research Director, Harvard Electricity Policy Group, and Director, LECG, LLC; Arlene A. Juracek, P.E., Vice President of Energy Acquisition, ComEd and Exelon Energy Delivery LLC; Andrew Parece, Managing Principal, Analysis Group, Inc.; William H. Hieronymus, Vice President, CRA International; and Kevin J. Waden, C.P.A., Director of Financial Reporting and Accounting Research, Exelon Energy Delivery Company.

The following witnesses testified on behalf of the Staff: David J. Salant, Principal, ERS Group, Adjunct Senior Research Scholar, Columbia Business School, Research Professor, Clemson University; David S. Sibley, John Michael Stuart Centennial Professor of Economics, the University of Texas at Austin; Scott A. Struck, CPA, Supervisor, Accounting Department, Financial Analysis Division; Richard J. Zuraski, Senior Economist, Policy Program, Energy Division; Serhan Ogur, Economic Analyst, Federal Energy Program, Energy Division; Eric P. Schlaf, Senior Economic Analyst, Energy Division; Peter Lazare, Senior Rate Analyst, Financial Analysis Division; Cheri L. Harden, Rate Analyst, Rate Department, Financial Analysis Division; Mary E. Selvaggio, CPA, Manager, Accounting Department, Financial Analysis Division; Steven R. Knepler, CPA, Supervisor, Accounting Department, Financial Analysis Division; Rochelle Phipps, Senior Financial Analyst, Finance Department, Financial Analysis Division.

The AG's witnesses were Kenneth Rose, Ph.D, consultant, lecturer, Institute of Public Utilities, Michigan State University; Harvey Salgo, Esq., Principal Consultant, La Capra Associates; David Efron, CPA, Regulatory Consultant, Berkshire Consulting Services; and Philip Reny, Ph.D., Professor of Economics, the University of Chicago.

BOMA's witnesses were Arthur B. Laffer, Chairman, Laffer Associates; and T.J. Brookover, Senior Vice President & Director of Property Management, The John Buck Company, and Kristav M. Childress, Technical Director, GEV Corp. (jointly).

CCG's witness was Michael D. Smith, Vice President, Regulatory and Legislative Affairs.

CES's witnesses were Philip R. O'Connor, Ph.D., Vice President, Illinois Market, NewEnergy; Mario Bohorquez, Director of Supply, Illinois Market, NewEnergy, and Wayne Bollinger, Director of Energy Supply, PES (jointly); and John L. Domagalski, NewEnergy, and Richard S. Spilky, Director of Electric Products, MidAmerican (jointly).

CUB-CCSAO's witnesses were Robert M. Fagan, Senior Associate, Synapse Energy Economics, and William Steinhurst, Senior Consultant, Synapse Energy Economics, Inc.

DES-USESC's witness was James Steffes, Vice President, US Government & Regulatory Affairs and Chief Compliance Officer, DES.

Dynegy's witness was Barry Huddleston, Senior Director, Governmental and Regulatory Affairs.

IIEC submitted testimony of Robert R. Stephens, Consultant, Brubaker & Associates, Inc.; James R. Dauphinais, Consultant, Brubaker & Associates, Inc.; and Brian C. Collins, Consultant, Brubaker & Associates, Inc.

Midwest Gen submitted testimony of Frank C. Graves, Principal, The Brattle Group.

PES submitted the testimony of Wayne Bollinger, which was separate from the joint testimony for the same witness that CES submitted.

DOE submitted the testimony of Dale E. Swan, Senior Economist and Principal, Exeter Associates, Inc., Mathew I. Kahal, Consultant, Exeter Associates, Inc.

Testimony, Motions and Rulings

On February 25, 2005, ComEd filed its direct testimony concurrently with its tariff filing. It presented direct testimony for each of its witnesses listed above, except Ms. Juracek, Mr. Parece, and Dr. Hieronymus (who each submitted only rebuttal and surrebuttal testimony) and Mr. Waden (who submitted only surrebuttal testimony).

On March 23, 2005, ComEd filed a Motion for Entry of a Case Management Order (the "Motion for Case Management Order"), requesting a pre-hearing conference and entry of a case management order.

Also on March 23, 2005, ComEd filed a Motion for a Protective Order (the "Motion for Protective Order"), requesting a protective order be entered pursuant to 220 ILCS 5/4-404 and 83 Ill. Adm. Code § 200.430(a).

On March 25, 2005, the Commission issued notice of an April 8, 2005 hearing.

On March 29, 2005, Staff filed a Motion to Consolidate Dockets 05-0128, 05-0159, 05-0160, 05-0161, and 05-0162, pursuant to 83 Ill. Adm. Code § 200.600 (the "Motion to Consolidate").

On March 30, 2005, the Commission issued notice that any responses to the Motion to Consolidate shall be filed by April 6, 2005.

On April 6, 2005, ComEd filed a response to the Motion to Consolidate, opposing Staff's Motion. ComEd argued that the tariff rates at issue in the two cases had sufficient independent issues that consolidation would prolong the proceedings with testimony and issues only relevant to one side. It also noted that a determination of the Ameren Companies' tariffs impacting customers might prejudice ComEd, whose customer tariffs are not yet at issue. ComEd urged coordination rather than consolidation.

Also on April 6, 2005, IIEC filed a response to the Motion to Consolidate in support of the Motion, and the AG, the City, CUB, and ELPC filed a Motion to file their response Instantly, after notice from the ALJ that filing an informal response not opposing the Motion to Consolidate in part was insufficient.

On April 8, 2005, Staff filed a reply in support of the Motion to Consolidate. Also on April 8, 2005, the Ameren Companies filed a response to the same Motion, arguing that the Motion depended on mere speculation that ComEd and the Ameren Companies would raise the same issues. They also noted the lack of relevance the issues of one party had for intervenors in the cases, and argued that consolidation would decrease the efficiency of these two factually distinct matters.

On April 12, 2005, the ALJ denied the Motion to Consolidate.

On April 15, 2005, IIEC, Staff, Midwest Gen, the AG, the City, CUB, and ELPC (collectively, the "Government, Consumer and Environmental Parties" (or "GCE Parties")), and the AG filed their responses to the Motion for Protective Order. IIEC did not object to the Motion, and Staff recommended modifications to the language of the proposed protective order.

Also on April 15, 2005, IIEC, Staff, Midwest Gen, and CES filed responses to the Motion for Case Management Order and Coordinated Schedule. IIEC, Staff, and CES argued for elongating the period for discovery.

On April 18, 2005, CCSAO filed a response to the Motion for Protective Order, seeking language to exempt enforcement actions from such Order.

Also on April 18, 2005, the GCE Parties filed a response to the Motion for Case Management Order, objecting to the parameters for data requests and the length of the discovery period.

On April 19, 2005, Dynegy filed a response to Motion for CMO and Coordinated Schedule.

Also on April 19, 2005, ComEd filed its reply in support of the Motion for Protective Order and the Motion for Case Management Order and Coordinated Schedule.

On April 22, 2005, the ALJ issued a ruling, granting the Motion for Case Management Order, and enumerating procedures to govern the case. Concurrently, the ALJ set forth the Coordinated Schedule.

On April 26, 2005, the ALJ issued a ruling, granting the Motion for Protective Order.

On May 17, 2005, the AG, CCSAO, CUB, and ELPC filed a Motion to Dismiss the portion of the proceeding related to ComEd's Rider CPP (the "Motion to Dismiss"), claiming that such Rider violates the consumer protections provisions in the Act reserving cost-based service to those commercial and industrial customers whose service has not been declared competitive, and asserting that the Act did not grant the Commission authority to approve a competitive procurement process for customers whose service has not been declared competitive.

On May 25, 2005, BOMA filed a reply to the Motion to Dismiss, supporting the AG, CCSAO, CUB, and ELPC's assertion that the Commission lacked the authority to approve Rider CPP.

Also on May 25, 2005, Locals 15, 51, 702, IBEW filed a response supporting the Motion to Dismiss.

Also on May 25, 2005, ComEd and IEA both filed Oppositions to the Motion to Dismiss. ComEd noted that the movants mischaracterized market-based rates as being distinct from the utility's costs, failed to acknowledge that the Procurement Tariffs recovered ComEd's actual costs, and explained that the Commission's authority to approve the auction system embodied in Rider CCP is within its clear authority to approve cost recovery mechanisms under Articles IX and XVI of the Act.

Additionally on May 25, 2005, Staff filed a response opposing the Motion to Dismiss on the grounds that ComEd's filing provides sufficient information for the Commission to determine whether rates determined by the procurement process are just and reasonable. Staff further pointed out that the movants erroneously extended language in the Act limited to residential and small commercial retail customers to all customers, thereby misapplying the Act's customer protection requirements. Also on May 25, 2005, Midwest Gen, Ameren Companies, EPSA, MWIPS, New Energy, MidAmerican, PES, and USESC filed responses to the Motion to Dismiss, opposing the Motion.

On June 1, 2005, the AG, CCSAO, CUB, and ELPC filed a reply in support of the Motion to Dismiss, arguing that ComEd's proposal does not allow the Commission an opportunity to review the costs for fairness and reasonability and forces market-based rates on customers whose service has not been determined competitive.

Also on June 1, 2005, the ALJ issued a Ruling denying the Motion to Dismiss. In the Ruling, the ALJ found that market-based prices like those proposed in the Procurement Tariffs are one method of a utility's determining costs, and are not a mutually-exclusive replacement for cost-based rates.

On June 8, 2005, Staff and Intervenors (other than J. Aron, MSCG, MWIPS, and EPISA) filed direct testimony for all of their respective witnesses listed above, except Mr. Effron, Mr. Reny, and Ms. Phipps (each of whom submitted rebuttal testimony).

On June 22, 2005, the AG, CCSAO, CUB, and ELPC filed a Petition for Interlocutory Review of the ALJ's Ruling denying the Motion to Dismiss (the "Petition for Interlocutory Review"), arguing that the Ruling misinterpreted Section 16-103(c) of the Act and that market-based pricing is not reflective of costs where they are set in a less than fully competitive market.

On June 28, 2005, the Commission, on its own motion, ordered that an oral argument on the Petition for Interlocutory Review be held on July 5, 2005.

On June 29, 2005, ComEd and Midwest Gen filed their responses to the Petition for Interlocutory Review, showing that the arms-length, market-based transactions proposed by Rider CPP would determine the costs that ComEd is entitled to recover. Also on June 29, 2005, BOMA filed a reply to the Petition for Interlocutory Review. Also on June 29, 2005, Locals 15, 51, 702, IBEW filed their response in support of the same Petition. Also on June 29, 2005, the AG filed a Motion to Reschedule and Clarify Scope of Oral Argument, seeking a later date for the argument and to confine the argument to the issue whether the Act grants the Commission authority to approve market-based rates for customers whose service is not declared competitive.

On June 30, 2005, ComEd and Locals 15, 51, 702, IBEW filed their responses to the Motion to Reschedule and Clarify Scope of Oral Argument.

On July 1, 2005 the Commission denied the Motion to Reschedule and Clarify Scope of Oral Argument by the AG.

On July 5, 2005, the Commission held oral argument on the Petition for Interlocutory Review.

On July 6, 2005 ComEd filed rebuttal testimony for all of its witness listed above except Mr. Clark, Ms. Moler, and Mr. Schnitzer (each of whom had submitted direct testimony), and Mr. Waden (who submitted surrebuttal testimony).

On July 13, 2005, the Commission denied the Petition for Interlocutory Review.

On July 27, 2005, the AG, CCSAO, and CUB filed a Motion to Clarify the Place of Hearing and Request the Place of Hearing Be at the Commission in Chicago (the "Motion to Clarify") for the convenience of the parties and their counsel.

On August 3, 2005, the AG, BOMA, CCG, CES, CUB, DES-USESC, Dynegy, IIEC, Midwest Gen, PES, and Staff filed rebuttal testimony of all of their witnesses listed above except Messrs. Swan and Kahal (each of whom had submitted direct testimony).

On August 4, 2005, the Ameren Companies and Staff filed a response in opposition to the Motion to Clarify. Also on August 4, 2005, ComEd filed a response to the Motion to

Clarify, taking no position, and the DOE filed a response in support of the Motion to Clarify.

On August 10, the AG, CCSAO, and CUB filed a reply to the Motion to Clarify.

On August 12, 2005, the ALJ issued a ruling denying the Motion to Clarify.

On August 16, 2005, the CCSAO and CUB filed a Motion in Limine to Bar Witnesses from being Cross Examined Simultaneously in this Matter with any Other Matter of the Cook County State's Attorney's Office and the Citizens Utility Board (the "Motion to Bar"), which Motion CCSAO and CUB based on the ALJ's ruling denying consolidation.

On August 18, 2005, the AG and CCSAO filed a Petition for Interlocutory Review of Request that Hearings Be Held in Chicago (the "Chicago Petition for Interlocutory Review"), arguing that the location convenient for some of the parties is in the public interest.

Also on August 19, 2005, ComEd filed its surrebuttal testimony for all of its witnesses listed above, except Mr. Clark, Ms. Moler, and Mr. Schnitzer (each of whom had submitted direct testimony).

On August 22, 2005, CCSAO and CUB filed their joint reply to the responses to Motion to Bar. On August 22, 2005, Staff filed its reply to responses to Motion to Bar.

On August 23, 2005, the ALJ denied the Motion to Bar.

Also on August 23, 2005, the AG, CCSAO, CUB, and ELPC filed a Motion in Limine to Exclude Testimony Regarding the Post 2006 Workshops ("Motion to Exclude").

On August 24, 2005, Ameren Companies, ComEd, and Staff filed responses to the Chicago Petition for Interlocutory Review.

On August 25, 2005, the Commission issued a notice denying the Chicago Petition for Interlocutory Review.

On August 26, 2005, the Ameren Companies, ComEd, IIEC, CES, and Staff filed responses to the Motion to Exclude.

Also on August 26, the ALJ issued a Ruling denying the Motion to Exclude.

On September 20, 2005, during a hearing, the ALJ issued a schedule for post-hearing briefs and party-proposed draft orders. On September 21, 2005, ComEd filed an outline for the post-hearing briefs, which the ALJ adopted on September 23, 2005. On September 27 and 28, 2005, IIEC and Staff filed motions to amend the brief outline.

On October 3, and again on October 12, 2005, ComEd filed a Motion to Correct the Transcript of Hearings.

On October 7, 2005, initial post-hearing briefs were submitted respectively by ComEd, Staff, the AG, CUB, DOE, IIEC, MSCG, PES, CES, CCG, DES-USESC, Dynegy, Midwest Gen, CCSAO, and BOMA.

On October 14, 2005, ComEd, ___ filed their respective proposed orders. On October 27, 2005, ComEd, _____, filed their respective post-hearing reply briefs.

On _____, 2005, the ALJ served a proposed order on the parties. Briefs on exceptions were filed by _____ on _____, 2005, respectively. Reply briefs on exceptions were filed by _____ on _____, 2005. All exceptions and replies to exceptions have been duly considered by the Commission.

The Illinois Auction Proposal

In this docket, the Commission is reviewing retail tariffs embodying the Illinois Auction Proposal, the process that ComEd has proposed for procuring power and energy after 2006, and which ComEd's witnesses testified was consistent with the results of the Commission's Post-2006 Initiative.

As described in more detail below in this Order, the Illinois Auction Proposal involves a "vertical tranche," full requirements, descending clock auction, in which potential suppliers vie for fixed percentage shares of the responsibility to provide electricity to meet the needs of ComEd's retail customers. Under this Proposal, customers are charged for the electricity ComEd acquires at ComEd's cost, without markup or profit for ComEd.

II. NEED FOR COMMISSION ACTION

As authorized by the Act and orders of the Commission, ComEd divested all of its generation assets. Because ComEd owns no generating assets of its own, it must purchase the power and energy necessary to serve its customers at wholesale. ComEd currently handles this purchasing through a contract with Exelon Generation LLC ("ExGen"). At the end of 2006, however, as the Commission has recognized, this power supply arrangement will end. ComEd will thereafter need to purchase power and energy in the wholesale market.

In the interests of customers and all parties in these circumstances, the Commission needs to approve tariffs embodying a procurement methodology that both secures reliable supply and results in reasonable and stable retail prices in the post-transition period in accordance with the intent of the Illinois Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILCS 5/16-101 *et seq.* (the "1997 Law" or the "1997 Restructuring Law"). To meet that requirement, ComEd has filed tariffs embodying the Illinois Auction Proposal.

The record before the Commission is lengthy and reflects an exhaustive analysis of the issues for decision regarding the tariffs and the Illinois Auction Proposal. Among other

things, that analysis covers the features of the auction process and the improvements that have been considered and incorporated as a result of suggestions from the parties. The Commission has before it everything that is necessary to conclude that the auction proposal is just and reasonable. Given that record, the Commission approves ComEd's proposal, with modifications identified herein, based on the record and for the reasons stated in this Order.

III. LEGAL ISSUES

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

The General Assembly began a process of transforming the electric services industry in Illinois through the passage of the 1997 Restructuring Law, 220 ILCS 5/16-101 *et seq.* The General Assembly recognized that “[c]ompetitive forces are affecting the market for electricity as a result of recent federal regulatory and statutory changes and the activities of other states.” 220 ILCS 5/16-101A(b). As a result of these changes, the 1997 Law provides that “[l]ong-standing regulatory relationships need to be altered to accommodate the competition that could fundamentally alter the structure of the electric services market.” *Id.*

During the mandatory transition period, tariffed electricity rates for traditional bundled customers have been frozen – and for ComEd’s residential customers, have been frozen with a 20% reduction in rates in two steps from the approved rates in force prior to passage of the 1997 Law. The rate freeze and transition period, however, are drawing to a close, and the 1997 Law contemplated that new tariff filings would be made to set rates during the post-transition period.

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

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

projected revenues, costs, investments and cost of capital directly or indirectly associated with the provision of such tariffed services....” *Id.* at § 16-111(i) (emphasis added).¹

Although the 1997 Law encouraged the separation of the electric generation function from the distribution function, it requires distribution companies to continue to provide “bundled” electric service to customers who do not yet have sufficient choice in their retail provider of electricity. A distribution company such as ComEd must therefore acquire electricity in order to meet their ongoing mandatory service obligations. Since ComEd is acquiring this electricity for resale to its retail customers, its acquisition is a wholesale transaction.

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

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

In accordance with the authority provided by Section 16-111(g), ComEd fully divested its remaining generation assets (some plants had been sold previously, pursuant to Commission authorization under prior law), selling some and transferring others to an affiliated entity. This Commission recognized at the time that, as a result of the divestitures, “subsequent to 2006, [ComEd] would obtain all of its supply from market forces.” *In re Commonwealth Edison Co., Proceeding Pursuant to Section 16-111(g)*, 2000 Ill. PUC LEXIS 667 at *6 (Aug. 17, 2000).

¹ The contention of the Cook County State Attorney’s Office (CCSAP Initial Brief (“Init. Br.”) at 11-12) that the Commission should reexamine in these proceedings whether the divestiture of generation assets was prudent conflicts with this mandate, as discussed further below. There is no authority for such an inquiry.

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

The Regulatory Framework in Illinois Regarding Utility Costs

ComEd's competitive procurement tariff proposes a method of setting retail rates based on ComEd's cost of obtaining, in the wholesale market, electricity required to meet ComEd's mandatory service obligations. Some parties to these proceedings argue that the Commission lacks authority in the first instance to approve such a tariff. Before turning to the specifics of those contentions, it is important to set forth certain fundamentals governing the Commission's authority to set rates.

Despite the significant transformation of the electric services industry in Illinois brought about by the 1997 Law, the essential principles of Illinois law governing ratesetting for a utility with mandatory service obligations have remained unchanged for almost 100 years.

First, it is well-settled that under the Public Utilities Act the Commission enjoys broad, "plenary power" regarding "the supervision of public utilities, including the power to establish reasonable rates and charges for service." *Abbott Labs, Inc. v. ICC*, 289 Ill. App. 3d 705, 786 (1997) (citations omitted); see 220 ILCS 5/4-101 (supervisory power over public utilities); *id.* 5/9-101 (just and reasonable rates). The Act does not dictate how the Commission should make the determination of whether a rate is just and reasonable and, indeed, it is firmly established that this body has wide latitude in establishing "preferable techniques in utility regulation." *City of Chicago v. Ill. Commerce Comm'n*, 13 Ill. 2d 607, 618 (1958).

Second, also pursuant to long-settled statutory authority, an electric utility is entitled to recover its prudently incurred costs. The Public Utility Act expressly provides that utility service prices are to "accurately reflect the long-term cost of such services" and "tariff rates for the sale of various public utility services [are to] ... accurately reflect the cost of delivering those services and allow utilities to recover the total costs prudently and reasonably incurred." 220 ILCS 5/1-102. Consistent with this expression of legislative intent, Article IX of the Act requires that utility rates be "just and reasonable." 220 ILCS 5/9-101. This requirement, which "has remained unchanged since the [Public Utilities Act] of 1913," means that rates "should be sufficient to provide for operating expenses, depreciation, reserves ... and a reasonable return to the investor." *Illinois Bell Tel. Co. v. ICC*, 414 Ill. 275, 286-88 (1953). Rates "must allow the utility to recover costs prudently and reasonably incurred." *Citizens Util. Bd. v. ICC*, 166 Ill. 2d 111, 121 (1995). In this respect, the law does not distinguish between costs of products a utility purchases in a market versus those which it acquires in some other way.

Indeed, if the Act did not authorize recovery of prudently incurred costs, the statute would raise substantial constitutional concerns. As the Illinois Supreme Court has explained: "The power of the Legislature over rates to be charged is not absolute, but is limited. It is the power to regulate and not to confiscate." *City of Edwardsville v. Ill. Bell Tel. Co.*, 310 Ill. 618, 621 (1924). "The state has no power to compel a corporation

engaged in operating a public utility to serve the public without a reasonable compensation.” *Id.*; see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309-10 (1989); *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 594 (6th Cir. 2001).

Because ComEd has divested its electric generating facilities, the make-up of the company’s costs has changed. The cost of the energy supplied to customers no longer reflects ComEd’s historical and current operating costs of maintaining its own generating facilities but, instead, reflects the cost of purchasing this energy in wholesale power transactions. The same principles, however, apply: a public utility like ComEd is entitled to recover the actual, out-of-pocket costs to supply electricity to its customers so long as those costs are reasonably and prudently incurred. Whether power procurement costs under the proposed tariff in fact would be reasonably and prudently incurred is discussed elsewhere in this Order.

ICC Authority Under Article IX

Rider CPP proposes a mechanism for setting retail rates based on the competitive procurement of wholesale power and energy and formulae that provides for recovery of those costs from retail customers with no markup. The conduct of the auction process proposed is beyond the control of the utility and would be fully monitored by the Commission. See CPP Rider Original Sheet Nos. 254-57, 266-68 (Feb. 25, 2005). Once the auction is completed, an independent auction manager must submit a formal report to the Commission summarizing what occurred at the auction. *Id.* The Commission will also receive information about the auction process and the operation of the auction for its Staff during the process leading up to the auction. The Commission’s Staff also must submit a report to the Commission regarding the auction. *Id.* The Commission then has the opportunity to review the auction and its results and, if it determines necessary, reject the results by initiating an investigation or other formal proceeding. *Id.* at Sheet Nos. 266-68. If not rejected, retail rates will be set by pre-determined formulae based on the auction results. *Id.* at Sheet Nos. 275-94. The Commission also retains its authority to initiate an investigation into the rate at any time and any aggrieved party may file a complaint if the rate is unjust and unreasonable. 220 ILCS 5/9-250.

Both the Commission and Illinois courts long have held that, among the techniques that may be used to establish the justness and reasonableness of utility rates, the Commission has the authority to approve formula-type rates, particularly for costs that fluctuate. Thus, in 1958, the Illinois Supreme Court upheld this agency’s authority to permit a utility to automatically increase its rates to recover the costs of wholesale power purchases pursuant to an approved “mathematical formula.” *City of Chicago*, 13 Ill. 2d at 611-13.² In upholding this rate setting method, the Court explicitly recognized

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

that “it is clear that the statutory authority to approve rate schedules embraces more than the authority to approve rates fixed in terms of dollars and cents,” as is done in a general ratemaking case. *Id.* The Court found it sufficient that the Commission retained its power to initiate a proceeding to investigate the reasonableness of the utility’s rates – a statutory power that remains intact under Rider CPP – Competitive Procurement Process. *Id.* at 617; see 220 ILCS 5/9-250. Quoting its earlier decision in *Antioch Milling Co. v. Pub. Serv. Co.*, 4 Ill. 2d 200, 210 (1954), the Court also emphasized that “[t]he act provides that rates shall be reasonable; but it entrusts the enforcement of that obligation in the first instance to the commission.” *City of Chicago*, 13 Ill. 2d at 618 (internal quotation marks and citation omitted).

More recently, the Supreme Court agreed with the Commission that, in the case of “unexpected, volatile or fluctuating expenses,” an adjustment mechanism provides a more “accurate and efficient” means than a general rate case for tracking costs and matching them with rates. *Citizens Util. Bd. v. Ill. Commerce Comm’n*, 166 Ill. 2d 111, 139 (1995). Such mechanisms simply provide for cost recovery and do not affect the utility’s fair rate of return. See *City of Chicago v. Ill. Commerce Comm’n*, 281 Ill. App. 3d 617, 628 (1st Dist. 1996).³

Of course, the Commission “may not approve a tariff which permits a utility to set its own rates.” *Citizens Util. Bd. v. Ill. Commerce Comm’n*, 275 Ill. App. 3d 329, 340 (1st Dist. 1995). The measure of costs, and the utility’s rates, must be outside the control of the utility. Rider CPP clearly meets this test. The process and formulae are both well defined and outside the utility’s control.

Some parties -- the Attorney General, on behalf of the People of Illinois, the Citizens Utility Board, and the Cook County State’s Attorney’s Office -- nonetheless contend that the Commission may not approve the procurement tariff because the specific rates to be charged customers cannot be known in advance of the auction. Thus, the Attorney General maintains that the tariff calls for an unlawful “blank rate.” AG Init. Br. at 13; see also CUB Init. Br. at 9-12; CCSAO Init. Br. at 12-16. These parties all rely on *Citizens Utility Board v. ICC*, 275 Ill. App. 3d 329, 655 N.E. 2d 961 (1st Dist. 1995) to support this view.

Citizens Utility Board, however, involved a fundamentally different situation. In that case, the utility proposed a tariff in which it would offer “discounted rates” to certain non-

³ Such mechanisms have not been limited to fuel purchases. See *Citizens Util. Bd.*, 166 Ill. 2d at 133 (upholding recovery of “coal tar clean up expenditures” through a flexible “rider” mechanism, which the Court described as a mechanism that could “increase a rate, allowing the utility to recover the cost as it is incurred, alleviating the delay of waiting until the utility files a general rate case to recover expenses”); *City of Chicago*, 281 Ill. App. 3d at 627-28 (upholding rider recovery of utility municipal franchise fees); *In re Ill. Power Co.*, No. 04-0294, 2004 WL 2208508, at *47 (Ill. Commerce Comm’n Sept. 22, 2004) (approving automatic adjustment clause for 90% of asbestos litigation costs).

residential customers “vis-à-vis negotiated contracts.” *Citizens Utility Board*, 275 Ill. App. 3d at 332. The only parameter governing the rates to be set by contract was that those rates would not be below the utility’s marginal cost or, as the court put it, “any rate [the utility] eventually chooses provided the company does not, in laymen’s terms, lose money.” *Id.* at 339 (emphasis added). The court contrasted that situation with a rate that “truly contains a ‘parameter of rates,’ such as where rates are set by “a mathematical formula under which rates would fluctuate with the wholesale cost of natural gas,” and which is permissible under the Act. *Id.* at 339-40.

Under ComEd’s proposal in the instant case, and unlike the situation in *Citizens Utility Board*, the utility does not enjoy unfettered discretion to set rates. Rather, the utility has proposed both a specific procurement process and a specific mathematical formula for converting the cost of power procured at auction into rates. ComEd enjoys no ability under its tariff to deviate either from the procurement process it has proposed nor from the ratesetting formula.⁴ Both the procurement process and the cost recovery formula to be used are being subjected to extensive and public scrutiny in these proceedings. The rates as calculated by formula will be publicly available.⁵

Thus, the cost recovery mechanism in Rider CPP is fully consistent with the principles set forth by the Illinois Supreme Court in *City of Chicago* and related cases, and the reliance upon *Citizens Utility Board* by the Attorney General and others is misplaced. Under long-standing regulatory principles, the Commission has authority to approve a mechanism by which ComEd will incur, and recover, the actual costs the utility will incur to fulfill its mandatory service obligations. There is nothing in the Act that prohibits the Commission from establishing that mechanism in advance, as it previously has done in analogous situations. Therefore, the agency enjoys authority to approve the tariff under Article IX of the Act.

ICC Authority Under Article XVI

In addition to the Commission’s authority under Article IX, express authority to approve Rider CPP is also provided by Section 16-111(i) of the Act. That provision directly addresses how this agency must evaluate rates in the context presented here, *i.e.*, after

⁴ CUB points to certain decisions which it claims are entirely committed to ComEd’s discretion and which therefore allegedly render this situation akin to the one in *Citizens Utility Board*. See CUB Init. Br. at 8-10. This claim is not supported by the record. All of these decisions, *e.g.*, bidder qualifications, the setting of a load cap, or maximum and minimum bidding prices, are matters as to which ComEd’s tariff proposes a specific approach which is itself subject to Commission approval. In none of these matters does ComEd propose that it retain unfettered discretion.

⁵ The *Citizens Utility Board* decision also found the tariff at issue therein to be unauthorized because it allowed the utility to keep the negotiated rates confidential, so that the public would never be able to enforce its statutory right to inspect utility rates. 275 Ill. App. 3d at 341. That holding has no application here.

the mandatory transition period but before a tariffed service is declared competitive. Section 16-111(i) directs:

In determining the justness and reasonableness of the electric power and energy component of an electric utility's rates for tariffed services subsequent to the mandatory transition period and prior to the time that the provision of the tariffed service is declared competitive, the Commission shall consider the extent to which the electric utility's tariffed rates for such component for each customer class exceed the market value determined pursuant to Section 16-112.

220 ILCS 5/16-111(i) (emphasis added).

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

Rider CPP comports with the specific authorization provided by Sections 16-111(i) and 16-112(a) to base rates for the electric power and energy component of tariffed service on the market value of that energy. “Market value” as used in Section 16-111(i) is defined in Section 16-112. That provision, in turn, broadly establishes that the Commission may determine “market value” pursuant to a “tariff that ... provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy.” 220 ILCS 5/16-112(a) (emphasis added). A

competitive auction process fits within the statutory criteria for establishing the “market value” for electric power and energy under Section 16-112(a).⁶

The parties contending that the Commission lacks authority to approve the procurement tariff do not, in the main, address the authority provided by Article XVI. The Cook County State’s Attorney does, however, contend in passing that the tariff is not permitted because the General Assembly did not expressly refer to an “auction” in setting rules for how rates are to be set subsequent to the mandatory transition period. CCSAO Init. Br. at 10. The statutory text and basic principles of statutory construction which must guide interpretation of that text, however, compel the conclusion that this argument is without merit.

Section 16-112(a) directs that “market value” can be determined by use of a broad variety of measures and proxies (such as through use of a range of index measures). The procurement method embodied in Rider CPP – an auction for the resources required to provide the very product to be used by retail customers -- produces a direct and precise assessment of market value, as called for by the Act. Moreover, it would be illogical for the statute to authorize the use of a more generalized proxy for market value but prohibit the most objective, fair and classic determinant of market value — a competitive auction that results in an index price for the very product being valued. One “should start with the assumption that the legislature intended to enact an effective law” and should “interpret [a] statute... as to give it efficient operation and effect as a whole.” *Pliakos v. Ill. Liquor Control Comm’n*, 11 Ill. 2d 456, 460 (1957); see also *Village of Lake Villa v. Branley*, 348 Ill. App.3d 280, 284 (2d Dist. 2004) (“The primary purpose of statutory construction is to determine and give effect to the legislature’s intent, while presuming the legislature did not intend to create absurd, inconvenient, or unjust results.”). And in doing so, one should not strain to impose a narrow, unduly literal interpretation never intended by the legislature. *City of Champaign v. Hill*, 29 Ill. App. 2d 429, 444 (3d Dist. 1961); *Krome v. Halbert*, 263 Ill. 172 (1914); *California v. United States*, 320 U.S. 577, 585 (1944).⁷ The fact that the word “auction” does not appear in Section 16-112(a) in no way precludes approval of the tariff.

⁶ An auction by definition constitutes a “market.” An “auction market” is “[a]n organized market in which prices adjust continuously in respect to shifts in supply and demand” and can be considered “the text-book model for competitive supply.” MIT Dictionary of Modern Economics, at 20 (4th ed. 1992). The contracts resulting from the auction constitute “index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy.” 220 ILCS 5/16-112(a). These contracts are directly “applicable” to the utility’s retail market within the meaning of the statute: Under the tariff, the utility’s actual bundled retail electricity load obligation is divided into discrete segments, and the lowest bidder for a given segment is selected for the contract. Rider CPP at Sheet Nos. 250-54, 257.

⁷ The Commission has stated elsewhere that the market value in Section 16-112 is a retail market value. See *In re Commonwealth Edison Co.*, 2001 Ill. PUC LEXIS 419, at *418 (Ill. Commerce Comm’n Apr. 11, 2001). However, the Commission has also recognized that “the wholesale market ... appears to offer the best source of data currently available.” *Id.* at *419-

For these reasons, the Commission has authority under Article XVI, independent of its authority under Article IX, to approve the procurement tariff.

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

The Attorney General, joined by the Citizens Utility Board and the Cook County State's Attorney's Office, continues to press the argument made in its motion to dismiss these proceedings that the Commission lacks authority to approve Rider CPP on the grounds that the tariff is prohibited by Section 16-103(c) of the Act.⁸ Those arguments were already examined and rejected in the decision denying the motion to dismiss, which decision the Commission affirmed when it denied interlocutory review. Nothing in the post-hearing briefs warrants revisiting the earlier decision that Section 16-103(c) does not preclude the Commission from approving the procurement tariff.

The Attorney General maintains that, until a retail electric service is declared competitive for a customer class, Section 16-103(c) of the Act requires that customers continue to receive "just and reasonable" rates "based on the actual cost of providing service -- and no more," AG Init. Br. at 10, and that these customers cannot be charged "market based rates," *id.* at 9. Moreover, because Section 16-103(c) defines "market based prices" to include "the electric utility's cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process," 220 ILCS 5/16-103(c) (emphasis added), the Attorney General effectively contends that, until a service is declared competitive, customers cannot be charged for electricity obtained through a competitive or other arms-length acquisition process.

At its most fundamental, however, this argument appears to confuse retail and wholesale markets. The auction proposal is a wholesale auction, whereby ComEd will purchase electric energy at wholesale from third party suppliers to serve its retail load. It is not a retail auction. ComEd will be charging its retail customers its actual costs of procuring power at wholesale. ComEd will not be charging its retail customers market-based rates. Thus, the Attorney General would read Section 16-103(c) to mean that a utility like ComEd that owns no generation facilities of its own could not charge customers, prior to a competitive declaration, the costs of wholesale electricity acquired through a competitive process.

It is also worth noting that this position contradicts the consensus conclusion reached in the Commission's "Post 2006" Initiative. Beginning in early 2004, the Commission

20. For purposes of the "market value" measure of the "electric power and energy component" of tariffed rates in Section 16-111(i), which explicitly applies "prior to the time that the provision of such electric power and energy is declared competitive," 220 ILCS 5/16-111(i), it is hereby found that wholesale market value again is the best source of data available.

⁸ The arguments made by the Citizens Utility Board and the Cook County State's Attorney are indistinguishable from the Attorney General's.

conducted a collaborative process to address issues regarding the Act's "post-transition" period commencing January 1, 2007. Those issues included how utilities should procure energy after the transition period ends. All interested stakeholders, including each of the parties now advancing the Section 16-103(c) argument, participated in that process through several open working groups, including one focused specifically on procurement. The declared consensus of all stakeholders in the Procurement Working Group was that "the ideal procurement method" for utilities that had divested their generation assets should, among other criteria, "allow for a competitive procurement approach," "provide for the opportunity for full cost recovery to the utilities if they follow the Commission approved procurement approach" and "result in market-based rates for customers." See The Post 2006 Initiative: Final Staff Report to the Commission, at 6 (Dec. 2, 2004) ("Post 2006 Report") (emphasis added). Thus, the parties relying on Section 16-103(c) now ask the Commission to declare unlawful precisely what the Procurement Working Group recommended to the Commission as consensus items. *Id.*

In any event, as discussed in the decision denying the motion to dismiss, the contentions made regarding Section 16-103(c) do not withstand scrutiny of that provision's text and purpose.

Section 16-103(c) provides in full:

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

220 ILCS 5/16-103(c).

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

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

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

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

This is consistent with the goal of bringing competition to formerly regulated retail markets.

Subsection 16-103(c), however, sets forth a limited exception to this rule for smaller customers. The section begins by declaring that “[n]otwithstanding any other provision of this Article” — meaning notwithstanding the provisions of Sections 16-103(a) and 16-113 described above — “each electric utility shall continue offering to all residential customers and to all small commercial retail customers” bundled electric service indefinitely, even if the service is declared competitive. 220 ILCS 5/16-103(c) (emphasis added). Section 16-103(c) then continues by defining how, when service to these smaller customers becomes “competitive,” the still-ongoing mandatory service obligation shall be priced, providing that pricing shall be at “at rates which reflect recovery of all cost components for providing the service.” Finally, Section 16-103(c) concludes by defining “cost” in this setting, stating that “[f]or those components of the service which have been declared competitive, cost shall be the market based prices.” *Id.* (emphasis added). “Market based prices” as referred to in Section 16-103(c) means either as provided for in Section 16-112, or the utility’s “cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process.” *Id.*

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

Thus, Section 16-103(c) is an exception that applies for limited customer groups when a service is declared competitive, and it defines how a utility shall obtain “recovery of all cost components” at and after that time. Section 16-103(c) says nothing about the situation here, where there is no dispute that the relevant customer classes have not yet been declared competitive. The fact that “cost” must be based on market prices when a service for certain small customer groups is declared competitive does not mean that “cost” cannot ever be based on market prices at any other time. To conclude otherwise would be to effectively rewrite the statute as stating that “cost shall be the market based prices only for any service that has been declared competitive.” But the word only nowhere appears in, and cannot be glossed onto, the provision. Absent an ambiguity, a statute must be interpreted in accordance with the words used by the legislature, and

provisions that do not appear may not be added. See, e.g., *People v. Glisson*, 202 Ill. 2d 499, 504 (2002) (“where a statute is clear and unambiguous, courts cannot read into the statute limitations, exceptions, or other conditions not expressed by the legislature”); *Donahoo v. Bd. of Educ. of School Dist. No. 303*, 413 Ill. 422, 426 (1953). Therefore, Section 16-103(c) is inapposite: it addresses pricing for residential and small commercial customer classes that have been declared competitive. ComEd’s tariff does not purport to apply to such a situation.

Other settled canons of statutory construction require the same result. First, an attempt should be made to avoid absurd results in construing a statute. See, e.g., *Chatham Foot Specialists, P.C. v. Health Care Servs. Corp.*, 2005 Ill. LEXIS 965, * 50 (Sept. 22, 2005) (“We will not interpret a statute so as to achieve an absurd result.”); *People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 280 (2003) (“In construing a statute, we presume that the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience or injustice.”).⁹ It would be illogical to read into the statute a prohibition that until a service is declared competitive, a utility’s recoverable costs cannot be based on competitive, arms-length transactions or market prices that define the utility’s actual costs. Because ComEd no longer owns generation assets, it necessarily must acquire wholesale electricity in the market, at prices subject to FERC regulation. That is why “market-based prices and cost-based rates are not mutually exclusive concepts.” 05-0159 ALJ Decision, at 6; see also *id.* at 7.

Put another way, it is not reasonable to read the statute as requiring a utility to price its mandatory services in the identical manner as it did in 1997 given the substantial changes engendered by the 1997 amendments, including the divestiture of generation facilities. Moreover, if the statute were read as the Attorney General urges, a utility that has no generation assets and necessarily must acquire power in the market would be prohibited from recovering its costs. It is also significant that, contrary to the implication in the Attorney General’s argument, ComEd does not propose to charge a retail “market-based rate” for its utility services based on the potential competitive offerings of other retail suppliers. That indeed would be inappropriate for any customer class before a service is declared “competitive” under Section 16-113. Rather, ComEd seeks to recover its actual costs, which happen here — as often is the case — to be incurred at market-based prices. Thus, the Attorney General’s references to the utility’s “profits” and “excess profits” in connection with Rider CPP, see AG Init. Br. at 11-12, are somewhat perplexing: The tariff proposes cost recovery without markup or profit.

⁹ Such a construction might well raise constitutional concerns, see *supra* at 13 (discussing constitutional law concerning utility cost recovery), and statutes are to be construed so as to avoid obvious constitutional problems. *Eden Retirement Center, Inc. v. Dep’t of Revenue*, 213 Ill. 2d 273, 281 (2004);

Second, a “statute should be evaluated as a whole” and that “each provision should be construed in connection with every other section.” *Abrahamson v. Ill. Dep’t of Prof. Reg.*, 153 Ill.2d 76, 91 (1992). “[I]f possible,” “no term [should be] rendered superfluous or meaningless.” *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 270 (1998). To conclude that, before a service is declared competitive, rates cannot be based on the market value of electric power and energy, would render Section 16-111(i) meaningless. That section explicitly provides that, before a service is declared competitive, the Commission must consider the market value of electricity in setting rates.

Finally, the Attorney General’s argument that Section 16-103(c) proscribes Commission approval of Rider CPP because the tariff allegedly fails to meet the “procedural and substantive standards” of the Act, fails for two reasons. AG Init. Br. at 10. First, this argument concerns the nature of the Commission’s rate review under the provided for under the tariff and goes, not to the Commission’s authority to approve the tariff but, rather, to the tariff’s merits, discussed elsewhere in this Order. Second, Section 16-103(c) does not speak to such issues as what type and scope of review is required by the Act, making it inapposite to the Attorney General’s argument concerning the Commission’s alleged lack of authority, due to Section 16-103(c), to approve the tariff. See *id.* at 10-12.

Therefore, for all these reasons, it is hereby found that nothing in Section 16-103(c) prohibits the recovery of costs based upon arms-length, competitive transactions or “market-based pricing.”

