

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY)
)
)
Proposal to implement a competitive procurement) No. 05-0159
process by establishing Rider CPP, Rider)
PPO-MVM, Rider TS-CPP and revising Rider)
PPO-MI. (Tariffs filed February 25, 2005))

**REPLY BRIEF OF
THE COALITION OF ENERGY SUPPLIERS**

COMPRISED OF:

**CONSTELLATION NEWENERGY, INC.
DIRECT ENERGY SERVICES, LLC
MIDAMERICAN ENERGY COMPANY
PEOPLES ENERGY SERVICES CORPORATION
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**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY)
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)
Proposal to implement a competitive procurement) No. 05-0159
process by establishing Rider Blended)
Multi-Year Product,)
Adjusted CPP, Rider PPO-MVM, Rider TS-CPP)
and revising Rider PPO-MI. (Tariffs filed February
25, 2005)

**REPLY BRIEF OF
THE COALITION OF ENERGY SUPPLIERS**

Constellation NewEnergy, Inc., Direct Energy Services, LLC, MidAmerican Energy Company, Peoples Energy Services Corporation, and U.S. Energy Savings Corp. (collectively the “Coalition of Energy Suppliers,” “Coalition,” or “CES”), by their attorneys DLA Piper Rudnick Gray Cary US LLP, pursuant to Section 10-101 of the Public Utilities Act (the “Act”) and Section 200.800 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), hereby submit their Reply Brief responding to the Initial Briefs filed by The Building Owners and Managers Association of Chicago (“BOMA”), the Citizens Utility Board (“CUB”), the Cook County State's Attorney's Office (“CCSAO”), Commonwealth Edison Company (“ComEd” or “the Company”), Constellation Energy Commodities Group, Inc. (“CCG”), Dynegy Inc. (“Dynegy”), the Illinois Industrial Energy Consumers (“IIEC”), the People of the State of Illinois (“AG”), the Staff of the Illinois Commerce Commission (“Staff”), and the United States Department of Energy (“DOE”) in the above-referenced proceeding.

**I. EXECUTIVE SUMMARY:
THE COMMISSION SHOULD NOT LOSE SIGHT
OF THE IMPACT OF THIS PROCEEDING UPON THE
COMPETITIVE RETAIL ELECTRIC MARKET IN ILLINOIS**

Implementation of ComEd's proposal will directly impact the *retail* electric market. In its Initial Brief, the Coalition of Energy Suppliers explained the indivisible link between electric utilities' wholesale procurement of power for bundled service customers and the retail electric market. The Coalition reminds the Commission that the rules governing the auction as well as the types of the wholesale products included in the auction will directly impact the products and services offered to retail customers by retail electric suppliers ("RESs").

The evidence in the instant record establishes that business customers in ComEd's service territory have enjoyed the benefits of the competitive retail electric market. The result of this proceeding will be critical in determining the necessary rules and processes to further develop the Illinois retail electric market. While the Coalition has recommended revisions to improve ComEd's proposal, there is no legitimate dispute that, at this stage in the transition to a fully competitive market, Illinois consumers have received sizeable benefits.

At the onset of this proceeding, the Coalition set forth two key standards that should guide the Commission: Customer Focus and Market Reliance. (*See* CES Init. Br. at 3.) ComEd's revised procurement proposal, as set forth in the Company's Initial Brief, is consistent, in almost all respects, with these two key standards. That is to say, ComEd's procurement proposal, as it presently stands, generally comports with applicable law and the Coalition's policy standards.

However, as will be discussed in greater detail below, several issues remain in dispute. In the instant Reply Brief, consistent with the arguments set forth herein, as well as in its Initial Brief and Draft Order, the Coalition respectfully asks the Commission to enter an Order that:

- ensures increased market flexibility and certainty for regulators, suppliers, policymakers and customers by supporting the Coalition's proposal for a May or July 2006 initial auction;
- adopts ComEd's revised structure for customer groupings and rejects certain parties' requests that ComEd be required to offer additional products to customers with demands equal to or greater than 3MW;
- adopts ComEd's revised proposal for a 50-day enrollment window for the initial auction and a 45-day enrollment window for subsequent auctions;
- rejects ComEd's proposal to eliminate a migration risk factor from the translation methodology for the CPP-B and directs ComEd to revise its migration risk factor to more accurately assign costs to each customer class;
- provides appropriate guidance regarding the terms of the Supply Administrative Charge ("SAC"), which is to be set in ComEd's pending rate case;
- requires ComEd, within ten (10) business days of the Order in this proceeding to: (a) fulfill its commitment to detail in its rate case the procedures for a RES to "DASR" new customer accounts prior to account and meter numbers being assigned; (b) provide its methodology for categorizing certain condominium customers as non-residential for the purposes of the Customer Supply Group definitions in Rider CPP;
- directs ComEd to: implement its condominium customer categorization methodology in ComEd's pending rate case;
- directs ComEd to (a) require commodity customers to pay energy-related uncollectible expenses; (b) allocate these costs evenly per kWh into the CPP-A, CPP-B and CPP-H tariffs; and (c) track these expenses in ComEd's AAF;
- ensures that, by way of a separate docketed proceeding, ComEd's dissemination of procurement process communication materials comports with the Commission's "Integrated Distribution Company" rules.

The Commission's Order should continue the Commission's implementation of the Illinois Electric Service Customer Choice and Rate Relief Law of 1997 ("Choice Law") in accordance with the General Assembly's that it develop a market-based competitive structure for electricity in Illinois. In so doing, the Commission should preserve the competitive choices that exist today for commercial and industrial customers while transitioning to a post-2006

procurement process, so that all Illinois customers can directly receive the benefits of competition.

By entering such an Order, the Commission can be confident that the retail electric market will further develop so that all customers in ComEd's service territory receive the additional benefits associated with a properly functioning competitive market.

II. NEED FOR COMMISSION ACTION

Staff accurately elucidated the factual and legal backdrop for the instant proceeding. (*See* Staff Init. Br. at 1-21.) With the expiration of both the mandatory transition period and ComEd's power purchase agreements, the Commission must determine how ComEd can meet its obligation to provide power and energy to its customers. ComEd's proposed procurement process appropriately incorporates the competitive goals of the General Assembly and provides for Commission pre-approval, oversight, and evaluation of the wholesale prices that emanate from the auction.

