

## VI. DIFFERENCES IN THE TREATMENT OF ELECTRIC UTILITIES AND ARES

Without question, the metaphor used most often in the discussions surrounding electric competition and deregulation was the "level playing field." The following discusses ways in which, on the face of Senate Bill 55, the treatment for electric utilities is different from that accorded alternative retail electric suppliers.

### A. Certification Requirements

A number of the certification requirements set forth in Section 16-115 are competitively neutral. The requirement that a prospective ARES demonstrate that it possesses sufficient technical, financial and managerial resources to provide the service for which it seeks authority, and the requirement that the Commission consider whether facilities based service is contemplated are straightforward and reasonable. Other requirements are at least partially based on reasonable premises, but may have unnecessarily anticompetitive effects. These are discussed here.

*Labor union provisions.* Section 16-115(d)(7) requires a prospective ARES to meet the requirements of Section 16-128. Section 16-128 requires an ARES applicant to demonstrate that its employees who install, maintain, and operate electrical facilities have the requisite knowledge, skills, and competence to perform those functions in a safe and reliable manner. Adequate demonstration of these characteristics would require consideration of such factors as the completion by the employee of an accredited or otherwise recognized apprenticeship program for the particular craft, trade, or skill, or specified years of employment with an electric utility performing a particular work function.

According to representatives of utilities supporting SB 55, this Section was added at the request of labor unions representing utility employees. The unions insisted upon safeguards ensuring that ARES personnel meet the same work standards as utility personnel. Safety concerns would exist where any ARES worker could take actions affecting facilities on which utility linemen and other employees work, but these concerns would be heightened if and when ARES began installing and maintaining facilities and equipment on individual customer premises.

SB 55 removes discretion from the Commission in many areas in which it has traditionally exercised authority, such as rates, asset transfers, and affiliate transactions. The stated purpose for a number of these changes has been the need for more certainty in making business decisions. It is ironic that the same bill confers discretion on the Commission in a completely new area; assessing the qualifications of electrical workers. A Commission decision in this new area will either keep a potential facilities-based ARES from entering the market, hindering the move to competition, or allow it in. The

Commission's improvidently taking the latter course, if the ostensible concerns which led to the addition of Section 16-128 are valid, could imperil the lives of ARES employees and utility laborers alike. The irony deepens with the fact that the Commission's decision must be made on the basis of 45 days' consideration of an application, except that the Commission has 135 days, with hearings if it so chooses, in the case of an applicant seeking to serve residential or small commercial customers.

An additional point for consideration is that employees of electric utilities subject to the jurisdiction of the Commission enjoy an exemption from the municipal registration of electrical contractors under Section 11-33-1 of the Municipal Code and municipal inspection and regulation of electrical equipment under Sections 11-37-1 through 11-37-4 of the Municipal Code; the bill does not offer such exemptions for ARES. This means that an ARES can be subject to inspection fees, permitting requirements, and standards for the installation, alteration, and use of electrical equipment that can vary from municipality to municipality, and that in no circumstance will apply to an electric utility.

*Anti-redlining provisions.* Section 16-115(c) requires ARES applicants to identify the area or areas in which they intend to offer service and the types of services they intend to offer. It requires applicants seeking to serve residential or small commercial customers within a service area that is smaller than an electric utility's service area to submit evidence demonstrating that the designation of this smaller area does not violate Section 16-115A. Section 16-115(d)(6) requires the Commission to find, as a precondition to certifying such an ARES, that the area it intends to serve and that limitations it proposes on the number of customers or maximum load to be served meet the provisions of Section 16-115A. It also permits the Commission to extend the time for considering such an application from 45 to 135 days, and to schedule hearings.

Section 16-115A(c) prohibits an ARES certificated to serve residential or small commercial customers from two things: (1) denying service to a customer or group of customers or establishing any differences as to prices, terms, conditions, services, products, facilities, or in any other respect, whereby such differences are based upon race, gender, or income, and (2) denying service to a customer or group of customers or establishing any unreasonable difference as to prices, terms, conditions, services, products, or facilities as between localities.

Taken together, these provisions appear to require an ARES applying to serve residential and small commercial customers to do one of two things: either commit to serve an area no smaller than the service territory of one or more utilities (and to arrange for sufficient capacity to serve as many customers as apply for service in their territory), or to submit what amounts to demographic evidence that any limitation on territory served, load served, and number of customers served will not have the effect of violating Section 16-115A.

Sound public policy concerns can be addressed by prohibiting new entrants from selecting their service territories to bring the benefits of competition to wealthy customers only, or to effectively deny service to areas on the basis of race. The question is whether the SB 55 method of addressing these issues is appropriate, or whether there may be less onerous means of accomplishing the same goals. Alternatively, the goals should, to the extent feasible, also apply to electric utilities serving customers outside their own service territories.

From a competitive standpoint, there is one substantial flaw in the way SB 55 addresses these issues: the disparity in the availability of supplemental low-income energy assistance funds under the Energy Assistance Act of 1989. New Section 13(b) of that Act would require each electric and gas utility, electric coop, and municipal utility to assess each of its customer accounts a monthly energy assistance charge. The charge would be \$0.40/month for residential accounts, and higher amounts for non-residential customers depending on peak electric demand or natural gas usage. Charging all customer accounts ensures that all ARES customers who are paying for delivery services (which will likely be virtually all ARES customers, especially in the near term) will be contributing to the supplemental low-income energy assistance fund.

While ARES and utility customers alike will effectively contribute to the fund, proceeds would be available only to electric and gas utilities, municipal electric and gas utilities, and electric cooperatives, on behalf of their customers who participate in the program. Thus, an ARES wishing to serve residential customers will be subject to the anti-redlining provisions, effectively required to subsidize the supplemental energy assistance fund through the payments of its customers who are delivery services customers of the utility, restricted in its ability to terminate service under PUA Sections 8-201 through 8-207, and foreclosed from receiving any supplemental energy assistance funds on behalf of low-income customers it is required to serve. In addition, the bill does not amend Section 4 of the Energy Assistance Act of 1989 to expressly make ARES and their customers eligible for energy assistance funds currently administered under that Section by the Department of Commerce and Community Affairs, although an ARES serving residential customers would appear to fit within the definition of "energy provider" in Section 3 of the Energy Assistance Act of 1989.

It should also be noted that while Section 16-115A(c) imposes stringent anti-discrimination requirements on ARES, current prohibitions on electric utility discrimination are substantially relaxed. Section 16-106 allows a utility to offer "billing and pricing experiments" for seven years (1/1/98 through 1/1/2005), to "groups of retail customers possessing common attributes as defined by the electric utility." The offer of such an experiment to program participants "shall not create any right in any other retail customer or group of customers to participate in the same or a similar program." This discrepancy between the obligations of and prohibitions applicable to

utilities and ARES is another example of the distinction in treatment of utilities and ARES.

**B. ARES Obligations**

Section 16-115A requires each ARES to meet a number of obligations, some of which do not, or are not likely to, apply to utilities, at least under certain circumstances.

*Switching suppliers.* Under Section 16-115A, an ARES must obtain verifiable authorization from a customer, in a form or manner approved by the Commission, before the customer is switched from another supplier. A utility must comply with this requirement only as to services the Commission has declared competitive, but not which the utility has declared competitive. The requirement therefore does not apply to tariffed services, services that are defined as competitive without any action on the part of the Commission (such as contract services and services provided outside the utility's service area), and services that the utility itself declares competitive as permitted by Section 16-113.

This distinction appears largely academic, however, given new Section 2EE to the Consumer Fraud and Deceptive Practices Act, which would be created by Section 45 of SB 55. The Commission's reading of this provision is that no change in providers of electric service would be permitted except after the customer's execution of a written letter of agency meeting the requirements of that Section, including the terms, conditions, and nature of the service to be provided, as well as a requirement that the electric service provider must directly establish the rates for the service contracted for by the subscriber. In assessing the competitive effect of this requirement, the appropriate question for the General Assembly to consider is whether the restrictions on changing suppliers, taking into account both sets of provisions (PUA and Consumer Fraud and Deceptive Practices Act), are appropriately drawn so as to protect those customers in need of protection, and at the same time so as not to constitute an unreasonable roadblock to competitors of the incumbent utility.

*Other obligations.* An ARES that is marketing, offering or providing products or services to residential and small commercial customers must comply with requirements as to marketing materials and provide to customers the following: documentation substantiating any claims regarding technologies and fuel types used to generate the electricity sold to customers, itemized billing statements describing products and services provided to the customer and their prices, and, before the customer is switched from another supplier, written information that adequately discloses, in plain language, the prices, terms and conditions of the products and services. By contrast, a utility need not comply with any of these requirements unless the service provided has been declared competitive by the Commission; this cannot happen as to electric power and energy provided to residential and small commercial customers until December 31, 2008.

### C. Miscellaneous Provisions

*"One-stop shopping."* Section 16-118(a) requires an electric utility to permit ARES to interconnect facilities to the utility's system if established standards are met. This appears to be the only service an electric utility is obliged to offer an ARES. Section 16-118(b) provides that an electric utility, an ARES, and a customer served by such ARES may enter into an agreement whereby the ARES pays to the utility the charges the utility imposes on the customer (such as delivery services charges, transition charges, and taxes). There is nothing on the face of SB 55 that would **require** a utility to enter into such an agreement. It would thus appear that a utility could, by simply not entering into any agreements under Section 16-118(b), retain a crucial competitive advantage—that of being the only provider of electricity within its service territory capable of offering its customers "one-stop shopping."

*Aggregation.* Section 16-104(b) states that aggregation of loads shall be allowed so long as the aggregation meets applicable reliability criteria. Representatives of entities supporting SB 55 have stated that the intent of this provision is to require utilities to allow aggregation of loads, but many subsections of the Section impose affirmative delivery services obligations on utilities in far less ambiguous terms. If the bill is enacted, and if a court were to construe Section 16-104(b) as allowing the utility the option of whether to aggregate, service to small customers other than by the utility would be a practical impossibility.