C. Relationship of Illinois and Federal Law and Jurisdiction

The Commission has no jurisdiction over wholesale electricity costs or rates because they occur in interstate commerce and are subject to FERC’s exclusive regulatory authority. See *New York v. FERC*, 535 U.S. 1, 18-19 (2002); *Mississippi Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988); see also *FPC v. So. Cal. Edison Co.*, 376 U.S. 205, 210 (1964). FERC’s authority preempts state regulation of wholesale energy prices. See *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *General Motors Corp. v. ICC*, 143 Ill. 2d 407, 416-17 (1991); *Mississippi Power*, 487 U.S. at 374; see also 16 U.S.C. § 824d(c) (describing FERC rate-filing procedure). Thus, a state may not subject a utility to unlawful “trapped costs” of wholesale power. *Mississippi Power*, 487 U.S. at 372 & n.12; see also *Nantahala*, 476 U.S. at 966, 972-73.

The Attorney General and CCSAO urge that the “*Pike County* exception” to federal preemption applies here, permitting the Commission to review the cost of power procured by ComEd at auction. AG Init. Br. at 18-19; CCSAO Init. Br. at 17-18. There is simply no need, however, to reach the issue of whether *Pike County* could permissibly be applied or, if it could, whether the tariffs under consideration could legally abridge the Commission’s authority. In the instant proceeding the Commission has exercised its traditional jurisdictional authority to review the method by which ComEd

would make its wholesale power acquisitions, recover the resulting costs, and allocate those costs among ComEd's different customer classes. As discussed elsewhere in this Order, the proposal to use competitive procurement process to acquire the electricity needed by Illinois consumers at the lowest possible market price, and to be sold at cost, without markup, has been determined to be consistent with the Public Utility Act's requirement of just and reasonable rates, and is approved. In so doing, there has been no need to run afoul of federal law or to call into question any order of the FERC with respect to wholesale rates.

D. References to Post-2006 Initiative Reports and Results

During these proceedings certain parties sought, in a motion in limine, to exclude all references to the Commission's Post 2006 Initiative, including all of the publicly available Working Group Reports that reflect the consensus items of each Working Group, and reports prepared by the Commission, its Staff, and its Office of General Counsel. That motion was denied. 05-0159 ALJ Decision of August 26, 2005. Only the Cook County State's Attorney continues to press this issue, averring that the Working Group Reports are not reasonably relied upon. CCSAO Init. Br. at 19.

The decision denying the motion in limine concluded: "I can find no instances of . . . inappropriate disclosures" of "specific positions or statements made in workshops or other inappropriate disclosures." 05-0159 ALJ Decision of August 26, 2005. There is no basis for revisiting this discretionary decision. See *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 681 (1st Dist. 2003).

Exclusion of all references to the Working Group Reports would be contrary to the Commission's policy that consensus items from its workshop processes are admissible in related proceedings; would result in an incomplete and misleading record; and would deprive the Commission of valuable information for understanding and analyzing the complex and critically important issues that must be resolved as the State approaches the end of the statutorily mandated transition period, see 220 ILCS 5/16-101 *et seq.* Moreover, the Working Groups presented their findings publicly and each Report was made publicly available on the Commission's website. See Press Release, Ill. Commerce Comm'n, *ICC to Hear Recommendations Regarding Deregulation in Illinois* (Oct. 12, 2004); Press Release, Ill. Commerce Comm'n, *Stakeholders to Provide ICC Policymaking Guidelines for Future Illinois Electricity Restructuring* (Oct. 14, 2004). And the Post 2006 Initiative Preamble in no way precludes disclosure of consensus items.

Finally, the Commission has given neither more nor less weight to the Post 2006 consensus items than those materials deserve. On the one hand, the Commission, its staff, and the numerous participating stakeholders invested a great deal of time and resources into the working group process, which efforts were rewarded when the parties reached consensus on many items and helped establish a framework the Commission could utilize in addressing post-2006 issues. On the other hand, the Commission has before it in these proceedings an extensive record consisting of far more than the post-

2006 Working Group Reports, and in making its determination in these proceedings regarding the proposed tariffs the Commission has considered the entire record.

E. Evidentiary Issues

Evidentiary issues are addressed in other parts of this Order.

F. Other Legal Issues

On August 31, 2005, the Governor of Illinois intervened in these proceedings and filed a letter directed to members of the Commission in which he expressed his view that the Commission must reject the competitive procurement tariff proposed by ComEd.

The Illinois Supreme Court has observed that, in establishing this Commission, “appointed by law and informed by experience,... the Legislature intended to create an office of dignity and great responsibility” that would not be swayed by “fear of popular disfavor.” *State Pub. Util. Comm’n ex rel. City of Springfield v. Springfield Gas & Elec. Co.*, 291 Ill. 209, 216 (1919). The Commission is keenly aware that it was created as an independent body, one capable of balancing the public’s need for efficient, safe and affordable utility service with the need to encourage the investment of private capital in public service, and whose acts have the force and effects of acts of legislature itself. *See Alton Water Co. v. Ill. Commerce Comm’n*, 279 F. 869, 871 (S.D. Ill. 1922); *see also Lunding v. Walker*, 65 Ill. 2d 516, 525-27 (1976).

Indeed, the Commission’s independence is reflected in the broad powers it enjoys as the expert body committed with plenary power over public utility regulation. *See Archer-Daniels-Midland Co. v. Ill. Commerce Comm’n*, 184 Ill. 2d 391, 397 (1998) (“[T]he Commission is entitled to great deference because . . . [of its] expertise in the field of public utilities.”); *Cent. Ill. Pub. Serv. Co. v. Ill. Commerce Comm’n*, 243 Ill. App. 3d 421, 445 (4th Dist. 1993) (“Because of its complexity and need to apply informed judgments, rate design is uniquely a matter for the Commission’s discretion.”); 220 ILCS 5/10-201(d) (requiring reviewing courts to hold Commission findings of fact prima facie true, and Commission rules, regulations, orders, and decisions prima facie reasonable). The Commission exercises a legislative power granted to it by the General Assembly, *see, e.g., Monarch Gas Co. v. ICC*, 261 Ill. App. 3d 94, 100 (5th Dist. 1994), and its decisions are subject to appellate review only by the Courts, *see* 220 ILCS 5/10-201.

The Commission is also conscious of the fact that the Act sets forth extensive procedural requirements to ensure that all parties in a tariff proceeding are afforded due process of law and that decisions are rendered based on the record. *See generally* 220 ILCS 5/9-201, 10-101, 10-103, 10-104, 10-108, and 10-110; *see also Fleming v. Ill. Commerce Comm’n*, 388 Ill. 138, 147 (1944) (“A hearing before the commission is not a partisan hearing with the commission on one side arrayed against the utility on the other. It is an administrative investigation instituted for the purpose of ascertaining and making findings of fact.”); *cf. Pillsbury Co. v. Fed. Trade Comm’n*, 354 F.2d 952, 965

(5th Cir. 1966) (setting aside Federal Trade Commission decision as tainted by congressional interference which precluded “appearance of impartiality”). Nor can a rate request filed by a utility be denied without a hearing to determine whether the rate would be just and reasonable. See *Ill. Bell. Tel. Co. v. Commerce Comm’n ex. rel. City of Edwardsville*, 304 Ill. 357, 360 (1922).

The Commission acknowledges the Governor’s intervention and comments. Our decision, however, must be based on the evidence in the record and the legal principles established by the Act and other relevant law.

IV. SUFFICIENCY OF THE COMPETITIVE MARKET

A. Markets’ Relationship to Auction Process

ComEd

ComEd showed that the Illinois Auction Proposal will bring the benefits of competitive procurement to ComEd’s customers because suppliers will compete to provide a slice of customer requirements at the lowest cost. In doing so, ComEd noted, suppliers will have to assemble portfolios of resources and will assume risks that otherwise would be borne, ultimately, by ComEd’s customers. ComEd also noted that even suppliers who own generation will have to contract for additional generating resources to assemble their portfolios, and will need access to the bilateral market in which they can enter into forward-term deals with generators or other suppliers, as well as access to the spot market to fill in the shape of their customers’ demand curves as needed. ComEd further pointed out that even the value that the generators assign to whatever of their own resources they rely on will be disciplined in the market by the prices of competing resources and the need to have the lowest overall price to win the auction. ComEd explained that while an auction process has distinct advantages even in the absence of a competitive wholesale market, the huge competitive PJM market, of which northern Illinois forms an integral part, will fully meet these needs.

ComEd presented various statistics demonstrating the vastness of the PJM market. For instance, ComEd noted that PJM is the largest integrated, centrally-coordinated dispatch region in North America, and operates the largest market of its kind for electric capacity and energy in the world. ComEd also noted at the outset of this proceeding that PJM operated the grid and administered markets in an area of over 163,000 square miles that included twelve states and the District of Columbia, and served a population of approximately 50 million people. In addition, ComEd observed that with the integration of Dominion Virginia Power into PJM (a thirteenth state), the grid that PJM operates contains over 55,000 miles of high-voltage transmission lines, to which approximately 160,000 megawatts of generating capacity are interconnected, and the PJM market area’s peak load expanded to over 125,000 megawatts. Moreover, ComEd noted, generators and other suppliers from outside PJM can participate in the PJM

market by arranging for delivery to the PJM border. (Naumann Direct (“Dir.”), ComEd Exhibit (“Ex.”) 5.0, pp. 12-13)¹⁰

Staff

Staff contended that any deficiencies in the competitiveness of the retail electricity markets merely add to the urgency and importance of approving viable and appropriate procurement, as consumers who cannot directly take service in a competitive retail market should at least be able to rely upon regulated public utilities to supply them with electric power. Staff claimed that assessing the competitiveness of electricity markets is pertinent to a broad debate about policies toward the electric industry; but not directly pertinent to a debate over how Illinois electric utilities will acquire electric power to sell to their retail customers starting in 2007. Staff noted ComEd’s obligation to provide power and energy to most of its retail customers, and its ability to acquire such power and energy only in the wholesale market. Staff also noted that CUB-CCSAO had not shown why the New Jersey model should be rejected, or how an alternative would somehow circumvent a less-than-competitive wholesale market and produce a better result for ratepayers.

CCG

CCG explained that ComEd’s auction will entail substantial participation by suppliers, and will ensure that ComEd procures power and energy in the most cost-effective manner. CCG noted that such participation will bring the benefits of competition to ComEd’s customers.

Midwest Gen

Midwest Gen noted that the wholesale market is sufficiently competitive and well developed to allow the northern Illinois retail customers to gain the advantages of efficient pricing. Midwest Gen also noted that concerns over exercise of market power and lack of competitiveness in the wholesale market are groundless.

AG

The AG claimed that the proposed auction is likely to produce artificially high prices, based on its assertion that the wholesale electricity markets in northern Illinois are not yet fully functioning or competitive. The AG argued that the extent to which retail customers would benefit from the proposed auction depended on resolving three issues – the level of ownership concentration in northern Illinois, congestion on the transmission system, and price-setting on the vertical supply curve.

CUB

¹⁰ Citations to testimony herein are to the most recent version, included any corrections.

CUB claimed that the wholesale market is not as developed or robust, in Illinois and the United States, as ComEd showed. CUB argued that the market contained many shortcomings and price-influencing uncertainties, alleging that there is generation market concentration and transmission constraints in northern Illinois generation that together will lead to higher prices.

Commission Analysis and Conclusion

The Commission concludes that ComEd must purchase its supply requirements, after the close of the mandatory transition period, from the wholesale markets and thus, those markets, provide are integrally related to the Illinois Auction Proposal. The evidence demonstrates that relationship, and, as discussed further below, shows that the markets in which these resources will be assembled by bidders and purchased by ComEd extends at least through the PJM footprint, are large in both scope and scale, and have the capacity to support a robust auction. The evidence further shows that the auction proposal will allow even customers who do not participate in the retail market to benefit from the competitive market in several ways, most particularly in receiving reliable supply at the lowest possible long-term cost.

B. Other Jurisdictions' Experiences with Competitive Electricity Procurement

ComEd

ComEd explained that the Illinois Auction Proposal is patterned on the successful New Jersey "Basic Generation Service" auctions. ComEd noted that the success in bringing the benefits of competition to New Jersey customers and driving down power and energy prices was a significant factor in developing the Illinois Auction Proposal. ComEd further noted that suppliers' participation in the New Jersey auctions shows their acceptance of the New Jersey model. (Clark Dir., ComEd Ex. 1.0, pp. 16-17)

Dr. Chantale LaCasse, who has acted as auction manager in each of those auctions, testified that auctions have been conducted since 2002 to acquire \$5 billion of electric supply for four New Jersey electric distribution companies – Atlantic City Electric d/b/a Conectiv Power Delivery, Jersey Central Power & Light, Public Service Electric & Gas, and Rockland Electric. (LaCasse Dir., ComEd Ex. 4.0, pp. 5, 16-19). ComEd also noted that beginning in February 2003, two auctions have been held in New Jersey each year: one (the BGS-FP auction, "FP" for fixed-price) for procuring fixed price supply for residential and other smaller customers under staggered 3-year contracts; and the other (the BGS-CIEP auction, CIEP for Commercial and Industrial Pricing) for procuring real time energy price supply for larger commercial and industrial customers using one-year term agreements.

ComEd further explained that the New Jersey experience provides convincing evidence that the PJM market worked in the context of an auction like the Illinois Auction Proposal. ComEd noted that even though areas of New Jersey are constrained as to

transmission imports (which the data for Northern Illinois has shown is not the case), the bidders in the New Jersey auctions have not been limited to companies with local generation portfolios. Rather, ComEd continued, there also have been many other competing suppliers bidding into those auctions – such as owners of peaking generation who use financial products or forward contracts to supplement their own generation, financial players such as Morgan Stanley who do not own any generation in PJM, and other generators outside PJM. (Naumann Dir., ComEd Ex. 5.0, p. 20; Moler Dir., ComEd Ex. 2.0, pp. 4-5)

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

We think that in light of where natural gas prices have gone over the last two years, natural gas, the NYNEX strip is up about 25 percent in the last year and where oil prices have gone they're up about 30 percent. Coal is also up. That these increases, although we certainly always like to report a rate decrease, are certainly very acceptable and show both the efficiency of the auction process... And it also speaks to the decision by the Board to have a rolling three year supply period which modifies any of the one year rate increases or energy increases that we do see.”

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

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

(McNeil Surrebuttal (“Sur.”), ComEd Ex. 18.0, pp. 18-19)

ComEd observed that the price of supply under any procurement process will depend on the cost of the inputs (such as fuel prices), as well as the balance between supply and demand. ComEd explained that if the cost of the inputs increases, the price of supply will increase as well, and no competitive process can insulate customers entirely from those increases. (McNeil Sur., ComEd Ex. 18.0, p. 18) ComEd pointed, however, to the experience over four years with the vertical tranche auction process in New Jersey, which process demonstrates the effectiveness of competition in obtaining the best available prices in the wholesale electric market to meet the needs of customers.

ComEd further noted that the New Jersey experience demonstrates that a competitive auction process that is approved by a regulatory authority and run by an independent

party, such as the process that ComEd is proposing, helps ensure that suppliers affiliated with a utility are not being favored under purchased power agreements. ComEd also observed that the New Jersey process, which has received very favorable reviews, maximizes the transparency of the procurement decision, has bidders competing on equal footing, and involves prices set by the forces of supply and demand. (Moler Dir., ComEd Ex. 2.0, p. 9)

CUB-CCSAO

CUB-CCSAO claimed that other auctions in the PJM region have produced both favorable and unfavorable outcomes for retail customers. (Steinhurst Rebuttal (“Reb.”), CUB-CCSAO Ex. 4.0, p. 29) CUB-CCSAO contended that RFP and auction proceedings in the District of Columbia, Maryland, Maine, and New Jersey had resulted in varying levels of rate increases, ranging from about 50% for the District of Columbia down to 5% in New Jersey. CUB-CCSAO made clear that it was not intending to suggest that the increase resulted from market manipulation or improper market design or execution, and suggested that many factors, including increased fuel costs and power market prices, caused price increases. (Steinhurst Reb., CUB-CCSAO Ex. 4.0, p. 29)

AG

The AG asserted that data from other states that have relied on the wholesale market and used competitive procurement processes to determine retail electricity rates suggests that caution is in order. The AG claimed that in general, these states are in regional wholesale markets more fully developed than Illinois’ and there have been significant rate increases in these states. The AG further asserted that if ComEd’s auction proposal were approved, rates could be substantially higher than retail customers are now paying. (Rose Dir., AG Ex. 1.0, Corrected, p. 4) The AG further claimed that most states have decided to discontinue efforts implementing or considering retail access, but noted that 16 states and the District of Columbia do fully allow such access and two other states allow only for larger customers. (Rose Dir., AG Ex. 1.0, p. 23) Dr. Rose claimed that other states’ experience is relevant. (Rose Reb., AG Ex. 5.0, p. 15)

Dr. Rose also noted certain results from the New Jersey auctions, which he recognized as the auctions most similar to ComEd’s proposal in this docket. He noted that clearing prices have risen (Rose Dir., AG Ex. 1.0, pp. 27-28) He recognized that fuel prices in New Jersey have increased, as they have across the country, but not all states have seen the increase level seen in New Jersey. (Rose Reb., AG Ex. 5.0, p. 17)

ComEd Response

ComEd showed that Dr. Rose’s assertions about other states’ experience with retail access or market reform are irrelevant, as the generation component of retail electric rates will be based on the wholesale market. Moreover, ComEd showed that in any

event, other states' experiences with competitive procurement processes support adoption of the Illinois Auction Proposal. Dr. Hieronymus explained that the increase in auction prices in New Jersey during 2005 stemmed from increases in fuel costs. (Hieronymus Reb., ComEd Ex. 15.0, pp. 32-33)

ComEd also demonstrated that CUB-CCSAO's examples of rate increases in other procurement situations do not suggest that ComEd's proposed auction should be rejected. ComEd noted that CUB-CCSAO appeared to be suggesting that outcomes are unfavorable if resulting rates were higher than rates at a different point in time in a different context. Yet, ComEd also noted, there was no explanation of why this suggestion is relevant, and CUB-CCSAO's witness, Dr. Steinhurst, said that he was not intending to suggest that the increases resulted from market manipulation or improper procurement design or execution. Instead, ComEd further noted, Dr. Steinhurst suggested that many factors, including increased fuel costs and power market prices, caused price increases. (Hogan Sur., ComEd Ex. 25.0, p. 15; Steinhurst Reb., CUB-CCSAO Ex. 4.0, p. 29)

Commission Analysis and Conclusion

Given that the Illinois Auction Proposal is closely patterned on the New Jersey auctions, the Commission finds the New Jersey experience to be particularly instructive. The record contains substantial evidence that such experience has been highly successful. While the Commission is very interested in the charges resulting from retail tariffs, their evidence does not indicate that the New Jersey action proposal resulted in rate increases. Moreover, the testimony concerning other states' experience with restructuring generally, and procurement strategies specifically, is not particularly relevant, as Illinois' statutory framework and ComEd's proposal both differ in significant ways, and Illinois has experienced demonstrable success with restructuring.

C. Retail Market Conditions

ComEd

ComEd presented evidence that retail market conditions are consistent with the conduct of the proposed auction and can benefit all customers. To date, many commercial and industrial end-use customers in ComEd's service territory have directly taken advantage of offerings by competitive retail electric service providers, who purchase their supply in the wholesale markets. Small commercial and industrial customers in ComEd's territory have switched, although not in the same numbers, but like larger customers have also benefited from choice and from restructuring in general. ComEd further showed that while at present, no residential customers in Illinois take service from Retail Electric Suppliers ("RESs"), that is in part because bundled retail rates to such customers have been frozen at a 20% discount from prior rates, and the benefits of restructuring to those customers, including that twenty percent rate reduction, have been considerable. Additionally, ComEd showed that competitive forces are the best tool to ensure that

those costs are held as low as reasonably possible in the future. ComEd explained that the Illinois Auction Proposal – under which ComEd would procure the full requirements to serve these customers through a transparent auction process – would bring the benefits of wholesale markets directly to customers for the first time. (Moler Dir., ComEd Ex. 2.0, pp. 2-3)

ComEd presented testimony as to why the full requirements auction would produce these benefits. It noted that the auction process provides for an intersection point between the wholesale and retail markets. ComEd observed that relatively high transaction costs and relatively low margins may make it infeasible at present for competitive retail providers to make attractive offerings to residential and some smaller non-residential customers. ComEd noted that in part, the lack of activity by marketers attempting to provide service to residential customers is attributable to the twenty percent residential rate reduction, which has made the current rate impractical to beat. ComEd explained that in the proposed auction, these problems would be resolved having sellers in the competitive wholesale market bid directly to supply ComEd with a portion of the power needed to serve those customers. As a result, ComEd further explained, it would in effect become an aggregator of retail load, passing the wholesale cost of the power along to customers, who would be paying prices determined by the wholesale market. ComEd thus would be passing along the benefits of wholesale competition to retail customers. (Moler Dir., ComEd Ex. 2.0, p. 4)

AG

The AG claimed that whether retail customers will benefit depends on the resolution of possible problems concerning market power, costs of operating the transmission system, and price setting along the vertical part of the supply curve. The AG asserted that these possible problems cannot be solved through a new procurement policy for retail customers or new wholesale market design rules, and that policy makers should exercise exceptional care until more is known about such problems. (Rose Dir., AG Ex 1.0, pp. 33-35) The AG also asserted that given the current state of the Illinois regional wholesale market, retail price will likely increase considerably if the proposed auction is held in the near future. (Rose Dir., AG Ex. 1.0, p. 37)

ComEd Response

As discussed below, ComEd demonstrated that there is no market power risk with the Illinois Auction Proposal. ComEd also showed the transmission costs do not pose an impediment to customers' receipt of benefits from the market. In addition, ComEd showed that the AG's concerns about price-setting along the vertical part of the supply curve are unfounded. ComEd explained that not only is such a concern irrelevant to this proceeding – the competitive market exists and from that market retail loads will be served, using an auction or other mechanism – but unfounded: procuring electricity through PJM will not increase marginal costs to the cost of gas-fired generation, and the vertical part of the supply curve consists of old, inefficient peaking units that are very rarely run. (Hieronymus Reb., ComEd Ex. 15.0, pp. 27-28)

Commission Analysis and Conclusion

The Commission concludes that the proposed auction will facilitate all customers benefiting from efficient competition. The record shows that the Proposal will keep ComEd's costs of procuring energy and capacity at a minimum, which will benefit ComEd's customers. The Commission finds the AG's discussion of potential problems concerning market power, transmission system operating costs, and price setting to be unpersuasive and largely based on unsubstantiated speculation about alleged market failures that have not occurred and that the evidence shows are not likely to occur. Moreover, the evidence shows that the asserted problems are largely unrelated to the market that will be relevant to the auction. For example, claims that "northern Illinois markets" are highly concentrated are both based on an unrealistically narrow and obsolete view of the scope of whole markets. Moreover, the record failed to support any conclusion that such concentration can or will result in the exercise of market power or, as noted by Staff, that any potential exercise of market power would be facilitated by the auction. Indeed, the evidence was to the contrary. Moreover, the AG's suggestion that policy makers use care when determining policy is unobjectionable, but does not itself constitute any reason to reject a competitive procurement mechanism that has been shown to be beneficial. In this respect, the record contains extensive evidence concerning the present PJM market and its competitiveness and robustness on which the Commission can reach conclusions. While continuing study of markets should and will no doubt occur, there is no reason to believe that present evidence is insufficient to reach conclusions about the market and its competitiveness. Finally, the Commission finds little merit in AG's assertion that prices will increase because of the auction. The evidence indicates otherwise, and the AG's argument confuses the fact that, especially after an extended rate freeze, prices may increase, but the auction is the best tool for keeping any such increase to as low as reasonably possible.

D. Relevant Product Market

1. Required Products

ComEd

ComEd explained that northern Illinois is an integral part of the PJM market, the largest and most developed wholesale power market in the world, offering transparent transactions and the services of an active market monitor, ensuring that all participants adhere to pro-competitive rules and procedures. (Naumann Dir., ComEd Ex. 5.0, p. 5) ComEd noted that PJM both operates the transmission grid and runs a unified market for wholesale power consisting of one centrally dispatched control area that covers all or parts of thirteen states and the District of Columbia. (See Moler Dir., ComEd Ex. 2.0, pp. 4-5; Naumann Dir., ComEd Ex. 5.0, pp. 12-13) ComEd also noted that the integration of ComEd and American Electric Power into PJM in 2004 means that PJM has an integrated grid from Chicago to the East Coast. (Moler Dir., ComEd Ex. 2.0, p. 4) ComEd observed that generation from this entire very wide area is now available to serve customers in northern Illinois. (Naumann Dir., ComEd Ex. 5.0, p. 5; Moler Dir., ComEd Ex. 2.0, p. 5) ComEd explained that this will make the proposed full

requirements auction far more robust because suppliers will be able to access a far wider range of generating resources in assembling competitive portfolios to bid into the Northern Illinois procurement process. (Moler Dir., ComEd Ex. 2.0, p. 5) In addition, ComEd noted, the elimination in 2004 of the transmission rate barrier between PJM and the Midwest ISO (“MISO”), the adjoining multi-state RTO, means that generation from the MISO area is also available to serve customers in northern Illinois at a single transmission rate. (Moler Dir., ComEd Ex. 2.0, p. 5) ComEd also observed that the deep and liquid power market in PJM makes it easier for suppliers who own no generation to assemble a portfolio for bidding into the auction. (Moler Dir., ComEd Ex. 2.0, p. 5) ComEd noted that whereas ComEd’s peak load is under 23,000 MW, there are approximately 160,000 MW of generation in PJM, and over 1,000 generating units, which have a diverse mix of fuel and operating characteristics. (Naumann Dir., ComEd Ex. 5.0, pp. 13-14)

ComEd showed that suppliers that bid into the auction can access the huge amount of generation available in PJM through the bilateral market either to serve their load obligations under contracts of varying lengths or to act as a financial hedge for these obligations. ComEd explained that such bilateral contracts can supply both the energy and the capacity that suppliers need. ComEd noted that in addition to the bilateral market, PJM operates central energy, capacity, and ancillary services markets: there are two spot markets for energy, a day-ahead market and a real-time market; and suppliers can rely on the capacity market to meet their capacity obligations. (Naumann Dir., ComEd Ex. 5.0, p. 6) ComEd explained further that supplier access to this vast range of resources will ensure that there is robust competition to support an efficient auction.

Thus, ComEd noted that PJM’s markets provide the fundamental requirements bidders need in order to assemble products and bid to supply tranches of ComEd’s load. ComEd explained that PJM’s markets give rise to a variety of energy products (largely financial) that allow suppliers to hedge location risk, and to enter into transactions that are based on the public price data published by PJM. In addition, ComEd noted that PJM has established several trading hubs, one of which rapidly developed in terms of liquidity and depth, and that PJM-administered financial transmission rights (“FTRs”) allow market participants another approach to hedge location risk. ComEd observed that all of these factors – embedded within a transactional accounting system that makes day-to-day management of a supply and demand portfolio relatively easy – are important benefits that the PJM markets provide. ComEd also noted that serving retail customers at fixed prices requires the use of a wide range of risk management products, and the PJM markets give bidders access to the building blocks for those risk management products. (Naumann Dir., ComEd Ex. 5.0, pp. 23-24)

ComEd further explained that bidders do not need to own or control any generation assets in Illinois – or anywhere – in order to participate effectively in the auction, as the PJM market gives generators and other suppliers the tools to effectively participate in the auction regardless of whether they own generation, and regardless of whether any owned resources that they do have are limited to one or two types of generation.

ComEd noted that in each case, they can rely on products available in the PJM forward market, on the centrally dispatched spot market, and available financial hedges to support their bids, and they have the benefit of liquid, competitive forward markets and, by assignment from ComEd, FTRs to hedge basis risks. (Naumann Dir., ComEd Ex. 5.0, pp. 24-25)

ComEd also explained that the “product” ComEd is acquiring includes more than power and energy and the obligation to arrange for various transmission and transmission ancillary services required to serve a tranche of load: when a “financial player” assumes that obligation, it is assuming the obligation to assemble the products and services necessary to meet its obligation and to assume and manage the financial risks associated with that undertaking. As an analogy, ComEd pointed out that a financial player in the electric industry, just like any other portfolio assembler, plays a role roughly analogous to leading “players” in other industries – such as Dell, which owns no capacity for manufacturing computer chips, but it delivers computers at a price that few others can match. ComEd thus noted that efficient and valuable providers of goods and services need not themselves own the means of producing every component of their product or service. (Naumann Dir., ComEd Ex. 5.0, pp. 25-26)

ComEd presented evidence of additional benefits from PJM. First, ComEd noted that PJM’s system for congestion management, known as “locational marginal pricing,” integrates generation and transmission facilities in real time in the most efficient way, thereby minimizing system costs. ComEd explained that as load changes on the PJM system and congestion develops, the prices at various locations on the system change in real time, giving generators the proper economic incentives to which to respond. Thus, ComEd noted, based on bids and system constraints, PJM’s system yields the least cost reliable system dispatch in each hour.

Second, ComEd observed that PJM covers changes in generation availability, virtually automatically, in real time. As an example, ComEd noted that if a generator unexpectedly goes off line, PJM automatically accommodates the problem and redispatches generation so that the load continues to be served.

Third, ComEd pointed to PJM’s very active Market Monitoring Unit (“MMU”), which oversees the operation of the PJM markets in real time, searching for anomalies that would signal potential exercise of market power. ComEd also noted that the MMU searches for actual or potential structural problems or design flaws in PJM rules, standards, or procedures that might inhibit a robust and fully competitive market. ComEd further explained that the MMU is directly accountable both to the PJM Board and to the FERC, and puts out periodic reports on its findings. ComEd thus concluded that this diligent oversight assures that the market’s ability to satisfy demand at the lowest cost is not impeded by gaming of any kind, let alone gaming on the disastrous scale that plagued the California market. (Moler Dir., ComEd Ex. 2.0, pp. 5-6)

Staff

Staff provided testimony concerning the market characteristics in PJM and MISO and regarding concentration of facilities in Illinois. However, Staff witnesses do not claim that northern Illinois is itself a relevant market and acknowledge that generator owners with facilities in other areas of PJM and, provided requirements of the applicable transmission tariffs are met, from MISO, as well as financial bidders can participate in the auction.

Other Parties

Other parties addressed evidence and arguments on issues concerning related products, but addressed those issues largely to specific arguments discussed elsewhere in this Order. Therefore, the Commission addresses those issues, and evidence and arguments offered by ComEd on those issues, elsewhere in this Order.

Commission Analysis and Conclusion

The Commission concludes that PJM has sufficient energy and capacity products available to suppliers to ensure robust competition for an efficient auction. Moreover, in practical terms, such availability is even greater when the MISO products are taken into account, as well.

2. Physical vs. Financial Markets

ComEd

ComEd noted that there are several fundamental features of the PJM energy and capacity markets that ensure a robust auction, one of which is that PJM automatically dispatches the generation connected to the system to serve customer demands reliably every day. ComEd showed that in committing to serve a slice of ComEd's full requirement load, a supplier takes only a financial risk, with no risk to customers: the supplier is committed to sell at a market clearing price, and if the supplier does not schedule physical deliveries of electricity, the supplier will simply owe PJM for the electricity that PJM dispatches. In other words, ComEd noted, financial arrangements for supplying power are independent of the actual physical power that is delivered. ComEd explained that this means that generation throughout PJM is available to suppliers bidding in the auction to serve ComEd's load, even though the suppliers cannot know in advance the system operating conditions in any hour.

ComEd further showed that this arrangement means that the auction clearing price is determined by the lowest auction bids, regardless of where the physical source of power may be in any hour. This is because, ComEd explained, the PJM model dispatches all generation in PJM, including but not in any way limited to the generation located in ComEd's territory, so as to serve all PJM load most efficiently. As an analogy, ComEd noted that through a service like FTD, a customer can have flowers

delivered in Chicago at a set price from a florist in New Jersey or indeed from a website, regardless of from where the actual flowers come. (Naumann Dir., ComEd Ex. 5.0, pp. 9-11)

ComEd also pointed out that one result of this separation between physical and financial transactions is that because a supplier assumes only financial risks, financial entities that own no generation can participate in the auction. ComEd noted that because the universe of entities that are financially strong is far larger than the universe of generation owners, the PJM market will allow the largest field of bidders to participate in the auction. (Schnitzer Dir., ComEd Ex. 6.0, pp. 8-9) ComEd showed that these financial players are not mere middlemen who buy low and sell high. ComEd explained that the essential task of any supplier in the auction – whether or not it owns generation – is to assemble supply portfolios and hedge the financial risks of making a firm commitment to supply an unknown and continuously varying amount of power on a daily basis for one, three or five years. ComEd noted that the product in the auction is a risk-hedging product that determines the value of energy. (Hogan Reb., ComEd Ex. 16.0, p. 18) ComEd observed that financial players with expertise in hedging risks can play a valuable role in the procurement process, and they have done so in the New Jersey auction, where prices would almost surely have been higher without their participation. (Schnitzer Dir., ComEd Ex. 6.0, pp. 9-10) ComEd added that financial players are among the largest electricity sellers in wholesale and retail markets and several of them were successful bidders in the New Jersey BGS auction. (Hieronymus Reb., ComEd Ex. 15.0, pp. 19-20)

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

ComEd stated that these characteristics of the PJM market – together with others, such as the requirement that generators bid into the PJM spot market every day, PJM bid caps for constrained grid locations and the continuous independent market oversight provided by the PJM Market Monitoring Unit – assure that the existing competitive wholesale market is fully capable of supporting an Illinois auction that will produce the best available prices for Illinois customers.

Staff

Staff also recognized that generators can use “non-physical” strategies for participating in the auction, and acknowledged that bidders in the full requirement recognized are committing to the movement of dollars and not energy. (Ogur Dir., Staff Ex. 4.0, pp. 14-18)

Other Parties

Other parties addressed evidence and arguments on issues concerning physical and financial markets, but addressed those issues largely to specific arguments discussed elsewhere in this Order. Therefore, the Commission addresses those issues, and evidence and arguments offered by ComEd on those issues, elsewhere in this Order.

Commission Analysis and Conclusion

The record contains significant evidence that the separation of financial and physical transactions enhances the competitive environment for PJM. Among other things, this division permits a far wider range of entities to participate in the auction, as has been the case with the New Jersey auctions. PJM’s use of LMPs instead of transmission reservations also will help the robustness of the auction, and the record shows the general lack of transmission congestion in northern Illinois should help keep prices near the lowest for northern Illinois customers. In light of the record, the Commission concludes that the existing competitive wholesale market will fully support an Illinois auction that will produce the best available prices for Illinois customers.

3. PJM Capacity Market

ComEd

ComEd noted that the continuity of service to customers cannot be assured without adequate capacity – that is, the ability to call upon sufficient generating resources when needed. Thus, ComEd explained, to assure the reliability of supply to end-use customers, PJM requires that all load-serving entities back up their obligations to serve customers with capacity – what is referred to as the PJM resource adequacy requirement, installed capacity requirement, or reserve requirement. As an example, ComEd noted that in 2005, PJM projects that installed deliverable capacity in PJM will exceed load by a 24 percent margin, which exceeds the 15% PJM reserve requirement. ComEd also noted that PJM also requires that capacity resources be deliverable throughout its region in the event of a contingency, and its deliverability requirements for generators ensure that the transmission system is adequate to deliver the aggregate output of the units to the total load in PJM regardless of the dispatch required. (Naumann Dir., ComEd Ex. 5.0, p. 12) In addition, ComEd stated that a capacity resource is required to be self-scheduled or bid into the day-ahead energy market, and, if it is not selected to run in the day-ahead market and it sells outside PJM, its output is

recallable by PJM during a maximum generation emergency. (Naumann Dir., ComEd Ex. 5.0 p. 19)

ComEd stated that the capacity can be in the form of generation owned by or under contract to the load-serving entity. In addition, ComEd noted that PJM operates a capacity market in which any supplier can secure the necessary capacity. ComEd further noted that the PJM capacity markets, both bilateral and the market operated by PJM, will be available to suppliers in the Illinois auction. ComEd explained that the PJM capacity market further assures robust participation in the auction, including by parties that do not own generation.

CUB-CCSAO

CUB-CCSAO suggested that PJM's proposed Reliability Pricing Model ("RPM") would result in a separate capacity market in northern Illinois in the future. (Fagan Reb., CUB-CCSAO Ex. 3.0, pp. 47-48)

CUB-CCSAO also claimed that the PJM wholesale energy and capacity markets in the Northern Illinois region are not fully competitive. (Fagan Dir., CUB-CCSAO Ex. 1.0, 15; Fagan Reb., CUB-CCSAO Ex. 3.0, p. 2) Additionally, CUB-CCSAO argued that the relative immaturity of the MISO spot energy markets and the insufficient scope of capacity and ancillary service structures in MISO result in a high level of uncertainty concerning the competitiveness of the MISO spot energy markets. (Fagan Dir., CUB-CCSAO Ex. 1.0, p. 4; Fagan Reb., CUB-CCSAO Ex. 3.0, p. 2)

AG

The AG noted that load-serving entities in PJM can meet their capacity requirement by self-supply, bilateral agreements, or participation in PJM capacity credit markets. (Rose Dir., AG Ex. 1.0, pp. 21-22) The AG cited an MMU report and some more HHI and RSI statistics to suggest high concentration in the ComEd capacity market, and claimed that suppliers without available capacity could find participating in the proposed auction very difficult. (Rose Dir., AG Ex. 1.0, pp. 22-23.)

IIEC

IIEC asserted that even if the FERC approves a new capacity construct for PJM that implements centralized forward procurement, such as is currently contemplated by PJM's Reliability Pricing Model, ComEd should be required to make a showing to the Commission that procurement of capacity through that mechanism is a least cost approach. (Dauphinais Reb., IIEC Ex. 5.0, p. 16.)

ComEd Response

ComEd showed that CUB-CCSAO's suggestion that the RPM would result in a capacity market in northern Illinois separate from other areas of PJM was erroneous. ComEd

explained that RPM is instead a new way of managing the capacity market that PJM has proposed to the FERC. ComEd noted that RPM is a model that treats capacity, as well as energy, as a commodity that can be traded and that is priced locationally. ComEd noted that under RPM there could be differences in locational capacity prices that differ based on system congestion, just as there are differences in locational marginal prices in the energy markets now. ComEd observed further, however, that PJM's RPM proposal would not result in separate prices for load connected to the ComEd system, nor would it produce separate markets in which local generation could exercise market power in capacity, or affect the ability of suppliers to bid or the nature of the resources on which they can base that bid. Thus, ComEd noted that CUB-CCSAO's attempt to bootstrap the locational design of RPM into a justification for asserting there would be separate capacity markets is simply wrong. (Naumann Dir., ComEd Ex. 5.0, p. 29; Naumann Sur. ComEd Ex. 23.0, 19.)

ComEd showed that the 2004 State of the Market Report point regarding very high concentration in the northern Illinois capacity market to be irrelevant. ComEd noted that in 2004, the period covered by the report, PJM operated a separate capacity market in northern Illinois, and hence the PJM market monitor evaluated it separately. ComEd further noted, however, that as of June 1, 2005, the northern Illinois capacity market was integrated into the single PJM capacity market, a market that the 2004 State of the Market Report found to be moderately concentrated. ComEd explained that suppliers of load in northern Illinois are able to purchase their capacity literally anywhere in PJM. (Hieronymus Reb., ComEd Ex. 15.0, p. 20)

ComEd also demonstrated the incorrectness of Intervenors' speculation that northern Illinois could become isolated from PJM energy markets and thus should be considered a separate market. As discussed later in this Order, ComEd showed that the relevant market is PJM, not northern Illinois, and that no transmission constraints, either presently or in the future, appear to exist.

ComEd made clear the unsoundness of IIEC's suggestion that ComEd be required to make a showing that use of the RPM was least-cost. Among other things, ComEd noted that before approving any change in the PJM capacity market and accepting a centralized forward procurement such as RPM, the FERC would have to find the mechanism just and reasonable, and if it did, the Commission would have to accept the rates, terms, and conditions as just and reasonable. In addition, ComEd explained that if IIEC is seeking a carve-out from the auction for Rider CPP-H customers, the concept of centralized procurement could be undermined and the reliability benefits to all of PJM would be put at risk. (Naumann Sur., ComEd Ex. 23.0, pp. 32-33)

Commission Analysis and Conclusion

The Commission concludes that PJM operates a regional capacity market from which bidders can acquire required capacity and that will promote participation in the auction. In particular, the record shows that the PJM capacity market can meet the needs of suppliers who do not have either their own capacity or pre-existing bilateral contracts for capacity. Moreover, that market extends throughout the PJM region and contains

numerous unaffiliated buyers and sellers and a volume many times greater than that required to serve ComEd's POLR load. The Commission therefore finds no merit in the AG's comments on potential market power in the so-called ComEd capacity market. The Commission also finds that the RPM will not create a separate capacity market in Illinois – rather, the record shows that RPM is instead a new way of managing the capacity market that PJM has proposed to the FERC. The evidence also makes clear more generally that ComEd will not be isolated from PJM energy markets.

