

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Power Company)	
)	
Proposed revisions to delivery services tariff sheets and other sheets.)	01-0432
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**ILLINOIS POWER COMPANY’S RESPONSE TO
ENRON ENERGY SERVICE, INC.’S MOTION TO STRIKE**

This is Illinois Power Company’s (“Illinois Power”, “IP” or “Company”) response to the “Motion to Strike” filed on October 12, 2001 by Enron Energy Services, Inc. (“Enron”). For the reasons set forth herein, Enron’s Motion must be denied.

In a nutshell, Enron contends that the portions of Illinois Power’s filed tariffs, and of its testimony and exhibits in this docket, relating to IP’s proposed increases in non-residential delivery services rates should be stricken (1) because, Enron asserts, IP lacks authority to request, and the Commission lacks authority to grant, an increase in IP’s non-residential delivery services tariffs (“DST”) during the “mandatory transition period” defined in §16-102 of the Public Utilities Act (“Act”), 220 ILCS 5/16-102 (Enron Motion, par. 1-6, 9¹); (2) because the Commission approved non-residential DSTs for the Company in Docket 99-0120 & 99-0134 (Cons.) (“1999 DST Order”), and §10-113 of the Act (220 ILCS 5/10-113) precludes IP from “relitigating” the 1999 DST Order for two years following its entry (Enron Motion, par. 7); and (3) for various other policy reasons relating to the purported impact on competition of raising delivery services rates. (Enron Motion, par. 10-14) As will be shown herein, Enron’s first contention is based on faulty statutory analysis, and its second assertion ignores directly applicable, and contrary, Supreme Court precedent. As to its third contention, Enron is free, in the

¹ Enron’s Motion has no paragraph numbered “8”.

briefing stage of this case, to advance policy reasons that it thinks warrant denying or limiting any increase in non-residential DSTs in this proceeding, for the Commission to consider along with all other evidence and arguments in this case. However, such reasons do not warrant striking parts of IP's tariffs and testimony as requested in Enron's Motion. Accordingly, Enron's Motion to Strike must be denied.

I. Illinois Power May Request, and the Commission Has Authority to Grant, Increases in IP's Non-Residential Delivery Services Rates During the "Mandatory Transition Period"

Enron states that "the mandatory transition period is a unique legislatively defined time during which special rules apply", and that "[d]uring the transition period, the authority of electric utilities to request modifications to their tariffs is limited to discrete circumstances as set forth by the General Assembly." (Enron Motion, p. 1) The first assertion is correct as a general matter, but the second assertion reflects a fundamental misapprehension of the relationship between Article IX of the Act and the relevant provisions of Article XVI.

Under Article IX of the Act, a public utility may file proposed revisions to its current tariffs at any time, whether to increase its rates, decrease its rates, or make other changes to its current tariffs. The public utility is required to file the revised tariffs with the Commission at least 45 days prior to their proposed effective date (unless the utility files, and the Commission grants, a petition requesting a different effective date). 220 ILCS 5/9-201(a). The Commission may suspend the effectiveness of the revised tariffs for up to 105 days, and then for an additional six months, while it conducts an investigation. 220 ILCS 5/9-201(b). If the Commission does not suspend the proposed revised tariffs, they go into effect 45 days after filing. *Id.* However, if the Commission

does enter into a hearing concerning the propriety of the proposed revised tariffs, then “the Commission shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed, in whole or in part, or others in lieu thereof, which it shall find to be just and reasonable.” 220 ILCS 5/9-201(c). Similarly, §9-250 provides:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith . . . are unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall establish the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided. (220 ILCS 5/9-250)

This docket was initiated in accordance with §9-201: IP filed various revised tariff sheets with the Commission on June 1, 2001, bearing an effective date of July 16, 2001 (i.e., 45 days later). The Commission could have allowed the revised tariff sheets to go into effect on July 16, 2001, but elected not to do so. Instead, the Commission issued a Suspension Order on June 6, 2001 suspending the effectiveness of the filed tariff sheets and initiating this docket for purposes of conducting a hearing on the proposed tariff sheets. The Suspension Order cited §9-201 as authority for the Commission’s actions.²