A few intervenors questioned and challenged the Commission's legal authority to approve ComEd's procurement proposal in the instant proceeding. (*See* AG Init. Br. at 4-20; CUB Init. Br. at 5-12; CCSAO Init. Br. at 6-20.) The Coalition, ComEd, CCG, and Staff testified in their respective filings that the Commission *may* and *must* take action in the instant proceeding to ensure that ComEd will meet its service obligations to the Company's commodity customers once the transition period and ComEd's wholesale energy contracts expire. (*See* CES Init. Br. at 6-8; ComEd Init. Br. at 6; CCG Init. Br. at 2-4; Staff Init. Br. at 7.) The Coalition and ComEd expressed concern in their respective Initial Briefs that the Commission's failure to act, and thereby ignore the General Assembly's directives, would loosen the Commission's control over ComEd's wholesale electricity procurement process by yielding such authority to the

Federal Energy Regulatory Commission (“FERC”). ComEd must procure power and supply for its commodity customers and, if the Commission fails to act, ComEd will seek FERC approval to do so. (*See* CES Init. Br. at 7; ComEd Init. Br. at 25-26.)

As a matter of explicit legislative directive and sound public policy, the Commission should approve a market-based post-transition procurement methodology for ComEd. ComEd’s proposed procurement process properly safeguards the Commission’s oversight of the Company’s procurement process. (*See* CES Init. Br. at 8.) As such, the Commission’s involvement and vigilance will ensure that the resulting wholesale rates that are produced through the auction process are just and reasonable. (*See id.*)

Accordingly, Commission action is both necessary and appropriate at this time.

III. LEGAL ISSUES

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

The AG, CUB and CCSAO each raised issues regarding the legal authority of the Commission to approve ComEd's procurement proposal. (*See* AG Init. Br. at 4-20; CUB Init. Br. at 5-12; CCSAO Init. Br. at 6-20.)

The Commission deliberated and rejected most, if not all, of the AG, CCSAO and CUB’s substantive legal issues.¹ The Commission appropriately decided that the General Assembly granted authority to the Commission to oversee the current procurement proceeding and ultimately approve the Company's procurement proposal. (*See* CES Init. Br. at 8-11.)

¹ As the Commission is well aware, there is a separate proceeding pending before the Circuit Court of Cook County in which certain parties have raised these same issues. (Case No. 05-CH-14914)

By enacting the Choice Law, the General Assembly formalized its belief that Illinois retail electric customers will benefit from competition because competitive pressures lower rates more effectively than regulation. (*See* ILCS 5/16-101(e).) In turn, one goal of restructuring the electric industry is to introduce competition to a formerly non-competitive, monopolistic market so that consumers will experience its benefits. As the steward of the competitive retail electric market in Illinois, the Commission, guided by the provisions of the Choice Law, has been given the authority to approve a market-based structure for all customers served by ComEd's default rates. (*Id.*)

IV. SUFFICIENCY OF COMPETITIVE MARKET

B. Retail market conditions

While several parties discussed, in their Initial Briefs, the state of Illinois' wholesale market, few parties evaluated the state of the Illinois *retail* market. In addition to the Coalition, which presented a thorough discussion of the facts and statistics that demonstrate a healthy and growing retail market, ComEd and the IIEC discussed the status of the retail market in Illinois. (*See* ComEd Init. Br. at 41-42; Coalition Init. Br. at 11-17; IIEC Init. Br. at 10-13.)

ComEd accurately observed that “many large and a number of smaller commercial and industrial customers have taken advantage” of the competitive market. (ComEd Init. Br. at 41.) ComEd also correctly observed that, although no residential customers take service from a RES, residential customers have benefited from the Choice Law via the substantial rate reductions mandated in the Choice Law. (*See id.*)

The Commission should recognize the un rebutted evidence demonstrating that, by year-end 2004, **competitive conditions in Illinois had yielded roughly \$4 billion in savings for Illinois' residential and non-residential consumers since passage of the Choice Law.** (*See*

ComEd Ex. 1.0 at lines 120-23; *See* CES Ex. 1.0 at lines 804-57.) The Coalition’s Initial Brief identified four (4) empirical measures to demonstrate the substantial market development in the ComEd service territory. (*See* Coalition Init. Br. at 13-17.) No party attempted to rebut this evidence. Moreover, no party attempted to refute this evidence in their respective Initial Briefs.

Notwithstanding these unrebutted facts, the IIEC adopted a pessimistic and somewhat confusing view of the retail market conditions in Illinois. On the one hand, the IIEC contended that Illinois customers have not received the “full benefits of a competitive retail market” (IIEC Init. Br. at 10); on the other hand, the IIEC failed to define what “full benefits” means. Similarly, although the IIEC stated that the Illinois retail market is “immature and fragile” (*id.* at 12), the IIEC also admitted that competition continues at a steady pace. The IIEC even pointed to Coalition witness Dr. O’Connor’s testimony regarding the expansion of the competitive retail supplier market. (*Id.* at 11-12.)

In the same vein, the IIEC described RES activity as “unimpressive.” (*Id.* at 12.) Even here, with this bold assertion, the IIEC failed to: (a) explain why roughly \$4 billion in savings did not constitute “impressive” activity; (b) provide any analysis to explain its purported lack of competition in Illinois; and, (c) finally, explain its casual reference to alleged problems caused by the “Reciprocity Clause” of the Public Utilities Act, 220 ILCS 5/16-115(d)(5).

When reviewed within the context of the Coalition’s comprehensive factual and statistical analysis of the status of the retail market, the IIEC’s pessimism is unfounded and unpersuasive. Certainly, juxtaposed with the overwhelming evidence offered by the Coalition, as discussed above and in the Coalition’s Initial Brief, the Commission should *not* adopt the IIEC’s pessimistic view of market conditions. Doing so would constitute a retreat for the

Commission from its consistently pro-competitive stance and the Choice Law's unambiguous pro-competitive mandate.

The Commission should take great care to preserve the competitive choices that exist today for commercial and industrial customers while, at the same time, transitioning to a post-2006 procurement process so that all Illinois consumers can directly receive the benefits of competition.

