

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

<b>Commonwealth Edison Company</b>	:	
	:	
<b>Proposal to implement a competitive</b>	:	<b>05-0159</b>
<b>procurement process by establishing</b>	:	
<b>Rider CPP, Rider PPO-MVM, Rider</b>	:	
<b>TR-CPP and revising Rider PPO-MI.</b>	:	
<b>(Tariffs filed February 25, 2005)</b>	:	
	:	

THE PEOPLE OF THE STATE OF ILLINOIS’  
EXCEPTIONS AND BRIEF ON EXCEPTIONS  
TO THE PROPOSED ORDER DATED DECEMBER 5, 2005  
and  
REQUEST FOR ORAL ARGUMENT

Susan L. Satter  
Susan Hedman  
Public Utilities Bureau  
Attorney General's Office  
100 West Randolph Street  
Chicago, Illinois 60601  
Telephone: (312) 814-1104/4947  
Fax: (312) 814-3212  
[ssatter@atg.state.il.us](mailto:ssatter@atg.state.il.us)  
[shedman@atg.state.il.us](mailto:shedman@atg.state.il.us)

December 19, 2005

<b>Introduction</b> .....	3
<b>Exceptions</b> .....	5
<b>1. The Commission Should Reject The Auction Proposal As Unnecessary And Require ComEd To Justify Changes In Its Bundled Rates By Filing A Rate Case Under Parts 285-287 Of The Commission’s Rules.</b> .....	5
PROPOSED LANGUAGE: .....	7
<b>2. The Proposed Order’s Use Of The Post-2006 Initiative Workshops Violates the Commission’s Promise That The Process Would Not Be Used In Subsequent Litigation And Will Discourage Participation In The Future</b> .....	8
PROPOSED LANGUAGE .....	11
<b>3. The Commission Should Reject the Auction Proposal As Unlawful Under the PUA.</b> ..	13
PROPOSED LANGUAGE .....	14
<b>4. The Commission Should Conclude That It Is Necessary To Conduct An Independent And Comprehensive Analysis Of The Illinois Regional Wholesale Market And The Regional Transmission System To Determine Whether Relying On The Wholesale Market To Determine Retail Prices Would Result Just And Reasonable Rates. The Commission Must Conduct Such A Study Before It Can Responsibly Approve A Tariff That Uses Wholesale Markets To Set Retail Prices.</b> .....	17
PROPOSED LANGUAGE: .....	18
<b>5. The Commission Should Examine Record Evidence Showing That Rates Have Increased More In Deregulated States Than In Regulated States And Should Find That It Is Not In The Public Interest To Expose Captive Customers In Illinois To The Risks Associated With Rates Set By The Market Rather Than Through The Regulatory Process.</b> .....	20
PROPOSED LANGUAGE .....	21
<b>6. The Commission Should Reject The Auction As Ill-Suited To Illinois Because The Clearing Price And Descending Clock Will Not Drive Down Prices And Result In Least Cost Service To Consumers.</b> .....	22
PROPOSED LANGUAGE .....	23
<b>7. The Commission Should Recognize That Alternatives To The ComEd Auction Present Greater Flexibility And Savings For Consumers And Should Not Be Foreclosed By Adoption Of An Auction.</b> .....	24
<b>A. Active Portfolio Management Provides Significant Consumer Protection By Insuring Flexibility And Limiting The Risks Inherent In Annual Procurements Of A Single, Full Requirements Product.</b> .....	24
PROPOSED LANGUAGE .....	26
<b>B. The Proposed Order Mistakenly Rejects The AG’s Insistence That ComEd Consider Affiliate Contracts In Its Efforts To Obtain Low-Cost Supply By Suggesting That ComEd Cannot Obtain Supply At A Price Lower Than “That Which Would Result From A Competitive Auction.”</b> .....	27
PROPOSED LANGUAGE .....	29
<b>8. The Ordering Paragraphs Should Be Changed To Reject The Auction Proposal, And Discussion Of The Details Of The Auction Proposal Should Be Deleted.</b> .....	31
PROPOSED LANGUAGE .....	31
<b>Request for Oral Argument</b> .....	33
<b>Conclusion</b> .....	34

## **Introduction**

The Commission should reject the Proposed Order's conclusion to approve the auction process proposed by Commonwealth Edison ("ComEd"). The People of the State of Illinois, by the Office of the Attorney General ("AG") urge the Commission to find:

1. There is no need to approve an auction or any other procurement process at this time. If ComEd believes its bundled rates are inadequate to cover its costs, it should request a rate increase and comply with Parts 285, 286 and 287 of the Commission's rules which specify the information necessary to justify a rate change. 83 Ill. Adm.Code Parts 285, 296, 287.
2. The auction is an unlawful attempt to require residential and small commercial customer to pay market rates for services that have not been declared competitive, and therefore violates section 16-103(c) of the Public Utilities Act.
3. The wholesale market from which ComEd will obtained electric supply is not sufficiently competitive to justify reliance on it to produce fair, just, reasonable and least cost rates for consumers. AG Ex. 1.0 and 5.0.
4. The auction proposed by ComEd will unnecessarily increase electricity prices paid by consumers, and the Proposed Order must be rewritten to incorporate the substantial evidence in the record showing that:

- a. Because generation costs vary among suppliers and types of generation (is asymmetrical), a declining price auction will result in a windfall to local, low-cost generators at the expense of consumers. AG Ex. 4.0.
- b. Evidence submitted by the Office of the Attorney General demonstrated, without dispute, that in 2004 Exelon Generation reported a 20.6% return on common equity, while charging ComEd an average price of 3.16¢/kwh. The average PJM “market” price during this same period was 4.4¢/kwh. Had Exelon Generation based its price to ComEd on this “competitive” or “market” price, and Exelon Generation was still providing service under a full requirements contract with ComEd, it would have received a return on common equity of about 40%, all else equal. AG Ex. 3.0. The 2004 market prices, and the current PJM spot prices, are not driving prices to cost, given the extraordinary returns that would result if electricity prices are constrained primarily by PJM spot prices.
- c. The proposal would have ComEd give up all influence it may have as a buyer of a substantial amount of electricity in Illinois, and in PJM (representing 14% of PJM’s capacity<sup>1</sup>) and would give up ComEd’s ability to minimize prices to consumers by actively managing its portfolio, including seeking to obtain low cost power from its affiliate Exelon Generation. See AG Initial Brief at 76-79.

---

<sup>1</sup> ComEd can be expected to purchase 18,500 megawatts, or 81,000 gigawatthours of supply in the first auction. AG Ex. 2.0 at 8.

The AG urges the Commission to reject the Proposed Order's conclusion to approve ComEd's auction proposal, and to conclude instead that the Commission lacks the authority to approve a variable, market-based rate for ComEd's 3 million customers whose service has not been declared competitive under section 16-103(c) of the PUA. 220 ILCS 5/16-103(c). In the alternative and in addition, the Commission should find that the market from which ComEd would purchase electricity is not sufficiently competitive to produce fair, just and reasonable prices for consumers and that the auction as proposed would unnecessarily and unfairly raise prices for Illinois consumers through the use of a descending clock, clearing price format.

