STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission,	:	
On Its Own Motion	:	
	:	**Docket No. 03-0056**
Proceeding to monitor the ongoing	:	
development of the marketplace for	:	
Commonwealth Edison Customers	:	

REPLY COMMENTS OF THE ILLINOIS INDUSTRIAL ENERGY CONSUMERS

The Illinois Industrial Energy Consumers ("IIEC" or "IIEC Companies"), by and through their attorneys, Lueders, Robertson & Konzen, and Conrad Reddick, offer this Reply to the comments of Commonwealth Edison Company ("ComEd") and the Coalition of Energy Suppliers ("CES") in this proceeding.

I. STATUS OF THE MARKET

A. Reality of the Market

CES alleges the Commission has granted certificates of service authority "to almost twenty (20) alternative retail electric suppliers . . ." (CES Comments at 3). However, the reality is ComEd's retail market for over 3 MW customers is characterized by the presence of only three (3) unaffiliated RESs who have continuously provided service to over 3 MW customers through 2005. (ComEd Comments at 5). Furthermore, the Commission has again received reports from end-use customers 3 MW and over, actually engaged in the market, stating that they are unable to secure competitive alternatives to their current bundled utility service.

In its comments filed in this proceeding, Nucor Steel Kankakee, Inc. ("Nucor") reports that it contacted all of the suppliers listed as "certified" on the Commission's website (presumably

including the twenty suppliers identified by CES). Nucor found that with respect to those suppliers -- though "certified" and listed by the Commission -- some were out of business, the contact details posted on the Commission's website were incorrect, or the suppliers did not have sufficient experience to serve energy intensive 3 MW and over customers. Out of six suppliers identified by Nucor as capable of providing Nucor service, one stated it chose not to serve Nucor's needs at this time. Another failed to respond at all. Of the remaining four suppliers, one was an affiliate of ComEd and none were prepared to offer Nucor the product that it wished to purchase. (Nucor Comments at 6).[1]

B. Inflated Switching Statistics

The switching statistics on which CES and ComEd rely are inflated because they include customers who actually are taking power and energy service from ComEd and its affiliate, Exelon Energy.[2] (ComEd Comments at 6). These statistics are also unreliable for assessing the competitiveness of the market for over 3 MW customers, because they can no longer return to bundled service. In fact, there has been a significant decline in the number of RES customers (-27%) in the over 1 MW group during 2005. (*See* IIEC Comments at 5). This suggests that had 3

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[1] Had IIEC been given the opportunity, IIEC would have presented the Commission with other evidence demonstrating the poor experiences of other 3 MW and over customers in the market. IIEC was denied that opportunity when its Motion to incorporate designated relevant portions of the record from ICC Docket 05-0159 was denied. (*See* IIEC's Motion to Incorporate Records of Other Proceedings into the Record in this Proceeding, or in the Alternative, to Take Administrative Notice of Transcripts and Exhibits in the Record of Another Docketed Commission Proceeding, filed May 1, 2006; Notice of Administrative Law Judge's Ruling, issued May 15, 2006.)

[2] The statutory measure for determining a service competitive is based, in part, on the availability of power and energy products from entities other than the utility or the utility affiliate. Therefore, switching statistics that include switches to products offered by ComEd and its affiliate prove nothing. (*See* 220 ILCS 5/16-113(a)).

MW and over customers been given a similar option to secure such a bundled service product in a corresponding time period, there would have been a similar decline in the number of 3 MW and over customers taking power and energy from RESs.

IIEC notes that in its May 2006 Report on Competition in Illinois Retail Markets in 2005, ("Commission Report") the Commission concluded that only 6.3% of ComEd's non-residential customers were receiving delivery services at the end of 2005; that 5,530 customers were taking service from a retail electric supplier and an additional 14,848 were receiving PPO service from ComEd. The Commission also concluded that there had been virtually no change in the number of delivery service customers between December 2004 and December 2005 in the ComEd service territory. (Commission Report, Executive Summary at 2).