V. AUCTION DESIGN ISSUES

F. Date of initial auction

The Commission has been presented with few arguments to counter the Coalition's reasonable proposition that a May or July 2006 initial auction would increase flexibility and options for the Commission, policymakers and, most importantly, customers. Although ComEd, Staff, the IIEC, and CCG each address this issue in their respective Initial Briefs, no party can deny that a September 2006 initial auction leaves very little time to correct any errors prior to the date that power is scheduled to flow.

ComEd offered just two (2) assertions to support a September 2006 auction.

First, ComEd asserted that such an auction timeline avoids the potential risk premiums that might arise from a longer lag time between the auction and the flow of energy, resulting in a "more accurate" price. (*See* ComEd Init. Br. at 98.) However, ComEd failed to present any quantitative analysis of these alleged "premiums." More importantly, ComEd offered no evidence to rebut the Coalition's comparison that refuted ComEd's assertion that a September 2006 initial auction would result in a more accurate price. Specifically, the Coalition's comparison noted that a May 2006 initial auction has no impact upon the "accuracy" of the price;

market prices in May were as “accurate” as the market prices in September for the upcoming calendar year. (*See* CES Init. Br. at 19; CES Ex. 2.0 at lines 140-64.)

Second, ComEd asserted that a September 2006 initial auction provided “adequate lead time” for customers to make decisions about alternative supply options. (*See* ComEd Init. Br. at 98.) Again, ComEd presented no evidence to support this assertion. Moreover, given the lack of evidence in the instant record to buttress ComEd’s “accuracy” assertion, ComEd failed to identify what harm is created by providing customers with more “lead time” to make supply decisions. Indeed, in keeping with the Customer Focus principle, providing more time to customers would be preferable.

The IIEC also supported the September 2006 initial auction and primarily echoed ComEd’s unsupported assertion that an auction date earlier than September 2006 could result in a price premium attributable to the risks of changes in market conditions between the time of the auction and the date that customers receive power. (*See* IIEC Init. Br. at 25.) Again, the unrefuted evidence in the record is that no such premium exists. (*See* CES Init. Br. at 19; CES Ex. 2.0 at lines 140-64.) The IIEC also contended that a September (versus a May auction) would allow bidders in the auction to “focus their efforts on a single task – preparing bids for the Illinois auction,” instead of simultaneously preparing for the auction and preparing supply arrangements for the summer peak season. (*See* IIEC Init. Br. at 27.) The IIEC did not cite any evidence that potential bidders prefer the September 2006 initial auction date. Further, any suggestion that an energy market participant can or should focus “on a single task” at any given time simply ignores the reality of the dynamic energy market. Indeed, potential bidder CCG acknowledged the many moving parts associated with the market and reiterated its preference for an auction earlier than September. As rationale, in its Initial Brief, the CCG repeated that an

earlier auction “would provide sufficient time, subsequent to the initial auction, for utilities, winning suppliers and the Midwest ISO and PJM to ensure that all of the operational details associated with providing service . . . are in place.” (CCG Init. Br. at 14.) (Internal quotations omitted.) Notably, the CCG indicated that it will participate in the auction, regardless of what date the Commission ultimately orders. (*See* CCG Ex. 1.0 at lines 93-95.)

Additionally, while the IIEC implicitly agrees with the Coalition’s contention that customers should be the main focus of this proceeding, the IIEC attempted to dismiss the Coalition’s concern for customers by stating that an earlier initial auction would provide a “longer period for customer decisions...” but [an earlier auction] “...also provides a longer period for RES marketing.” (IIEC Init. Br. at 27.) The IIEC failed to explain exactly how a longer period for RES marketing harms consumers. The IIEC could not explain, of course, because the opposite is true. (*See* CES Ex. 1.0 at lines 207-14.)

Finally, despite Staff’s initial preference for an “earlier” initial auction date, Staff currently supports the Company’s proposed September 2006 auction. (Staff Init. Br. at 80.) Staff’s Initial Brief provided no guidance for other parties to understand the motivations behind this apparent change of heart other than to state that Staff now believes that the September auction will provide ComEd sufficient time “to complete the tasks that must be completed prior to the auction.” (*Id.* at 81.) However, ComEd itself admitted that there is no technical reason to wait until September to conduct the auction. (*See* McNeil Tr. at 641.)

Thus, the arguments in support of a September 2006 initial auction date can be summarized as follows: (1) unsupported fear that, contrary to the historic data, an earlier auction might yield a higher price; (2) unsupported fear by some industrial customers (apparently not shared by potential bidders) that bidders are unable to focus on the Illinois auctions until

September 2006; and (3) Staff's concern that, despite ComEd's testimony to the contrary, ComEd requires nearly three times as much time as the New Jersey utilities required to prepare for New Jersey's initial auction.

The Coalition previously addressed each of these assertions and offered substantial and reasonable explanations why the Commission should conduct the initial auction well before September 2006. (*See* CES Init. Br. at 17-22.) In short, an earlier auction will: (1) benefit consumers; (2) allow additional time to address any auction problems that arise; and (3) add much-needed certainty to the market. (*See* CES Init. Br. at 17-22.) Although ComEd, Staff, and the IIEC appear to believe that a September 2006 auction will allow sufficient time to address potential auction issues, the Coalition respectfully reminds the Commission of the critical importance of a successful auction. The Commission should take every possible precaution to ensure that the market is launched successfully, with the least amount of uncertainty.

As explained by the Coalition and the CCG, an initial auction prior to September 2006 provides additional time for auction participants, the Commission, and the Auction Manager to correct or adjust unanticipated problems or issues that could adversely affect the ComEd and Ameren auctions. (*See* CES Initial Br. at 20-22; CCG Init. Br. at 14, CES Ex. 1.0 at lines 216-25; CES Ex. 2.0 at lines 77-95.) None of the parties adequately explained how a later auction will *lessen* these risks. On the contrary, delay increases the risk that the Illinois market could simply run out of time to address unexpected problems.

By setting an earlier initial auction date, the Commission would place its imprimatur on a time frame that defines the post-transition rules of the game well before the actual transition period ends. By doing so, the Commission would bring greater certainty to the retail market for

customer decision-making, and thereby provide benefits to Illinois consumers and other retail market participants.