### Exceptions

#### **1. The Commission Should Reject The Auction Proposal As Unnecessary And Require ComEd To Justify Changes In Its Bundled Rates By Filing A Rate Case Under Parts 285-287 Of The Commission's Rules.**

The Proposed Order concludes that "it has to act upon the tariffs filed by ComEd." Proposed Order at 9. However, the Proposed Order does not explain why. The Electric Service Customer Choice and Rate Relief Law of 1997 (the 1997 Amendments) retained all of the PUA's longstanding consumer protections for electric service customers who take service that has not been declared competitive pursuant to Section 16-113 of the Act. 220 ILCS 5/16-113, 16-101(a), 16-103. See Initial Brief of the People of the State of Illinois at 2-4. Accordingly, rates cannot be changed unless the appropriate filing is made under Commission rules, demonstrating that costs have increased and require a change in rates.

The only evidence about the need for a change in bundled rates was presented by AG witness David Effron. AG Ex. 3.0. He demonstrated that ComEd's return on equity

averaged 11.95% over the last six years (the transition period), and that Exelon Generation, which provides all of ComEd's electricity (either through its own generation or by purchased power) reported a 20.6% return on equity in 2004, with an average electricity price of \$31.61 per MegaWattHour. AG Ex. 3.0 at 9, 6. Further, ComEd reported recovering \$950 million more in non-delivery revenues than it paid Exelon Generation for non-delivery (i.e. generation) services. BOMA Cross Ex. 1, Sch. A5, page 2 of 2; Tr. Aug. 29, 2005 at 124-126. Until ComEd can show that its costs exceed its revenues, the Commission should not entertain a change in ComEd's rates, or approve a procurement process that would set rates in an auction and pass-through price changes to consumers without regulatory justification.

ComEd does not currently have a uniform fuel adjustment clause (UFAC), which would enable it to modify the cost of purchased power on a monthly basis, subject to annual prudence reviews. See 220 ILCS 5/9-220. Instead, it has a bundled rate which can only be changed under section 9-201 of the PUA in compliance with the Commission's rate case rules. See 83 Ill.Adm.Code Parts 285, 286, 287.<sup>2</sup> Therefore, the Commission lacks authority to change the purchased power component of ComEd's bundled rate, and there is no need to act on a procurement proposal.

ComEd has been responsible for obtaining electricity for its non-competitive, bundled service customers since the 1997 Amendments and its transfer of its generation facilities. 220 ILCS 5/16-103(a). The law does not require that its procurement methods be changed at the end of the mandatory transition period, and the Commission is under no

---

<sup>2</sup> PART 285 - Standard Information Requirements For Public Utilities And Telecommunications Carriers In Filing For An Increase In Rates; Part 286 - Submission Of Rate Case Testimony; Part 287 - Rate Case Test Year.

obligation to approve a new and costly procurement process because the rate cap imposed as part of the transition period will expire.

PROPOSED LANGUAGE:

The AG proposes the following changes<sup>3</sup> to the Proposed Order at page 9. If the change below is made, the other parts of the Proposed Order can be eliminated, because the tariff filed by ComEd would be rejected, as addressed in Exception 8 below.

II. Need for Commission Action

The parties devoted some thought to the need for Commission action concerning the filed tariffs. ComEd insisted that because it owns no generating assets of its own, it must purchase the power and energy necessary to serve its customers at wholesale. ComEd notes that it currently handle this purchasing through a contract which will expire at the end of 2006 and ComEd will thereafter need to purchase power and energy in the wholesale market.

ComEd, in additional to other parties such as the Coalition of Energy Suppliers and MidWest Generation urge the Commission to approve tariffs embodying a procurement methodology that both secures reliable supply and results in reasonable and stable retail prices in the post-transition period in accordance with the intent of the Illinois Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILCS 5/16-101 et seq. (the "1997 Law" or the "1997 Restructuring Law"). To meet that requirement, ComEd has filed tariffs embodying the competitive procurement auction.

The AG asserts that the only action that the Commission needs to take in connection with this docket is to permanently suspend the tariffs ComEd has filed. According to the AG the Commission does not need to approve ComEd's proposal. Moreover, the AG argues that the Commission need not and should not pre-approve any other method of procuring electricity for 2007 and beyond. In its Exceptions, the AG added that the return on common equity reported by ComEd over the past few years and the 20.6% return on common equity reported by Exelon Generation show that current bundled rates currently provide sufficient revenues to cover both delivery and electricity.

The AG argues that the Commission must also continue to regulate rates pursuant to 220 ILCS 5/ 9-101 and 9-201, and continue to enforce the other

---

<sup>3</sup> Changes will be shown in the traditional style, with new language underlined and deleted language ~~struck out~~.

consumer protection provisions in the PUA. The AG points out that if ComEd believes that its bundled rates are not sufficient to cover the costs of electricity and delivery, it can file a rate case under the Commission's rules to justify a change.

The Commission concludes that ComEd has failed to show that a change in rates is necessary, or that the Commission is legally obligated ~~it has~~ to act upon the tariffs filed by ComEd. Accordingly, the tariffs filed by ComEd are permanently annulled, and current bundled rates will remain in effect until ComEd requests a change in its bundled rates, and that action is set forth in the following sections of this order

2. **The Proposed Order's Use Of The Post-2006 Initiative Workshops Violates the Commission's Promise That The Process Would Not Be Used In Subsequent Litigation And Will Discourage Participation In The Future.**

The AG, along with the Citizens Utility Board, the Cook County State's Attorney and the Environmental Law and Policy Center, objected to the use of reports and other aspects of the Post 2006 Initiative process on the grounds that at the inception of the process, the Commission stated that no discussions from the workshops would be used in subsequent litigation. Specifically, the following promise was posted on the Commission's web site:

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

<http://www.icc.illinois.gov/ec/docs/040511ecPostPreamble.pdf>. Stakeholders – including utilities, consumer advocates and Staff - thus had assurances that statements they made would not be used for any purpose, either in support or opposition, in subsequent litigation.

The Preamble constitutes a promise to the parties to the workshop that their

discussions would not be used in subsequent litigation. Participants such as the AG relied on that promise, and the Commission is estopped from breaking that promise to parties' detriment. The Illinois Supreme Court has described equitable estoppel as follows:

An estoppel is an impediment or bar to the assertion of a right arising as a result of one's own actions. Byron Community Unit School No. 226 v. Dunham-Bush, Inc., 215 Ill.App.3d 343, 348, 158 Ill.Dec. 990, 574 N.E.2d 1383, 1387 (1991); Greer v. Carter Oil Co., 373 Ill. 168, 176-77, 25 N.E.2d 805, 809-10 (1940). The doctrine of estoppel is invoked to prevent fraud and injustice. Hickey v. Illinois Central R.R. Co., 35 Ill.2d 427, 449, 220 N.E.2d 415, 421 (1966). The test is whether under all the circumstances of the particular case, conscience and honest dealing require that the defendant be estopped. Byron, 215 Ill.App.3d at 348, 158 Ill.Dec. 990, 574 N.E.2d at 1387 citing Carey v. City of Rockford, 134 Ill.App.3d 217, 218, 89 Ill.Dec. 278, 480 N.E.2d 164, 165 (1985). Estoppel arises when a party, by his words or conduct, intentionally or through culpable negligence, induces reasonable reliance by another on his representations and thus leads the other, as a result of that reliance, to change his position to his injury. Byron, 215 Ill.App.3d at 348, 158 Ill.Dec. 990, 574 N.E.2d at 1387; Payne v. Mill Race Inn, 152 Ill.App.3d 269, 277, 105 Ill.Dec. 324, 504 N.E.2d 193, 199 (1987); Gary-Wheaton Bank v. Meyer, 130 Ill.App.3d 87, 95-96, 85 Ill.Dec. 180, 473 N.E.2d 548, 554 (1984). While an intent to mislead is not necessary, the reliance by the other party must be reasonable. Byron, 215 Ill.App.3d at 348, 158 Ill.Dec. 990, 574 N.E.2d at 1387.