² The caption to Enron’s Motion styles this docket as “Petition for Approval of Residential Delivery Services Tariffs Pursuant to Sections 16-105 And 16-108 of the Public Utilities Act,” and Enron asserts that IP was required to state in its “Proposal” and its “petition” that the Commission has jurisdiction. (Enron Motion, pp. 3, 5) As shown above, however, this docket was initiated by the Commission, who cited §9-201 as authority for doing so, and not by IP. Enron’s confusion may be due to the fact that its Motion is largely a copy of a Motion to Strike, based on similar theories, that it filed (jointly with certain other parties) in the current Commonwealth Edison DST case, Docket 01-0423. ComEd did initiate Docket 01-0423 by filing a petition.

Enron's first contention, at bottom, is that §16-111 of the Act (220 ILCS 5/16-111) sets forth the only circumstances under which an electric utility may request, and the Commission may authorize, an increase in any rates of an electric utility during the mandatory transition period. This is incorrect. To the contrary, §16-111 imposes specific limitations, during the mandatory transition period, on the general powers and authority embodied in §9-201 and §9-250. Specifically, §16-111(a), on which Enron relies, states in relevant part that:

During the mandatory transition period, notwithstanding any provision of Article IX of this Act, and except as provided in subsections (b), (d), (e) and (f) of this Section, the Commission shall not (i) initiate, authorize or order any change by way of increase (other than in connection with a request for rate increase which was filed after September 1, 1997 but prior to October 15, 1997, by an electric utility serving less than 12,500 customers in this state), (ii) initiate or, unless requested by the electric utility, authorize or order any change by way of decrease, restructuring or unbundling (except as provided in Section 16-109A), **in the rates of any electric utility that were in effect on October 1, 1996**, or (iii) in any order approving any application for a merger pursuant to Section 7-204 that was pending as of May 16, 1997, impose any condition requiring any filing for an increase, decrease or change in, or other review of, an electric utility's rates or enforce any such condition of any such order; provided, however, that this subsection shall not prohibit the Commission from: (220 ILCS 16-111(a); emphasis supplied)

The phrase "in the rates of any electric utility that were in effect on October 1, 1996" in §16-111(a) applies to both the prohibition on increases in clause (i) and to the prohibition on decreases, unbundling and restructuring in clause (ii), in the rates of an electric utility. If the phrase "in the rates of any electric utility that were in effect on October 1, 1996" did not apply to clause (i), then that clause would make no sense – the phrase "any change by way of increase" in clause (i) would not apply to anything. That is, if the phrase "in the rates of any electric utility that were in effect on October 1, 1996" did not apply to clause (i), then clause (i) would read: "the Commission shall not (i)

initiate, authorize or order any change by way of increase (other than in connection with a request for rate increase which was filed after September 1, 1997 but prior to October 15, 1997, by an electric utility serving less than 12,500 customers in this state).” Clause (i) would be incomplete – there would be no object for “initiate, authorize or order any change.” Only by recognizing that the phrase “in the rates of any electric utility that were in effect on October 1, 1996” applies to both clause (i) and clause (ii) can clause (i) be read coherently.³

IP’s non-residential delivery services rates were not “in effect on October 1, 1996.” In fact, IP’s non-residential DSTs were not in effect until October 1, 1999, the date on which IP was first required to offer delivery services to certain non-residential customers. Thus, the prohibition on the Commission authorizing any increase, during the mandatory transition period, “in the rates of any electric utility that were in effect on

