

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On its own motion	:	
	:	
Proceeding to monitor the ongoing	:	Docket No. 03-0056
Development of the marketplace for	:	
Commonwealth Edison Customers	:	

**Comments of Commonwealth Edison on the April 27, 2006 Market Monitoring Report Issued by the Staff of the Illinois Commerce Commission**

Commonwealth Edison Company (“ComEd”) submits these comments on the Second Market Monitoring Report (“Second Report”) issued by the Staff of the Illinois Commerce Commission (“ICC” or “Commission”) on April 27, 2006.

Section I of these comments provides an overview of the key data that ComEd has provided in response to the Commission’s April 9, 2003 Interim Order in the instant proceeding, and reviews that data in the context of the Commission’s findings and conclusions set forth in the November 14, 2002 Interim Order in Docket No. 02-0479 (“Competitive Declaration Order”). Section II contains ComEd’s comments on the specific conclusions set forth in the Second Report.

Overall, the current data continue to support the Commission’s decision to allow the competitive declaration to take effect by operation of law for bundled utility service to customers with demands over three (3) megawatts (“over 3 MW”). The evidence strongly demonstrates that, since that time, the market has continued to develop for the over 3 MW customers. Moreover, nothing in the statistical evidence suggests a need for Commission intervention. If anything, the evidence gathered during the past three years – which shows more than 80% of customers in the over 3 MW group opting

for some type of competitive choice, and more than 50% receiving service from a retail electric supplier (“RES”) unaffiliated with ComEd – would support the Commission’s entry of an order affirming the competitive declaration and terminating this docket.

I. Overview of Statistical Data and Competitive Declaration Order in Docket No. 02-0479

A. Background and Summary

In the Competitive Declaration Order, the Commission found the evidence proffered by ComEd to be sufficient to allow the competitive declaration to take effect by operation of law:

[T]he Commission, in its review of the evidence, finds that competitive conditions in the ComEd service territory for Rate 6L customers 3MW and greater exist in considerable degree. There are, however, sufficient concerns about recent developments that cause the Commission to refrain at this time from either granting or denying ComEd’s Petition. Rather, the Commission declines to issue a final order in this matter, thereby permitting the declaration to take effect by operation of law.

Competitive Declaration Order, at 13.

The Commission further explained its rationale for allowing the declaration to take effect by operation of law:

The Commission is encouraged that, since October of 1999, a large portion of the customers and load previously served under 6L have moved to alternative service. We are hopeful that the implementation, by operation of law, of a competitive declaration with respect to 6L customers 3MW and greater will contribute to ongoing improvements in competitive conditions.

*Id.* at 30 (emphasis added).

With respect to the relevance of switching data to the statutory standards for the declaration of a service as competitive, the Commission concluded:

We find that switching data, particularly if it is substantial, can be used to satisfy the statutory standard of Section 16-113(a). The Commission must

make its review on a case-by-case basis and we recognize that in some circumstances switching data may not be compelling enough to satisfy this statutory requirement. In this proceeding, however, the data are substantial.

*Id.* at 55 (emphasis added).

Because of concerns that competitive conditions would deteriorate for these customers, the Commission's Competitive Declaration Order established the instant proceeding to monitor the development of the market for the over 3 MW customers:

While the Commission will neither approve nor deny the Petition, but allow it to take effect by operation of law, the Commission shares Staff's and Intervenors' concerns about the development of the retail market. Accordingly, the Commission will initiate on its own motion a proceeding to monitor the ongoing development of the marketplace for customers 3MW and greater. The record in the instant proceeding shall be incorporated into this new proceeding.

By initiating this proceeding, the Commission intends to track the nature of the competitive market on a forward-going basis.

*Id.* at 78 (emphasis added). The Commission's April 9, 2003 Interim Order in this docket detailed the data to be submitted and reviewed for monitoring purposes.

The "concerns" referenced in the Commission's order were raised by IIEC and other customer representatives. These included (i) doubts "regarding the ability of RESs currently serving the [over 3 MW] market to continue serving those customers," (ii) a fear of a "wholesale return to Rate 6L," and (iii) concerns relating to "the continued viability of nonaffiliated RESs in the marketplace." *See id.* at 38-41, 64. These representatives continued to voice similar concerns in the procurement case. *See Commonwealth Edison Co.*, ICC Docket No. 01-0159, at 126-27 (Order, Jan. 24, 2006) ("Procurement Order"). The data gathered in this proceeding show that these fears were and are unfounded. RESs have remained in the market and customers have continued to

make competitive choices. Specifically, the data collected by the Commission in the instant proceeding since 2003 clearly demonstrate that:

- (1) Unaffiliated RESs are actively and effectively serving this customer segment (*see* Second Report, at 12-13);
- (2) Customers have demonstrated an interest and ability to move into the competitive market and off bundled service (*see* Second Report, at 5);
- (3) Options to return to bundled service did not prove attractive to customers (*see* Staff's Initial Market Monitoring Report, at 4-5 (Dec. 2003) ("Initial Report"));
- (4) ComEd's service to these customers is, in fact, competitive under the standards set forth in Section 16-113 of the Public Utilities Act ("PUA") (220 ILCS 5/16-113); and
- (5) The market will continue to serve customers with demands over 3 MW without Commission intervention.

The following is a review of the key statistical information specifically considered by the Commission in its 2002 Competitive Declaration Order and the current status of such statistics.

B. Presence of Unaffiliated Alternative Suppliers

In its Competitive Declaration Order, the Commission noted the concerns raised regarding the stability of RESs:

Many parties have emphasized the uncertainties faced by RESs on a going-forward basis and the Commission fully recognizes the uncertainties faced in a competitive market. The Commission, nevertheless, must make its determination based upon evidence and testimony in support of or opposition to the competitive declaration criteria as set forth in Section 16-113 as of the the [*sic*] Petition is under consideration.

Competitive Declaration Order, at 42.

As shown by the following data, however, the RESs serving over 3 MW customers have demonstrated stability and growth since the declaration, contrary to the assertions of certain parties to the 2002 proceedings. *See id.* at 38-41; *supra* at 3.

During the period in which the Commission was considering the competitive declaration, there were five (5) unaffiliated alternative suppliers providing

service to customers with demands over 3 MW. As of December 2005, there were six (6) unaffiliated RESs providing service to these customers. Although the number of unaffiliated RESs serving these customers has varied somewhat from month to month during the three-year period, three (3) of the unaffiliated RESs serving customers at the time the competitive declaration was filed in 2002 have been continuously providing service to these customers through 2005, while one (1) of the five (5) was the subject of a subsequent corporate reorganization and transferred its customers to a new entity within the reorganized corporation, which continued to serve these customers through 2005.<sup>1</sup> Only one (1) of the five (5) alternative suppliers providing service in 2002 exited the Illinois market.

The loss of one (1) of the original five (5) unaffiliated RESs is of little consequence as this supplier had been essentially replaced by two (2) others by the end of 2005. In fact, one of these two new suppliers has been in the Illinois market since 2002. Furthermore, based on more recent data collected, which directly corresponds to the recent increase in the number of ARES certifications, ComEd expects to report to Staff later this year that all nine (9) of the RESs that are currently certified to serve over 3 MW customers are today, or soon will be, providing service to over 3 MW customers.<sup>2</sup> These data should put to rest any lingering concerns regarding the general viability of RESs.

#### C. Percentage of Customers Not Taking Bundled Service

The portion of the customers previously served under Rate 6L that had moved to alternative service was a factor considered by the Commission in reaching its

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<sup>1</sup> During the period June 2003 (*i.e.*, when the competitive declaration took effect) and December 2005, there were as many as seven (7) unaffiliated alternative suppliers serving over 3 MW customers at varying points in time, which was due in part to the transition that occurred as part of this reorganization.

<sup>2</sup> This statement is based on DASR (direct access service request) information drawn on April 25, 2006. Such information will be reflected in ComEd's second quarter report to Staff, which is due in August 2006.

2002 decision. *See* Competitive Declaration Order, at 30 & 42. At the time of the competitive declaration proceedings, 71% of the over 3 MW customers had switched from ComEd bundled service (*i.e.*, were taking PPO, ISS or supply from an affiliated or unaffiliated supplier). ICC Docket No. 02-0479, Crumrine & Kelter Dir., ComEd Ex. 2.0, Attach. PRC/DFK-4. By the end of 2005, over 80% of these customers had switched. As illustrated in Table 1, *see infra* at 9, the propensity of these “large, economically sophisticated customers” (Competitive Declaration Order, at 36-37) to switch continued to grow steadily throughout the three year period -- even after the competitive declaration took effect. This is all the more noteworthy when considering that, as Staff noted in its December 2003 Initial Report, leaving bundled service for delivery service after June of 2003 was “an irreversible decision for customers.” Initial Report, at 4.

