

**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	:	

REPLY BRIEF OF ILLINOIS INDUSTRIAL ENERGY CONSUMERS

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INDEX

	<u>PAGE</u>
I. Executive Summary (Introduction).....	1
II. Need for Commission action	1
IV. Sufficiency of the competitive market.....	3
C. Retail market conditions	3
V. Auction design issues.....	7
C. Multiple round descending clock format	7
1. Load caps	7
F. Date of initial auction.....	16
G. Common vs. parallel auction	18
4. Common deliverability test.....	18
I. Fixed price auction product and tariffed services for larger customers	21
3. Treatment of customers (≥ 3 MW) taking services subject to a competitive declaration.....	21
4. Demand charge component for ≥ 1 MW customers	29
J. Continuation of CPP-H auction	31
L. Regulatory oversight and review	33
4. Formal proceeding(s) to consider process	33
VII. Tariff and rate design issues	36
B. Matters concerning Rider CPP.....	36
4. Rider CPP – Retail customer switching rules	36
a. Enrollment window.....	36
i. Duration of window	36

INDEX

PAGE

10.	Alternative proposals re: service to self-generation customers	39
11.	Alternative proposals re: interruptible service (ALM and non-ALM demand response).....	42
	a. ALM demand response	43
	b. Non-ALM demand response.....	44
X.	Conclusion	45

I.

INTRODUCTION

The industrial companies that have intervened in this case as the Illinois Industrial Energy Consumers (“IIEC” or “IIEC Companies”) have elected to respond to certain arguments made and positions taken in the Initial Briefs of Commonwealth Edison Company (“ComEd”), the Staff of the Illinois Commerce Commission (“Staff”), the Coalition of Electric Suppliers (“CES”), and Midwest Generation LLC (“MWG”). IIEC’s failure to respond to arguments made or positions taken by any party in its initial brief, or the failure to respond to any party’s initial brief, should not be considered endorsement or acceptance of the positions taken and arguments made by those parties, unless otherwise expressly stated herein.

II.

NEED FOR COMMISSION ACTION

While IIEC did not address the need for Commission action in its Initial Brief and has neither supported nor opposed the auction process itself as a method for procuring power in the post-2006 period, it feels compelled to respond to a particular statement made on this issue by CES in its Initial Brief. CES argues that “it is clear that as a matter of law . . . , there is need for the Commission to approve a . . . procurement methodology for ComEd.” IIEC disagrees that “as a matter of law” the Commission is required to approve, in advance, any ComEd procurement strategy or method. Nor is the Commission, “as a matter of law,” required to approve in advance the justness and reasonableness of rates that may result from the implementation of any ComEd procurement strategy. Whatever the Commission’s decision, it is not required to adopt the ComEd proposal “as a matter of law.”

Indeed, after suggesting that the Commission is required, as a matter of law, to approve a power procurement method for ComEd, CES fails to cite to a single substantive provision of the Illinois Public Utilities Act (220 ILCS 5/1-101 et seq.) (the “Act”) that imposes such a requirement on the Commission. Instead, CES argues that because ComEd was able to divest itself of generation (220 ILCS 5/16-111(g)), and because the Commission is empowered to investigate the need for restructuring and unbundling tariffed prices (220 ILCS 5/16-109), and because the Commission is required to consider ComEd’s costs of providing tariffed service in setting tariff service rates (220 ILCS 5/16-111(i)), the Commission is somehow required, as a matter of law, to approve ComEd’s proposal. The alleged legal requirement to approve the power procurement proposal made by ComEd in this proceeding or to approve any other power procurement method, simply does not follow from those premises.

CES argues further that if the Commission ignores the directives of the General Assembly, *viz.*, authority to divest generation, to investigate rate restructuring and to use the cost of service to set tariff rates, it would lose “significant authority” to the FERC. (CES Init. Br. at 7). To the extent these specific authorities are properly characterized as directives of the General Assembly, the Commission’s failure to adopt as a matter of law the ComEd proposal obviously would not affect ComEd’s decision to voluntarily divest itself of generation, a step it has already taken. Nor would it diminish the Commission’s authority to investigate the restructuring of ComEd’s rates or its authority to consider the utility’s costs in providing tariffed service.

Finally, while the FERC has exclusive jurisdiction over wholesale rates, that jurisdiction does not prohibit the Commission from considering the prudence and reasonableness of the utility’s decision to pay a particular wholesale rate for the acquisition of power supply, if that supply were available from other sources at a lesser or more reasonable price. (*See* discussion of

the Pike County doctrine in IIEC Init. Br. at 53-57). However, by concluding that the Commission as a matter of law must approve, in advance, some power procurement approach for ComEd, the Commission most certainly would deprive itself of significant authority over ComEd's procurement and ratemaking processes.

IV.

SUFFICIENCY OF THE COMPETITIVE MARKET

C. Retail Market Conditions

IIEC explained in its Initial Brief that Illinois customers, particularly large customers, currently are not enjoying the full benefits of an effectively competitive retail market due to the very limited number of Retail Electric Suppliers ("RESs") serving customers in the ComEd territory. Yet, ComEd's power procurement proposal would deny large customers access to any benefits of competition among the much greater number of wholesale suppliers expected to participate in the proposed auctions. IIEC also noted that the evidence of record shows that the modest Illinois retail supplier market retracted in 2005, compared to 2004, suggested an immature and fragile market. IIEC concluded by stating that "until the retail market conditions improve sufficiently for a competitive retail market which provides 'economically viable' options to all customers, it is important to ensure that the utility provides an avenue to the more competitive wholesale supply market." (IIEC Init. Br. at 12-13).

In their briefs, three other parties commented on retail market conditions, as they affect large customers IIEC represents -- Staff, ComEd and CES. Of these, IIEC will reply only to the Initial Brief of CES on this issue.

Reply to CES

CES claims that “the competitive conditions in Illinois had yielded something on the order of \$4 billion in savings for Illinois’ residential and non-residential consumers since passage of the choice law.” (CES Init. Br. at 11). This figure is misleading. The majority of those savings accrued to residential customers as the result of legislatively mandated reductions in regulated rates, not as a result of competition. As pointed out by ComEd, not a single residential customer has actually elected competitive supply. (*e.g.*, ComEd Init. Br. at 41).

CES claims that the Commission’s approval of a global settlement that certain CES members negotiated with ComEd in early 2003 “created the conditions necessary for businesses to enter into multi-year retail contracts; enabling businesses for the first time, to hedge their supply and Competitive Transition Charges (“CTCs”) for the duration of the transition period, thereby ensuring budgetary certainty.” (CES Init. Br. at 12-13). Two replies are warranted. First, as discussed at significant length in IIEC’s Initial Brief, for customers 3 MW and larger the settlement has occasioned virtually no change in RES supply load since 2003. (*See* Stephens Dir. IIEC Ex. 1 at 10:212-11:247; IIEC Init. Br. at 11).¹ Second, CES fails to acknowledge that for many customers, the very act of signing up for multi-year CTCs forced those customers to forego -- permanently -- utility supply service (Power Procurement Option (“PPO”) or bundled service), and expose themselves to the volatility of hourly energy prices. This effect is shown in IIEC Exhibit 4, Schedule 1. There, ComEd explains (in response to an IIEC data request) that of the 63 customers currently on the hourly energy price, only nine had voluntarily elected to be on that pricing plan. Fifty customers had no other option for service from ComEd except Rate HEP

¹ When citing prefiled testimony in this Reply Brief, IIEC has provided citations to the page number in format of “Page(s):Line(s) or Page:Line-Page:Line.” References to the transcript in ComEd 05-0159 will be designated as “Tr.____,” references to the Joint Transcripts in ComEd 05-0159 and Ameren 05-0160, et al., will be designated as “Jt. Tr.____”.

– Hourly Energy Price having elected to take the multi-year CTC option. Therefore, these customers saw no price stability because hourly pricing is volatile and risky as even CES admits. (*See* CES Init. Br. at 48-49). Hence, there is no evidence in the record that the “Global Settlement” benefited any large consumers, and for the consumers forced onto the hourly rate, it more likely ensured budgetary uncertainty.

Also, and inexplicably, CES states that the Memorandum Of Understanding (“MOU”) (Clark ComEd Ex. 1.6) “is another way in which market participants have sought to provide degrees of freedom and certainty for business customers to hedge their post-2006 supply needs prior to the auction, if conditions so warrant.” (CES Init. Br. at 13). Close examination of the MOU indicates that the only aspect directed specifically to large customers is agreement among the signatories that ComEd will offer them an hourly energy price product. (*See* Clark ComEd Ex. 1.6 at third page). This is a product that ComEd is already obligated by law to provide to all customers. (220 ILCS 5/16-107; 5/16-103(b); 5/16-111(a)(3); Commonwealth Edison Company (March 25, 2003) 2003 Ill. PUC LEXIS 310, 21-22). Nothing about this agreement provides “certainty for business customers to hedge their post-2006 supply needs.” Further, as ComEd witness Mr. Clark admitted, (a) all but one of the parties signing the MOU were suppliers of retail electricity and (b) higher prices charged by ComEd for its power and energy would make those suppliers more “competitive.” (Clark Tr. 206-207). The one non-RES representative that signed the MOU is a trade association that is a customer of Exelon Generation. (Clark Tr. 207). The MOU was beneficial to ComEd, CES, and ComEd’s affiliate, but not to large customers of ComEd as CES suggests, and nothing contained therein promotes hedged power supplies for business customers.