*Decommissioning.* Section 16-114 requires each utility with responsibility for decommissioning costs to file a tariff conforming to PUA Section 9-201.5 to be applicable to tariffed services customers and ARES customers who do not take delivery services from the utility. By establishing the applicability of the decommissioning rate, the Section appears to preclude the recovery of decommissioning costs from special contract customers and all other competitive services customers of the utility. Utility representatives have offered several arguments as to why the amounts recovered on a per/kwh basis from tariffed services customers and ARES customers would be set so as to spread decommissioning costs over all customers, including wholesale customers and competitive customers. These arguments are not comforting in the face of potential counterarguments based on the plain language of the bill itself. If tariffed services customers and ARES customers bear decommissioning costs to the exclusion of, for example, special contract customers of the utility, the utility has a clear competitive advantage over all other providers in attracting and retaining special contract customers. The advantage is equal to the per/kwh decommissioning charge.

*Municipal utility and electric cooperative provisions.* Under Section 17-200, a municipal utility or electric cooperative (muni or coop) may elect in its sole discretion to make one

or more of its customers eligible to take service from an ARES. If it does so, an electric utility appears to be authorized to serve the customer or customers on a competitive basis under Section 16-116(a)(ii). Under Section 17-300, a muni or coop may elect to become an ARES; if it does so, the electric utility or utilities in whose service areas the muni or coop proposes to provide service are themselves entitled to delivery services on the muni or coop system, but there is no provision for allowing other ARES to serve muni or coop customers.

*Eminent domain for new power plants.* Under Section 8-503 as amended by SB 55, the Commission would not be authorized to order a utility to build a new power plant unless the utility had sought a certificate for the plant under Section 8-406. This means that a utility can only be ordered to construct new generation capacity if it wishes to, but as long as that is the case, it may seek and receive eminent domain authority to take private property necessary for the construction. SB 55 makes no provision for an ARES to receive eminent domain authority for any construction, whether of generation, transmission, or distribution facilities.

*Effective date of the bill.* As it passed the House of Representatives, Article XVI bore an effective date of January 1, 1998 (Section 75). Representatives of utilities supporting the bill have stated that this is a typographical error, and that the intended effective date of Article XVI should be the date the bill becomes a law. In either event, electric utilities will have the better part of two years to enter into unregulated special contracts with their customers before any customers are eligible for delivery services. It is difficult to overstate the competitive advantage this gives utilities.

*Securitization – utilities obtaining cash.* Utilities are required to use the proceeds of the sale of transitional funding instruments for one or more of the purposes set out in Section 18-103(d)(1)(A) through (F), and the Commission's order authorizing the creation of transitional funding instruments must require the utility to use at least 80% of the proceeds for purposes set forth in (A) and (B). Section 18-103(d)(1)(A) includes the phrase "to recover previously incurred costs"; there appears to be no limitation on the nature of these costs, and thus, no apparent limitation on the use of the cash representing the "recovery of previously incurred costs." The availability of cash resulting from the State's pledge that it will not in any way limit, alter, impair, or reduce the value of intangible transition property, may constitute a significant competitive advantage for utilities over ARES.

It should also be noted in this context that Section 18-103(d)(1)(B) includes the phrase "to refinance . . . equity . . . in a manner which the electric utility reasonably estimates will result in an overall reduction in its cost of capital . . .". This means that one use of securitization proceeds that falls within the 80% limit is the repurchase of shares of a utility's common stock from the holding company (Unicom, Illinova, CIPSCO, and CILCORP, to name several). There appears to be no limit on the uses the holding

company and its non-utility affiliates may make of the proceeds of these stock repurchases, calling into question the efficacy of the "safeguard" set forth in Section 18-103(d)(1)(iii): "in no event shall the **electric utility** use the proceeds of [securitization] to repay or retire obligations incurred by any affiliate of the electric utility . . . without the consent of the Commission." (emphasis added.)

*Securitization – utilities maintaining customers.* Under the definition of "instrument funding charge" in Section 18-102, the charge is non-bypassable, is expressed in cents per kilowatt-hour authorized in a transitional funding order, and is to be applied and invoiced to "each retail customer, class of retail customers of an electric utility or other person or group of persons obligated to pay any base rates, transition charges, or other rates for tariffed services from which such instrument funding charge has been deducted and stated separately pursuant to subsection (j) of Section 18-104." Section 18-104(j) provides that before any instrument funding charges may be imposed by a public utility, the utility must file tariffs directing that the amount of any instrument funding charge be "deducted, stated, and collected separately from the amounts otherwise billed by such electric utility for base rates and charges, and where applicable, other rates for tariffed services as set forth in the transitional funding order."

Article XVIII thus appears to contemplate the creation of a debt owing by all customers and customer classes who are taking tariffed services, including those paying transition charges (delivery services tariffs do not appear to be excluded either), to those entitled to collect instrument funding charges either by levying tariffs under Section 18-105(a) (irrespective of whether the utility is providing electricity at that point) or those entitled to bring an action against retail customers or classes of retail customers for instrument funding charges under Section 18-109.

The one clear way to avoid being responsible to third parties for instrument funding charges is to avoid paying tariffed rates, which include transition charges and appear to include delivery services tariffs. The simplest way to do that is to enter into an unregulated special contract with the incumbent electric utility.

## **VII. RATE AND BILL IMPACTS OF SB 55**

This Section discusses SB 55's impacts on customer rates. The Commission's analysis shows that overall bill savings for Illinois ratepayers will be modest at best.

### **A. Bill Savings**

The proposed legislation offers ratepayers two avenues for saving on their electric bills. First, residential ratepayers of utilities serving 12,500 or more customers will receive rate cuts, depending on current rate levels and whether customer rates have been reduced since 10/1/96. Second, customers of all classes may select delivery services

service and take advantage of additional savings associated with the "mitigation factor."

*Residential class rate cuts.* ComEd and IP residential ratepayers will receive a 10% rate reduction on 1/1/98 and a further 5% reduction on 10/1/2000. Customers of the remaining utilities will receive smaller increases because their rates fall below the average of a group of Midwestern investor-owned utilities. CIPS, CILCO and UE residential ratepayers will receive 5% cuts and MidAmerican ratepayers will receive a rate reduction of 1.3%.<sup>4</sup> Because ComEd and IP are the two dominant utilities in the state, approximately 85% of all residential ratepayers in Illinois will receive the 15% rate decrease. The proposed legislation does not offer base rate reductions to either commercial or industrial customers.

The residential rate reduction provisions are summarized in the following table:

**Residential Rate Decreases**

Utility	Date	Rate Decrease Amount
ComEd, IP	January 1, 1998 October 1, 2000	10% of base rates Additional 5% of base rates
CILCO, CIPS, Union Electric	January 1, 1998	5% of base rates, then no further expected rate decreases <sup>5</sup>
MidAmerican	January 1, 1998	1.3% of base rates, then no further expected rate decreases
Interstate Power, Mt. Carmel, South Beloit	No rate decrease required	

*Mitigation factor savings.* The savings from purchasing power from an alternative supplier is specified in Section 16-102 in the definition of transition costs and may be referred to as "mitigation factor" savings. Mitigation factor savings can be thought of as the value of "shopping" and constitute an additional rate reduction for customers who switch suppliers. For residential customers, mitigation factor savings vary from 6% of the base rates in effect as of 10/1/96 for customers switching suppliers from 10/1/2000 to 12/31/2002 to 10% of base rates for customers purchasing non-utility power during 2007 and 2008. For ComEd and IP residential customers, annual gains from shopping would be on the order of \$140-\$160 in 2000 and \$160-\$200 in 2008.

<sup>4</sup> MidAmerican customers already received rate reductions of 10% in 1996 and 3.7% in 1997.

<sup>5</sup> These utilities would not have to reduce rates further unless their rates exceed the Midwest average on 10/1/2000 and 10/1/2002.

The mitigation factor savings available to non-residential customers range from a one-half-cent per kwh reduction from the tariffed rate or special contract rate under which the customer is served at the beginning of the open access period, to a one-cent reduction during 2006 through 2008. On average, this represents the maximum gain from switching suppliers. However, customers that do "better than the market"- that is, obtain power and energy at a price that is lower than the market price - will achieve greater savings than customers who obtain power and energy at prices above the market level. On the other hand, it is possible that some customers may find that they are unable to achieve any savings by switching suppliers.

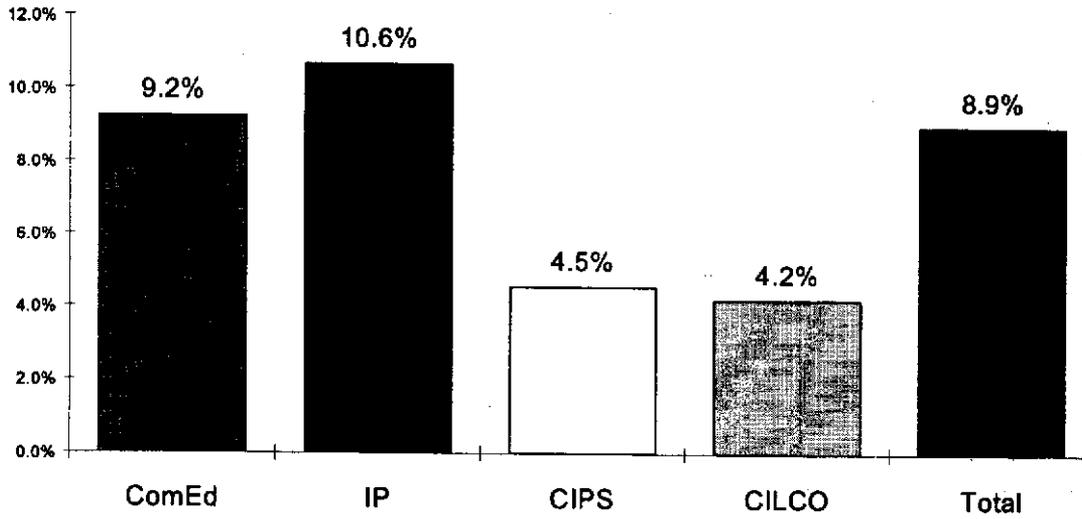
**B. Projected Savings**

Attainable savings are limited to the rate reductions offered to residential customers and the "mitigation" factor savings that can be obtained from purchasing power from an ARES or using the power purchase options of Section 16-110. Both are discussed below.

