

**OFFICIAL FILE**

**ILLINOIS COMMERCE COMMISSION**

**STATE OF ILLINOIS**

**ILLINOIS STATE COMMERCE COMMISSION**

**COMMONWEALTH EDISON COMPANY** )  
)  
Petition for expedited approval of implementation )  
of a market-based alternative tariff, to become )  
effective on or before May 1, 2000, pursuant to )  
Article IX and Section 16-112 of the Public )  
Utilities Act. )

Docket No. 00-0259

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ILLINOIS  
COMMERCE COMMISSION

**COMMONWEALTH EDISON COMPANY'S  
REPLY BRIEF ON EXCEPTIONS**

In reading the Briefs on Exceptions filed by some of the parties, a casual observer would never know that the methodology presented in ComEd's Petition was developed through Commission-sponsored workshops, that parties now objecting to that proposal had publicly complained about the NFF methodology which ComEd's proposal was designed to replace, or that ComEd had been urged by many parties to present its alternative methodology in time for the summer billing period.

Nor would the reader learn from the objecting parties' Briefs on Exceptions that ComEd made many compromises during the workshop efforts in an effort to build consensus. These compromises included: (i) the development of the limited time wholesale offer; (ii) changes in how to weight the different market values in order to capture differences in load shape; and (iii) the selection of the February/March time frame for the initial snapshot, instead of the later period (one in which the Altrade™ and Bloomberg exchanges have increased in liquidity) originally proposed by ComEd. This latter compromise allowed other parties to review the initial market value credits prior to the filing of the Petition. These values – which no one has claimed are unreasonable – were then filed with the Petition. (Petition, Exhibit B

(Attachment 5)). Finally, these parties' Brief on Exceptions ignore the fact, pointed out in Nicor's Brief on Exceptions at 3, that "several power marketers, both retail and wholesale, indicated that the prices or market values produced by the market index process were in the area of power deals being executed in the over-the-counter market, and those available on traded indices."

Instead, those parties that most vociferously raise "due process" issues create a false impression that ComEd unilaterally developed the proposed alternative methodology in secret, held off filing until the absolute last minute, and is now attempting to "force" expedited Commission approval and avoid a full investigation. That these charges are both untrue and unfair should be evident to the Commission. Although ComEd would agree that the schedule in this proceeding has necessarily been an expedited and demanding one, the timing reflects a rapidly evolving market. As is further explained below, the schedule used, in the unique circumstances of this case, satisfies due process.

Because the lion's share of the objecting parties' Briefs on Exceptions is devoted to procedural issues, ComEd will respond to those points first in Section A. The substantive issues that have been raised – which are largely based on speculation already refuted by Staff, Nicor, and ComEd – are addressed in Section B.

**A. The Schedule Adopted By The Commission In Its April 12 Order Provided Parties An Adequate Notice And An Opportunity To Be Heard, Particularly Given The Unique Context Of This Proceeding.**

The schedule adopted by the Commission in its April 12 Order, and implemented by the Hearing Examiner in his April 13 and April 20 Orders, is consistent with the Public Utilities Act ("Act"), the Administrative Procedure Act ("APA"), and due process. The schedule appropriately takes account of the unique context of this proceeding, such as the previous dockets and workshops on this subject that preceded this proceeding, and the need to have a

market value alternative in place by May 1, 2000 if it is to serve any purpose at all this year. The schedule also provided all parties an adequate opportunity to present their views to the Commission on the issues at hand. By contrast, the alternative schedule presented by parties such as IIEC would not result in final approval of summer 2000 market values until – at the *earliest* -- in the winter of 2000.<sup>1</sup> Simply put, the Commission's correct recognition that many of the benefits of ComEd's proposal would be lost if the proposal were not put into place for the summer of 2000 provides no basis to overturn the months of hard work by the Commission and the parties.