CES seems to give weight to the fact that the Commission's website identifies 16 RESs eligible to serve non-residential customers above 15,000 kWh per year as an empirical measure of market success. (CES Init. Br. at 16). CES fails to acknowledge, as pointed out on the record in this case, the mere fact that RESs are listed on the Commission's website does not necessarily mean that any particular RES is marketing electricity in Illinois, or marketing electricity in any particular utility service territory in Illinois, or marketing to any particular customer segment. (Stephens Jt. Tr. 81). This point is obvious from the fact that in 2004, only eight RESs were actually serving non-residential customers in the ComEd territory, only five in the AmerenCIPS territory, only three in the AmerenIP territory, only one in the AmerenCILCO territory, and only one in the AmerenUE territory. (Stephens Reb. IIEC Ex. 4 at 10 fn 6; Stephens Dir. IIEC Ex. 1 at 5:90-93). Stated simply, a list of company names on the Commission's website does not make a market competitive.

CES also claims that in the ComEd area, from the summer of 2001 through the summer of 2004, estimated demand in reports to the regional reliability coordinator increased for all but one of the eight RESs shown as load serving entities scheduling deliveries into ComEd. (CES Init. Br. at 16). CES does not mention that one year later, the comparable 2005 source document reported that half of the listed RESs had actually experienced a decrease in customer demand (including CES member Constellation NewEnergy, which dropped demand by approximately 30%), and that one of the listed suppliers from 2004, Dynegy, had dropped out altogether. (Compare IIEC Cross Ex. 1 (2004 MAIN Report), page 9 of 11 and IIEC Cross Ex. 2 (2005 MAIN Report), page 9 of 10).

Thus, the rosy picture of the Illinois competitive retail market CES attempts to paint is not as bright as it would have the Commission believe.

Finally, Staff makes an excellent point at page 17 of its Initial Brief. Though not directed specifically at large customers, it does apply. Staff states:

However, it is self-evident that any deficiencies in the competitiveness of the *retail* electricity markets merely add to the urgency and importance of approving viable and appropriate procurement methods for electric utilities to implement, since consumers who cannot rely on a competitive *retail* market should at least be able to rely upon their regulated public utilities to supply them with electric power. Deficiencies in the competitiveness of *retail* electricity markets, in and of themselves, say absolutely nothing about which procurement methods are appropriate for electric utilities to implement.

(Staff Init. Br. at 17, emphasis in original).

IIEC agrees with Staff that given the deficiencies in Illinois' retail competitive market, customers, including large customers, should be able to rely on their utility to supply them with electric power.

V.

AUCTION DESIGN ISSUES

C. Multiple Round Descending Clock Format

1. Load Caps

In its Initial Brief, IIEC opposed imposition of an artificial load cap constraint on the “robust competition” the auction proposal is supposedly founded upon, and which is necessary for the auction to “function correctly.” (IIEC Init. Br. at 14-25; *also see* McNeil Dir. ComEd Ex. 3.0 at 47:1024). IIEC opposed ComEd’s original proposal for a 50% load cap, and IIEC opposes the greater market intervention represented by the 35% load cap introduced in ComEd’s rebuttal testimony. If the Commission finds that Illinois market conditions warrant reliance on auction competition to obtain supplies at the best prices for consumers, there must be a very strong

presumption against interfering with that competition. ComEd and other supporters of a load cap have not presented evidence justifying this proposed barrier to unfettered competition -- a barrier that will limit supplies from large, low-cost suppliers and potentially raise prices for end users.

Besides IIEC, only ComEd, Staff and MWG addressed this issue in their Initial Briefs. (*See* ComEd Init. Br. at 78-79; Staff Init. Br. at 31-35; MWG Init. Br. at 10-16). Other than IIEC, each of those parties supported imposition of a load cap in connection with any auction the Commission approves. Before even a single auction is held, ComEd and the others have rejected the idea of depending on the competitive market forces that they assure the Commission will produce just and reasonable outcomes. Instead, they propose to manage the outcomes of the competition by imposing a load cap to curtail bids and supplies from large suppliers -- likely low-cost/low-price suppliers -- to the detriment of end-use consumers. (Salant Dir. Staff Ex. 1.0 at 68:1533-1534).

As demonstrated in IIEC's Initial Brief, the evidence and arguments offered to support a load cap are not adequate to justify (a) the likely increase in retail rates for ComEd customers and (b) the certain interference with the operation of competitive markets that is inherent in the imposition of a load cap. (*See* IIEC Init. Br. at 14-25). The specific arguments presented in the initial briefs of load cap supporters are rebutted in the following discussion.

Reply to ComEd

ComEd asserts that IIEC's opposition to a load cap "is based on the speculative assertion that higher costs might result from a load cap under certain circumstances." (ComEd Init. Br. at 79). It argues further that "the benefits of the load cap outweigh any theoretical disadvantage on which IIEC's opposition is based." (ComEd Init. Br. at 79). The implication that there is

superior support **for** a load cap is baseless. ComEd's argument suggests that the supporters of a load cap have empirical information regarding the actions of bidders in post-2006 Illinois. They do not. The arguments of load cap advocates suggest that their testimony establishes real (not theoretical) benefits of a load cap. It does not. Certainly, load cap advocates have not presented any such empirical evidence or proof in this record.

In that vein, ComEd and MWG criticize Mr. Collins' illustration of the operation of a load cap as though it were the only evidence of how a load cap would affect customers. They claim ". . . Mr. Collins acknowledged on cross examination that different hypotheticals could be constructed under which the absence of a load cap would produce higher prices." (ComEd Init. Br. at 79 and MWG Init. Br. at 14 *citing* Collins Jt. Tr. 151). This is an inaccurate portrayal of Mr. Collins' written testimony and an incomplete description of his cross-examination. Mr. Collins explained in plain words the limited purpose of his hypotheticals.

The examples that I provided in my testimony **were simply to illustrate the concept of a load cap and do not attempt to portray** a certain bidder, the number of bidders, **the amount of supply** that would be bid into the common auction process, **or the prices** that the **bidders would submit** into the auction.

(Collins Jt. Tr. 149-150, emphasis added).

My example was very simple and was to illustrate the concept and was not intended to forecast the conditions that may or may not exist in the common auction process.

(Collins Jt. Tr. 153, emphasis added).

Mr. Collins' hypotheticals also provide the Commission with information on how a load cap could affect auction prices and consumer rates. Neither MWG's witness Mr. Graves nor ComEd's Dr. LaCasse made any attempt to estimate or even illustrate the effects of the proposed load cap, providing only subjective, conclusory opinions. (*See, e.g.*, LaCasse Jt. Tr. 908; IIEC

Cross Ex. 3 (IIEC 6.05, 6.06, 6.11)). Unfortunately, this subordination of the interests of customers (low auction prices and low regulated service rates) to an objective of managing the outcome of an allegedly “competitive market” process is pervasive in the testimony of load cap proponents.

While Mr. Collins’ hypotheticals illustrated the flaws in the load cap proposal, they do not constitute the proof of those flaws. That proof lies in the record evidence demonstrating that higher, not lower, consumer rates are likely to result from the imposition of a load cap. That evidence was examined in detail in IIEC’s Initial Brief. (*See generally* IIEC Init. Br. at 14-25). There is the unrebutted testimony -- from load cap proponents and load cap opponents alike -- that a load cap, if it works as designed, will restrict large suppliers. For ComEd customers, “the large suppliers are likely also the low-cost suppliers in Illinois.” (Salant Dir. Staff Ex. 1.0 at 68:1533-1534). Indeed, there is no dispute that the largest supplier in Illinois (ComEd) is also the supplier with the lowest cost generation. (*See* CUB-CCSAO Ex. 1.2; O’Connor Jt. Tr. 239). IIEC is aware of no record evidence of experience with an auction load cap under the unique set of circumstances that prevails in Illinois. If a load cap excludes low-cost supplies from the auction, as seems inevitable if a load cap is imposed in an Illinois auction, auction prices and prices to consumers cannot be lower, and they probably will be higher. (Collins Dir. IIEC Ex. 3 at 9:174-177).

It is important that the Commission keep in mind (on this and other issues in the case) that it is ComEd -- not any intervenor -- that has the burden of proof. ComEd must prove that its proposal will yield just and reasonable results. There is no presumption that use of a load cap is appropriate or any of its individual elements are appropriate. ComEd also must rebut the evidence challenging the factual underpinnings of its proposal, and it must affirmatively

demonstrate the worth of its proposed load cap. Mere criticism of others does not meet that burden.

Reply to Staff

Like ComEd, Staff bases its support for an artificial load cap primarily on the testimony of ComEd witnesses Mr. McNeil and Dr. LaCasse. (Staff Init. Br. at 31-32). Staff also offers the testimony of its own retained experts Dr. Salant and Mr. Sibley. (See Staff Init. Br. 32-34).