The Commission further reported that the number of ComEd PPO customers grew by about 56% in 2005, reporting at the same time a sharp drop of almost equal magnitude in the number of RES customers. The RES share of delivery service load in the ComEd service territory dropped from 68% in 2004 to 61% in 2005. (Commission Report at 12-13). The Commission attributed the increase in the number of ComEd PPO customers at the expense of RES supply service to the significant increase in wholesale electric prices during 2005, noting that the average system LMP for 2005 in PJM was 37% higher than in 2004. (Commission Report at 7 and fn. 9). Thus, the switching statistics heavily relied on by ComEd and CES do not tell the whole story and the Commission Report contradicts the picture painted by CES and ComEd in their Initial Comments.

II. REPLY TO COMED

ComEd suggests that the data collected by the Commission since 2003 support several positions it advances. First, ComEd alleges the data show that unaffiliated RESs are actively and

effectively serving the 3 MW and over customer segment. (ComEd Comments at 4). However, as demonstrated by the Comments of Nucor, and would have been demonstrated by relevant evidence from Docket 05-0159, RESs have failed to actively and effectively serve the special needs of some 3 MW and over customers.

Second, ComEd alleges the data show that customers have demonstrated an interest and ability to move into the competitive market and off bundled service. (*Id*). It is certainly true that customers, such as Nucor, have demonstrated an interest in moving into the market, but they have apparently been unable to do so, contrary to ComEd's suggestion. Furthermore, the test of whether a service is competitive is not customers' ability to move off of bundled service, the Public Utilities Act gives all customers that ability as a matter of right. (*See* 220 ILCS 5/16-104). The test is whether a "reasonably equivalent substitute service is reasonably available . . . at a comparable price" from someone other than ComEd or its affiliate, Exelon Energy. (220 ILCS 5/16-413(a)).

Third, ComEd claims the data show that options to return to bundled service did not prove attractive to customers. ComEd cites to Staff's Initial Market Monitoring Report ("Initial Report") in support of this assertion. (*Id*). However, the Staff's Second Market Monitoring Report ("Second Report") explains that delivery service customers were allowed to return to bundled service between November 2002 and June 2003, but "[w]ith only limited exceptions, subsequent to that period, delivery service customers in the 3 MW group have been ineligible to return to bundled service." (Second Report at 3). Furthermore, the Staff explained that ComEd implemented a plan to allow RES customers to fix their CTCs for a multi-year period. The plan took effect in April 2003. That plan tended to encourage customers to move from bundled service. (*Id*). Thus, beginning in 2003, bundled service was intentionally made less attractive and the 3 MW and over group was ineligible

to return to bundled service except in limited circumstances.

Fourth, ComEd suggests that service to these customers is in fact competitive under the standards set forth in the Public Utilities Act. (ComEd Comments at 4). However, not only has the market failed to serve all 3 MW and over customers, as demonstrated by the Nucor Comments, but there is already evidence in the record that there were no products comparable to Rate 6L available to 3 MW and over customers in the first instance. (*See* Dkt. 02-0479 DOE Ex. 1.0 at 9-11:178-239). In addition, there is evidence in the record which suggests that 3 MW and over customers had difficulty securing RES supply in the first instance. (*Id*. at 13-17:287-384). Thus, there has been no demonstration that a product equivalent to Rate 6L is readily available to the entire 3 MW and over customer group. The data on which ComEd relies does not demonstrate that such a product is available. The evidence of record clearly demonstrates that it is not.

Fifth, ComEd argues that the data demonstrate the market will continue to serve customers with demands over 3 MW without Commission intervention. (ComEd Comments at 4). While the data in the Staff Report provides certain information about market conditions as they existed through December 2005, the Staff does not represent that they are an accurate predictor of the future. For example, certain Commission decisions on certification of retail electric suppliers are now on appeal to the Fifth District Appellate Court in Mt. Vernon, Illinois. (*See* Reliant Energy Solutions, ICC Dkt. 05-0600, appeal pending; Local Unions 15, et al., International Brotherhood of Electrical Workers v. ICC, et al., 5th Dist. App. Ct. Dkt.05-05-0725). This is the same court that issued a widely criticized interpretation of the reciprocity clause. The issue before the Court is likely to be the Commission's new interpretation of the reciprocity clause, which has allowed additional RESs to be certified. A decision by this reviewing court, reversing the Commission's current

interpretation, would no doubt adversely affect the status of some of those certified RESs and disprove ComEd's unfounded prediction that "[t]he market will continue to serve customers with demands over 3 MW without Commission intervention." (ComEd Comments at 4).