E. Relevant Geographic Market

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

ComEd

ComEd showed that the relevant markets, including for the purpose of analyzing measure market concentration, is the entire PJM regional market, and thus that northern Illinois is an integral part of a large interstate market rather than a distinct market. (Hieronymus Sur., ComEd Ex. 24.0, p. 32) Dr. Hieronymus, a leading expert on market power in the electric industry, presented a study demonstrating that wholesale electric prices in northern Illinois are formed over a broad interstate area. Among other things, Dr. Hieronymus showed that ComEd zonal prices are essentially identical to those in Northern Indiana Public Service, the lower peninsula of Michigan, American Electric Power, Dayton Power & Light, Cinergy and the Ohio portion of First Energy. In addition, Dr. Hieronymus demonstrated that much of the time, ComEd zonal prices are also identical to prices in MidAmerican Energy, Louisville Gas & Electric and Illinois Power. (Hieronymus Reb., ComEd Ex. 15.0, pp. 10-11) Dr. Hieronymus therefore explained that this study demonstrates that northern Illinois is not a separate market and that bidders into the Illinois auction can hedge their obligations with contracts to buy power in this broader area. (Hieronymus Reb., ComEd Ex. 15.0, p. 11)

Dr. Hieronymus also presented a second study to the same effect, based on the U.S. Department of Justice and Federal Trade Commission *Merger Guidelines*. Those guidelines, he noted, define a relevant geographical market by whether a monopolist who controlled all the supply in that region could profitably sustain a small but significant price increase. Dr. Hieronymus' second study showed that northern Illinois does not meet that test. A hypothetical monopolist who owned all the generation in northern Illinois would have to raise its bid prices by about 40 percent to achieve a 5 percent price increase for a year, because replacement generation would come in from outside Illinois. As a result of raising prices, however, the monopolist would lose so much in sales that exercising market power would be unprofitable. As no entity actually owns all the generation in northern Illinois, an actual supplier is still less likely to be able to raise prices profitably, given that it would face competition from inside as well as outside Illinois. (Hieronymus Reb., ComEd Ex. 15.0, pp. 11-12)

CUB-CCSAO

CUB-CCSAO asserted that generation capacity and energy supply has been concentrated in northern Illinois in the past, and that along with the pending expiration of the existing ComEd-Exelon supply contracts, continuing ownership of generation in Northern Illinois could permit suppliers to exercise market power at times, leading to wholesale market prices that do not reflect competitive market outcomes. CUB-CCSAO further asserted that the underlying generation ownership concentration will influence pricing strategies of all auction participants, regardless of the number of such participants. (Fagan Dir., CUB-CCSAO Ex. 1.0, pp. 3-4) CUB-CCSAO also claimed that if generators could exercise market power in the physical spot markets, they could bias the auction results, resulting in supra-competitive prices in the auction, even if market power were not exercised in the auction itself. (Fagan Reb., CUB-CCSAO Ex. 3.0, pp. 4, 29, 33) CUB-CCSAO asserted that there would be problems in the electricity market relevant to northern Illinois. In addition, CUB-CCSAO claimed that further analysis of the market should be performed, and that in the absence of an analysis that would satisfy, it would nevertheless be reasonable to “presume” the existence of market power. (Fagan Reb., CUB-CCSAO Ex. 3.0, pp. 10-11) CUB-CCSAO further claimed that it was not assuming that northern Illinois is operationally a separate energy market. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 13)

CUB-CCSAO also asserted as a separate control zone within PJM, and formerly a separate control area, the “ComEd region” in northern Illinois is an appropriate area for measuring market concentration post-2006, given potential transmission limitations. (Fagan Reb., CUB-CCSAO 3.0, pp. 2-3)

CUB-CCSAO further asserted that Dr. Hieronymus used only average monthly prices to illustrate likely price convergence among Illinois and midwest regional pricing hubs., but he should have used the absolute value of those prices, and the impact of load-weighting those prices, in determining the ultimate price of the hedge. In addition, CUB-CCSAO claimed that Dr. Hieronymus’ averaging of three months of price data was not sufficiently granular to determine “price commonality” among regional hubs affecting the pricing for hedges. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 5)

CUB-CCSAO claimed that Dr. Hieronymus’ two studies were flawed because they used a 2006 time period, covered the entire Eastern Interconnection, and were not designed to allow careful simulation of the potential exercise of market power. (Fagan Reb., CUB-CCSAO Ex. 3.0, pp. 22-23)

CUB-CCSAO noted that prices are formed in the larger PJM area whenever transmission is not binding into ComEd, but also claimed that when transmission does bind into ComEd, price formation is essentially limited to the offers of suppliers within northern Illinois. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 8)

CUB-CCSAO also claimed that a high level of uncertainty concerning the competitiveness of the MISO spot energy markets affects the ability of potential auction participants to secure competitively priced supplies from the MISO region for delivery to the northern Illinois region, thereby reducing competition available for supplying basic utility service in the northern Illinois region. (Fagan Dir., CUB-CCSAO Ex. 1.0, p. 4)

CUB-CCSAO further asserted that the criteria to be used by the FERC in the post-2006 timeframe to determine if an entity has market power are uncertain, noting that current interim rules may change pending the outcome of the FERC's current proceeding on this issue. (Fagan Dir., CUB-CCSAO Ex. 1.0, p. 5)

AG

The AG also raised the question whether generators would exercise market power. The AG suggested that if there were an insufficient number of suppliers or there were inadequate transmission access, it is possible that one or more suppliers could have some degree of control over the wholesale market price, which if used, would lead to higher auction prices. (Rose Dir., AG Ex. 1.0, p. 5) The AG asserted that "there is not yet enough information on which to base a conclusion that electricity markets are sufficiently competitive to support an auction," (Rose Reb., AG Ex. 5.0, p. 7), and urged that an "independent" analysis of the market be performed periodically. (Rose Reb., AG Ex. 5.0, p. 12; Rose Dir., AG Ex. 1.0, p. 4) It also claimed that premature use of a market-based approach would make use of such approaches for the Commission more difficult in the future. (Rose Dir., AG Ex. 1.0, p. 36)

The AG stated that a competitive market is usually defined as a market that has many buyers and sellers, relatively easy entry to the market by sellers, readily available information for buyers about products, and a market price that no buyer or seller has the ability to affect significantly. The AG argued that few markets are perfectly competitive, markets vary in their competitiveness, and significantly imperfect markets can have problems similar to those in imperfectly regulated ones. (Rose Dir., AG Ex. 1.0, p. 6) The AG also claimed that the ability to exercise market power in electricity can be very significant, as electricity markets are relatively concentrated and both supply and demand are inelastic. (Rose Dir., AG Ex. 1.0, pp. 7-8) The AG asserted that demand-response programs can help mitigate market power, but implementation of such programs has been limited so far. (Rose Dir., AG Ex. 1.0, p. 18)

The AG agreed with Dr. Hieronymus that PJM prices have been converging, but claimed that such convergence is not necessarily good for customers in Illinois, as prices in PJM east were generally higher. (Rose Reb., AG Ex. 5.0, pp. 17-19)

ComEd Response

ComEd pointed that there is no evidence of that market power can or will be exercised, or that it could be exercised profitably. Moreover, ComEd pointed out that the arguments made by the AG and CUB-CCSAO are not only inherently speculative, they but based on data which about market structure and concentration that are obsolete and inapplicable to the regional markets that will support the auction. ComEd pointed out that the AG did not present any study of the competitiveness of the wholesale markets of which northern Illinois forms part, and that the data the AG claimed were relevant to this question were outdated, deriving from the period before ComEd was fully integrated into the PJM market. (Hieronymus Sur., ComEd Ex. 24.0, pp. 29-30) ComEd likewise noted that CUB-CCSAO's claims that there would be problems in the

electricity market relevant to northern Illinois were based entirely on speculation and were inconsistent with the demonstrated facts. Moreover, ComEd noted that like the AG, CUB-CCSAO presented no study and relied on outdated data in reaching the conclusion that generators in northern Illinois could exercise market power under certain conditions – conditions that CUB-CCSAO never attempted to show would exist.

ComEd further explained that the false premise underlying the chain of erroneous observations in which both the AG and CUB-CCSAO engage is the tacit assumption that northern Illinois by itself constitutes the wholesale market that an analyst should be concerned with in evaluating the competitiveness of the wholesale market relevant to the proposed ComEd auction. ComEd noted that CUB-CCSAO simply hypothesized a northern Illinois market and then claimed that such market is insufficiently developed to support the auction proposal. (Naumann Reb., ComEd Ex. 14.0, p. 2) ComEd showed that geographic markets for electricity are not determined by the political boundaries of a state, but by the access of consumers to suppliers and the extent to which one supplier can be substituted for another. ComEd noted that even before it was integrated into PJM, the market to which it had access was not limited to northern Illinois, and that now it has access to the huge PJM market and to the adjoining MISO market. ComEd also pointed out that neither CUB-CCSAO nor the AG expressly asserted that northern Illinois is a relevant geographical market for wholesale power. In fact, ComEd noted, in their rebuttal testimonies, the AG expressly conceded that it was making no such assertion, and CUB-CCSAO stated that it was not claiming northern Illinois was a separate market. (Rose Reb., AG Ex. 5.0, p. 13; Fagan Reb., CUB-CCSAO Ex. 3.0, p. 13) In addition, ComEd noted that the issue of whether MISO immaturity or seams will reduce market efficiency has no bearing on this proceeding, which concerns the best way to procure power from the wholesale market, whatever small infirmities it may have. (Hieronymus Sur., ComEd Ex. 24.0, p. 15)

ComEd noted that the AG and CUB-CCSAO did not allege that the auction itself, which is essentially an auction for financial hedges, could be the source of market power. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 31) ComEd explained that this omission is important, because to show market power in the auction, one would have to show that there was market power in the market for financial hedges, not the physical spot markets mentioned by CUB-CCSAO. (Hogan Reb., ComEd Ex. 16.0, p. 19.) ComEd further noted that none of CUB-CCSAO's or the AG's testimony presented any facts or analyses supporting the existence of market power or future potential market power in any market.

ComEd also showed that its use of average prices to demonstrate similarity in prices between northern Illinois and the surrounding market to be appropriate. In contrast, it explained that absolute average real-time price differentials were wholly irrelevant, as suppliers are indifferent to real-time spreads between areas so long as they average out to be about the same. (Hieronymus Sur., ComEd Ex. 24.0, pp. 18-19)

ComEd pointed out that the AG's agreement about price convergence between northern Illinois and the rest of PJM is very strong evidence that the market is larger than Illinois.

Such agreement, ComEd further noted, also undermines CUB-CCSAO's claim about constraints, as prices in northern Illinois would be higher if there were such constraints. (Hieronymus Sur., ComEd Ex. 24.0, p. 25)

Finally, ComEd demonstrated that there is no reason that MISO market will take years to develop, as CUB-CCSAO asserted. ComEd noted that there is considerable experience with RTOs, and that MISO has had a long period of gestation. ComEd also pointed out that even with a somewhat immature MISO and some remaining seams issues, MISO and the integration of other Midwestern utilities into PJM has already enhanced competitiveness in the market. (Hieronymus Reb., ComEd Ex. 15.0, pp. 29-30) Furthermore, ComEd noted that regardless of the state of the MISO market, that state is not a reason to reject ComEd's proposed auction. ComEd also observed that the fact that the joint and common market does not exist does not mean that MISO generation assets are unable to bid in the auction, that a bidder cannot rely on those assets, or that the required transmission is congested. (Naumann Sur., ComEd Ex. 23.0, pp. 31-32)

Commission Analysis and Conclusion

The Commission concludes that northern Illinois is not a separate market for which generation concentration statistics can meaningfully be calculated. The record shows instead that PJM is the relevant market, and that northern Illinois is simply an integral part of that multi-state market. Indeed, the AG and CUB-CCSAO conceded that northern Illinois was not a separate relevant market. Thus, the Commission finds that CUB-CCSAO's and the AG's assertions assuming that generators located in northern Illinois might be able to exercise market power that could adversely affect the auction are without basis and are contrary to the facts. In fact, the record shows that the PJM market in which the proposed auction will take place fits the AG's own definition of a competitive market – namely, that the market has many buyers and sellers, relatively easy entry to the market by sellers, readily available information for buyers about products, and a market price that no buyer or seller has the ability to affect significantly. In these circumstances, the Commission finds no grounds for and thus rejects CUB-CCSAO's and the AG's calls for additional studies.

2. PJM /MISO Seam & Joint Operating Agreement

ComEd

ComEd showed that there is no longer a meaningful constraint or "seam" between PJM and MISO that will adversely affect the proposed auction. ComEd noted that MISO and PJM have taken decisive action under the direction of the FERC to eliminate operational seams issues, and that the North American Electric Reliability Council ("NERC") approved the reliability plans of both RTOs prior to the integration of ComEd. ComEd also noted that regardless of the success of that effort, there is nothing in the Illinois Auction Proposal that would exacerbate any seams issue or make it more likely to be an operational concern. (Naumann Dir., ComEd Ex. 5.0, p. 23: pp. 497-502) ComEd

pointed out that PJM and MISO will implement a joint and common market under which they will essentially operate as one entity. ComEd also pointed out that the RTOs have already taken essential steps towards implementing this market, and that day-to-day operations are now being handled under the PJM/MISO Joint Operating Agreement (the “JOA”). In addition, ComEd showed that the JOA has contributed to unprecedented operational integration between the two RTOs, has assisted in the smooth inter-operation of their markets and their cooperative management of system congestion, and is a major step toward a full joint and common market. (Naumann Reb., ComEd Ex. 14.0, pp. 17-18; Hieronymus Reb., ComEd Ex. 15.0, p. 30) ComEd showed that the practical effect of the JOA is to substantially blur the electrical boundaries between the two RTOs, so that “the boundary ‘seams’ are disappearing.” ComEd noted that the two RTOs have made enormous progress in eliminating the seams, and have substantially eliminated them. (Hogan Sur., ComEd Ex. 25.0, 9: p. 8)

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

In addition, ComEd explained that regardless of the establishment of a joint and common market, before or after January 1, 2007, the Illinois Auction Proposal will not impair the reliability of service to ComEd’s customers, Ameren’s customers, or any other customers, and there is no reason why the parallel auction being in the Ameren operating companies’ service territories should impair reliability of service to their customers.

CUB-CCSAO

CUB-CCSAO asserted that the “seam” between the RTOs posed impediments to transactions occurring between the two, and that this would make markets in both RTOs less competitive. (Fagan Dir., CUB-CCSAO Ex. 1.0, pp. 4:86-91, 24-25) CUB-CCSAO also asserted that there are “day to day operational hurdles the RTOs must overcome to allow efficient transactions between the regions.” (Fagan Dir., CUB-CCSAO Ex. 1.0, p. 22) In addition, CUB-CCSAO claimed that there is no joint and common market between the two RTOs, and that such a market would not be ready until after the auction. (Fagan Dir., CUB-CCSAO Ex. 1.0, pp. 23, 24) CUB-CCSAO also claimed that progress in coordinating operations is not the same as instituting a joint and common market. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 5)

ComEd Response

ComEd showed that CUB-CCSAO's assertions about effects of the "seam" between PJM and MISO are neither relevant nor true. ComEd explained that they would be irrelevant because the PJM market is more than adequate to support the ComEd auction, regardless of the accessibility of the MISO market. (Naumann Reb., ComEd Ex. 14.0, p. 17) In fact, ComEd noted, even if the few remaining seams were more serious, they would not be a reasons for rejecting ComEd's proposed auction. ComEd further explained that CUB-CCSAO's assertions are in fact not true, pointing to the evidence discussed above showing, among other things, that PJM and MISO are implementing a joint and common market under which they will essentially operate as one entity, that day-to-day operations are now being handled under the JOA, and that with the FERC's elimination of the transmission "barrier" between the two RTOs, the cost of transmission will be the same, whether the generator is located in MISO or PJM.

Commission Analysis and Conclusion

The Commission concludes that the so-called "seam" between PJM and MISO will not affect the competitive environment in either RTO. The record shows that such "seam" has diminished, and that the RTOs have already moved far in creating a joint and common market – that they are already operating together under the JOA, with unprecedented cooperation. The RTOs have the same power flows on the grid and same locational marginal prices, and now have a single transmission rate. Furthermore, the record shows that even if there some sort of impediment from a "seam", it would be irrelevant, as PJM market is more than adequate to support the ComEd auction, regardless of the accessibility of the MISO market.

F. Market Characteristics, Including Supplier Concentration

ComEd

ComEd presented evidence that the relevant market encompassed the entire is PJM region, and that there is the in PJM markets are unconcentrated. ComEd noted recent FERC actions should mitigate concerns about market concentration and access in northern Illinois. One of those actions that ComEd cited was the November 18, 2004 FERC Order to eliminate the transmission rate "pancake" between PJM and MISO, which instructed the RTOs to eliminate by December 1, 2004 any charges for new through and out transmission service between them, which charges were seen as a potential barrier to free trade between the two regions. ComEd also noted prior FERC orders that have required MISO and PJM to coordinate their efforts in the operation of their markets and calculation of Available Transmission Capacity (ATC) so as to allow for greater inter-RTO commerce. (Naumann Dir., ComEd Ex. 5.0, pp. 22)

In addition, ComEd explained that given PJM's market structure, it expects broad participation by suppliers. ComEd noted that such expectation is strongly supported by

the data to date – such as the already robust forward market at the northern Illinois trading hub, where over twenty active market participants engage in transactions, including fifteen generation owners and ten purely financial players. (Naumann Dir., ComEd Ex. 5.0, p. 24)

Staff

Staff noted that generation capacity in Illinois is highly concentrated using HHIs, although it did not view the former ComEd northern Illinois control area as a relevant geographic market. Staff also claimed that prices in the eastern portion of PJM are generally higher than those in Illinois, and noted that this might make participation by non-Illinois generators in the auction less profitable. Staff was also concerned that other potential suppliers might not necessarily participate in the auction. Based on its claim that a wholesale market concentration problem exists, Staff suggested that the Illinois Auction volume adjustment and load cap rules be modified and used to address potential exercises of market power. (Sibley Dir., Staff Ex. 2.0, pp. 23, 28-29.)

CUB-CCSAO

CUB-CCSAO asserted that there is generally a high concentration of generation and capacity markets in northern Illinois, and that therefore there is potential for the exercise of market power. CUB-CCSAO based this assertion of concentration on calculations of the HHI statistic adopted in the *Merger Guidelines* published by the U.S. Department of Justice and the Federal Trade Commission. CUB-CCSAO further claimed that including import capacity into northern Illinois does not automatically result in lower HHIs and a “moderately concentrated” market, contrary to ComEd’s contention. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 3) CUB-CCSAO also based its assertions on generation and capacity ownership concentration indices in northern Illinois emanating from MMU reports. (Fagan Dir., CUB-CCSAO Ex. 1.0, pp. 6, 9) Mr. Fagan claimed that market power could be exercised either through physical withholding or economic withholding of capacity from the market. (Fagan Dir., CUB-CCSAO Ex. 1.0, p. 13) CUB-CCSAO also claimed that after 2006, Exelon will be able to sell its power and energy at market-based rates, which may increase the chances of the exercise of market power. (Fagan Dir., CUB-CCSAO Ex. 1.0, pp. 14-15)

CUB-CCSAO further asserted that Dr. Hieronymus’ GE MAPS analyses are flawed, and do not sufficiently explore potential “price commonality” across the Illinois and proximate regions for the post-2006 periods. It also claimed that the methodologies used do not sufficiently examine the potential for exercise of market power in the post-2006 timeframe. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 3)

CUB-CCSAO also claimed that ComEd’s statement that generation supply is not highly concentrated when transmission imports are accounted for is based on an unsupported assumption about import rights allocation to suppliers other than those with generation in northern Illinois. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 8)

AG

Like CUB-CCSAO, the AG claimed that there is a high concentration of generation in northern Illinois based on the HHI for the ComEd control area. (Rose Dir., AG Ex. 1.0, p. 9) The AG also cited the residual supply index (“RSI”), which generates measurements about load service without a market’s largest supplier, to suggest that ComEd’s control area is highly concentrated. (Rose Dir., AG Ex. 1.0, pp. 12-13) The AG claimed that these concentration statistics suggest the need for caution and further analysis. (Rose Dir., AG Ex. 1.0, pp. 13-14)

ComEd Response

The record is clear that, while it may have been in the past, northern Illinois is no longer a relevant geographic market for the analysis of market power and competitive behavior. While CUB-CCSAO and the AG claim that northern Illinois is a relevant market to be studied, there is no evidence that auction competition is or will be limited to that geographic area nor that there are operational or market barriers that would isolate northern Illinois from suppliers elsewhere in the PJM market. Moreover, neither the AG nor CUB-CCSAO present any such study themselves, or any evidence that northern Illinois is a load pocket or an area where other generators and non-physical sellers cannot participate. ComEd noted that because northern Illinois is not a separate market, the concentration statistics that CUB-CCSAO and the AG used were not relevant. ComEd also noted that such statistics, even if they were relevant, were in any event erroneous.

ComEd explained that under the *Merger Guidelines*, the HHI market concentration statistics are calculated only for a relevant geographical market. (Hieronymus Sur., ComEd Ex. 24.0, p. 29) ComEd noted that neither CUB-CCSAO nor the AG expressly asserted that northern Illinois was a relevant geographical market, and on rebuttal the AG conceded that it was making no such claim. (Rose Reb., AG Ex. 5.0, p. 13.) Yet as ComEd noted, both parties continued to rely on HHI calculations that purported to show that northern Illinois is a concentrated market – despite not claiming that it is a market at all, and despite the FERC’s conclusion that the issue of generation market power within PJM should be analyzed on a PJM-wide basis. (Naumann Reb., ComEd Ex. 14.0, p. 8) In addition, ComEd pointed out that CUB-CCSAO used obsolete data for measuring market concentration from the period when ComEd was a separate control area, and before it was subject to regional dispatch. (Naumann Sur., ComEd Ex. 23.0, p. 8)

ComEd also showed that there was, in fact, no material transmission congestion that would impair competitive participation in the auction. Moreover, even if there were concentration of generation in northern Illinois, it would only matter if transmission were constrained into, not out of northern Illinois, and virtually all of the constraints around this area occur in that other direction (to the east). ComEd also noted that because of concerns about concentration, bids are automatically mitigated whenever the area is constrained, that the nuclear generation in northern Illinois is less amenable to

withholding (and thus the end of ComEd's current contract with Exelon Generation LLC will not affect the PJM operations), and that the auction will have highly competitive bidding. (Hieronymus Reb., ComEd Ex. 15.0, pp. 7-8; Naumann Sur., ComEd Ex. 23.0, pp. 18-19) ComEd pointed out that CUB-CCSAO does not positively assert that there are or will be binding transmission constraints, but rather that there is the "potential" for such constraints. ComEd observed that CUB-CCSAO based its speculation on ComEd's history of operating a control area, though it provided no basis for concluding that this history continues to be relevant, even if ComEd's control area boundaries were ever indicative of persistent constraints (which they were not). In addition, ComEd noted that "deriving any conclusion on market concentration from such speculation is contrary to FERC policy, which in the absence of evidence of constraints presumes that the correct market to analyze is the entire RTO." (Naumann Sur., ComEd Ex. 23.0, p. 7)

In addition, ComEd showed that even if one believed that northern Illinois were a relevant geographic market, a proper calculation of HHIs would show that this "market" was only moderately concentrated, rather than highly concentrated, as CUB-CCSAO erroneously claimed. (Hieronymus Reb., ComEd Ex. 15.0, p. 9) ComEd demonstrated moderate concentration even when it made its assumptions about import capacity more conservative. (Hieronymus Sur., ComEd Ex. 24.0, pp. 17-18) Moreover, as noted above, ComEd presented two studies that showed that northern Illinois is not the relevant market. In particular, ComEd's second study used the test for a relevant geographic market defined in the DOJ/FTC *Merger Guidelines* and showed that even a monopolist who owned *all* the generation in northern Illinois could not profitably raise prices. Additionally, ComEd explained that GE MAPS is a model that is particularly well suited for markets based on LMPs, and that the GE MAPS database was specially adapted for ComEd's use in this docket. (Hieronymus Sur., ComEd Ex. 24.0, p. 15)

ComEd noted that in light of these studies and other data, Staff's claim that generation capacity in Illinois is concentrated is incorrect. ComEd further noted that Staff's suggested manipulation of auction rules to control the wholesale market is misguided and provides no basis for abandoning sound principles of auction theory and practice that underlie the procedures and rules recommended by Dr. LaCasse.

ComEd observed that a fundamental feature of the Illinois Auction is that suppliers do not bid to provide wholesale market products, as Staff's views suggest, but rather to compete to supply a wide range of integrated risk management services along with a portfolio of other products – referred to as a "full requirements" product. ComEd explained that the product in the auction, for which suppliers compete, and the wholesale products in whatever relevant market Staff addresses are two entirely different things. Thus, ComEd noted, even if there were concentration in the wholesale product market, such concentration would not show whether there is concentration in the market for the auction product. ComEd explained that there are many potential suppliers for the risk management auction product, some of whom own generation capacity and many of whom do not, making Staff's contentions about concentration irrelevant. (LaCasse Reb., ComEd Ex. 11.0, pp. 23-24, 33-37)

ComEd further pointed out that even if there were a concentration issue in the broad PJM markets, auction rules could not “fix” it as Staff suggests. ComEd explained that a competitive safeguard in an auction for full requirements risk management services, such as the load cap or volume adjustment rule, would not change the realities in the wholesale markets for energy and capacity. (LaCasse Reb., ComEd Ex. 11.0, pp. 36-37). ComEd noted that misusing volume adjustment rules would not solve any perceived problems arising from concentration of capacity. (LaCasse Reb., ComEd Ex. 11.0, pp. 39-41) ComEd showed that efforts to do so would be completely ineffective, and would only expose customers to volatile spot market prices for supply services that ended up being withdrawn from the auction for inappropriate reasons having nothing to do with the competitiveness of the competition for the full requirements auction product.

Commission Analysis and Conclusion

The Commission finds CUB-CCSAO’s and the AG’s assertions regarding the possible effects on the auction of concentration of physical generation in northern Illinois to be unsubstantiated and contrary to the evidence establishing that bidders will operate in the PJM regional market and will not be limited by physical generation location. Their assertions depend in large part on HHI calculations that are meaningful only in a relevant geographic market. The record shows that northern Illinois does not constitute such a market. ComEd presented two studies showing that the relevant geographic market is the interstate PJM market, of which northern Illinois is just one part. Moreover, even CUB-CCSAO and the AG disclaimed the concept of a separate northern Illinois market. Accordingly, the Commission rejects the AG’s calls for caution and further analysis.

The absence of supplier concentration in the relevant regional market also makes clear that further revisions to the auction rules are not necessary. Moreover, the Commission finds Staff’s suggestions for further revisions to the auction rules to be inappropriate and at odds with the record. The Commission therefore rejects such suggestions.

G. Transmission Constraints

ComEd

ComEd presented evidence from professional witnesses, including qualified professional engineers and experienced system operators that there are no transmission constraints that currently exist or that are likely to exist in the future, that would prevent generation from outside northern Illinois from competing with Illinois generation in the auction. Dr. Hieronymus presented two studies demonstrating this point. The first study showed that prices in the ComEd zone are essentially identical to prices in a wide interstate region, thereby demonstrating that transmission constraints are not separating northern Illinois from the broader PJM market. The second study showed that a monopolist who owned all the generation in northern Illinois could not profitably raise prices because so much replacement generation would come in from outside Illinois. ComEd explained that because Northern Illinois exports low cost

energy for which there is no demand in northern Illinois, area generators would first have to forego export sales (that create counterflows on the transmission system) before even beginning to use up the substantial import capacity into northern Illinois. In addition, Dr. Hieronymus presented data directly demonstrating that there were no significant transmission constraints to importing power into northern Illinois. Moreover, ComEd presented testimony of actual operating conditions that confirmed that there are no such constraints. In particular, PJM data on limiting transmission elements in the area around northern Illinois show no significant constraint into northern Illinois, and this is confirmed by transmission loading relief data. (Hieronymus Reb., ComEd Ex. 15.0, pp. 14-16)

In order to make sure that the Commission had the full view of transmission conditions prevailing after the full integration of both ComEd and utilities to the east (e.g., AEP) into PJM. ComEd presented updated data showing that binding transmission constraints that would isolate northern Illinois simply have not happened through August 16, 2005. This data captures the summer season of 2005. (Naumann Sur., ComEd Ex. 23.0, p. 12) ComEd also noted that the data clearly show that there will not be persistent or significant constraints in northern Illinois: indeed, the data show that, in most hours, the Northern Illinois zone, largely because of a lack of transmission constraints, enjoys among the lowest LMPs in PJM, and during some hours, LMPs in Northern Illinois are materially lower than LMPs in eastern areas of PJM. (Naumann Dir., ComEd Ex. 5.0, p. 16)

ComEd also showed that the PJM markets have efficient means of dealing with transmission congestion that will not freeze bidders with remove generation out of the auction. PJM dispatches all generation on an integrated basis consistent with system operation; this is called “security-constrained economic dispatch,” meaning that PJM directs the generators to operate in the very best (*i.e.*, most economic) way possible consistent with serving all the load. ComEd explained that any local transmission limits are internalized by the market, which adjusts the dispatch to make sure that all the load is served while at the same time there is no violation of constraints on the transmission system. In other words, the PJM computer model yields the most economic dispatch of generation that will make maximum use of the transmission system in every hour. (Naumann Dir., ComEd Ex. 5.0, p. 6) Unlike the prior regime, where flows were transactions that were routinely limited as a means of addressing congestion, PJM handles local congestion with market pricing and, moreover, allows a variety of hedges (e.g., FTRs) to be used by sellers and buyers to avoid or minimize even those costs.

CUB-CCSAO

CUB-CCSAO argued that it was appropriate to use northern Illinois as a market in which to measure market concentration because there might be times when transmission constraints would prevent generation outside northern Illinois from competing with Illinois generation. (Fagan Dir., CUB-CCSAO Ex. 1.0, p. 4; Fagan Reb., CUB-CCSAO Ex. 3.0, p. 10) In response to ComEd’s evidence to the contrary, CUB-CCSAO asserted that actual data and 2006 projected data were insufficient to prove that

transmission constraints would not develop in the period 2007-2011, and claimed that there was, therefore, no market power analysis showing the proposed procurement will take place in a workably competitive regional market. (Fagan Reb., CUB-CCSAO Ex. 3.0, pp. 12, 20) CUB-CCSAO further asserted that such period was different from current conditions because it would come after the expiration of ComEd's contracts with Exelon, and physical conditions change over time. (Fagan Reb., CUB-CCSAO Ex. 3.0, pp. 18-19) CUB-CCSAO therefore suggested that the 2007-2011 period be studied, using strategic bidding behavior as the basis. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 12) CUB-CCSAO further claimed that ComEd provided no evidence that northern Illinois generators would have "strong incentives" to bid competitively when transmission may bind. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 9)

AG

The AG presented comments and statistics about transmission expansion nationally, noting that expansion projects in the near term tend to be more local than regional in focus. The AG also asserted that if this trend continues, it could be a serious challenge to the development of competitive wholesale markets. The AG acknowledged that PJM, MISO, and other RTOs have planning processes to address this situation, but claimed it would take many years to remove the transmission constraints and to reach a point where the transmission system could provide the open access need to support a more developed wholesale market. (Rose Dir., AG Ex. 1.0, pp. 15-17)

ComEd Response

ComEd noted that CUB-CCSAO witnesses, in particular, repeatedly assumed, without evidence, that northern Illinois may or will become constrained away from the rest of the Eastern Interconnection, and, hence, at least for some unquantified amount of time, northern Illinois will become a separate market. Neither CUB-CCSAO nor the AG provided any evidence whatsoever that there will be (or that there is even any reasonable likelihood that there will be) a single transmission constraint into northern Illinois that will impact the auction in any way, let alone that there will be constraints persistent and significant enough to turn northern Illinois into a "load pocket" that non-local generation cannot reach.

With respect to CUB-CCSAO's speculation that transmission constraints might develop in the period 2007-2011, ComEd observed that both the FERC and the antitrust agencies commonly use current and near term forward conditions in assessing the potential for the exercise of market power on a going-forward basis. (Hieronymus Sur., ComEd Ex. 24.0, p. 7) Moreover, ComEd showed that conjectures about future conditions on the system are less probative than the PJM planning process. ComEd explained that if the current condition of the transmission system is adequate – as at least the AG agreed it is (Rose Dir., AG Ex. 1.0, p. 15; Tr. 665) – the entire purpose of the PJM Regional Transmission Expansion Plan is to assure its adequacy on an ongoing basis by continually performing studies to identify where potential constraints can develop on the system, which then become the basis for planning system

reinforcements. Thus, ComEd explained, rather than perform a one-time analysis of the future, as CUB-CCSAO recommended, PJM continually performs studies to ensure that the system remains reliable and can support market operations by allowing generation resources to be deliverable throughout PJM. ComEd also refuted CUB-CCSAO's conjecture that future catastrophic events could cause transmission constraints affecting the auction, as such events are not only in fact highly improbable and rare, but that bidders will not pay more for hedges to cover them, and thus will not raise their prices. They do not constitute a reason to reject the auction. (Naumann Sur., ComEd Ex. 23.0, pp. 14-16)

ComEd further observed that the insubstantiality of CUB-CCSAO's arguments about transmission constraints was clearly revealed by their failure even to attempt to distinguish between significant and systematic transmission constraints that would actually separate northern Illinois from the larger PJM market, creating a load pocket – which the evidence showed have not and will not occur – and the occasional temporary divergence of locational marginal prices on the system caused by temporary congestion that has no effect whatever on the market. ComEd noted that CUB-CCSAO claimed that a binding constraint exists whenever generation is redispatched (Laffer, Tr. 364), but occasional local redispatch does not result in separation of markets, has nothing to do with bidding in the proposed auction (and therefore could not skew or distort bidding therein), and certainly does not permit the exercise of market power. ComEd explained that the hourly price separations among different nodes on the system and accompanying local generation dispatch show the normal efficient operation of a complex market and facilitate, rather than inhibit, efficient allocation of resources. (Naumann Sur., ComEd Ex. 23.0, p. 5) ComEd also noted that CUB-CCSAO's implication that locational marginal pricing equates to local market power is inconsistent with their acknowledgement that they have “no major concern with the general design of the PJM LMP spot markets.” (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 16)

ComEd also showed that CUB-CCSAO's claims that there is insufficient proof that transmission constraints will not isolate northern Illinois from the rest of the Eastern Interconnection at some time, and that therefore it is reasonable to presume market power in northern Illinois, have no evidentiary support. In fact, ComEd noted that there is considerable evidence that northern Illinois is and will remain an integrated part of the competitive regional PJM market. (Hieronymus Sur., ComEd Ex. 24.0, 1)

ComEd also noted that CUB-CCSAO's presumption that the ability to exercise market power will be present during 2007-2011 is unreasonable. ComEd explained that there is no basis for this presumption that an analysis would show that the current state of the market, wherein northern Illinois is a net exporter, would so radically change in a short time that a presumption that the market will become a load pocket is warranted. (Hieronymus Sur., ComEd Ex. 24.0, p. 7) ComEd also showed that any study of 2007-2011 showing temporary market aberrations, as CUB-CCSAO hypothesized, would be of little relevance to the auction because what will be important to the bidders in the 2006 auction is the forward prices in 2006, which will be based on general expectations of future market trends. (Hieronymus Sur., ComEd Ex. 24.0, p. 4)

Finally, ComEd noted that claims that even during hypothetical and unsupported periods during when transmission constraints are conjectured to isolate northern Illinois, high concentration of local generation ownership will give market participants, apparently including ComEd's affiliate Exelon Generation, the ability to implement "nimble strategies of exercising market power" that would not be subject to sanctions or mitigation by PJM, would not be subject to FERC sanctions or intervention, and would not be subject to civil penalty under antitrust laws. ComEd explained that these assertions are not only wholly unsupported, they are contrary to the facts and empirical evidence in the record, contrary to PJM market rules and FERC regulations, and sometimes defy logic. (Hieronymus Sur. ComEd Ex. 24.0, p. 3) ComEd made clear that there are no binding transmission constraints "that would make northern Illinois a load pocket, that would limit the ability of suppliers relying on PJM resources outside ComEd to compete fairly in the auction, or that would permit the exercise of market power by bidders controlling local generation." (Naumann Sur., ComEd Ex. 23.0, p. 11) ComEd also provided testimony explaining why market oversight and rules would address concentration issues, even if a load pocket were to occur.

Commission Analysis and Conclusion

The record clearly establishes that northern Illinois does not experience binding transmission constraints that would cause it to separate from the rest of PJM and become a "load pocket" or that would prevent competition in the auction by parties not owning local generation. ComEd presented multiple studies and other data showing that no such constraints exist presently, or are expected to exist in coming years. ComEd also presented unrefuted evidence that the purpose of the RTO planning process is to anticipate and respond to developing transmission needs, and that this Commission's record of approving transmission construction projects is excellent. By contrast, the assertions of the AG and CUB-CCSAO about potential transmission constraints are not only entirely speculative and contrary to the most recent data available, but also do not focus on the fact that most "constraints" will impede neither the market nor competition in the auction. The Commission therefore concludes that there is no reason to believe that transmission constraints affecting Illinois, or the PJM markets in general, will impede the Illinois Auction Proposal.

H. Limitations on Generator Entry

ComEd

ComEd presented evidence that there are no significant limitations on generator entry. ComEd explained further that in the near term (*i.e.*, before new generation can be built), entry is not needed to discipline prices, as there is substantial excess capacity in the relevant market. ComEd showed that in the longer term, not only do the existing transmission system and operating rules permit efficient generator entry, but that historically substantial generator entry has occurred in response to demand. (Naumann Reb., ComEd Ex. 14.0, p. 15) ComEd noted that since 1999, in northern Illinois alone, more than 8,000 MW of new generation, nearly all owned by independent generators,

has been interconnected to ComEd's system. (Naumann Reb., ComEd Ex. 14.0, p. 16) Moreover, ComEd explained that because the PJM markets have visible locational prices, the increase in prices for energy and capacity as supplies tighten signals the need for new generation even better than in the past. ComEd also noted that the standardized interconnection processes and terms in the PJM transmission tariff also facilitate entry.

AG

The AG asserted that ease of entry of new competitors is one measure of how competitive a market is, and that the entry of new generation may be difficult because of the long lead times required. (Rose Dir., AG Ex. 1.0, p. 14-15)

ComEd Response

ComEd agreed with the AG that ease of entry of new competitors is one measure of how competitive a market is, but presented evidence contesting the AG's assertion that long lead times for certain types of generation make the entry of new generation difficult. ComEd also noted that the AG could not square claims concerning barriers to generator entry with the history of entry in northern Illinois and that, in northern Illinois in particular, generation construction has been rapid and robust. ComEd also noted again that the AG's argument incorrectly assumes that northern Illinois is a separate market, and the new generation in other portions of PJM would also be available to supply auction load.

Commission Analysis and Conclusion

The Commission concludes that there are no significant limitations on entry of new generators in the PJM market, including northern Illinois. ComEd presented substantial evidence that in the short term, this issue is essentially irrelevant, given excess capacity. Likewise, the record shows that in the long term, generator entry is largely unimpeded and in fact rapid. The Commission notes that this capacity for entry is clear from recent experience – in particular, the entry of more than 8,000 MW of new generation.

I. Relationship to Service to Small Commercial and Residential Customers

ComEd

As discussed above, ComEd noted that to date that many non-residential customers have directly benefited from competitive retail service. ComEd also noted, however, that all customers, including residential customers, have received great benefits from the transition to competition, including a 20 percent rate reduction for residential customers and nearly a decade of frozen bundled rates. This is true regardless of the fact that residential customers have not yet received direct offers from competitive providers, who, ComEd explained, have not seen a profit in aggregating small accounts

at the low prevailing prices. (Moler Dir., ComEd Ex. 2.0, pp. 3-4) This, however, is a reason to approve, not reject competitive procurement.

ComEd demonstrated to this end that under the Illinois Auction Proposal, ComEd would in effect aggregate the demands of small customers and offer them to wholesale suppliers through a transparent auction process. ComEd observed that acquiring new supply through any means whatever is unlikely to leave the resulting rates at their current artificial – reduced and frozen – level. (Moler Dir., ComEd Ex. 2.0, pp. 3-4) ComEd showed, moreover, that accessing the competitive market through the proposed auction format is intended to result in ComEd's incurring the lowest cost available to serve its customers' needs, and in doing so it will bring the benefits of wholesale competitive markets to small customers. ComEd also explained that aligning its rates with actual wholesale market prices will also make small customers more attractive to competitive suppliers, giving these customers direct access to retail competition. In addition, ComEd noted that the auction format is a straightforward, open and transparent mechanism for establishing the market value required under Article XVI of the Act.

CUB-CCSAO

CUB-CCSAO asserted that the general experience in many states is that residential and small commercial customers have limited alternatives even when default service rates are not frozen or incorporate adders. CUB-CCSAO also claimed that it had greater concern about the "smallest and most vulnerable customers," whom CUB-CCSAO further asserted were least likely to be marketed to by RESs. (Steinhurst Reb., CUB-CCSAO Ex. 4.0, p. 45)

AG

The AG claimed that many retail markets have been relatively inactive, especially with respect to small residential customers. The AG contended that multiple distribution companies have had either none or fewer than 1% of their customers choose alternative suppliers. (Rose Dir., AG Ex. 1.0, p. 25)

Commission Analysis and Conclusion

The Commission finds that small commercial and residential customers already have benefited from the transition to competition – especially through the 20% rate reduction and freeze – and that the Illinois Auction Proposal will benefit such customers more, as they gain direct access to competitive markets, regardless of whether they participate directly and individually in retail competition. The Commission recognizes that rate levels are of great importance, to customers and utilities, but the record, as noted elsewhere, does not support the claim that properly designed competitive procurement mechanisms increase costs. Indeed, it shows that the Illinois Auction Proposal will minimize the increases, including for residential and small commercial customers, by allowing them to enjoy the lowest costs that their aggregated demand can garner in the market.

J. Market Rules and Monitoring

1. PJM Market Rules

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

Mandatory Day-Ahead Bidding

ComEd

ComEd explained that increasing prices through the exercise of market power inherently involves withholding supply, and that the profitability of the strategy, if any, arises from receiving such high prices on the generation that is not withheld that they more than make up for not being paid for the generation that is withheld. (Hieronymus Reb. ComEd Ex. 15.0, p. 18) ComEd showed, however, that several circumstances ensure that northern Illinois generators cannot withhold their supply from the PJM market.

ComEd noted that the PJM market rules require that every generator that qualifies as a capacity resource – which includes nearly all generation in northern Illinois – bid into the PJM day-ahead market every day unless the generation is on an authorized scheduled outage or a legitimate forced outage. ComEd also noted that the PJM Market Monitor may investigate whether a forced outage was legitimate. (Naumann Dir., ComEd Ex. 5.0, p. 21) Thus, ComEd explained, physically withholding generation violates PJM market rules and is closely watched by the Market Monitor.

ComEd also showed the impracticality of economically withholding generation (by bidding at excessively high prices) in northern Illinois. ComEd noted that Dr. Hieronymus' study described above demonstrated that even an entity that owned *all* of the generation in northern Illinois could not profitably engage in that strategy, let alone any actual generation owner.

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

ComEd also pointed out that the largest generation owner in northern Illinois is Exelon Generation and its generation is primarily nuclear. The FERC has repeatedly recognized that “the operational characteristics of, and regulatory scrutiny over, nuclear units virtually eliminate the possibility of withholding output to drive up prices.” *Exelon Corporation and Public Service Enterprise Corporation, Inc.*, 112 FERC ¶ 61,011 (2005); *USGen New England, Inc.*, 109 FERC ¶ 61,291 (2001); *Commonwealth Edison Co.*, 91 FERC ¶ 61,036 (2000). ComEd noted that nuclear units are in fact price-takers, bid into the market around the clock. As a result, ComEd explained, the largest northern Illinois generator could not engage in either physical or economic withholding. (Hieronymus Sur., ComEd Ex. 24.0, p. 13)

CUB-CCSAO

CUB-CCSAO suggested that a generator could employ “nimble strategies” to take advantage of temporary binding constraints at peak hours. (Fagan Reb., CUB-CCSAO Ex. 3.0, pp. 23-24). CUB-CCSAO did not, however, provide details about what these strategies were or how they would be effected.