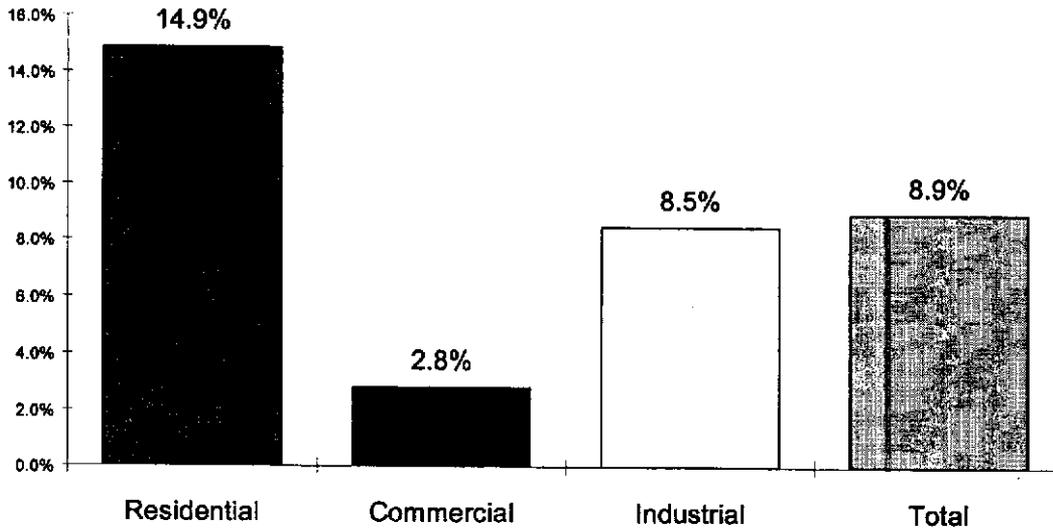
The data presented below were calculated on a Net Present Value basis (NPV). This approach expresses prices for future years in current dollars and thereby puts all prices on an even level. The NPV approach is necessary to compare the rate impacts of SB 55 from one year to the next over the course of the 1998-2008 transition period.

On a NPV basis, ComEd and IP ratepayers will save about 10% off their 1996 rates. CILCO and CIPS ratepayers will save only about 5%. Overall, customer savings are about 9%. By rate class, commercial customers will save the least, about 3%; residential customers will save the most, about 10% (see charts below).

**SB 55 Savings on Current Revenue for Illinois Ratepayers  
by Utility**  
NPV in \$000



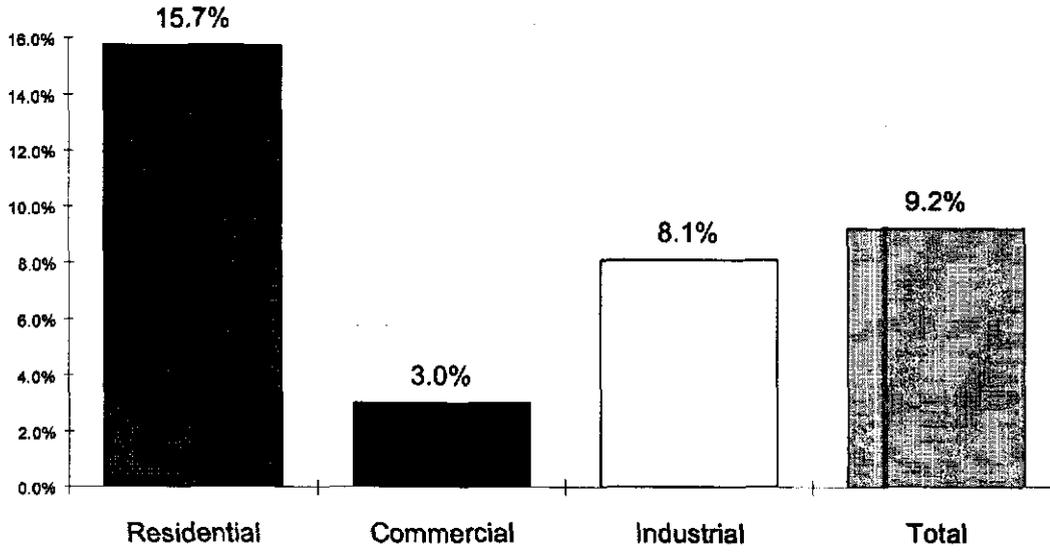
**SB 55 Savings on Current Revenue for Illinois Ratepayers  
by Rate Class**  
NPV in \$000



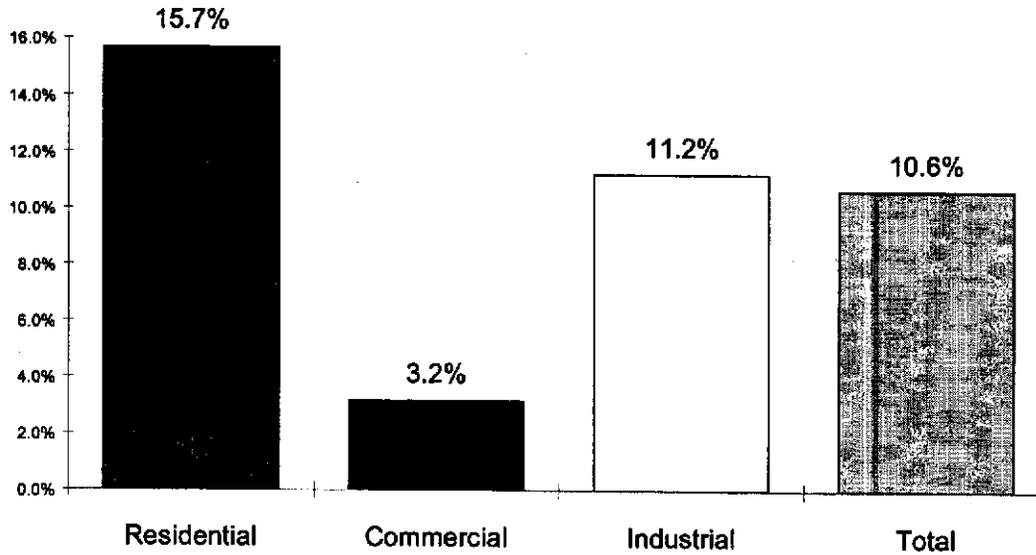
The following charts present these rate comparisons for each utility broken down by rate class on an annual basis throughout the 1998-2008 transition period.