It must be said that no party has asked for "Commission intervention" in any market. The Commission order initiating these additional proceedings recognizes that IIEC has asked only that 3 MW and over customers be given access to the "market prices" resulting from ComEd's auction -- to provide IIEC with access to the numerous wholesale suppliers ComEd claimed would participate in the auction. In essence, IIEC was asking the Commission to remove ComEd's artificial restriction on the market opportunities for 3 MW and over customers, which limits those opportunities to a handful of non-utility suppliers, including ComEd's own retail marketing affiliate.

In the following paragraphs, IIEC addresses a number of other points made by ComEd in its comments on the Staff Report.

A. Presence of Unaffiliated Suppliers

ComEd also appears to suggest that the mere presence of unaffiliated alternative suppliers in its service territory demonstrates the viability of RESs. (*See* ComEd Comments at 4-5). In doing so, ComEd relies on data not discernable in the Second Report -- information on which RESs have been serving customers since the previous Staff report. (ComEd Comments at 5). Indeed, it appears that the information is confidential data available only to ComEd.[3]

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[3] This type of data is precisely what the IIEC Companies asked to review under suitable protective arrangements. IIEC was denied the opportunity to review the data. Therefore, IIEC's ability to respond to ComEd's arguments is limited by its inability to review and analyze the same data upon which ComEd's conclusions are based. (*See* Illinois Industrial Energy Consumers' Motion for Access to Market Monitoring Data and for Administrative Notice of Certain Commission Records, filed March 27, 2006; Administrative Law Judge's Ruling, issued April 18, 2006).

However, even ComEd's description of the data is not supportive of its position. The data show that as of December 2005, only six out of the 20 ARES CES claims are certified are actually serving customers; and, only three of those six have been continuously providing this service. (ComEd Comments at 5; CES Comments at 3). Furthermore, the data do not demonstrate the stability claimed by ComEd, since the relative market share of each RES is unknown and may have changed significantly.[4] In any case, stability is not a meaningful measure of competition, especially in the highly concentrated retail markets shown by Staff's HHI calculation. (*See* Second Report at 13-14). In fact, ComEd's claimed stability would suggest that these higher retail market concentrations could continue for a long time and denotes the presence of entrenched market power in the 3 MW and over retail market.

B. Percentage of Customers No Longer Using Bundled Service

ComEd attaches significance to the fact that by the end of 2005 over 80% of 3 MW and over customers were no longer taking bundled service. These customers were taking the power purchase option (PPO) from ComEd, an interim supply service (ISS) option from ComEd, supply from ComEd's affiliate, or supply from an unaffiliated supplier. ComEd has ignored the fact that under Section 16-113(a) of the Public Utilities Act, the Commission is to determine if a service reasonably comparable to Rate 6L is available from ". . . providers other than the electric utility or an affiliate of the electric utility." (220 ILCS 5/16-113(a)). ComEd instead relies on statistics that show the percentage of customers that have switched from bundled to unbundled services, including ComEd

[4] The market may, in fact, be even less competitive than these numbers suggest, since Staff declares only that the suppliers it counts as active made "at least one sale to 3 MW customers in a given month during that period." (Second Report at 13). Thus, several of these suppliers may have made only a single sale for only a brief period, rather than being part of continuing competition among long-lived suppliers.

services, and the services of a ComEd affiliate -- studiously avoiding any discussion of the reasons for that movement. The switching statistics presentation from ComEd also ignores the simple fact that as of December 2005, only 13 more customers were taking some form of unbundled service than were taking such services in September 2002. And, only a fraction of those 13 customers actually chose unaffiliated third party supply. (*See* Second Report at 2).