³ Clause (iii) in §16-111(a) ends with the phrase, “an electric utility’s rates or enforce any such condition of any such order”. Enron may contend in its reply that this phrase modifies clause (i) as well as clause (iii). Such an assertion would be incorrect. Clause (iii) is completely self-contained and deals with a unique topic: it serves to prohibit the Commission, in any order under §7-204 approving an application for a merger involving an electric utility that was pending on May 16, 1997, from imposing certain conditions relating to the electric utility’s rates that the Commission would otherwise have authority to impose under §7-204, or from enforcing any such condition of any such order. Clause (iii) was added to §16-111(a) to address a particular merger proceeding that was pending during 1997, to prevent the Commission from in effect bypassing the prohibitions on increases and decreases in rates in effect on October 1, 1996 in clauses (i) and (ii) by requiring the electric utilities involved in that merger to increase or decrease their electric rates as a condition of approval of the merger. See, e.g., Report to the Senate President by the Illinois Commerce Commission, Analysis of Electric Restructuring with Particular Emphasis on Senate Bill 55, Aug. 15, 1997, p. 45. Moreover, for the last phrase in clause (iii) to logically apply to clause (i), the word “in” would need to appear before “an electric utility’s rates”, but it does not. Finally, the last phrase of clause (iii) cannot apply to clause (i) because it would then also have to apply to clause (ii), with the result that the end of clause (ii) would read, nonsensically, “. . . in the rates of any electric utility that were in effect on October 1, 1996 an electric utility’s rates or enforce any such condition of any such order.”

October 1, 1996,” imposed by §16-111(a), does not apply to IP’s non-residential delivery services rates – as the Commission has already recognized in initiating this docket pursuant to §9-201.⁴

The Administrative Law Judge should be aware that Enron and certain other parties, represented by the same counsel who represent Enron herein, filed essentially the same motion to strike in the pending ComEd DST case, Docket 01-0423, and that ComEd, IP and the Commission Staff responded to that motion in the same manner as above. The motion to strike in the ComEd DST case was fully briefed before Enron filed its Motion to Strike in this docket, yet Enron fails to mention, let alone address, the statutory construction presented above in its Motion herein. In fact, Enron’s Motion to Strike fails to ever quote §16-111(a) in full. Instead, Enron relies only on piecemeal quotations, paraphrases, and characterizations of §16-111(a).⁵ (See, e.g., par. 2(a), 2(c)(iii), 6 and 9 of Enron’s Motion)

⁴ The distinction between (i) an electric utility’s rates that were in effect at the time Article XVI was enacted and (ii) the electric utility’s delivery services rates, is also recognized in §16-103 of the Act, “Service obligations of electric utilities”. Section 16-103(a) states the electric utility’s obligation to “continue offering to retail customers each tariffed service that it offered as a distinct and identifiable service on the effective date of this amendatory Act of 1997.” Section 16-103(b) separately states the electric utility’s obligation to offer, as tariffed services, delivery services in accordance with Article XVI, the power purchase option described in §16-110, and real-time pricing as described in §16-107. Each of these is a new service required by Article XVI.

⁵ In its Reply in support of its motion to strike in the ComEd DST case (which was filed before Enron filed its Motion to Strike in this docket), Enron argued that the phrase “in the rates of any electric utility that were in effect on October 1, 1996” can only apply to clause (ii), and not to clause (i), of §16-111(a) based on the “last antecedent doctrine.” (Joint Movants’ Verified Reply in Support of Their Motion to Strike, Docket 01-0423, filed Oct. 5, 2001, p. 19) Enron has not presented this argument in its Motion to Strike in this docket, apparently hoping to sandbag IP, Staff and any others opposing the Motion by “saving” this argument for its reply. However, while the “last antecedent doctrine” is one of many principles of statutory construction available to help resolve ambiguities, it cannot be used to reject a sensible reading in favor of a nonsensical one. As shown

Although analysis of the language of the first paragraph of §16-111(a), as quoted and discussed above, is sufficient to demonstrate that its prohibition on increases in certain electric utility rates during the mandatory transition period does not apply to delivery services rates, the “exceptions” listed in subparagraphs (1) through (4) of §16-111(a) also demonstrate that the Commission is not prohibited from authorizing increases in IP’s non-residential DSTs during the mandatory transition period. Specifically, subparagraph (3) states that the Commission is not prohibited from “ordering into effect tariffs for delivery services and transition charges in accordance with Sections 16-104 and Sections 16-108” Further, subparagraph (4) states that the Commission is not prohibited from “ordering or allowing into effect any tariff to recover charges pursuant to Sections . . . 16-108 . . .”