G. Common v. parallel auction

3. Between ComEd and Ameren Products

ComEd agreed to conduct its auction in parallel with Ameren, facilitating wholesale suppliers' switching between the ComEd and Ameren fixed price and hourly auctions. (*See* ComEd Init. Br. at 101.) As noted in its Initial Brief, the Coalition does not object to this proposition. (*See* CES Init. Br. at 22.) However, the Coalition cautioned the Commission not to let the desire for perfect congruence in auction products between ComEd and Ameren come at the expense of interfering with the market's role in allocating migration risk premiums. (*See* CES Init. Br. at 23.) That is, customers who are anticipated to migrate from utility service in similar patterns should be assigned a similar migration risk premium (or propensity to switch) and grouped together. This grouping should occur even if the resulting make-up of the customer groupings for ComEd's customers differ from those of Ameren.

While the IIEC did not elucidate its reasons for advocating its preferences for customers with demands between 400 kW to 1 MW, the IIEC appeared to object to ComEd's treatment of these customers.² (*See* IIEC Init. Br. at 28-29.) Without citation to any record evidence, the IIEC implied that the Ameren customers with demands greater than 1 MW "potentially" could have load profiles, load factors and exhibit a propensity to migrate that are "radically different"

² The only explicit recommendation given by the IIEC in this Section of its initial brief is that the Commission conduct a separate auction for the over 3 MW customers. Given the make-up of the IIEC (seven large industrial customers), it is appropriate that its recommendations relate solely to that customer class. However, as discussed in Section V(I)(2) of the Coalition's Initial Brief and the instant Reply Brief, such customers are not eligible to receive an annual product from ComEd.

from the eligible customers in the ComEd service territory with demands greater than 400 kW. (See IIEC Init. Br. at 28-29.)

The Coalition agrees with the IIEC that symmetry between characteristics of the customer population to be served under the annual and blended products throughout the state is necessary to facilitate suppliers' ability to switch between the ComEd and Ameren auctions. (See CES Init. Br. at 23; IIEC Init. Br. at 28-29.) However, the Coalition offered testimony that directly rebutted the IIEC's implication that Ameren customers with demands greater than 1 MW have different characteristics than the eligible customers in the ComEd service territory with demands greater than 400 kW. (See CES Ex. 4.0 at lines 654-62.)

For the reasons noted herein and in its Initial Brief, the Coalition respectfully asks the Commission to include all eligible customers with demands between 400 kW and 3 MW in the CPP-A product auction, regardless of the treatment of the 400 kW to 1 MW customers in the Ameren service territories.

I. Fixed Price Auction Product And Tariffed Services For Larger Customers

ComEd proposed a revised structure for the customer groupings. (See ComEd Initial Brief at 105.) The Coalition respectfully asks the Commission to agree with and adopt ComEd's revised structure for customer groupings.

1. Nature Of Auction Product And Tariffed Services For 1-3 MW Customers

(See V(I)(2)&(3))

2. Nature Of Auction Product And Tariffed Services For 400 kW- 1 MW Customers

The Coalition and Staff generally agreed that the proposed customer groupings outlined in ComEd's surrebuttal testimony appropriately aligned the Large Customer Grouping (400 kW to 1 MW customers) with the Very Large Customer Grouping (1- 3 MW customers) for

ComEd's CPP-A annual product auction. (*See* Coalition Init. Br. at 26; Staff Init. Br. at 99-101. *See also* ComEd Ex. 18.0 at lines 553-64.) The CUB likewise endorsed grouping together all eligible customers with demands of 400 kW or greater. (*See* CUB Ex. 4.0 at lines 1325-26.) The only party that questioned ComEd's revised customer grouping is the BOMA, which asserted that all customers with demands less than 3 MW should be eligible for the blended product. (*See* BOMA Init. Br. at 17-19.)

Although the BOMA acknowledged the high level of sophistication exhibited by customers in the Large and Very Large Customer Groupings, as well as these customers' active participation in the competitive market, the BOMA argued that ComEd's revised customer groupings exposed these larger customers to price volatility. (*See* BOMA Init. Br. at 18-19.) However, the BOMA did not deny that larger customers who desire long-term contracts may obtain such contracts in from RESs the competitive market. As Dr. O'Connor explained, the BOMA's proposal "would be a retreat from the progress already achieved and that can easily be furthered in assuring customers a vigorously competitive retail market." (*See* CES Ex. 4.0 at 767-69.) Indeed, customers with demands greater than 400 kW have experienced the process of contracting for multi-year products matched to multi-year customer transition charges. (*See* CES Init. Br. at 26-27. *See also* CES Ex. 1.0 at 316-18.)

As discussed at length in the Coalition's testimony and in its Initial Brief at pages 25 to 27, the inclusion of eligible customers with demands greater than 400 kW in one single grouping for the annual product greatly benefits all customers. Moreover, the Coalition explained that ComEd's revised customer grouping proposal aids in the development of the competitive market. Furthermore, the Company's revised customer grouping proposal insulates smaller customers by allowing wholesale suppliers to focus more precisely upon the costs and risks associated with

serving residential and smaller business customers. (See CES Ex. 1.0 at 324-26.) As such, the Coalition pointed out how all customers benefit from ComEd's revised customer grouping proposal by allocating, with greater precision any migration risk premiums among customers directly in the auction rather via administrative fiat. (See CES Ex. 1.0 at 327-29.) Finally, ComEd's revised customer groupings, if adopted, would enable future competitive declarations of service to additional customer classes – as was envisioned by the General Assembly in the Choice Act. (See CES Ex. 1.0 at 321-23.)

For the reasons noted herein and in its Initial Brief, the Coalition respectfully asks the Commission to include all eligible customers with demands between 400 kW and 3 MW in ComEd's CPP-A auction product.

3. Treatment of customers (≥3MW) taking services subject to a competitive declaration

The Commission already has determined the appropriate treatment of certain ComEd customers with demands of 3 MW or greater. One question, inappropriately asked in the instant proceeding, is whether the Commission should revisit and/or reverse its prior determination. The Coalition agreed with ComEd that the record evidence and sound legal principles dictate that the Commission should not reverse its prior decision.