D. Option to Return to Rate 6L

In response to concerns that the market might not continue serving the needs of the over 3 MW customers, the Commission in its Competitive Declaration Order urged Staff and ComEd to reach agreement concerning the provision of a one-time option that would allow customers that were taking service under competitive contracts at the time the declaration took effect to return to service under Rate 6L. The Commission further noted: “We would expect to review the role of an appropriate return option for customers currently on alternative service contracts in the success of the implementation of the competitive declaration.” Competitive Declaration Order, at 75.

ComEd notes that *no* customers elected or exercised these options to return to Rate 6L. As Staff recognized in its Initial Report, this “shows significant

confidence among current RCDS customers in the future of the retail market.” Initial Report, at 4. Furthermore, contrary to the predictions of certain parties to the 2002 proceeding (*see, e.g.*, Competitive Declaration Order, at 64), there was never a mass or “wholesale” return of customers to Rate 6L in 2003 before the competitive declaration took effect, as is reflected in Table 1. The fact that this option to return remained unexercised reaffirms Staff’s 2003 finding that confidence in the retail market remains high.

E. Percentage of Eligible Customers Served by Unaffiliated Suppliers

One statistic presented by ComEd that carried weight in the Commission’s decision to allow the competitive declaration to take effect was the percent of over 3 MW customers served by unaffiliated alternative suppliers. In its 2002 Competitive Declaration Order, the Commission observed:

While noting that nearly 70% of those customers within the identified segment have opted not to take tariffed service, our examination must focus on those who have taken service from other providers, i.e. flowed power. The record is clear that nearly one-third of all members of the identified group are taking service from RES-flowed power.

Competitive Declaration Order, at 28. *See also id.* at 37 & 45.

As shown in Table 1, *infra* at 9, that number had increased such that over half (roughly 52 percent) of the over 3 MW customers were being served by unaffiliated alternative suppliers at the end of 2005.<sup>3</sup> This statistic evidences the ability of RESs to procure supplies through the wholesale market, which has been greatly improved through ComEd’s entry into PJM Interconnection L.L.C. in 2004, as well as customer confidence in market-based supplies.

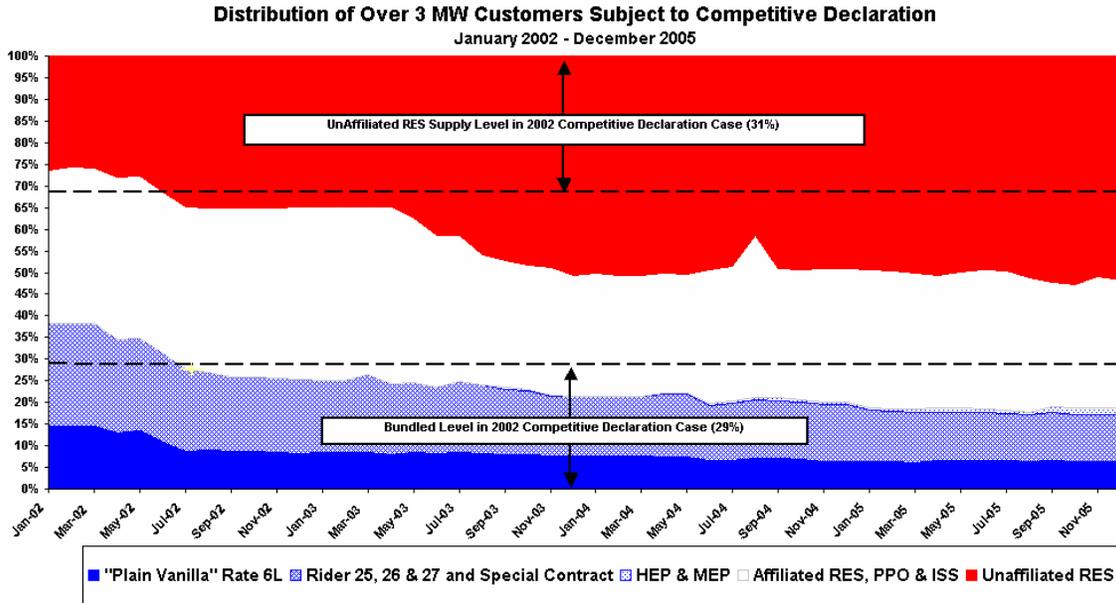
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<sup>3</sup> Moreover, by including those customers assigned to the PPO (Power Purchase Option) by an unaffiliated alternative supplier (*i.e.*, the supplier is using PPO to supply its customers), the percentage of customers served increases slightly to 55 percent.