Turning to the Sections referenced in subparagraphs (3) and (4) of §16-111(a), §16-104(a) states that “Each electric utility shall offer delivery services to retail customers located in its service area in accordance with the following provisions”, and then states various dates by which an electric utility must offer delivery services to various segments of the retail customers in its service area, culminating with “On or before December 31, 2000, the electric utility shall offer delivery services to all remaining non-residential retail customers in its service area.” 220 ILCS 5/16-104(a).

Section 16-108(a) in turn requires an electric utility to file a DST with the Commission at least 210 days prior to the date that the electric utility is required to begin offering delivery services. Section 16-108(a) specifies that the electric utility shall provide the components of delivery services that are subject to the jurisdiction of the

above, if the phrase “in the rates of any electric utility that were in effect on October 1, 1996” were read to apply only to clause (ii), then clause (i) would make no sense.

Federal Energy Regulatory Commission (“FERC”) at the same prices, terms and conditions set forth in its applicable tariff as approved or allowed into effect by FERC. Section 16-108(a) then goes on to state that “The Commission shall otherwise have authority pursuant to Article IX to review, approve, and modify the prices, terms and conditions of those components of delivery services not subject to the jurisdiction of the [FERC] . . .” 220 ILCS 5/16-108(a). Further, §16-108(b) states:

The Commission shall enter an order approving, or approving as modified, the delivery services tariff no later than 30 days prior to the date on which the electric utility must commence offering such services. **The Commission may subsequently modify such tariff pursuant to this Act.** (220 ILCS 5/16-108(b); emphasis supplied)

As described at the outset of this Response, Article IX empowers the Commission to investigate tariffs filed by a public utility, and based upon such investigation to order increases, decreases or other revisions to those tariffs. The references in §16-111(a)(3) and 16-111(a)(4) to §16-108, and the language of §16-108(a) and (b), make it clear that during the mandatory transition period, the Commission has its full Article IX powers to increase, decrease or otherwise revise the delivery services tariffs of an electric utility.⁶

Enron, however, claims that because §16-111(d) of the Act (220 ILCS 5/16-111(d)) allows an electric utility to request an increase in its “base rates” during the mandatory transition period if certain conditions are met, the General Assembly must be deemed to have precluded requests for increases in delivery services rates during the mandatory transition period. (Enron Motion, par. 1(b), 6) Enron’s erroneous argument is

⁶Consistent with the full range of its Article IX powers, the Commission would not be restricted to allowing an increase or decrease in an electric utility’s delivery services rates solely upon the request of the utility. The Commission could also initiate an investigation on its own motion, at any time during the mandatory transition period, to, for example, determine whether an electric utility’s existing delivery services rates should be decreased.

a creature solely of the faulty premise on which Enron bases its entire Motion: that the General Assembly, in §16-111(a), has prohibited increases in all electric utility rates during the mandatory transition period. In fact, the General Assembly, in §16-111(d), only needed to provide for a limited set of conditions under which an electric utility, facing “financial distress” (Enron Motion, par. 6), could request an increase in its base rates during the mandatory transition period because *the General Assembly, in §16-111(a), only prohibited increases in an electric utility’s base rates during the mandatory transition period.* That is, the limited authority to request base rate increases during the mandatory transition period, in §16-111(d), corresponds to the general prohibition on base rate increases during the mandatory transition period imposed by §16-111(a). Since the General Assembly, in Article XVI, has **not** precluded an electric utility from requesting, and the Commission from granting, increases in **delivery services rates** during the mandatory transition period, there was no need for the General Assembly to define a set of conditions under which increases in delivery services rates could be requested.

Similarly, Enron argues that because §16-111(f) (220 ILCS 5/16-111(f)) allows an electric utility, during the mandatory transition period, to file revised tariffs reducing the price of any tariffed service, the General Assembly, by virtue of the “maxim” *expressio unius est exclusio alterius* must be deemed to have precluded electric utilities from requesting, and the Commission from authorizing, increases in any tariffed services, including delivery services. This argument is also misplaced. Section 16-111(f) states in its entirety:

During the mandatory transition period, an electric utility may file revised tariffs reducing the price of any tariffed service offered by the

electric utility for all customers taking that tariffed service, which shall be effective 7 days after filing.