When the competitive declaration for certain ComEd customers with demands of 3 MW or greater became effective, in 2001, the Commission decided that ComEd only should be required to offer these customers service under Rate HEP. (See Ill. Commerce Comm'n, *Commonwealth Edison Company, Petition for Declaration of Service Currently Provided Under Rate 6L to 3 MW and Greater Customers as Competitive*, ICC Docket No. 02-0479, Final Order (March 28, 2003).) In that Final Order, the Commission refused to accept the IIEC's arguments

that would require ComEd to offer an annual product to such customers. In doing so, the Commission correctly determined that the competitive market had developed to the point that, with limited exceptions, customers with demands greater than 3 MW could reliably expect to find comparable and alternative energy service products from RESs in the market. (*See id.*)

The IIEC, the DOE and the Staff each objected to the Commission's original decision to declare service under ComEd's Rate 6L competitive. Now, in the instant proceeding, each aforementioned party suggested that the Commission, in effect, reverse that prior decision. (*See* IIEC Init. Br. at 32-33; DOE Init. Br. at 3; Staff Init. Br. at 102.) However, these arguments amount to little more than improper collateral attacks against the Commission's Order in ICC Docket No. 02-0479. (*See Illini Coach Co. v. Commerce Comm'n*, 408 Ill. 104, 111-12, 96 N.E.2d 518, 522 (1951); *City of Chicago v. O'Connell*, 278 Ill. 591, 608, 116 N.E. 210, 216 (1917).) No party has petitioned the Commission to reopen ICC Docket No. 02-0479. (*See* Stephens Tr. at 93.) Indeed, although the Commission initiated a docket to monitor the development of the competitive market, no party has seen fit to present any new evidence, initiate any motion, or make any filing in that market monitoring proceeding for nearly two (2) years. (*See generally* ICC Docket No. 03-0056. *See also* IIEC Ex. 1 at lines 191-95.)

Moreover, the IIEC introduced evidence in the instant proceeding that merely demonstrated the number of very large customers who are taking service under ComEd's Rate HEP. (*See* IIEC Ex. 1 at 145-55.) The fact that a high percentage of the customers taking service under Rate HEP "defaulted" onto that rate is not particularly relevant. Significantly, the IIEC failed to produce evidence that might explain these customers' decisions to take service on Rate HEP. Specifically, the IIEC failed to ascertain whether those customers solicited market alternatives from RESs, simply chose to take service under Rate HEP, or whether Rate HEP was

simply their most economic offer. (*See* Stephens Tr. at 87-90.) Without this analysis, the IIEC’s reference to Rate HEP customers provides no guidance to the Commission. As discussed in Section IV(C) of the Coalition’s Initial Brief and the instant Reply Brief, the competitive market in Northern Illinois is strong and is likely to continue to develop with appropriate decisions by the Commission in the instant proceeding.³

In short, those parties that advocate for the Commission to require ComEd to offer additional products to customers with demands equal to or greater than 3 MW also failed to demonstrate that such customers are unable to obtain these products in the competitive market. Thus, if the IIEC’s assertion is correct, and the products they seek to force ComEd to offer are not “below market,” there would be no point for ComEd rather than RESs, to offer them. (*See* IIEC Init. Br. at 42.) As Dr. O’Connor observed, “Burdening the auction process with unnecessary obligations serves no purpose when the needs of customers otherwise can be met.” (CES Ex. 4.0 at 777-78.)

For the reasons noted herein and in its Initial Brief, the Coalition respectfully asks the Commission to reject any effort to improperly revisit the issues that it decided in ICC Docket No. 02-0479.

L. Regulatory oversight and review

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

(*See* VII(D)(8) and V(L)(3))

³ The Commission should dismiss out of hand IIEC’s claims that the “reciprocity requirement” is dampening the development of the competitive market in Illinois. As the Commission is well-aware, the Commission’s interpretation that it adopted in the Strategic Energy, LLC ARES Application proceeding, ICC Docket 04-0811, has opened the door for qualified applicants to satisfy that requirement. And the competitive market has responded; there presently are eighteen certificated ARES, with another application pending.

VII. TARIFF AND RATE DESIGN ISSUES

B. Matters concerning Rider CPP

2. Rider CPP – Definitions

a. Customer Supply Group definitions (*See V(I)(1)(2)(3)*)

4. Rider CPP – Retail customer switching rules

a. Enrollment Window

i. Duration of Window

The Coalition supported ComEd’s pro-consumer compromise proposal to expand its original 30-day enrollment window to a 50-day enrollment period in the first auction year and a 45-day window in all subsequent auction years. (*See ComEd Init. Br. at 132.*) As a result, the Coalition no longer seeks adoption of an enrollment window equivalent to ComEd’s currently established 75-day Power Purchase Option (“PPO”) enrollment window. The IIEC, the DOE and Dynegy asked the Commission to order ComEd to adopt a considerably shorter 30-day enrollment window. (*See IIEC Init. Br. at 64; DOE Init. Br. at 14; Dynegy Init. Br. at 20-21*) The Staff recognized that its original proposal of a 30-day window was too short, and now advocates for an enrollment period that is no longer than 40 to 45 days. (*See Staff Init. Br. at 153.*)

The IIEC based its support for the 30-day enrollment window on the theory that such a shortened window will minimize any pricing premiums that wholesale suppliers may add to bids

to compensate them for risks associated with a longer enrollment period. (*See* IIEC Init. Br. at 64.)⁴

Both the DOE and Dynegy echoed the IIEC's argument that any enrollment period longer than 30 days will have the effect of "unduly increasing the cost of the product." (DOE Init. Br. at 14; Dynegy Init. Br. at 19.) Further, Dynegy suggested that, in addition to factoring in the risk associated with a longer enrollment period, if the Commission adopts ComEd's proposed September 2006 auction date, wholesale suppliers would be confronted with a 75-day enrollment window in addition to the uncertainty associated with knowing "barely a month before energy must be delivered the exact size of the class of customers to be served by CPP-A." (Dynegy Init. Br. at 21.)