AG

The AG asserted that there are insufficient safeguards in place to prevent the exercise of market power and inadequate market monitoring mechanisms in place to warrant reliance on the wholesale market to determine retail prices. (Rose Dir., AG Ex. 1.0, pp. 3-4)

ComEd Response

ComEd challenged CUB-CCSAO’s assertion that a generator could employ “nimble strategies” taking advantage of temporary binding constraints at peak hours. ComEd noted that the evidence does not show that such constraints will exist. Moreover, ComEd noted that even assuming that they will exist, generators could not by being “nimble,” evade both the competitive constraints imposed by the market rules, including the requirement to bid into the day-ahead PJM market at the same price for all 24 hours of the day, and the numerous preventive and enforcement mechanisms. (Hieronymus Sur., ComEd Ex. 24.0, p. 13)

Commission Analysis and Conclusion

The Commission concludes that there is no evidence of any credible risk that supply will be withheld, either physically or economically, from the PJM market. The record shows that PJM’s mandatory day-ahead bidding rules, along with monitoring and market forces (some of which are specific to northern Illinois), effectively prevent such withholding.

Moreover, there is no evidence that the existence of withholding strategies, even were they to be possible and were they to occur, is a reason to disapprove the auction; indeed, a well-designed auction, as noted below, may be less susceptible to manipulation than other procurement mechanisms.

The Bid Mitigation Rule

ComEd

ComEd noted that if the circumstances that CUB-CCSAO and the AG hypothesize were to occur – that is, if transmission constraints were to temporarily isolate northern Illinois from the rest of PJM and leave it with fewer than three pivotal suppliers – then PJM’s market mitigation rules would be triggered automatically. ComEd explained that under such circumstances, the generators in the constrained area would not be allowed to bid their generation at market rates but would be required to reduce their bids to their marginal cost plus 10%. (Hieronymus Reb., ComEd Ex. 15.0, p. 13) ComEd pointed out that the FERC has agreed that “PJM’s current offer capping rules work effectively to mitigate market power in a manner that is fair to most generating units.” (Naumann Sur., ComEd x. 14.0, p. 23, *citing* PJM Interconnection, LLC, 107 FERC ¶ 61,112 at P 26 (2004))

CUB-CCSAO

CUB-CCSAO asserted that a price of marginal cost plus 10% could still allow exercise of market power because bids would exceed barebones short-run variable costs. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 4; Fagan Dir., CUB-CCSAO Ex. 1.0, p. 32) CUB-CCSAO also argued that the bid mitigation rule would not apply when transmission constraints were binding, but there is an exception in place for those constraints. (Fagan Reb., CUB-CCSAO Ex. 3.0, p. 36) CUB-CCSAO thus claimed that PJM’s and MISO’s mitigation rules are insufficient to address potential use of market power and likely price increases. (Fagan Dir., CUB-CCSAO Ex. 1.0, p. 5) CUB-CCSAO also asserted that the PJM 10% adder should be reduced so that values are closer to 100% of marginal costs. (Fagan Dir., CUB-CCSAO Ex. 1.0, p. 35)

CUB-CCSAO further asserted that the MMU’s mitigation authority is threatened by recent FERC questioning of PJM’s use of a “no three pivotal suppliers” test when deciding whether to implement local market power mitigation when transmission constraints bind. (Fagan Reb., CUB-CCSAO Ex. 3.0, pp. 4-5)

AG

The AG claimed that PJM’s bid mitigation does not adequately protect customers because “the capped units receive the higher of the market price or their offer price cap.” (Rose Dir., AG Ex. 1.0, p. 20) The AG also claimed that mitigation cannot be protecting customers adequately because its use has been declining. (Rose Dir., AG Ex. 1.0, p. 20)

ComEd Response

ComEd refuted CUB-CCSAO’s assertion that a price of marginal cost plus 10% could still allow the profitable exercise of market power. Using the PJM *State of the Market*

Report, ComEd explained that this constrained price results in a lower cost-price ratio than is typical when no constraints are present. (Hieronymus Sur., ComEd Ex. 24.0, p. 13) ComEd noted further that if prices were always limited to marginal cost, the marginal seller could never recover any of its fixed costs, and such an approach to market bidding would not be sustainable. (Hieronymus Reb., ComEd Ex. 15.0, p. 25)

ComEd also demonstrated the inapplicability of the exceptions to the transmission constraints noted by CUB-CCSAO, and thus that these situations pose no risk to the market. ComEd explained that the exceptions apply only where the FERC has determined that no generator could exercise market power. (Naumann Sur., ComEd Ex. 23.0, pp. 24-26) In addition, ComEd noted that the PJM Market Monitoring Unit's 2004 State of the Market Report explained in detail that the mitigation mechanism is important but that it is seldom necessary to apply the offer caps, and that they have little direct effect on net revenues. (Hogan Reb., ComEd Ex. 16.0, pp. 21-22) ComEd also showed that CUB-CCSAO's concerns about the FERC's evaluation of the No Three Pivotal Supplier Test are unfounded. ComEd explained that even if the FERC modifies this test, it will not weaken the MMU's ability to impose mitigation on suppliers behind transmission constraints. (Naumann Sur., ComEd Ex. 23.0, pp. 26-27)

ComEd refuted the AG's assertions about bid mitigation's protection of customers, and noted that by their rebuttal testimony, the AG and CUB-CCSAO had dropped any assertion that the rules for bid mitigation or the frequency with which the rules apply shows that PJM fails to protect consumers in dealing with generators that attempt to exercise market power. ComEd noted that the AG misunderstands the function of the offer cap. ComEd explained that market prices in PJM are correctly set by the offers of marginal units: if the capped unit is the marginal unit, its mitigated bid defines the market price; if another unit is the marginal unit, that unit's bid defines the market price. ComEd thus noted that the offer cap simply prevents the mitigated unit from exploiting its location in relation to a constraint. (Hogan Reb., ComEd Ex. 16.0, pp. 3-4, 23-24)

ComEd also refuted the AG's assertion about the decline in the use of mitigation. ComEd explained that such declining use simply indicates a declining number of situations in which transmission constraints arise that require bids to be mitigated. (Hogan Reb., ComEd Ex. 16.0, pp. 24-25)

Commission Analysis and Conclusion

The Commission finds that PJM's bid mitigation rules effectively and fairly limit the possible and profitable exercise of market power. The evidence, in particular, shows that CUB-CCSAO's and the AG's concerns about these rules are without merit and that these rules will both be applicable to bidders. The record also shows that the exceptions to the transmission constraints are not an issue. Nor is there any question that the bid mitigation rules help protect customers and will restrain bid price increases.

2. PJM Market Monitoring Unit ("MMU")

ComEd

ComEd showed that PJM has a large, professional, and active Market Monitoring Unit (“MMU”) that continually monitors the operation of the market for potential exercises of market power or other attempts at manipulation or gaming. The testimony showed that MMU has a staff of more than 16 full-time professional employees, continuously monitors the functioning of the market, and makes periodic reports on its operations. ComEd also noted that the MMU has tools to prevent physical or economic withholding of generation to drive up prices. The MMU detects physical withholding by reviewing forced outages or deratings and detects economic withholding by reviewing bids against cost information. (Naumann Dir., ComEd Ex. 5.0, p. 21) ComEd also noted that if the MMU identifies a problem it generally discusses the issue informally with the market participants involved, which is itself effective in ending behavior the MMU questions. If this does not yield results, ComEd further noted, the MMU issues a Demand Letter requesting the market participant to desist and provides copies to FERC and relevant state regulator(s). ComEd observed, as well, that the FERC also has authority to monitor the PJM markets and has established protocols to work with the MMU to ensure that the FERC can exercise its statutory authority to ensure that rates are just and reasonable. ComEd further observed that the MMU must report to the FERC all instances where it has reason to believe a market violation has occurred and has not been resolved through informal channels. (Naumann Sur., ComEd Ex. 23.0, pp. 21-22)

In addition, ComEd noted that PJM’s market design also helps prevent “gaming” behaviors and that reliance on open markets is a means of reducing the risks of such behaviors. ComEd explained that open, bid-based centrally-dispatched market is inherently harder to game than many, if not all, other market structures, and that many of the colorfully-named behaviors that “worked,” for example, in California during its crisis, simply would not work in the PJM markets. ComEd also noted that market manipulation based on generation withholding, misreporting of data, phony sales, and like stratagems are not permitted by PJM tariffs and market rules and, in many cases, are violations of federal and state law. (Naumann Dir., ComEd Ex. 5.0, pp. 20-21)

CUB-CCSAO

CUB-CCSAO claimed that PJM’s and MISO’s market monitoring are insufficient to address potential use of market power and likely price increases. (Fagan Dir., CUB-CCSAO Ex. 1.0, p. 5) They also claimed that the PJM MMU could not fully prevent the exercise of market power during periods of transmission constraints. In addition, they asserted that ComEd is relying on the PJM MMU as a first choice, not a last resort. (Fagan Reb., CUB-CCSAO Ex. 3.0, pp. 4, 35)

AG

The AG asserted that the PJM MMU is not very effective because it does not invoke remedies very often. (Rose Dir., AG Ex. 1.0, pp. 9-10)

ComEd Response

ComEd refuted the AG's assertion about PJM's effectiveness because of PJM's infrequent invocation of remedies, explaining that the assertion is like arguing that umbrellas do not deflect rain in the desert. ComEd noted, in fact, that the MMU's 2004 State of the Market Report is replete with evidence that prices in PJM are at very competitive levels.

ComEd also made clear that the auction proposal does not rely on the MMU as a "first resort." There are many reasons, discussed above, why anti-competitive behavior will be discouraged and reduced by the competitive procurement, and CUB-CCSAO's claims to the contrary stem both from their erroneous assumption that binding transmission constraints can turn northern Illinois into an insular and uncompetitive market and that mitigation is the only defense against market power. ComEd also noted that the MMU can initiate mitigation even if transmission constraints are not binding in PJM. (Naumann Sur., ComEd Ex. 23.0, p. 21)

ComEd also explained that beyond the PJM MMU, there are additional layers of oversight and protection. The FERC, ComEd noted, likely would investigate if parties exercised market power. In fact, ComEd pointed out that since the California debacle, the FERC's powers have expanded substantially to sanction all forms of market manipulation, including the power retroactively to retrieve profits earned thereby. ComEd further noted that the recently signed federal energy legislation provides the FERC with additional powers and criminalizes manipulation of energy markets. Intervenor witnesses expressly acknowledged that the FERC could be expected to do its job. ComEd also observed that antitrust agencies could play a role, and that parties could pursue civil remedies for damages. (Hieronymus Sur., ComEd Ex. 24.0, pp. 11-12)

Commission Analysis and Conclusion

The record contains significant evidence showing the effectiveness of PJM's MMU as the last line of defense against market manipulation. Among other things, the MMU continuously monitors the market, has multiple methods for preventing efforts to drive prices up artificially through withholding, and has processes for addressing any issues that do arise. In addition, the record demonstrates that the FERC performs additional monitoring and that the MMU and the FERC work together in these regards. The Commission is not persuaded by the AG's assertion that the MMU is not effective, as such assertion does not square with the evidence or logic. Accordingly, the Commission concludes that PJM's MMU will be an effective safeguard for the Illinois Auction Proposal.

3. Proposed Illinois Market Monitor

CUB-CCSAO

CUB-CCSAO suggested that a separate Illinois Market Monitoring Unit be established that would review the effectiveness and competitiveness of the PJM market structure and would have access to confidential market data to monitor detect and potential

market power and take action to prevent or eliminate abuse. CUB-CCSAO claimed that potential remedies would include petitioning RTOs, the FERC, or the U.S. Department of Justice to take action. They also claimed this IMMU could have authority beyond RTO-administered markets into broader investigations of energy industries. (Steinhurst Dir., CUB-CCSAO Ex. 2.0, pp. 41, 44-45)

ComEd

ComEd explained that in effect, CUB-CCSAO was proposing an Illinois entity to do a job the PJM MMU was already tasked to do. ComEd also noted multiple problems with this proposal. First, there is no source of authority – and CUB-CCSAO suggested none – for an Illinois entity to monitor transactions in wholesale power markets in interstate commerce, transactions that are by federal statute subject to the exclusive jurisdiction of the FERC. In addition, ComEd noted that CUB-CCSAO’s proposal adds nothing to the scope of the markets being monitored, since under the Illinois Auction Proposal ComEd and other restructured utilities will be purchasing resources on the monitored wholesale market anyway. ComEd further explained that for reasons noted above, there is no need for the proposal, as its purported function already is being performed adequately by the PJM MMU and the FERC. In addition, ComEd noted, if there are criminal violations, the U.S. Department of Justice, the various United States Attorneys’ offices, and state prosecutorial authorities have authority to enforce the law. In addition, ComEd proposed for the non-federal portions of the auction, Staff could be actively involved. (Naumann Reb., ComEd Ex. 14.0, pp. 20-24)

Commission Analysis and Conclusion

The Commission concludes that there is no need for a separate Illinois Market Monitoring Unit. Moreover, as the legal authority for such an entity is at best unclear, and it would be entirely duplicative of the PJM MMU and the FERC, the Commission does not adopt CUB-CCSAO’s proposed Illinois Marketing Monitoring Unit.

K. Other Competitive Market Issues

An additional issue regarding competition arose concerned the pending merger of Exelon and PSEG.

ComEd

ComEd explained that the pending merger is irrelevant to this docket. Dr. Hieronymus, who was the Applicant’s principal market power witness in the FERC proceeding, noted that no party to that proceeding presented evidence that the merger would have competitive implications in Illinois, as the focus of the proceeding was on combining generation fleets in New Jersey and Pennsylvania. (Hieronymus Sur., ComEd Ex. 24.0, p. 23) In addition, Dr. Hieronymus observed that the PJM MMU concluded that Exelon’s and PSEG’s proposed mitigation (divestiture of 6,600 MW of generation) is

sufficient to cure any competitive concerns, and that the FERC had acted to approve the merger without hearing and without finding any unmitigated market power issues. (Hieronymus Reb., ComEd Ex. 15.0, p. 28) ComEd added that operationally there is no link between the proposed merger and any of bidding on generation in northern Illinois, planning or operations of the transmission system, or marginal costs of generation. (Naumann Sur., ComEd Ex. 23.0, pp. 19-20)

AG

The AG asserted that the pending Exelon/PSEG merger “would likely have a material impact on the development of wholesale markets across the country” and that the FERC did not comprehensively address these competitive impacts. (Rose Reb., AG Ex. 5.0, pp. 2-7) The AG cited the MMU’s 2004 State of the Market Report, which noted that the merger “raise[d] concerns about potential adverse competitive effects, absent mitigation.” (Rose Dir., AG Ex. 1.0, p. 11) In addition, the AG claimed that neither the FERC nor the MMU had examined possible collusion with respect to the merger. (Rose Reb., AG Ex. 5.0, p. 4)

ComEd Response

ComEd noted that the AG adduced no evidence or support for Dr. Rose’s vague allegations, and, as explained that it is irrelevant to focus on an unmitigated merger when a variety of mitigation measures are part of the merger proposal. ComEd also noted that the AG’s assertion that the FERC erred in not requiring a behavioral analysis of strategic bidding is a false issue. ComEd pointed out that there was simply no credible evidence of any way in which the merger would increase the price bid in the auction, or reduce participation below levels required to achieve a competitive result.

ComEd also addressed the specific points raised by the AG and CUB-CCSAO. ComEd explained that the FERC rejected the argument that a behavioral analysis was needed for two reasons: first, the structural analysis used in the Department of Justice/Federal Trade Commission *Merger Guidelines* conveys information about the likelihood of the exercise of unilateral market power as well as coordinated market power; and second, Applicants proposed to divest a large amount of generating units, including units that protestors argued could be used to engage in strategic bidding. ComEd further noted that the FERC concluded that divestiture will restore competition to the pre-merger level and thus the merger, as mitigated, will not harm competition. *Exelon Corporation and Public Service Enterprise Group*, 112 FERC ¶ 61,011 at P 131 (2005).

ComEd also explained that although the AG claimed that the FERC was wrong because the *Merger Guidelines* state that “market share and concentration data provide only the starting point for analyzing the competitive effects of a merger.” (Rose Reb., AG Ex. 5.0, pp. 3-4) ComEd states that the AG’s argument failed to take into account that the quoted sentence means that even if a merger *fails* structural screens the applicant can overcome the presumption of adverse competitive effects. (Hieronymus Sur., ComEd Ex. p. 24) ComEd further noted that in any case, the DOJ Antitrust Division is

investigating the merger, as it is required to do by law, and will make its own evaluation of potential effects on competition. (Hieronymus Sur., ComEd Ex. 24.0, p. 25)

Commission Analysis and Conclusion

The Commission concludes that there is no evidence that the pending Exelon-PSEG merger will have any deleterious impact on the Illinois Auction Proposal and substantial evidence that it will have none. The evidence demonstrated that the merger, as proposed, will not have competitive implications for Illinois. The Commission also notes that the FERC already evaluated and rejected use of a behavioral analysis, and the DOJ Antitrust Division is already considering possible impacts of the merger on competition.

V. AUCTION DESIGN ISSUES

A. General Effectiveness and Suitability

ComEd

ComEd noted that the Illinois Commerce Commission, recognizing the need for a coordinated approach to post-2006 supply issues, established the Post 2006 Initiative to provide a framework for considering available alternatives. (ComEd Ex. 1.1) ComEd actively participated in that effort, along with Staff and a variety of stakeholders. ComEd states that, after considering a wide variety of procurement alternatives, and assessing the advantages and disadvantages of each, the Post 2006 Initiative identified eighteen characteristics of an ideal procurement process. The Final Staff Report on the Post 2006 Initiative recommended that a vertical tranche auction be utilized by large utilities without significant generation assets. (ComEd Ex. 1.2) ComEd pointed out that its proposed tariffs follow the guidance and direction provided in the Final Staff Report on the Post 2006 Initiative using a vertical tranche auction, and that no other party has proposed a method that better meets the identified criteria. (Hieronymus, Tr. 1025 Hogan, Tr. 1167; Clark, Tr. 138, 212-214)

Staff

Staff noted that the auction process “is an efficient mechanism for procuring supply to serve ComEd’s load at the best possible cost.” (Salant Dir., ICC Staff Ex. 1.0, p. 5) Staff concluded that the basic auction concept as proposed by ComEd is an appropriate competitive procurement method for securing power supply commitments for serving ComEd’s retail customers.

MWGen

Midwest Gen supports the auction design proposed by ComEd, and commented that the auction design allows ComEd to make efficient use of competition utilizing a process that has been used and refined in the New Jersey procurement process. Midwest Generation noted that the proposed auction model has four specific benefits: (1) Through its transparency, it ensures competitiveness and encourages participation by potential suppliers; (2) it is commercially fair and reasonable, and non-discriminatory; (3) the auction provides all of the benefits of market competition while providing customers with reasonably stable rates; and (4) the auction model allows the regulatory body the opportunity to review and assess the process from time to time to assess whether any adjustments are needed. Midwest Generation noted that a competitive procurement process ultimately benefits ratepayers because “[c]ompetition is widely acknowledged by economists to produce the lowest reasonable prices to consumers, while ensuring that suppliers assume the risk of investment, financial, and operating decisions.” (Graves Dir., MWGen Ex. 1.0, p. 2)

Dynegy

Dynegy commented that the auction “permits many potential suppliers to compete to supply needed resources, and thereby brings with it the substantial benefits of competition to the ultimate prices the utilities will have to pay for wholesale supply.” (Huddleston Dir., DYN Ex. 1.0, p. 5)

CCG

Constellation Energy Commodities Group, Inc. notes that “the Illinois Auction Structure proposed by ComEd incorporates the serious and thoughtful consideration provided by numerous stakeholders with differing interests during the Procurement Working Group discussions.” (Smith Dir., CCG Ex. 1.0, pp. 2-3)

DES-USESC

DES-USESC states that “an auction is a procurement approach that is fair, objective and efficient for both buyers and sellers in ComEd’s service territory at this time.” (Steffes Dir., DES/USESC Ex. 1.0, p. 11)

IIEC

The IIEC does not oppose ComEd’s proposed auction and ratemaking proposal, generally, though the IIEC raises issues with certain details of the competitive procurement process, as proposed.

AG

The Attorney General opposes any competitive procurement model. The Attorney General argues that the proposed auction is unfair in that it results in a uniform price that all suppliers receive, regardless of their costs. The Attorney General additionally contends that a single, annual auction for multi-year supply puts consumers at risk for all of their supply.

CUB

CUB asserted that the Commission should not use a competitive procurement model. CUB argues that ComEd's affiliate ExGen will financially benefit from the auction, in that ExGen will be able to provide supply at a lower cost than those of natural gas plants, which will be utilized in setting the auction price.

CCSAO

CUB contends that ComEd should have presented multiple options for consideration in this Docket, and asserted that ComEd did not provide evidence that rates will be lower using an auction model than with some alternative procurement method. CUB argued that the Commission should reject ComEd's proposal, open a new docket to consider the full range of procurement options, and implement a prudence review of ComEd's decisions.

ComEd's Response

ComEd indicates that Staff and the vast majority of stakeholders support the vertical tranche auction, as proposed by ComEd. ComEd notes that even parties opposing the process acknowledge that a competitive process would put downward pressure on prices, benefiting customers.

Commission Analysis and Conclusion

The Commission has long recognized the need for adequate, reliable power and energy supply for Illinois customers post-2006, and initiated the Post 2006 Initiative for that very purpose. The Post 2006 Initiative welcomed participation from Staff and a variety of stakeholders holding individual, and often competing, interests, and identified eighteen characteristics of an ideal procurement process to serve as benchmarks for evaluating alternatives. The results of months of presentations and evaluation by all parties involved revealed that a vertical tranche auction best met the goals of providing adequate power supply at the best prices for consumers, as noted in the Staff Final Report of the Post 2006 Initiative. The Commission finds that the vertical tranche auction proposed by ComEd best meets the needs of ComEd customers in providing adequate, reliable, and reasonably priced supply post-2006.

B. Full Requirements Product**ComEd**

ComEd describes the principal benefit of a full requirements product, such as that proposed, as shifting risks from customers to suppliers. ComEd explains that a utility's load varies over time based on a number of factors -- time of year, commercial operations evidenced during peak periods, and hour-to-hour based on weather conditions and other variables. Under a full requirements model, a supplier agrees to provide a set portion of the utility's full requirements throughout the term of the

agreement, even though the amount of energy at some times will be significantly greater and more costly than at other times. (Naumann Dir., ComEd Ex. 5.0, pp. 8-9) ComEd indicates that suppliers must assemble a portfolio that provides for adequate generation, and assume the associated risks of acquiring too little or too much generation. In contrast, customers receive and pay only for the supply they need when they need it, without additional financial obligation or exposure, and are therefore insulated from risk. (Schnitzer Dir., ComEd Ex. 6.0, pp. 21-22; Juracek Reb., ComEd Ex. 9.0, p. 8; Hogan Sur., ComEd Ex. 25.0, pp. 12-14)

Staff

Staff supports the full requirements vertical tranche concept, as articulated by ComEd witness LaCasse (LaCasse Dir., ComEd Ex. 4.0, p. 24), for several reasons: (1) The full-requirements product fulfills the goal of having competitive entities take, manage and price supply risks; (2) The full-requirements product maximizes participation, expanding the base of potential competitors, including financial players and marketers and traders that are able to use specialized skills in price-risk management to assemble wholesale portfolios and compete in the Auction; (3) A full-requirements product minimizes customer confusion to allow for reasonable budgeting; and (4) The full-requirements product encourages efficient retail markets.

AG

The Attorney General asserted that a full requirements contract puts the risk of volume fluctuation exclusively on the supplier, and that each supplier therefore will build the risk of this uncertainty into their bids by including a risk premium. (Salgo Dir., AG Ex. 2.0, p. 18) The Attorney General argued that consumers are therefore left vulnerable to paying excessively high prices to cover risks that could be more economically managed, a risk which is increased by what the Attorney General called an “abbreviated post auction review.”

Dynegy

Dynegy notes that baseload generation is produced by large power plants that run continuously most of the year to meet ongoing needs for energy. (Huddleston, Tr. 1047-1048).

IIEC

IIEC agrees that a bidder could not supply a vertical tranche with its baseload resources alone. (Collins, Tr. 166).

CES

CES notes that a full requirements contract under a vertical tranche requires that a supplier be prepared to provide for all peak periods, which requires resources in addition to continuously running nuclear facilities. (O'Connor, Tr. 240).

Commission Analysis and Conclusion

The Commission concludes that ComEd's proposed full requirements product is in the best interest of customers in ComEd's service territory. Successfully managing an energy portfolio requires that there be a sufficient amount of energy to serve customer's needs, while safeguarding against paying for energy that is not needed. In order to adequately provide for energy supply that varies widely by month, by time of day, and in response to particular events, a utility without substantial generation assets would be left vulnerable to certain risks. ComEd's proposal for a full requirements auction product ensures that customers in ComEd's service territory have adequate energy supply, and that they pay only for the energy that they use. In shifting the risk from customers to suppliers, customers are guaranteed adequate electric supply while at the same time gaining rate stability.

C. Multiple Round Descending Clock Format

1. General Effectiveness and Suitability

ComEd

ComEd articulates that use of a multiple round, descending clock format for the auction is a transparent process that enables bidders to compare the prices of the various products in the auction and to continuously evaluate their bids with the benefit of information provided during the progress of the auction, thereby extracting the market price. (Hieronymus, Tr. 1022–1023). ComEd notes that use of this auction format is supported by successful experience in New Jersey, as well as by academic and professional literature supported by extensive research concerning auction design. (LaCasse Dir., ComEd Ex. 4.0, pp. 11–13, 26–27)

Commission Analysis and Conclusion

The Commission concludes that use of a multiple round, descending clock format is appropriate for use in ComEd's service territory. Specific details of ComEd's proposal are discussed below.

2. Load Caps

ComEd

ComEd articulates that load caps act as a competitive safeguard, limiting the influence that any one bidder can have on the results of the auction while at the same time limiting the utility's exposure to any one particular supplier, thereby shielding the utility and its customers from risk. ComEd initially proposed that the load cap be set at a 50% level. (McNeil Dir., ComEd Ex. 3.0, pp. 46–48) However, after considering various

suggestions from Staff and Intervenors, ComEd modified the load cap proposal in its rebuttal testimony, decreasing the cap level from 50% to 35%. (McNeil Reb., ComEd Ex. 10.0, pp. 4, 24–25)

Staff

Staff noted that the weight of the evidence supports the Company's 35% load cap proposal. Staff articulates that ComEd's proposed load cap is within the range recommended by both Staff witness Salant and Midwest Gen witness Graves, and is supported by all the witnesses testifying on the issue of load caps, but for the IIEC. Thus, Staff recommended that the Commission reject the IIEC proposal for the elimination of the load cap, and that the Commission approve the use of a 35% load cap per auction.

Midwest Gen

Midwest Gen supported the proposed 35% load cap proposed by ComEd. Midwest Gen articulated four purposes of a load cap in the auction process: (1) increase supplier diversity; (2) reduce the likelihood that a segment of the supply will be subject to default; (3) reduce the impact of any particular supplier's default; and (4) increase supplies available on the wholesale market by encouraging participation from potential suppliers that do not own significant generation assets. (Graves Dir., MWG Ex. 1.0, p. 9–10) Midwest Gen noted that the purposes of a load cap serve to decrease costs and risks for both the utility and its customers. Furthermore, Midwest Gen recognized that a 33% load cap was successfully utilized in the New Jersey auction process, and concluded that a similar load cap is appropriate for use in ComEd's service territory.

IIEC

IIEC advocated that no load cap be imposed, asserting that higher costs might result from a load cap under certain circumstances. IIEC disagreed with other parties that a load cap is the way to promote robust competition in the auction. IIEC asserted that 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. IIEC alleged that 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 will reduce the competitiveness of the auction, and in turn increase the auction clearing price. (Collins Dir., IIEC Ex. 3.0, p. 13)

ComEd's Response

ComEd stated that the 35% load cap performs important functions that are recognized by the Staff and the majority of the parties. "Smaller participants are more likely to be involved. You'll have more diversity of viewpoint... That's likely to result in lower prices." (Graves, Tr. 1190). ComEd noted that IIEC's lone opposition to this safeguard is based on the speculative assertion that higher costs might result from a load cap under certain circumstances, but that Mr. Collins acknowledged on cross examination

that different hypotheticals could be constructed under which the absence of a load cap would produce higher prices. (Collins, JTr. 151). ComEd indicated that the benefits of the load cap outweigh any theoretical disadvantage.

Commission Analysis and Conclusion

The Commission concludes that ComEd's proposed load cap, as modified in its rebuttal testimony to be set at 35%, is appropriate. Load caps serve as a competitive safeguard, limiting the influence that any one bidder can have on the results of the auction. At the same time, load caps limit the utility's exposure to any one particular supplier, thereby shielding the utility and its customers from risk. Staff and the vast majority of stakeholders agree, with IIEC the lone opponent of the proposed load cap. The Commission is not persuaded by the IIEC's suggestions that a load cap could, in certain hypothetical situations, increase auction clearing prices, and finds that the benefits provided by a load cap outweigh any potential disadvantages.

3. Starting Prices

ComEd

ComEd indicated that the starting prices for products in the auction will be established by the Auction Manager in consultation with the ICC Staff and ComEd. (ComEd Ex. 19.3) The prices will fall within the maximum and minimum starting prices provided to qualified bidders in connection with submission of their Part 2 applications to participate in the auction. ComEd noted that the Part 2 applications must include indicative offers from prospective bidders indicating the number of tranches they would be willing to serve at the maximum and minimum prices. This information is then taken into account in setting the starting prices. (ComEd Ex. 19.3)

Staff

Staff recommended that the Commission approve the Company's proposal with respect to the auction's starting prices. As noted by Staff, the minimum and maximum starting prices should be set high enough to encourage participation. Competition will tick prices down to their final levels. The range between the minimum and maximum starting prices should be narrow enough to provide bidders with meaningful bounds on the eventual round 1 prices, but wide enough that the actual starting prices will fit within the range even given changes in the market that may occur between the time at which the minimum and maximum starting prices are released and the start of the auction. The minimum and maximum starting prices will be developed considering recent market data, including energy forward prices for standard products, capacity market data as available, congestion and wholesale transmission rates. The round 1 prices would take the indicative offer data into account. (LaCasse Reb., ComEd Ex. 11.0 Revised, p. 81)

AG

The Attorney General claimed that ComEd failed to include an estimate of starting bids or a method for determining the maximum and minimum opening bids, and contended that the proposal therefore leaves consumers vulnerable to the unknown rate increases. The Attorney General argued that the Commission cannot approve such an open-ended process without violating the PUA's requirement that it only allow rates that are just and reasonable. See 220 ILCS 5/9-101.

Commission Analysis and Conclusion

The Commission finds that ComEd's proposal adopts the appropriate methodology for establishing the starting prices. The Attorney General's position that possible starting bids should be revealed at this juncture is without merit, as the determination of starting bids must consider recent market data, which can only be assessed near the time of the auction. The Commission Staff's involvement in developing the starting price in conjunction with the Auction Manager and ComEd adequately safeguards consumer interests.

4. Bid Decrements

ComEd

ComEd proposed that the size of the reductions in price from round to round in the auction be determined by a formula taking into account the amount of "excess" supply for the particular product. Under ComEd's proposal, products that attract more supplier interest and therefore have more excess supply would experience larger price reductions. Those that have garnered less interest would have smaller price reductions. Dr. LaCasse noted that depriving bidders of any information about the decrement formula would have certain drawbacks. However, based on Staff concerns, Dr. LaCasse devised an alternative to provide bidders with price decrement formulas, but to make sure that these formulas do not allow bidders to make good inferences about the excess supply on a product toward the end of the auction. (LaCasse Reb., ComEd Ex. 11.0 Revised, pp. 85-86) The actual bid decrement formulas would be developed as soon as possible by the Auction Manager, in conjunction with ICC Staff and the Auction Advisor.

Staff

Staff witness Dr. Salant initially proposed that the formula for determining "bid decrements" be concealed from bidders to avoid efforts to "game" the auction. In his rebuttal testimony, Dr. Salant discussed Dr. LaCasse's alternative approach, stating that it "provides a good structure for setting bid decrements." (Salant Reb., Staff Ex. 11.0, p. 8) Staff supported ComEd's proposal to work with the Staff to develop the formula fully, which would be provided to prospective bidders prior to the auction, in the Auction Manual.

BOMA

BOMA opposed providing any feedback to bidders during the auction about the prevailing level of supplier interest.

Commission Analysis and Conclusion

The Commission concludes that the proposal by ComEd and Staff to provide price decrement formulas in the Auction Manual in a way that precludes bidders from making inferences about excess supply toward the end of the auction is prudent and reasonable. ComEd and Staff are attempting to balance two conflicting consequences of providing excess supply feedback: providing too much feedback may empower a bidder to stop the auction prematurely at an elevated price, but providing too little feedback may lead to more timid bidding.

5. Auction Volume Reductions

ComEd

ComEd explained that the auction design provides for volume reductions by the Auction Manager in the event that interest in the auction by suppliers is not as high as expected. If interest is not sufficient, the auction volume is reduced to ensure competitive prices at the auction, and the remainder of the volume is procured on PJM-administered markets. As ComEd witness Dr. LaCasse explained, provision is made for volume reductions as a safety net to ensure that prices resulting from the auction are competitive. (LaCasse Reb., ComEd Ex. 11.0, p. 39)

Staff

Staff agreed that volume cut-backs provide an important safeguard for the reason specified by Dr. LaCasse—insufficient bidder interest in the auction. (Salant Reb., ICC Staff Ex. 11.0, pp. 22-23; (Sibley Dir., Staff Ex. 2.0 Revised, pp. 19-20) Staff witnesses initially proposed that the Auction Manager also be provided discretionary volume adjustment power for the purpose of exerting pressure on suppliers who may have limited options to sell in other markets. However, Staff ultimately agreed with ComEd that there is no reliable method for discerning the underlying motivation of suppliers who are withdrawing tranches and, without a practical method of implementing such a proposal, the Auction Manager (or the Staff) should not be imbued with the power to cut back auction volumes unless it is extremely clear that such reductions will benefit ratepayers. Staff noted that Staff and the Auction Manager possess both the right and responsibility, independently, to address questions relating to the competitive process. However, the Commission (rather than the Auction Manager or Staff) should retain a

remedy should it find reason, based on the Auction Manager's Report and/or the Staff Report, to question the competitive integrity of the auction process.

Dynergy

Dynergy supported ComEd's proposal regarding volume reductions and portfolio reductions. Dynergy noted that parties to the auction need to be assured that, absent some pre-defined events occurring, the basic contours of the auction will not vary during the auction itself, and expressed the opinion that ComEd's proposal best meets that goal.

Commission Analysis and Conclusion

ComEd's proposal to allow for volume reductions by the Auction Manager in the event that interest in the auction by suppliers is not as high as expected best ensures that the auction clearing price reflects competitive prices, with which no party disagreed. Though Staff witness Salant initially recommended that the Auction Manager be permitted to make volume reductions to exert pressure on suppliers, Staff ultimately concluded that the Auction Manager would not possess sufficient information to make an informed judgment regarding supplier motivations, and that the Commission is best suited to construct a remedy if the competitive integrity of the auction is called into question. The Commission concurs.

6. Portfolio Rebalancing

ComEd

ComEd noted that Staff witness Salant suggested that the volume reduction power be used to readjust the individual auction product volumes, increasing volume for products with excess supply and decreasing it for products with limited supply offers. ComEd indicated that Dr. Salant's proposal disregards the dynamic nature of the auction process in which switching among products is anticipated and expected so that initial interest in particular products does not always reflect the ultimate distribution of bids. (LaCasse Reb., ComEd Ex. 11.0, pp. 53-54) Moreover, adjusting relative percentages of total requirements among various products during the auction would destroy the careful balance between price and stability that the choice of durations was intended to achieve. For these and other reasons explained by Dr. LaCasse, ComEd recommended that this second volume reduction proposal be rejected as it is likely to be harmful to the auction process.

Staff

Staff recommended that the Commission authorize the Company's Auction Manager to utilize the portfolio rebalancing option only after consulting with the Staff and there is consensus between the Auction Manager and Staff that such action is appropriate,

provided that the Company's Auction Manager, in consultation with the Staff and the Auction Advisor, can devise prior to the auction a protocol deemed appropriate by the Auction Manager for carrying out such portfolio rebalancing.

Dynergy

Dynergy supported ComEd's proposal regarding volume reductions and portfolio reductions. Dynergy noted that parties to the auction need to be assured that, absent some pre-defined events occurring, the basic contours of the auction will not vary during the auction itself, and expressed the opinion that ComEd's proposal best meets that goal.

Commission Analysis and Conclusion

The record demonstrates that the volume reduction proposal to readjust the individual auction product volumes, increasing volume for products with excess supply and decreasing it for products with limited supply offers, should be rejected, as it is likely to be harmful to the auction process.

7. Association and Confidential Information Rules

ComEd

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

Staff

Staff agreed that there should be an appropriate set of "Association and Confidential Information Rules" within the framework of the proposed auction. Staff witness Salant suggested that bidders be required to disclose any full requirements agreements with wholesale suppliers that are contingent on the outcome of the auction conflicts with the approach taken in the successful New Jersey auctions. However, Staff recognized that there are reasonable arguments against requiring additional disclosure of full-requirements contract information. Considering the real potential for some negative unintended consequences from its proposal Staff did not recommend that the Commission order ComEd to modify the association and confidential information rules.

PES

PES expressed concern about a bidder's relationship with entities with which Retail Electric Suppliers ("RESs") compete. Specifically, PES is concerned about a bidder sharing information with an unaffiliated but "associated" RES. Second, PES is concerned about the "advisor" role in the process, and argued that a bidder could consider an unaffiliated RES to be an advisor in the process, and thereby exchange valuable market intelligence with the bidder.

ComEd's Response

ComEd pointed out that the disclosure exceptions were limited to other bidders in the auction and only applied if the association between a bidder and a particular RES were disclosed. (LaCasse Sur., ComEd Ex. 19.0, p. 13). Hence, Mr. Bollinger was wrong to assume that confidential information could be disclosed to an affiliate who was not also a bidder and further wrong in not recognizing that such disclosure would need to be revealed to the Auction Manager. To alleviate PE Services' second concern, ComEd proposed modifications in the Auction Manual to the term "advisor", defining the advisor as a person (not an entity), and specifying that an advisor cannot disclose confidential information to anyone but the bidder.

Commission Analysis and Conclusion

The Commission finds that the rules proposed by ComEd ensure the independence of bidders, prevent collusion among bidders, and prevent any one bidder from gaining advantage in the auction through better information about its competitors. The record further supports modification to the Auction Manual concerning the term "advisor", as proposed by ComEd. Such modifications provide adequate assurance that confidential information is not inappropriately communicated by an advisor to a bidder.

8. Tranche size

ComEd

ComEd's proposed to follow the New Jersey approach to tranche size, having suppliers bid to provide a percentage of peak load approximating 100 MW. (McNeil Dir., ComEd Ex. 3.0, p. 20) Following testimony from Staff witness David Salant suggesting the use of a tranche size smaller than 100 MW, ComEd agreed to revise its proposal to establish a tranche size of approximately 50 MW. (McNeil Reb., ComEd Ex 10.0, p. 26; LaCasse Reb., ComEd Ex. 11.0, pp. 48–49)

Staff

Staff witness Salant concluded that "ComEd's revised proposal [is] a reasonable one at this time and I recommend the approval of a 50 MW tranche size for ComEd's first auction." (Salant Reb., Staff Ex. 11.0, p. 15) Staff noted that no other parties took issue with the proposal. Hence, Staff recommended that the Commission approve the revised

proposal to define tranche size as approximately 50 MW of each customer segment's peak demand.

Commission Analysis and Conclusion

The record supports a tranche size of approximately 50 MW of each customer segment's peak demand.

9. "Price taker" Proposal

ComEd

ComEd advocated for the open auction, requiring that market participants desiring to supply a specified portion of ComEd's load participate in the auction process.

Staff

In his direct testimony, Dr. Salant suggested that the Illinois Auction proposal be revised to include a "price taker" feature under which a supplier could elect not to participate in the auction directly, but announce its willingness to supply a specified portion of load (which could exceed the load cap applicable to auction bidders) at the auction clearing price. (Salant Dir., Staff Ex. 1.0, pp. 66–69) In Staff's view, the price taker option is unlikely to have much of an effect on the auction, either a positive or a negative effect. Furthermore, Staff explained that since suppliers can also sell their power to other bidders or into the PJM organized markets, or in other bilateral markets, the price taker option is not necessary for consumers to gain access to low-cost producers' power. Staff did not recommend that the Commission order the Company to incorporate the price taker option into the auction, as proposed by Dr. Salant.

Midwest Gen

Midwest Gen concluded that Staff witness Salant's proposal would deter participation. (Graves Reb., Midwest Gen Ex. 2.0, p. 4)

ComEd's Response

ComEd explained that Staff witness Salant's proposal would negate the advantages of an open auction, that the resulting auction volume reduction would deter participation by other suppliers (and would increase default risk by the price-taking supplier, who would be committed to providing supply at a price it could not influence), and pointed out that a price taker experiment in Connecticut failed and was abandoned for future auctions. (LaCasse Reb., ComEd Ex. 11.0, pp. 41-47)

Commission Analysis and Conclusion

The open auction process is essential to maintain the auction's ability to encourage wide participation to achieve low market prices for customers. The record demonstrates that the price taker feature would jeopardize these fundamental advantages of the auction. Accordingly, the Commission rejects Staff's proposal.

10. Other Format Concepts and Issues

All format concepts and issues in this docket are addressed in other parts of this Order.

D. Clearing Price: Uniform vs. Pay-as-Bid

ComEd

ComEd posited that the uniform descending clock auction best meets the goals of the auction, and is based upon the tried-and-true methodology successfully implemented in the New Jersey power supply auction.

Staff

Staff noted that Dr. Laffer's recommendations advanced by BOMA for a pay-as-bid auction are either internally inconsistent or ambiguous. Staff pointed out that under any interpretation, however, his proposed auction design is susceptible to a variety of unintended consequences revealed by the analysis of the auction experts and electricity experts testifying in this case. Additional problems with Dr. Laffer's proposed auction pertain to his failure to recognize the influence of the "winner's curse" on bidding strategies and auction outcomes.

Staff opined that the Attorney General's alternative auction designs are flawed and unrealistic. Staff noted that several questions were raised by ComEd that the Attorney General failed to address. Staff concluded that they are merely the bare bones of auction proposals—inadequately delineated to be of practical value for purposes of this docket. Accordingly, Staff recommended that the Commission reject the BOMA and Attorney General auction proposals.