The ComEd witnesses on whom Staff relies presented argument and opinion on four criteria identified by Dr. LaCasse as the factors she considered in her balancing of costs and benefits. (See IIEC Init. Br. at 19-20). Dr. LaCasse found that subjective balance in the 50% load cap ComEd originally proposed. (LaCasse ComEd Ex. 4.0 at 63:1497, 64:1525). She also found subjective balance in ComEd's revised recommendation of 35%, when the utility decided to change its proposal and presented the new number to her for evaluation. (LaCasse Reb. ComEd Ex. 11.0 at 31:746-753; LaCasse Jt. Tr. 908). Had other load cap levels been proposed by ComEd, she may have found the same subjective balance in them as well.

As to its own experts, Staff quotes the following testimony of Dr. Salant:

Absent a detailed analysis of the optimal load cap for the Illinois CPP, I recommend setting the load cap at a level consistent with the levels used in previous SMR [Simultaneous Multiple Round] format auctions, i.e., in the range of 25 to 35 percent.

(Staff Init. Br. at 33-34, quoting Salant Dir. Staff Ex. 1.0 at 64:1456-1458, explanation added).

Staff also cites the commentary of Mr. Sibley, its other retained expert. (Staff Init. Br. at 33-34). Ultimately, Staff supports and recommends ComEd's proposal for a load cap, at a level of 25%-35%. (Staff Init. Br. at 35). But, as Dr. Salant candidly acknowledged, the question of the

appropriate level for a load cap is a quantitative one -- a question for which neither he nor the ComEd witnesses have conducted any quantitative analysis. (LaCasse Jt. Tr. 908; IIEC Cross Ex. 3 (IIEC 6.05, 6.06, 6.11); Salant Jt. Tr. 1072-1073).

In addition, as IIEC pointed out in its Initial Brief, Dr. Salant's recommendation of a 25%-35% load cap is not, as he contends, "consistent with the levels used in previous SMR [Simultaneous Multiple Round] format auctions." (IIEC Init. Br. at 16; Staff Init. Br. at 33-34, quoting Salant Dir. Staff Ex. 1.0 at 64:1456-1458, explanation added). The range of load caps for New Jersey's auctions (SMR auctions), which Staff's Initial Brief (quoting Dr. Salant) describes as "25 to 35 percent" (Staff Init. Br. at 33-34), actually includes IIEC's proposed 100% load cap -- *i.e.*, no load cap. According to Dr. Salant, at least one auction in New Jersey was successfully concluded without imposing any restrictive load cap at all (a 100% load cap). (Salant Jt. Tr. 1061-1063). Although load cap advocates consistently turn to the New Jersey auction experience as distinguishing their pro-load cap position from IIEC's no load cap position, that argument is belied by Dr. Salant's testimony. (*See* IIEC Init. Br. at 16).

Absent from Staff's Initial Brief is any coherent consideration of the effect of a load cap on consumer prices. In fact, Dr. Salant essentially concedes the probability of the adverse consequences that were the subject of Mr. Collins' caution. (*See* Collins Dir. IIEC Ex. 3.0 at 13:279-283 re: caution). Because "the large suppliers are likely also the low-cost suppliers in Illinois" (Salant Dir. Staff Ex. 1.0 at 68:1533-1534), if a load cap works as designed -- to limit the bids from large suppliers -- the supply excluded from auction will likely be low-cost supply. Given the assurances of load cap proponents (Staff excepted) about the competitiveness of Illinois' wholesale markets and prospective auctions, this unjustified limitation on low-cost supply should not be preferred over unrestricted competition. (*See, e.g.*, Collins Dir. IIEC Ex. 3

at 9:171-182). The interests of consumers should not be inappropriately subordinated to the appearance of diverse, robust competition in the auction process -- an objective that load cap advocates believe requires multiple winners.

In responding to Mr. Collins' testimony, Staff's initial brief repeats Dr. LaCasse's mistaken claim that Mr. Collins considered only one of the four criteria she considered in her qualitative evaluation of the quantitative issue of load cap level. In doing so, Staff ignores evidence of record directly contrary to this claim. Mr. Collins addressed all four criteria directly, in his rebuttal testimony. (*See* Collins Reb. IIEC Ex. 6 at 5:80, 7:137-11:215).

It appears that in its survey of testimony on a load cap, Staff could find no quantitative support for the quantitative recommendations of load cap proponents. IIEC also has searched the record for something other than opinion and speculation to support the use of a load cap. IIEC submits that such support does not exist in this record. In the absence of any such support, if the Commission finds sufficient competition exists to approve the auction process, the Commission should not endorse the use of a load cap to restrict competition in the auction. To be defensible, a Commission decision cannot simultaneously approve (a) a "market-based" auction that relies on, and (b) a load cap that deliberately distorts, the subject market.

Reply to MWG

Like ComEd, MWG argues that Mr. Collins bases his conclusion on the illustrative hypotheticals in his direct testimony. (MWG Init. Br. at 14). That argument was addressed in the discussion of ComEd's Initial Brief in this Section V.C. above. The support of MWG (a major supplier) for a 35% load cap itself lends credibility to IIEC's position that a load cap is

likely to raise auction prices. When a supplier, like MWG, has capacity capable of serving more than the load cap amount (35% of auction load)² it raises a question: Why would a bidder want to limit its own ability to bid and win auction tranches? The only logical answer is that it expects, likely through higher prices, to profit more under the restricted competition created by a load cap.

MWG (like other load cap proponents) also facetiously asserts that diversity produced by a load cap will lead to lower prices. (*See, e.g.*, MWG Init. Br. at 12; ComEd Init. Br. at 79). However, no load cap advocate explains why or how that magical result will come about; the record contains only bald assertions and “possibilities.” For example:

To the extent that a 35% load cap **induces** generation owners to commit fewer generation resources directly into the auction, more generation resources **potentially** will be **available** for sale in the **underlying** wholesale energy markets that backstop the auction. **If**, in this fashion, a lower load cap **facilitates** a more liquid underlying wholesale market . . . , then the lower load cap **potentially could encourage** more breadth of participation and bidding”

(*See, e.g.*, MWG Init. Br. at 12-13, emphasis added).

After this gross speculation, MWG incredibly accuses Mr. Collins of relying on speculation and unsupported assumptions. (*Id.* at 14).

In addition, the MWG assertion that load caps will produce “increased competitive pressure” (MWG Init. Br. at 15) flies in the face of testimony that low-cost suppliers, which are likely to be excluded by an Illinois load cap, are the more aggressive bidders. (Salant Jt. Tr. 1087). Load cap advocates also argue that the exclusion of low-cost supply occasioned by a load

² MWG represents approximately 52% of the initial auction load (all ComEd load) and 105% of the typical annual auction load, after the initial auction, calculated as follows: MWG Capacity (9366.6 MW) ÷ initial auction load (18,000 MW) = 52% and MWG Capacity (9366.6 MW) ÷ typical annual auction load (8900 MW) = 105%. (*See* LaCasse Dir. ComEd Ex. 4.0 at 56:1334 & 62:1469; Sibley Dir. Staff Ex. 2.0 at 11; McNeil Dir. ComEd Ex. 3.0 at 47:1014-1016).

cap does not mean higher auction prices -- because suppliers will not bid based on their production costs in any case. (*See, e.g.*, LaCasse Reb. ComEd Ex. 11.0 at 42:1001-1003; MWG Init. Br. at 14).

In reacting to Mr. Collins' plain observations about the effects of a load cap, the advocates of a load cap contradict and undermine the arguments they offer to support the auction itself. In the context of her comments on the price-taker proposal Staff offers to remedy problems created by a load cap, Dr. LaCasse charges that Staff "confuses competition in the auction and competition in the wholesale market." (LaCasse Reb. ComEd Ex. 11.0 at 42:997). She notes that "[t]his is another instance where there is a confusion between the auction product and wholesale market products." (*Id.* at 42:1006-1007). Staff, which also supports a load cap, accepts this distinction. (Staff Init. Br. at 56). In attacking Mr. Collins' illustrations, Dr. LaCasse and others insist that bidders will not bid to their marginal costs. Dr. LaCasse states:

While the notion that electricity **prices** should be **based** on the **marginal cost** of the marginal unit **underlies** much of the theory of price formation in **competitive wholesale** spot power **markets**, it is **not** the notion that is **relevant** to the auction product.

(LaCasse Reb. ComEd Ex. 11.0 at 42:1012-1014, emphasis added).

These attacks on IIEC's opposition to a load cap provide ample basis for the Commission to question whether (a) an auction that is distinct from the "robust" competitive markets used to support ComEd's proposal and (b) market dynamics where competition forcing prices to cost is not "relevant" will, in fact, produce the lowest prices for Illinois' consumers.

MWG witness Mr. Graves responded to a question from Judge Wallace by describing Mr. Collins' proposal. His description alone is a compelling argument for IIEC's sensible proposal to eliminate any load cap from ComEd's proposed auction.

JUDGE WALLACE: Mr. Graves, if could you explain what your understanding of Mr. Collins testimony is that a hundred percent load caps should be a requirement?