F. Annual Load of Customers Served by Unaffiliated Suppliers Resulting in Loss of Business to ComEd

In its Competitive Declaration Order, the Commission opined that “[g]iven that ComEd has lost nearly one-third of its customer locations to alternative suppliers and that those customers represent 4,545 GWh of annual consumption is substantial evidence in support of the proposition that the Company has actually sustained a loss of business.” Competitive Declaration Order, at 45. As shown in ComEd’s response to Question 1, the annual energy consumption of customers served by unaffiliated suppliers in 2005 was just over 6,600 GWh, which represents an increase of roughly 45 percent. Correspondence of M. Pabian to Commission (Mar. 9, 2006), Attach. 1. Although as an Integrated Distribution Company under Part 452 (83 Ill. Adm. Code Part 452), ComEd does not actively compete with RESs, nevertheless, its “loss of business” in this customer segment has been significant.

**Table 1**



II. Staff's Second Market Monitoring Report

In general, ComEd believes Staff's Second Report accurately depicts the data provided by ComEd pursuant to the Commission's Interim Orders in the instant proceeding.<sup>4</sup> ComEd does not agree, however, with one of the conclusions suggested in the Staff report, and also believes that additional information is needed to put the HHI calculations that Staff provided in proper context. Both of these issues are discussed below.

A. Customers on Riders 26 and 27

As noted in the Procurement Order, Staff's Initial Report indicated that the "growth in unaffiliated supply among certain subclasses of customers is uneven," and there had been little change in the number of bundled customers on Rider 26 –

<sup>4</sup> In Section C of the Second Report, Staff indicated that there were nine customers taking Rider 26 service in January 2002 and nine customers taking that service in December 2005. ComEd, however, reported that there were seven customers taking Rider 26 service in January 2002 and eight customers taking that service in December 2005.

Interruptible Service (“Rider 26”) and Rider 27 – Displacement of Self-Generation (“Rider 27”). Procurement Order, at 129-30; Initial Report, at 15. As Staff’s Second Report continues to indicate, the statistical evidence submitted by ComEd shows that there has been little change in the number of Rider 26 and 27 customers on ComEd bundled service. Second Report, at 9-11. Staff appears to be referring to these customers when it repeats the conclusion from its Initial Report, that there remain “a significant number of customers for whom RCDS options are still not a viable economic alternative to continued bundled service.” Second Report, at 1 (quoting Initial Report, at 15).

However, Staff’s analysis confuses two separate types of rates. Rate 6L is the only bundled utility service offering for these customers, and as Staff’s Second Report confirms, there are many viable economic market alternatives for these customers as compared to Rate 6L. Riders 26 and 27 are not properly viewed as rates for “utility service.” They are tariffs that provide payments or discounted charges to customers that were thought to provide supply related benefits to ComEd at the time the riders were adopted.<sup>5</sup> These payments resulted in the net rate paid by these customers being reduced below market.

The customers on Riders 26 and 27 are sophisticated customers that are used to carefully monitoring price signals and potential savings opportunities. As reported in the Competitive Declaration Order summarizing ComEd’s testimony:

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<sup>5</sup> The Commission previously recognized the payments being made under Rider 26 as uneconomic for ComEd and its customers when it froze that rate in 1984 and again when it refused to reopen it in 1994. See *In re Commonwealth Edison Co.*, ICC Docket No. 83-0537, 61 P.U.R. 4th 1 (Order, July 12, 1984, amended July 17, 1984); *In re Commonwealth Edison Co.*, ICC Docket No. 94-0056, 158 P.U.R. 4th 458 (Order, Jan. 9, 1995). And there is certainly no economic benefit to ComEd in its current role as a distribution utility, or to its customers, to paying customers on Rider 27 not to run generation that they installed, presumably because it was of an economic benefit for them to do so.

Curtailment programs permit customers to manage their loads based on the short-term price signals the products provide. Many of these customers also use these same plans to implement energy savings activities every day by coordinating their usage to reflect changes to their demand and consumption. As a result, ComEd maintains, these customers enjoy both the payments they receive from participating in curtailment programs and the savings realized by reducing their overall usage. In short, these customers become very good at adjusting their use of energy based on both short-term and long-term price signals. ComEd concludes the customers in this segment with such expertise are well equipped to protect their economic interests in the competitive energy marketplace.

Competitive Declaration Order, at 14-15.

The fact that such customers must either (1) have invested in self-generation equipment used to reduce their purchases from ComEd and agree to curtail their load (*i.e.*, run their generators) when notified by ComEd to do so in order to qualify for Rider 27 or (2) be willing to interrupt their business operations with less than ten minutes notice up to 30 times per year to take service under Rider 26, leads to the conclusion that these customers are clearly sophisticated enough to make informed choices as to their electricity supply and to participate in the market for supply.