C. Option to Return to Rate 6L

ComEd also attaches significance to the fact that customers did not elect or exercise the option to return to Rate 6L. (ComEd Comments at 6-7). ComEd quotes from the Staff's Initial Report to support its point. However, ComEd's reference to the Staff report is incomplete. The Staff's Initial Report went on to observe that the failure of customers to return to Rate 6L could have been due " . . . to a reduction in customer price uncertainty via the introduction of the option to take a multi-year CTC if taking service from a RES." As Staff noted in its Second Report, the multi-year CTC plan encouraged customers to move from bundled service. (Second Report at 3). Moreover, the ComEd tariff implementing the plan provides that customers selecting the plan would be disqualified from returning to Rate 6L service. (*See* ComEd Rider CTC-MY at Ill.C.C. No. 4 Original Sheet No. 235). This short-term economic incentive changes the meaning of the switching behavior ComEd reports.

Furthermore, ComEd's observation that customers did not elect to return to Rate 6L during the brief window of opportunity to do so, ignores the fact that economic conditions change over time. As IIEC explained in its initial comments, it is clear that market prices for wholesale electricity and natural gas have increased significantly relative to historical norms, particularly after the 2005 hurricane season. (IIEC Initial Comments at 5). These changing conditions could have induced

many 3 MW and over customers to revert to bundled service, had they been able to do so after 2003 when the window of opportunity to do so expired. Therefore, the fact that customers did not exercise a one time option to revert to bundled service in a prior period when market conditions may have been better, really says nothing about the competitiveness of the current RES product offerings relative to bundled service or a fixed price product under the ComEd auction, under current economic conditions.

D. Percentage of Eligible Customers Served by Unaffiliated Suppliers

ComEd discusses the fact that a little over half of the 3 MW and over customers, no longer taking Rate 6L service, were being served by unaffiliated alternative suppliers as of December 2005. (ComEd Comments at 7). ComEd suggests this statistic shows that the ability of RESs to procure supply through the wholesale market has greatly improved and customer confidence in market-based supplies has improved as well. However, this statistic does not say anything about the ability of RESs to procure supplies through the wholesale market. It does not address wholesale market power, nor does it say anything about the source of the RES power supply. The record is clear that, on at least two prior occasions, ComEd and its affiliate offered a product to all RESs that enabled them to continue to operate in ComEd's service territory. (*See* ICC Dkt. 02-0479, IIEC Ex. 2.0 at 5; and IIEC Ex. 3.0 at 4-8; *see also* Dissent of Commissioner Kretschmer, Dkt. 02-0479 November 27, 2002).

Indeed, the only information in the record in this case as to the nature of the wholesale market in which RESs must secure their supply was provided by IIEC in Docket 02-0479. There the HHI for the generating market in the ComEd service territory was calculated to be 2,443. (Dkt. 02-0479, IIEC Ex. 2.3). When expanded to include producers of electricity in other areas beyond

the ComEd service territory, the resulting HHI was 1,809, which still indicates a highly concentrated market. (*Id*.) Thus, the simple fact that RESs may be able to procure a supply in the wholesale market does not demonstrate that the market in which that supply is secured is, in fact, competitive – even though in this case it appears less highly concentrated than the more highly concentrated retail market. Nor does the argument provide a reason to deny 3 MW and over customers another means of access to the competition in that market through the auction process available to all other ComEd customers.

In addition, statistics on the increase in the percentage of customers being served by unaffiliated alternative retail electric suppliers is not necessarily an indicator of "customer confidence in market-based supplies." The statistic by itself does not address customer confidence in the market. In fact, as shown by the comments of Nucor in this case and the testimony of DOE in Docket 02-0479, customers actually have expressed little confidence in the market as currently structured. Moreover, as IIEC noted in its Comments that large customers still having the right to return to bundled service, (i.e., 1-3 MW customers) are leaving the market, suggesting that customer confidence has not grown over time, as argued by ComEd, but has dwindled. (*See* IIEC Comments at 5-6).

F. Loss of Business

ComEd attaches significance to the fact that it has lost business to third party suppliers. However, as ComEd itself recognizes, it no longer competes for that business. Indeed, it is effectively prohibited from doing so under the Commission's rules on Integrated Distribution Companies. (83 Ill. Adm. Code Part 452).