THE WITNESS: . . . My understanding of Mr. Collins' viewpoint is that you should have **as many suppliers** offering **as much as they possibly can** into the auction. And if some -- so that they should be completely **unfettered in their ability to offer** a large share of potential auction result.

* * * *

If **in principle** he could serve 100 percent, **he should get the opportunity** to do so according to Mr. Collins.

(Graves Tr. 1188-1189, emphasis added).

ComEd and other load cap advocates oppose that common sense position. When asked, in the same exchange, about one of the main arguments for a load cap, Mr. Graves had an equally telling response:

JUDGE WALLACE: And there's a certain amount of agreement that that would open the auction up more to smaller and medium-sized suppliers or bidders?

THE WITNESS: Well, **no one knows for sure**

(*Id.*, emphasis added).

On this record, we do know for sure that a load cap will interfere with the competitive forces on which the auction depends, likely to consumers' detriment, whether or not the proposed management of outcomes actually produces any benefit. Therefore, the proposed load cap should be rejected.

F. Date of Initial Auction

In testimony and its Initial Brief, IIEC recommended that ComEd's proposal to hold its initial auction in September 2006 be adopted if an auction is approved. ComEd argued that an

auction closer to the date of power delivery would yield a more accurate price and that the interim is better spent in preparing for a good auction than in correcting a bad one. IIEC found these arguments persuasive. ComEd, IIEC, Staff, Constellation Energy Commodities Group (“CCG”), and CES address the initial auction date issue in their Initial Briefs. (*See* ComEd Init. Br. at 98-99; IIEC Init. Br. at 25-28; Staff Init. Br. at 80-82; CCG Init. Br. at 14; CES Init. Br. at 17-22). At this point in the proceeding, no party vigorously opposes the September 2006 date for an initial auction. ComEd, IIEC and Staff support an initial auction date of September 2006 in their briefs. (IIEC Init. Br. at 25; ComEd Init. Br. at 99; Staff Init. Br. at 81). CCG did not oppose a September 2006 initial auction. (*See* CCG Init. Br. at 14). CES also finds the September 2006 date may in fact be reasonable, but it appears to be the only party that continues to question that date. (CES Init. Br. at 5 and 17).

CES focuses on two issues: price accuracy and technical requirements. First, CES says that “ComEd’s assumption that a September auction would be more ‘accurate’ than an earlier auction is not always correct.” (CES Init. Br. at 19). With respect to future events, nothing is certain, but it defies common sense to suggest that a date even further in time before an event will provide a more accurate perspective. Second, CES says there is no technical reason to wait until September, because eight months is more time than is required. (CES Init. Br. at 18). At the same time, CES emphasizes the novelty of an auction in Illinois and asserts that an early date will provide “the benefit of additional time to make corrections or adjustments in the event of problems that impact” the auctions. (CES Init. Br. at 20). IIEC (like Staff) believes that the consumers of Illinois will be best served by avoiding, rather than correcting, auction miscues. “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.” (Staff Init. Br. at 81).

However, CES does not discuss the divergence of its interests from those of consumers. The Commission should not forget that it is Illinois businesses and residents that will be directly affected by any auction process. An auction’s results would determine their rates for an essential service. An earlier date for the auction will result in additional risk for suppliers. That risk will be reflected in a premium added to their bids. This in turn will result in a higher auction clearing price and thus higher prices for end-use customers. The retail supplier members of CES will not participate in the auction as bidders; the cost of their competitive supplies will not be determined by the auction; and an uncertainty premium will not affect the prices of their electricity products. While a higher auction price may be attractive to CES members (easier to compete against), it is not a good result for consumers.

There is no compelling reason for advancing the initial auction to a point in time more than one-half year before the winning bidders will be required to supply power, with the concomitant increase in risk and price. (*See* IIEC Init. Br. at 25). The Commission should reject CES’s questioning arguments and accept the otherwise unanimous conclusion of the parties (including CES) that the September 2006 initial auction date is reasonable.

G. Common vs. Parallel Auction

4. Common Deliverability Test

In its testimony and initial brief, IIEC supported the development and implementation of a common deliverability test for resources in the combined PJM-MISO footprint to deliver power and energy to load in the ComEd and Ameren service areas. (Dauphinais Dir. IIEC Ex. 2

at 2:34-47; IIEC Init. Br. at 32). Currently, separate, distinct tests are required by PJM and MISO to assess the ability of particular resources to deliver power to load in each Regional Transmission Organization's ("RTO's") respective footprint. The practical and economic hurdles to actual use of resources in one RTO for load in another make switching among ComEd and Ameren auction segments unlikely. (Dauphinais Dir. IIEC Ex. 2 at 6:138-7:164). It is IIEC's position that only by acting affirmatively to assure elimination of this hurdle to the ability to switch products in the ComEd and Ameren auctions can consumers truly realize the benefit of a common simultaneous auction where suppliers can switch supplies between auctions. (Dauphinais Dir. IIEC Ex. 2 at 7:159-9:197). IIEC is not suggesting, and has not suggested, the combined auction be delayed until a common deliverability test is implemented. However, this barrier to the use of a resource in one RTO to serve load in the Illinois portion of the other RTO does make significant switching between products in the Ameren and ComEd auction segments unlikely.

ComEd did not address this issue in its Initial Brief. Staff appears to be the only party that did address the issue in its Initial Brief. Staff concluded that if IIEC was suggesting that the auction be delayed until a common deliverability test was implemented then Staff recommended IIEC's proposal should be rejected. (Staff Init. Br. at 91).

Staff accuses IIEC witness Mr. Dauphinais of "ambiguity" in his testimony respecting the need for a common deliverability test and his recommendation that the Commission order cooperation among utilities and RTOs to resolve the issue and prompt implementation of remedial changes. (Staff Init. Br. at 90). Specifically, Staff argues it is not clear whether Mr. Dauphinais recommends that the auction be delayed pending the implementation of a common deliverability test. However, in the very portions of Mr. Dauphinais' testimony that Staff

excerpted to illustrate the alleged ambiguity, Mr. Dauphinais answers the question Staff asks -- whether IIEC advocates delay of any auction until there is a common deliverability test.

I believe some type of initial auction could go forward without an accountability (*sic*) [common deliverability] test. But **at some point in the future at a date certain** it should be there.³

(Staff Init. Br. at 90, quoting Dauphinais Jt. Tr. 126).

Staff also notes that Mr. Dauphinais explained:

[T]he Commission can condition the **continued use** of procurement auctions on establishment of a common deliverability test and a joint auction **by a date certain**.

(Staff Init. Br. at 91, quoting Dauphinais Dir. IIEC Ex. 2 at 8:187-188).

Thus, there is no ambiguity. Mr. Dauphinais did not suggest the use of the combined auction be delayed pending implementation of the common deliverability test.

However, while the Commission's decision on an auction process should not be delayed until the common deliverability test is implemented, the Commission should be resolute in (a) requiring that ComEd and Ameren work with PJM and MISO to establish a common deliverability test for resources located in the combined MISO/PJM footprint to serve load in the combined Ameren and ComEd service territories and (b) setting a date certain for implementation of a common deliverability test. Until that is accomplished, utilities and RTOs should be ordered to work toward that goal, with regular reports (every 90 days) to the Commission, so that it can track their progress.

³ IIEC submitted a motion to correct this portion of the transcript on September 28, 2005.

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

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

IIEC recommended the Commission should, as a condition of the auction approval, direct ComEd to provide an annual fixed price option to customers pursuant to an annual auction. If, contrary to IIEC's belief, the Commission concludes that it is legally prohibited from doing so because ComEd's petition to declare Rate 6L service competitive (although neither granted nor denied) was allowed to take effect by operation of law, the Commission should immediately reopen Docket No. 02-0479. In that reopened docket, the Commission should rule on, and explicitly deny, the petition for a competitive declaration for the post-2006 period so that it is not a barrier to all customers obtaining the full benefit of the competitive wholesale market as intended by the General Assembly. (IIEC Init. Br. at 38). In related recommendations, which were not directly opposed by other parties in Initial Briefs, IIEC recommended (a) that the load of customers ≥ 3 MW should constitute a separate segment in the ComEd fixed price auction, (b) that customers should "prequalify" their load in an effort to mitigate supply risk, and (c) that ComEd should also offer a multi-year auction product. (IIEC Init. Br. at 38-51).

Parties addressing this issue in their initial briefs include IIEC, ComEd (ComEd Init. Br. at 105-106), Staff (Staff Init. Br. at 102-106), the Department of Energy ("DOE") (DOE Init. Br. at 12-13) and CES (CES Init. Br. at 27-28).⁴ Of these, the only parties that oppose ComEd's offering of fixed annual price service to customers 3 MW and larger are the ones that are not representing the interests of customers, namely ComEd and CES. All parties addressing this issue who represent to any degree the interests of customers agree that such service is necessary

⁴ One other party representing non-residential customers in this case, BOMA, advocated a fixed price service to 3 MW and larger customers in testimony in the case (*see* Brookover/Childress Dir. BOMA Ex. 2.0 at 6:126-129); however BOMA did not address this issue in its Initial Brief.

and should be provided by ComEd and that ComEd has not provided any justifying reason for not offering the service to customers.