Further, given that these are clearly sophisticated customers, the next area to consider is whether there has been any economic incentive to switch from bundled service under Rate 6L given the opportunity for the legacy offsets for interruptible load under Rider 26 and to idle cogeneration under Rider 27. The short answer to this question is that for the reasons stated above, these riders have removed the incentive for these customers to switch to RESs by allowing them to effectively receive their supply at net rates that generally have been below market throughout the statutorily mandated transition period as a result of the rate freeze provisions in the Act.

Last, it should be noted that as part of its pending rate case, ComEd has proposed to eliminate Riders 26 and 27 entirely. *See, e.g.*, ICC Docket No. 05-0597, Crumrine Reb., ComEd Ex. 23.0, at 74:1601-75:1613. The ICC Staff agreed that elimination of the riders is consistent with ComEd’s increased reliance on the auction process, and stated that “it would be difficult and costly to maintain these existing riders.” ICC Docket No. 05-0597, Staff Init. Br., at 105; Lazare Dir., Staff Ex. 6.0, at 45:1092-97. Thus, no special consideration should be given to the fact that the Rate 6L customers who have benefited from these riders have not yet switched to the market for utility supply. The purpose of this proceeding is not to protect sophisticated energy consumers from paying market based prices for supply they receive or to ensure that they receive more than market for supply or load management options that they might in turn supply. The market is ready, willing and able to supply these customers at market-based rates.

B. Herfindahl-Hirschman Index Calculations

The Second Report contains a new analysis not presented in the Initial Report that is based on the Herfindahl-Hirschman Index (“HHI”). The HHI is a means for calculating market concentration ratios that typically are used by federal regulators as a *screen* to quickly dispose of the easy cases and identify those mergers or transactions that may warrant further inquiry. In and of itself, the HHI does not determine or confirm the potential for the exercise of market power. *See* Competitive Declaration Order, at 57.

The issue of “market concentration” also is unrelated to the legal standard under Section 16-113(a) of the Public Utilities Act, and is therefore irrelevant. The Commission for this reason did not rely on an HHI analysis offered by IIEC in Docket 02-0479, noting in its Competitive Declaration Order that:

[p]ursuant to Section 16-113, the Commission shall declare the service to be a competitive service, if, among other criteria, the service or a reasonably equivalent substitute service is reasonably available to the customer segment or group at comparable price “from one or more providers other than the electric utility or an affiliate of the electric utility.”

Competitive Declaration Order, at 42. *See also* 220 ILCS 5/16-113(a).

Based on the statutory standard, the Commission correctly found that “[t]he record is clear that the customer group selected by the Company, customers with usage of 3MW and above, is being served by more than one provider, other than the electric utility or an affiliate of the electric utility. The Company has met its burden.” Competitive Declaration Order, at 42. As discussed above, nothing has changed in this regard.

There are a variety of other reasons why market power is not a concern in the market for the over 3 MW consumers, many of which were detailed in Docket 02-0479. *See* Competitive Declaration Order at 57. Also, as Staff’s analyses reflect, the over 3 MW customer market is clearly in a state of transition – another fact that limits any significance that might otherwise be attached to the HHI ratios. As the Commission is well aware, ComEd is approaching the end of the mandatory transition period. This marks the end of certain below market rates and the PPO, which appear to have provided some disincentive to competitive entry. Coincidentally, more RESs recently have entered the Illinois market in general, and the over 3 MW customer market in particular. When facts such as these are present, the U.S. Department of Justice and Federal Trade Commission’s Horizontal Merger Guidelines caution that the transitional characteristics of a market affect the significance of market shares and concentration:

Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance.

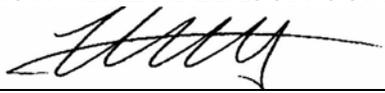
See U.S. Department of Justice & Federal Trade Commission's Horizontal Merger Guidelines, available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/15.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/15.html).

Although Staff's HHI analyses are not relevant to the Section 16-113(a) standard and, in any event, are subject to a number of considerations not discussed in its Second Report concerning market definition and market power, ComEd notes that Staff's report concludes that the "HHIs have decreased over time." Second Report, at 15. This confirms that competitive activity is increasing in the market and there is no need for further Commission intervention.

### III. Conclusion

The evidence confirms that the market is working properly and that no Commission intervention is warranted at this time.

Respectfully submitted,  
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