In a competitive environment, the theoretical premiums asserted by the IIEC, Dynegy and the Staff likely will be "squeezed out" of bids and, therefore, will not be reflected in the final prices bid into the wholesale auction. (*See* CES Init. Br. at 34; Tr. at 430-31.) However, even if Staff's figures are accepted at face value for the sake of argument, this theoretical premium is a small price to pay to afford customers a meaningful opportunity to evaluate, negotiate, and execute their choices while, at the same time, provide sufficient time for the utility to make the appropriate changes, should an error be discovered during the enrollment window. (*See* CES Init. Br. at 34-35; CES Ex. 2.0 at lines 183-210; Tr. at 231-33.)

By adopting a reasonable compromise position, ComEd and the Coalition acknowledged that, even if a premium associated with providing customers with additional time does exist (and

⁴ Although the IIEC initially appeared to be supporting the 30-day enrollment proposal for all CPP-A customers, ultimately, the IIEC requested that the Commission retain the 30-day window for larger

(footnote continued to next page)

no evidence was presented to prove it does), customers would be better served by paying the alleged premium because they would have valuable additional time within which to make their enrollment decisions. (See CES Init. Br. at 30; ComEd Init. Br. at 133.) Staff now appears to support this conclusion.⁵ (See Staff Init. Br. at 153.)

The Coalition noted that, if the enrollment window is too short, many customers simply will accept the utility supply option, not because it is the most economical option, but rather because customers simply lack sufficient time to implement and complete the decision-making steps necessary to meet their supply needs. (See CES Init. Br. at 31; CES Ex. 6.0 at lines 411-15.) Unlike the very large customers represented by the IIEC, most CPP-A customers do not have personnel or offices dedicated to buying electricity. As such, many of these customers simply require more than 30 days to analyze their electricity choices, move proposals through the corporate or institutional chain of command, negotiate contracts, and, finally, execute purchase transactions. (See CES Init. Br. at 32; CES Ex. 5.0 at lines 102-86; BOMA Ex. 2.0 at lines 514-30; CES Ex. 3.0 at lines 604-28.)

The Commission's decision regarding the duration of the enrollment window will have a direct, immediate, and significant impact upon the development of the Illinois retail electric market. This is true because, as we noted earlier in the instant Reply Brief, the rules governing the auction as well as the types of the wholesale products included in the auction will directly impact the products and services offered to retail customers by RESs. An appropriately defined

(footnote continued from previous page)

customers, regardless of what the Commission determines smaller customers may need. (See IIEC Init. Br. at 67.)

⁵ Staff likewise supported the idea of having a longer window associated with the first enrollment period following the end of the mandatory transition period. (See Schlaf Tr. at 1340.)

enrollment window, because it directly affects customers' abilities to assess supply options, is critical.

Accordingly, the Coalition respectfully asks the Commission, for the reasons stated herein and in its Initial Brief, to properly weigh the merits of these unsubstantiated concerns regarding an adverse hypothetical effect on prices. In doing so, the Coalition is certain that the Commission will conclude that these hollow concerns fail from their lack of support. As such, the Coalition respectfully asks the Commission to adopt ComEd's revised proposal for a 50-day enrollment window for the initial auction and a 45-day enrollment window for subsequent auctions.

5. Rider CPP – Limitations and Contingencies

(See V(L))

6. Rider CPP – Translation to retail charges

a. Customer Supply Group Migration Risk Factor

Regardless of the customer groupings that the Commission ultimately adopts in the instant proceeding, the Commission should direct ComEd to include a properly-calculated migration risk factor in its translation tariff. Such a migration risk factor is a necessary element of any translation methodology, and is required to account for prevailing market conditions at the time bids are formulated and to minimize the volatility of short-term fluctuations in forward prices due to potential anomalies in market conditions. (*See* CES Init. Br. at 41.) Rather than eliminating the migration risk factor from the translation methodology for calculating the CPP-B Supply Charges as proposed by ComEd and Staff, the Commission should order ComEd to revise its migration risk factor to more accurately account for: (1) the amount of load that is

likely to switch if savings were available; and (2) the volatility associated with the forward price for a given delivery period.

ComEd proposed to withdraw its migration risk factor from the translation methodology for calculating the CPP-B service Supply Charges if the Commission approves, without revision, ComEd's proposed "integrated package" of rate design changes. (*See* ComEd Init. Br. at 142.) ComEd stated that, if the Commission does not approve the Company's rate design changes, the Commission should approve ComEd's original proposal to employ the migration risk factor in the translation methodology for calculating the CPP-B service Supply Charges. (*See id.*)

Staff supported ComEd's revised proposal to eliminate the migration risk factor from the Company's translation methodology and stated that ComEd should not be permitted to adopt a any migration risk factor in this proceeding. (*See* Staff Init. Br. at 162-63.) Staff asserted that both ComEd and the Coalition should orient their analysis around the relative power prices of bundled and RES-supplied power – and not simply around forward price volatility. (*See id.*)

The goal of the translation mechanism is to properly allocate costs (higher prices) to those customers who caused those costs (that is, who are responsible for the additional costs that cause prices to be higher). One of the relevant costs to be assigned is the cost associated with the possibility that customers may migrate away from the utility supply and to the competitive market. (*See* CES Init. Br. at 35.) That is, the rates should reflect the fact that, all else being equal, the auction price should be higher for a customer class that has exhibited a greater propensity to choose RES service rather than remain on utility supply. (*See* CES Init. Br. at 35.) Staff inappropriately dismissed such analysis as "speculation on the part of the witnesses about what drives customer decisions concerning PPO and RES service." (*See* Staff Init. Br. at 162.)

What Staff refers to as “speculation“ is actually the observations and experiences of the Coalition members' five (5) years of interacting with customers and customizing solutions to their specific supply needs. Indeed, the Coalition offered un rebutted evidence based upon their experience in the Illinois retail electric market and the observed pattern of migration between PPO and RES service for most customer groups in the ComEd service territory. (*See* CES Ex. 1.0 at lines 637-69; CES Ex. 3.0 at lines 163-76.) The Coalition pointed out that, in most years, customers exhibited a willingness to choose the least cost available service, regardless of whether it is supplied by the utility or a RES. (*See* CES Init. Br. at 37.) This evidence is not “speculation“ as Staff would suggest.