In the case of CES, the reasons for its position are clear. If customers ≥ 3 MW have no fixed price option available from the utility, they will of necessity be forced to alternate retail suppliers to acquire the needed price stability. Customers will be compelled to do so irrespective of the actual competitiveness of the retail market and the cost of the fixed priced product. Consequently, CES members, acting in their own commercial interests, naturally would prefer that the utility not provide this beneficial service to this segment of customers (or any other segment for that matter). This is not a surprise, as one of the CES members, specifically Constellation NewEnergy, supported ComEd's efforts to get Rate 6L declared competitive in Docket No. 02-0479 in the first place. (See Commonwealth Edison Company, ICC Docket No. 02-0479, Interim Order Nov. 14, 2002 at 7, 15, 21, 32-33, 42, 45, 49, 53, 59, 64, and 67).⁵ In fact, CES proposes to artificially increase the price of the CPP-H product through the addition of various unquantified and unproven administration and credit risk costs.⁶ (CES Init. Br. at 48-49). CES's interest in this case is transparent. It is to make utility supply options as unattractive, unavailable, or high priced as possible.

While CES's promotion of its own interests is understandable, ComEd's position remains curious. ComEd's stated positions on this issue are brief and provide nothing to explain why it will not offer a service desired by customers and for which it would be fully compensated. To wit, ComEd's position is stated as follows:

⁵ Interestingly, the two other ARES members of CES, namely MidAmerican Energy Company and Peoples Energy Services Corporation, were parties in Docket No. 02-0479 as well; however neither supported ComEd's petition and, in fact, MidAmerican provided testimony maintaining that ComEd's evidence relating to competition was flawed. (See Commonwealth Edison Company, ICC Docket No. 02-0479, Interim Order Nov. 12, 2002 at 1 and 21).

⁶ IIEC agrees with ComEd that these issues should not be addressed in this proceeding. (ComEd Init. Br. at 172-173).

ComEd is not required to offer tariffed commodity service that is subject to a competitive declaration -- a legal distinction that recognizes the competitive alternatives that are available to this customer group.

* * * *

ComEd considered these suggestions [of BOMA, DOE, IIEC and Staff], but determined that the line between customers whose service is subject to a competitive declaration and those who are not should be respected.

(ComEd Init. Br. at 106, explanation added).

Reply to ComEd

ComEd's only rationale for rejecting the IIEC proposal for fixed price products seems to rely on the fact that the Commission had allowed ComEd's petition to declare service as competitive to go into effect by operation of law under Section 16-113 of the Act. (220 ILCS 5/16-113). ComEd provides no explanation of how it, the retail or wholesale market, or other customers would be harmed by ComEd simply offering this service to customers. Nor does ComEd refute Staff and intervenor parties who indicate that the service is desired. Finally, ComEd fails to acknowledge the fact that as an Integrated Distribution Company, it would only be asked to pass through, at cost, the same type of auction-based product that it is offering to its other customers. Obviously, ComEd is not acting in the interest of its customers in refusing to offer the fixed price product for 3 MW and over customers.

ComEd argues at page 106 of its Initial Brief that there are already RESs in Illinois offering service to the 3 MW and over customer group. In reply, IIEC notes that, to the extent this is true for ≥ 3 MW customers, it is also true for virtually all non-residential customers. To wit, although IIEC does not attest to the accuracy of his figures or claims, CES witness Dr. O'Connor suggests that a significant percentage of customers both above and below 1 MW have

already chosen delivery service. (See O'Connor Dir. CES Ex. 1.0 at 34:743-36:802; O'Connor CES Ex. 1.4). ComEd has indicated that it believes that current switching statistics associated with the 1-3 MW customers exceed levels that ComEd presented to support its request that ≥ 3 MW customers should be declared competitive. (See Stephens Reb. IIEC Ex. 4 at 4:103-5:106). Hence, ComEd proposes to deny a fixed price service to ≥ 3 MW customers with switching rates the Commission declined to find indicative of sufficiently competitive options in Docket No. 02-0479. At the same time, ComEd proposes to provide a fixed rate service to customers in the 1-3 MW category, even though switching statistics for these smaller customers suggest more non-utility choices by customers than was the case for the ≥ 3 MW customers. (Stephens Reb. IIEC Ex. 4 at 5:111-116).

ComEd's cavalier refusal to provide a service it admits it ought to be indifferent to providing (Clark Tr. 193-195) is based solely on the Commission's decision to allow ComEd's competitive declaration petition to go into effect by operation of law, despite the fact that the Commission did not find sufficient competition to grant ComEd's request -- a flimsy basis indeed.

If the availability of utility fixed price service in the post-2006 environment is going to hinge on the Commission's Interim Order in Docket No. 02-0479, which it should not, a review of said Order is warranted. By a vote of 3 to 2, the Commission entered an interim order that neither granted nor denied ComEd's petition in that case. (CES's statement to the contrary (CES Init. Br. at 27) should receive no weight in the Commission's deliberations). Specifically, the Commission found:

[C]ompetitive conditions in the ComEd service territory for Rate 6L customers 3 MW and greater exist in considerable degree; however, there are sufficient concerns about recent developments that cause the Commission to refrain at this time from either

granting or denying ComEd's petition; . . . In recognition of many of the intervenors' arguments concerning future possibilities that could lead to a decrease in competition for this particular customer segment the declaration will take effect by operation of law. (Interim Order, ICC Docket No. 02-0479 at 79).

Even the majority of Commissioners that approved the interim order was not persuaded by the evidence offered to support ComEd's claim that sufficient competition was available. In fact, the Commission initiated a proceeding to monitor developments in the marketplace for ≥ 3 MW customers. (Interim Order, ICC Docket No. 02-0479 at 80).

Moreover, in a strong dissenting opinion, one of the Commissioners who considered the same evidence, reached several illuminating conclusions. Among its key conclusions:

Staff and other parties correctly argue that the switching statistics relied on by ComEd are distorted because, incredibly, ComEd subsidizes its own competitors. The Majority chose to ignore the testimony of Staff and other parties that the subsidization of Retail Electric Suppliers ("RESs"), either in the form of direct supply of energy or direct cash support, is overwhelming evidence that reasonably comparable non-subsidized RES-supplied service is not available at a price comparable to Rate 6L service. The statistical evidence presented is suspect due to the presence of wholesale offers and subsidies provided by ComEd and/or its affiliated generating company. It is disingenuous at best to claim that even a semblance of a competitive market exists when ComEd itself is propping up its own competitors.

(Commonwealth Edison Company, ICC Docket No. 02-0479, Dissenting Op. Comm. Kretchmer, November 27, 2002 at 1-5).

As suggested in its interim order, the Commission subsequently opened Docket No. 03-0056 to collect information from ComEd and RESs and to monitor the ongoing development of the retail marketplace for ≥ 3 MW customers.

Clearly, the Commission was not convinced that the market was competitive at the time of its split-decision interim order in 2002, nor has the ongoing market monitoring docket provided any conclusive indication of an improvement in circumstances.

ComEd quotes CES witness Dr. O'Connor's claim that offering a fixed price service to customers 3 MW and larger "would have the practical effect of rescinding the competitive declaration . . ." (ComEd Init. Br. at 107).⁷ IIEC does not agree. ComEd's provision of a fixed price option to customers 3 MW and larger, whether on its own initiative or by Commission directive, does not constitute a rescission of a Commission Order that did not affirmatively grant or deny ComEd's petition to declare Rate 6L competitive. Indeed, IIEC considers that order to have little relevance in a post-2006 environment. Section 16-113 of the Act, which contains the provisions under which ComEd sought to declare Rate 6L service to customers 3 MW and over competitive, was enacted to allow Illinois utilities to effectively compete with alternative providers for the retention of customers. (220 ILCS 5/16-113). ComEd's current proposed application of that provision turns the intent on its head. ComEd, having chosen to become an Integrated Distribution Company barred from active competition, no longer needs the flexibility to compete for customer load provided in Section 16-113. (*See* 83 Ill. Adm. Code Part 452). ComEd's need for a competitive declaration has passed. Plus, the market-based, auction-priced service proposed in this case is not regulated Rate 6L service in the first place. (Stephens Dir. IIEC Ex. 1 at 12:265-281). Unless ComEd is functioning as something other than a wires-only company, it should be willing to offer an auction-based fixed price service to these customers.

If the Commission believes the 2002 decision bars conditioning any approval in this case upon ComEd providing this service to >3 MW customers, then the Commission should simply reopen that docket to deny the petition to declare Rate 6L competitive that was neither granted nor denied in the first instance.

⁷ IIEC notes that in ComEd's Proposed Order, at page 99, ComEd incorrectly attributes Dr. O'Connor's statement to ". . . IIEC's own witness." Dr. O'Connor clearly is not an IIEC witness in this case.