Section 16-111(f) is not authorization to file tariffs to reduce tariffed rates, to the exclusion of all other actions during the mandatory transition period. Rather, §16-111(f) provides for a modification during the mandatory transition period to the generally-applicable provisions of §9-201 that require all tariff revisions to be filed on 45 days notice (unless the public utility petitions for, and the Commission grants, a shorter period). Section 16-111(f) modifies this provision so as to allow an electric utility, during the mandatory transition period, to place reduced rates into effect on only seven days notice, and removes the authority of the Commission to suspend such decreases. (The provisions of §16-111(f) apply, however, only if the proposed price reduction is applicable to “all customers taking that tariffed service.”) Thus, the maxim cited by Enron does not apply: Section 16-111(f) is not authorization for an electric utility to file for rate decreases to the exclusion of all other actions. Rather, §16-111(f) establishes specific procedures, differing from those in §9-201, for certain tariff filings to decrease rates during the mandatory transition period. Enron’s attempt to apply the maxim is misplaced because it considers on §16-111(f) in isolation and does not take into accounts Sections 9-201, 16-111(a) or 16-108. Section 16-111(f) does not support Enron’s Motion to Strike.

Enron’s contention that an electric utility may not request, and the Commission may not authorize, an increase in the electric utility’s delivery services rates during the mandatory transition period is directly contrary to the position taken by Enron before the Commission in Docket 99-0013. In that proceeding, Enron, represented by the same

counsel who represent it in this docket, made the following statement at page 14 of its Initial Brief filed July 14, 2000:⁷

As the Commission is aware, the utilities will have additional proceedings in which they will be unable to address alleged implementation costs in the proper context. In fact, the utilities are required to file a residential delivery services rate proceeding no later than August 1, 2001. (See Weiss Tr. at 1341.) **Of course, as the utilities were forced to admit, any utility may petition the Commission at any time for an increase in its non-residential delivery services rates.** (See Houtsma Tr. at 1620; Weiss Tr. at 1341.) Furthermore, at the end of the transition period, the utilities may petition the Commission for a general rate increase. (See 220 ILCS 5/16-111(a).) **In any such proceeding, the utilities could, and likely would, present evidence that their overall revenue requirements have changed.** The costs associated with meter service unbundling would be a single issue appropriately addressed within such a proceeding. (Emphasis added)

In its Brief on Exceptions in Docket 99-0013, filed on August 23, 2000, at pages 11-12, Enron repeated the same paragraph quoted above. And in its Reply Brief on Exceptions in Docket 99-0013, filed on August 30, 2000, at page 9, Enron again repeated the same paragraph quoted above. Presumably Enron and its counsel, satisfied themselves that the statement “any utility may petition the Commission at any time for an increase in its non-residential delivery services rates” was an accurate statement of Illinois law, before placing their names on three pleadings that made this representation of the law to this Commission.⁸ For Enron, through the same counsel, to now assert that electric utilities have no authority to request, and the Commission has no authority to grant, increases in

⁷ Enron’s Initial Brief, and its Brief on Exceptions and Reply Brief on Exceptions in Docket 99-0013 referred to below, were filed jointly with several other parties styled collectively as the “Unbundling Coalition.”

⁸ Presumably, as well, Enron and its counsel did not place this statement in their briefs in Docket 99-0013 while crossing their fingers behind their backs and whispering to each other, “But the Commission would have no authority to grant such a petition during the mandatory transition period.”

delivery services rates during the mandatory transition period is neither credible nor persuasive.

II. Section 10-113 Does Not Preclude Illinois Power from Requesting, or the Commission from Granting, an Increase in IP's Non-Residential Delivery Services Rates

As a second ground for its Motion to Strike, Enron contends that §10-113(a) of the Act precludes IP from requesting an increase in its non-residential delivery services rates until at least two years have passed from the entry of the Commission's 1999 DST Order establishing IP's initial non-residential DSTs.⁹ (Enron Motion, par. 7) The language of §10-113(a) relied on by Enron is "Only one rehearing may be granted by the Commission, but this shall not be construed to prevent any party from filing a petition setting up new and different set of facts after 2 years, and invoking the action of the Commission thereon."¹⁰ (220 ILCS 5/10-113(a)) Enron contends that by requesting an increase in its non-residential DSTs, IP is engaging in an impermissible collateral attack on the 1999 DST Order.