It is also worth noting that the essence of the ComEd auction approach will be to acquire the

electric commodity for customers through the auction process and to pass through the cost of that commodity to customers, while at the same time providing customers delivery service through the unbundled delivery service rates approved by the Commission. In essence, if the Commission were to direct a fixed price product be offered to over 3 MW customers the current RESs would really be competing with the suppliers of power and energy who were bidders in the ComEd auction, not ComEd. The net effect would be to expand the universe of suppliers available to 3 MW and over customers without regard to market barriers such as the reciprocity clause and, at least in theory, make the ComEd retail market more competitive, not less.

G. Rate 6L Customers on Riders 26 and 27

ComEd discounts the fact that the data show there are Rate 6L customers who have been unable to find viable economic alternatives to continued bundled service. (*See* ComEd Comments at 9-10 citing Staff's Second Report at 1). ComEd attempts to distinguish between Rate 6L and Riders 26 and 27. It attempts to do so by taking the rather unique position that Riders 26 and 27 are not properly viewed as rates for "utility service." (ComEd Comments at 10). A review of the language of Rider 26 illustrates that ComEd makes a distinction without a difference. Customers taking service under these Riders must also take service under Rate 6L. Rider 26 specifies a monthly customer charge, facility charge, and energy charge to be paid by Rider 26 customers. (ComEd Rider 26 - Interruptible Service, Ill.C.C. No. 4 38th Revised Sheet No. 92). It provides in pertinent part:

> This rider shall not be available again to customers discontinuing <u>service</u> hereunder and electing <u>service</u> under other rates or <u>riders.</u> (Emphasis added) (Id).

Rider 26 itself is entitled "Interruptible <u>Service</u>". (Emphasis added). Under the rider the Company

is ". . . entitled to interruptible service at any time the Rider establishes a monthly minimum charge "for service." (Emphasis added). (Id. 19th Rev. Sheet No. 93). The rider references the customer's "total payments for service under the Rider". (Emphasis added). The rider establishes "Special Service Conditions". It requires customers to sign an agreement for "service" under the rider. (*See* Id. 19th Rev. Sheet No. 93). Obviously it is a rate for utility service.

Rider 27 states that it is available to customers who execute an initial contract " . . . and take service under . . ." the rider. (Rider 27 - Displacement of Self-Generation, Ill.C.C. No. 4 Original Sheet No. 93.01). The word "service" is used at least a dozen more times in the context of Rider 27 and the phrase "service hereunder" is used numerous times as well. Therefore, ComEd's suggestion that Riders 26 and 27 are not properly viewed as rates for "utility service" defy not only common sense, but the language of the rates themselves as well.

ComEd attempts to further distract the Commission from the fact that these customers are not able to secure a product from RESs comparable to the interruptible product offered by ComEd by suggesting these customers are receiving an inappropriate subsidy. These customers are paying a rate reflecting the quality and level of service received from ComEd, not an inappropriate discount. Furthermore, the ComEd argument ignores the real issue, which is that the market is not providing a similar product to these customers at a price comparable to the bundled service product offered by ComEd.[5] The availability of a comparable product at a comparable price is one of the statutory standards for determining service competitive in the first instance. The Nucor comments

[5] Whether the service is market priced, is a meaningless test of the effectiveness of the market as a pricing mechanism. The prime economic indicator of an effectively competitive market is whether prices are forced to cost. Yet, the suppliers' arguments avoid any reference to suppliers' costs, to surrogates like the statutory standard of regulated service prices, or even to prospective auction prices.

demonstrate that there is no reasonably equivalent substitute service available to all 3 MW and over customers at a price comparable to the price ComEd is offering the service. The simple fact that interruptible service is a lower quality of service relative to firm service and interruptible customers have historically been charged on that basis, does not provide any proof that a reasonably comparable service is available at a reasonably comparable price from unaffiliated retail electric suppliers in the ComEd service territory.