Moreover, numerous expert witnesses testified on behalf of ComEd, the Coalition, and customer groups that wholesale suppliers *will* make assumptions about the migration risk factor, and that these assumptions *will* be informed by the observations and experiences of prior switching behavior of the customers in the ComEd service territory. (*See* CES Init. Br. at 35-41; O'Connor Tr. at 267; IIEC Init. Br. at 42-43; ComEd Ex. 3.0 at 797-877.) Pretending that this risk factor does not exist will not make it go away. As such, ComEd’s originally-proposed translation mechanism or “Prism” appropriately included an adjustment to reflect the migration risk within each customer group.

Rather than ordering the outright elimination of the migration risk factor, the Commission should order ComEd to revise its assumptions regarding customer migration so that the Company relies upon the available empirical data. By doing so, the Commission would ensure that costs are properly charged to the “cost causers.” (*See* Staff Init. Br. at 38.)

First, for the reasons outlined in the Coalition’s Initial Brief at pages 36 to 38, the Commission should order ComEd to modify its assumption regarding the amount of load that is

likely to switch if presented with a more attractive offer from a RES. For purposes of allocating migration risk premiums, ComEd should estimate the PPO customer migration potential at 100%, which is the Company's identical assumption for the migration potential assumed for customers being served by RESs.

Second, as discussed at length in the Coalition's Initial Brief at pages 38 to 41, the Commission should order ComEd to modify its assumption regarding forward price volatility. Rather than using stale historical data, the Commission should direct ComEd to use data from the six-month period just prior to the auction.

The Coalition respectfully asks the Commission to reject the proposals of ComEd and Staff to eliminate a migration risk factor from the translation methodology for calculating the CPP-B service Supply Charges and to order ComEd to revise its migration risk factor to more accurately assign costs to each customer class.

7. Rider CPP – Supply Administration Charge

The Commission should direct ComEd to revise its proposed Supply Administration Charges ("SAC") tariff in order to ensure that supply-related costs appropriately recovered from customers who take supply from ComEd. The Coalition made various recommendations to improve ComEd's methodology to calculate and assess the SAC. (*See* CES Init. Br. at 41-45.) Specifically, the Coalition noted the lack of specifics in ComEd's proposal regarding the amount and methodology for determining the SAC. The Coalition also identified additional costs that ComEd may not have considered. (*Id.*) Lastly, the Coalition contended that ComEd did not specify what costs should be included in the SAC, nor had the Company proposed a reasonable allocation methodology for these costs. (*Id.*)

ComEd continues to insist that the Coalition's proposals are premature, as they related to issues to be litigated in ComEd's currently pending rate case and that the Company is only seeking the Commission's approval of placeholder language regarding the SAC. (ComEd Init. Br. at 166). The Staff concurred that this matter would be better addressed in ComEd's currently pending rate case. (Staff Init. Br. at 189.)

In their respective Initial Briefs, ComEd and the Staff either misunderstand or mischaracterize the Coalition's position. The Coalition agrees that the appropriate forum in which to review and assign these costs is ComEd's rate case. The Coalition explained, however, that the instant proceeding is the appropriate venue in which to describe the appropriate parameters of this "placeholder." That is to say, while the actual charge and the actual allocation of the SAC should be set in the Company's pending rate case, it is incumbent upon the Commission to ensure that ComEd's "placeholder" is properly designed within the instant proceeding. Thus, the Commission should address the types of costs that should be included, the proper allocation method, and the manner in which the SAC is to be set. Neither ComEd nor the Staff has provided any convincing rationale for delaying consideration of the mechanics of the SAC.

Accordingly, as discussed at length in the Coalition's Initial Brief at pages 42 to 43, the Commission should direct ComEd to ensure that all direct and indirect costs associated with the service of arranging for the supply of electric energy provided by the utility be allocated taking into consideration the relevant characteristics of the customers' demands on the electric utility's system. In addition, as discussed at length in the Coalition's Initial Brief at pages 44 to 45, the Commission should find that the SAC should be allocated evenly per kWh, rather than by a

fixed-dollar amount per account, per month, and should be tracked in the AAF to ensure that ComEd neither over- nor under-collects for this expense.

8. Rider CPP – Accuracy Assurance Mechanism

(See VII(B)(7))

9. Rider CPP – Subsequent review / Contingencies

(See V(L))

C. Matters Concerning Proposed Rider PPO-MVM

2. Supply Administration Charge

(See VII(B)(7))

D. Additional tariff and rate design issues

4. DASR procedures in anticipation of serving new customer facilities

ComEd committed to detail, in its rate case, the procedures for a RES to "DASR" a new customer account prior to the account and meter numbers being assigned. *(See ComEd Init. Br. at 172.)* The Coalition respectfully asks the Commission to enter an Order recognizing ComEd's commitment and directing ComEd to clarify the Company's new customer DASR procedures within ten (10) days of the final order in this proceeding.

5. Recategorizing certain condominium customers as Non-Residential customers

ComEd requested the Commission to approve the Coalition's proposal to recategorize certain condominium customers as non-residential customers for the purposes of the Customer Supply Group definitions in Rider CPP. *(See ComEd Init. Br. at 172.)* The Coalition respectfully requests that ComEd's recategorization methodology be formally recognized in the instant proceeding; that ComEd provide its recategorization methodology within ten (10)

business days of the final order in this proceeding; and that ComEd implement this methodology in the Company's pending rate case.

6. Treatment of Uncollectibles

ComEd indicated the Company's willingness to address issues regarding the amount and methodology for determining the adjustment for supply-related uncollectible costs in its currently pending rate case. (*See* ComEd Init. Br. at 165-6). Furthermore, ComEd stated that, contrary to the Coalition's recommendation, the Company does not plan to include supply-related uncollectible expenses in its AAF. (*See id.* at 149.)

The Staff concurred with ComEd's position. (*See* Staff Init. Br. at 202-03). According to the Staff, ComEd's rate case provided the appropriate forum to present a more comprehensive set of facts and analysis upon which to base decisions about this matter. (*See id.* at 202) In addition, the Staff proposed that the rate case provided the proper context in which to review the costs of both the delivery and procurement segments and assign them appropriately. (*See id.*)

Although the proposed supply-related uncollectible expenses should be established in the ComEd rate case, the instant proceeding is the appropriate place to ensure that uncollectible expenses are recovered accurately and fairly. No party provided any convincing reason for deferring discussion of this issue until the DST case.