**1. The Schedule Appropriately Took Heed Of The Context Of This Docket At The End Of A Lengthy Commission Process.**

It is important to recognize at the outset that this docketed proceeding is the end, not the beginning, of a year-long effort to develop a market-index based alternative to the "neutral fact finder" ("NFF") market value. The process began in early 1999 in Docket No. 99-0171, which considered ComEd's first proposed market-based alternative to the NFF. All or nearly all of the parties to this proceeding also participated in Docket No. 99-0171 and, in that Docket, they conducted substantial discovery of various market index alternatives, prepared and filed testimony, and conducted cross-examination of ComEd and Staff witnesses.

After Docket 99-0171 ended without consensus on a market index-based alternative to the NFF value, the Commission sponsored "round table" discussions in January of this year on the development of competition in which many parties raised concerns about the

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<sup>1</sup> By ComEd's estimation, IIEC's schedule – which permits 30 days for discovery, two weeks for filing direct testimony, three weeks for rebuttal testimony, at least three more weeks of discovery, hearings, three weeks for initial briefs, two weeks for reply briefs, 30 days for preparation of a proposed order, likely three weeks to one month for initial briefs on exceptions, likely two weeks for reply briefs on exceptions, and some unspecified time for preparation of a final order – would stretch until at least late November 2000, assuming that no party seeks an extension of any deadline and no appeal is taken.

NFF. The next month, the Commission initiated a series of workshops to consider alternatives to the NFF. The Commission provided notice of this process to all interested parties, including the parties to Docket 99-0171, through publication on its web site and otherwise. The Commission held intensive workshops on February 23, 2000, March 8, 2000, and March 14, 2000, and the parties to this proceeding (with the sole notable exception of Enron) actively participated in the workshops, presented proposals, and considered the proposals of other parties. Moreover, on March 28, 2000, after ComEd had presented to the parties the proposal it ultimately introduced in this proceeding, interested parties participated in a teleconference at which ComEd answered questions and provided additional information about its proposal. Only after the conclusion of that process did this docketed proceeding commence. Unlike most other Commission docketed proceedings, therefore, this docket is the culmination of a process; it is not the entire process itself.

Moreover, the instant proceeding is also unique in that it has a limited shelf-life. The impetus for this proceeding, as several parties note, was the urgent need to revise the market value for the summer of 2000, when the perceived imbalance between the NFF value and actual market conditions will be at its greatest, thus creating incentives for customers to abandon their suppliers for ComEd's PPO and to "game" the system. Therefore, if this proceeding is not concluded by May 1, 2000, many if not most of the benefits of ComEd's proposal will be lost forever. One of these benefits is that under ComEd's proposal rates would be reduced for most customers to whom the rates are applicable. (*See* Zuraski at 23; Commonwealth Edison's Verified Response to ICC Questions at 2 (Apr. 13, 2000)). As Staff witness Zuraski noted, while parties can always claim that allowing more time to litigate might produce a more refined market

index alternative, "[i]n the long run, we are all dead," and there are costs and disadvantages in "[w]aiting for the perfect market index alternative." (Zuraski at 23).

It was against this backdrop that the Commission correctly ruled on April 12 that an expedited schedule was called for, and it was against this backdrop that the Hearing Examiner properly established the next day a schedule that would permit parties to be heard and an order to issue by May 1.

Although the schedule involved some short time frames, some parties' hyperbolic statements concerning the schedule are simply incorrect. For instance, contrary to assertions of IIEC and the AG, the schedule did not deprive any party of the right to take discovery. Rather, any party that wished to take discovery could have done so as soon as ComEd filed and served its petition on March 31. Staff in fact filed two rounds of discovery soon after ComEd filed its petition, even before the April 13 hearing, and ComEd responded to Staff's requests in full. IIEC and Enron later filed one round of discovery each and, although they provided very short time frames to respond, ComEd did so in full. For instance, IIEC served 46 detailed requests at 3:00 p.m. on Friday, April 14, and sought responses by 9:00 a.m. by Monday, April 17, and ComEd responded to all but ten requests by 9:00 a.m. and the remaining ten within 1-2 hours. Similarly, Enron first served discovery requests at 10:45 a.m. on Friday, April 21, and sought responses by 3:00 p.m. that same afternoon, and ComEd responded by the requested time.<sup>2</sup>