The Commission also should be concerned about the precedent it could be setting by allowing ComEd to abandon the offering of all fixed price service to a group of customers merely because of a competitive declaration as to one service for that group. ComEd has indicated that its switching statistics in the 1-3 MW customer range are greater than what it used to try to justify the competitive declaration for the ≥ 3 MW customers. (*See* Stephens Reb. IIEC Ex. 4 at 4:103-5:106). In addition, CES argues that switching among 400 kW to 1 MW customers is greater than the 1-3 MW customer group. (CES Init. Br. at 24). If ComEd seeks competitive declarations for customers all the way down to 400 kW, the number of customers without a fixed price option could balloon to tens of thousands. This obviously is not a desirable outcome for the citizens and businesses of Illinois.

The final reply to this section of ComEd's Initial Brief relates to ComEd's erroneous assertion that hourly energy purchases are not a disfavored option compared to a fixed price alternative. (ComEd Init. Br. at 107). It is hard to see how the hourly price could be anything other than "disfavored." ComEd witness Mr. Crumrine admitted hourly customers would be exposed to a more volatile price and greater risk. (Crumrine Tr. 768-769). The Locational Marginal Pricing in the ComEd zone had prices of over \$100 per MWh for over 100 hours in the last year. (Domagalski/Spilky Dir. CES Ex. 3.0 at 23:504-505). IIEC witness Mr. Stephens, DOE witness Mr. Swan, and BOMA panel witnesses Mr. Brookover and Mr. Childress (all of whom represent consumers) explained that customers prefer service with a stable price. (Stephens Dir. IIEC Ex. 1 at 18:396-402; Swan Dir. DOE Ex. 1.0 at 6:121-131; Brookover & Childress Dir. BOMA Ex. 2.0 at 6:126-129). Staff witness Dr. Schlaf also suggested customers prefer a stable price. (Schlaf Reb. Staff Ex. 13.0 at 17:414-18:449). Further IIEC witness Mr. Stephens provided evidence showing that out of the thousands of customers currently eligible for

hourly energy priced service, only nine elected the service. If this does not demonstrate that hourly service is a disfavored option compared to a fixed price service, then ComEd has an odd definition of the word “disfavored.”⁸

Reply to CES

CES’s self-serving comments on this issue should be given little weight by the Commission. However, their protest to ComEd offering service to ≥ 3 MW customers is telling. If the market were as developed as fully as CES would have the Commission believe and if fixed price products were as readily available in the market, then a fixed price service from ComEd would not be an issue for CES members or any other retail suppliers. Individual retail contracts with customers, customized to their needs with a price based on individual customer loads, have a natural advantage over an auction-based product priced to include premiums that account for numerous uncertainty risks. (Stephens Dir. IIEC Ex. 1 at 16:361-17:381).

A desirable outcome of the transition to competition would be that customers have no need to rely on, and thus no desire for, a fixed price option from the utility. However, the market is not there yet. As explained by IIEC witness Mr. Stephens and ComEd witness Dr. LaCasse, the existence of auction-based product will provide a needed discipline to the limited retail market and thereby promote a more effective version of retail competition. (Stephens Reb. IIEC Ex. 4 at 8:181-196, quoting Dr. LaCasse’s response to data requests).

⁸ ComEd’s citation to IIEC witness Mr. Stephens’ acknowledgement that an hourly product could be less costly than an annual product is incomplete and inconsequential. An examination of the transcript reveals that Mr. Stephens qualified this possibility as depending on how the market moves subsequent to the establishment of the fixed price. (See Stephens Jt. Tr. 90, emphasis added). The negligible use of Rate HEP demonstrates customers’ distaste for volatile hourly products that are vulnerable to such market movement.

Even in the more developed competitive retail markets in New Jersey and Maryland (as indicated by the larger number of retail suppliers in those territories), a fixed priced option was available to large customers in the initial auctions. (O'Connor Jt. Tr. 225-226). Yet, both CES and ComEd propose to deny customers such an option in Illinois, despite the legally constrained retail supplier market.

CES mistakenly relies upon the Commission's Order of March 23, 2003 in Docket No. 02-0479. (CES Init. Br. at 27). The Commission's March 28, 2003 Order did not even address the availability of comparable and alternative energy service products in the market. Rather, this Order simply addressed whether the proposed amendments to Rate HEP are just and reasonable. (See Order March 28, 2003, Docket No. 02-0479 at 9). Further, as IIEC discussed above in its reply to ComEd in this Section V.I.3., as a result of the Commission's concerns about the competitive nature of the market, it allowed ComEd's declaration of Rate 6L as competitive to take effect by operation of law, neither granting nor denying the petition.

As IIEC explained in its Initial Brief, the Legislature intended for the benefits of the wholesale and retail market to benefit all Illinois consumers. Proposals by CES and ComEd to deny ≥ 3 MW customers access to benefits potentially available from the wholesale market should be rejected.

4. Demand Charge Component for ≥ 1 MW Customers

IIEC recommended in its Initial Brief that the energy price resulting from the CPP-A auction be modified to isolate a demand component, which can then be charged on a per kW basis, with the remainder of the auction price being charged on an energy basis. This recommendation was based on the fact that energy-only prices, by themselves, would not fully

recognize the benefits of load factor in overall customer cost. (*See* IIEC Init. Br. at 50). Capacity values for use in this exercise will be readily available through either the separate capacity auction ComEd proposes to use in conjunction with its hourly priced product (associated with the CPP-H segment), or through the use of the PJM capacity market, once it is sufficiently developed and approved. (*Id.*). Although this is IIEC's recommended approach, IIEC witness Mr. Stephens testified that IIEC would be willing to consider alternative proposals. (Stephens Dir. IIEC Ex. 1 at 23:520-521).

No parties opposed the IIEC recommendation, either in testimony or in their initial briefs. The singular reference to this issue in any other parties' post-hearing documents is a short reference in ComEd's Proposed Order in this case. In its Proposed Order, ComEd addresses this issue for the first time, recommending that the Commission decline to adopt IIEC's proposal "in view of the lack of specificity and the absence of support from other parties." (*See* ComEd Proposed Order at 101). Obviously, absence of support from other parties is not a basis for the Commission to accept or reject a recommendation. Moreover, even ComEd would not wish to be held to this standard for Commission approval, since under it virtually every aspect of ComEd's proposal that was not specifically addressed and supported by other parties in this case should be rejected.

With regard to ComEd's suggestion for rejection due to lack of specificity, IIEC respectfully suggests that ComEd more properly should have raised this criticism in the evidentiary phase of the case, along with an alternate recommendation, in order that the issue could be more thoroughly examined in rebuttal and surrebuttal testimonies. The Commission's decision on this issue should not be thwarted by ComEd's prior reluctance to engage in any

discussion of the issue. The Commission should conclude, based on the evidence, that the IIEC recommendation is reasonable and should be adopted.

J. Continuation of CPP-H Auction

IIEC recommended the Commission require ComEd to implement and maintain its proposed CPP-H Auction until such time as (a) the PJM-RPM centralized capacity market is operational and (b) ComEd demonstrates to the Commission that procurement through the RPM centralized capacity market is reasonable and would provide the least cost means of acquiring capacity for CPP-H customers (versus other available options for meeting the PJM-RPM capacity requirements). ComEd and Staff appear to be the only parties addressing the IIEC proposal. Staff supports IIEC's recommendation. (Staff Init. Br. at 108). ComEd, on the other hand, appears to oppose IIEC's recommendation. But, it is clear that ComEd misconstrues IIEC's recommendation.

Specifically, ComEd argues that the Commission need not accept IIEC's recommendation because ComEd does not intend to discontinue the CPP-H auction until the PJM-RPM capacity market is in operation. (ComEd Init. Br. at 107-108). ComEd apparently believes that this assurance meets IIEC's objection. If so, ComEd has missed the point. It is IIEC's recommendation that ComEd also be required to demonstrate that the PJM-RPM centralized capacity market will be a reasonable, least cost, replacement for the CPP-H capacity auction before ComEd is permitted to discontinue that auction.

However, instead of presenting its principal arguments in its Initial Brief, ComEd has presented an additional rationale for rejecting IIEC's position in its Proposed Order alone. There, it suggests that once FERC has determined that the PJM-RPM centralized capacity market

is just and reasonable, the Commission would be required to find that it is just and reasonable as well. (ComEd Proposed Order at 40).

Again, ComEd misses the point. The issue is not whether FERC approved the terms of the tariff establishing the PJM-RPM centralized capacity market or whether those terms of the FERC tariff are just and reasonable, but whether that market or the CPP-H auction will provide ComEd CPP-H customers with the most reasonable and least cost source of capacity to meet PJM-RPM requirements. Clearly, under the Pike County Doctrine, the Commission is permitted to determine whether the CPP-H auction or the PJM-RPM centralized capacity market will provide the most reasonable and least cost source of capacity for CPP-H customers under PJM-RPM requirements. (*See* IIEC Init. Br. at 52-57).

Under the Pike County doctrine, the Commission is free to determine whether or not the choices made by ComEd in acquiring capacity for the CPP-H customers were prudently and reasonably made. For example, if the choice is between acquiring capacity in the PJM-RPM capacity market at a price determined just and reasonable by the FERC or at a price established by bilateral contract also at a price determined just and reasonable by the FERC, the Commission has the right to determine whether the utility acted prudently in acquiring the capacity pursuant to the centralized market.