Schwinder v. Austin Bank of Chicago, 348 Ill.App.3d 461, 472, 809 N.E.2d 180, 191-192, 284 Ill.Dec. 58, 69-70 (2003). Further, estoppel can be asserted against a public body such as the Commission when:

"some positive acts by [State] officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit [that party] to stultify itself by retracting what its officers had previously done. (Hickey v. Illinois Central R.R. Co. (1966), 35 Ill.2d 427, 448-49, 220 N.E.2d 415.) The doctrine is invoked only to prevent fraud and injustice. "

Bradley v. Department of Employment Security, 146 Ill.2d 61, 81, 585 N.E.2d 123, 65 Ill.Dec. 727 (2003) (internal quotation marks and cite omitted).

Based on the Commission's and the participants' representations and promises that nothing in the Post 2006 Initiative would be used in subsequent litigation, stakeholders participated in the process to varying degrees. "Consensus" as represented by ComEd or in the various reports of the convenors, therefore, was dependent upon the presence of various stakeholders and was not understood to bind any participant or nonparticipant.

Despite the Commission's promise that workshop discussions would not be used in Commission litigation, ComEd witnesses repeatedly referred to reports stemming from the Post 2006 Initiative process and characterized parties who did not agree with the cited reports as recalcitrant or outside the consensus of the group. See, e.g., ComEd Ex. 9.0 at 26, lines 603-605 (question at 23, lines 533-534); ComEd Ex. 16.0 at 9-10, lines 192 – 223; ComEd Ex. 1.0 at 12, lines 275-281.

The Proposed Order accepts the parties' use of the Post-2006 Initiative discussions and suggests that it allowed all parties to question others' use of that material. See, e.g., Proposed Order at 47, 165-166, 239. This sends the wrong signal to parties appearing before the Commission. Instead of protecting the workshop process to encourage all parties to be open to education, discussion, and compromise, it allows parties with the most resources (ComEd witness Frank Clark said he would not be surprised if ComEd and Exelon representatives outnumbered all other parties at the last meeting where the "attributes" list was developed, Tr. Aug. 29, 2005 at 85) to bulldoze through a result they prefer, and then present it as if it was the result of considered compromise.

The Proposed Order would also allow parties to offer their view of workshop discussions, and then leave it to other participants to dispute their version, shifting the

hearing's focus from the issues to what one or another party claims were issues already resolved. Clearly, if an issue persists in a docket, it was not resolved, and it is unfair and a misuse of the workshop process to suggest that a dispute presented to the Commission was somehow already resolved by the parties in informal discussions. Many considerations go into the "appearance" of consensus at workshops: at times it is clear that further discussion will not change other parties' positions. Does that mean that consensus has been reached, or that impasse has been reached?

The Commission is estopped from relying on or citing the Post 2006 Initiative reports and discussions in the Order in this docket. The use of the Post 2006 Initiative workshop process to build the appearance of momentum and consensus violates the Commission's promise to the participants to shield workshop discussions from use in subsequent litigation, and represents a dangerous manipulation of the workshop process to advantage one party. Unless parties can freely negotiate and argue their respective positions, and stop arguing when issues are at stalemate, without fear of being bound in subsequent litigation, the workshop process will cease to be useful as an informal tool to generate discussion, identify issues, and explore options.

To protect the workshop process, the Commission should expressly reject ComEd and other parties' attempts to interject the Post-2006 Initiative Reports and discussions into this proceeding.

#### PROPOSED LANGUAGE

The following changes should be made on page 47 of the Proposed Order.

D. References to Post-2006 Initiative References and Results

ComEd addresses references to post-2006 Initiative Reports and Results. As noted by ComEd, a motion to strike certain such references was denied.

The AG takes issue with references by ComEd and other parties to post-2006 Initiative reports and results. The AG believes such references are inappropriate and should be disregarded.

The AG argues that Initiative participants relied on the Commission's promise free and open discussion would be fostered by explicitly protecting Post 2006 Initiative discussion materials and reports from use in subsequent litigation. The AG asserts that preserving free and open discussion without fear of later misrepresentation is essential to the workshop process as used by the Commission.

The AG contends that ComEd's use of the Post-2006 Initiative is repetitive, selective and unnecessary. The AG argues that even if properly admitted, testimony referring to the Post-2006 initiative should be given little or no weight because of the nature of the workshop process and assumptions made by participants.

Objections to certain references to or characterizations of the Post-2006 Initiative and reports were ruled upon during the course of this proceeding and are not before the Commission in this Order.

The Commission believes the Post-2006 Initiative was an innovative and inclusive process that provided a valuable opportunity to explore and develop alternatives on the critical issues relating to post-2006 electric supply acquisition. As part of that process, parties were promised that "statements made, positions taken, and documents and papers provided by the stakeholders in the Post 2006 Initiative Process will not be used by the stakeholders in any subsequent litigation," including litigation before this Commission. The Commission believes that the workshops were helpful to the Commission, the parties and the Staff, due to the ability of the parties to discuss matters of concern without the fear that the process would be used in litigation.

Although pParties who disagreed with the thrust of or characterizations in the references to the Post-2006 process or results thereof were given a full opportunity to express their views in this docket, whether a party correctly presented the results of informal workshops should never be a matter the Commission need consider. We will disregard all references to the workshops, and direct parties that in the future workshops are meant to enable parties to meet informally to resolve differences, but are not to be referenced in docketed proceedings. If agreement was reached in a workshop setting, that will be reflected in the case by the lack of controversy over a certain proposal or position when it is formally presented to the Commission. as they were in the Post-2006 Initiative itself, and their comments have been duly considered.

Changes to the language on page 165 of the Proposed Order, Section VI.D. are addressed in Exception 7 below and the accompanying Proposed Language.

**3. The Commission Should Reject the Auction Proposal As Unlawful Under the PUA.**

The AG excepts to the Proposed Order's conclusion that ComEd's auction proposal does not violate section 16-103 of the Public Utilities Act. Proposed Order at 48-50. The Proposed Order repeats the same legal errors found in the denial of the Motion to Dismiss, and should not be adopted by the Commission. Without repeating the arguments contained in the AG's Initial Brief at pages 8 – 13, the plain language of section 16-103(c) of the PUA only authorizes the Commission to allow market-based rates if a service classification has been declared competitive.