Similarly, contrary to the statements of IIEC and the AG, the schedule established by the Hearing Examiner did not prevent parties from filing testimony or other evidence. In his April 13 scheduling order, the Hearing Examiner expressly ruled that parties could file

testimony, affidavits, or verified or unverified statements of position on ComEd's proposal by April 18, and thus parties were given nearly three weeks from the time ComEd filed its testimony to prepare and file their testimony or evidence. Staff and several parties in fact did file testimony, affidavits, or statements of position on ComEd's proposal.

Finally, again contrary to the assertions of IIEC and the AG, any party that wished to file a brief or reply brief could do so. Numerous parties did file briefs on April 24, and it is expected that a similar number will file reply briefs on April 25 as well. Moreover, any party that wished to do so could have filed a brief or similar statement of position, with or without its testimony, on April 18. Further, several parties presented argument on the merits of ComEd's proposal in their petitions to intervene and again in their written briefs on the schedule. It is thus simply incorrect to assert that the schedule did not permit the filing of briefs.

To be sure, some of the time frames in this schedule were short compared to other types of proceedings, such as general rate cases. However, these time frames were required if the goal of setting accurate market values for the summer was to be accomplished before the summer was over. These deadlines were also readily achievable, given the long background to the commencement of this proceeding (which meant that parties were already familiar with the issues), and the widespread use of electronic mail at every stage of the proceeding (which permitted instantaneous service of documents).

In these circumstances, it is simply not credible to say that any party was denied "the essence of due process," which is "the opportunity to be heard at a meaningful time and in a meaningful manner." *Petersen v. Chicago Plan Comm'n*, 302 Ill. App.3d 461, 466, 707 N.E.2d

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<sup>2</sup> ComEd also provided Enron by noon that day with the confidentiality agreement other parties had signed to obtain access to confidential information. Although Enron's counsel

150, 154 (1<sup>st</sup> Dist. 1998). It is axiomatic that “due process is flexible and calls for such procedural protections as the particular situation demands.” *Scott v. Department of Commerce and Community Affairs*, 84 Ill.2d 42, 51, 416 N.E.2d 1082, 1087 (1981). It is “not a technical conception with a fixed content unrelated to time, place and circumstances.” *Id.* “An administrative body possesses broad discretion in conducting its hearings” and is fully entitled to “tailor” its procedures “in light of the decisions to be made, to the capacities and circumstances of those who are to be heard, to ensure that they are given a meaningful opportunity to present their case.” *Petersen*, 302 Ill. App.3d at 466, 707 N.E.2d at 154.

Here the schedule mandated by the Commission, and implemented by the Hearing Examiner, appropriately did not pretend that this was a brand new proceeding or that there was unlimited time to consider the issues. Rather, the schedule was properly “tailored” “in light of the decisions to be made,” *i.e.* the setting of accurate market values for the summer of 2000, because these “decisions” had to be made before the summer began. *See id.* The schedule was also tailored “to the capacities and circumstances” of the parties, who had had numerous opportunities to obtain information and present views even before the docketed proceeding began. *See id.* And, for the reasons discussed above, the schedule gave these parties “a meaningful opportunity to present their case” through testimony, evidence, statements of position, and briefs. *See id.* While full-blown rate cases may employ more elaborate opportunities to present evidence and arguments, nothing requires the Commission to employ full-blown rate case schedules in every proceeding, regardless of the context and time pressures. *See Commonwealth Edison Co.*, 84 PUR 4<sup>th</sup> 469, 493 (Ill. C.C. 1987) (recognizing that challenged schedule’s fairness was bolstered by “the negotiation process which began

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acknowledged receipt of the confidentiality agreement, Enron never executed and returned it,

approximately 45 days before the filing” of Edison’s rate case). Certainly nothing required the nine-month schedule of two rounds of testimony and four rounds of briefs proposed by IIEC, and indeed such a schedule would have been nonsensical given the unique background and purpose of this proceeding.