**S.B. 55 Savings on Current Revenue for ComEd Ratepayers**

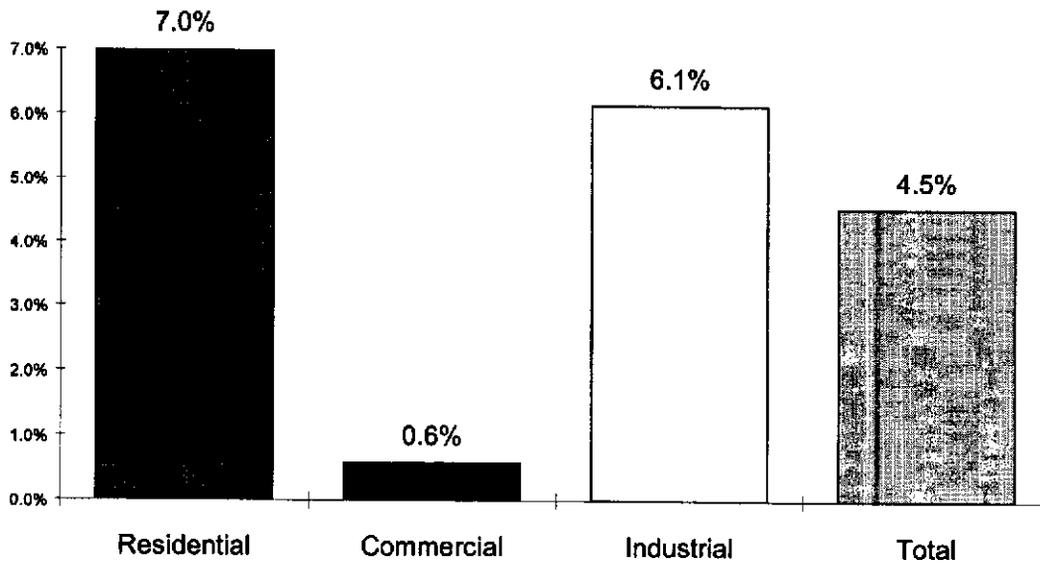
NPV in \$000



**S.B. 55 Savings on Current Revenue for IP Ratepayers**  
NPV in \$000

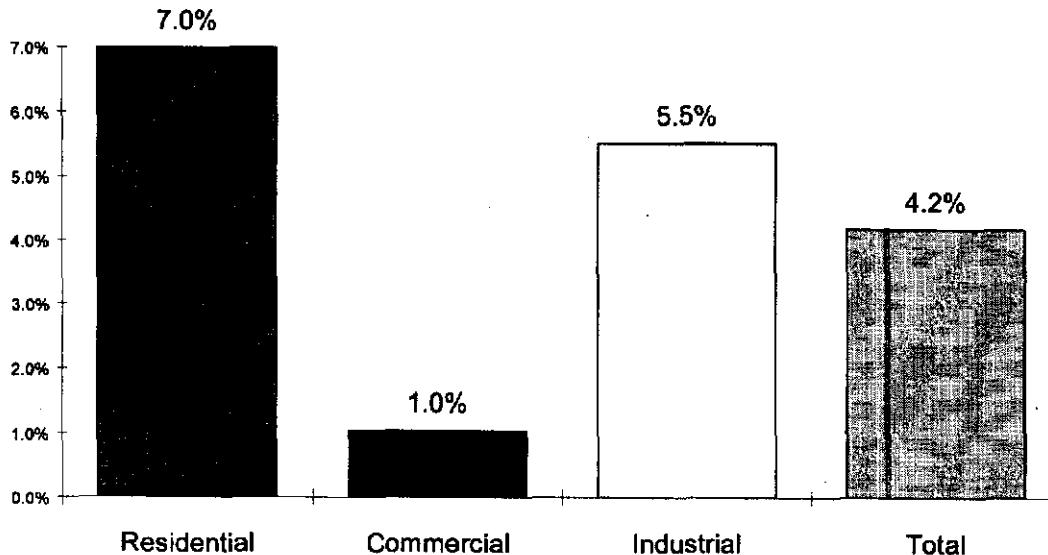


**S.B. 55 Savings on Current Revenue for CIPS Ratepayers**  
NPV in \$000



### S.B. 55 Savings on Current Revenue for CILCO Ratepayers

NPV in \$000



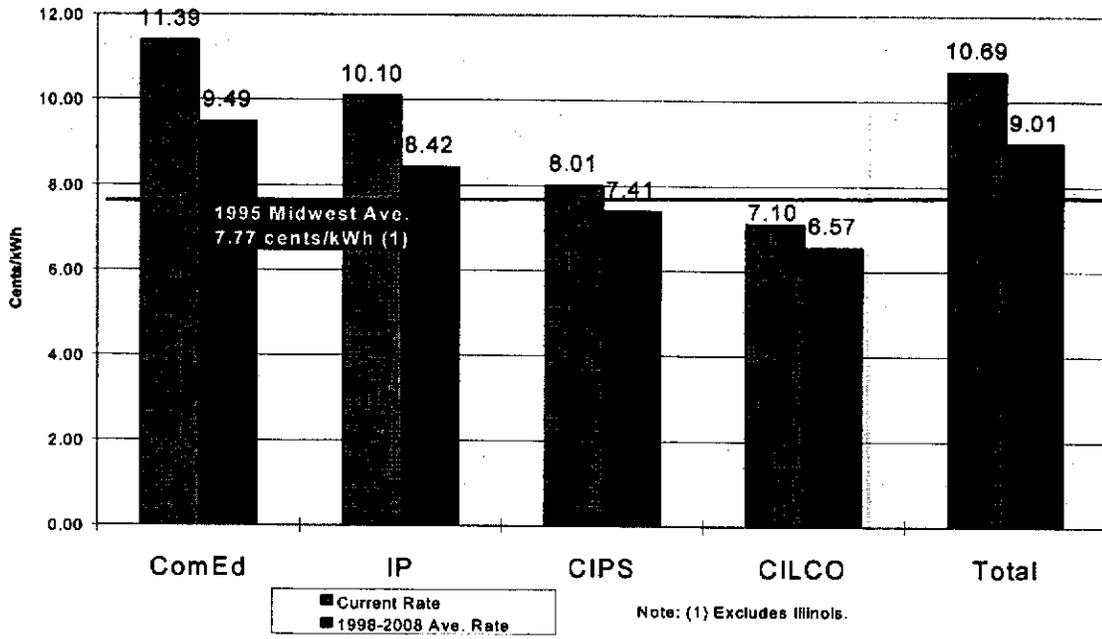
#### C. Midwestern Rate Comparison

The charts presented below show 1996 average prices per kwh for each of the four utilities and the average of the prices per kwh that customers of each utility are expected to pay each year over the course of the transition period. The data indicate that ComEd and IP residential and commercial customers currently pay rates that are above the rates paid by customers in other Midwestern states. It is projected that their rates will remain above current the Midwest average for much, if not all, of the transition period.<sup>6</sup>

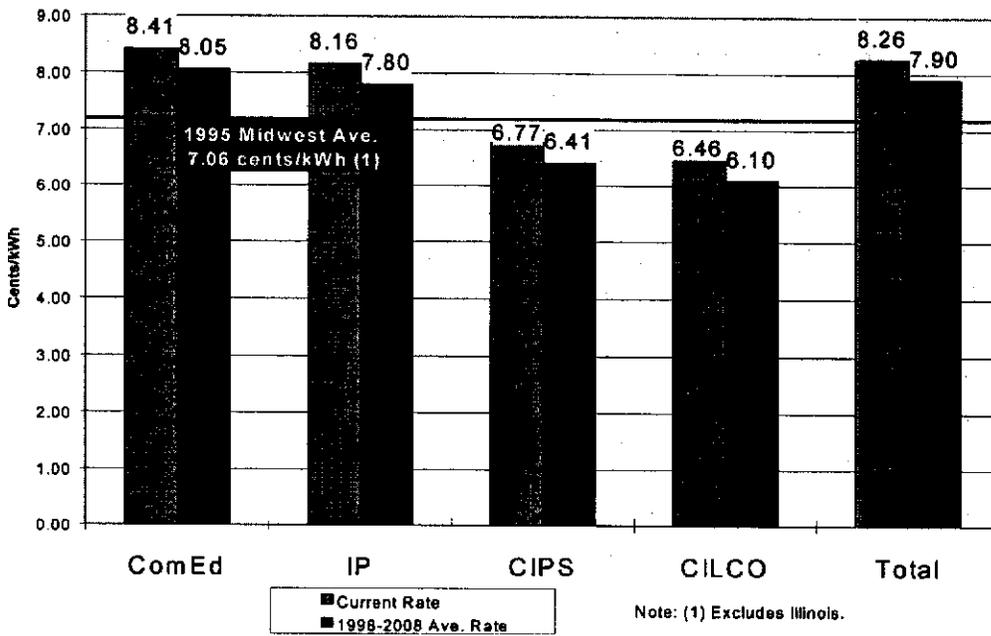
The difference between Illinois rates and rates paid by neighboring states will become even greater if competitive electric markets in those states reduces rates from current levels. Thus, while the legislation confers benefits on Illinois ratepayers, it prevents most ratepayers served by ComEd and IP from receiving all of the savings that could be realized from the development of a competitive electric market.

<sup>6</sup> The Midwest average calculation excludes Illinois rates.

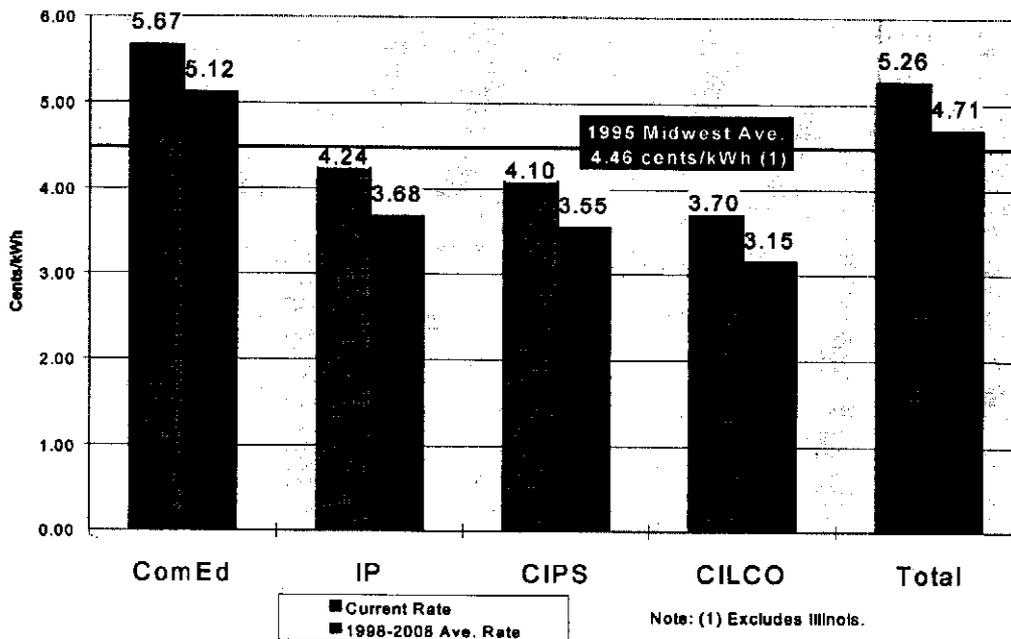
**Residential Rates vs. 1995 Midwest Average**



**Commercial Rates vs. 1995 Midwest Average**



Industrial Rates vs. 1995 Midwest Average



### C. Residential Customer's Bill Impact

SB 55 affects the residential customer's bill in the following ways:

#### Mandatory Changes

- Rate reductions from 0% to 15%.
- Additional charges: Renewable Resource Charge of 5¢/month, and the Low Income Assistance Charge of 40¢/month.

#### Optional Changes

- Uniform Fuel Adjustment Clause (UFAC) elimination, at utility's option.
- Delivery services impacts (at customer's option, when available)

## VIII. COMPARISON OF SB 55 WITH GOVERNOR'S ADVISORY COMMITTEE REPORT<sup>7</sup>

The recommendations offered by the Governor's Advisory Committee contained within the report entitled "Principles Applicable to the Electric Industry Reform Legislation" (GTFR) are designed to encourage the development of a competitive generation market in Illinois. These recommendations are generally not consistent with provision of SB 55. In the Commission's opinion, SB 55 could greatly benefit if it were changed to adhere more closely to the thirty-five market structure and regulatory and financial principles enumerated in the GTFR.

The GTFR indicates that in order for competitive generation markets to develop existing utility market power must be reduced as regulatory oversight is diminished or the result may be the creation of unregulated firms with monopoly power. The development of an efficient, unregulated generation market requires, among other things, that existing vertically-integrated utilities be de-integrated. As discussed in Section IV, SB 55 does not require de-integration of the existing vertically-integrated utilities.

The first actions that should be taken are to unbundle customer rates and to implement "functional separation" of generation, transmission and distribution divisions of each utility. The GTFR explains that "these divisions should be operated as if they were independent firms." SB 55 does not require immediate unbundling or functional separation of the existing utilities' operating divisions.

As the second crucial step in creating a competitive generation market, the GTFR recommends the formation of a truly independent ISO that controls and eventually owns the State's transmission assets. The GTFR note that control and ownership of the ISO is important because

...the essential facility in an electricity market is the transmission network. The ability to control that network is the ability to discriminate. Regulators' abilities to control discrimination when the network is controlled by a firm that owns generators or which buys power in the market is limited. Comparable access to transmission access for all generators and all users requires that all transmission assets in the ISO's control area come under the full control of the ISO." (GTFR at 17).