Enron fails to mention, however, that the very same contention it makes here was considered and rejected by the Supreme Court over 28 years ago, and that decision has never been reversed or overruled. Illinois Bell Tel. Co. v. Commerce Commission, 414 Ill. 275 (1953). In that case, Illinois Bell filed revised tariffs by which it proposed a rate increase, and the Commission suspended the tariffs for hearing. The City of Chicago, an

⁹ The 1999 DST Order was issued on August 25, 1999. A rehearing was held on a limited set of issues; the Order on Rehearing, issued on March 9, 2000, ordered a \$23,000 increase in the approved distribution revenue requirement, and changes in various terms and conditions of the DST. (Order on Rehearing, pp. 34-35)

¹⁰ As noted earlier, Illinois Power (unlike ComEd) did not initiate this proceeding by filing a petition; rather, IP filed revised tariff sheets with the Commission, and the Commission issued a Suspension Order suspending the effectiveness of the revised tariffs and initiating this docket to hold an investigation pursuant to §9-201 of the Act.

intervenor, contended “that the Commission should have cancelled and annulled the rate schedules filed with it, for the reason that less than two years had elapsed since the last order had been entered by the Commission on rate schedules filed by the Company, in violation of section 67 of the Public Utilities Act.” (Id., p. 278) Section 67 read in pertinent part: “Only one rehearing shall be granted by the Commission; but this shall not be construed to prevent any party from filing a petition setting up a new and different set of facts after two years, and invoking the action of the Commission thereon.”¹¹ The Court noted that “It is contended that section 67 creates a two-year period of repose, during which a utility is prohibited from filing new tariffs.” (Id.) In rejecting this contention, the Court observed:

The sentence above quoted, relied upon by the City, appeared in the original public utilities statute and an identical provision has been included in the statutes ever since. It is conceded by the City that the Commission has consistently overruled objections to its jurisdiction based upon the two-year limitation, and the trial courts have sustained the Commission in such rulings. It is true that we have held that public utility reports are not considered as authority in this court on an issue involving the review of an order of the Commission and that we cannot allow a governmental agency to extend the operation of a statute by administrative regulation. [citations omitted] On the other hand, such administrative and judicial authority over a period of thirty years is persuasive, since we are interpreting the meaning of a statute and trying to gather the legislative intent. The legislature is well aware of the rulings on this point, has revised the Public Utilities Act once and has amended it numerous times without changing the language of the quoted sentence. Surely, if it would have intended the sentence to act as a limitation of jurisdiction of the administrative body and found that such limitation was being ignored by the tribunal created by it, the legislature would have amended the act in such a manner that its meaning be made clear. (Id. At 279)

The Court concluded:

The construction contended for seems to be in conflict with the spirit of the act. One of its primary purposes was to set up machinery for

¹¹ Prior to the recodification of the Illinois statutes, Ill. Rev. Stat. Ch. 111-2/3, §67 contained what is now found in 220 ILCS 5/10-113.

continuous regulation as changes in conditions require. It appears to be inherent in the act itself. A thorough reading of the act, particularly section 36^[12] and 71, makes it clear that the isolated sentence is in conflict with the proposition that a two-year period must elapse. If the legislature intended the last sentence of section 67 to be an absolute two-year limitation, then it probably would have placed it in section 36 of the act, and would not have tacked it on to an entirely distinct section. We are of the opinion that the last sentence of section 67 does not constitute a limitation of two years. (Id. At 281)

In the ensuing 28 years, the Illinois Bell decision has never been overruled; the Commission has on a number of occasions entertained and granted requests for rate increases less than two years after a utility's prior rate order¹³; and the General Assembly has amended the Act numerous times, including §10-113 in particular (most recently in 1997 as part of P.A. 90-561 which also enacted the Electric Service Customer Choice and Rate Relief Law of 1997). Illinois Bell completely disposes of Enron's second contention.