**2. The Hearing Examiner’s Schedule Is Consistent With The Public Utilities Act, The Administrative Procedure Act, The Commission’s Rules, And Due Process.**

Not only was the schedule appropriate in light of the unique context of this proceeding, it was also fully consistent with the Public Utilities Act, the Administrative Procedure Act, the Commission’s rules, and due process. As noted above, the schedule permitted discovery; the presentation of testimony, other evidence or briefs stating parties’ positions on April 18; the filing of briefs on exceptions on April 24; and the filing of reply briefs on exceptions on April 25.<sup>3</sup> That is more than Illinois law and constitutional due process require.

**a. The Schedule Is Consistent With The Act And The APA.**

This schedule provided all parties an adequate opportunity to present evidence and argument, and thus fully complied with the Act and the APA. As an initial matter, Section 16-112 of the Act does not itself prescribe a hearing or indeed any procedural requirements on the adoption of proposed market-index based alternatives. *See* 220 ILCS 5/16-112(a).

Moreover, although the alternative market value must be filed as a tariff (*id.*), the Commission is not required to hold any kind of a proceeding before permitting a tariff to go into effect under Section 9-201 of the Act (220 ILCS 5/9-201). Rather, as occurs literally hundreds of times a year, when a party files a tariff the Commission may permit the tariff to go into effect without

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and thus did not receive any confidential data.

<sup>3</sup> Moreover, several of the parties that now object to the schedule also filed petitions to intervene that laid out at some length their positions on ComEd’s proposal.

suspending it, subject to the right of other parties or the Commission itself subsequently to initiate an action on the justness and reasonableness of the tariff. 220 ILCS 5/9-201(a). Therefore, there would have been nothing improper or unusual had ComEd simply filed its tariff changes with the Commission, and the Commission had simply let them go into effect without any hearing whatever. The Illinois Supreme Court so held in *Antioch Milling Co. v. Public Serv. Co. of Northern Ill.*, 4 Ill. 2d 200, 123 N.E.2d 302 (1954), where it rejected a ratepayer's claim that the Commission violated the Act by failing to hold a hearing before permitting rates to go into effect. Significantly, ComEd's petition initiating this proceeding did *not* ask the Commission to declare its tariff "just and reasonable," contrary to the AG's assertion. Rather, it asked the Commission merely to permit the tariff to go into effect. (Petition at 7). Therefore, the AG's claim that the Hearing Examiner's schedule violated the Act because it did not employ the hearing procedures used in rate cases (AG Br. at 2-5) is based on an incorrect premise.

In all events, even when "the Commission enters upon a hearing concerning the propriety of any proposed rate," Section 201 does not prescribe any particular procedural requirements. *See* 220 ILCS 5/9-201(c). Rather, to the extent there are minimum procedural requirements for a hearing on a proposed tariff, they are found in the APA, 5 ILCS 10/1 *et seq.* And contrary to the suggestions of some parties, the schedule adopted by the Commission is fully consistent with the APA. As an initial matter, because the market values are incorporated into optional rates, it is far from clear whether this proceeding is a "contested case" under the APA. But even assuming that it is, the schedule is entirely consistent with Section 10-25 of the APA, which prescribes the procedures which must be followed in "contested cases." 5 ILCS 100/10-25. That provision requires merely "an opportunity for a hearing after reasonable notice," and the only stated requirement for such a hearing is that "an opportunity shall be

afforded all parties to be represented by legal counsel and to respond and present evidence and argument.” *Id.* The APA does not necessarily require *any* discovery (though the Hearing Examiner permitted discovery here), *any* briefing (though the Hearing Examiner authorized the filing of briefs, briefs on exceptions, and reply briefs on exceptions), or *any* oral hearing. The Hearing Examiner’s schedule indisputably permitted parties “to be represented by legal counsel” and to “respond and present evidence and argument.” The schedule thus satisfied the requirements of the APA that were applicable in this case.