BOMA

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

prospect of achieving lower prices than are possible under the Illinois Auction's uniform clearing price auction design.

AG

The Attorney General asserted that it is self-defeating for consumers to limit the price decreases a supplier might be willing to offer. The Attorney General further argued that multilateral negotiations, or a reserve price in an auction are better suited to capture the different cost structures that exist. (Reny Reb., AG Ex. 4.0, pp. 1-6)

Midwest Gen

Midwest Gen found BOMA's proposed pay-as-bid approach flawed. First, Midwest Gen noted that BOMA witness Laffer could point to no empirical evidence showing successful implementation of the proposed approach. Second, Midwest Gen pointed to the lack of evidence that a pay-as-bid approach would result in lower costs than would be gained through ComEd's proposed market clearing price.

ComEd's Response

ComEd cautioned that the fundamental change in the auction design proposed by BOMA to convert the auction to a pay-as-bid auction (Laffer Dir., BOMA Ex. 1.0, pp. 6–17) would render it unworkable. ComEd noted that the change conflicts with basic features of the auction design and would ultimately eliminate the transparency that drives down supplier bids through multiple auction rounds. (LaCasse Reb., ComEd Ex. 11.0, pp. 74–75) In addition, ComEd explained that the pay-as-bid approach would pose a significant risk of gaming to defeat the purpose of the auction and would increase the risk that products in the auction end up undersubscribed. (LaCasse Reb., ComEd Ex. 11.0, pp. 74–75; LaCasse Sur., ComEd Ex. 19.0, pp. 35–36) Finally, as indicated by ComEd, the pay-as-bid modification to a multiple round, descending clock auction appears to have never been used in any jurisdiction in this country to procure supply for electric utility customers. (LaCasse Reb. ComEd Ex. 11.0, p. 66)

ComEd pointed out that the Attorney General failed to indicate if any of the three empirical conditions necessary for Dr. Remy's multilateral negotiation approach to succeed at lowering prices are present in the market for electric supply available to ComEd. (Hogan Sur., ComEd Ex. 25.0, p. 22) ComEd noted that the Attorney General witness Remy failed to address whether: (i) the suppliers' costs are significantly different; (ii) reasonably accurate information about each supplier's cost is available; or (iv) the buyer is a large purchaser with enough buying power that no single supplier has substantial bargaining power relative to the buyer.

Commission Analysis and Conclusion

The record is devoid of any tangible benefits that would result from the unproven pay-as-bid modification, or the multilateral negotiation or price caps approach. However, significant disadvantages have been identified that would result through the use of such approaches. Accordingly, the Commission rejects the alternative theoretical untested approaches in favor of the descending clock auction.

E. Auction Management

1. Auction Manager

ComEd

ComEd explained that the Illinois Auction would be administered by an independent, third-party Auction Manager, performing a wide variety of functions necessary to successfully complete the procurement process. (McNeil Dir., ComEd Ex. 3.0, pp. 27, 29) ComEd stated that it had discussed with Ameren the desirability of having a single Auction Manager to conduct the auctions to procure supply to serve their customers, and that Ameren and it were jointly proposing that Dr. Chantale LaCasse be retained for that purpose. ComEd noted that Dr. LaCasse is recognized as an expert on auctions, has extensive experience in this area, and has acted as Auction Manager for each of the New Jersey Basic Generation Service auctions. ComEd further noted that Dr. LaCasse has wide ranging background with the design and conduct of such auctions and is highly qualified to serve in this important capacity. (McNeil Dir., ComEd Ex. 3.0, pp. 28–29)

Staff

Staff reviewed Dr. LaCasse's qualifications and was satisfied that she is competent to be the Auction Manager. Staff noted its expectation that whoever is chosen as Auction Manager would share ComEd's desire to have an auction that runs smoothly and results in as many tranches being filled as possible.

Staff claimed that it had concerns over the independence of the Auction Manager, as both ComEd and Ameren have affiliates who are engaged in the sale of wholesale power and who could be bidders in the proposed auctions. Staff asserted its belief that retail consumers generally want low, stable prices and service reliability, and its desire that the Auction Manager embrace these goals. Staff further asserted, however, that although ComEd noted that it had these intents, too (Clark Dir., ComEd Ex 1.0, p. 15), ComEd has a conflict of interest. Staff alleged that the Auction Manager, nominally hired by ComEd, would be working for two bosses with opposing incentives: one (ComEd) that has no particularly strong incentives but at least a duty to get low prices for its retail customers; and another (Exelon) that has an incentive to get high prices for its generation and marketing affiliates participating in the auction. Staff therefore suggested that the Commission should appoint the Auction Manager, or the Auction

Manager's discretion with ComEd affiliates should be limited. (Salant Dir., Staff Ex. 1.0, p. 87)

ComEd Response

In its rebuttal testimony, ComEd explained how it was supporting proposals to reinforce the independence of the Auction Manager (McNeil Reb., ComEd Ex. 10.0 Revised, pp. 30-31), and that it had considered the proposals to reinforce further the existing independence of the Auction Manager made primarily by Staff. ComEd noted that although ComEd believed that its original proposal accomplished that goal, it had no objection to reasonable proposals to reinforce that independence, while still respecting utilities' legitimate special role as the purchaser. To this end, ComEd agreed that it was reasonable for the Commission to direct that: (1) the Auction Manager conduct the auction in close consultation with Commission Staff, and that decisions made by the exercise of the Auction Manager's professional judgment during the auction be made in consultation with a Staff lead designated by the Manager of the Energy Division; (2) ComEd representatives not be present "in the room" during the actual conduct of the auction, not be permitted to direct or influence the Auction Manager's conduct of the action, and not be permitted to communicate with the Auction Manager during the running of the auction; and (3) ComEd will be entitled to round by round data concerning the price and excess aggregate supply for each product and term, provided that this information will only be shared with specific persons at ComEd who will be identified by name to the Manager of the Energy Division in advance. ComEd also committed to "continuing to define the auction process so the rules of the auction and the criteria by which bidders' actions are to be reviewed are known well before the auction begins." (Juracek Reb., ComEd Ex. 9.0, pp. 12-13)

With respect to Staff's concerns about the Auction Manager's discretion, ComEd addressed these concerns in some detail. (LaCasse Reb., ComEd Ex. 11.0 Revised, pp. 87-93), including a summary of Staff's involvement in the entire auction process. (LaCasse Reb., ComEd Ex. 11.0 Revised, p. 95)

Staff assessed the above-mentioned replies from ComEd, and recommended the adoption of ComEd's revised proposal.

Staff's Response

Staff considered ComEd's response and concluded that its concerns had been addressed. The Staff recommends that the Commission approve the proposal to have the Illinois Auction conducted by an independent auction manager, and stresses that, under the proposal, Staff will be able to monitor and provide input on the performance of the auction manager's functions. Staff Brief at 74.

Commission Analysis and Conclusion

The record shows that having an independent, third-party Auction Manager would be advantageous in numerous respects. In addition, the record makes clear that Dr. LaCasse is highly qualified to hold such a position, particularly in light of her significant experience in the New Jersey auctions. The Commission therefore concludes that ComEd and Ameren should jointly retain Dr. LaCasse for the role of independent, third-party Auction Manager. In addition, the record demonstrates that ComEd's proposal for the Auction Manager, as modified in response to Staff's concerns, is just and reasonable. The Commission therefore approves such proposal, as modified.

2. Role of ComEd

ComEd

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

Staff

As described in sub-section E.1, above, Staff asserted that ComEd had a conflict of interest due to its affiliation with Exelon and Exelon's generating and power marketing subsidiaries. Staff noted, however, that ComEd had agreed that its "representatives not be present 'in the room' during the actual conduct of the auction, not be permitted to direct or influence the Auction Manager's conduct of the action, and not be permitted to communicate with the Auction Manager during the running of the auction." (Juracek Reb., ComEd Ex. 9.0, p. 13) With this restriction—along with the measures described in sub-section E.1 to limit the discretion and to reinforce the independence of the Auction Manager—Staff found that ComEd's role to be satisfactorily narrowed.

CUB

CUB acknowledged that ComEd's role of procuring power in the auction, yet claimed that ComEd must take care to avoid conflicts of interest and the appearance of any impropriety in designing and managing the auction. CUB also noted that Exelon Generation currently provides electricity for ComEd, and asserted that the best thing for the Generation part of the company may not always be the best thing for ComEd's ratepayers.

Commission Analysis and Conclusion

It is important that the Auction Manager function independently of any particular party, so as to maintain the fairness of the auction and to keep it free of any bias. As noted above, ComEd has agreed to certain measures to help promote that independence. The Commission therefore concludes that ComEd should retain the Auction Manager,

but such manager should not be under ComEd's direction. Rather, the manager should conduct the auction independently in accordance with Commission-approved procedures.

3. Role of Staff

ComEd

ComEd stated that Staff will have a major role in all aspects of the auction process, ensuring that the Commission-approved process is followed and that the interests of customers are protected. ComEd also noted that following each auction, Staff will submit to the Commission a formal report, which will provide an independent assessment whether the auction was conducted fairly and appropriately and all necessary actions to ensure the competitiveness and integrity of the process were taken. (McNeil Reb., ComEd Ex. 10.0, pp. 19–20) ComEd further stated that Staff will also highlight any issues or concerns for consideration by the Commission and will include recommendations regarding further action. (McNeil Reb., ComEd Ex. 10.0, pp. 19–20)

Staff

Given all the discussion in sub-sections E.1 and E.2, above, Staff believed that as an agent for the Commission, it should play a definite role in the implementation of any auction approved in this docket. Staff agreed with ComEd's suggested role for Staff in the auction, and agreed in general with the outline for a Staff Report to the Commission following each auction, which would address pre-auction activities, the conduct of the auction, external events that may have affected the auction results, and any issues, concerns or recommendations identified by the Staff. (McNeil Reb., ComEd Ex. 10.0 Revised, p. 20) Staff also proposed some modifications to the Report.

ComEd Response

In response to Staff's suggestions, ComEd proposed a revised outline for the Staff Report (ComEd Ex. 19.6.), which resolved Staff's issues regarding such outline.

Commission Analysis and Conclusion

The record shows that Staff will be actively involved in all parts of the auction process, which will help ensure the protection of consumers. The record also shows that Staff's post-auction reports will be useful for independently assessing the fairness and appropriateness of the auction, for helping ensure its competitiveness, for addressing issues, and for considering potential improvements. The Commission therefore approves the proposed full involvement of Staff in the auction process, including its issuance of a post-auction report in the form of the revised outline.

4. Representation of Consumer Interests / Separate Consumer Observer

ComEd

ComEd stated that it, along with other supporters of the Illinois Auction Proposal, agreed that the interests of customers are important and should be considered at all stages of the auction process. ComEd pointed out that concern for customer interests has played a major role in the development of the Proposal, shaping many of the provisions that are reflected in ComEd's tariffs. ComEd noted that the auction design provides for significant regulatory oversight by the Commission and its Staff, which will be present at all phases of the process to assure that the interests of customers are promoted and protected. ComEd also noted Staff's unique regulatory role in protecting consumers. (McNeil Dir., ComEd Ex. 3.0, pp. 60–64; McNeil Reb., ComEd Ex. 10.0, pp. 33–36)

Staff

While Staff is willing to accept the responsibility for observing and assessing the auction as a neutral party, which Staff believes is in the best interest of consumers, Staff takes no position with respect to the CUB-CCSAO proposal for an additional "Consumer Observer."

CUB-CCSAO

CUB-CCSAO claimed that if the Commission did not reject the auction, then it should provide for a consumer observer. They asserted that such an observer should have the same access to information and processes as the Staff Advisor, but would be charged with monitoring the process and outcome from a consumer perspective and presenting that perspective to the Commission when the Commission is deciding whether to accept or reject the results of the auction. CUB-CCSAO also suggested that their observer play an active role in other reviews. (Steinhurst Dir., CUB-CCSAO Ex. 2.0, pp. 35-36)

AG

Like CUB-CCSAO, the AG expressed concern about the ability of Staff to represent customers and proposed that the auction design incorporate a separate consumer advocate to perform that function.

ComEd Response

ComEd welcomed Staff's willingness to perform oversight functions on behalf of customers, and expressed its confidence that Staff is fully capable of doing so. ComEd observed that the auction design provides for the preparation of a report by the Staff following the conduct of each auction that will provide an independent view for the Commission on issues of significance to customers. ComEd noted that given the

extensive role that Staff has undertaken, the addition of a separate consumer advocate would be unnecessary and duplicative. (McNeil Reb., ComEd Ex. 10.0, pp. 31–32)

Commission Analysis and Conclusion

Staff has extensive experience and expertise in working to protect customer interests. The auction process envisions a full and active role for Staff in providing such a function, and Staff has indicated its willingness to perform it. In light of the broad range of this function, including the provision of post-auction reports and recommendations, the Commission concludes that there is no reason to establish a separate consumer advocate.

F. Date of Initial Auction

ComEd

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

ComEd favored a joint auction with Ameren, which would require that a common date be selected. Toward that end, ComEd noted, it and Ameren, which originally had proposed a May 2006 date, had agreed that the initial auctions should be conducted during the first ten days of September 2006. (McNeil Reb., ComEd Ex. 10.0, pp. 26–28)

Staff

Staff emphasized the need for a joint auction that would procure supply for the customers of ComEd and Ameren at one time. (Salant Dir., ICC Staff Ex. 11.0, p. 7) As a result, Staff supported ComEd's and Ameren's agreement to hold the auction in the first ten days of September 2006, even though Staff had initially proposed July 2006. (Salant Reb., ICC Staff Ex. 11.0, pp. 12–14) In expressing this support, Staff noted that such a date would give the Auction Manager the maximum time after entry of the Order in this proceeding to complete the necessary pre-auction tasks, including testing of, and practice with, the software that bidders and the Auction Manager will use during the auction. Staff also noted that it would be preferable to spend more time ironing out any problems upfront rather than, as CES suggests, scheduling the auctions at an early date and leaving September 2006 as a fallback date. In addition, Staff recommended that the Commission find that ComEd should have a contingency plan ready to present to Staff and the Commission in the event that the auction results are rejected. (Schlaf Reb., Staff Ex. 13.0, p. 16)

IIEC

IIEC favored a September 2006 auction, conducted simultaneously with Ameren's auction. (Collins Dir. IIEC Ex. 3.0, p. 5) IIEC pointed out that such timing would provide more time to lay the groundwork for the auction process, and that holding the auction closer to the time of physical delivery would yield a more accurate price. (Collins Reb., IIEC Ex. 6.0, p. 3; Collins JTr. 160.) IIEC also noted that all parties but one appeared either to support or not to oppose a September 2006 date. IIEC stated that there was no compelling reason for advancing the initial auction to a point in time more than one-half year before the winning bidders would be required to supply power, with the concomitant increase in risk and price. In addition, IIEC noted that 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, while a September 2006 initial auction date would allow bidders to focus their efforts on a single task -- preparing bids for the Illinois auction. (Collins Dir., IIEC Ex. 3.0, p. 4)

CES

CES argued for a May 2006 date for the initial auction. (O'Connor Dir., CES Ex. 1.0, p. 6) CES claimed that an auction scheduled for May 2006 could be delayed until September 2006 to allow time for the Auction Manager to address problems that may arise. (O'Connor Dir., CES Ex. 1.0, p. 10; Bohorquez-Bollinger Dir., CES Ex. 2.0, p. 4) CES also claimed that an earlier auction date would allow customers under 1 MW additional time to evaluate their supply options. (O'Connor Dir., CES Ex. 1.0, p. 10) CES conceded that given ComEd's other revisions to its proposal, it might be reasonable for the initial auction be held in September 2006 – though CES claimed that there are no technical reasons to wait and that waiting would not increase price accuracy. In addition, CES argued that by setting a May 2006 initial auction date, “the Commission will be encouraging all parties to define the post-transition rules of the game, thus bringing more certainty to the environment for customer decision-making.” (O'Connor Dir., CES Ex. 1.0., p. 11)

CCG

CCG, a potential bidder in the auction, preferred to hold the auction in May 2006 to allow sufficient time for winning bidders to hedge their positions and have operational details in place prior to the delivery date of January 2007. (Smith Dir., CCG Ex. 1.0, pp. 4-5) On rebuttal, however, CCG stated that it would not object to simultaneous September auctions and that the September date would not affect CCG's desire to participate in the auctions. CCG further stated that it also would not object to a July 2006 auction, though that was its last preference. (Smith Reb., CCG Ex. 2.0, p. 2)

ComEd Response

ComEd considered the Coalition's advocacy of a May 2006 auction date, but concluded that the advantages of the September 2006 process to which both Ameren and ComEd

agreed outweighed any arguments that had been advanced in favor of a May date. In addition, ComEd noted that the lengthy delay between a May auction and the January 2007 flow of energy could result in increased risk premium costs for customers that are avoidable by conducting the auction in September 2006.

Commission Analysis and Conclusion

The record shows that conducting the ComEd and Ameren auctions simultaneously would be beneficial to all concerned parties. The evidence also favors September 2006 over May 2006, as the September date would permit more time to complete various pre-auction tasks and iron out any problems, and would tend to provide more accurate prices, thereby reducing any need for a risk premium to cover a longer period between the auctions and the January 2007 start date. The Commission therefore approves the first ten days of September 2006 as the period for commencing the initial ComEd and Ameren auctions.

G. Common vs. Parallel Auction

1. Among Fixed Price Products and Hourly Products

ComEd

In its original filings, ComEd proposed that various “fixed price” products should be grouped together and auctioned simultaneously, while the “hourly” product should be purchased in its own separate auction (held in parallel with the fixed price products auction). In addition, ComEd proposed that its various products should be auctioned separately from Ameren’s products (in parallel auctions). In its rebuttal testimony, ComEd modified its proposal to allow: (1) a common auction for all of the fixed price products of both ComEd and Ameren; (2) a common auction for the hourly products of both ComEd and Ameren; but (3) the two common auctions referenced above would be conducted in parallel in relation to each other.

Staff

Staff witness Salant praised the approach of combining products within a single common auction. In particular, Staff noted the general efficiency gains and consumer benefits to the common auction approach (allowing switching or “arbitrage” between products) as opposed to the separate but parallel auction approach. (Salant Dir., Staff Ex. 1.0, pp. 31-47)

Commission Analysis and Conclusion

The Commission finds that a common auction for fixed-price products and a common auction for hourly products is efficient, and provides additional benefits to consumers as compared with the parallel auction approach. Accordingly, ComEd’s proposal, as modified in its rebuttal testimony, is approved.

2. Between Fixed Price and Hourly Products

ComEd

ComEd explained that the fixed and hourly products are not good substitutes for each other and that switching between them would not be appropriate or effective. (LaCasse Reb., ComEd Ex. 11.0, pp. 61–62) Andrew Parece, Auction Monitor for the first New Jersey basic generation services auction, likewise concluded that switching between these products would present risks of additional costs, complexity and potential for strategic bidding behavior that may be detrimental to the auction. (Parece Reb., ComEd Ex. 12.0, pp. 35–38)

Staff witness Dr. Salant initially suggested that the auction rules provide for switching between fixed price and hourly products. (Salant Dir., Staff Ex. 1.0, pp. 39-40, 43) Dr. LaCasse responded to that recommendation, citing the necessity for separate products without switching. In his rebuttal testimony, Dr. Salant noted that “the potential benefits of combining the fixed price and hourly price contracts into a single auction are relatively small” and, therefore, accepted ComEd’s revised approach to product switching, recommending approval of the proposal “even though the fixed price and hourly products are auctioned separately.” (Salant Reb., Staff Ex. 11.0, p. 11)

Staff

Staff noted the aforementioned exchange between Dr. Salant and ComEd witnesses LaCasse and Parece, and Dr. Salant’s eventual concurrence that fixed price and hourly priced products should be auctioned separately (in parallel auctions). Staff agreed that this feature of the proposed auction process is appropriate, and should be approved by the Commission.

Commission Analysis and Conclusion

The record shows that allowing bidders to switch between fixed price and hourly products in an auction setting would be neither appropriate nor effective. Additionally, the potential benefits of combining the fixed price and hourly price contracts into a single auction are relatively small. Therefore, the Commission accepts ComEd’s revised approach to product switching, recommending approval of the proposal with fixed price and hourly products to be auctioned separately.

3. Between ComEd and Ameren Products

ComEd

ComEd initially considered separate parallel auctions by ComEd and by Ameren. Staff witness Dr. Salant urged that the auction rules provide for switching between the fixed price products of ComEd and Ameren. (Salant Dir., Staff Ex. 1.0, pp. 39-40, 43) Having reached agreement with Ameren (prior to the filing of rebuttal testimony) on a common date for the initial auction, ComEd responded favorably to Dr. Salant's suggestion and proposed in Mr. McNeil's testimony that the auction provide for switching between ComEd and Ameren fixed price products. (McNeil Reb., ComEd Ex. 10.0, pp. 28–30) ComEd also proposed that switching be permitted between the hourly products of ComEd and the hourly products of Ameren. ComEd identified the fixed and hourly price products of ComEd and Ameren to be included in the Illinois Auction divided between the Fixed Price Section (within which switching is permitted) and the Hourly Price Section (within which switching is also permitted) in ComEd Ex. 11.5 (b).

CES

The Coalition does not object to ComEd's proposition to conduct its auction in parallel with Ameren, but expressed concern over the way in which certain customer classes were treated. CES indicated that the 400 kW to 1 MW customer group in the ComEd service territory has shown greater total switching activity than even the 1-3 MW group in the ComEd service territory and considerably more than that for all Ameren customers over 1 MW. CES therefore recommended that those ComEd customers be included in the CPP-A auction. (O'Connor Reb., CES Ex. 4.0, p. 27)

IIEC

IIEC supported the notion of a common auction between the ComEd and Ameren territories, should an auction process be approved in this case. IIEC expressed 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. 2.0, p. 4) However, IIEC claimed that disparities such as the lack of a single common deliverability test and the differing nature of the auction segments serve to bifurcate the auctions and tend to make them less competitive. (Dauphinais Dir., IIEC Ex. 2.0, p. 6) The IIEC argued that the Commission should require that a separate auction segment be conducted 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).

Commission Analysis and Conclusion

The Commission finds that the fixed price and hourly price products of ComEd and Ameren to be included in the Illinois Auction divided between the Fixed Price Section (within which switching is permitted) and the Hourly Price Section (within which switching is also permitted) as identified in ComEd Ex. 11.5 (b) will be subject to common auction, as proposed by ComEd.

4. Common Deliverability Test Applicable to Illinois Generation

Staff

Staff expressed no position on the IIEC's apparent recommendation that the Commission "require ComEd to work with Ameren, PJM and MISO to establish a common deliverability test for capacity resources within the combined MISO and PJM footprint to the combined ComEd and Ameren load zones in Illinois." (Dauphinais Reb., IIEC Ex. 5.0, p. 8) Staff explained that approval of ComEd's proposed auctions should not be withheld until such a common deliverability test is established, and cited the testimony of numerous witnesses who indicated that there are benefits to a common auction, even if the seams between MISO and ComEd are not completely eliminated.

IIEC

IIEC claimed that 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 should be implemented. (Dauphinais Dir., IIEC Ex. 2.0, p. 8) IIEC asserted that, 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. IIEC further argues that 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. 2.0, p. 2)

Commission Analysis and Conclusion

Based on the record, the Commission concludes that approval of ComEd's proposed auctions should not be withheld until such a common deliverability test is established.

H. Contract Durations for Blended, Fixed Price Product

1. Proposed Blends for Residential and Small Commercial Customer Supply

ComEd

ComEd has proposed to use a blend of contract durations to acquire supply for residential customers. Under the Illinois Auction proposal, supply for ComEd's residential customers will be provided under agreements with a series of staggered 1, 3 and 5 year contract terms comprising 15%, 60%, and 25% of the auction respectively.

(McNeil Dir., ComEd Ex. 3.0, pp. 23-25) ComEd states that this feature of the Illinois Auction that has received broad support, notably the Staff's Final Report discussed the ways in which the goals of rate stability and market based pricing can be balanced through separate products designed for different customer groups, giving as one example the possibility of offering "a relatively stable product for small customers based on overlapping multi-year full requirements contracts with suppliers...." (ComEd Ex. 1.2) ComEd maintains that its blended 1, 3 and 5 year contract product for residential customers complies with the Staff's guidance, making a relatively stable product available to provide supply for residential customers. (McNeil Dir., ComEd Ex. 3.0, pp. 25-26)

ComEd responds to DES' proposal for 3-month contracts by noting that small customers will have the option to choose short-term price signals through real-time pricing options. However, ComEd maintains that it would be inappropriate to use such short-term contracts for default service as customers would be unnecessarily exposed to price volatility.

Regarding the concerns voiced by the AG and PES about the robustness of the five-year contract, ComEd points out that markets exist for longer-term contracts. Second, ComEd states that the actual offering of five-year contracts as part of the Illinois auction proposal will help to create an even more robust market

Staff

Staff supports ComEd's proposal to use a blend of one, three, and five year contracts. Staff presented a risk assessment analysis which supported the ComEd proposal. Staff determined that there was no evidence of a better way of balancing the two goals of price stability and market sensitive pricing. In particular, Staff stressed that it would be concerned with proposals to use contracts of less than one year or blends utilizing a greater percentage of five-year contracts.

CUB

CUB recommended that the mix of contract durations be more heavily weighted toward the long-term contracts. CUB argues that a blend of 9% one-year, 51% three-year, and 40% five-year contracts is more appropriate.

AG

The AG questioned whether the market was sufficient to support the five year contracts. As such, the AG recommends an analysis of appropriate contract durations.

PES

PES also objected to the robustness of the five year contracts, though indicating that there was no objection to the principle of using a five-year contract.

DES

DES objects to the use of long-term contracts. DES proposes the use of three-month contracts.

Commission Analysis and Conclusion

Many of the parties in this proceeding have put forth differing proposals regarding the blend of contracts. While some parties suggest short-term contracts and some long-term contracts, ComEd and Staff support a blend designed to balance price stability and market sensitivity. Staff supported ComEd's proposed blend of contracts with a risk analysis which showed that longer term contracts would likely result in excessive risk premiums. ComEd has shown that the proposed blend of a series of staggered 1, 3 and 5 year contract terms comprising 15%, 60%, and 25% of the auction respectively is appropriate. The Commission approves ComEd's proposed blend of contracts

2. 5-Year Agreements**ComEd**

As discussed Section V(H)(1), ComEd has proposed to use a blend of contracts composed of 25% five-year contracts.

Staff

Staff's position is discussed in Section V(H)(1). Staff supports the use of 25% five-year contracts.

CUB

CUB suggests that the number of 5-year agreements in the blend be increased and that the percentage of 1-year contracts be decreased. (Steinhurst Dir., CUB-CCSAO Ex. 2.0, pp. 27-28) In support of this approach, CUB noted that these changes could reduce the percentage of ComEd's total load that would be included in annual auctions after the initial procurement from 40% to approximately 34%, an outcome CUB indicates is desirable. (Steinhurst Dir., CUB Ex. 2.0, pp. 27-28)

DES

In contrast, DES opposed the inclusion of contracts longer than one year in the blended supply portfolio. (Steffes Dir., DES-USESC Ex. 1.0, p. 8) DES, as discussed in Sections V(H)(1) and (4), argued that longer term agreements may result in higher default service prices, and could contribute to demand side management and environmental problems. As such, DES opposed the five-year contracts.

PES

PES suggests that it would like to see all 5-year contracts eliminated from the portfolio supply for customers with demands of 25 kW to 400 kW. (Bollinger Dir., PES Ex. 1.0, pp. at 8-9)

Commission Analysis and Conclusion

As discussed in Section V(H)(1), ComEd has proposed a blend of contracts including 25% five-year contracts. Both Staff and ComEd have shown that long-term contracts are an important part of a balanced portfolio to provide for price stability. However, due to risk premiums included in five-year contract prices, there is a need to balance the associated cost with the control of price volatility. The Commission adopts ComEd's proposal to use 25% five-year contracts as an appropriate balance.

3. 3-Year Agreements**ComEd**

As discussed Section V(H)(1), ComEd has proposed to use a blend of contracts composed of 60% three-year contracts as they provide a balance of price stability and market sensitivity.

PES

PES suggests that they would like to see all and 3-year contracts eliminated from the portfolio supply for customers with demands of 25 kW to 400 kW. (Bollinger Dir., PES Ex. 1.0, pp. 8-9)

Commission Analysis and Conclusion

As discussed in Section V(H)(1), ComEd has proposed a blend of contracts including 60% three-year contracts. Both Staff and ComEd have shown that mid-term contracts contribute to a balanced portfolio. The Commission adopts ComEd's proposal to use 60% three-year contracts.

4. 1-Year Agreements**ComEd**

As discussed more fully in Section V(H)(1), ComEd has proposed to use a blend consisting of 15% 1-year agreements. ComEd states that, even those who sought to

eliminate 5- and 3-year agreements entirely, acknowledge that they add an element of stability to the overall rate. (Bollinger, Tr. 918-919).

AG

The AG has expressed concern about the use of longer terms agreements and the potential risk premiums that suppliers may require under such contracts. (Salgo Dir., AG Ex. 2.0, p. 19) The AG indicated that an analysis of appropriate contract durations should be performed.

DES

DES proposes the use of three-month contracts. DES states that three-month contracts would provide more appropriate price signals to customers.

Commission Analysis and Conclusion

As discussed in Section V(H)(1), ComEd has proposed a blend of contracts including 15% one-year contracts. Both Staff and ComEd have shown that short-term contracts increase the risk of price volatility. However, such contracts also provide the lowest risk premium. The Commission finds that ComEd's proposal strikes an appropriate balance. The Commission adopts ComEd's proposal to use 15% 1-year contracts.

5. Percentage of Supply Acquired at Subsequent Auctions

Several Parties have proposed different contract products for use in the auction. Those proposals are discussed in Section V(H)(1). The positions of Parties who specifically addressed the percentage of supply to be acquired in subsequent auctions are discussed in this section.

ComEd

ComEd has proposed a staggered term structure which limits acquisition volume after the initial auction to 40% of ComEd's load. (McNeil Reb., ComEd Ex. 10.0, pp. 39-40)

Staff

Staff supports ComEd's proposed blend of contracts as well as the resulting amount of supply to be acquired at subsequent auctions.

CUB

CUB states that less of ComEd's supply should be acquired at each subsequent auction. As such, CUB proposed increasing the five-year percentage and decreasing the one-year percentage. CUB claims that these changes could reduce the percentage

of ComEd's total load that would be included in annual auctions after the initial procurement from 40% to approximately 34%. (Steinhurst Dir., CUB Ex. 2.0, pp. 27-28)

Commission Analysis and Conclusion

ComEd has proposed a blend that will result in approximately 40% of its requirements to be acquired at subsequent auctions. While CUB has indicated a desire to reduce that amount, Staff and ComEd have shown that ComEd's proposal reflects an appropriate balance between the risk premium of long-term contracts, which would mean a lower amount of supply in subsequent auctions and the price volatility of short-term contracts, which result in a higher amount of supply in subsequent auctions.

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

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

ComEd

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

Regarding the proposal by BOMA to allow 1-3 MW customers access to the CCP-B auction product, ComEd expressed concern that allowing the 1-3 MW customer class access to the CPP-B product would retard competition. In addition, ComEd points out that one of the purposes is to provide unsophisticated customers with price volatility protection. However, ComEd states that the 1-3 MW customers are sophisticated and do not need the additional protection of the blended product.

Staff

Staff does not oppose ComEd's surrebuttal position setting the range for the CPP-A product between 400 kW and 3 MW.

DES

DES proposes that for customers with demand over 1 MW, the bundled product should be an hourly energy product. DES notes that given that interval meters are already installed for this class of customers, no new technology would be necessary to implement the proposal.

BOMA

BOMA objects to ComEd's proposal regarding use of one-year products to meet the needs of 1-3 MW customers. BOMA instead proposes that such customers should be served with the CPP-B auction, to provide the price volatility mitigation of the blended product which is afforded to smaller customers. BOMA argues that the same reasons which ComEd states support the use of a blended product for smaller customers, support the use of such a product with the 1-3 MW customer class.

Commission Analysis and Conclusion

ComEd has proposed placing the 1 MW to 3 MW customers on the CPP-A product. BOMA is the only party who opposed this. BOMA has not presented sufficient evidence to show why this customer class should be offered the blended auction product. Rather, ComEd has shown that the 1 MW to 3 MW customers should be placed on the CPP-A product. The Commission accepts ComEd's proposal to serve 1 to 3 MW customers with the CPP-A product.

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

ComEd

ComEd's proposal envisioned that supply for 400 kW to 1 MW customers would be procured in the 1, 3 and 5 year blended auction that also served residential customers.

After considering the views expressed by the Coalition and the Staff, ComEd revised its proposal to include supply for 400kW to 1 MW customers in the 1-year fixed price auction, rather than in the blended auction. (McNeil Sur., ComEd Ex. 18.0, pp. 19-21) ComEd notes that that change had the collateral effect of eliminating the need for the migration adjustment factor initially proposed by ComEd to account for the different propensity of 400 kW to 1 MW customers to switch suppliers as compared with residential customers. (McNeil Sur., ComEd Ex. 18.0, pp. 20, 35; Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 12-13; Crumrine, Tr. 774-775; Spilky / Domagalski, Tr. 576-577). As a result of ComEd's revised proposal, ComEd states that there is now widespread agreement on appropriate supply terms for customers with peak demands between 400 kW and 3 MW.

Staff

Staff does not oppose ComEd's surrebuttal position setting the range for the CPP-A product between 400 kW and 3 MW. Staff notes that switching data supports this grouping.

BOMA

BOMA claims that ComEd's revised proposal to serve 400kw to 1 MW customers with the CPP-A product would harm customers. BOMA claims that such customers need to have access to the blended product to enjoy the benefits of market competition and to obtain protection against price volatility.

DES

DES proposed that customers with an annual peak demand under 1 MW and annual usage greater than 15,000 kWh that have not been declared competitive be eligible for a Bundled Product with a monthly energy price. DES maintains that under this proposal, these customers also would have access to a monthly Delivery Service tariff.

CES

CES argues that the 1-year fixed price product should also be the supply source for customers with demands between 400 kW and 1 MW. CES maintains that ComEd's surrebuttal proposal is appropriate as it more closely aligns the customer groupings with the realities of the competitive market, customer requirements based on load, likelihood of competitive declaration, and migration risks.

Commission Analysis and Conclusion

ComEd has proposed placing the 400 kW to 1 MW customers on the CPP-A product. Staff and CES agree. ComEd has shown that the 400 kW to 1 MW customers should be serviced with the CPP-A product. Although BOMA opposes this, it has not presented sufficient evidence to support its proposal. The Commission accepts ComEd's proposal to serve 400 kW to 1 MW customers with the CPP-A product.

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

ComEd

ComEd states that service to customers with peak demands in excess of 3 MW is subject to a competitive declaration that became effective by operation of law in 2003. Given that competitive declaration, ComEd notes that the legal status of these customers with respect to ComEd service obligations is different from the status of other customers. ComEd indicates that tariffed service for customers who are subject to a competitive declaration is not required – a legal distinction that recognizes the competitive alternatives that are available to this customer group.

Regarding the various proposals to advocate inclusion of this customer group in the 1-year fixed price supply auction, ComEd indicates that it understands that the Commission cannot require this change for customers subject to a competitive declaration, and that the proposals by these parties are in the nature of requests that ComEd voluntarily extend the 1-year fixed price auction to include customers who have no legal right to be included.

ComEd states that it has considered these suggestions, but determined that the line between customers subject to a competitive declaration and those who are not should be respected. ComEd maintains that there are already retail electric suppliers in Illinois offering service to this customer group. (McNeil, Tr. 581). Regarding the DOE's contention that a large federal government customer received few, if any, responses to requests for proposals from retail suppliers, ComEd notes that cross examination of the DOE witness suggested that the terms of the RFP were responsible for the outcome because they included onerous provisions.

In contrast to DOE's and IIEC's claims, ComEd states that the customers in the over 3 MW category have alternative sources of supply if they agree to reasonable commercial terms. ComEd states that it will continue to offer bundled service to over 3 MW customers, but the service would be supplied through hourly energy purchases. (McNeil Sur., ComEd Ex. 18.0 at pp. 43-44) ComEd notes that it is not required to provide a fixed-price POLR product for large load customers and that hourly pricing will provide a sufficient safety net in the unlikely event that such service is needed. ComEd further highlighted the fact that the DOE's own contract terms have historically presented a hurdle for their receiving a RES contract. ComEd also notes that IIEC's proposal, in the words of IIEC's own witness, "would have the practical effect of rescinding the competitive declaration..." (O'Connor, JTr. 202)

Staff

Staff does not oppose the proposals by DOE and IIEC to include customers having over 3 MW loads in the CPP-A auction or in a separate CPP-A type auction. Staff supports IIEC's proposal for pre-qualification and notes that it could be applied to other customer classes at least on a voluntary basis.

CES

CES notes that service for the over 3MW customer group has been declared competitive. CES maintains that several of the parties effectively seek to rescind that declaration, such as by requiring ComEd to provide POLR service in the form of a fixed price product. CES opposes such proposals.

DOE

DOE objects to ComEd's lack of POLR service for over 3MW large load customers. DOE claims that ComEd is forcing its over 3MW large load customers to rely on the

PJM hourly LMP as their default service in the event they are unable to obtain reasonably priced supply contracts from RESs. DOE claims that ComEd has not shown that it or any of its other customer groups will be harmed by providing POLR service for over 3MW large load customers. DOE proposes the use of a one-year, or at least three month, fixed price POLR product.

DOE claims that POLR service is needed by the very large load class customers to provide a safety net for those who can not secure a contract with a RES. DOE argues that all of the parties to this proceeding who are very large load customers have expressed a desire for POLR service.

DOE claims that no other party would be adversely affected by provision of POLR service. DOE includes ComEd in this blanket statement, indicating that under the proposals for POLR service, ComEd would be fully compensated for all costs incurred in procuring power and providing the bundled service to those customers. DOE also argues that POLR service would not harm the “competitive” nature of large load market, as POLR service will include a migration risk which should allow RESs to remain competitive.

Regarding the reliance on the hourly LMP market, DOE characterizes that as risky and unreliable. DOE claims that hourly pricing would result in increased costs, both due to increased energy costs and related administrative costs. DOE also criticizes the use of hourly pricing due the inherent difficulty in budgeting, particularly long-term, for energy costs in a volatile market.

IIEC

IIEC also proposes that ComEd offer a fixed-price POLR service to over 3 MW customers. IIEC claims that the hourly energy price proposed by ComEd will not be a sufficient default option as it does not allow customers to reap the full benefits of the competitive markets. IIEC argues that in Docket 03-0056, opened to review competitiveness for this customer group, Staff expressed some concern over the competitiveness of the class. IIEC claims that the competitive declaration should not be controlling since the service ComEd is offering via the Illinois auction proposal is not the same as the Rate 6L service that was declared competitive. IIEC highlights several distinctions between the rate under which service was declared competitive and ComEd’s current proposal.

IIEC also proposes a separate auction segment for over 3 MW customers. First, IIEC claims that a separate auction segment would promote uniformity between the ComEd and Ameren products. Second, IIEC suggests that a separate auction segment would recognize that the over 3 MW customers load characteristics differ significantly from other customers. Third, IIEC argues that there may be a load risk for the over 3 MW customer class that does not exist for smaller customers.

IIEC also proposes that in addition to the one-year product, ComEd provide over 3 MW customers with access to a multi-year contract. IIEC reasons that a blended product as

is proposed for smaller customers would serve the same benefit for larger customers. IIEC acknowledges that a multi-year product may not be desirable in the future, but claims that there is a need for such a product in the initial period.

IIEC proposes to require customers in the over 3 MW customer group to “prequalify” their load for the auction so as to mitigate the load risk faced by suppliers which results in increased bid prices. IIEC describes the prequalification as not being a commitment to take the ultimate fixed-price offer, but rather an affirmative indication of eligibility. Those customers not pre-qualified could not take the one-year product.

Commission Analysis and Conclusion

ComEd has proposed to exclude customers with over 3 MW of demand from the CPP-A auction and to provide hourly market service to those customers. IIEC and DOE have proposed to instead include such customers in the CPP-A auction. However, IIEC and DOE have not shown that ComEd is required to provide such a product to those customers. Because the over 3 MW customer class has been declared competitive, the Commission cannot require ComEd to provide such service. Regardless, the Commission does not find the evidence and arguments for providing such service to be persuasive. ComEd has shown that customers over 3 MW should be excluded from the CPP-A auction and offered service under the hourly market. The Commission adopts ComEd’s proposal to offer hourly service to customers having over 3 MW of demand.

4. Demand Charge Component for \geq 1MW Customers

IIEC recommended the isolation of a demand charge component for customers subject to the CPP-A auction. (Stephens Dir., IIEC Ex. 1.0, pp. 22-23) IIEC claims that ComEd’s use of energy-only price will not fully recognize the benefits of load factor in overall customer cost. IIEC proposes that ComEd isolate the capacity component and charge it out on a per kW basis with the remainder of the auction price being charged on an energy basis.

IIEC did not provide the details of its proposal. No other party submitted testimony supporting IIEC’s proposal. The Commission declines to adopt IIEC’s proposal at this time, in view of the lack of specificity and the absence of support from other parties.

J. Continuation of CPP-H Auction

ComEd

ComEd explained that the Illinois Auction design provides for ComEd to acquire supply for its largest customers through the hourly CPP-H auction until the PJM Reliability Pricing Model (“RPM”) or a functionally equivalent model is in place in PJM.

Staff

Subject to certain limitations and clarifications brought out during cross-examination of IIEC witness Mr. Dauphinais, Staff contended that ComEd should maintain its CPP-H auction until such time as the proposed RPM centralized capacity market or the equivalent is in operation and the Commission finds such market or equivalent to be a reasonable approach for acquiring capacity for hourly pricing customers in Illinois. Staff noted that those limitations and clarifications included (1) that the Commission should not attempt to meter load under the CPP-H auction if the FERC approves a tariff that imposes a capacity requirement on all load, and (2) to the extent that the final version of the RPM did not allow the CPP-H auction to meet the capacity requirement, the Commission would not require the continuation of the CPP-H auction for that portion not covered. (Common Tr., pp. 131, 133)

IIEC

IIEC claimed that the Commission should require ComEd to implement and maintain its proposed CPP-H auction until the RPM or the equivalent is in operation and the Commission finds the RPM capacity market or its equivalent to be a reasonable approach for acquiring capacity for hourly pricing customers in Illinois. IIEC suggested that the FERC could modify the RPM proposal, and at this point the Commission cannot 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.