ComEd does not deny, indeed cannot deny, the Commission's authority under the Pike County doctrine. The Commission should not surrender its authority to determine whether the CPP-H auction or the centralized PJM-RPM capacity market will produce the most reasonable and least cost source of capacity for CPP-H customers, if and when the PJM-RPM centralized market is actually implemented and ComEd has the option to acquire capacity to meet the PJM-RPM requirements by other means.

L. Regulatory Oversight and Review

4. Formal Proceeding(s) to Consider Process

IIEC recommended the Commission initiate a formal review process, to be conducted on an annual basis, after each auction. The purpose of the review process would be to evaluate the fundamental structure of the auction and to determine whether the auction continues to be the appropriate means for power procurement for ComEd. (IIEC Init. Br. at 59-60). ComEd opposes IIEC's recommendation and instead recommends an informal workshop be conducted annually and that a formal review be conducted every three years. (ComEd Init. Br. at 114). Staff does not object to the ComEd approach. (Staff Init. Br. at 117).

There appear to be two fundamental differences between the IIEC approach and the ComEd approach. First, ComEd proposes a formal review every three years. IIEC proposes a formal review every year. Second, while it is not absolutely clear, there appears to be some difference between ComEd and IIEC on the scope of the formal review process.

With regard to the timing of the formal review process, IIEC notes that the ComEd proposal is inconsistent with the New Jersey approach. New Jersey is the state with the greatest auction experience and the state with the greatest comfort in the auction process. (McNeil Tr. 598-599). However, New Jersey conducts an annual review of the auction process in which it considers annually whether the process should be continued. (*Id.*, 599-600). It is difficult to understand why ComEd and Staff wish to forego such a review in Illinois, a state with no auction experience and no empirical basis for comfort in the auction. Illinois customers should be entitled to safeguards at least equal to the protections available to their New Jersey counterparts. They should be entitled to participate in an annual formal review process.

The ComEd proposal contemplates a workshop on an annual basis. A workshop and a formal review process are not one and the same. There are significant differences in the tools available to participants in a workshop and a formal proceeding, such as access to discovery. (McNeil Tr. 602). Also, a formal process assures consumers that the Commission actually will timely assess all relevant developments. However, there is nothing to prevent the Commission from incorporating a workshop into the IIEC formal review process on an annual basis.

ComEd's three-year formal review process also appears to be deficient in scope. That is, the proposal made by ComEd does not appear to contemplate the Commission's consideration of the appropriateness of the auction process on a going-forward basis. Specifically, ComEd's formal review process limits the Commission's determination to whether the results of the three prior auctions were within a reasonable expected range of outcome, given prevailing market conditions at the time of the auction, and taking into account all of the supply costs and risks that were borne by the suppliers in the auction. (McNeil Reb. ComEd Ex. 10.0 Rev. at 34:716-35:748). Limiting the formal review process to determining whether the auctions have produced results that fall within the range of reasonably expected outcomes, imposes an unnecessary and unwarranted boundary on the scope of the Commission's review. In the formal review process, IIEC proposes that the Commission should determine whether the auction process continues to be appropriate for the acquisition of power supply by ComEd on a going-forward basis. The Commission should not limit itself or the parties by agreeing to ComEd's apparent attempts to bind the Commission and Illinois consumers irrevocably to its auction process, even if change or discontinuation is needed.

Both ComEd and Staff argue that parties would be free to initiate their own proceedings by filing a complaint or petition with the Commission. However, neither ComEd nor Staff

explain how the parties would gain access to information they would need to support such a complaint or petition in the first instance. As explained in IIEC's Initial Brief, under such circumstances, a complaining or petitioning party would have the burden of proof. (IIEC Init. Br. at 62). Without access to such information, parties would have a difficult time persuading the Commission to initiate proceedings and meeting their burden of proof. A petition or a complaint to open an auction investigation is not a realistic remedy for the customers required to pay -- without prior review or subsequent remedy -- the power supply costs incurred by ComEd, which could be as much as the \$2.6 billion ComEd spent on power supply in 2004. (*See* Clark Tr. 122-126; BOMA Cross Ex. 1).

New Jersey, the state with the most auction experience, continues to believe that annual formal reviews are necessary elements of the auction process, based on its experience with the auction to date. Illinois, a state with no auction experience whatsoever, should do no less. If the Commission does not wish to provide Illinois customers with the same protections as New Jersey customers it could, as a compromise, direct formal annual reviews be conducted after each of the first two auctions and every two years thereafter, instead of every three years as proposed by ComEd.

VII.

TARIFF AND RATE DESIGN ISSUES

B. Matters Concerning Rider CPP

4. Rider CPP – Retail Customer Switching Rules

a. Enrollment Window

i. Duration of Window

ComEd originally proposed, and IIEC supported, a 30-day enrollment window for CPP-A auction products. (ComEd Init. Br. at 131; IIEC Init. Br. at 64). Staff also supported the 30-day window in its direct and rebuttal testimony. (*See* Staff Init. Br. at 153; Schlaf Reb. Staff Ex. 13.0 at 7:156-158). CES and BOMA proposed a 75-day enrollment window. (CES Init. Br. at 31).⁹ Dynegy opposes a lengthy enrollment window because it will ultimately translate into higher prices to utility customers. (Dynegy Init. Br. at 19). CCG observes that the duration of the window could impact price. (CCG Init. Br. at 19).

IIEC continues to support the 30-day enrollment window. A longer window will mean that suppliers will add a premium to their bid price to cover the cost of the additional risk associated with holding their prices open for longer periods of time. (Stephens Dir. IIEC Ex. 1 at 17:376-378; Stephens Jt. Tr. 59). DOE also supports the 30-day window. (DOE Init. Br. at 13-14).

⁹ BOMA did not address this issue in its Initial Brief.

However, “[f]ollowing discussions with other parties who expressed views about the appropriate length of the enrollment window . . .”, ComEd now proposes a 50-day window for the first auction and a 45-day window for all subsequent auctions.¹⁰ (ComEd Init. Br. at 132).

ComEd’s decision will cause potential bidders in the auction to add an additional risk premium to their bid and thereby raise the auction clearing price to the benefit of the RESs and low-cost bidders in the auction, which may include ComEd’s own generating affiliate. On the other hand, ComEd’s decision will be detrimental to customers, who will, by definition, pay a higher price for power that ComEd acquires for them in the auction. As ComEd witness Mr. McNeil testified:

. . . suppliers will require greater compensation (i.e. price premiums) for the costs associated with their risks if the rate is held open over a longer time period, . . .”

(McNeil Reb. ComEd Ex. 10.0 Rev. at 54:1180-1182).

In addition, ComEd’s proposal to extend the enrollment period ignores the empirical analysis performed by Staff witness Dr. Schlaf, which demonstrated the impact of increasing the enrollment window on auction prices. (Schlaf Reb. Staff Ex. 13.0 at 5:129-6:151). The total risk premium for the 75-day window would be over 5% (3.5% for 30 days and 1.8% for the additional 45 days). (See Staff Init. Br. at 152).

CES naturally supports ComEd’s proposal to increase prices to retail customers (because it gives retail suppliers more headroom), arguing that the premium associated with holding the CPP-A auction price open is “merely theoretical.” (CES Init. Br. at 33). Ironically, CES relies in large part on the testimony of its witness Dr. O’Connor, Vice-President for the Illinois Market for Constellation NewEnergy. (CES Init. Br. at 34; O’Connor Dir. CES Ex. 1.0 at 1:4-6). CES

¹⁰ ComEd did not discuss the 50/45-day window with all parties that expressed views on this subject. ComEd spoke only with retail electric suppliers. It certainly did not speak with IIEC and apparently did not speak with DOE. (See ComEd Init. Br. at 133).

conveniently ignores the testimony of Michael Smith, Vice President of Regulatory and Legislative Affairs for another Constellation company, Constellation Energy Commodities Group, Inc., Mr. Smith testified that it was likely that suppliers would price an auction premium into their bid to account for the optionality associated with the period of time the customer would have to choose to take CPP-A service. (Smith Dir. CCG Ex. 1.0 at 1:8-12 and 3:84-89). Another potential supplier, Dynegy, also testified that the more risk and uncertainty suppliers are required to accept, the higher the auction clearing prices will be, and that time-related uncertainty is one of the reasons prices are not kept open by suppliers for extended periods of time. (Huddleston Jt. Tr. 1041-1042).

Therefore, the premium for holding open the price for the CPP-A product is hardly theoretical. Indeed, Dr. O'Connor himself had to agree that his own company, as a standard rule, would not hold open prices for the 75 days recommended by CES. (O'Connor Jt. Tr. 209-210). CES cannot now credibly argue that the premium for holding open the CPP-A price is "merely theoretical." If it were, then Mr. Smith and Mr. Huddleston would not have testified otherwise, and Dr. O'Connor's company would routinely hold its prices open for extended periods of time.

CES next reasoned that customers require more time to decide on taking the CPP-A product and that giving these customers additional time is worth the additional premium (price increase) customers would pay. (CES Init. Br. at 31). However, CES does not speak for larger customers who have stated they do not require additional time and prefer not to pay the additional premium. (IIEC Init. Br. at 64-67; DOE Init. Br. at 13-14). In addition, the Commission should remember that CES is a coalition of retail electric suppliers who will not pay the premium (but rather will benefit from it). Therefore, they have nothing to lose by suggesting

customers would rather pay the premium in return for more time to make their decision about the CPP-A product.