This conclusion is again confirmed by *Antioch Milling*. There the Commission permitted a rate to go into effect after holding a “preliminary hearing in order to ascertain the views of interested persons” on the proposed tariff. At this hearing, parties were able to present evidence and their views on the tariff, but were not permitted discovery or cross-examination, and the Commission elected not to issue formal findings before permitting the rate to go into effect. 4 Ill.2d at 206, 123 N.E.2d at 305. A ratepayer contended that this process violated the procedural protections of the Act, but the Illinois Supreme Court rejected the contention. The Court noted that imposing the ratepayer’s proposed procedural requirements on this preliminary hearing would “erase the discretion given the Commission” under the Act. 4 Ill.2d at 206, 123 N.E.2d at 306. As the Court stated, “the statute does not specify a particular method to be followed by the Commission in deciding the matter, and we think that the choice of method rests with the Commission.” 4 Ill.2d at 206, 123 N.E.2d at 305. Accordingly, the Court held that “the Commission did not err in permitting the proposed rates to go into effect without a formal hearing and formal findings and an order.” 4 Ill.2d at 206, 123 N.E.2d at 306.

In short, there is simply no basis for IIEC’s and other parties’ contentions that the Act or APA required the Commission to employ a rate case-style schedule before permitting the

tariff to go into effect. The Commission has wide discretion under the Act and APA to tailor its procedures to the task at hand, and the schedule falls well within that discretion.

**b. The Commission Can Waive, Suspend, Or Modify Its Own Procedural Rules In A Particular Proceeding.**

IIEC, Enron, and the AG also contend that the schedule is inconsistent with certain procedural rules of the Commission governing paper hearings, cross-examination, and the like. (Enron Br. at 8-9; IIEC Br. at 3-4; AG Br. at 10-12). The short answer to these contentions is that even if this proceeding were a formal hearing, Section 200.30 of the same Commission rules expressly provides that the Commission may waive, suspend, or modify any of its procedural rules "for good cause shown." 83 Ill. Adm. Code § 200.30. The Hearing Examiner's proposed order recognizes that "there has been good cause shown to justify the Commission's expedited treatment of this matter." (See HEPO at 24). This conclusion was plainly correct. As noted above, such expedited treatment is appropriate because this docketed proceeding was preceded by months of discussions – in other docketed proceedings, round table discussions, and workshops – concerning the same issues raised here. Expedited treatment was also necessary because the proceeding needed to be completed by May 1 if the benefits of ComEd's proposal were to be fully realized.

In short, there was "good cause" to waive, suspend or modify any Commission rules which were inconsistent with the Hearing Examiner's expedited schedule.

**c. Under The Circumstances Of This Case, The Schedule Was Consistent With Due Process.**

Because it is plain that the Hearing Examiner's schedule complied with the Act and the APA, and because the Hearing Examiner correctly concluded that there was good cause to waive otherwise-applicable Commission procedural rules, the objecting parties' argument

must ultimately be that the schedule violated their constitutional right to due process of law. This argument is meritless, for two fundamental reasons.