IIEC stated that it did 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, but claimed that depending on its final form as accepted by the 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 JTr. 131-134). IIEC also contended that under the *Pike County* exception to the filed rate doctrine, the ICC has the authority to review the prudence of ComEd's choices.

ComEd Response

ComEd provided assurances that it would continue to conduct the CPP-H auction until the RPM had been filed with and approved by the FERC, and the PJM forward centralized capacity auction was in effect. (Naumann Reb., ComEd Ex. 14.0, p. 20) ComEd pointed out that Mr. Dauphinais' suggestion was unsound and should be rejected for multiple reasons. ComEd noted, first, that prior to approving any change in the PJM capacity market and accepting a centralized market methodology such as RPM, the FERC must find the new methodology to be just and reasonable; if the FERC accepts such a methodology, the ICC must accept the rates, terms, and conditions as just and reasonable, and ComEd cannot properly ask the Commission to reconsider the question of whether the prices set by RPM are just or appropriate. ComEd also noted that, assuming PJM files and the FERC accepts a centralized locational capacity market

for all of PJM, CPP-H customers cannot be carved out from that procurement (and have their capacity requirements continue to be met through the ComEd-run CPP-H process), as such carving out would undermine the entire concept of centralized procurement of capacity and put the reliability benefits to all of PJM at risk. (Naumann Sur., ComEd Ex. 23.0, pp. 32-33)

Commission Analysis and Conclusion

ComEd made clear that it would continue to conduct the CPP-H auction until the PJM RPM or a functionally equivalent model is in place in PJM. RPM had been filed with and approved by the FERC, and the PJM forward centralized capacity auction was in effect. The Commission finds IIEC's suggestion that the Commission make a finding of reasonability regarding the RPM capacity market or its equivalent to be likely inappropriate under the law and risky for PJM as a whole. In addition, IIEC's concern is solely speculative, and thus the Commission finds no compelling reason to act now. This is particularly true because to the extent that the Commission did have the ability to act regarding the means for meeting capacity requirements, it can do so if the need arises. Thus, the Commission rejects IIEC's request for an additional requirement of Commission approval of the RPM capacity market or its equivalent at this time.

K. Contingencies

1. Volume Reduction

ComEd

ComEd noted that as discussed in Section V B(6), the Illinois Auction design provides for volume reductions by the Auction Manager in the event that interest in the auction by suppliers is not as high as expected. ComEd explained that in this contingency, volume reductions serve as a safety net to ensure that prices resulting from the auction are competitive. (LaCasse Reb., ComEd Ex. 11.0, 39:931–940). ComEd stated that the Auction Manager will make an assessment of the competitiveness in the auction at the indicative offer stage, and in the first round of the auction – if the assessment indicates that the level of interest from suppliers is not sufficient to provide assurances of a competitive result, the Auction Manager can cut back the volume to be procured. ComEd explained that “the volume cutback means that a larger number of tranches bid will be chasing a smaller number of tranches of available load, ensuring a more competitive bidding environment.” ComEd has proposed a contingency plan whereby in the event of a volume reduction any shortfall would be purchased at spot. This will ensure that the auction is the only opportunity to sell price-risk management services to ComEd and will encourage maximum participation in the auction (LaCasse Reb., ComEd Ex. 11.0, p. 27).

Staff

Staff did not oppose this contingency proposal, and agreed with ComEd that, in a volume cutback scenario, purchasing power from the PJM spot market would be preferable to the other alternatives. (Staff Ex. 5.0, p. 18) Staff suggested that this contingency be clarified so that in the event that the Commission rejects the results of an auction, all of the tranches originally to be procured through the rejected auction – including any tranches not auctioned due to volume reductions – should be handled pursuant to the “rejection” contingency provisions. Staff explained that if this were not the case, the portion of ComEd’s load requirements separated from the auction due to the volume reductions would be purchased using the supply options described in ComEd’s “undersubscription” contingency plans, while the rest would be subject to the rejection contingency provisions.

Commission Analysis and Conclusion

The evidence shows that the proposed volume reduction contingency and the pain to purchase any shortfall from the volume reduction at spot is reasonable and necessary. Accordingly, the Commission approves this contingency.

2. Supplier Default

ComEd

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

Staff

Staff has no objection to the various plans for this contingency.

Commission Analysis and Conclusion

The evidence shows that this contingency, including its three plans, is reasonable and necessary. The Commission therefore approves it.

3. ICC Rejection

ComEd

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

Staff

Staff found ComEd's proposal for addressing a Commission rejection of auction results to be acceptable.

Commission Analysis and Conclusion

The record shows that this multi-pronged proposal is reasonable and necessary. Accordingly, the Commission approves it.

4. Subsequent Prudence Reviews of Actions in Response to Contingencies

ComEd

ComEd stated that in the event that replacement power must be procured as a result of a supplier's default, ComEd will file a detailed report with the Commission concerning the default and the actions that ComEd took to replace the power lost as a result of the default. ComEd noted that in the event that ComEd's actions caused the default, those actions would be subject to a prudence review and a determination whether any additional costs resulted from ComEd's decisions. (McNeil, Tr. 565). ComEd also noted that if the Commission rejects the auction results and an interim supply plan has to be implemented with Commission approval, the entire plan would be subject to review by the Commission for prudence prior to its implementation. (McNeil, Tr. 566).

Staff

Staff agreed in part and disagreed in part with what appeared to be ComEd's request for a full, complete and across the board prudence determination for its proposed contingency purchases. Staff noted that as of the close of the hearings, ComEd and Staff agreed that ComEd's request for a prudence determination with respect to the contingency scenarios exempted or excluded certain aspects or types of issues under those scenarios. Staff explained that in general, ComEd clarified that – with respect to the contingency scenarios – it is not seeking a prudence determination where it will be

taking future discretionary action, which may or may not be prudent under applicable legal standards, that could cause the need for such purchases or impact the net amount to be charged to ratepayers for such purchases. With this understanding and limitation, Staff supported ComEd's request for a prudence determination for the alternative procurement methods outlined in its contingency scenarios.

That is, Staff supported a finding of prudence for prices to be paid pursuant to the contingency procurement methods – the contingency purchases to be made through the PJM spot market, through a new auction, or through an RFP process – will result in prudently incurred reasonable costs for such supply. Staff did note one limitation: if ComEd's contingency plan in the event the Commission rejects the results of an auction is to develop a new supply plan to be brought to the Commission for approval, it would be premature to preapprove the prudence of supply plans that have not been developed, including the prices that would result from such unspecified plans, and ComEd agrees that it is not seeking a prudence determination for that scenario in this proceeding. (McNeil, Tr., pp. 565-566) At the same time, Staff claimed that a full prudency analysis of how ComEd will purchase power if certain future events develop could not be undertaken, nor of credit requirements for potential contingency purposes.

Staff also noted that as discussed in Section VII.B.5, below, Staff and ComEd have stipulated to an Agreement addressing Commission oversight of ComEd's purchases of replacement or additional power due to ComEd's implementation of a contingency plan. (ComEd Cross Examination Ex. No. 11)

AG

The AG asserted that through its proposal, ComEd is trying to avoid regulatory review of the rates it charges consumers for electricity. The AG asserted that ComEd is seeking in this docket pre-approval of a process, the results of which should not be subject to later regulatory review. The AG further asserted this proposal violates various provisions of the Act. Additionally, the AG contended that if the Commission adopts ComEd's proposal, the Commission should add language suggested by Staff witness Mr. Schlaf in his rebuttal testimony – namely, to include Commission review of charges for electricity obtained outside the auction in Rider CPP. The AG also claimed Cross Examination Exhibit 11 does not protect consumers and would leave multiple decisions unreviewed.

Commission Analysis and Conclusion

The evidence demonstrates that ComEd's proposals for prudence reviews are reasonable and necessary. One sensibly addresses defaults caused by ComEd, after the fact – ComEd's prudence potentially is at issue, and the default is not apparent until after the fact. Equally sensible is the prudence review of alternative procurement methods outlined in ComEd's contingency scenarios, with the limitations identified – namely, ComEd is not seeking a prudence determination where it will be taking future discretionary action, which may or may not be prudent under applicable legal standards,

that could cause the need for such purchases or impact the net amount to be charged to ratepayers for such purchases. The AG's various legal arguments, as discussed elsewhere in this Order, have no merit. Accordingly, the Commission approves ComEd's proposals for prudence reviews.

L. Regulatory Oversight and Review

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

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

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

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

(Order, Docket 84-0395, October 7, 1987)

The Illinois Appellate Court has agreed with this formulation of the standard, stating that "the Commission's interpretation of prudence is logical and supported by the parameters of the statute." *BPI v. Illinois Commerce Commission*, 279 Ill. App. 3d 824, 831 (1st Dist. 1996).

ComEd

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

ComEd observed that with respect to the proposed auction process, the time to determine prudence is now, before the process has been implemented. ComEd explained that the decisions about the overall approach and the details of its execution should be considered in advance, when changes can be made to reflect the

Commission's judgment about how best to proceed. Thus, ComEd stated that this proceeding offers the ideal opportunity for the Commission to accomplish precisely what prudence review is intended to provide—a review of the decision that Illinois utilities are making about procurement of supply for customers based on the facts that are available at the very time the decision must be made.

ComEd further explained that review of the prudence of the auction process should not take place after the auction has occurred, for several reasons: (1) hindsight review is impermissible in a prudence review - any new facts that became available at that time would not be appropriate for consideration; (2) the utility does not make any decisions during the course of the auction that would subject it to review of the prudence of the auction process (3) it would be too late to implement any recommendations that the Commission concluded were meritorious; and (4) it is essential from a commercial point of view to limit the post-auction review period to two days. (Schnitzer Dir., ComEd Ex. 6.0, pp. 27–30)

ComEd also pointed out that the factors that should be considered by the Commission have all been explored in detail in this proceeding. ComEd noted that among other things, the Commission has before it: the Final Report of the Post 2006 Initiative to Illinois Governor Blagojevich, which concludes that “the State’s largest electric utilities that no longer own generation must procure power in the wholesale market.” (ComEd Ex. 1.1); the recommendation in the Staff’s Final Report that “Large Illinois utilities that do not own significant generation resources should be encouraged to procure their electricity via a vertical tranche auction, as exemplified in Scenario 1 of the Procurement Workshop Report.” (ComEd Ex. 1.2); a specific proposal, supported by extensive expert testimony, that follows Staff’s recommendation and outlines all of the relevant procedures of a vertical tranche auction to procure supply for ComEd’s customers; and exhaustive reviews by other parties of ComEd’s proposal, together with revisions to the proposal adopted by ComEd in response to suggestions that have been made. ComEd further observed that the Commission has the opportunity to consider each of the issues raised in this proceeding concerning the process, as described in this Order, and to resolve any remaining disagreements about the best approach to be followed. Thus, ComEd concluded that this is the path the Commission should take, and that it should determine that the Illinois Auction is a prudent and reasonable method to acquire supply to serve customers needs.

ComEd also noted that witnesses for the few parties opposing the Illinois Auction have essentially conceded in testimony that the use of a vertical tranche auction to acquire supply for customers in the wholesale market is not imprudent. As an example, ComEd cited CUB-CCSAO witness Dr. Steinhurst, who agreed that there is nothing inherently unjust or unreasonable about ComEd’s buying energy at wholesale, which it has done for years. (Steinhurst, JTr. 482). ComEd also noted that Harvey Salgo, testifying for the Illinois Attorney General, agreed. (Salgo, JTr. 723–724). ComEd further pointed out that both of these witnesses recognized that if ComEd prudently acquired supply and used it to serve customer load, the costs it incurred “would be recoverable from all the different customer classes.” (Steinhurst, JTr. 486; Salgo, JTr. 727–729). ComEd observed that these two witnesses also agreed that there is nothing in their testimony

expressing the view that a competitive procurement process in general or an auction are imprudent per se. (Steinhurst, JTr. 486–487; Salgo, JTr. 729–731). Finally, ComEd noted these two witnesses' agreement that, if ComEd procured power for its customers using a competitive procurement process that the Commission determined was prudent and did not result in any costs that were not entitled to be recovered under traditional ratemaking, ComEd would be entitled to recover the resulting costs in its rates. (Steinhurst, JTr. 489–490; Salgo, JTr. 729–731). .

MSCG

MSCG claimed that the uncertainty associated with the Commission's acceptance of the auction would put bidders at risk – a risk that could not be hedged. This situation, MSCG argued, would likely lower participation and increase auction clearing prices and resulting rates, to the detriment of consumers. MSCG therefore contended that the Commission should affirm that its review will be limited. MSCG agreed with Staff, CCG, and ComEd that during post-auction review, the Commission should focus on whether the process was followed and whether there were anomalies that would call the competitiveness of the auction into question.

AG

The AG claimed that in asking the Commission to approve a “process” for obtaining market based rates, ComEd is attempting to avoid the responsibility to charge consumers rates that can pass regulatory review to insure they are fair, just and reasonable. The AG asserted that such avoidance and ComEd's proposal more generally are not legally appropriate because the Commission has to consider actual rates.

IIEC

IIEC contended that the Commission should not commit itself and consumers irrevocably to a procurement process and that there should be a formal process to review the successes and failures of that process and its various components. Thus, IIEC claimed 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.

Commission Analysis and Conclusion

The overwhelming record in this case provides more than enough evidence for the Commission to determine the prudence of ComEd's proposed process. Having reviewed this record, the Commission concludes that such process is prudent. As discussed in other parts of this Order, the Commission finds that it has the authority to reach this conclusion, and therefore again rejects the AG's legal suppositions. The

Commission also has considered IIEC's request for a firm schedule of formal proceedings, but rejects this request as unnecessary. The Commission, its Staff, the Auction Manager, and the MMU, among others, all will be watching the auction process closely. And, in any event, if the Commission determines at some point that a formal proceeding is needed, it can open one.

2. Post Auction Commission Review of Results

ComEd

ComEd explained that as in New Jersey, the Commission will conduct an immediate review of the auction and will determine whether to accept the results or commence an investigation. ComEd noted that in the course of that review, there is no limitation on the Commission's ability to review all available information. (McNeil, Tr. 504).

To the extent that parties have advocated that review of the prudence of the procurement process take place after the auction when the prices that resulted from it are known, ComEd showed, as noted above, why that approach is not appropriate. (McNeil, Tr. 551–552). ComEd did recognize that insofar as ComEd may be required to make decisions if it becomes necessary to implement contingency plans, the prudence of those decisions could be considered by the Commission. (McNeil, Tr. 564–568).

CCG

CCG claimed that the Commission should consider adopting a post-auction review that is similar to the one adopted by the New Jersey BPU. CCG contended that by focusing the review on ensuring that the Commission's approved auction process is followed and that no "anomalies were found in the bids or process that would call into question the competitiveness of the bids received," the potential bidders would have confidence that the auction will result in executed SFCs. (Smith Dir., CCG Ex. 1.0, p. 5) CCG argued that such certainty would encourage suppliers to bid, thereby benefiting consumers.

AG

The AG asserted that the proposed post auction review is too rushed and limited to protect consumers. The AG complained that three business days is not enough for the Commission to consider the reports of the auction monitor and the auction manager, and to decide whether to accept or reject the auction, identify problems, and take whatever action it believes is appropriate.

The AG further asserted that ComEd's alternatives if the auction result is rejected offer no consumer protection or regulatory review, and reduce the viability of post-auction review. The AG claimed that it is unclear what plan would be used in the interim. The AG also contended that the interim measures (e.g., requests for proposal) would not be subject to prudence review by the Commission.

CUB

CUB argued that the Illinois Auction proposal eliminates the Commission's obligation to perform an after-the-fact prudence review of the resulting auction prices, as well as its obligation to determine whether the rates are just and reasonable. CUB complained that the Auction Manager's report provides a factual summary of the activities and events that occurred during the course of the auction, the resulting prices and the manager's affirmation that the auction rules apparently were followed but not an after-the-fact analysis whether the prices resulting from the auction are fair, reasonable or prudently incurred by ComEd. CUB also complained that the Commission has only three business days from the close of the auction to accept the results, and can reject the results only if there is unambiguous evidence that the auction process was not followed. CUB further asserted that ComEd wants to avoid an after-the-fact prudence review. Additionally, CUB contended that the three-day period violates various statutory and constitutional provisions.

Commission Analysis and Conclusion

The record shows that a three business day review period is sufficiently long for the Commission to determine whether to accept or reject the auction results, and if the latter, to begin taking steps to address it. The successful post-auction review process in New Jersey is highly instructive. Moreover, the Commission will have the benefit of the Auction Manager's and Staff's reports providing information and recommendations from parties who were actively and fully involved in the auction process. In addition, because in this docket the Commission has thoroughly investigated and evaluated the auction process that will be used, the Commission will already be starting with significant familiarity with the process. For these reasons, as well as others noted in other parts of this Order, the Commission concludes that the AG's and CUB's allegations of unfulfilled and violated legal duties are without merit. The Commission therefore approves the post-auction process set forth in ComEd's Auction Proposal.

3. Post-Auction Workshop Process

ComEd

ComEd proposed that after each auction, Staff lead a well-designed post-auction workshop process, enabling parties to assess the need for improvements and any response to address lessons learned from the process. (McNeil Dir., ComEd Ex. 3.0, p. 3). ComEd also proposed that the Commission initiate periodic formal reviews of the auction process, held every three years. (McNeil Reb. ComEd Ex. 10.0, p. 34)

Staff

Staff did not object to ComEd's recommendation to hold informal workshops after the conclusion of the auction, rather than open annual proceedings. Staff noted that the workshops, under ComEd's proposal, would be sponsored by the Commission, and led

by Staff, which should alleviate any concern that any party that wishes to comment on the conduct (and the results) of the auction would not have an opportunity to be heard in an open forum. Staff also noted that while any tariff proposals that result from the workshops would likely be initiated by ComEd, rather than intervenors, parties would retain their rights to petition the Commission to open proceedings for the purpose of examining ComEd's tariffs, or, in fact, for the purpose of evaluating the auction process itself. Moreover, Staff observed, under ComEd's proposal, such proceedings would be automatically opened by the Commission every three years.

CES

CES claimed that the issue of what products should be offered to which customers should be a topic for Commission consideration in the annual post-auction collaborative effort, along with other issues. (O'Connor Dir., CES Ex. 1.0, p. 17) CES also contended that the Commission should continue to evaluate products, customers class demarcations, and other important tariff terms and conditions to look for further opportunities to promote the development of the competitive retail electric market in Illinois.

IIEC

IIEC claimed that a formal review, in the form of a docketed proceeding, should be undertaken annually before the next auction, given the novelty of the auction process and the effect on rates stemming from the process. IIEC noted that it is not against workshops, but finds them inadequate.

ComEd Response

ComEd pointed out that IIEC's proposal for annual formal proceedings was unnecessary and more costly than ComEd's proposal, and would not yield additional information that is useful to the Commission. (McNeil Sur., ComEd Ex. 18.0, p. 39)

Commission Analysis and Conclusion

The evidence in the record supports the use of post-auction workshops. The Commission notes that workshops usually are quite useful and influential. For instance, the Post-2006 Initiative encompassed multiple workshops, and their products were highly valuable prior to the initiation of this proceeding, and have continued to be so throughout this docket. In addition, the Commission is taking note of the topics already suggested as possible topics for the workshops. Thus, the Commission approves the proposal to hold annual workshops.

Further, the Commission finds the proposed triennial formal review process reasonable. Three years permits the collection of significant data, which will help make such a proceeding more meaningful. Thus, the Commission finds IIEC's suggestion of annual

proceedings unnecessarily costly and likely wasteful if undertaken based only on one year of data. In addition, parties will retain their rights to petition the Commission to open proceedings to examine ComEd's tariffs or the auction process. Accordingly, the Commission rejects IIEC's suggested annual review proceedings, and approves the proposed triennial ones.

4. Formal Proceeding(s) to Consider Process

ComEd

ComEd proposed that the Commission initiate a proceeding once every three years to review the procurement experiences during a multi-year period, determining whether changes in the process or details of the approach should be considered. (McNeil Reb., ComEd Ex. 10.0, pp. 34-35).

IIEC

IIEC claimed that a formal docketed proceeding should be undertaken annually before the next auction, given the novelty of the auction process and the effect on rates stemming from the process. (Collins Dir., IIEC Ex. 3.0, p. 14) IIEC noted that the New Jersey Board of Public Utilities (NJBPU) requires annual proceedings, even after several years' experience with the auction process.

ComEd Response

ComEd explained annual proceedings are unnecessary because the Illinois Auction proposal already incorporates all of the post-auction review that is required or desirable. (McNeil Reb., ComEd Ex. 10.0, pp. 33-36; Juracek Sur., ComEd Ex. 17.0, pp. 26-28; McNeil Sur., ComEd Ex. 18.0, pp. 39-41) ComEd noted that the Commission will conduct an immediate review of the auction results; post auction workshops will take place to explore possible improvements to the process, and formal proceedings will be initiated every three years. In addition, ComEd showed that annual proceedings would be more costly than the triennial ones that ComEd is proposing, and there appears to be no real benefit provided by such additional proceedings.

Commission Analysis and Conclusion

As noted above, the Commission finds the proposed triennial formal review process reasonable. Three years permits the collection of significant data, which will help make such a proceeding more meaningful. Thus, the Commission finds IIEC's suggestion of annual proceedings unnecessarily costly and likely wasteful if undertaken based only on one year of data. In addition, parties will retain their rights to petition the Commission to open proceedings to examine ComEd's tariffs or the auction process. Accordingly, the Commission rejects IIEC's suggested annual review proceedings, and approves ComEd's proposed triennial ones.

5. Other Processes and Proceedings

ComEd

ComEd noted that in addition to the specific review proceedings and workshops to consider auction issues, the Commission will retain its powers to initiate whatever investigations or proceedings it sees fit under the provisions of the Act. In addition, ComEd highlighted the significant regulatory oversight that is built into the process: “There’s oversight clearly before the auction in all the activities leading up to the actual auction itself, and then there’s staff oversight in the auction, and there’s staff involvement in the post auction workshop process.” (McNeil, Tr. 607). Moreover, there will be a formal proceeding every three years. Further, if the Commission concludes at any time that a formal proceeding is necessary, it can initiate one, as even IIEC’s Mr. Collins concedes. (Collins, Tr. 171).

DES-USESC

DES-USESC claimed that the Commission should articulate its vision for achieving in Illinois a robust and fully competitive retail electric marketplace and should actively seek out opportunities to promote fair and open competition in the provision of electric power and energy. DES-USESC then claimed that enacting changes that they had identified represented one such opportunity. They argued that “the Commission must keep in mind that the end of this initial transition period is only the beginning step in establishing a competitive retail electricity market.” (Steffes Dir., DES/USESC Ex. 1.0, p. 35) They also asserted that the Commission needs to be mindful that nothing it implements in this docket should delay the time when all consumers benefit from a competitive retail electricity market, and thus the Commission should be very wary of locking Illinois into a series of long-term wholesale supply contracts.

DES-USESC also claimed that the Commission could advance retail electric competition by launching a “Customer Choice” initiative in the form of ongoing collaboratives to identify and eliminate barriers to implementing a competitive retail electricity market for all customers.

DES-USESC also asserted that the Commission should immediately initiate an investigation to determine how advanced metering technology could be deployed more widely. (Steffes Dir., DES/USESC Ex. 1.0, p. 34)

AG

As above, the AG asserted various legal arguments to object to the Illinois Auction Proposal.

Commission Analysis and Conclusion

As discussed above, the Commission approves the various oversight processes that ComEd is proposing. With respect to DES-USESC's comments about promotion of competition, the Commission is mindful of the goals of the 1997 Restructuring Act, and has been working to implement those goals for years in many ways, including through this docket. In addition, the Commission will consider DES-USESC's ideas for proceedings through normal means. Finally, the Commission has addressed the AG's various legal arguments in other parts of this Order.

M. Supplier Forward Contracts

1. Uniformity in General

ComEd

ComEd proposed the use of a uniform supply contract to eliminate negotiations over non-price terms and to permit supplier offers to be compared directly on the basis of price. (McNeil Dir., ComEd Ex. 3.0, p. 41) ComEd states that the use of a standard contract enables bidders to become familiar with the details of the transaction well in advance of the conduct of the auction and provides them with an opportunity to resolve any questions or uncertainties before the process begins. According to ComEd, this will help to eliminating uncertainties which would be reflected by a premium in bidders bids. In addition, ComEd maintains that having all bidders addressing identical terms and conditions enhances the competitiveness of the auction and provides the best means to achieve the lowest expected market price for the products procured under this proposal for customers.

ComEd notes that the proposed Supplier Forward Contracts were largely modeled on the form of agreement used with suppliers in the New Jersey Basic Generation Service auction. The initial changes made to the provisions used in New Jersey were, ComEd states, mostly due to the differences between New Jersey and Illinois restructuring rules. ComEd notes that in order to ensure that potential suppliers had an opportunity to comment on and suggest changes to the agreement, ComEd held public meetings with potential suppliers, solicited suggestions and incorporated numerous modifications to address issues that were raised. (McNeil Dir., ComEd Ex. 3.0, pp. 42-44)

ComEd further suggested that, in the event that possible additional areas of uniformity can be achieved, the Commission direct Staff, ComEd, and Ameren to meet to make a compliance filing incorporating the revised agreements within 30 days of the entry of a final order.

ComEd opposes an additional period following the final order, during which suppliers could provide additional input. ComEd maintains that all suppliers had the opportunity to participate in previous input periods during which ComEd undertook to gather feedback on the contracts.

Staff

Staff agreed with ComEd's recommendation for a meeting following the final order to craft a compliance filing regarding revised agreements. However, Staff further suggested that the draft contracts should be posted to the auction web site within 7 days of the proposed order and the compliance filing be due 60 days after the contract is posted to allow for an opportunity to incorporate supplier input. Staff also contended that the Commission should provide further details for the compliance filing, such as identifying unresolved issues and directing ComEd, Ameren, and the Auction Manager to file a petition with the Commission to resolve any open issues within 21 days of compliance filing.

Commission Analysis and Conclusion

ComEd has proposed to utilize uniform supply contracts based on those used in the New Jersey auction. ComEd has also worked with Ameren to achieve as much uniformity as possible between the ComEd and Ameren SFCs. ComEd has adopted various changes to the supply contracts it is proposing based on various comments of parties in this proceeding as well as based on public meetings with potential suppliers who would be subject to the contracts. ComEd has shown that its uniform supply contracts are appropriate. Staff's proposal to allow for a 60 day period for a compliance filing to allow for additional supplier input is unnecessary. The Commission finds that ComEd's proposed uniform supply contracts are reasonable and are therefore adopted.

2. Credit Requirements

ComEd

ComEd notes that adequate supplier credit requirements are important because they serve to protect customers from the costs and risks of supplier default, particularly at times when the market price increases after the contract is executed, and the contract price becomes lower than the market price. (Schnitzer Dir., ComEd Ex. 6.0, p. 20). Under the Supplier Forward Contracts, Suppliers can qualify for unsecured credit lines based on their own credit ratings and balance sheet strength or those of a guarantor. In addition, suppliers are required to post collateral for any exposure amounts in excess of their unsecured credit lines. ComEd states that because energy prices change from time to time, the exposure amount is determined through a mark-to-market mechanism designed to capture the effect of energy price fluctuations on the incremental cost of replacement supply.

The New Jersey supplier agreement also includes base credit requirements, and ComEd initially incorporated that feature in the draft contract discussed with suppliers. However, concerns were raised that the base credit requirements were too onerous, particularly for non-investment grade suppliers, and would discourage participation in the auction. (Schnitzer Dir., ComEd Ex. 6.0, p. 25) Faced with these concerns and the

prospect that a more competitive price with adequate customer protections could be achieved if the base credit requirement were eliminated, ComEd agreed to dispense with the base requirement feature. (Schnitzer Dir., ComEd Ex. 6.0, p. 25; Juracek Reb., ComEd Ex. 9.0, p. 3) That decision was a reasonable compromise serving the best interests of customers.

In response to Staff's opposition to the provision regarding ComEd's unilateral power to change the credit requirements, ComEd proposed eliminating the provision.

Midwest Gen

Midwest Gen supports ComEd's proposal not to include a base credit requirement in the CPP-A and CPP-B Supply Forward Contracts. Noting that the issue is not contested, Midwest Gen nevertheless stress that the exclusion of a base credit requirement is important to suppliers.

Staff

Staff proposes three recommendations regarding the credit requirements. First, Staff recommends the level of ComEd's proposed credit requirements should be approved. Second, Staff proposes that ComEd should eliminate the provision to notch down user credit ratings by Moody's Investors Service. Third, Staff argues that there should be a reporting requirement for ComEd in connection with the credit provision that allows ComEd to unilaterally reduce its credit requirements.

Regarding the third point, Staff states that there is no basis to currently assess the reasonableness of unspecified future change to credit requirements. Staff recommends that ComEd be required to file a report with Staff within 15 days of any change in credit requirements. The report is to explain the reason for the change and a summary of the relevant facts.

Commission Analysis and Conclusion

ComEd has shown the importance of balanced credit provisions for the protection of the consumers and control of price premiums added into bids by suppliers due to credit requirements. ComEd has adjusted the credit requirements based upon the feedback and proposals in this proceeding. ComEd's proposal to allow suppliers to qualify for unsecured credit lines based on their own credit ratings and balance sheet strength or those of a guarantor or to post collateral for any exposure amounts in excess of their unsecured credit lines reaches a reasonable balance. The Commission finds ComEd's proposed credit requirements to be appropriate. Therefore, the Commission approves ComEd's credit requirement proposals.

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

Throughout the discussions with suppliers prior to the filing of this proceeding, ComEd accepted many suggestions for modifications to the proposed supplier forward contract. Additional suggestions were made in testimony that ComEd has also agreed to incorporate. With respect to a few changes proposed by Mr. Huddleston and Mr. Dauphinais, ComEd has included modifications that address issues raised, but that do not track in all respects the proposed revisions requested. (Juracek Reb., ComEd Ex. 9.0, p. 3) With respect to those changes, ComEd believes that it has been responsive, has made appropriate modifications and that there are valid reasons, explained by Ms. Juracek, for not including all of the language suggested by the witnesses.

Constellation proposed four changes, which ComEd has accepted. The first two relate to Section 5.4e regarding situations where multiple contracts exist between the same parties. Constellation's first proposed change to Section 5.4e provides that, when multiple agreements are in existence between the ComEd and the same supplier, the Non-Defaulting Party as well as ComEd would calculate the termination payment. (Juracek Reb., ComEd Ex. 9.0, p. 30) Constellation's second proposal regarding Section 5.4e provides that, when there is termination of one SFC between ComEd and a supplier because of a default, all SFCs between the same parties are terminated. (Juracek Reb., ComEd Ex. 9.0, p. 30) Constellation's third proposal changes Section 15.13 to require parties to provide copies of any applicable tax exemption certificates. (Juracek Reb., ComEd Ex. 9.0, p. 30) Constellation's fourth proposed change relates to Section 13.2 clarifying whether ComEd or the supplier is responsible for changes in charges associated with delivery services or NITS.

Morgan Stanley proposed that New York law govern the guaranties that are available under the Illinois auction proposal as one way to meet the credit requirements. Morgan Stanley maintains that it is standard to use New York law to govern guaranties, as New York has the most well developed body of law regarding guaranties. Morgan Stanley suggests that New York law also govern any alternative guaranties. ComEd agreed.

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

Although significant progress was made in achieving agreement on modifications and clarifications to the supplier forward contracts, a small number of issues remain.

a. **ComEd's Right to Withhold Payments from Suppliers**

Midwest Gen

Midwest Gen identifies two provisions of the Supplier Forward Contracts with which Midwest Gen takes issue. The first provision to which Midwest Gen objects is ComEd's right to withhold payments from suppliers. This provision provides that a party who improperly withholds an amount in dispute shall pay to the other the amount due plus interest. Midwest Gen reasons that because ComEd is projected to be the net payer

under the contracts, the provision will unfairly apply only to suppliers. Midwest Gen claims that under the SFCs ComEd can withhold payment for up to ninety days without justification. Midwest Gen claims that given the amount of money that will be due the suppliers, such a delay could place them into dire financial conditions. Midwest Gen also argues that the interest rate provided for in the SFCs (currently tied to the Federal Funds Effective Rate) is insufficient to compensate suppliers if ComEd arbitrarily withholds payment. Midwest Gen proposes language providing that ComEd cannot withhold payment at its discretion without being required to justify that withholding promptly and paying a compensatory interest rate.

ComEd

ComEd maintains that the language allowing ComEd to withhold payments from suppliers is necessary to protect customers. ComEd stated that it does not intend to arbitrarily withhold payments; therefore no change is necessary to the provision.

Commission Analysis and Conclusion

ComEd has shown that its proposed language allowing the withholding of payments to suppliers is necessary. The Commission finds that ComEd's proposal appropriate and therefore adopts ComEd's proposed language.

b. Supplier Indemnification of ComEd Liability Under Section 16-125

Midwest Gen

Midwest Gen objects to the SFCs' language providing for ComEd's shifting of liability under Section 16-125. Section 16-125 requires a utility to pay affected customers for actual damages where more than 30,000 customers are affected for more than 4 hours or where transmission is at less than 50% and the replacement value of all goods damaged as a result of a power surge or other fluctuation affecting more than 30,000 customers. Midwest Gen argues that ComEd should not be allowed to shift its liability under Section 16-125.

ComEd

ComEd maintains that the SFC language is appropriate. ComEd notes that a supplier is responsible for the 16-125 damages only when it was caused by or occurs as a result of an act or omission of the supplier. ComEd states that, although Midwest Gen claims that ComEd can cause the outage and still shift the charges to the supplier, the language clearly states that the supplier must cause the event which leads to the damages. ComEd witness Ms. Juracek clarified that the intent of this provision is to place the liability for an outage with the entity causing the outage. ComEd maintains that this is an important feature necessary to protect both customers and ComEd given the need to rely on electricity suppliers.

Commission Analysis and Conclusion

Midwest Gen objects to ComEd's proposal to hold the suppliers responsible for damages resulting from their action or inaction. ComEd has shown that such a provision is both allowable under Section 16-125 and is a reasonable manner for placing the burden for damages on the appropriate party. The Commission adopts ComEd's proposed language.

c. Additional Supplier Input into Final ComEd Supply Forward Contracts

Dynegy

Dynegy proposes that workshops be convened to provide an open forum to allow all suppliers to provide input regarding the SFCs. Dynegy acknowledges ComEd's willingness to work with suppliers, noting the numerous compromises and changes made to the SFCs. However, Dynegy claims that it would be inappropriate to approve the SFCs with only input from one side, i.e. ComEd.

ComEd

ComEd opposes further opportunities for input regarding the SFCs. ComEd notes that it has undertaken an open process to elicit information from suppliers. ComEd also notes the numerous changes made to the SFCs as a result of the current proceeding. ComEd states that Dynegy's proposal would be unduly burdensome and unnecessary.

Commission Analysis and Conclusion

ComEd has actively solicited feedback from suppliers in crafting the SFCs. In addition, numerous parties to this proceeding have provided comments and proposals regarding the SFCs. The Commission agrees with ComEd that there is no need to provide another opportunity for suppliers to provide input.

N. Other Auction Design Issues

All auction design issues are addressed in other parts of this Order.

VI. PROCUREMENT PROCESSES ALTERNATIVES

A. Active Portfolio Management

ComEd

ComEd opposes the use of an active portfolio management procurement process. ComEd points out that portfolio management would rely on the judgment of one party – ComEd – to assemble the necessary portfolio instead of relying on multiple suppliers, each of whom might employ different strategies and techniques to meet the variable demands of customers. ComEd also notes that the same products available to ComEd in a portfolio management process are available to suppliers bidding in the auction, but with the added benefit of planning by multiple parties. (McNeil Sur., ComEd Ex. 18.0, pp. 6-9) ComEd states that whether and how to use such products are questions that would be considered by each of the bidders and the resulting diversity of solutions would provide assurance that only the most effective alternatives for meeting customer needs would be selected. By this means, risk is managed by those entities that are able to do it at the lowest possible cost. (Hogan Sur., ComEd Ex. 25.0, pp. 11-15; McNeil, Tr. 520).

ComEd notes that reliance on a number of sophisticated suppliers to arrive at the best supply approach will not only achieve a better result, but it will eliminate the risk of huge losses that can arise when a utility undertakes unilateral responsibility for supply decisions. (McNeil Sur., ComEd Ex. 18.0, p. 12) ComEd states that one particular problem is that active portfolio management can leave a utility with long term, fixed volume contracts that are no longer needed if customers switch to alternative suppliers and the costs of such contracts must then be spread over a shrinking pool of customers, driving rates up. (McNeil Sur., ComEd Ex. 18.0, p. 12) ComEd characterizes active portfolio management as a “very difficult process” that has been proven in Illinois and other jurisdictions to increase customers’ costs. (Schnitzer, Tr. 978).

ComEd notes that Dr. Steinhurst admitted that, under the Vermont long range planning process that he oversaw, electric rates were “well above the national average.” (Steinhurst, Tr. 469-470). The Illinois Auction and its full requirements product will free ComEd’s customers from significant risks inherent in the active portfolio management approach. “[S]uppliers will provide a fixed price for doing all that risk management service as opposed to the company managing those risks and ultimately customers bearing those risks as events change.” (McNeil, Tr. 513).

Regarding CUB/CCSAO’s claim that ComEd could extract better offers from suppliers as an active portfolio manager than will result from the auction process, ComEd maintains that there is no basis for reaching any such conclusion. ComEd states that it has no special bargaining position that would generate below market offers from suppliers. Rather, bidders in the auction and suppliers outside an auction would both consider available opportunities to sell in the marketplace. (McNeil Sur., ComEd Ex. 18.0, pp. 13-14) ComEd stresses that for both auction suppliers and suppliers under a portfolio procurement mechanism, there is an open market where suppliers have many opportunities to sell; they have absolutely no reason or incentive to sell below what they could receive in the market. (Juracek, Tr. 255).

ComEd also rebuts the claims by the AG and CUB/CCSAO that ComEd did not consider active portfolio management, as it was one of the procurement scenarios considered during the Commission’s Post 2006 Initiative. (ComEd Ex. 1.4). ComEd

notes that the Staff's Final Report did not recommend that ComEd pursue this approach, with good reason. (ComEd Ex. 1.2). ComEd also maintains that contrary to the AG and CUB/CCSAO's unsupported arguments, the choice of the Illinois Auction process is likely to reduce costs through the transparent, dynamic descending clock mechanism that tends to drive prices down. (LaCasse Reb., ComEd Ex 11.0, pp. 13-16)

Staff

Staff also opposes the active portfolio management approach, recommending that the Commission reject it. Staff reviews the arguments made by Mr. Salgo and Dr. Steinhurst in support of active portfolio management, but concludes that "there is no hard evidence to support these claims." Staff's Brief at 131. Staff points out that, even the witnesses who seem most inclined toward active portfolio management "have not gone so far as to actually recommend that the Commission order utilities to utilize this approach." Staff's Brief at 133. Along with other alternative procurement approaches discussed by various parties, Staff characterizes these ill-defined options as "vague or incomplete." Staff's Brief at 126.

AG

The AG has suggested that ComEd should fully considered active portfolio management as a procurement mechanism. The AG did not provide any details regarding a portfolio management mechanism. However, the AG stresses that portfolio management allows access to a variety of products. The AG also claims that ComEd would be able to exert power in procurement due to its position as a large purchaser.

CUB

CUB suggests that active portfolio management by ComEd would make it possible to use a variety of products that are uniquely available to it. CUB also suggests that ComEd could extract better offers from suppliers as an active portfolio manager than will result from the auction process. Although the proposal is not described in any detail, the active portfolio management approach would require ComEd to acquire a portfolio of baseload, intermediate and peaking generation resources, together with any associated hedges, sufficient to provide full requirements supply for customers. It would impose the costs and risks of assembling such a portfolio on ComEd's customers, rather than on suppliers.

Commission Analysis and Conclusion

The evidence shows that an active portfolio management procurement process is a poor choice that is likely to result in higher costs and greater risks for customers than the Illinois Auction proposal. Active portfolio management would rely on the judgment of one party – ComEd – to assemble the necessary portfolio instead of relying on multiple suppliers, each of whom might employ different strategies and techniques to

meet the variable demands of customers. The diversity of solutions resulting from the Illinois Auction proposal would provide assurance that only the most effective alternatives for meeting customer needs would be selected. Risk would be managed by those entities that are able to do so at the lowest possible cost. Reliance on a number of sophisticated suppliers to arrive at the best supply approach will not only achieve a better result, but it will eliminate the risk of huge losses that can arise when a utility undertakes unilateral responsibility for supply decisions. An active portfolio management approach can leave a utility with long term, fixed volume contracts that are no longer needed if customers switch to alternative suppliers and the costs of such contracts must then be spread over a shrinking pool of customers, driving rates up. ComEd has shown that an auction proposal is a superior procurement method for ComEd. The Commission finds that the Illinois Auction and its full requirements product will free ComEd's customers from significant risks which are inherent in the active portfolio management approach.

B. Request for Proposal

ComEd

ComEd states that that no party is contending that supply for customers should be acquired through a request for proposal ("RFP") process. ComEd notes that the RFP process was one of the alternatives considered during the Post 2006 initiative, but the Staff's Final Report rejected that option, recommending instead that large utilities use a vertical tranche auction. (ComEd Ex. 1.2). ComEd evaluated the RFP process and likewise concluded that the Illinois Auction was the preferable procurement approach.

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

and she recommended the descending clock auction process. (McNeil Dir., ComEd Ex. 3.0, pp. 32-33)

ComEd believes that the Illinois Auction is a better means to acquire supply for customers than the RFP process.

Commission Analysis and Conclusion

ComEd has shown that the Illinois auction proposal has several distinct advantages over a RFP process. No party in this proceeding has advocated the use of an RFP process. The Commission finds the Illinois auction proposal to be the more appropriate procurement scenario than a RFP.