The Proposed Order suggests that market-based prices can be a component of cost for purposes of rate-setting. Proposed Order at 48. However, ComEd's auction proposal does not treat the rate it would derive from the auction as a "component" of the rate, but at the final rate consumers would pay. Prior to the declaration of a service as competitive pursuant to section 16-113, consumers cannot rely on competition to keep market prices fair and reasonable. Further, under sections 16-103 and 16-111(i), the Commission may only consider market rates as a limiting factor if regulated rates are *above* the market price.

Under ComEd's proposal, the Commission would throw consumers into the competitive market, as constructed by ComEd's auction. Section 16-111(i) does *not* authorize the Commission to simply pass through a market value rate for services that have not been declared competitive. To suggest otherwise would be inconsistent with

Section 16-103(c).<sup>4</sup> Rather, Section 16-111(i) directs the Commission to compare cost-based rates with the “market value” calculated using one of the methods listed in Section 16-112 to provide a *check* on utility cost-based rates so that the assumed benefits of competition would not be lost to consumers who lack competitive options. This consideration of “market value” is simply one step in the process of determining the justness and reasonableness of the regulated rates charged to captive customers. It is not authority to abandon cost-based ratemaking or to increase rates above what is fair, just and reasonable. See 220 ILCS 5/9-201.

Further, the prohibition in section 16-103(c) does not, as the Proposed Order suggests, prohibit all procurement alternatives that use market-based prices. Proposed Order at 49-50. Rather, section 16-103(c) prohibits the sole use of a market mechanism to set rates for consumers. The Commission should delete references in the Proposed Order that suggest that the AG has argued or implied that section 16-103(c) precludes ComEd from obtaining supply from market sources or from independent generators.

#### PROPOSED LANGUAGE

The following changes should be made to pages 48-50 of the Proposed Order. The sections of the Proposed Order further discussing auction procedures and details would no longer be necessary and should be removed from the final Order.

- E. Conclusions Relating to Commission Authority
  - 1. Market-Based Rates for Service not Declared Competitive

---

<sup>4</sup> As discussed in the Initial Brief of the People of the State of Illinois 8-9, Section 16-103(c) authorizes the Commission’s to approve market-based rates only for customers who have access to service that has been declared competitive.

One of the arguments made by AG, CUB and CCSAO is that the PUA “does not authorize market-based rates for electric service that has not been declared competitive under Section 16-113.”

As indicated above, ComEd, Staff, CCG, CES and MWIPS contend that this argument should be rejected, as it was in the ruling issued on June 1, 2005 denying a motion to dismiss jointly filed by several parties including AG, CUB and CCSAO. After oral argument, an interlocutory appeal of that ruling was denied by the Commission on July 13, 2005.

On this issue, one of the arguments made by AG, CUB and CCSAO is that, contrary to law, the Proposed Riders “replace cost-based rates with market-based rates” set by an auction. Much of the focus is on Section 16-103(c). It provides in part that “. . . each electric utility shall continue offering to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer’s premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997.”

Section 16-103(c) goes on to provide:

Upon declaration of the provision of electric power and energy as competitive, the electric utility shall continue to offer to such customers, as a tariffed service, bundled service options at rates which reflect recovery of all cost components for providing the service. For those components of the service which have been declared competitive, cost shall be the market based prices. Market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility’s cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process. (Emphasis added)

Similarly, Section 16-111(i) provides for the consideration of costs in establishing rates for tariffed services subsequent to the mandatory transition period.

As argued by the consumer parties, ~~Staff, ComEd and other parties~~, it is clear from a simple reading of Section 16-103(c), and its numerous references to cost, that market-based prices are not to be the basis of retail rates for customer classes which have not been declared competitive under section 16-113 of the PUA. ~~and cost-based rates are not mutually exclusive concepts. To the contrary, use of market based prices is recognized as a mechanism for or subset of, not an exception to or “replacement” of, the development of rate components based on cost. That is, use of market based pricing is identified as one method for determining such costs, not an alternative thereto. In the instant case, ComEd’s~~

~~proposal is intended to recover only such costs as are actually incurred in procuring power and energy through the auction process. How well the proposal is designed to work in that regard is a different question that is addressed elsewhere in this order.~~

~~Thus, the issue is not whether use of market-based prices is inherently inconsistent with the principle of setting rate components at cost, but whether ComEd's proposal would replace a cost based system, that is flexible and considers all alternatives, with a strict market-based process. Given the admitted lack of competition for residential and small commercial customers, it is premature to use a market mechanism as the sole factor in setting retail rates for captive customers. As indicated above, it is not.~~

~~The next question is whether Section 16-103(c) prohibits the use of an auction or other market based process in determining the costs of power and energy in setting rates for non-competitive customers, as argued by AG, CUB and CCSAO. A close reading of Section 16-103(c) reveals that no such prohibition exists. What Section 16-103(c) says is that "[f]or those components of the service which have been declared competitive, cost shall be the market based prices." Hence, rate components for competitive services may only be set, not illogically, by using market based prices to establish cost.~~

~~Some parties have argued that Implicit in the position advocated by AG, CUB and CCSAO on this issue is the proposition that because market-based prices must be used to establish the cost for components of competitive services, it necessarily follows that market-based prices may not legally be used to establish costs on which to base rate components for non-competitive services or customers. However, as indicated by various parties on the other side of this issue, the Act contains no such language, either in Section 16-103(c) or elsewhere. As those parties correctly observe, the The presence of a statutory mandate to use a particular method for establishing certain cost components for competitive services, and the absence of such a mandate for non-competitive services, demonstrates the legislative intent that only the services named should be set by reference to a market. This is consistent with the premises of Article XVI: that until competition arises and provides a substitute for regulation, consumers are to continue to receive the same regulatory protections that existed before Article XVI was enacted. 220 ILCS 5/16-101(a); 16-103(c); 16-113. does not somehow mean that method is statutorily prohibited for other services or customers, particularly where, as in the instant case, use of market based prices is expressly recognized as one means of establishing costs in Section 16-103(c).~~

~~In addition, as several parties have commented, it is difficult to see by what means AG, CUB and CCSAO envision the cost of procuring power and energy being determined for non-competitive services in a manner consistent with their theory that market based prices may not be used to establish costs on which to base rate components for non-competitive services. As noted above, Section~~

~~16-103(c) contains a broad definition of “market based prices.” It provides that “market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility’s cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process.” (Emphasis added)~~

~~Although Since ComEd has divested itself of all generation assets pursuant to Section 16-111(g) of the Act, and claims that it can only obtained electricity from a “market”, this does not mean that the AG, CUB and CCSAO arguments leave no legal means to obtain supply. As specified by the AG, under section 16-111(i), wholesale and other market prices are one factor to consider in determining whether the utility’s purchasing decisions were prudent and whether retail rates are just and reasonable to consumers. The Commission rejects as both spurious and inconsistent with the AG’s stated position the notion that its view of section 16-103(c) would prohibit any and all market purchases. On the contrary, as stated by some parties, utilities already purchase various services and products from competitive markets. As in those circumstances, in reviewing rate proposals based on “market” prices for electricity, the Commission would consider whether the purchase was reasonable and justified. it is unclear how the cost of procuring power and energy would be established for non-competitive services, when existing contracts expire at the end of 2006, if all such market-based mechanisms were prohibited as AG, CUB and CCSAO contend. In other words, prohibiting the auction and the requested pass-through of procurement alternatives that use market-based prices, as that term is defined in Section 16-103(c), would preclude the use of the very alternatives suggested by AG, CUB and CCSAO, such as contracts with ComEd’s affiliated generating company. Under that “baby with the bathwater” scenario, utilities without generation would be left with no “legal” means of procuring supply. In the Commission’s view, a theory that leads to such a result is not a proper interpretation of the statute.~~

For the reasons set forth, the theory that the proposed auction is prohibited by Section 16-103(c) of the Act ~~should not be~~ is adopted.