*First*, it has long been settled that ratepayers have no protectable interest in a utility rate, such that the constitutional protection of due process even applies. “Under the law no customer has a constitutional or statutory right to any specific rate or rate treatment and both are always subject to review and change.” *Consolidated Edison of New York, Inc.*, 29 PUR 3d 542, 543 (N.Y.P.S.C. 1959); *see also Glade Park East Homeowners Assn. V. Pennsylvania Pub. Util. Comm’n*, 628 A.2d 468 (Pa. Comm. Ct. 1993) (rejecting argument that customers had protectable “property interest in receiving just and reasonable rates”); *Ten Ten Lincoln Place, Inc. v. Consolidated Edison Co.*, 69 PUR (NS) 108, 110 (N.Y.P.S.C. 1947) (“Nor has plaintiff any vested right to . . . any particular rate except to the extent that the public service law grants him such right; and he is not entitled to invoke his constitutional guarantees of ‘due process’ or equal protection’ under such circumstances.”); *Pennsylvania Pub. Util. Comm’n v. Peoples Natural Gas Co.*, 55 PUR (NS) 214, 216 (Pa. P.S.C. 1944) (“neither a city nor any of its citizens have any right of property protected in rate cases by the Fourteenth Amendment”). Because ratepayers have no protectable property interest in a rate, there is no *constitutional* (as opposed to statutory) requirement that they be afforded any particular procedural protections before a rate adopted in the first place. *See Petersen*, 302 Ill.App.3d at 466, 707 N.E.2d at 154; *Wilson v. Bishop*, 82 Ill.2d 364, 368, 412 N.E.2d 522 (1980).

*Second*, even if ratepayers had a protectable constitutional interest in a utility's rates – and they do not – this schedule was more than adequate to satisfy due process. Indeed, courts have upheld against due process challenges agency proceedings that have provided for far fewer procedural opportunities to present evidence and be heard than the schedule employed

here. As the Second District Appellate Court stated, “[I]t is, of course, well-recognized that not all the accepted requirements of due process in the trial of a case are necessary at an administrative hearing.” *Fox River Valley Dist. Council of Carpenters v. Board of Ed. Of School Dist. No. 231*, 57 Ill. App.3d, 345, 349, 373 N.E.2d 60, 63 (2d Dist. 1978); *see also Petersen*, 302 Ill. App.3d at 468, 707 N.E.2d at 154 (“The full panoply of judicial procedure does not apply to the fact-finding investigation, including rights of discovery, confrontation, cross-examination, and other elements of due process involved in judicial and quasi-judicial proceedings.”); *Klein v. Fair Employment Practices Comm’n*, 31 Ill.App.3d 473, 482, 334 N.E.2d 370, 377 (1<sup>st</sup> Dist. 1975) (“Rights of discovery, confrontation, cross-examination, and other elements of due process attending judicial and quasi-judicial proceedings do not apply” in administrative agency investigations”).

Consistent with these principles, courts have rejected due process challenges to proceedings like that at issue here based on precisely the grounds IIEC, Enron, and other parties advance here. Thus, for instance, although the Hearing Examiner’s schedule permitted parties to take discovery of ComEd, courts have repeatedly held (once as recently as two months ago) that “there is no constitutional right to pretrial discovery in administrative hearings.” *Kelly v. EPA*, 203 F.3d 519, 523 (7<sup>th</sup> Cir. 2000); *see also Scott*, 84 Ill.2d at 54, 416 N.E.2d at 1088 (“[w]e have repeatedly held that [discovery] is not constitutionally required, even in particular criminal proceedings”). Therefore, the schedule would have been consistent with due process even if it had entirely denied discovery, which it did not. Similarly, courts have recognized that there is no constitutional right to cross-examination in all administrative proceedings, especially where, as here, no hearing at all is required. *Fox River Valley*, 57 Ill.App.3d at 349, 373 N.E.2d at 63. More recently, the First District Appellate Court followed *Fox River Valley* to reject a claim that

the Chicago Plan Commission violated due process by refusing to permit cross-examination in planning commission proceedings, noting that "this court has previously held that due process does not always require cross-examination in a similar administrative proceeding." *Petersen*, 302 Ill. App.3d at 469, 707 N.E.2d at 156.