C. Affiliate Contract

ComEd

ComEd states that in designing the Illinois auction proposal, it has attempted to design a competitive procurement process that facilitates the participation of as many suppliers as possible. According to ComEd, this includes adopting a process that will permit inclusion of Exelon Generation as a potential bidder is therefore a desirable goal. Because Exelon Generation is affiliated with ComEd, ComEd notes that additional requirements apply under federal law to any power purchase agreement (“PPA”) between the companies. As explained by Elizabeth Moler, former Chair of the Federal Energy Regulatory Commission, FERC requires the parties to show by objective market value criteria that the terms of the PPA are reasonable. Ms. Moler discussed the 1991 *Edgar* decision in which FERC set forth three criteria by which the applicant could make such a showing: (1) evidence of direct competition between the affiliated supplier and non-affiliated suppliers; (2) comparable sales by the affiliated supplier to non-affiliated purchasers; and (3) benchmark evidence of sales involving other parties. Ms. Moler also stressed that FERC has recently reiterated the importance of the *Edgar* criteria and has applied them to numerous affiliate transactions. (Moler Dir., ComEd Ex. 2.0, p. 9)

ComEd maintains that The Illinois Auction includes the features that meet the requirements set forth under the *Edgar* standard. ComEd states that the Illinois auction process maximizes the transparency of the procurement decision. In the Illinois auction proposal, ComEd highlights that all bidders, including any ComEd affiliates, compete on an equal footing and the price is set by the forces of supply and demand. Thus, ComEd notes that there is no way for the utility to favor its affiliate in such a process.

Regarding the use of a purchase directly from ComEd’s affiliate ExGen, ComEd states that it cannot force ExGen to sell below market prices any more than ComEd can force any other generator to supply ComEd at below market prices. ComEd notes that energy generators have many potential purchasers. Thus, generators, including ExGen, are going to seek a price based on the market price they could receive. ComEd

maintains that it is illogical to assume that generators such as ExGen will agree to sell to ComEd at a price less than what they could receive by selling to other purchasers.

AG

The AG asserts that ComEd should use its “substantial buying power” to negotiate with its generation affiliate. The AG asserts that prior affiliate contracts between ExGen and ComEd were able to save consumers money while providing compensatory returns to both ComEd and ExGen. Regarding ComEd’s comments that ExGen and other generators will not accept “below market prices”, the AG claims that many different market prices for electricity exist due to the different types of buyers and sellers. The AG contends that Illinois customers paid for, and in some situations, continue to pay for the nuclear plants that allow ExGen to have among the lowest cost of production of any electric generator. The AG asserts that ComEd should seek to capture ExGen’s low cost of production through the use of affiliate contracts, such as those currently in place. The AG stresses that ComEd has substantial bargaining power to negotiate with its affiliate to buy ExGen’s low-cost electricity for ComEd customers in 2007 and beyond.

Commission Analysis and Conclusion

The evidence shows that the Illinois auction proposal is far preferable to a process that would procure ComEd's energy needs only via an affiliate contract for supply. A clear advantage of the Illinois auction proposal is its facilitation of the widest possible participation of all potential suppliers, including affiliated generation companies, in the process used to acquire supply for customers.

D. Other Competitive Procurement Mechanisms

ComEd has noted that Staff and the other participants in the Post 2006 Initiative, including many of the intervenors in this proceeding, did not confine their analysis to a limited group of options. They considered a broad range of alternative scenarios and variants of those scenarios. They analyzed the advantages and disadvantages of each approach. The effort was lengthy and detailed, providing a searching review of the available options. ComEd has presented detailed evidence supporting the choice of a competitive procurement auction as suggested by the Staff’s Final Report. The Commission finds that nothing that has been presented in this proceeding or in any other forum provides any basis for reaching a different outcome or for proposing any other procurement approach. Therefore, the Commission approves ComEd’s tariffs incorporating a competitive procurement auction.

E. Other Procurement Processes Alternatives

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

VII. TARIFF AND RATE DESIGN ISSUES

A. General tariff and rate design issues

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

ComEd characterized its proposed tariffs and tariff amendments as serving five important purposes: (1) they accurately “translate” the results of the proposed CPP auctions into retail Supply Charges, without mark-ups; (2) they ensure, for the benefit of customers and the utility, the accuracy of cost recovery in relation to those Supply Charges and to the associated Accuracy Assurance Factor charges or credits; (3) they establish, in detail, the requirements for passing costs through those charges; (4) they establish, for purposes of the PPO, accurate market value energy charges; and, (5) they apply to bundled electric service rates a proven mechanism for accurately passing through costs incurred under FERC-jurisdictional transmission tariffs. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, pp. 2-4, 31)

ComEd noted that the Commission’s Post-2006 Initiative’s Rates Working Group, in its Final Report, determined that, given a full requirements auction, “utilities should pass through, with no ‘mark-ups’ or ‘return on’, the costs of the commodity itself.” (Alongi / Crumrine Dir., ComEd Ex. 7.0, p. 17) (quoting “The Post 2006 Initiative: Final Report [of the] Rates Working Group”, ComEd Ex. 1.5) ComEd stated that it agreed, and that it structured Rider CPP to incorporate that concept. (Alongi / Crumrine Dir., ComEd Ex. 7.0, p. 17)

ComEd stated that the amendments to Rider PPO-MI extend it by exactly one day in order to address a minor timing issue under slightly unsynchronized provisions of the Act. (Alongi / Crumrine Dir., ComEd Ex. 7.0, p. 24) No party opposed that extension.

In addition, in response to various suggestions from Staff and intervenors over the course of this Docket, ComEd’s proposed tariffs, in particular Rider CPP and Rider PPO-MVM, were revised to make improvements and to clarify language, as indicated by the lists and record citations in Exhibit 1 to ComEd’s Initial Brief.

The provisions of proposed Rider CPP relating to the design and implementation of the proposed CPP auctions generally already have been discussed, directly or indirectly, in earlier Sections of this Order, especially Section V. The Commission has accepted, as shown in those Sections, that the implementation of the proposed CPP auctions through ComEd’s tariff proposals is supported by the evidence and are just and reasonable, providing for the recovery of actual costs of ComEd that are prudently incurred and

reasonable in amount. This Section VII addresses the remaining tariff and rate design issues.

B. Matters concerning Rider CPP

1. Rider CPP – Organization

ComEd witnesses Lawrence Alongi and Paul Crumrine discussed and supported the organizational structure of proposed Rider CPP in their direct testimony. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, pp. 38-39; ComEd Ex. 7.1) Staff witness Cherie Harden proposed certain organizational changes in Rider CPP. (Harden Dir., Staff Ex. 7.0, pp. 6-7 and Sch. 7.1) Messrs. Alongi and Crumrine generally accepted Ms. Harden’s proposals on this subject, but proposed certain modifications. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 5-7) Ms. Harden then accepted those modifications. (Harden Reb., Staff Ex. 19.0, pp. 1-3, and Sch. 19.1) Thus, there are no open issues on this subject. (Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 5-6)

ComEd has shown that the revised organization for Rider CPP is appropriate. Therefore, the Commission approves the organizational structure of proposed Rider CPP, as revised by ComEd in its rebuttal testimony and as agreed to by Staff in rebuttal testimony. ComEd and Staff are in accord on this subject. No intervenor has submitted any testimony on this subject.

2. Rider CPP – Definitions

a. Customer Supply Group definitions

ComEd

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

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

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

Staff and intervenors did not oppose the Customer Supply Group definitions. Staff's and BOMA's respective rate mitigation proposals, discussed in Sections VII.D.1 and 3 of this Order, does not require any change in the definition of any Group.

Commission Analysis and Conclusion

ComEd has established that the Customer Supply Groups defined in Rider CPP are appropriate. The Commission approves the Customer Supply Groups defined in proposed Rider CPP and the conforming change in the definition of the Large Load Customer Supply Group.

b. Peak and Off-Peak Period definitions

ComEd

ComEd originally proposed new Peak and Off-Peak period definitions for purposes of the Supply Charges calculated under Rider CPP that would conform both the "translation" methodologies ("prisms") for "translating" costs that ComEd will incur under the SFCs resulting from the CPP auctions into retail Supply Charges and the Supply Charges themselves with the commonly used definitions in the wholesale market, thereby enhancing the transparency of, and simplifying, the Supply Charges calculations, better reflecting cost-causation, and sending appropriate price signals. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, pp. 46-47; ComEd Ex. 7.1 at Original Sheet No. 247) ComEd in rebuttal responded to the arguments made by Staff and BOMA, defending the new definitions. (Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 9)

However, ComEd has indicated in surrebuttal that as a compromise proposal it is willing at this time to continue use of ComEd's existing Peak and Off-Peak period definitions, with the North American Electric Reliability Council ("NERC") holidays, in the "translation" formulae for calculating Supply Charges under Rider CPP and in defining those charges, without waiving the right to propose new definitions in the future. (Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 6-7)

Staff

Staff Witness Mr. Lazare opposed the changes to the Peak and Off-Peak period definitions originally proposed by ComEd. (Lazare Dir., Staff Ex. 6.0, pp. 34-39) He argued that rather than merely aligning with wholesale market definitions for Peak and Off-Peak periods, the periods should be developed according to the impact of customer classes on the cost of wholesale power. (Id. p. 35) Mr. Lazare asserted that average hourly system demand shows that the hours 6 a.m. to 9 a.m. should be excluded from the Peak period. Staff recommended the continued use of ComEd's current Peak and Off-Peak period definitions. Staff did not object to ComEd's compromise proposal.

BOMA

BOMA opposed the new Peak and Off-Peak period definitions and urged use of existing definitions. (*E.g.*, Brookover/Childress Dir., BOMA Ex. 2.0, pp. 20-23) BOMA argued that ComEd customers have relied on ComEd's current definition of Peak and Off-Peak periods in developing an energy usage strategy. (*Id.* p. 22) BOMA claimed that customers have invested in capital improvements to maximize the use of energy during Off-Peak periods and ComEd's proposed change would result in the loss of the benefits from such improvements. (*Id.*) BOMA did not object to ComEd's compromise proposal.

Dynergy

Dynergy supported the new Peak and Off-Peak period definitions originally proposed by ComEd for much the same reasons ComEd discussed in its rebuttal testimony. (Huddleston Reb., DYN Ex. 1.2, p. 13) Dynergy highlighted that the Peak and Off-Peak differentials and timing sends signals which customers act on. (*Id.*)

Commission Analysis and Conclusion

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

As is noted in the preceding subsection of this Initial Brief, ComEd, in surrebuttal, in light of certain Staff and intervenor direct and rebuttal testimony, agreed as a compromise to continue using its current definitions, with the NERC holidays. That is reasonable and is supported by the evidence. The Commission approves the use of the existing Peak and Off-Peak period definitions, with the NERC holidays.

3. Rider CPP – Specification of Competitive Procurement Process

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

Nearly all of the issues relating to this part of Rider CPP are derivative, i.e., they turn on how the Commission resolves procurement design and implementation issues addressed in other Sections of this Order, primarily Section V. The only two issues in

dispute regarding specification of the Competitive Procurement Process part as such are first, the period in which a CPP-A customer must / may choose to “opt in” or, alternatively, “opt out” of the annual product service, which involves (in part) certain language of the CPP Timeline section of the Competitive Procurement Process part, and which is discussed in Section VII.4.a.i and ii of this Order, and second, certain issues that have been raised with regard to reporting by ComEd and to Staff and Commission review of Supply Charges and Accuracy Assurance Factors, which also involve (in part) certain other language of the CPP Timeline section of the Competitive Procurement Process part, which is discussed in Section VIII.B.9 of this Order.

The Commission approves as reasonable the Competitive Procurement Process part of Rider CPP, subject to such conforming changes as are needed to effectuate the Commission’s determinations on the issues as they are discussed elsewhere in this Order regarding the design and implementation of the proposed CPP auctions. Therefore the Commission directs ComEd to submit a compliance filing consistent with this Order.

4. Rider CPP – Retail customer switching rules

a. Enrollment window

ComEd proposes to acquire 1-year, fixed price supply for CPP-A eligible customers. Because those customers may be taking bundled electric service or may be taking delivery services and employing varying supply options as of the relevant dates, and because they may or may not wish to take CPP-A service, some procedures are necessary to determine which customers will be placed on CPP-A service, and when any service elections available to them must or may be made.

i. Duration of window

ComEd

ComEd originally proposed that CPP-A eligible customers have a 30-day enrollment window following the auction within which to “opt-in” to the CPP-A fixed price service; otherwise, unless they took service from a RES, they would “default” to CPP-H service. (ComEd Ex. 7.1, Original Sheet No. 272) ComEd supported the 30-day enrollment window as the appropriate balance of the interest of customers in flexibility in choosing service versus the concern that more migration risk (uncertainty) will increase the costs customers pay for supply due to suppliers adding risk premiums. (McNeil Dir., ComEd Ex. 3.0, pp. 38-39)

ComEd in surrebuttal, after assessing the direct and rebuttal testimony submitted by other parties, proposed that: (1) eligible customers taking bundled electric service under Rates 6 and 6L or Rider 24 as of the relevant date would be placed on CPP-A service on an “opt out” basis, with the ability to leave (for a RES or CPP-H service) on a seven day “DASR” basis; (2) eligible customers taking hourly service as of the relevant date

would have to “opt in” to CPP-A service during an annual 30 day enrollment window in order to take CPP-A service; and (3) eligible customers taking delivery services as of the relevant date also would have to “opt in” to CPP-A service during an annual 30 day enrollment window in order to take CPP-A service. (McNeil Reb., ComEd Ex. 18.0, pp. 26-27) Customers in categories (2) and (3) must remain for the full annual term. (*Id.*)

After discussions with some other parties, ComEd proposed to modify its surrebuttal proposal to provide for a 50-day enrollment window in the first auction year and a 45-day window in all subsequent auction years, for the eligible customers that its surrebuttal proposal had placed on an “opt in” basis. In support of this change in its proposal, ComEd stated that the length of the enrollment period is a matter of judgment on which reasonable people can have different views, and that ComEd and CES agreed that a 50-day enrollment window in the first auction year, when customers are becoming accustomed to the new procurement environment, would be appropriate, and that, for all subsequent years, a 45-day window will be adequate.

ComEd stressed that those customers who would become subject to a one year term requirement (17 months in the first instance) by opting into CPP-A supply are not limited to 50 (and later 45) days within which to begin and complete their analysis of their service options. They can canvass the retail supplier service market in advance of the auction, preparing themselves to evaluate the auction results. When the results become known, the advance preparation will assist them in making an informed service decision within the applicable enrollment window.

Staff

Staff initially agreed with ComEd’s proposal for a 30 day window. (Schlaf Dir., Staff Ex. 5.0, p. 6) Staff also proposed that the issue be studied further prior to the next auction. (*Id.* p. 6)

In rebuttal testimony, Staff responded to the CES direct testimony proposal to use a 75 day window. (Schlaf Reb., Staff Ex. 13.0, pp. 4-7) Staff argued that the use of a 75 day window would likely result in additional customers switching to a RES, in part because the clearing price for the auction will be higher with a 75 day window than with a 30 day window. (*Id.* pp. 4-5) Staff presented an analysis of the cost to customers associated with increasing the window from ComEd’s proposed 30 days to CES’ proposed 75 days. (*Id.* pp. 5-7) Staff estimated that bidders can be expected to add an additional 1.8% to their bids to account for the 75 day window instead of a 30 day window. (*Id.*) On cross examination, Staff indicated that the duration of the enrollment window does involve some judgment and that a 30-day window is not the only appropriate choice. (*E.g.*, Schlaf Tr., p. 1346) Staff later indicated that a window of up to no more than 40 to 45 days would be a reasonable compromise. (Staff Initial Brief at 153 (citing Schlaf Tr., 1340, 1346))

CES

CES initially proposed a 75 day window. (O'Connor Dir., CES Ex. 1.0, pp. 25-28) CES analogizes the 30-day sign-up for Rider CPP with the existing Rider PPO-MVM 75-day window currently in place. (Id. p. 25) CES argued that a 75-day window is appropriate because first, customers are accustomed to it and want it; second, it allows for more time to correct mistakes, and third, no empirical evidence shows that a 75-day window would increase auction prices. However, CES agreed that, when selling energy, "the longer the price is held open, the more chance there is that the market will move." (Bollinger, Tr. 393). In addition, CES agreed that there was a "real possibility" that there would be a risk premium associated with holding a price open for a longer period of time, although he expected competition to squeeze it down. (Bohorquez, Tr. 432-433). Following discussion with ComEd over the length of the enrollment window, CES modified its position, agreeing to support use of a 50-day enrollment window for the initial auction and a 45-day window for subsequent auctions.

BOMA

BOMA advocated the use of a 75-day window similar to that used for the current Rider PPO-MI. (Childress/Brookover Dir., BOMA Ex. 2.0, pp. 25-26)

CECG

CECG did not take a position, but did express concern about increasing supplier risk premiums. (Smith Dir., CECG Ex. 1.0, p. 3)

DES/US Energy

DES/US Energy, in the context of its proposal for altering the nature and timing of the auctions, opposed an enrollment window. (DES/US Energy Initial Brief at 26)

Dynegy

Dynegy supported a 30 day window (and also objected to ComEd's "opt out" approach to customers under Rates 6 and 6L and Rider 24). (Dynegy Initial Brief at 19-22)

IIEC

IIEC supported ComEd's initial position to adopt a 30-day window. IIEC agreed with ComEd regarding the need for a balance between allowing customers sufficient time to make a decision and keeping bid price premiums to a minimum. (Stephens Reb., IIEC Ex. 4.0, pp. 12-13; Stephens, Tr. 62)) IIEC stressed that the comparison to Rider PPO by BOMA and CES is inappropriate because the window of time for Rider PPO has no impact on the price. (Id. p. 13)

U.S. Department of Energy

The U.S. Department of Energy supported a 30 day window. (U.S. DOE Initial Brief at 13-14)

Commission Analysis and Conclusion

The length of the enrollment period is a matter of judgment on which reasonable people can have different views. The challenge is to strike the right balance between providing customers time within which to make decisions and avoiding the higher premium that would result if suppliers were forced to hold out fixed price call options for longer periods of time. Based on the evidence in the record, the Commission finds that a 50-day enrollment window in the first auction period, when customers are becoming accustomed to the new procurement environment, is appropriate. Thereafter, a 45-day window will be adequate and should be provided.

ii. Opt in vs. opt out

As the above discussion indicates, ComEd's proposal to change its approach from "opt in" to "opt out" as to customers on Rates 6 and 6L and Rider 24 as of the relevant date is opposed by Dynegy, as indicated above. Staff agreed with ComEd's approach. The other intervenors that addressed the subject of the enrollment window focused on the duration of the window. Based on the evidence in the record, the Commission approves ComEd's respective opt-in and opt-out features for CPP-A service as a reasonable balance of the competing concerns.

b. Other switching rule issues

The Commission, with regard to the Retail Customer Switching Rules part of Rider CPP, is presented with four additional issues, two of which relate to CPP-H service and two of which relate to CPP-A service: (1) whether "new accounts" that are eligible for CPP-A service should be allowed to elect to take CPP-A service outside of the enrollment window; (2) whether "successors accounts" to existing customers that were eligible for, but elected not to take, CPP-A service should be allowed to elect to take CPP-A service outside of the enrollment window; (3) how much advance notice a CPP-H customer should be required to give to ComEd before terminating that service; and (4) whether a CPP-H customer should be allowed to request to be switched off of that service on an "off-cycle" basis (i.e., on a date other than the customer's regularly scheduled meter reading date).

i. The CPP-A Issues.

ComEd

With regard to the two issues related to CPP-A service, ComEd indicated that it is willing to agree to Staff's proposal to permit new accounts that are eligible for CPP-A service to elect to take CPP-A service outside of the enrollment window, provided that

the definition of new accounts does not permit “successor accounts” to existing customers that were eligible for, but chose not to take, CPP-A service, to elect to take CPP-A service outside of the enrollment window. (McNeil, ComEd Ex. 10.0, p. 53; Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 12; LaCasse Sur., ComEd Ex. 19.0, p. 6; Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 10-11)

ComEd in surrebuttal explained that ComEd’s concern is not just with existing customers legally changing their corporate name, but rather much more broadly with customers simply changing the name on their account and then claiming the right to be treated as a “new” customer. (Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 11; see *also* Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 12) ComEd stated that in the event of such a name change on the account, which may or may not reflect an actual change in ownership or an actual change in a corporate name, it would be costly and burdensome for ComEd to have to implement the internal processes that would be needed in order to determine whether a successor account actually involves new ownership. (Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 11)

ComEd stated that, were Staff’s proposal as formulated in its rebuttal testimony to be adopted, that would mean ComEd would have to incur the burden and costs of such investigative processes. That ultimately would redound to the detriment of customers in future rates. Moreover, a customer might dispute ComEd’s conclusion, and that could lead to informal or formal complaints and thus to imposing burdens on Staff and the Commission as well.

ComEd stated that it is willing to accept permitting new accounts that are eligible for CPP-A service to elect to take CPP-A service outside of the enrollment window, but that the evidence does not warrant exempting successor accounts from the enrollment window that is applicable to all other existing customers, and that any theoretical benefits of doing so as to successor accounts that involve actual changes in ownership would be outweighed by the burdens and costs of requiring ComEd to investigate and distinguish among different types of successor accounts. Thus, for each of these reasons, ComEd believed that Staff’s proposal should be limited to new accounts, and should exclude successor accounts. ComEd requested that its compromise proposal be approved.

Staff

Staff, in direct testimony, proposed that new customers that would otherwise be eligible for CPP-A service should be permitted to take CPP-A service outside of the enrollment window. (Schlaf Dir., Staff Ex. 5.0, p. 10) Staff, in rebuttal testimony, agreed that its proposal should not apply to customers that had changed their corporate name, but took the position that it should apply to customers at an existing location under new ownership. (Schlaf Reb., Staff Ex. 13.0, pp. 3-4)

Staff’s witness, on cross-examination, appeared to indicate that he was in accord with the position expressed in ComEd’s surrebuttal testimony. (See Schlaf Tr. 1349:20 -

1350:3) Staff in its Initial Brief confirmed that Staff accepted ComEd's surrebuttal position.

Commission Analysis and Conclusion

The Commission finds that the evidence warrants permitting new accounts that are eligible for CPP-A service to elect to take CPP-A service outside of the enrollment window, except that it does not warrant exempting successor accounts of customers not on CPP-A service from the enrollment window that is applicable to all other existing customers, and that any theoretical benefits of doing so as to successor accounts that involve actual changes in ownership would be outweighed by the burdens and costs of requiring ComEd to investigate and distinguish among different types of successor accounts. That ultimately might work to the detriment of customers in future rates. Moreover, a customer might dispute ComEd's conclusion, and that could lead to informal or formal complaints and thus to imposing burdens on Staff and the Commission as well.

Thus, for each of those reasons, the Commission believes that Staff's proposal should be limited to new accounts, and should exclude successor accounts of customers not on CPP-A service. Those limitations are reasonable and supported by the evidence. The Commission approves ComEd's compromise position permitting new accounts that are eligible for CPP-A service to elect to take CPP-A service outside of the enrollment window, subject to those limitations.

ii. The CPP-H Issues.

ComEd

ComEd originally proposed that CPP-H customers be required to give 60 days advance notice before terminating service. (McNeil Dir., ComEd Ex. 3.0, p. 38; ComEd Ex. 7.1, Original Sheet No. 273) ComEd proposed a 60 day notice period in order to balance two different, and in this case competing, interests of customers -- flexibility in switching and lower prices. (McNeil Dir., ComEd Ex. 3.0, pp. 38-39) According to ComEd, customers' interests conflict here because the greater the switching flexibility, the more the uncertainty faced by wholesale suppliers, and thus the greater the risk that the suppliers will add an increment to their auction bids due to that uncertainty. (*Id.*)

ComEd responded to Staff and CES's proposal regarding implementation of DASR rules, i.e., 7 day switching, indicating that it was willing to permit CPP-H customers to terminate that service under the existing DASR rules, provided that such terminations occurred only on the customer's normally scheduled meter reading date, because off-cycle switching would impose substantial unwarranted administrative burdens and costs on ComEd. (Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 11) ComEd indicates that Staff's opposition failed to take into account that there may be far greater interest on the part of customer agents (General Account Agents) in having customers move on to and off of CPP-H service in the post-transition period, which would mean that off-cycle

switching could be far more burdensome and costly for ComEd after 2006 than Staff's position assumed. (Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 9-10)

Staff

In regard to ComEd's original proposal to require 60 days notice, Staff proposing that CPP-H customers be allowed to terminate that service under the existing DASR rules relating to delivery services, i.e., 7 days notice. (Schlaf Dir., Staff Ex. 5.0, pp. 13-16)

Staff submitted rebuttal testimony opposing ComEd's proposed compromise. (Schlaf Reb., Staff Ex. 13.0, p. 9) Staff argued that very few customers are likely to request such a termination. (Id.) However, Staff's witness acknowledged, on cross-examination, that, depending on price movements, switching in relation to CPP-H service may increase, resulting a larger burden on ComEd and thus increased costs to customers. (Schlaf Tr. 1352 - 1353) Staff takes the position that ComEd should be allowed to recover the incremental costs of off-cycle switching through a non-standard switching fee, rather than avoiding those costs by prohibiting such switching.

CES

CES also argued for a different balance regarding ComEd's 60 day notice, proposing that CPP-H customers be allowed to terminate that service under the existing DASR rules relating to delivery services. (O'Connor Dir., CES Ex. 1.0, p. 25; Domagalski / Spilky Dir., CES Ex. 3.0, pp. 22-23) On rebuttal, CES noted but did not express any objection to the proposed limitation to on-cycle switches. (Domagalski / Spilky Reb., CES Reb. 6.0, p. 12)

Commission Analysis and Conclusions

The burdens and costs that would result from permitting off-cycle switching in relation to CPP-H service are concrete, not abstract. ComEd has shown that it would incur additional burdens and costs if Staff's proposal were accepted. ComEd is willing to accept switching in relation to CPP-H service on the general DASR timeline. The Commission accepts this, however, the Commission believes that the case for permitting off-cycle switching in relation to CPP-H service has not been made, and that ComEd has shown that the disadvantages of permitting off-cycle switching here outweigh any benefits. Based on the evidence, the Commission approves ComEd's compromise proposal to accept switching in relation to CPP-H service on the general DASR timeline, provided that the switching is on-cycle.

5. Rider CPP – Limitations and Contingencies

The Limitations and Contingencies part of Rider CPP addresses the contingent competitive procurement processes to be used in the event of auction under subscription or default under an SFC resulting from an auction. (Alongi / Crumrine Dir., ComEd Ex. 7.0, pp. 39, 51; see also, e.g., McNeil Dir., ComEd Ex. 3.0, pp. 2, 4, 52-57;

ComEd Ex. 3.5) ComEd has shown that the limitations and contingencies language is necessary, reasonable, and appropriate.

The open questions with regard to this part, in relation to the contingent processes as such, are entirely derivative, in that they simply are what conforming changes will be needed to implement the Commission's decisions on those processes. ComEd is directed to submit a compliance filing consistent with this Order.

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

6. Rider CPP – Translation to retail charges

In the Translation to Retail Charges part of Rider CPP, ComEd proposed detailed "translation" formulae (also referred to as "prisms") to accurately "translate" the results of the CPP-B and CPP-A auction segments and the potential CPP-H auction into retail Supply Charges, without mark-ups, for each Customer Supply Group, as applicable. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, pp. 2, 51-65)

As Messrs. Alongi and Crumrine explained, "the 'translation' methodology serves to develop ratios that reflect the cost-causation contribution of each Customer Supply Group to the auction (segment) relating to that group, in each auction cycle[.]" (Alongi / Crumrine Dir., ComEd Ex. 7.0, p. 52) The ratios take into account usage (including demands), time of use (Peak, Off-Peak, Summer, and Nonsummer Periods), and transmission and distribution line losses; and the ratios also take into account forward market costs for electric energy and generation capacity, estimated ancillary transmission services, and migration risks. (*Id.* p. 52) The methodology applies the ratios to a load weighted average of the clearing prices resulting from the applicable auction (segment), taking into account seasonal supplier payment differences, in order to arrive at the retail Supply Charges for the monthly billing periods in which the charges will be applicable. (*Id.* p. 52)

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

There have been only four issues raised in this Docket with regard to the specifics of the translation formulae: (1) the definitions of Peak and Off-Peak periods, (2) the use of the Migration Risk Factor in the "prism" for calculating CPP-B service Supply Charges, (3) the use of forwards in the translation formulae, and (4) whether the translation formulae should be modified for CPP-H service. The first issue is discussed in Section VII.B.2.b

of this Order, and the fourth issue is discussed in Section VII.B.10 hereof. The second and third issues have been resolved in a reasonable manner, as explained in the following two subsections of this Order.

a. Customer Supply Group Migration Risk Factor

ComEd

ComEd originally proposed to include a Migration Risk Factor in the translation methodology for calculating CPP-B service Supply Charges, at a time when ComEd was proposing that the Large Load Customer Supply Group would be part of the CPP-B auction segment. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, pp. 43, 55-62; ComEd Ex. 7.6) The Large Load Customer Group had by far the greatest migration risk impact per MWh, more than twice that of the next most significant Group. (Alongi / Crumrine Dir., ComEd Ex. 7.0, p. 61) Residential customers had the lowest impact. (*Id.*)

ComEd, in rebuttal testimony, continued to support its original proposal. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 13-24) ComEd, in surrebuttal, in light of certain Staff and intervenor direct and rebuttal testimony, proposed an integrated “package” of auction / rate design changes, two of which were to move the Large Load Customer Supply Group out of the CPP-B auction segment and into the CPP-A auction segment and to eliminate the Migration Risk Factor from the translation methodology for CPP-B. ComEd explained that, in the interests of narrowing the issues, it was willing to accept the elimination of the Migration Risk Factor in that scenario. (Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 12) As ComEd further stated, the movement of the Large Load Customer Group to the CPP-A Auction Segment would eliminate most of the migration risks from the CPP-B Auction segment. While some risks would remain, they would be diminished, and, accordingly, in the interests of compromise, ComEd was willing to accept the elimination of the migration risk factor from the translation mechanism in the CPP-B service in that circumstance. (Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 12)

If that integrated proposal were not to be approved, however, then ComEd was of the view that its formulation of Migration Risk Factor (not that of CES) should be incorporated within the CPP-B translation methodology. (Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 12-13)

Staff

In contrast, Staff in its direct testimony, recommended the elimination of the Migration Risk Factor, on various grounds. (Lazare Dir., Staff Ex. 6.0, pp. 25-30)

CES

CES, in its direct testimony, supported the concept of a Migration Risk Factor but proposed revisions to the Migration Risk Factor that would likely result in a greater allocation of costs to non-residential customers and a lesser allocation of costs to

residential customers. (O'Connor Dir., CES Ex. 1.0, pp. 28-30; Domagalski / Spilky Dir., CES Ex. 3.0, pp. 4-15)

BOMA

BOMA, in its respective direct testimony, recommended the elimination of the Migration Risk Factor, on various grounds. (Brookover / Childress Dir., BOMA Ex. 2.0, pp. 15-19)

Commission Analysis and Conclusion

Although the Commission finds that a Migration Risk Factor may be appropriate to account for the increased bid prices due to migration risks, ComEd has shown that at this time the Migration Risk Factor may be eliminated in light of the movement of the Large Load Customer Supply Group to the CPP-A auction segment approved in Section V.I.2 of this Order. The Commission approves the elimination of the Migration Risk Factor from the translation methodology for calculating the CPP-B service Supply Charges as part of the integrated "package" of rate design changes referenced in preceding subsections of this Order.

b. Market cost information – Market Energy Costs

ComEd

ComEd proposed to use, within the Market Cost Information component of the formulae, forward prices for electricity delivered into the Northern Illinois Hub ("Ni-Hub"), by Peak and Off-Peak period, for each month for which retail Supply Charges are being determined. (*E.g.*, Alongi / Crumrine Dir., ComEd Ex. 7.0, p. 62)

ComEd stated in rebuttal that the use of forward prices will send more appropriate price signals than Staff's direct testimony proposal to use locational marginal prices ("LMPs"), in part because forward prices are statistically better indicators of prices that potential wholesale suppliers will be incorporating into their bids. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 25-27)

Staff

Staff in direct testimony originally proposed to substitute data based on LMPs (Lazare Dir., Staff Ex. 6.0, pp. 30-32), but, after ComEd supplied additional data regarding the relative merits of the two approaches, Staff withdrew its proposal and supported ComEd's proposal. (Lazare Reb., Staff Ex. 14.0, p. 14) The AG conducted extensive cross-examination of Staff's witness on this subject. (Lazare Tr., 1243, *et seq.*) However, Staff's witness ultimately confirmed that Staff still supported ComEd's proposal. (Lazare Tr., 1262 - 1263) The AG did not pursue the issue in briefing.

Dynegy

Dynergy supported ComEd's proposal. (Huddleston Reb., DYN Ex. 1.2, p. 13)

Commission Analysis and Conclusion

ComEd has shown that forward prices are a better indicator of prices than other possible indicators, such as LMPs. The Commission approves ComEd's use of forward price information in the translation formulae.

7. Rider CPP – Supply Administration Charge

ComEd's proposed Supply Administration Charge is found not in proposed Rider CPP, but rather in proposed Rider PPO - MVM. The charge, therefore, is addressed in Section VII.C.2 of this Order.

8. Rider CPP – Accuracy Assurance Mechanism

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

The Accuracy Assurance Mechanisms part of Rider CPP is intended to ensure accurate cost recovery, which benefits customers and the utility alike. The AAM part provides for a monthly charge or credit (depending on the underlying calculations applicable to any given month) called the Accuracy Assurance Factor ("AAF"). (ComEd Ex. 7.1, Original Sheet Nos. 291-294) The AAF in turn is composed of two factors, the Customer Demand and Usage ("CDU") Factor and the Contingency Factor ("CF"). (*Id.*) "The CDU Factor serves to balance the amounts billed to retail customers taking ComEd supply service with payments made to suppliers as a function of the contract terms and prices determined in accordance with Rider CPP, and based on changes in retailers' customers usage and demands. The need for this factor stems from the fact that there will be differences between retail customers' actual demands and usage and the historical retail customer demand and usage data used in developing the wholesale to retail translation ratios." (Alongi / Crumrine Dir., ComEd Ex. 7.0, p. 66) The CF "addresses the Company's net costs in the event of use of the contingent wholesale market competitive procurement processes" provided for in the Limitations and Contingencies part of proposed Rider CPP. (*Id.* p. 67; *see also id.* pp. 67-68) Rider CPP provides for ComEd's submitting to the ICC, on a monthly basis, informational filings regarding the AAF and the underlying data and calculations. (*Id.* p. 68)

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

The Commission approves those resolutions of AAM part issues as to which Staff and ComEd are in agreement, and also approves ComEd's final positions on the remaining open issues. These agreed resolutions, and ComEd's positions on the remaining issues, are supported by the evidence in the record and are just and reasonable.

a. Issues That Have Been Resolved.

As indicated above, numerous issues relating to the AAM part of Rider CPP have been resolved on a basis that is supported by the evidence.

First, Staff and ComEd reached an accord on ComEd's conducting an annual internal audit of costs and recoveries under Rider CPP and ComEd's filing a copy of the report to Staff by April 30th of each year. (Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 33; ComEd Ex. 13.1; Knepler Reb., Staff Ex. 18.0, p. 12; Alongi / Crumrine Sur., ComEd Ex. 21.0, lines p. 32; Knepler, Tr. P. 1210)

Second, Staff and ComEd reached an accord on ComEd's filing with the Staff, by April 30th of each year, an annual report that summarizes the operation of the AAM part for the previous year. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 33-34; ComEd Ex. 13.1; Knepler Reb., Staff Ex. 18.0, p. 11; Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 32; Knepler Tr., 1208 to 1211)

Third, ComEd and Staff are amenable to working out the details of the format and content of ComEd's monthly informational filing setting forth the AAFs. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 34-36; ComEd Ex. 13.1; Knepler Reb., Staff Ex. 18.0, pp. 5-10; Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 23, 31, 33) The timing of the monthly filings is disputed in certain respects, however, and, thus, is discussed further below. Also, Staff points to the fact that the content has not been finalized as a ground for its proposal for automatic annual reconciliation proceedings, discussed below.

Fourth, Staff accepts ComEd's identification of the particular expense and revenues Accounts within the Uniform System of Accounts (the "USoA") that should be used to record the components of the AAF calculations. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 34-40; ComEd Ex. 13.2 Revised; Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 21; Waden Sur., ComEd Ex. 22.0, pp. 4-10; Selvaggio Tr. 1123 - 1128) Certain issues relating to the Accounts and of sub-Accounts are disputed, however, and, accordingly, they are discussed further below.

Fifth, ComEd, in its rebuttal testimony, agreed to modify language of the AAM part to clarify that certain components of the formulae therein are calculated on an accrual basis, in accord with Staff's preference. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 40, 41, 43; ComEd Ex. 13.1; Selvaggio Reb., Staff Ex. 16.0, pp. 2-3)

Sixth, ComEd, in its surrebuttal testimony, accepted Staff's proposal that ComEd use forecasts in the CDU Factor and CF formulae denominators, with some limited

conforming and related language changes that are appropriate and that are not contested by Staff. (Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 32-33)

Seventh, ComEd and Staff are in partial agreement on the addition of a factor to the CDU Factor and CF calculations -- referred to by ComEd as "Factor A" and by Staff as "Factor O" -- to reflect adjustments for refunds or additional collections, but ComEd and Staff differ in part on both the substance and the name of this factor, which, accordingly, are discussed further below.

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

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

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

Those proposals are supported by evidence in the record and are approved. Therefore, the Commission finds that ComEd's compliance filing should reflect such.

b. Contested Issues.

i. Monthly Informational Filing Date

ComEd

ComEd proposed to make its monthly informational filings setting forth the AAFs no later than the third business day before the monthly billing period in which the AAFs will be applicable. (Alongi / Crumrine Dir., ComEd Ex. 7.0, p. 68; ComEd Ex. 7.1, Original Sheet Nos. 269, 291) timeframe in order to: (1) perform the three AAF calculations; (2) process the necessary changes in its billing system for the next month; and (3) complete the required submission to the ICC. Because of the importance of accurately billing its customers, ComEd needs to extensively test any changes in rates in its billing system prior to the first billing day of the cycle. Consequently, there would be insufficient time to re-process and re-test any changes made after twentieth of the calendar month. Once changes to rates are entered into the billing system, adjustments to those rates likely could not be processed and tested until the next billing cycle/month because the testing process must be completed before subsequent changes could be incorporated. Thus, a filing deadline of the twentieth of the calendar month would not create sufficient time for the error correction process Staff's proposal contemplates. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 34-35)

ComEd, in its surrebuttal testimony, further demonstrated that Staff's position is unwarranted, impractical, and detrimental for customers and the utility, pointing out that the purpose of the AAF is to balance the several billions of dollars of revenues and expenses that will be incurred annually. ComEd states that it is important for both customers and ComEd to reflect the appropriate charge or credit through the AAF in as timely a fashion as possible. Therefore, it would be inappropriate to inject an additional month's delay into the process. Furthermore, as ComEd witness Kevin Waden discussed in his surrebuttal testimony (ComEd Ex. 22.0), ComEd and Exelon Corporation controls for the calculation and implementation of the AAFs will ensure that customer bills reflect the appropriate factors. (Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 31)

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

ComEd contends that there is no legal basis in the provisions that Staff's witness cited, 220 ILCS 5/9-201(a) and 83 Illinois Administrative Code Part 255, that mandate Staff's proposed requirement of special permission filings.

Staff

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

Commission Analysis and Conclusion

Staff's position, if it were adopted, would unnecessarily cause serious practical problems for customers as well as the utility. The evidence reflects that ComEd's proposal for a monthly information filing no later than the third business day before the monthly billing period is appropriate. Based on ComEd's current monthly accounting close process and the availability of the components of the calculation, the Commission finds that ComEd's proposed deadline (three business days prior to the start of the next

monthly billing period) represents a realistic deadline. To submit the AAF informational filing any sooner may well have the unintended effect of undermining ComEd's (and Staff's) efforts to ensure the accuracy of such calculations. Moreover, any error that Staff identifies in the filing, if it requires a correction in the AAF, can be corrected in the next monthly billing period. For each of the above reasons, ComEd's proposed due date is approved, and Staff's position regarding special permission filings is not adopted.

ii. Commission Review of Identification of AAF component Accounts

Staff

Staff has proposed further contested proceedings and Commission review of ComEd's identification of the Accounts that should be used to record the components of the AAF calculations, and of the specific sub-Accounts that ultimately will be created for use in those calculations. (Selvaggio Reb., Staff Ex. 16.0, pp. 5-8)

ComEd

ComEd stated that Staff's unprecedented proposal is unwarranted and unreasonable, for a number of reasons. (Alongi/Crumrine Reb., ComEd Ex. 13.0, pp. 36-38; Waden Sur., ComEd Ex. 22.0; Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 20-21, 31, 37-38) ComEd indicated, among other things, that it does not anticipate any changes in the current method of accounting as required by Generally Accepted Accounting Principles and the FERC's Uniform System of Accounts. Therefore, ComEd identified in ComEd Ex. 13.2 Revised which FERC Accounts will be the umbrella accounts that are expected to house the information that will be used to calculate the AAF. ComEd states that it intends to track the cost components of the AAF algorithms by supplier based upon the structure of the proposed auction process. ComEd indicates that it will also track the supplier information in further detail by product and, perhaps, by tranche. ComEd commits to maintaining the records that will impact the AAF calculations in sufficient detail such that they will be readily auditable by Staff. ComEd also explains that, for general ledger control purposes, these sub-accounts should not and will not be created until they can be specifically assigned and will actually be needed. ComEd also pointed out that it is the tariff language, not the Accounts or sub-Accounts, which determines which costs appropriately may be included in calculating the Supply Charges as well as the AAFs.

Thus, ComEd submitted that Staff's proposal for ComEd to provide a comprehensive list of detailed Accounts and sub-Accounts for Staff's review and approval within thirty days of the completion of the instant proceeding is not an appropriate or useful mechanism to accomplish Staff's goals. In addition, ComEd agreed to meet with Staff when the necessary information is available and ComEd has determined the appropriate sub-Accounts in order to facilitate Staff's understanding and review of the decisions that ComEd made in setting up such accounts.