H. HHI Calculation

ComEd asserts that the HHI statistics for a given market do not confirm the potential for the exercise of market power and that the issue of market concentration is irrelevant to the statutory standard for market competitiveness. (ComEd Comments at 12). First, contrary to ComEd's assertion, the horizontal merger guidelines issued by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) state that in highly concentrated markets with HHIs in excess of 1800, it will be presumed that mergers that increase the HHI by more than 100 points "are likely to create or enhance market power or facilitate its exercise." (DOJ and FTC, Horizontal Merger Guidelines, April 2, 1992 at 30). The HHI calculated by the Staff exceeds 1800 by several hundred points and is more than a strong indicator of the potential to exercise market power in the 3 MW and over retail market. Moreover, the degree of market concentration in the 3 MW and over market directly impacts the level of price competition. The existence of price competition is a necessary discipline to market prices and would increase the likelihood that the prices of RES supply have at least a chance to remain comparable to the price of Rate 6L service. Therefore, the level of market concentration in the retail market for 3 MW and over customers is directly relevant to the statutory criteria the Commission must consider in evaluating the competitiveness of the market for 3 MW

and over customers. Given current market prices and the experience of Nucor, one must seriously question whether there is a product comparable to Rate 6L at a price comparable to Rate 6L in the market at this time. In that case, Rate 6L service may no longer be competitive, even under the statutory criteria referenced by ComEd.

Furthermore, ComEd overlooks the fact that the HHI calculation in Docket 02-0479 presented by IIEC related to the wholesale market, not the retail market. Therefore, the Commission's consideration and treatment of HHI in Docket 02-0479 is not relevant to this situation. It would defy common sense and be poor public policy to suggest, especially since the Second Report is devoid of information on price levels, that HHI calculations relating directly to the retail market in question bear no relationship to determining whether a reasonably equivalent substitute service for Rate 6L, continues to be reasonably available to all 3 MW and over customers at a comparable price -- from suppliers other than ComEd and its affiliate, as provided under Section 16-113(a). (220 ILCS 5/16-113(a)). Whether or not an equivalent substitute service is reasonably available at a comparable price is directly impacted by the level of market concentration and the associated potential for exercise of market power, as measured by HHI calculations.

This conclusion is reinforced by the Commission's decision to monitor the on-going development of the marketplace for customers 3 MW and greater. (Initiating Order, ICC Dkt. 03-0056, January 23, 2003). The Commission decided that market monitoring would require more than mere switching statistics. By adopting the Staff Report, in its January 23, 2003 Initiating Order, the Commission accepted the proposition that ". . . a full picture of the competitive nature of the ComEd marketplace depends on the number of customers actually being served by all providers of electricity and the prices customers are actually paying for electric power and energy." (*Id.* at 3). To show that

a competitive declaration and the related denial of service are warranted, the Company has the burden to show that the services available in the marketplace are reasonably equivalent substitute services, reasonably available, at a comparable price. The simple fact that the Commission found that the Company had shown that the 3 MW and over customers are being served by more than one provider other than ComEd or its affiliate, does not demonstrate full compliance with the statutory standard. The Comments of Nucor suggest that a reasonably equivalent service is not available to all 3 MW and over customers. In addition, the HHI statistics in the Second Report suggest that there is insufficient price competition to ensure that such service is available at a reasonably comparable price. These are substantially different facts from those considered by the Commission in its original determination in Docket 02-0479.

Finally, the Commission did not find it appropriate to declare Rate 6L service competitive. Rather, it allowed ComEd's competitive declaration to take effect by operation of law. The Commission could not find that ComEd had completely met its burden of proof in the first instance. Had it done so, the Commission simply would have granted ComEd's petition. The Commission's "wait and see" approach has now produced enough market information to justify a fixed price product for large customers, which will not harm ComEd or the market.

IV. Response to CES

CES highlights the portion of Staff's report that shows that 83% of 3 MW and over customers have chosen a supply option other than bundled service. (CES Comments at 3). As IIEC has explained above, the absence of a customer option to revert to bundled service since 2003 means these statistics say nothing about the competitiveness of the current RES product offerings relative to any ComEd bundled service. Also, as noted above, the number of RES-supplied customers in the

1 MW and over group has declined by 27% in the last year. (IIEC Initial Comments at 5-6). Had there been no prohibition on the return to bundled service for 3 MW and over customers, it is reasonable to conclude there would have been a further decline in RES-served load for that customer group as well. Therefore, continued heavy reliance on switching statistics to measure the competitiveness of the retail market for 3 MW and over customers cannot be justified.