*Balmoral Racing Club v. Illinois Racing Bd.*, 151 Ill.2d 367, 603 N.E.2d 489 (1992), on which several parties place primary reliance, is not to the contrary. Unlike here, where it is settled that no constitutionally protected interest is at stake (*see supra*), the Court in *Balmoral* expressly held that the plaintiffs there had "a property interest which cannot be denied without affording due process." 603 N.E.2d at 506. Moreover, the proceeding in *Balmoral* was to be an evidentiary hearing, and provided far fewer opportunities to be heard than this case. There the plaintiff arrived at the hearing with little notice of what would be decided, plaintiff had no ability to obtain information through discovery or otherwise until the "hearing was almost half over" (and even then the information it received was *de minimis*), the plaintiff had no ability to file a brief or written statement of position, the plaintiff was only able to address the evidence in a brief oral statement that "comprises all of 1 1/2 pages within the transcript," and the decision was made on the spot at the hearing. *Id.* at 506-07. Here, by contrast, the parties had nearly three weeks to engage in discovery, and could file testimony, statements of position, and two sets of briefs in response to a proposed order. In short, in *Balmoral* the Court held that the plaintiff

was provided "no opportunity to examine [the] evidence and respond to it at all." *Id.* The same cannot plausibly be said here.<sup>4</sup>

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For all of these reasons, the schedule adopted in the unique context of this proceeding satisfied both statutory procedural requirements and constitutional due process standards. ComEd recognizes, however, that the issues in this docket will remain controversial, even if the Commission gives approval to ComEd's proposal. For that reason, if the Commission believes further investigation is necessary, ComEd suggested in its Brief on Exceptions that the Commission approve the market index alternative in an interim order, direct ComEd to file a report at the end of the year, and schedule workshops beginning in the autumn of 2000. The Commission could then provide for a hearing in early 2001 in order to allow for a final order in April, 2001.

**B. The Few Substantive Objections To The Proposal Are Not Sufficient To Deny Consumers The Benefits Of The Proposal.**

Various of the Briefs on Exceptions contain additional objections to ComEd's proposal as well. These range from outright misstatements by parties who were not active in the workshops and have apparently not taken the time to understand the proposal (see Enron "risk

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<sup>4</sup> Other cases cited by parties opposed to the schedule are similarly unavailing. For instance, the courts' statements in *Piotrowski v. State Police Merit Board*, 85 Ill.App.3d 369, 373, 406 N.E.2d 863, 865 (5<sup>th</sup> Dist. 1980), and *Illinois Commerce Comm'n v. Operator Communications, Inc.*, 281 Ill. App.3d 297, 303-04, 666 N.E.2d 830, 834 (1<sup>st</sup> Dist. 1996), that "due process is served" where there is a right to cross-examination, do not suggest or hold that due process *requires* cross-examination in all instances. *Abrahamson v. Illinois Dept. of Professional Regulation*, 153 Ill.2d 76, 606 N.E.2d 1111 (1992), and *Stillo v. State Retirement Systems*, 305 Ill.App.3d 1003, 714 N.E.2d 11 (1<sup>st</sup> Dist. 1999), actually held that there was *no* due process violation in hearing processes that were more abbreviated and less formal than this one, and thus these decisions support ComEd's position here.

shifting” argument on p. 3 of its BOE<sup>5</sup>) to efforts to lay the groundwork for future workshop arguments (see various modifications proposed by NewEnergy despite its admission that ComEd’s proposal is “consistent with the Act, fair to ComEd, and meets the public interest.”) NewEnergy even goes so far as to suggest that there are separate markets for “buyers” and “sellers”. NewEnergy BOE at 9-11. Obviously it takes both buyers and sellers to create a market.

Other arguments, such as the “front end loading” argument offered by MidAmerican (BOE at 4), or the selective rewritings of 16-112(a) offered by IIEC and Enron (see Enron BOE at 6), are simply attacks on the Act. No-one has argued, nor can they, that ComEd’s annualized calculation of transition charges is not exactly what is required by Section 16-102 (definition of transition charges) of the Act. Nor does Section 16-112(a), as IIEC and Enron suggest, preclude reliance on historical data, or bid-ask spreads, when actual transaction data is not available. Instead, it provides for the determination of market values “*as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market . . .*” (emphasis added). ComEd’s proposed methodology falls within these parameters.