**4. The Commission Should Conclude That It Is Necessary To Conduct An Independent And Comprehensive Analysis Of The Illinois Regional Wholesale Market And The Regional Transmission System To Determine Whether Relying On The Wholesale Market To Determine Retail Prices Would Result Just And Reasonable Rates. The Commission Must Conduct Such A Study Before It Can Responsibly Approve A Tariff That Uses Wholesale Markets To Set Retail Prices.**

The Commission can approve a tariff that relies on wholesale market prices to establish retail rates only if electric service has been declared competitive and the wholesale market is sufficiently competitive to ensure that the resulting retail rates are just and reasonable. Several parties, including the People, have raised questions about the extent of competitiveness in Northern Illinois regional wholesale electricity markets and the quantity and quality of information available to determine whether the markets are, in fact, sufficiently competitive. Although ComEd has presented several studies that address some of the relevant issues, many questions remain to be answered before the Commission can make the requisite finding that there is sufficient wholesale competitiveness to ensure just and reasonable rates.

The Commission should conduct an independent, comprehensive study of the wholesale market and the regional transmission system to assess the extent of competition. The study could be conducted by a balanced panel of experts, perhaps nominated by the parties to this proceeding. The Commission must conduct such a study before it can responsibly approve a tariff that uses wholesale markets to set retail prices.

PROPOSED LANGUAGE:

The AG proposes the following change to the Proposed Order at page 60:

5. Commission Conclusion

~~The Commission concludes that the auction process approved herein with safeguards adopted is an appropriate method of procuring electricity. The record shows that the proposal will keep ComEd costs of procuring energy and capacity at a minimum, which will benefit its customers. The Commission finds the AG's discussion of potential problems to be somewhat speculative concerning alleged market failures that have not occurred and that may not occur. Moreover, t~~  
While the record in this docket contains some evidence regarding conditions in the Illinois regional wholesale electricity market, the data is not comprehensive and much of it comes from self-interested sources. The AG's suggestion that policy makers use care when determining policy is a reasonable proposal for the

Commission, especially given the radical nature of the proposed tariff, and is a strong rationale for an independent and comprehensive analysis of the Illinois regional wholesale market. The Commission must conduct such a study before it can determine whether relying on the wholesale market to determine retail prices would result just and reasonable rates.

PROPOSED LANGUAGE:

The AG proposes the following change to the Proposed Order at 64:

e. Commission Conclusion

~~The Commission finds that the parties generally agree that political boundaries have no significance to the market for electricity. However, the problem of defining the “relevant market” has not been resolved on the basis of the record in this docket. Defining the relevant market should be the first step in any study of the Illinois regional wholesale market that the Commission conducts before considering any further proposals to use wholesale markets to set retail prices. The Commission notes the AG’s contention that a “relevant market” should be defined, according to antitrust principles, but also notes that the scope of this proceeding and the Commission’s authority does not include determining antitrust issues. The Commission finds that the relevant market in these proceedings is PJM. The Commission also notes that FERC must approve the auction.~~

PROPOSED LANGUAGE:

The AG proposes the following change to the Proposed Order at 71:

5. Commission Conclusion

While the record in this docket contains some evidence regarding the extent of transmission constraints that may affect Northern Illinois, the data is not comprehensive and much of it comes from self-interested sources. An independent and comprehensive analysis of the transmission constraint issue is needed to determine whether Northern Illinois is sometimes a “load pocket” that is isolated from PJM and in which generation owners can exercise market power. The Commission must conduct such a study before it can responsibly approve a tariff that relies on wholesale markets to set retail prices. The Commission is of the opinion that northern Illinois does not experience binding transmission constraints that would cause it to separate from the rest of PJM and become a “load pocket” or that would prevent competition in the auction by parties not owning local generation. ComEd presented multiple studies and other data showing that no such constraints exist presently, or are expected to exist in coming years. ComEd also presented evidence that the purpose of the RTO-

~~planning process is to anticipate and respond to developing transmission needs, and that this Commission's record of approving transmission construction projects is excellent. The Commission observes that the assertions of the AG and CUB CCSAO about potential transmission constraints are not only speculative and contrary to the most recent data available, but also do not focus on the fact that most "constraints" will impede neither the market nor competition in the auction. The Commission therefore concludes that there is no reason to believe that transmission constraints affecting Illinois or the PJM markets in general, will impede the Illinois Auction Proposal.~~

**5. The Commission Should Examine Record Evidence Showing That Rates Have Increased More In Deregulated States Than In Regulated States And Should Find That It Is Not In The Public Interest To Expose Captive Customers In Illinois To The Risks Associated With Rates Set By The Market Rather Than Through The Regulatory Process.**

The Proposed Order appears to rely heavily on ComEd's frequent references to New Jersey's brief experience with a reverse auction to legitimize the Illinois auction proposal. The Order does not give equal weight to the data from other states<sup>5</sup>, which clearly show that rates have increased significantly more in deregulated states than in regulated states. Proposed Order, at 58. Moreover, the ALJ denied the People's request to file updated data from an August 2005 report (prepared by AG witness Dr. Kenneth Rose) that confirms that this trend is continuing and gaining strength. Tr., Sept. 8, 2005, at 627 – 633. The Commission should reverse the ALJ's ruling or take administrative notice of the *2005 Performance Review of Electric Power Markets* (see AG Ex. 1.7, attached to Motion of the People of the State of Illinois for Leave to File a Late-Filed Exhibit, filed on E-docket on September 7, 2005) to ensure that the decision in this docket is based on the most up-to-date and comprehensive data available.

---

<sup>5</sup> Comprehensive state-by-state data, through 2004, is presented in AG Ex. 1.0, at 23 – 32; AG Ex. 1.5.

The Commission cannot make a sound decision in this case by selectively considering certain aspects of the New Jersey experience and ignoring mounting evidence from other states showing that rates are higher in deregulated states than in regulated states. A comprehensive review of record evidence comparing regulation with deregulation will allow the Commission – and Illinois consumers -- to benefit from the experiences of other states that face similar circumstances.

Thirty-four of those states have repealed, delayed, or suspended restructuring or limited retail access to only to large customers, or are now no longer considering retail access and have opted to continue regulating their retail electricity sector in a traditional manner. AG Ex. 1.0, at 23 – 25; AG Ex 5.0, at 13. Fortunately, the PUA provides the Commission with authority – indeed, a mandate -- to follow the trend in the majority of other states to retain regulatory ratemaking, by continuing to set regulated rates for customers who take electric service that has not been declared competitive pursuant to 220 ILCS 16-113.