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<sup>7</sup> The Governor's Advisory Committee For Electric Utility Regulatory Reform consists of Nancy Brockway, Randle Smith and Charles Stalon. The Committee presented its report to the Governor on April 28, 1997.

As explained elsewhere in this Report, the ISO provisions in SB 55 will not accomplish the purposes that the GTFR believes are necessary for the creation of a competitive generation market.

The GTFR states that electric rates should be "brought to, or near, the regional average as soon as possible." This is not a likely outcome for most Illinois electric customers. The GTFR recommends that fuel adjustment clauses be eliminated, which is allowed, but not required, by SB 55. The GTFR also recommends the introduction of pilot programs in order "to help develop the market for competitive suppliers to small customers." SB 55 does not require the implementation of pilot programs.

## IX. BENEFITS FOR ELECTRIC UTILITIES

The wide support of S. B. 55 has received from electric utilities is natural given the numerous and far-reaching benefits the bill would provide to them. The discussion below specifies many of the benefits electric utilities would enjoy under the proposed legislation. Many of these benefits are also impediments to competition. Thus, in order to avoid repetition, this Section contains only a general discussion of the utility benefits described in detail in earlier Sections.

*Deregulation of contract services.* The bill generally removes Commission oversight over contracts negotiated between customers and utilities. Until customers are eligible for delivery services, only utilities can offer individually negotiated contracts.

*Pricing and billing experiments.* Section 16-106 allows electric utilities to undertake billing experiments that can include discounts to various customer groups. Contrary to current law, the bill allows the utility to discriminate among customers.

*Weak functional separation and ISO requirements.* As drafted, the functional separation and ISO requirements do little to prevent a vertically-integrated electric utility from using its transmission system in an anti-competitive and discriminatory manner.

*Bypass customers must pay transition charges.* Customers that are able to bypass an electric utility's generation, transmission and distribution system (e.g., connect with an interstate transmission line or cogenerate with leased facilities) are required to pay transition charges pursuant to Section 16-108 (d). The imposition of transition charges in this manner significantly reduces the economic benefit for customers to acquire electricity in an alternative manner.

*Commission cannot order immediate rate unbundling.* See discussion of unbundling in Section VIII.

*Exclusive access to supplemental energy assistance payments.* Under the bill, a monthly charge for each customer's account (both gas and electric) will be assessed and deposited in a fund in the State treasury. The charge is a part of the energy assistance program for customers unable to pay utility bills. While the charge is assessed to all electric energy accounts (including delivery services accounts), the funds can be distributed to electric utilities but not to ARES. This provision clearly provides an economic advantage for electric utilities.

*Utilities do not become ARES outside service territory.* The bill would allow electric utilities to serve retail customers outside their service areas and provide competitive, non-tariffed services without becoming an ARES.

*Utilities can respond quickly to competitive threats.* Under Section 16-111(f) an electric utility may reduce any rate tariff within seven days after filing. This provision allows an electric utility to respond to competitive threats with virtually no regulatory lag.

*Removal of Commission authority over financial transactions.* As discussed above in Section II, Changes to Commission Authority, many activities that are currently subject to Commission approval would become exempt from such approval under Section 16-111(g) and as a result of changes to existing Sections of the Act. Commission oversight of reorganizations (excluding mergers between Illinois utilities or the holding companies of Illinois utilities, which remain regulated, but including mergers between Illinois utilities or their holding companies and any corporation which is not an Illinois utility or the holding company of an Illinois utility); retirement of generating plants; sale assignment, lease or other transfers of assets and agreements with transferees is reduced. The proposed changes would generally reduce the costs associated with regulation and increase the possibility of electric customers subsidizing non-utility activities.

*Commission oversight over asset depreciation rates removed.* The proposed change to Section 5-104, accelerated depreciation, would allow utilities to accelerate recovery of assets and could allow an electric utility to avoid a large, one time write-off of uneconomic assets. In addition, accelerated depreciation could allow an electric utility to avoid the earnings sharing provision of Section 16-111(e).

*Transfer of tax credits and excess tax reserves.* The bill would allow electric utilities to transfer unamortized investment tax credits and/or excess tax reserves to a non-operating income account. This could result in higher reported income and such a transaction could offset the impact of accelerated depreciation or any write-off of utility plant.

*Commission oversight of non-utility books and records removed.* Eliminating the requirement that public utilities maintain the books and records for non-utility businesses in a like manner and form as utility books and records may reduce the cost of record-keeping.

*Commission oversight of security issuances removed.* Elimination of Commission oversight of security issuances would reduce the utility costs and increase utility flexibility in raising capital.

*Commission authority to order generating plant construction removed.* The bill would eliminate the Commission's authority to order a utility to build an electric generating plant unless the utility requests a certificate of convenience and necessity under Section 8-406.

*No approval needed for energy services activities.* The bill permits utilities to perform energy-related services, such as consulting on load-reduction strategies, and charge market prices for such services. Currently, utilities must obtain Commission approval in order to undertake energy-related services.

*New menu of UFAC options.* The bill provides electric utilities a smorgasbord of options under which the fuel adjustment clause can be eliminated. The utility may select the option it finds most advantageous. Depending on the option selected by the utility, the costs recovered from customers may significantly exceed the cost of fuel that the utility is reasonably expected to incur in future years. Additionally, the Commission could be prohibited from reviewing 1997 UFAC fuel expenditures. This provision has the potential to provide a significant economic benefit to some electric utilities at the expense of customers.

*Commission cannot change rates during transition period.* During the mandatory transition period the Commission is prohibited from initiating actions that would change, restructure or unbundle the utility rates that were in effect on October 1, 1996 (Section 16-111 (a)).

*Utilities not prohibited from seeking rate increases.* Electric utilities would be allowed to request an increase in base rates under certain circumstances pursuant to Section 16-111 (d). Clearly, this provision limits the downside risk for electric utility investors. If an electric utility is unable to sufficiently reduce costs, faces significant competition or encounters adverse operating conditions - it is allowed to request authority to increase base rates. Utility earnings would be restricted above a return on equity that exceeds the U.S. Treasury bond yield by 5.5 percentage points (through the end of 1999) to 6.5 percentage points (beginning in the year 2000); however, the utility may reduce its reported earnings by undertaking such programs as accelerated depreciation and amortization of plant, lowering tariffed rates, or offering special contracts and billing experiments to individual or groups of customer. Thus, electric utilities (including

those utilities with no uneconomic investments) would be able to easily avoid exceeding the earnings cap.

*Securitization activities.* The bill would allow electric utilities to engage in asset securitization. Under Article XVIII, electric utilities are authorized to create intangible transition property and impose a non-bypassable instrument funding charge. While the instrument funding charge has no net impact on customer bills, by virtue of its structure, the instrument funding charge allows electric utilities to issue new bonds at a relatively low cost. Absent Article XVIII, circumstances could arise under which an electric utility would have severe difficulty raising new capital (issue new securities). However, Article XVIII ensures electric utilities will have the ability to raise significant amounts of capital. Further, the utilities claim that Article XVIII will allow them to reduce their overall cost of capital.

## **X. UTILITY RISKS**

Utility revenue losses from the required rate decreases for residential customers as well as the revenue losses due to the "mitigation factor" can be estimated fairly accurately. It is a much more difficult task to measure or estimate the potential for further revenue losses that can be attributed to competition. For instance, among other things, the bill allows utilities to conduct billing and pricing experiments and to decrease selected rates upon seven days' notice to meet competitive threats. It also requires utilities to offer power at market rates. The revenue losses associated with such actions simply cannot be determined at this time with any reasonable degree of confidence. As explained in Section IX, one thing that can be stated with confidence is that it is extremely unlikely that utilities will be required to give refunds.

Other threats to revenue can be identified, but that are even more difficult to quantify. For example, the definition of "transition costs" is premised on the idea that capacity not sold to a delivery services customer can be sold elsewhere at the price that the delivery services customer would have paid. A utility would lose revenue if the price of the resold capacity is less than this price. On the other hand, the reverse could also occur. Additionally, while the Illinois ISO that would be required were the bill to be enacted may be inadequate to achieve the goals that a truly independent ISO ideally should achieve, it may help reduce utility market power and thus may result in sales at prices lower than perhaps could have been obtained absent the ISO.

## **XI. RATEPAYER BENEFITS**

This Section discusses the benefits that electric customers could obtain through the enactment of SB 55.

*Scheduled rate cuts for most residential customers.* As discussed in earlier Sections, ComEd and IP residential customers will receive a 10% rate cut in 1998 and a further 5% rate cut in 2000. Most other residential customers will receive a 5% rate cut in 1998.

*Deregulation of special contracts.* Currently, the Commission must approve all discounts from tariffed rates, which typically takes several weeks. Customers sometimes found the necessity for Commission approval a burden. Thus, to the extent that there will be not be any regulatory delay in implementing contracts, customers will find the deregulation of power sales to be beneficial.

*Power purchase options.* The power purchase options of Section 16-110 allow customers to purchase power from the utility at market prices, with appropriate notice to the utility and the payment of a fee. Contract lengths are typically a minimum of one year. The power purchase options provide some assurance to customers that they will receive "market prices" even if a competitive retail market does not develop. These options could be particularly valuable for customers of utilities which have limited ability to import power.

Utilities must notify residential and small commercial customers at least twice per year that the Section 16-110 purchase power options are available. However, residential customers may not use this option until 2004. A related provision, Section 16-111 (i), which applies to rate proceedings after 1/1/2005, allows the Commission to limit the generation component of a utility's tariffed rates to no more than 10% above the market value as determined pursuant to Section 16-112 in any general tariffed services rate.

*Pricing and billing experiments.* Pursuant to Section 16-106, utilities may offer pricing and billing experiments at their discretion during the transition period. Generally, pricing and billing experiments result in customer discounts. However, it is not expected that many residential customers will be eligible for any such experiments. Thus, the value of Section 16-106 to residential customers is probably very small.