CES also emphasizes that most of the 3 MW and over customers that have remained on bundled service are on special rates. (CES Comments at 3). As noted by Nucor in its Initial Comments, many of these special rate customers have interruptible service, which provides a value to all customers in ComEd's service territory. The market has obviously failed to provide some 3 MW and over customers with a product that is comparable in terms and price to their current ComEd bundled rate. The lack of switching among these customers underscores the lack of competitiveness for the 3 MW and over group.

CES also points out that the number of RESs certified by the ICC has increased to 20. (CES Comments at 4). However, the number of certified RESs is irrelevant to assessing the competitiveness of the 3 MW and over market segment. ComEd shows that of these 20, only six are active in the ComEd market for 3 MW and over customers and only three have been continuously active. (ComEd Comments at 5). To determine the competitiveness of the market, the Commission must focus on the number of RESs that are actively serving 3 MW and over customers, their respective market shares and the degree of price and service competition among these RESs, as well as the degree to which dominant suppliers in that market segment can distort competitive market outcomes through market power abuses. (*See* Dissenting Opinion of Commissioner Kretschmer in Dkt. 02-0479 at 3). In sum, the Second Report shows that despite the increase in the

number of certified RESs, the 3 MW and over market is dominated by a small number of suppliers and that price and service competition in the market may be limited by the exercise of market power.

Even the fact that some RESs actively participated in the market over the relevant time period proves little here because the Second Report does not provide data regarding the level of participation of each RES in the 3 MW and over market, as evidenced by the market share of each RES, responses to competitive solicitations, or other measures. (This makes the HHI calculations even more important.) The Second Report does not provide information regarding the prices of RES product offerings. Such information was data that the Commission requested be provided in assessing the development of the market for 3 MW and over customers. (*See* Interim Order, Dkt. 03-0056, April 9, 2003 at 5, 7). Absent such data, it cannot be determined that there is effective price competition in the 3 MW and over market. In fact, the high HHI levels for this market segment suggest that a relatively small number of suppliers dominate the market and, thus, limit its competitiveness.

Finally, CES observes that the market concentration levels in the 3 MW and over market are decreasing according to the Staff Report. (CES Comments at 5). ComEd made a similar observation in its Comments. (ComEd Comments at 14). This is a red herring argument. The reality is that the current HHI levels for 3 MW and over customers remain well in excess of the widely accepted 1800 HHI threshold for a highly concentrated market. Moreover, the fact that the HHI has decreased over the past few years provides no guarantee that the trend will continue in the future, especially if an adverse ruling is received in the current appeal on the reciprocity clause. Furthermore, even if the historical rate of reductions in the HHI remains constant, it will be at least seven years before the 3 MW and over market falls below the 1800 threshold for high market concentration. Thus, market

concentration and the risk of market power abuse remains a problem for 3 MW and over customers for the foreseeable future.

Finally, CES asserts that RESs offer a wide array of services to 3 MW and over customers. (CES Comments at 5). ComEd makes similar arguments. (ComEd Comments at 10). The Second Report does not support this statement. In fact, it states plainly:

> . . . a complete picture of the type of services offered by RESs is unavailable. (Second Report at 14).

The Second Report also notes that only two of seven or eight RESs have consistently reported data regarding their product offerings to the Commission. (*Id*.). Consequently, the Second Report does not provide any data regarding the services offered by non-reporting RESs. Finally, the data filed by the two RESs reporting to the Commission, show that they offer only firm (not interruptible) service to over 3 MW customers. Thus, there has been no demonstration, in the context of the Second Report, that RESs are offering a wide array of services to 3 MW and over customers.

V. Conclusion

The Second Report, when viewed in a proper light, justifies reconsideration of the decision to deny large customers access to the fixed price product in the ComEd auction and granting of such access.

DATED this 2nd day of June, 2006.

Respectfully submitted,

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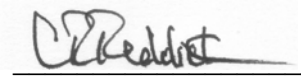

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PROOF OF SERVICE

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I, Eric Robertson, being an attorney admitted to practice in the State of Illinois and one of the attorneys for IIEC, herewith certify that I did on the 2nd day of June, 2006, electronically file with the Illinois Commerce Commission, Reply Comments of IIEC, and electronically served same upon the persons identified on the Commission's official service list.

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SUBSCRIBED AND SWORN to me, a Notary Public, on this 2nd day of June, 2006.

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