#### PROPOSED LANGUAGE

The AG proposes the following addition to the Proposed Order at page 8:

On September 7, 2005, the AG filed a motion seeking leave to file, as a late-filed exhibit, the 2005 Performance Review of Electric Power Markets to update the 2004 Performance Review of Electric Power Markets previously submitted as AG 1.5.

On September 8, 2005, the ALJ denied the AG’s motion for leave to file this report as a late-filed exhibit.

The AG proposes the following change to the Proposed Order at 58:

#### 3. AG’s position

The AG notes that the state of restructuring in the US has taken a dramatic turn since 2000. The AG states that only 16 states and the District of Columbia

have fully implemented legislation and commission orders that allow full retail access for all customer groups. Two other states allow retail access only for larger customers. The AG presents state-by-state data showing that 34 states have repealed, delayed, or suspended restructuring or limited retail access to only to large customers, or are now no longer considering retail access and have opted to continue regulating their retail electricity sector in a traditional manner. AG Ex. 1.0, at 23 – 25; AG Ex. 1.5; and AG Ex 5.0, at 13. ~~notes that several states have rolled back restructuring and 26 states are no longer considering restructuring.~~

The AG continues stating that states that have used bidding or auctions have experienced price increases. The AG argues that the auction price increases in New Jersey's 2005 BGS can not be explained simply by increased fuel costs. The AG notes that ~~other~~ unrestructured states have had either flat retail prices or nominal increases because regulated utilities in those states have ~~of~~ long-term coal contracts. (AG Brief at 27)

The AG further argues that Maine, Maryland, and Massachusetts that rely on the wholesale market to provide for retail customers have all seen an increase in rates for residential customers.

#### 4. Commission Conclusion

~~Although views may be helpful to the Commission, t~~ The Commission is ~~not bound by those decisions and~~ will look to the record in this matter for what is most advantageous to Illinois customers. The record contains comprehensive data from other states which show that electric rates are rising faster in deregulated states than in regulated states and that 34 states have opted to retain traditional regulation to protect consumers. We also take administrative notice of the 2005 Performance Review of Electric Power Markets, which updates AG Ex. 1.5 and shows that this trend continues unabated in 2005. Additionally the Commission is required to follow

The Commission finds that it is not in the public interest to expose captive customers in Illinois to the risks of deregulated market prices at this time. Under Illinois law the Commission has authority – indeed, a mandate -- to continue to set regulated rates for customers who take electric service that has not been declared competitive pursuant to 220 ILCS 16-113. The Commission will, therefore, continue to perform its traditional ratemaking function and permanently suspends the market-based tariff proposed by ComEd. , not laws of other states.

#### **6. The Commission Should Reject The Auction As Ill-Suited To Illinois Because The Clearing Price And Descending Clock Will Not Drive Down Prices And Result In Least Cost Service To Consumers.**

The Proposed Order relates the significant concerns expressed by the AG that the clearing price and descending clock aspects of the ComEd proposal will not result in least cost service to consumers. These aspects of ComEd's proposal do not capture the generation cost differences available to purchasers of electricity, and therefore will unnecessarily increase costs to consumers. The clearing price and the descending clock characteristics both allow low-cost generators to receive prices significantly higher than their marginal cost. They will not drive costs below the costs of the *least efficient*, necessary supplier despite the fact that other suppliers may have significantly lower costs.

Several parties, including BOMA (BOMA Ex. 1 at, e.g., 10, 15), CUB and the Cook County State's Attorney's Office (CUB/CCSAO Ex. 2.0 at 16, 20-22) and the AG (AG Ex. 3.0 & 4.0) pointed out that these aspects of the auction design would increase prices so that ComEd's affiliate, Exelon Generation, would be in a position to charge prices that reflect the higher costs associated with natural gas generation and the PJM spot markets. While this is a benefit to Exelon Generation, it is bad for consumers and for Illinois, which stand to lose \$1 billion in excess energy costs if Exelon's low-cost nuclear generation is purchased by ComEd, and paid for by consumers, at either PJM or natural gas prices. CUB/CCSAO Ex. 2.0 at 20. The Commission should see ComEd's proposal as an attempt to benefit its affiliate at Illinois consumers' expense, and reject it as designed to increase revenues to ComEd's affiliated generation company.

#### PROPOSED LANGUAGE

On page 81 of the Proposed Order, paragraph 7 should be rewritten with the following and should conclude that the auction is ill-suited to Illinois and will harm Illinois consumers. These paragraphs can be placed at the end of the Section V. Auction Design Issues, and the conclusions on pages 81, 83, 84, 87, 88, 89, 92, 93, 94, and 95 should all be deleted. The description of the parties' positions need not be omitted,

The Commission finds that the vertical tranche auction proposed by ComEd is an inappropriate competition procurement method for securing power supply for the needs of ComEd customers. It fails to capture for Illinois consumers the low-cost electricity generated in this State, and would drive prices up by use of both a descending clock auction format and a clearing price. These price-setting methods are inappropriate in an industry such as electricity generation, where there is a wide range of costs, related to the method of generation (e.g., nuclear, various types of coal, natural gas, wind, other renewable).

The Commission recognizes that ComEd is part of a larger corporation, with generation affiliates that expect to supply ComEd. In reviewing ComEd's auction proposal, we must be careful to focus on the needs of Illinois consumers and to be especially vigilant against potential conflicts of interest in ComEd's proposal. We find that the mechanics of the proposed auction unreasonably favor ComEd's low-cost generation affiliate, at consumer expense, and cannot accept it as a least cost procurement method.

## **7. The Commission Should Recognize That Alternatives To The ComEd Auction Present Greater Flexibility And Savings For Consumers And Should Not Be Foreclosed By Adoption Of An Auction.**

The Proposed Order rejects, without substantive discussion, consideration of the two alternatives to the auction that were presented in the record. Its summary rejection of active portfolio management and affiliate contracts ignores key issues and should not be adopted by the Commission.

### **A. Active Portfolio Management Provides Significant Consumer Protection By Insuring Flexibility And Limiting The Risks Inherent In Annual Procurements Of A Single, Full Requirements Product.**

Although it describes the arguments relating to active portfolio management, the Proposed Order fails to give any reasoned consideration to the real benefits that it can produce. The Proposed Order merely asserts that the auction process is a “better procurement method.” Proposed Order at 162, 165-166. This is insufficient to justify rejection of a process that has been followed in other states and that offers real opportunities for flexibility and consumer savings.

ComEd’s auction proposal is premised on the false notion that there is a single market price that all buyers must pay. The auction is designed to discover this common denominator, notwithstanding the irrefutable fact that the producers have various costs, and therefore various prices should be available to purchasers. This variability can be seen in truly competitive markets throughout our economy.

Without repeating the arguments in favor of active portfolio management, which are found in the AG’s Initial Brief at 71-75 and Reply Brief at 43-45, and summarized in the Proposed Order at 159 (as amended below), an everyday example of how a competitive market can benefit consumers is seen in the differences in price charged by various retailers such as Costco. Costco uses its substantial buying power to contract with low cost suppliers, and then passes these savings to consumers. These savings may not be matched by other merchandisers, who lack Costco’s purchasing acumen and devotion to low prices. The result is widely varying prices among retailers, all purchasers in the competitive market, and demonstrates that a truly competitive market produces a range of prices. A reasonable, responsible, and educated purchaser is not limited to a single, “market” price, but can use its position in the industry to drive prices down. This is a basic feature of markets.