Selected non-residential customers, on the other hand, may become eligible for pricing experiments, and may receive lower electric bills as a result of their participation. It is unknown the extent to which utilities may institute pricing or billing experiments. Therefore, the value of the pricing and billing experiments cannot be determined.

*Real-time pricing.* Utilities must offer real-time pricing tariffs, as provided in Section 16-107. Implementation of real-time pricing tariffs is available under current Commission authority (ComEd and IP have real-time pricing programs).

Each utility must file with the Commission proposed real-time pricing tariffs for residential customers by 5/1/2000 for implementation by 10/1/2000. Though it is not stated in the bill, it is reasonable to expect that all customers will be eligible to take

service under real-time pricing tariffs. Real-time pricing tariffs are subject to the Commission's Article IX authority.

Real-time pricing seeks to reflect the fact that the cost of producing electricity varies from day to day and even from hour to hour. A theoretical advantage of real-time pricing is that such pricing more closely reflects how customers actually make decisions whether to consume additional units of electricity than traditional pricing based on embedded costs.

The norm for current real-time pricing tariffs available from various utilities around the country, including ComEd and IP, is one-day advance notice through electronic means of the hourly prices that will prevail during the following day. Meters capable of recording prices on an hourly basis typically are needed to implement real-time pricing. However, residential customers generally do not have such meters and likely will have to purchase or lease meters to take service real-time pricing tariffs, which will reduce the benefits of real-time pricing.

The residential customers most likely to benefit from real-time pricing are those customers who are aware of the benefits from switching consumption from peak periods to off-peak periods. In particular, customers who can run appliances during lower-cost periods rather than during the daytime may benefit most. However, it is very difficult to determine the potential cost savings available to residential customers through real-time pricing.

Non-residential customers may find real-time pricing tariffs to be useful tools to reduce bills. Section 16-107(a) requires utilities to file real-time pricing tariffs available to non-residential customers beginning 10/1/98. As explained above, those customers that actively monitor electric consumption and can switch production processes from peak periods to off-peak periods upon one day's notice would benefit most. However, the savings available to customers will depend on the provisions of the real-time pricing tariffs proposed by the utilities and approved by the Commission.

*Excess earnings sharing.* Section 16-111(e) requires utilities to refund one-half of "excess earnings" during the transition period.<sup>8</sup> Excess earnings is defined as follows:

Two-year average of rate-of-return on common equity LESS  
The Index applicable to each of the two years PLUS 1.5 percentage points

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<sup>8</sup> It is unclear whether refunds would be paid in the year following the second calendar year on which the two-year average is calculated or the second year after the second calendar year.

The Index equals the 12-month average yields of 30-year U.S. Treasury bonds plus 4.00 percentage points (during 9/1/97) or 5.00 percentage points (during 9/1/2000 through 9/1/2004). Thus, excess earnings equals:

Two-year average rate-of-return on common equity LESS  
Average T-bond yields PLUS 5.5 (or 6.5) percentage points.

It is difficult to estimate the potential for customer refunds due to excess earnings. However, it appears that any utility that wished to avoid refunding excess earnings could do so quite easily by accelerating depreciation expense or offering rate reductions to selected customers.

At current long-term T-bond rates, utilities would not be required to contemplate giving refunds unless utility two-year average earnings were greater than about 12.5%. Any refunds offered to customers must be shared by both "retail" customers and delivery services on a kwh usage basis. Thus, customers that retain service from the host utility (or simply are not eligible for delivery services) must share refunds with those customers buying power from alternative suppliers. The refunding method is most favorable to large-volume customers with a high load factor.

*Assurance of continued bundled sales service.* Utilities must continue to offer bundled sales service to residential and small commercial customers that is "consistent" with the bundled sales service currently available. This requirement ensures that customers who have no interest in switching suppliers may rely on the local utility for electric service.

## **XII. RATEPAYER RISKS**

*Rates remain above Midwest average.* Even with the rate reductions required by the bill, rates for smaller-use customers of ComEd and IP will remain substantially above the rates paid by most Midwestern customers. After the second rate reduction takes effect, ComEd's residential customers will be paying rates that are about 25% higher than the current Midwest average rate. IP's residential customers would pay rates that are closer to the current Midwest average, but their rates would still be about 10% higher than the average.

*Commission cannot review rates.* Section 16-111(a) generally prohibits the Commission from conducting a review of electric rates during the mandatory transition period. Even though depreciation tends to reduce costs over time, the Commission cannot order a utility to reduce its rates. Under traditional regulation, in theory, at least, cost reductions are eventually passed through to customers. In contrast, under SB 55, which essentially establishes a "price caps" regulatory scheme, cost savings become and remain utility profits.

It should also be noted that the rate reductions are taken from a level of rates which may not be at the level that a current rate review would find to be just and reasonable. Any utility that has made significant cost reductions since its last rate case would not be required to reflect the cost reductions in customer rates before the mandatory rate decreases take effect.

*Potential for future rate increases.* SB 55 does not protect electric customers against future rate increases. As described below, a utility may seek an increase in rates for bundled sales services when specified financial performance levels are not met. A utility may also request an increase in rates for tariffed services, such as delivery services, at its discretion. A rate increase for bundled service would not necessarily also mean an increase in tariffed services (and vice versa).

Section 16-111(d) describes the circumstances in which a request for an increase in the rates for bundled sales service is permitted. A utility may seek rate relief during the transition period if it has two years of earnings that are below the two-year average yield of the least risky long-term government securities or when its "interest coverage ratio" is less than 1.70. A utility may not increase depreciation expense in order to qualify for a rate increase, but is not otherwise precluded from bringing a rate increase request to the Commission. The Commission conceivably could refuse to increase rates, but the fact remains that the bill provides no guarantee against future rate increases during the transition period.

After the end of the mandatory transition period, any utility may seek a rate increase in bundled sales services regardless of its overall financial performance. Section 16-111(i) restricts the generation component of customer rates to no more than 10% above the market value of generation but there is nothing denying the utility the ability to make up the difference elsewhere in tariffed rates.

*Customer savings from switching suppliers is minimal.* As shown in Appendix B, it is apparent that potential savings achievable from purchasing power from alternative suppliers is not likely to be substantial for most customers.

*Little protection against market power abuses.* The bill provides no meaningful authority for the Commission to correct any abuse of market power that may develop. The lack of authority to remedy market power abuse will severely discourage the development of competitive markets.

*Bypass customers must pay transition charges.* See Section V for a discussion of this topic.

*Lenient Alternative Regulation Program review standards.* SB 55 amends existing Section 9-244, the part of the PUA that sets requirements for approval of alternative regulation programs. The new approval standards are substantially more lenient than the

standards that are replaced. Specifically, the Commission no longer would have to find that a program a) is in the public interest; b) would produce just and reasonable rates; and c) will benefit ratepayers through the realization of efficiency gains, cost savings or productivity improvements. Moreover, if the Commission found that modifications would be needed to satisfy the criteria listed in Section 9-244, a utility could withdraw its request for approval. Another problem is that it is not clear that the Commission would be allowed to offset possible negative impacts of a program against the possible positive impacts when determining whether a program would be "likely to result in other substantial and identifiable benefits," as required by subsection (b)(2).

### **XIII. CHANGES IN REGULATORY AUTHORITY**

SB 55 diminishes or effectively eliminates regulatory oversight over various aspects over the Illinois electric market. Some of these changes in regulatory oversight could be fairly labeled as actual "deregulation." Other changes are not required to "deregulate" or more lightly regulate the industry, but nevertheless, if enacted could significantly restrict the development of competition. It is noteworthy that no other state has so extensively removed regulatory oversight over utility operations in the course of deregulating the electric industry.

SB 55 also adds Commission responsibilities. These new responsibilities are briefly discussed in this Section.

#### **A. Existing Commission Authority Diminished**

*Special contracts and other "competitive services."* Section 16-102 defines "competitive service" as contract service, services that are related to but not necessary for the provision of tariffed services, and any service the Commission has declared competitive under Section 16-113. "Contract service" is defined essentially as that provided under a special contract entered into after the effective date of SB 55, and service provided by a utility outside its service area. Section 16-116(b) provides that competitive services are not subject to Article V, VII, VIII or IX of the PUA, except insofar as any of these provisions are made applicable to ARES under Section 16-115 or 16-115A. Thus, from the effective date of the bill, the Commission has no Article IX rate authority over special contracts.

In addition, because Article VII is not applicable to such services, a utility may offer special electric rates or services "related to, but not necessary for, the provision of tariffed services" to any affiliated interest, including corporations with interlocking directorates or entities more directly affiliated without being subject to Section 7-101. Special contract rates not only need not be filed under Article IX; it appears that they may not be the subject of a staff review under Section 5-105 (except to the extent Commission Staff is performing a contract summary audit under Section 16-112). It

further appears that the Commission is precluded from requiring the utility to provide such contracts under Section 5-101.

Further questions are raised by the interplay between the definition of "competitive service" as including services "related to, but not necessary for, the provision of tariffed services," and the inapplicability of Article VII, which prohibits the diversion of utility resources to non-utility business absent Commission approval, to such services.

Also, a comparison of Section 16-101 with existing Section 13-101 (which addresses the lesser degree of regulation for competitive telecommunications services) reveals a significant difference. Articles I through V, certain Sections of Article IX, and all of Article X apply to competitive services provided by telecommunications carriers, while none of these provisions are mentioned in Section 16-101 as applying to the competitive services provided by utilities or to any of the services provided by ARES. While utility representatives engaged in the development of the SB 55 language have stated that the intent was not to exclude these matters from Commission jurisdiction under Article X, the apparent effect of this omission is to call into question the Commission's Article X authority even to subpoena records of a utility's competitive services. The ARES and competitive utility matters subject to the complaint jurisdiction and hearing related powers of the Commission under Article X appear to be limited to those listed in Section 16-115B, which is made applicable to the competitive services of utilities under Section 16-116(b). An additional concern is that the Commission will not have rulemaking authority with respect to any of the subjects of Article XVI except for tariffed services of a utility and those subjects as to which such authority is expressly given. Furthermore, it is not clear how Commission decisions under Article XVI are reviewed if Section 10-201 does not apply.