Moreover, the laundry list filed by Enron in its Brief on Exceptions (pages 3-6) is in large part speculative and fails to take account of the evidence submitted in this proceeding. The testimony of ComEd’s witnesses address the means by which the accuracy of the market values produced under ComEd’s alternative market-based methodology will be ensured, and describe the transparency, accessibility and increased liquidity of the proposed system. See

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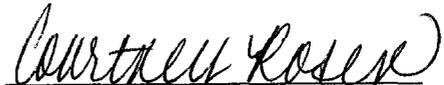
<sup>5</sup> It is worth noting that Enron contradicts this same argument two pages later by arguing both that the market values are too low and do not adequately adjust for uncertainty or variability. (Enron BOE at 5).

Testimony of Arlene Juracek at 6-7; Testimony of David Nichols at 7-8, 11-12. Staff witness Richard Zuraski, who thoroughly reviewed ComEd's proposal, testified that he has "not seen any evidence of a significant bias either upward or downward while using the High-Low midpoints rather than weighted averages." Testimony of Richard Zuraski at 18. Nicor Energy further pointed out that the prices or market values produced by the market index process are in fact in the area of power deals being executed in the over-the-counter market, and those available on traded indices. See Nicor Energy, L.L.C.'s Brief on Exceptions at 3. Enron's laundry list not only ignores this evidence, it also draws heavily on various "observations" made by NewEnergy, ignoring that party's overall conclusion that ComEd's Petition meets the primary objectives of "calculation of a Market Value which is consistent with the Act, is fair to ComEd, and meets the public interest." Exceptions of NewEnergy Midwest, L.L.C. to Hearing Examiner's Proposed Order at 4.

Finally, ComEd opposes Staff's proposed modifications to the wholesale offer (Staff BOE at 6-8), which, as noted above, was a product of compromise. There are many sources of wholesale power, and other suppliers have found ComEd's offer to be a reasonable one. The Commission should not condition its approval on further modification of that offer to either reduce the price or extend the offer. This will only discourage RESs from looking for other, more competitive, sources of supply.

ComEd will not further respond to all of the arguments raised by others in this reply brief, other than to note its disagreement with them and to state its confidence in the Commission's ability to evaluate the evidence and judge the proposal as what it is – a good faith attempt to improve the accuracy of the market values used in calculating CTCs and PPO prices, address concerns raised by suppliers and customers alike, and to enhance market development.

ComEd's proposal offers the opportunity to establish more seasonally accurate market values based on actual market data. For all of the reasons stated herein, in its Petition, and its Brief of Exceptions, the Commission should grant ComEd's Petition, with the modifications stated in ComEd's Brief on Exceptions.

By:   
One of the Attorneys for  
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Dated: April 25, 2000

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STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY )  
 )  
Petition for expedited approval of implementation )  
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effective on or before May 1, 2000, )  
pursuant to Article IX and Section 16-112 )  
of the Public Utilities Act. )

No. 00-0259

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on this date we have forwarded for filing with the Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, the original and eleven copies of the Reply Brief on Exceptions of Commonwealth Edison Company in the above-captioned matter.

COMMONWEALTH EDISON COMPANY

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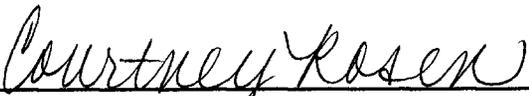
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## CERTIFICATE OF SERVICE

I, Courtney A. Rosen, certify that I served copies of the attached Notice of Filing and the Reply Brief on Exceptions of Commonwealth Edison Company, on each party on the attached service list by either electronic mail, facsimile, messenger, Federal Express or by depositing a copy in a properly addressed, sealed envelope with the U.S. Post Office, Chicago, Illinois, with proper postage prepaid on April 25, 2000.

  
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