The Proposed Order should be rewritten to recognize both the flaws in the ComEd auction proposal, and the fact that a true market gives the buyer opportunities that the auction proposal abandons. This is bad for consumers, and should not be allowed by the Commission.

#### PROPOSED LANGUAGE

The third paragraph of the description of the AG's argument on page 159 (section VI.A.3.) should be amended as follows:

The AG argues that ComEd's auction proposal would unnecessarily and unfairly limit its opportunities to obtain low prices for consumers, particularly when compared to more active management of supply. The AG insists that multilateral negotiations can yield lower prices than a simultaneous descending clock auction ~~for the reason a multilateral negotiation might yield a lower price than a simultaneous descending clock auction is that~~ because, in part, direct participation allows a shrewd buyer to implement price caps by holding firm and refusing to purchase from suppliers at prices above which the buyer expects they can afford to accept. The AG points out that in other competitive industries, buyers regularly compete to find the best price for their consumers, and that there are many prices available to consumers for products available in a market.

The Commission's Conclusion at page 162 (section VI.A. 5.), should be rewritten as follows to reject the auction in favor of active portfolio management.

#### 5. Commission Conclusion

The Commission finds that active portfolio management is consistent with the management of supply decisions during the transition period, and provides important flexibility to enable ComEd, as purchaser for three million customers, to manage its supply decisions. Obtaining all supply once per year, and in some cases for up to three years in one process, increases exposure to risk by eliminating the ability to spread purchases over time.

We believe that active portfolio management is a better option than the proposed auction. It will enable ComEd to take advantage of both its substantial buying power and the existence of multiple suppliers to serve various aspects of its load. Given ComEd's history on the generation side of the industry, ComEd has the knowledge to understand the generation process, generation costs and the negotiation process. Consumers are entitled to have ComEd exercise its

knowledge and ability to negotiate and manage its supply to keep prices as low as possible.

We further note that with ComEd's divestiture of generation, it must obtain electricity through agreements with generators. To the extent that a competitive market exists, ComEd is expected to seek out the best price and the best terms possible for its customers, whether those prices are obtained from affiliated or independent suppliers. An auction like that proposed by ComEd unreasonably limits ComEd's flexibility as a buyer, and ignores the substantial knowledge and management it should bring to the task of obtaining electricity for its customers. at this time that the auction proposal is a better procurement method than an active portfolio.

**B. The Proposed Order Mistakenly Rejects The AG's Insistence That ComEd Consider Affiliate Contracts In Its Efforts To Obtain Low-Cost Supply By Suggesting That ComEd Cannot Obtain Supply At A Price Lower Than "That Which Would Result From A Competitive Auction."**

The Commission must reject the conclusion found at page 165 of the Proposed Order that ComEd should not be required to consider supply contracts with its low-cost affiliate because: "Neither this Commission nor ComEd can compel any supplier to sell power to ComEd at a price lower than that which would result from a competitive auction." This conclusion is erroneous because it assumes that an auction is an existing alternative.<sup>6</sup> Worse, however, it rejects a potentially lower cost procurement method because it is possible that Exelon Generation could get a higher price if a different procurement method, i.e. an auction, were used. The Proposed Order assumes an auction, which it allegedly is assessing, and finds that it is preferable because it sets a higher price than direct negotiation! The Commission must write its own analysis of and conclusion about the use of affiliate contracts.

---

<sup>6</sup> There is no existing auction for electricity to serve ComEd customers. An auction will only occur if ComEd establishes such an auction as the mechanism to obtain power. The issue before this Commission is whether the Commission should approve the establishment of an auction which the Proposed Order assumes will produce a higher price than a negotiated contract would produce.

Citing ComEd and Staff arguments, the Proposed Order presents the option of using affiliate contracts to supply ComEd's captive ratepayers as an attempt to "force ExGen to sell below market prices." Proposed Order at 164. It then would have the Commission make the irrelevant statement that "[t]he Commission finds that any procurement strategy must be grounded in the real world." Proposed Order at 165. Allowing or even encouraging the use of affiliate contracts is very much "grounded in the real world." In fact, ComEd and Exelon Generation have had affiliate contracts since 2000, providing service to consumers under the original statutory rate cap, and continuing to provide service at the same capped consumer rate when the statutory rate cap was extended two years from December 31, 2004 to December 31, 2006.

The point that the Proposed Order fails to relate to the Commission is that from the consumer's perspective, it makes no sense to rule out affiliate contract options, when ComEd is in a position to use its considerable buying power to negotiate with its generation affiliate to purchase electricity from the affiliate's nuclear plants, which produce some of the lowest-cost (1.3¢/kwh)<sup>7</sup> electricity available in the United States and which ComEd's customers paid to build and maintain until 2001. Ignoring this option only "makes sense" if the goal is to avoid the sort of vigorous bargaining that is the hallmark of a truly competitive market and to, instead, allow ComEd to use its monopoly franchise to maximize profits for its unregulated generation affiliate (ExGen) and parent company (Exelon).

The AG is not recommending that affiliate contracts be mandated as the only option available to ComEd, but maintains that if ComEd acted like an independent buyer

---

<sup>7</sup> CUB-CCSAO Ex. 2.2 at 1. See also Tr. Sept. 1, 2005 at 1000-1002.

in the generation market, it would attempt to continue to obtain the benefits of low cost generation from Exelon Generation. This could be done in conjunction with active portfolio management, and such contracts could be expected to capture significant savings for Illinois consumers and the Illinois economy. The AG's arguments in favor of including affiliate contracts in the options available to ComEd can be found in the AG Initial Brief at 76-79 and Reply Brief at 45-49.

The Proposed Order fails to fully and accurately present the AG's arguments in favor of including affiliate contracts as part of a procurement strategy, and against an auction that would eliminate the potential savings from affiliate contracts. The Commission should reject the Proposed Order's conclusion on page 165, section VI.B.4., and Section VI.D., and conclude that ComEd should be continue to negotiate with its affiliate for low cost supply to serve Illinois consumers.

### PROPOSED LANGUAGE

#### 3. AG's Position

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

In response to the argument that ExGen cannot be "forced" to sell to ComEd at below market prices, the AG points out that in a truly competitive market, one would not expect a seller to refuse to negotiate with a buyer the size

of ComEd. Further, the AG has not provided a price at which ExGen would be expected to sell to ComEd, other than noting that ExGen is a low-cost generator. The AG maintains that the potential of supply contracts with ExGen supports the use of active portfolio management. By contract, the ComEd auction proposal prohibits direct negotiation with a key low cost supplier, i.e. ExGen, and will likely increase prices to consumers.