Finally, even where the Commission is still authorized to entertain complaints by customers over the provision of service by an ARES or by a utility on a competitive basis, this jurisdiction is limited to complaints by small customers (those having maximum demands of less than one megawatt).

*Rates during the mandatory transition period.* From the effective date of the bill through January 1, 2005, the Commission is deprived of its Article IX authority to regulate the rates charged by a utility to its tariffed services customers, subject to certain narrow exceptions. Section 16-111(a) would also provide that the Commission shall not, "in any order approving any application for a merger pursuant to Section 7-204 that was pending as of May 16, 1997, impose any condition requiring any filing for an increase, decrease, or change in, or other review of, an electric utility's rates." Section 16-111 (a) would apply to the currently pending CIPS/Union Electric merger.

*Other transactions during the mandatory transition period.* From the effective date of the bill through January 1, 2005, a utility may, under Section 16-111(g), implement a

reorganization other than a merger, retire generating plants from service, transfer utility assets to an affiliated or unaffiliated entity and as a part of such transaction enter into power purchase agreements, service agreements, or other agreements with the transferee, and use any accelerated cost recovery method including recording reductions to the original cost of its assets. The only Commission approval required for any of these transactions is that if generation, transmission, or distribution assets in excess of certain stated thresholds are transferred, the Commission may hold a 90-day proceeding after notice and hearing and prohibit the proposed transaction if it finds that the transaction will render the utility unable to provide its tariffed services in a safe and reliable manner, or that there is a strong likelihood that the transaction will result in the utility being entitled to seek a rate increase during the mandatory transition period under Section 16-111(d).

Also, under Section 16-111(h), the Commission may not, during the mandatory transition period, establish or use any rates of depreciation or amortization other than those chosen by the electric utility under Section 5-104(c) (which allows electric utilities to choose any depreciation and amortization rate consistent with generally accepted accounting principles). While a utility must exclude any accelerated depreciation from the calculation of whether it meets the threshold for seeking rate relief during the mandatory transition period under Section 16-111(d), the Commission would apparently be precluded from applying any depreciation or amortization rate other than that selected by the utility in the ensuing rate proceeding. Such a result, it should be noted, would appear to conflict with Section 5-104(d), which provides that the Commission may determine in a Section 9-201 or 9-202 rate proceeding not to use the depreciation or amortization rates established by the utility under Section 5-104(c)—Section 16-111(d) expressly references Article IX. The answer to this apparent conflict may lie in the fact that the Section 16-111(h) prohibition applies specifically to the mandatory transition period and that this specific temporal reference would control the more general language of Section 5-104 to the advantage of the utilities through the end of 2004.

Finally, under Section 16-111(j), an electric utility may transfer a specified amount of unamortized investment tax credit or excess tax reserves to a non-operating income account. The Commission is required to approve the transfer within 14 days of receiving the utility's statement of the transfer.

*Depreciation changes.* As noted above, Section 5-104 is amended to allow an electric utility to change depreciation rates without Commission approval.

*Securities issuances.* The Commission's authority to approve or disapprove securities issuances under Section 6-102 of the PUA is largely eliminated; the Commission's traditional authority would continue only as to stock issuances that exceed 10% of total outstanding stockholders' equity in a calendar year or 20% in any 24-month period, and

bond issuances that exceed similar thresholds for the aggregate principal amount of evidences of indebtedness. No Commission authority exists for issuances 90% or more of the proceeds of which are to be used for refunding outstanding issues of stocks and bonds. This change applies to all utilities.

*Affiliate transactions.* Commission authority over affiliate transactions is diminished in several ways. Commission access to books and records of affiliates is limited to accounts and records of joint or general expenses with the utility (no such restriction currently exists), any portion of which is related (current law says "may be applicable") to such transactions. The Commission must seek access to records of affiliate transactions from the utility in the first instance, and the Commission is expressly precluded from having access to accounts and records of an affiliated interest, and from requiring affiliate reports, that are not related to a transaction with the public utility. These amendments to Section 7-101 are applicable to all public utilities.<sup>9</sup>

*Asset transfers, non-utility business, etc.* SB 55 would amend Section 7-102. For utilities with gross revenues in all jurisdictions of \$250,000,000 annually, the requirement that Commission approval be sought for any assignment, transfer, lease, purchase, sale, merger, consolidation, contract or other transaction in an amount of \$5 million per year or less would no longer be required. Transactions over which the Commission would not have authority, if they fell under the \$5 million threshold, would include the sale, lease, or mortgage of utility assets, utility guarantees of the performance of a contract or obligation by another entity, the use, appropriation, or diversion of utility resources to non-utility business, and the utility's loaning, advancement or investment of its resources for or to other entities. The \$5 million limit on transactions is not cumulative, so any of the transactions described above could be consummated without the approval of, or even notice to, the Commission; this might include loans, sales of assets, and possibly all non-utility business contracted for in increments of less than \$5 million (although it could as well be argued that Section 7-102 would continue to operate as to any "diversion" of resources valued at \$5 million, irrespective of the size of individual contracts for other than utility business). The changes to Section 7-102 apply to all public utilities (of the requisite size).

*Reorganizations.* Section 7-204 is amended in several ways, including to state that no approval other than under Section 7-204 is required for a merger. This removes the Commission's Section 7-102 authority to apply the public convenience standard to

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<sup>9</sup> There is little judicial precedent addressing the language amended in this Section, although it has been considered in a number of proceedings before the Commission. It could be argued that the amendments highlighted here confirm existing law, or that they restrict Commission authority (because they further qualify affiliate documents to which the Commission has access, and because all amendments are presumed to be intended to change the meaning of the law).

mergers. Language precluding the Commission from approving a reorganization without ruling on the allocation of any resulting savings, and imposing an 11-month deadline on the Commission's consideration of a Section 7-204 petition apply only to merger applications submitted to the Commission after April 23, 1997, but the provision removing Section 7-102 authority over mergers is not limited to new applications. These changes apply to all public utilities.

*Records of "nonpublic business" of public utility.* The Commission may, as before, require a public utility to keep separately the accounts of all business other than public utility business, but the Commission could not, under Section 7-206 as amended, require that such accounts be kept in like manner and form as utility accounts. This change applies to all public utilities.

*Repeal of least-cost energy planning and related provisions.* Section 8-402, which requires the Commission to complete statewide and electric utility-specific least-cost energy plans on a three-year cycle, would be repealed by Section 18 of SB 55, as would Sections 8-402.1 (Clean Air Act compliance plans, ruled unconstitutional in Alliance for Clean Coal v. Miller, 44 F.3d 591(1995)), and 8-404 (the Commission's authority, irrespective of any energy plan, to require any public utility to implement energy conservation, demand control, or alternative supply programs).

*Authority to require utility to construct generating facility.* Section 8-503 is amended to provide that the Commission may not order the construction of a new electric generating facility unless the utility requests a certificate of public convenience and necessity for the plant.

*Electric reliability provisions.* Section 16-125 requires the Commission to undertake two rulemaking proceedings. The first is applicable to all electric public utilities and ARES owning, controlling, or operating facilities and equipment subject to the Commission's jurisdiction. It covers some of the same subject matter as the Commission's current rules requiring utilities to maintain records of outages and report to the Commission (83 Ill. Adm. Code 410, Subpart C); there is no savings clause or phrase such as "The Commission shall, at a minimum include the following:". Under canons of statutory construction, the Commission's broadly stated Article VIII authority to make rules providing for safe, adequate and reliable utility service would at least arguably be limited by this newer, more specific statement of legislative intent. The same can be said for the other rulemaking required by Section 16-125, which would apply only to utilities serving more than 1,000,000 customers (Commonwealth Edison).

## **B. New Commission Responsibilities**

*ARES certification and proceedings.* The Commission will determine whether to grant certificates of service authority to ARES under Section 16-115, which appears to require a total of 45 days for Commission consideration, including a "paper hearing," except for

those applicants who intend to serve residential and small commercial customers. In those instances, the Commission may extend the hearing period for an additional 90 days, and schedule hearings, presumably to determine whether the applicant is in compliance with the "anti-redlining" provisions of Section 16-115A.

*Consumer education program.* Section 16-117 requires the Commission to form a working group, approve a package of educational materials (and provide Internet access to such materials), and to make other information available. The Commission is to receive a General Revenue Fund appropriation to print materials for distribution by utilities and ARES.

*Municipal tax "rate design".* Within 90 days of the receipt of a request from a municipality, the Commission is required to promulgate rates of municipal taxation for categories of customers taxed for the privilege of consuming electricity on a per kwh basis under new taxing authority in Section 8-11-2 of the Municipal Code.

*Neutral fact-finder.* Under Section 16-112, the Commission will be required to choose a partner of a national accounting firm to determine the market value of power and energy in Illinois.

*New rates to be set.* The Commission will have traditional Article IX ratemaking authority (although not necessarily with 11 months to complete proceedings) with respect to delivery services tariffs under Section 16-108 (subject to the concerns with respect to authority to unbundle delivery services outlined in Section X of this Report, "Miscellaneous Provisions"), transition charges as defined in Section 16-102 and as set under Section 16-108, and delivery services customer power purchase tariffs under Section 16-110. The Commission will review the utilities' attempts to translate market values developed under Section 16-112 into transition charges and delivery services customer power purchase rates, and determine rates that satisfy the standards the bill sets.

*Functional separation.* Section 16-119A requires the Commission to establish standards of conduct for utilities to prevent undue discrimination and to promote competition. The Commission is also given authority to adopt rules on functional separation between generation and delivery services, and, after 1/1/2003, between competitive and noncompetitive services.

*Study development of competitive markets.* Section 16-120 requires the Commission to study the development of competitive markets on or before 12/31/98 and once every three years thereafter.

*Utility/affiliate relationships.* The Commission is required to adopt rules within 180 days of the effective date of the bill governing the relationship between electric utilities and

their affiliates, and ensuring nondiscrimination in services provided to a utility's affiliate and any ARES.