Staff, in its Initial Brief, continues to express concern about the expansion of the enrollment window. Staff notes it originally supported the 30-day window proposed by ComEd. (Staff Init. Br. at 150). However, Staff in spite of its cogent and persuasive arguments and empirical analysis, now recommends an increase in the enrollment window. While Staff would not support a window in excess of 45 days, it would accept as a compromise a 40 to 45-day enrollment window and recommends that ComEd be required to study the appropriate duration of the enrollment window and report to Staff and the parties on the results of its analysis. (Staff Init. Br. at 148-149). IIEC respectfully disagrees with Staff's suggestion. The record here clearly demonstrates, and the testimony of at least two suppliers (Dynergy and CCG) supports, the fact that the market clearing price in the auction will be higher than it would have otherwise been as a result of extending the enrollment window. At least two customer groups (IIEC and DOE) have clearly stated they do not require the additional time and would prefer not to pay the premium. Therefore, while IIEC disagrees with Staff's recommendation, if Staff's approach is adopted, the expanded enrollment window should apply only to smaller customers (1 MW or less). If IIEC's recommendation for a separate auction segment for customers 3 MW and over is adopted (*see* IIEC Init. Br. at 45-47), the 30-day window should be applied to this segment.

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

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

- Bill self-generating customers taking hourly pricing service for capacity on a per kW-day basis on those days energy is actually taken from ComEd; or

- Adjust self-generating customer capacity charges through a rate translation process to reflect the low likelihood that all such customers will experience generation outages at the same time, at the time of system peak, or both, and their ability to commit to performing generation maintenance during off-peak periods of the year.

Of these recommendations, IIEC prefers the first approach. Under the first approach, self-generation customers appropriately only pay for capacity on the days they draw energy from the utility. Moreover, this first approach is consistent with the approach proposed by the Ameren Operating Companies in Docket Nos. 05-0160, 05-0161 and 05-0162 for the hourly pricing customers of the Ameren Operating Companies. (*See* IIEC Init. Br. at 69-71).

ComEd was the only party that responded to the IIEC proposal. ComEd recommends the Commission reject both the primary and alternate recommendations of IIEC. ComEd argues there are numerous flaws in the IIEC proposal including a reliance on mistaken interpretations and assumptions. It argues that ComEd's approach is consistent with the determination of capacity obligations for ComEd's bundled service customers under PJM requirements. It argues that IIEC ignored the possibility that the impact of any single outage during one of the five peak summer hours in PJM would be mitigated by good performance during the other four peak summer hours. It alleges IIEC's proposal is a self-insurance scheme that would be imposed on hourly pricing customers by Commission fiat. (ComEd Init. Br. at 163-164).

IIEC has not relied on mistaken interpretations and assumptions. IIEC witness Mr. Dauphinais in his rebuttal testimony made it clear that ComEd's clarifications in rebuttal testimony did not fully address the unjustness and unreasonableness of applying a customer's load established during the previous summer as its billing units under ComEd's proposed Rider CPP per kW-month charge. (Dauphinais Reb. IIEC Ex. 5 at 9:201-10:207). Moreover, IIEC has not neglected the potential effect of using five of the summer peak hours of the previous summer

rather than just a single hour. Specifically, in response to a question by Judge Wallace during cross-examination, Mr. Dauphinais indicated:

- A. My concern is that the company's proposal, ComEd's proposal, basically exposes self-generation customers to exorbitant capacity charges if they have the misfortune of having a forced outage during one of the five hours that are used to determine the capacity responsibilities within PJM. That doesn't reflect requirements of PURPA to consider that as a very little likelihood of a simultaneous outage of all these self-generators. (Dauphinais Jt. Tr. 136).

Mr. Dauphinais also indicated:

- A. All generators, including self-generators, have some degree of forced outage rate. The rate is usually fairly low for self-generation historically. Self-generation facilities are very reliable. But they do experience outages. But the idea is -- the concern that they are not going to be exposed to them simultaneously and have the misfortune of just having to be in one of those five hours out of the 8,760 in one year and create a capacity responsibility that is significant for the following year is unreasonable. (Dauphinais Jt. Tr. 136-137).

Mr. Dauphinais has clearly considered any possible mitigating effect of the other four peak summer hours in his conclusions. More important, as Mr. Dauphinais pointed out, ComEd has ignored FERC requirements for those self-generation customers that are designated as Qualifying Facilities under the Public Utilities Regulatory Policies Act of 1978 (PURPA) in regard to sales of backup power or maintenance power. FERC regulations related to PURPA require that for Qualifying Facilities:

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

- (1) Shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, or during the system peak, or both; and

- (2) Shall take into account the extent to which scheduled outages of qualifying facilities can be usefully coordinated with scheduled outages of the utility's facilities.

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

ComEd has ignored the requirement that its rates conform to these FERC regulations. ComEd's witness Mr. Crumrine admitted that self-generation customers' demand charge under ComEd's proposal would not be based on the calculation of probability of that self-generation customer experiencing an outage during a particular period. (Crumrine Tr. 815). Because ComEd cannot explain its refusal to conform to PURPA requirements, it can only mischaracterize the IIEC proposal as a self-insurance scheme imposed by Commission fiat. (Alongi/Crumrine Sur. ComEd Ex. 21.0 at 15:326-17:371). Actually, the IIEC proposal is one that is consistent with federal law and regulation. ComEd should be required to adopt a per kW-day billing approach for demand for hourly pricing customers, including self-generation customers as Ameren has done in Docket No. 05-0160, et al. If the Commission chooses not to adopt that approach, the Commission should require ComEd to adjust self-generating customer capacity charges through a rate translation process to reflect the low likelihood that all such customers will experience generation outages at the same time, at the time of system peak, or both; and the ability of such customers to commit to performing generation maintenance during off-peak periods of the year.

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

IIEC made recommendations in regard to participation of: (a) ComEd's hourly pricing customers in PJM's Active Load Management (ALM) credit program; and (b) ComEd's 3 MW and larger fixed price customers in PJM's Emergency Load Response and Economic Load

Response Programs. Under a modified proposal that parallels ComEd's post-PJM-RPM proposal for hourly pricing service, IIEC proposed that ComEd simply procure all energy and ancillary services from PJM rather than from CPP-H suppliers for the portion of hourly pricing customer load that is covered by ALM capacity credits. IIEC also proposed allowing all 3 MW and larger customers taking fixed price service from ComEd to have an opportunity to participate directly in PJM's Emergency Load Response and Economic Load Response Programs through PJM members or a PJM curtailment service provider.

a. ALM Demand Response

ComEd was the only party that responded to IIEC's recommendations in regard to ALM Demand Response. ComEd opposes IIEC's modified proposal, arguing there is no need to introduce the complexity that such an approach would involve because ComEd's Rider CLR already assures that customers who participate in the PJM ALM program will receive full credit for doing so. Thus, ComEd argues, the modifications suggested by IIEC are unnecessary. (ComEd Init. Br. at 164).

ComEd has incorrectly characterized IIEC's proposal as adding greater complexity. In fact, IIEC's proposal brings simplicity. Specifically, IIEC's proposal eliminates ComEd's inefficient, unnecessary step of procuring (through the CPP-H auction) capacity for load covered by ALM capacity credits.

In addition, IIEC's ALM proposal is necessary. ComEd witness Mr. McNeil did not dispute that the cost of capacity under the CPP-H rate of ComEd's proposal for load covered by ALM capacity credits may or may not be equal to the dollar credit that is returned through Rider CLR for that load. (McNeil Tr. 592-593). Furthermore, Mr. McNeil testified he knows of no

way to quantify the difference between the Rider CLR dollar credit and the capacity costs included in the CPP-H price. (McNeil Tr. 593). IIEC's proposal would eliminate the possibility of such a difference occurring by avoiding in the first instance the purchase of superfluous capacity for hourly pricing customer load covered by ALM capacity credits. The Commission should require ComEd to modify its proposal to conform to IIEC's recommended modified approach for ALM Demand Response for hourly pricing customers.

b. Non-ALM Demand Response

No party in this proceeding has responded in opposition to IIEC's proposal for Non-ALM Demand Response in initial briefs or proposed orders. The Commission should adopt IIEC's recommendation that all 3 MW and larger customers taking fixed price service from ComEd be given the opportunity to participate in PJM's Emergency Load Response and Economic Load Response Programs directly through PJM members or PJM curtailment service providers. Allowing customers to directly participate in the PJM Economic Load Response Program would be consistent with the Commission's recent expression of interest in energy efficiency and demand response programs. (See ICC Resolution Docket No. 05-0437, Re: Governor's Sustainable Energy Plan, July 19, 2005).

X.

CONCLUSION

None of the parties opposing IIEC recommendations in this case have given any valid rationale for rejecting those recommendations. Therefore, for the reasons stated herein and in IIEC's Initial Brief, they should be adopted.

Respectfully submitted by the Illinois Industrial Energy Consumers,

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