ComEd submitted the detailed surrebuttal testimony of Kevin Waden, C.P.A., Exelon Energy Delivery Company's Director of Financial Reporting and Accounting Research, ComEd Ex. 22.0, responding to Staff's proposal, demonstrating that ComEd has identified the correct Accounts in ComEd Ex. 13.2 Revised in accordance with the USoA, establishing that it is inappropriate and detrimental from an accounting and internal controls perspective to create the sub-Accounts prematurely (before the CPP auctions) as Staff proposes, and otherwise showing that Staff's proposal is unjustified, inappropriate, and detrimental. (Waden Sur., ComEd Ex. 22.0, pp. 1-2, 4-8)

ComEd also showed that the USoA, with limited exceptions, does not specify sub-Accounts, and that ComEd has hundreds of sub-Accounts in its accounting system, none of which were established in a formal ICC or FERC proceeding. (Waden, Tr. 872-873)

Commission Analysis and Conclusion

Staff has proposed an unnecessary and unwarranted proceeding. Staff has failed to show that further contested proceedings over Accounts which are not even disputed and over sub-Accounts that are not required by the USoA and that ComEd has shown should not be established at this time are necessary or would serve any useful purpose. Such proceedings also would impose burdens and costs on the participants and the Commission. ComEd has established the correct Accounts in accordance with accounting procedures and shown that Staff's demand for sub-Accounts is inappropriate for multiple reasons. Therefore, Staff's extraordinary proposal is rejected.

iii. Addition of Factor "A" for CDU Factor and CF Calculation

ComEd

ComEd added a factor, which it called "Factor A", to the CDU and CF calculations in response to a Staff proposal, but ComEd believed, however, that, for practical reasons, Factor A should cover both adjustments made based on the utility working with Staff to resolve disputed issues without a formal Commission proceeding as well as adjustments made pursuant to a Commission Order. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 38-40; Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 28-30) ComEd stated that to assume and mandate that all such issues must be resolved through formal proceedings, when they might well be resolved without such, would be unnecessary, overly litigious, and administratively burdensome on ComEd, Staff, and the Commission, and potentially other stakeholders, and could unnecessarily delay, possibly for extended periods, the correction of errors, which could have significant adverse consequences for customers and the utility.

ComEd stated that "A" for adjustment makes the most sense, but that it was willing to accommodate Staff by using another letter if there truly is a confusion concern, provided

that it should not be “O” unless the Commission approves Staff’s underlying substantive position on resolving all such matters through Commission Orders. (Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 29-30) ComEd proposed that Factor A permit ComEd to amortize adjustments over multiple effective periods with interest (interest was included because Staff proposed it, as noted earlier). (ComEd Ex. 13.1, Original Sheet No. 292)

Staff

Staff wished Factor A to be limited to adjustments made pursuant to a Commission Order. (Selvaggio Reb., Staff Ex. 16.0, pp. 17-18) In addition, Staff objected that the only Commission should determine the amortization period for an adjustment it ordered. (Selvaggio Reb., Staff Ex. 16.0, p. 19) Staff preferred the term “Factor O” because “O stands for ordered, and opposed “Factor A” because it is a term in 83 Illinois Administrative Code Part 525, Section 525.50, relating to purchase gas adjustment (“PGA”) clauses. (Selvaggio Dir., Staff Ex. 8.0, p. 16; Selvaggio Reb., Staff Ex. 16.0, lines p. 17) ComEd disagreed with Staff’s position, as indicated above, and stated that it does not believe there is any actual likelihood of confusing it with a gas utility with a PGA clause.

Commission Analysis and Conclusion

ComEd and Staff are in partial agreement on the addition of a factor to the CDU Factor and CF calculations -- referred to by ComEd as “Factor A” and by Staff as “Factor O” -- to reflect adjustments for refunds or additional collections, but ComEd and Staff differ on both the substance, in two respects, and the name of this factor. The gist of the first substantive dispute is that Staff wishes Factor A to be limited to adjustments made pursuant to a Commission Order. The gist of the second substantive dispute relating to Factor A also is that Staff objected, arguing that the only Commission should determine the amortization period. The disagreement over the name of Factor A / Factor O reflects the underlying substantive dispute regarding whether the sole method of dealing with Factor A adjustments should be a contested case before the Commission.

The Commission agrees with ComEd that to assume, or require, that all such disputed issues be resolved through formal proceedings, when they might well be resolved by Staff and ComEd working together and reaching an accord, would be unnecessary, overly litigious, and administratively burdensome on ComEd, Staff, and the Commission, and potentially other stakeholders, and it could unnecessarily delay, possibly for extended periods, the correction of errors, which may have significant adverse consequences for customers and the utility. Therefore, the Commission finds that these issues need not be required to be resolved in a formal proceeding. Staff or another interested party can seek, or the Commission on its own motion can initiate, a formal proceeding when and if the circumstances warrant such. The name “Factor A” and the amortization period language are appropriate. In the event of a formal proceeding, the Commission can direct the appropriate amortization period.

iv. Interest Component of Factor A

ComEd's contends that the interest component of Factor A should run from when the erroneous AAF was applied through when it was corrected. (Alongi/Crumrine Sur., ComEd Ex. 21.0, p. 29) Because the Commission finds that formal proceedings to resolve issues relating to possible Factor A adjustments are not automatically to be required, and because it makes sense to fully address that aspect of an error corrected by an adjustment, the Commission approves ComEd's proposal.

c. Accounting reconciliations

Please see the following Section of this Order.

9. Rider CPP – Subsequent Review / Contingencies

The Commission is presented with four related issues regarding the review of charges, of the calculation of charges, and of accounting under Rider CPP: (1) general issues regarding the subject of additional retrospective "prudence review", which is addressed elsewhere in this Order, primarily in Section V.L.1 and 2, rather than here; (2) Staff's and ComEd's joint proposal relating to review of Supply Charges and AAFs, which involves proposed language for the CPP Timeline section of the Competitive Procurement Process part of Rider CPP; (3) Staff's and ComEd's joint proposal relating to review in certain contingent scenarios, which involves proposed language for the Limitations and Contingencies part of Rider CPP; and (4) Staff's revised (i.e., expanded) proposal for automatic annual Docketed reconciliation proceedings under Rider CPP, Rider PPO-MVM, and Rider TS-CPP. The latter three subjects are discussed here.

a. Review of Supply Charges and AAFs

Staff and ComEd each presented testimony on the appropriate scope of Commission review of computational errors and incorrect inclusion of costs in calculating Supply Charges and AAFs. (Knepler Tr. 1207-1208) ComEd and Staff are now in agreement on proposed language, set forth in a Stipulation filed on August 31, 2005. Staff's and ComEd's proposed language permits, among other things, Commission review of calculations of Supply Charges and AAFs and of whether ComEd has included only those costs authorized to be included by the Commission's Order in this Docket, and also permits appropriate relief, including refunds, as stated more specifically in that language. Staff's witness confirmed that the final proposed language is appropriate. (Knepler Tr. 1208) The final proposed language is supported by the evidence in the record, is just and reasonable, and should be approved. Therefore, the Commission approves Staff's and ComEd's final revised proposal regarding review of Supply Charges and AAFs.

b. Review in Certain Contingent Scenarios

Staff and ComEd each submitted proposals regarding review of Rider CPP in certain contingent scenarios. Staff, in its direct testimony, made a proposal relating to reporting and review under the Limitations and Contingencies part of Rider CPP, but did not propose specific tariff language. (Schlaf Dir., Staff Ex. 5.0, p. 20) ComEd, in its rebuttal testimony, indicated that it was willing to accept what it understood to be the intention and scope of Staff's proposal, with certain limitations, but it found the proposal to be unclear and potentially overinclusive in certain respects, and ComEd, accordingly, proposed certain modifications of Staff's proposal, to be effectuated through specific proposed tariff language found in ComEd Ex. 13.1 at Original Sheet No. 274. (Juracek Reb., ComEd Ex. 9.0, p. 16; McNeil Reb., ComEd Ex. 10.0, pp. 66-69; Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 12-13; ComEd Ex. 13.1 at Original Sheet No. 274) Staff, in its rebuttal testimony, expressed certain questions and concerns regarding ComEd's proposed modifications and language. (Schlaf Reb., Staff Ex. 13.0, pp. 10-11) ComEd, in its surrebuttal testimony, responded. (McNeil Sur., ComEd Ex. 18.0, pp. 40-41)

ComEd and Staff ultimately presented and supported a compromise proposal, the language of which appears in ComEd Cross Ex. 11, and which would be added as the last paragraph of the Limitations and Contingencies part on Original Sheet No. 274 of Rider CPP as originally filed (numbered). The additional language addresses the concerns raised by Staff; Staff's witness confirmed that Staff's and ComEd's final revised proposed additional language is supported by Staff and is reasonable. (Schlaf Tr., 1353 - 1354, 1356 - 1357) The Attorney General's Office and the Citizens Utility Board, neither of which submitted rebuttal testimony on either Staff's original proposal or ComEd's rebuttal counter-proposal, nonetheless each conducted extensive cross-examinations of Staff's witness on the subject of Staff's and ComEd's final revised proposal. (Tr. 1358, *et seq.*; Tr. 1376, *et seq.*) The additional testimony adduced on that cross-examination further illustrated and established that the final revised proposal is a reasonable compromise supported by the evidence in the record. The Commission finds that the final language is supported by the evidence in the record, is just and reasonable, and should be approved.

c. Automatic Annual Docketed Reconciliation

Staff

Staff proposed automatic annual Docketed reconciliation proceedings under Rider CPP, Rider PPO-MVM, and Rider TS-CPP. Staff originally proposed automatic annual Docketed proceedings to reconcile electric power and energy costs with recoveries under Rider CPP (only). (Knepler Dir., Staff Ex. 10.0, pp. 2, 6-9) The stated purposes were "[r]eviewing the cost mechanism on an annual basis to ensure that the Company's process is effective" and "[c]orrecting omissions, errors, or misclassifications of cost[.]" (*Id.* p. 7) Staff, in its rebuttal testimony, adhered to that proposal but also, without

identifying particular grounds, proposed to expand it to Rider PPO-MVM and Rider TS-CPP. (Knepler Reb., Staff Ex. 18.0, pp. 2, 10-11, 14, 15)

Staff asserted in rebuttal testimony that the Procurement Working Group's goal of "transparency" supported Staff's proposal (Knepler Reb., Staff Ex. 18.0, p. 10) Staff claimed that its position was supported by certain of IIEC witness Mr. Collins's direct testimony.

ComEd

ComEd opposes Staff's proposal for automatic annual Docketed reconciliation proceedings. ComEd agreed that, if Staff, another interested party, or the Commission itself were to identify a valid basis for conducted a formal reconciliation of costs and recoveries, and of whether the correct costs were included when calculating Supply Charges or AAFs, then Rider CPP would permit the Commission to do so, as has been confirmed by Staff's and ComEd's final revised proposal regarding review of Supply Charges and AAFs, discussed above. (E.g., Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 24-25) ComEd made an additional proposal along these lines in its rebuttal testimony, as discussed further below.

ComEd stated that there has not been any valid basis shown for conducting automatic annual Docketed reconciliation proceedings. ComEd stated that it is willing to maintain its records in sufficient detail to accommodate audits and to submit the results of internal audits annually; to file annual reports (verified by an officer of ComEd). ComEd highlighted that, with the necessary information in hand, Staff could discuss and seek to resolve the subject with ComEd and, if Staff was unable to resolve the subject, could advise the Commission as to the need for an investigation. ComEd also proposed in rebuttal that, as part of its final order in this proceeding, the Commission formally direct Staff to (1) review the information supplied by ComEd annually and (2) within six months, issue a report to the Commission regarding its findings, including a recommendation regarding the need, or lack thereof, for a formal Commission investigation. (ALongi / Crumrine Reb., ComEd Ex. 13.0, pages 38-39)

ComEd stated that Staff's assertion that the Procurement Working Group's goal of "transparency" supported Staff's proposal is not logical or reasonable on its face. (Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 23) Moreover, Staff's assertion overlooked that the formulate for the calculation of the Supply Charges and the AAFs, and the monthly and annual informational filings and reports that will be filed by ComEd, as well as other information, all provide transparency without the need for an automatic proceeding. (Id.) ComEd also pointed out that Staff is incorrect in its characterization of IIEC's testimony and that Mr. Collins in the passage cited by Staff was addressing a completely different issue. (Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 23)

ComEd, in its surrebuttal testimony, pointed out that Staff's belated and unsupported expansion of its proposal to Rider PPO-MVM and Rider TS-CPP simply did not make sense. (Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 27-28) All of the costs that Staff proposes to reconcile in Rider PPO-MVM are costs calculated in determining the Supply

Charges in Rider CPP that are incorporated in Rider PPO-MVM. (Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 27; ComEd Ex. 7.2, Original Sheet No. 296) ComEd also pointed out that Rider TS-CPP is based on existing Rider TS - Transmission Services, 5th Revised Sheet No. 217, *et seq.*, which was approved by the Commission in March 2003 and has been in operation since June 2004, which determines transmission service charges for almost 15,000 customers on existing Rider PPO-MI and Rider-ISS, which contains no such requirement of annual reconciliation proceedings, and which was not shown ever to have needed such. (Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 27-28)

Commission Analysis and Conclusion

Staff's proposal for automatic annual Docketed reconciliation proceedings lacks merit as to Rider CPP, Rider PPO-MVM, and Rider TS-CPP. Staff's revised proposal is unwarranted and is unnecessarily burdensome on stakeholders, ComEd, Staff, and the Commission. ComEd has established that there is no need for an automatic annual docketed reconciliation. Therefore, the Commission rejects Staff's proposal for an automatic annual Docketed reconciliation.

10. Alternative proposals re service to self-generation customers

IIEC

IIEC proposed that ComEd either (1) charge self-generating customers on a dollars and cents per kilowatt-day basis (e.g., \$X.XX/kW-Day) or (2) create a new translation process for self-generating customers. (Dauphinais Dir., IIEC Ex. 2.0, p. 9-12) IIEC stated that these changes are necessary to provide fair treatment of self-generation customers.

ComEd

ComEd, in its rebuttal testimony, indicated numerous flaws in IIEC's proposal, including IIEC's reliance upon mistaken interpretations / assumptions, and showed that ComEd's approach is consistent with the determination of the auction suppliers' capacity obligations for each of ComEd's bundled service customers under PJM and, in turn, ComEd's financial responsibilities under the CPP-H Supplier Forward Contract. (Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 27-29)

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

allocating the aggregate capacity obligation for the group on a pro rata basis to each individual customer, which is tantamount to a self-insurance scheme, a scheme that ComEd notes such customers could voluntarily enter into if they choose, but which should not be imposed on them by Commission fiat. (Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 15-17)

Commission Analysis and Conclusion

IIEC has not justified its proposed recommendations relating to self-generating customers, which ComEd has shown to be unnecessary and inferior to ComEd's proposal. The evidence supports that ComEd's proposed treatment of self-generation customers is appropriate. Therefore, IIEC's recommendations regarding self generation customers are rejected and ComEd's proposed treatment of self-generation customers is approved.

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

IIEC

IIEC recommended that ComEd provide an active load management ("ALM") credit to the capacity billing units for hourly pricing customers who meet PJM ALM requirements. (Dauphinais Reb., IIEC Ex. 5, pp. 12-15) IIEC's proposal would address the issue by splitting supply procurement for CPP-H load into two segments – ALM and non-ALM supply.

ComEd

ComEd maintained that Rider CLR compensates customers directly for curtailable capacity credit, making the modification suggested by Mr. Dauphinais unnecessary. (McNeil Sur., ComEd Ex. 18.0, pp. 41-42, Crumrine, Tr. 820-824)

Commission Analysis and Conclusion

There is no need to introduce the complexity that such an approach would involve because ComEd's proposal already assures that customers who participate in PJM active load management will receive full credit for doing so. The Commission approves ComEd's proposal and rejects the proposal put forth by IIEC.

C. Matters Concerning Proposed Rider PPO-MVM

1. Supply Charge

Staff in direct proposed revised language relating to the Supply Charges under proposed Rider PPO-MVM. (Struck Dir., Staff Ex. 9.0, pp. 3-6) In its rebuttal, ComEd

proposed different revised tariff language. (ALongi/Crumrine Reb., ComEd Ex. 13.0, pp. 48-49) ComEd and Staff have agreed on that revised tariff language. (Struck Reb., Staff Ex. 17.0, p. 7; Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 40) The uncontested language is supported by the evidence in the record, is just and reasonable. The Commission therefore approves the uncontested revised tariff language.

Staff, in rebuttal testimony, raised the separate question of whether the Supply Charges adjustment for supply-related uncollectibles costs should be moved from the Supply Charges into a new charge or into the Supply Administration Charges. (Struck Reb., Staff Ex. 17.0, pp. 7-8) Staff's concerns were based primarily on a misunderstanding that ComEd was proposing that those costs would flow through the AAFs, a misunderstanding that has been discussed in Section VII.B.8 of this Order. Staff's witness confirmed that, with that misunderstanding cleared up, he thought it might be helpful, but it is not essential, to break out these costs in a separate charge. (Struck, Tr. 1186 - 1187) Staff has not shown that any tangible benefit would warrant creating a new, separate charge, which would add complexity to the charges. The Commission rejects Staff's proposed change.

2. Supply Administration Charge

Staff proposed the inclusion of language indicating the Supply Administration in proposed Rider PPO-MVM would be set by the Commission in a subsequent rate case. (Struck Dir., Staff Ex. 9.0, pp. 2-3) ComEd disagreed with Staff's proposal in rebuttal testimony, and proposed alternative revised language. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 46-47) ComEd and Staff ultimately agreed on further revised tariff. (Struck Reb., Staff Ex. 17.0, pp. 3-4; Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 39) That uncontested language is supported by the evidence in the record, is just and reasonable. The Commission adopts the uncontested final revised tariff language.

CUB/CCSAO made several general recommendations regarding how the Supply Administration Charges should be calculated and assessed. (Steinhurst Dir., CUB/CCSAO Ex. 2.0, pp. 25, 33-34)

CES also made various general recommendations regarding how the Supply Administration Charges should be calculated and assessed. (O'Connor Dir., CES Ex. 1.0, pp. 7-8; Domagalski / Spilky Dir., CES Ex. 3.0, pp. 15-21; Domagalski / Spilky Reb., CES Ex. 6.0, p. 18)

ComEd characterized CUB/CCSAO's and CES' proposals as premature and not appropriate for this Docket. According to ComEd, the language regarding these charges in Rider PPO-MVM is placeholder language, because the actual charges are to be determined in ComEd's rate case, which now is pending as ICC Docket 05-0597; and, thus, the issues sought to be raised by CUB/CCSAO and CES are appropriately

dealt with in that Docket, not here. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 45-46; Alongi / Crumrine Sur., ComEd Ex. 21.0, p. 39)

The Commission agrees with ComEd that the language regarding the Supply Administration Charges in Rider PPO-MVM is placeholder language. The actual charges are to be determined in ComEd's rate case, which now is pending as ICC Docket 05-0597. It is that Docket which is the appropriate proceeding to deal with the CUB/CCSAO and CES recommendations. Therefore, the Commission rejects CES's and CUB/CCSAO's recommendations and adopts ComEd's proposal regarding the Supply Administration Charges.

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

ComEd

ComEd has proposed, as discussed previously, to replace the current Rider PPO-MI with Rider PPO-MVM. ComEd stated that BOMA's proposal to keep the existing Rider PPO-MI or, alternatively, adopt of new Rider PPO based on the neutral fact-finder ("NFF") methodology, is entirely without merit given the fact that ComEd no longer owns generation facilities and is proposing a competitive procurement process in this proceeding. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 50-51) ComEd stated that its actual costs and the costs that are determined through this proposed process are one and the same. (See Alongi / Crumrine Dir., ComEd Ex. 7.0, p. 20) Therefore, the market value and ComEd's costs converge which, logically, means that the two required post-transition period PPO offerings also converge. (*Id.*) Further, ComEd's proposal is beneficial from a ratemaking viewpoint. (See, e.g., *id.*, p. 21) ComEd also highlighted the fact that the Commission has previously recognized shortcomings in the NFF process. *E.g., In re Commonwealth Edison Co., et al.*, Docket 00-0259, page 155 (Order on Reopening April 11, 2001).

Staff

Staff supported ComEd's proposal to replace Rider PPO-MI with Rider PPO-MVM. (Zuraski Reb., Staff Ex. 12.0, pp. 27-33 (noting numerous additional problems with BOMA's proposal))

BOMA

BOMA proposed that Rider PPO-MI should not be replaced by RIDER PPO-MVM, and that ComEd should be required to continue to offer Rider PPO-MI or an equivalent rider based on the "neutral fact finder" ("NFF") methodology. (Brookover / Childress Dir., BOMA Ex. 2.0, p. 20; Brookover / Childress Reb., BOMA Ex. 4.0, p. 14)

Commission Analysis and Conclusion

BOMA's proposal is unjustified and detrimental, contrary to the evidence in the record, and should not be approved. ComEd has shown that there is no need for the continuation of the current Rider PPO-MI once the proposed Rider PPO-MVM is adopted and in effect. The Commission rejects BOMA's proposal and instead adopts ComEd's proposal to replace Rider PPO-MI with Rider PPO-MVM.

D. Additional tariff and rate design issues

1. Staff's rate increase mitigation proposal

Staff

Staff has proposed a rate increase (bill impacts) mitigation proposal, which relates to the CPP-B auction segment (i.e., to all residential customers and most commercial and industrial customers), as that proposal has been clarified and revised in rebuttal testimony. (Lazare Dir., Staff Ex. 6.0, pp. 8-23; Lazare Reb. Staff Ex. 14.0, p. 16)

Under Staff's proposal, if the overall average increase for customer groups with access to the CPP-B auction segment is 13.33% or less, then the largest overall bill increase any one customer group in CPP-B auction segment would receive is 20%. This is because at this point the 20% maximum overall bill increase and the 150% of system average overall bill increase are equivalent ($20\%/1.50=13.33\%$). According to Staff's proposal, for average overall increases above 13.33% the maximum overall bill increase any class would receive is 1.5 multiplied by the system average overall bill increase for the CPP-B auction segment. Staff states that this adjustment process would occur after all components of the bundled ratemaking process are complete. (Lazare Dir., Staff Ex. 6.0, pp. 21-22) Staff proposes that a calculation would occur comparing the current and post-2006 bills for each customer group and if any of the proposed increases are constrained based on the parameters identified above, then the excess revenue would be reallocated on an equal percentage to the remaining customer groups. Under Staff's proposal, this process is repeated until all remaining revenue shortfall is allocated. (*Id.*, p. 22) Staff's proposal, as clarified and revised in rebuttal testimony, also includes applying the above mitigation criteria to residential space heating customers as a subgroup of the Residential Customer Supply Group. (Lazare Reb., Staff Ex. 14.0, pp. 15-16)

ComEd

ComEd supports Staff's rate increase mitigation proposal as clarified by ComEd and Staff in rebuttal. (Juracek Reb., ComEd Ex. 9.0, pp. 17, 25-26; Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 51-55) ComEd in surrebuttal explained how it would address the questions and concerns regarding certain details of Staff's proposal, raised by CCG and Dynegy in rebuttal testimony. (Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 42-43)

CCG

CCG, in rebuttal testimony, expressed certain questions / concerns regarding certain details of Staff's proposal. (Smith Reb., CCG Ex. 2.0, pp. 4-7)

Dynegy

Dynegy, in rebuttal testimony, expressed certain questions / concerns regarding certain details of Staff's proposal. (Huddleston Reb., Dynegy Ex. 1.2, pp. 12-13)

BOMA

BOMA has proposed a rate increase mitigation proposal relating to Rider 25 -- non-residential space heating -- customers, one that BOMA proposes should supersede Staff's proposal as to such customers. The merits of BOMA's proposal is discussed in Section VII.D.3 of this Order.

Commission Analysis and Conclusion

Staff's proposal, as supported by ComEd, is also supported by the evidence in the record, is just and reasonable, and should be approved. BOMA's proposal, as discussed in Section VII.D.3 provides no valid basis for rejecting Staff's proposal, whether in whole or in part. Therefore, Staff's mitigation proposal is adopted.

2. Elimination of Rider ISS**BOMA**

BOMA has proposed that the Commission order ComEd to continue to offer service under Rider ISS - Interim Supply Service ("Rider ISS") as a separate service after the end of the transition period. (See Brookover / Childress Dir., BOMA Ex. 2.0, p. 26; Brookover / Childress Reb., BOMA Ex. 4.0, p. 21)

ComEd

ComEd argues that BOMA's proposal is beyond the scope of this Docket, and, in any event, is without merit and inappropriate. ComEd pointed out, in rebuttal and surrebuttal testimony, that this subject is not before the Commission as ComEd has not filed to cancel or modify Rider ISS, and BOMA has not proposed any change in Rider ISS, and that BOMA's proposal is without merit. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 55-56; see *also* Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 43-44)

Although ComEd maintained that BOMA's proposal is not proper for consideration in this Docket, ComEd also noted that Rider ISS will no longer be needed or appropriate in the post-2006 period. ComEd explained that Rider ISS, as it has been structured during the transition period, is a service that is being voluntarily provided by the utilities.

ComEd is not willing to provide that service in the same manner that it has in the past. In addition, ComEd pointed out that a separately structured Rider ISS is no longer necessary or appropriate because the post-2006 bundled electric service rates will provide the necessary service that Rider ISS provides today.

In addition, the retail customer switching rules as proposed in Rider CPP, provide an exception to the twelve-month hold on bundled electric service related to the CPP-B Auction Segment in the circumstance that a customer is switched from delivery service to such bundled service as a direct result of the customer's RES' ceasing to do business as a RES in ComEd's service territory. Moreover, all customers may elect bundled electric service related to the CPP-H Auction that provides termination provisions that effectively provide for a much shorter term of service.

ComEd also contends that the Commission lacks the jurisdiction and authority to require ComEd to continue to offer Rider ISS, a voluntary service, as a separate service in the post-transition period. 220 ILCS 5/16-103(e).

Commission Analysis and Conclusion

BOMA's proposal is not proper for consideration in this docket as no changes to Rider ISS have been proposed by ComEd. In addition, the evidence supports rejection of BOMA's proposal. The Commission rejects BOMA's proposal. Moreover, the Commission lacks the jurisdiction and authority to require ComEd to continue to offer Rider ISS, a voluntary service, as a separate service in the post-transition period.

3. Non-Residential space heating customers

BOMA

BOMA has presented a rate mitigation proposal relating to Rider 25 -- non-residential space heating -- customers, under which they would be exempted from distribution facilities charges in ComEd's delivery services tariffs or, alternatively, would be treated as a separate sub-group in Staff's mitigation proposal. (See Brookover / Childress Dir., BOMA Ex. 2.0, pp. 14-15; Brookover / Childress Reb., BOMA Ex. 4.0, pp. 5-7)

ComEd

ComEd stated that BOMA's proposal, especially in terms of the relief that BOMA seeks, which involves amending or establishing delivery services tariffs not before the Commission, is beyond the scope of this Docket, and, in any event, is without merit and inappropriate, for several reasons, and that BOMA's alternative proposal also was without merit for multiple reasons. (Alongi / Crumrine Reb., ComEd Ex. 13.0, pp. 56-58; Alongi / Crumrine Sur., ComEd Ex. 21.0, pp.44-46) ComEd stated that it is completely inappropriate to deal with supply-related rate impacts by adjusting the delivery rates for any customer or group of customers. In addition, ComEd explained that Rider 25 was created under the previous vertically integrated utility structure and was designed based

on facts that are no longer relevant. However, ComEd stated that in the post-transition period, because ComEd owns no generation, ComEd, as the distribution utility, no longer has an internal cost structure associated with the generation of electricity using its own assets. ComEd also maintained that BOMA's proposal would result in an inaccurate price signal regarding the cost of distribution capacity, effectively providing this group of customers with free delivery service for eight months each year. ComEd stated that it is inappropriate to provide free delivery to any customer group. ComEd also pointed out that Rider 25 customers are not a separate rate and instead are served under multiple rates. (See *also* Alongi / Crumrine Tr., pp. 752-755)

Staff

Staff's witness did not support BOMA's proposal or its alternative proposal. BOMA cross-examined Staff's bill impact mitigation witness regarding BOMA's proposal, but Staff's witness indicated that BOMA's proposal would more appropriately be considered in ComEd's rate case, not the instant Docket. (Lazare Tr. 1232 - 1233, 1238 - 1239) Staff does not support BOMA's proposal or its alternative proposal. (Id.)

Commission Analysis and Conclusion

ComEd has shown that BOMA's rate mitigation plan is inappropriate for several reasons. BOMA has proposed a rate mitigation plan relating to Rider 25 which would be more appropriately considered in ICC Docket 05-0597. In addition, BOMA's proposal is inappropriate given ComEd's restructuring. The Commission rejects BOMA's proposal for a Rider 25 rate mitigation plan.

4. DASR procedures in anticipation of serving new customer facilities

CES asked that ComEd clarify the procedures for a RES to "DASR" a new customer account in anticipation of serving their load requirements when the account and meter numbers are not yet assigned. (Domagalski / Spilky Dir., CES Ex. 3.0, p. 27) In response, ComEd committed to fully specifying its proposal in ICC Docket 05-0597, such that RESs will have a full understanding of the DASR rules and processes well in advance of the first auction. (Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 58) CES accepted that resolution. (Domagalski / Spilky Dir., CES Ex. 6.0, p. 12) The Commission does not have any open issue before it on this subject.

5. Recategorizing certain condominium customers as Non-Residential customers

CES proposed to recategorize certain condominium customers as non-residential for purposes of the Customer Supply Group definitions in Rider CPP. (Domagalski / Spilky Dir., CES Ex. 3.0, p. 25) ComEd did not oppose that proposal. (Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 58) The Commission finds that CES' proposal is appropriate and approves it.

6. Treatment of Uncollectibles

See Sections VII.B.8 (relating in part to supply-related uncollectibles costs and AAFs) and VII.C.1 and 2 (relating in part to supply-related uncollectibles costs and Supply Charges and Supply Administration Charges) of this Order.

7. Credit risk and other administrative costs

CES

CES proposed to include a charge for credit risks and other administrative costs in relation to CPP-H service. (Domagalski / Spilky Dir., CES Ex. 3.0, pp. 23-24) CES argued that those CPP-H administrative charges should be addressed now, in this Docket.

ComEd

ComEd opposed inclusion of a charge for credit risks and other administrative costs at this time. ComEd stated that CES' proposal is a premature attempt to attempt to address in this Docket what costs should go into the CPP-H Supply Administration Charges, which will be determined in ICC DOcket 05-0597, and, in any event, lacks merit. (Alongi / Crumrine Reb., ComEd Ex. 13.0, p. 60; Alongi / Crumrine Sur., ComEd Ex. 21.0, pp. 46-47)

Commission Analysis and Conclusion

The Commission concludes that CES' proposal is premature. Therefore the Commission rejects CES' proposal. The Commission need not reach the merits of the proposal.

8. Integrated Distribution Company issues

CES

CES proposed that the Commission require ComEd to initiate a separate docketed proceeding for consideration of new procurement communication materials. (See Domagalski / Spilky Dir., CES Ex. 3.0, pp. 20-21; Domagalski / Spilky Reb., CES Ex. 6.0, p. 11) CES argued that because ComEd was certified as an Integrated Distribution Company, ComEd should not be allowed to advertise or market any retail electric supply service as stated in 83 Ill. Admin. Code 452.240(a). CES claimed that it is necessary to allow industry stakeholders a chance to review ComEd's communication materials to ensure that they are not biased or an attempt at marketing ComEd's supply options.

ComEd

ComEd stated that the Commission should not approve CES' proposal for a separate formal proceeding for the consideration of any new ComEd communication materials related to the procurement process because ComEd is an Integrated Distribution Company ("IDC"). (ALongi / Crumrine Sur., ComEd Ex. 21.0, p. 47) ComEd noted that CES did not cite any experience in the over three years since ComEd became an IDC that warrants the proposal. As a Commission-approved IDC, ComEd stated that it is fully cognizant of the restrictions regarding marketing and attempts to retain customers that are imposed upon it -- and of the strict "three-strikes and you're out" provision, which if violated could require ComEd to functionally separate. ComEd stated that it will continue to take the necessary measures to ensure that its actions comport with the restrictions set forth in the Commission's rule.

ComEd maintained that a formal Commission proceeding, as proposed by CES, to evaluate, and to litigate, the contents of proposed communication tools would be burdensome and unworkable. (ALongi / Crumrine Sur., ComEd Ex. 21.0, p. 47) ComEd stated that CES has not made the case for requiring other stakeholders, ComEd, Staff, and the Commission to undertake the burdens and costs associated with such a Docket.

Commission Analysis and Conclusion

CES has proposed a formal Commission proceeding to ward off a potential concern that CES has with ComEd's communication materials. However, CES has not shown that there is likely to be any issue with those communication materials. As ComEd stated, it is subject to gela requirements regarding presenting marketing materials in its communications. ComEd is well aware of the restrictions placed on it as an IDC and CES has not shown any evidence that ComEd is likely to violate those restrictions. The Commission finds that opening another formal docket is unwarranted and would be unduly burdensome and therefore rejects CES' proposal.

VIII. CONCLUSIONS AND MIXED LEGAL/FACTUAL ISSUES

A. Legality of Rider CPP

For the reasons discussed in Section III and other parts of this Order, the Commission concludes that it has the authority to approve Rider CPP and that the evidence shows that Rider CPP complies with all applicable legal requirements.

B. Legality of Rider PPO-MVM

For the reasons discussed in Section III and other parts of this Order, the Commission concludes that it has authority to approve Rider PPO-MVM and that the evidence shows that Rider PPO-MVM complies with all applicable legal requirements.

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

Cook County suggests that there may be provisions of Illinois law that are inconsistent with the Illinois Auction process or with which the Commission will be unable to comply. A review of each of the provisions identified by Cook County indicates that there is no such inconsistency. The Illinois Auction will be conducted in accordance with Illinois law, and the Commission will comply with all legal requirements.

1. Illinois Open Meetings Act

The Open Meetings Act requires that “[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a.” 5 ILCS 120/2(a). A “meeting” is defined as “any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.” 5 ILCS 120/1.02.

There is nothing in the Opens Meetings Act that is inconsistent with the Illinois Auction process and there is no reason to assume that the Commission will fail to comply with the requirements of that act. The auction is conducted by an independent auction manager in accordance with a process specified in a tariff approved by the Commission. The Commission does not conduct the auction. To the extent that the Commission holds any meetings to take any action with respect to the auction or the results of the auction, it will comply with the provisions of the Open Meetings Act.

2. The Illinois Ethics Law

The Illinois Ethics Law defines an ex parte communication as:

any written or oral communication by any person that imparts or requests material information or makes a material argument regarding potential action concerning regulatory, quasi-adjudicatory, investment, or licensing matters pending before or under consideration by the agency.

5 ILCS 430/5-50 (b) (emphasis added)

The Illinois Auction is run by an independent auction manager in accordance with a process specified in a tariff approved by the Commission. The auction is not a matter “pending before or under consideration by” the Commission. In the event that any matters relating to the auction or its results do become the subject of a regulatory,

quasi-adjudicatory, investment, or licensing matter pending before or under consideration by the Commission, the agency will comply with the requirements of the Illinois Ethics Law.

3. Regulation of Public Records

The regulation of public records provision, 220 ILCS 5/10-101, appears under Article X of the Public Utilities Act entitled: Proceedings Before the Commission and the Courts. Section 10-101 itself begins:

The Commission, or any commissioner or hearing examiner designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Acts relating to public utilities subject to such rules and regulations as the Commission may establish. ... Complaint cases initiated pursuant to any Section of this Act, investigative proceedings and ratemaking cases shall be considered "contested cases" as defined in Section 1-30 of the Illinois Administrative Procedure Act (5 ILCS 100/1-30).

220 ILCS 5/10-101

The language of 220 ILCS 5/10-101 applies to "investigations, inquiries, and hearings." In other words, it applies to "contested cases" or other formal proceedings before the Commission.

As previously explained, the auction process is managed by an independent auction manager. It is not an investigation, inquiry or hearing before the Commission. In the event that any matters relating to the auction or its results do become the subject of an investigation, inquiry or hearing, the Commission will comply with the regulation of public records provisions of the law.

4. Ex Parte Communications

The Public Utilities Act states in part that "[t]he provisions of Section 10-60 of the Illinois Administrative Procedure Act shall apply in full to Commission proceedings." 220 ILCS 5/10-103. The Illinois Administrative Procedures Act is limited to contested cases before the Commission. The relevant portion of the statute states:

Except in the disposition of matters that agencies are authorized by law to entertain or dispose of on an ex parte basis, agency heads, agency employees, and administrative law judges shall not, after notice of hearing in a contested case or licensing to which the procedures of a contested case apply under this Act, communicate directly or indirectly, in connection with any issue of fact, with any person or party, or in connection with any other issue with any party or the

representative of any party, except upon notice an opportunity for all parties to participate.

5 ILCS 100/10-60 (a) (emphasis added)

The Illinois Auction is not a “contested case” under the Illinois Administrative Procedures Act. “Contested case” is defined as follows:

“Contested case” means an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.

5 ILCS 100/1-30

The Public Utilities Act expands the definition of “contested case” to include investigative proceedings and rate cases (see 220 ILCS 5/10-101). However, the Illinois Auction is not an investigative proceeding or a rate case. In the event that any matters relating to the auction or its results do become the subject of an investigative proceeding or a rate case, the Commission will comply with the requirements of 220 ILCS 10-103.

5. Decisions of the ICC Being Based on Record Evidence

Cook County also raised the concern that, in “proceedings, investigations or hearings conducted by the Commission,” decisions are required to be made on record evidence as defined in 220 ILCS 5/10-103. The Illinois Auction is not a proceeding, investigation or hearing conducted by the Commission. In the event that any matters relating to the auction or its results do become the subject of a proceeding, investigation or hearing conducted by the Commission, the Commission will comply with the record evidence requirement.

D. Other Conclusions and Mixed Legal/Factual Issues

All conclusions and mixed legal/factual issues are addressed in other parts of this Order.

IX. OTHER ISSUES

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

ComEd

ComEd explained that the eighth consensus attribute identified in the Commission's Post-2006 Initiative was that the procurement process should be sufficiently flexible to permit incorporation of renewable resource requirements. ComEd showed that its Illinois Auction Proposal has this attribute. (McNeil Dir., ComEd Ex. 3.0, p. 14.)

Staff

Staff opposed CUB-CCSAO's recommendation to make renewable and energy efficiency purchases through the auction, contending instead that if such resources are to be procured, they should be so outside the auction. (Zuraski Reb., Staff Ex. 12.0, p. 33) Staff noted that the Commission had recently adopted a policy of encouraging voluntary participation by electric public utilities in a plan to make greater use of renewable and energy efficiency resources, and that therefore it was not necessary for the Commission to make any decisions about purchasing resources in this proceeding. (Zuraski Reb., Staff Ex. 12.0, pp. 33-34)

CUB-CCSAO

CUB-CCSAO claimed that the Commission should consider Illinois' renewable energy goals when considering ComEd's procurement proposal, and even if the Commission adopts the proposal, it should retain authority and keep its options open regarding renewables and energy efficiency (Steinhurst Dir., CUB-CCSAO Ex. 2.0, p. 48)

Commission Analysis and Conclusion

The record shows that the Illinois Auction Proposal is sufficiently flexible to permit incorporation of any renewable resource requirements that might arise at a later time, and thus meets the eighth consensus attribute of the Post-2006 Initiative. Such issues, therefore, are not an impediment to the Commission's approval of the Proposal.

B. Additional Other Issues

CUB suggested that testimony from ComEd and Exelon employees who hold stock of Exelon might be not be objective because Exelon might make a profit if it participates in

the proposed auction, and such employees have a personal and professional stake in such potential profit.

This suggestion of possible bias is both unfounded and no reason to reject to discount the testimony. The Commission has long considered the testimony of both utility employee witnesses and witnesses for intervening parties that may have both direct and indirect financial stakes in entities that employ them or retain them, or interests in the policies that they believe in. The Commission evaluates that testimony on the merits, based on the particular witnesses' credibility, the nature of their interest, and the nature of their testimony. Just as ComEd witnesses may theoretically increase the value of stock options, experts retained by all parties may theoretically benefit financially if the policies they advocate are adopted and/or if their own stature as a testifying witness grows. However, we do not dismiss credible, qualified expert testimony on that basis. Rather, we weigh it based both upon its content and the witnesses' demeanor. Here, absolutely nothing in this record or in the witnesses' demeanor, in general and concerning the option, in particular, suggest that their testimony is anything but objective, or should be discounted. Nor has CUB provided any evidence whatsoever that any of these witnesses did or could have biased his or her testimony. The Commission finds no reason to discount this testimony.

All other issues in this docket are addressed in other parts of this Order.

FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) Commonwealth Edison Company is an Illinois corporation engaged in the retail sale and delivery of electricity to the public in Illinois, and is a "public utility" as defined in Section 3-105 of the Public Utilities Act and an "electric utility" as defined in Section 16-102 of the Public Utilities Act ;
- (2) the Commission has jurisdiction over the parties and the subject matter herein;
- (3) the recitals of fact and conclusions of law reached in the prefatory portion of this Order are supported by the evidence of record, and are hereby adopted as findings of fact and conclusions of law;
- (4) ComEd's competitive procurement tariff proposes a method of setting retail rates based on ComEd's cost of obtaining, in the wholesale market, electricity required to serve ComEd's retail customers. The Public Utilities Act expressly encourages that utility service prices to "accurately reflect the long-term cost of such services" and "tariff rates for the sale of various public utility services ... accurately reflect the cost of delivering those services and allow utilities to recover the total cost prudently and reasonably incurred."

The Commission has authority under Article IX of the Public Utility Act to establish reasonable rates and charges for retail service, including the authority to approve formula-type rates, particularly for costs that fluctuate, as provided for in ComEd's proposed tariffs. In addition to the Commission's authority under Article IX, express authority to approve Rider CPP and PPO-MVM is also provided by Section 16-111 and 16-112 of the Act. Rider CPP comports with the specific authorization provided by Sections 16-111(i) and 16-112(a) to base rates for the electric power and energy component of tariffed service on the market value of that energy. The cost that ComEd will incur to obtain power and energy to meet its service obligations will be established by a competitive procurement process, and the record shows that process will produce costs that are reasonable in amount. As a result, the costs of power and energy obtained will be prudently incurred, and the Commission concludes that the resulting rates are just and reasonable.

- (5) the competitive procurement process proposed by ComEd for procurement of power and energy, as modified, is prudent and reasonable, based on the record herein;
- (6) the tariff proposed by ComEd in its initial filing, as modified to reflect the findings herein, are just and reasonable, and ComEd should be authorized to file and put into effect such tariff sheets, as modified; and
- (7) the new tariff sheets authorized to be filed by this Order should reflect an effective date not less than three (3) days after the date of filing, with the tariff sheets to be corrected, if necessary, within that time period, and should reflect an operational date of January 2, 2007.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed tariff sheets to implement a competitive procurement process by establishing Rider CPP, Rider PPO-MVM, and Rider TS-CPP and revising Rider PPO-MI, filed by Commonwealth Edison Company on February 25, 2005, are permanently canceled and annulled.

IT IS FURTHER ORDERED that Commonwealth Edison Company is authorized and directed to file new tariff sheets with supporting workpapers in accordance with Findings (6) and (7) of this Order, applicable on and after the effective date of said tariff sheets and operational on and after January 2, 2007.

IT IS FURTHER ORDERED that any motions, petitions, objections, and other matters in this proceeding that remain unresolved are disposed of consistent with the conclusions herein.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this ____ day of _____, 2005.

(SIGNED)