*Reliability rulemaking.* Section 16-125 requires a reliability rulemaking for all electric utilities, and one specific to Commonwealth Edison. As noted above, there is some concern that this requirement could be read, in its specificity, as a limitation on the Commission's otherwise broad Article VIII authority over reliability.

#### **XIV. MISCELLANEOUS PROVISIONS**

SB 55 contains several provisions that do not fit neatly into the other Sections of this report but which, in the Commission's view, are significant or otherwise bear mentioning. The following is a discussion of these provisions.

*Legislative findings.* Section 16-101A sets forth a number of findings, including the following: the citizens and businesses of Illinois have been well served by a comprehensive electrical utility system that has provided safe, reliable, and affordable service; competitive forces are affecting the electricity market; competition may create opportunities for lower costs for users of electricity; long-standing regulatory relationships need to be altered to accommodate the competition that "could fundamentally alter the structure of the electric services market"; the State has an interest in providing existing utilities a reasonable opportunity to obtain a return on certain investments on which they depended in undertaking certain investments in plant and personnel they were encouraged to undertake, while at the same time not permitting new entrants to take advantage of the investments made by the "formerly regulated industry"; a competitive wholesale and retail market must benefit all Illinois citizens; the ICC should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all customers; consumer protections must be in place.

As a general rule, findings and statements of legislative intent are not substantive provisions, but may be used as evidence of legislative intent in construing vague or ambiguous provisions. Given this, the findings on competition, which are lukewarm at best, will not give much basis for construing an ambiguous provision to favor competition. By contrast, ambiguous provisions relating to deregulation will be construed by reference to the "formerly regulated industry."

*Antitrust provisions.* A number of discussions leading up to the creation of SB 55 and legislative drafts that preceded it centered on the existence of antitrust laws as a safeguard against abuses of market power in the absence of traditional forms of utility regulation. Section 95 of the bill, which according to utility representatives was based on a suggestion from a senior antitrust official in the Office of the Illinois Attorney

General, changes the exemption traditionally enjoyed by Illinois utilities from the Illinois Antitrust Act. The activities of utilities, which are currently exempt from the operation of the Illinois Antitrust Act to the extent the activities are subject to Commission jurisdiction, would be exempt only to the extent that they are subject to "a clearly articulated and affirmatively expressed State policy to replace competition with regulation, where the conduct to be exempted is actively supervised by the State itself."

It is difficult to predict with precision the meaning that courts will assign to this language if and when they construe it in conjunction with Article XVI, but the wisdom of supplanting regulation with antitrust protections only (rather than antitrust provisions and a greater likelihood of actual competition) is suspect.

*Vague unbundling authority.* The bill leaves substantial ambiguity over the Commission's authority to unbundle delivery services. Under Section 16-108(a), an electric utility must file a delivery services tariff with the Commission at least 210 days prior to the date it is required to begin offering delivery service. The components of delivery services that are subject to FERC jurisdiction must be provided in accordance with the utility's FERC tariffs, and the Commission otherwise has authority to review, approve, and modify the other components of delivery services, "including the authority to determine the extent to which such delivery services should be offered on an unbundled basis, pursuant to Article IX of this Act and Section 16-109."

Section 16-109 requires the Commission to open a proceeding to consider the need for different or additional unbundling of delivery services on approximately September 1, 2003, and again around March 1, 2006. The Commission must consider the effect of additional unbundling on the objective of just and reasonable rates, electric utility employees, and the development of competitive markets for electric services in Illinois. Specific changes to individual utility tariffs to implement the findings of the Commission's investigation are to be addressed through individual electric utility tariff filings.

In addition, Section 16-108(b) requires the Commission to enter its order approving (with or without modifications) the initial delivery services tariff no later than 30 days before date on which delivery services must commence, and states that the "Commission may subsequently modify such tariff pursuant to Article IX and this Section."

Several participants in negotiations leading to Section 16-109 have stated that the intent of that Section was not to limit the Commission's delivery services unbundling authority to the two instances expressly addressed in that Section, but rather to allay concerns of potential power and energy market participants that the Commission would not exert sufficient regulatory control over delivery services unbundling. The express incorporation of that Section into the only direct reference to unbundling

authority in Section 16-108 was further explained as an attempt to incorporate the Section 16-109 criteria only (that is, just and reasonable rates, employee impact, and development of competition). The concern remains, however, that the reference to Section 16-109 in Section 16-108(a) could be read to constrain the exercise of the Commission's full Article IX unbundling authority, which is in the Commission's view crucial to the development of competition.

*Severability.* Section 15 of the bill provides that if any non-tax provision added by the bill is held invalid, then all provisions added by the bill are invalid except for the tax provisions (the tax provisions are the subject of a separate severability clause in Section 60). If the bill is declared invalid, transactions that have been completed remain valid, but those that have not been completed are voided. No presumption of validity or invalidity of actions and transactions under Article XVIII (securitization) results from a determination of invalidity of any non-tax provision of the bill. Thus, it would appear that if a court determined with finality on 12/31/99, for example, that a non-tax provision of the bill was invalid, rates would revert to the pre-bill levels (the first 10% or 5% residential rate decrease would be eliminated), delivery services tariffs and service offerings would no longer be required of utilities, and securitization transactions might or might not be affected. Any transactions consummated without Commission approval by virtue of Section 16-111(g) would stand, but any contracts entered into with customers for a period extending beyond the date of the final declaration of invalidity would appear to terminate.

Commission authority removed by the bill might not be reestablished automatically -- it could be argued that certain deletions from existing sections of the PUA were not "provision[s] added by this amendatory Act of 1997," and were thus severable.

There are several possible grounds for a constitutional challenge to non-tax provisions of the bill. First, a utility could challenge the mandated rate cuts (Section 16-111(b)) as confiscatory if it felt that the General Assembly had used its legislative ratemaking powers in violation of State and Federal unconstitutional "takings clauses."

A second possible challenge would be based on the neutral fact finder determination of the market value of power and energy under Section 16-112. The neutral fact finder is the default determiner of market value if a utility does not establish a market index by tariff, or if the Commission rejects the utility's selection of a market index. If the neutral fact finder process comes into play, it puts substantial discretion in one individual to make decisions that will drive the amount of the transition charge (defined in Section 16-102 and implemented under Section 16-108) and the rates for delivery services customer power purchase options under Section 16-110.

Questions could be raised as to the adequacy of the standards the General Assembly has established to guide NFF discretion, and as to the lack of any apparent mechanism

for administrative or judicial review of the individual's determinations. Utility representatives have stated that the utilities maintain the ability to create tariffs that incorporate the NFF, and the Commission retains authority to consider the justness and reasonableness of those tariffs. A central question is whether a court will view the NFF constraints on the Commission's ability to make findings and determine just and reasonable rates as an improper delegation of legislative authority or as improperly limiting the court's own authority to review administrative decisionmaking.

A third attack could be based on Section 16-128(c), which requires electric utilities who sell generating stations or generating units during the mandatory transition period to enter into contracts with the purchasing entity that oblige the purchasing entity to offer employment to non-supervisory personnel at no less than the same wage rates and substantially equivalent fringe benefits that continue for at least 30 months. A comparison of this language with the Illinois statute held to violate the Supremacy Clause of the U.S. Constitution in Commonwealth Edison v. IBEW, Local No. 15, (US Dist. Court, N.D.Ill., Case No. 96 C 3989, Order dated February 21, 1997) reveals sufficient similarity to raise questions as to the validity of Section 16-128(c), although utility representatives state that they do not believe there is a legal problem.

*All-electric versus electric and gas customers – energy assistance charge disparity.* Under Section 13(b) of the Energy Assistance Act of 1989, which would be added to that Act by Section 85 of the bill, all gas and electric utilities are required to collect a charge from each customer account to be paid into the Supplemental Low-Income Energy Assistance Fund in the State treasury. The charge is 40 cents per month for each residential customer, \$4/month for nonresidential customers with less than 10MW of peak demand or 4 million therms of gas during the previous year, and \$300/month for larger users of gas and electricity. This means that an all-electric residence will pay \$4.80 less into the Fund than an electric and gas residence over the course of a year, an all-electric small business will save \$48, and an all-electric large user will save \$3600.

This effect is compounded by the 5 cents (residential), 50 cents (small non-residential), and \$37.50 (large non-residential) charges per month imposed on electric and gas customers under Section 6-5 of the bill, half of the proceeds of which are deposited in the Renewable Energy Resources Trust Fund, and the other one half of which are deposited in the Coal Technology Development Assistance Fund.

*Neutral fact finder.* As noted above, Section 16-112 establishes for a neutral fact finder the task of determining the market value of capacity and energy for use in calculating transition costs and establishing the price of power and energy under the delivery services customer power purchase options of Section 16-110. The NFF determination of market value must be used unless a utility tariff approved by the Commission provides for the use of a market index.

The NFF receives summaries from electric suppliers describing the price of capacity and energy sold and, during a two-month period each summer, determines the market value under varying sets of circumstances (for example, peak versus off-peak, firm versus interruptible, etc.). The market value determinations must then be used by electric utilities and the Commission in establishing tariffs for transition charges and delivery services power purchase options.

The Commission is not aware of any circumstance in which decisions of such economic magnitude are made without the safeguards of administrative procedure and judicial review.

## XV. CONCLUSION

Significant changes to SB 55 are necessary to protect customers from the potential abuses of electric utilities exercising monopoly power and to enhance the development of competition in the electric industry. As drafted, SB 55 would reduce regulatory oversight of monopoly providers without providing adequate opportunities for competition to develop.

SB 55 should be modified to synchronize the reduction of regulatory oversight with the development of competition. Under SB 55 there would be no meaningful competition until at least 2005 and competition will not likely begin to develop until 2008 in much of the market. As a result, existing customer safeguards should not be eliminated in the wholesale manner proposed in SB 55. In addition, the easing of regulation should be accompanied by meaningful competition. Therefore, the barriers to competition contained in SB 55 must be removed and replaced with provisions that would foster healthy competition in all segments of the electric market.