Thus, the Commission should clarify in the instant proceeding that ComEd's commodity customers, and not its delivery service customers, are to pay energy-related uncollectible expenses. Furthermore, the Commission should mandate in the instant proceeding that ComEd allocate these costs evenly per kWh into the energy supply charges of the CPP-A (PPO-MVM), CPP-B and CPP-H tariffs. Lastly, the Commission should order in the instant proceeding that

ComEd to track these supply-related uncollectible expenses in ComEd's AAF, in order to ensure that the Company neither over-collects nor under-collects these costs.

8. Integrated Distribution Company Issues

To assist ComEd's dissemination of objective educational materials to the public that comport with the Commission's "Integrated Distribution Company" rules, the Commission should direct ComEd to initiate a separate docketed proceeding for consideration of new procurement process communication materials. (*See* CES Init. Br. at 50.)

ComEd balked at the Coalition's request for a separate formal proceeding. (*See* ComEd Init. Br at 173.) ComEd asserted that the Coalition failed to cite any experience since ComEd's formal designation as an IDC that warrants ComEd, other stakeholders, the Staff and the Commission to undertake the burdens and costs associated with such a proceeding. (*Id.*)

Of course, the Coalition's point is that ComEd will develop materials to describe and explain customers' post-transition generation options, and these marketing materials will dramatically differ from marketing materials that ComEd might have developed during the transition period. Furthermore, ComEd should welcome the opportunity to discuss these important pieces of consumer education. Regardless of ComEd's behavior during the transition period, during which rates were frozen, the Commission should be concerned about the manner in which ComEd balances "good customer communications" with what even the Company admitted might be construed as "marketing" new supply options. (*See* CES Init. Br. at 51; Crumrine Tr. at 794.)

Interested parties should have an opportunity in an open forum to strike the appropriate balance between informing customers of the Company's available supply choices and ensuring that these materials contain no bias or favoritisms that would direct customers toward ComEd's

supply options. (See CES Init. Br. at 51; CES Ex. 3.0 at lines 449-53.) Given the dramatic and fundamental changes that will occur in customers' rates and options at the end of the transition period, ComEd's marketing and communications materials should stand some scrutiny and review by the Commission Staff and interested parties prior to their dissemination to the public. Additionally, the Commission should ensure that ComEd properly tracks the costs associated with commodity-related workshops, so that these costs are directly assigned to and recovered in the generation portion of customers' bills. (See CES Init. Br. at 51; Crumrine Tr. at 791-92, 794.)

The Coalition respectfully asks the Commission to direct ComEd to initiate a separate docketed proceeding in which such communication and marketing materials, as well as all related accounting issues, would be reviewed, commented upon, and approved by the Commission. This proceeding should occur well before the Company disseminates such materials.

CONCLUSION

The instant proceeding represents another milestone for all stakeholders in the development of the Illinois electric market -- consumers, utilities, RESs, wholesale suppliers, and the Commission. Consistent with the statutory mandate of the Choice Law, the Commission has adopted a pro-competitive regulatory approach. This proceeding should not give way to those parties who wish to backslide. On the contrary, the instant proceeding represents a critical opportunity for the Commission to ensure that rules and practices in the post-2006 period aid the further development of the fully competitive market.

Not only does ComEd's current proposal, as modified through the course of this proceeding, comport with applicable law, but also the Company's proposal is generally

consistent with the overriding policy standards of Customer Focus and Market Reliance, as the Coalition has repeatedly articulated. Other parties' quarrels with ComEd's modified proposal generally represent attempts to roll back certain pro-competitive measures or to boldly obtain a result on a discrete issue that benefits a single specific insular group whose interests do not necessarily comport with the interests of the majority of market participants. The Commission should not waver on either basis. Indeed, the record in the instant proceeding provides no basis for the Commission to do so.

The Commission should recognize that adoption of ComEd's current proposal, as modified with the Coalition's recommended additions and changes, would appropriately fulfill the Commission's duty to advance the Illinois competitive market in a manner that continues to encourage safe, reliable, and reasonably-priced service to Illinois customers.

WHEREAS, for the reasons stated herein and in its Initial Brief and Draft Order, the Coalition respectfully requests that the Commission enter an Order that:

- (1) Adopts ComEd's proposed CPP tariffs;
- (2) Adopts ComEd's revised design for auction products CPP-A, CPP-B, and CPP-H;
- (3) Adopts a 50-day enrollment window for the CPP-A product for the first auction; and adopt a 45-day enrollment window for all subsequent CPP-A auctions;
- (4) Establishes an appropriate date for the initial auction to take place (which, given ComEd's other revisions, may be September 2006, but the record evidence also would support Staff's recommendation for a July 2006 auction, or the Coalition's original May 2006 date recommendation);
- (5) Rejects ComEd's proposal to eliminate a migration risk factor from the translation methodology for the CPP-B and directs ComEd to revise its migration risk factor to more accurately assign costs to each customer class;
- (6) Directs ComEd to assess the Supply Administration Charge ("SAC") on a per kWh volumetric basis in order to more accurately relate prices to cost on a customer class basis;

- (7) Directs ComEd, within ten (10) business days of the Order in this proceeding to:
(a) fulfill its commitment to detail in its rate case (Docket No. 05-0597) the procedures for a RES to “DASR“ new customer accounts prior to account and meter numbers being assigned; (b) provide its methodology for categorizing certain condominium customers as non-residential for the purposes of the Customer Supply Group definitions in Rider CPP;
- (8) Directs ComEd to separately account for the uncollectible amounts related to delivery services customers and bundled services customers by class;
- (9) Directs ComEd to properly recognize the increased uncollectible expenses rate resulting from CPP-H customers being exposed to wide variability in hourly prices;
- (10) Directs ComEd to properly recognize and treat all direct and indirect costs and related capital expenditures associated with serving CPP-H customers; and
- (11) Grants such other further or different relief as the Commission deems just and reasonable.

Respectfully submitted,

**CONSTELLATION NEWENERGY, INC.
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