#### 4. Commission Conclusion

The Commission finds that any procurement strategy must retain as many options as possible, and that affiliate contracts between ComEd and its generation affiliate should not be precluded by an approved procurement strategy. In rejecting the proposed auction, the Commission recognizes that other options, such as the continuation of affiliate contracts or the negotiation of other contracts with affiliates, can benefit consumers and the Illinois economy. We reject the argument that the AG is suggesting that affiliate contracts would be “below market” and note that a truly competitive market consists of many buyers and sellers, and that the goal of each buyer is to obtain the lowest price and the best terms possible. Price and terms will not be the same for every buyer and every seller, and our decision in this Order insures that ComEd will have all options available to it to obtain the best price and terms for Illinois consumers. ~~be grounded in the real world. Neither this Commission nor ComEd can compel any supplier to sell power to ComEd at a price lower than that which would result from a competitive auction.~~

#### D. Other Competitive Procurement Mechanisms

ComEd has invited this Commission to inject the discussions from the Post 2006 Initiative into this proceeding to support its argument that its proposal should be adopted. ComEd argues that other options were considered in those informal meetings, and that noted that Staff and the other participants in the Post 2006 Initiative, including many of the intervenors in this proceeding, did not confine their analysis to a limited group of options. They considered a broad range of alternative scenarios and variants of those scenarios. They analyzed the advantages and disadvantages of each approach. The effort was lengthy and detailed, providing a searching review of the available options. ComEd has presented detailed evidence supporting the choice of a competitive procurement auction as suggested by Staff’s Final Report. The Commission finds that nothing that has been presented in this proceeding or in any other forum provides any basis for reaching a different outcome or for proposing any other procurement approach. The Commission finds, first, that it will only consider matters presented in this docket, and will not consider matters presented in any other forum, including the Post 2006 Initiative workshops or reports. In addition, the Commission rejects ComEd’s suggestion that “nothing has been presented” that provides a basis for not accepting the auction. On the contrary, we find that the auction is a high-cost procurement method, that will unlawfully pass an

unnecessarily high “market-based rate” on to consumers, while foreclosing the use of potentially lower cost alternatives. Therefore, as modified elsewhere in this Order, the Commission disapproves ComEd’s tariffs incorporating a competitive procurement auction. Active portfolio management, including the use of affiliate contracts, continues to be available to ComEd to meet its service obligations.

**8. The Ordering Paragraphs Should Be Changed To Reject The Auction Proposal, And Discussion Of The Details Of The Auction Proposal Should Be Deleted.**

The Findings and Ordering Paragraphs on pages 240-241 of the Proposed Order need to be replaced so that the Order rejects the use of the proposed auction for the procurement of electricity for non-competitive customers. Further, the sections of the Proposed Order identified in the proposed language section below should be eliminated from the final Order as irrelevant. The stricken language will not be set out in full in the interest of space.

**PROPOSED LANGUAGE**

The discussion in the following sections can be eliminated because it addresses the operation of the auction. Once the auction itself is rejected, further description and conclusions about auction design are irrelevant:

V. Auction design issues

C.2 – 10 through M, pages 79-156

VI. Tariff and Rate Design Issues, pages 166 – 240.

The Findings and Ordering Paragraphs on pages 240-241 should be changed as follows:

**X. FINDINGS AND ORDERING PARAGRAPHS**

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Commonwealth Edison Company is an Illinois corporation engaged in the retail sale and delivery of electricity to the public in Illinois, and is a “public utility” as defined in Section 3-105 of the Public Utilities Act and an “electric utility” as defined in Section 16-102 of the Public Utilities Act;

(2) the Commission has jurisdiction over the parties and the subject matter herein;

(3) the recitals of fact and conclusions of law reached in the prefatory portion of this Order are supported by the evidence of record, and are hereby adopted as findings of fact and conclusions of law;

~~(4) the Commission has authority under the Public Utilities Act to establish reasonable rates and charges for retail service, including Rider CPP and PPO-MVM as modified in this Order;~~

~~(5) the Commission has the authority to approve the competitive procurement process and the associated tariffs, subject to the conditions imposed for procurement of power and energy;~~

~~(6) the tariff proposed by ComEd in its initial filing, as modified to reflect the findings herein, are just and reasonable, and ComEd should be authorized to file and put into effect such tariff sheets, as modified;~~

~~(7) the new tariff sheets authorized to be filed by this Order should reflect an effective date not less than 30 days after the date of filing, with the tariff sheets to be corrected, if necessary, within that time period, and should reflect an operational date of no earlier than January 2, 2007;~~

~~(8) ComEd should be subject to the annual reconciliation proceedings related to its power purchases as described and approved in the prefatory portion of this Order; and~~

~~ComEd should be required to implement the rate mitigation proposal described and approved in the prefatory part of this Order.~~

(4) Commonwealth Edison’s tariff proposal in this docket includes Rider CPP, which would establish market-based rates for electric service that has not been declared competitive pursuant to Section 16-113 of the Public Utilities Act;

(5) Section 16-103(c) authorizes the Commission to approve market-based rates only for electric service that has been declared competitive pursuant to Section 16-113 of the Public Utilities Act;

(6) Commonwealth Edison's Rider CPP is rejected as a matter of law because it seeks to impose market-based rates on customers who have not been declared competitive pursuant to Section 16-113 of the Public Utilities Act;

(7) Commonwealth Edison's tariffs are further rejected because they will not produce least cost electric supply for Commonwealth Edison's consumers, as required by law.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Riders and tariffs, filed by Commonwealth Edison on February 28, 2005, are permanently cancelled and annulled.

IT IS FURTHER ORDERED that Commonwealth Edison is authorized to file new tariff sheets, which will be reviewed in accordance with the findings in this order, 220 ILCS 5/9-101 and 9-201, and the other consumer protection provisions in Article IX and XVI that the 1997 Amendments to the Public Utilities Act expressly retained during the ongoing transition to a competitive retail electricity market.

IT IS FURTHER ORDERED that the Commission's continued exercise of its authority to set regulated rates for electric service that has not been declared competitive, pursuant to Articles IX and XVI of the Public Utilities Act, effectuates an extension of the transition period as the transition to competition continues.

IT IS FURTHER ORDERED that any motions, petitions, objections, and other matters in this proceeding which remain unresolved are disposed of consistent with the conclusions herein.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

### **Request for Oral Argument**

Pursuant to section 200.850 of the Commission's rules, the People of the State of Illinois request that the Commission hear oral argument on the issues raised in this docket. This docket addresses key policy questions that will affect the pricing of electricity for three million ComEd customers throughout northern Illinois. Electricity is an essential service that affects the quality of life for residential consumers and the

operation and competitiveness of Illinois businesses. The Office of the Attorney General believes that the Commission would benefit from the opportunity to discuss the issues presented by this docket directly, particularly in light of the abbreviated nature of many of the adverse conclusions contained in the Proposed Order.

### **Conclusion**

For the foregoing reasons, the People of the State of Illinois request that the Commission reject the conclusions of the Proposed Order and adopt the language in the Exceptions filed with this Brief.

Respectfully submitted,

The People of the State of Illinois  
by LISA MADIGAN, Attorney General

December 19, 2005

---

Susan L. Satter  
Susan Hedman  
Public Utilities Bureau  
Office of the Attorney General  
100 West Randolph Street, 11<sup>th</sup> Floor  
Chicago, Illinois 60601  
Telephone: (312) 814-3736  
Fax: (312) 814-3212  
E-Mail: [ssatter@atg.state.il.us](mailto:ssatter@atg.state.il.us)  
E-Mail: [shedman@atg.state.il.us](mailto:shedman@atg.state.il.us)