Moreover, by filing its revised tariffs that would result (among other things) in an increase in its non-residential DSTs, IP did not initiate an "impermissible collateral attack" on the 1999 DST Order. The 1999 DST Order set delivery services rates which have been in effect since October 1, 1999. Illinois Power is not here contesting that those rates were just and reasonable when set in 1999. Nor is IP attempting to attack the underlying basis for those rates (which were set based on a 1997 test year), or attempting

¹² Prior to the recodification, §36 contained the language now contained in §9-201.

¹³ See, e.g., Illinois Power Company, Dockets 80-0544 and 80-0365, filed August 8, 1980, less than 9 months after the previous rate order in Illinois Power Company, Docket 79-0071 (Nov. 28, 1979), and decided July 1, 1981; and Illinois Power Company, Docket 82-0152, filed February 19, 1982, and decided January 12, 1983. See also Illinois Power Company, Docket 89-0276, filed July 13, 1989, less than four months after the previous rate order in Illinois Power Company, Dockets 84-0055, 87-0695 & 88-0256 (Cons.) (Mar. 30, 1989), and decided June 6, 1990, and Illinois Power Company, Docket 91-0147, filed March 19, 1991 and decided February 11, 1992.

to obtain an order entitling it to collect additional revenues in respect of the period from October 1, 1999 through the date of the order in this docket. Rather, IP is seeking to have new non-residential DSTs, based on a 2000 test year, placed into effect prospectively from the date of the final order in this docket.¹⁴

In response to Enron's Motion to Strike in the ComEd DST case, Docket 01-0423, ComEd cited Illinois Bell as completely disposing of Enron's contention based on §10-113. Enron and its co-movants in that case filed a 27-page reply memorandum but never even mentioned, let alone attempted to distinguish, Illinois Bell. In this docket, Enron continues its practice of knowing ignorance by again relying on §10-113 as grounds for its Motion, without even acknowledging the contrary Supreme Court precedent of Illinois Bell. Enron's argument is completely without foundation, serves no purpose other than to waste the time of those who must respond to it and rule on it, and must be rejected.

II. Enron's Other Arguments Do Not Support its Motion to Strike

Under the heading "The Commission Should Not Allow Illinois Power to Increase Commercial and Industrial Delivery Services Rates During the Mandatory Transition Period," Enron advances a number of additional arguments in support of its Motion to Strike. (Enron Motion, par. 10-14) All of these arguments are in essence policy arguments directed to matters of Commission discretion, rather than purported statutory bars to requesting or granting increased non-residential DSTs, as Enron portrays its first two contentions. (See Sections I and II above) While Enron is free to make such

¹⁴ In contrast, Illini Coach Co. v. Commerce Commission, 408 Ill. 104 (1951), cited at by Enron at par. 7 of its Motion, the complainants sought to vacate the original order that had been issued by the Commission, and to "obtain a rehearing of the evidence adduced on the original applications." (408 Ill. At 105, 111)

policy arguments during the course of this case for the Commission's consideration, these arguments do not warrant granting a Motion to Strike that would preclude all consideration of increased non-residential DSTs. On the assumption that Enron will again assert these arguments in the briefing phase of this case, Illinois Power responds to them only briefly in this response.

First, Enron contends that to allow an increase in non-residential delivery services rates would be “unfairly discriminatory”, in violation of 220 ILCS 5/9-241 and 9-250, because it would result in delivery services customers receiving a rate increase while bundled service customers “would receive no rate increase for the services that comprise delivery services.” (Enron Motion, par. 10, 12) However, such “discrimination” is inherent in the legislative plan for the mandatory transition period, and is already present even if Illinois Power receives no increase in its non-residential DSTs in this case. Specifically, bundled rates are capped at October 1, 1996 levels by §16-111(a), whereas each utility's initial non-residential delivery services rates were set in 1999 and its initial residential DSTs will be set in early 2002. In the case of Illinois Power, its bundled rates (including “the services that comprise delivery services”) were last set in 1992, based on 1992 test year costs (Docket 91-0147); its initial non-residential delivery services rates were set in August 1999 based on 1997 test year costs; and its initial residential delivery services rates will be set in 2002 based on 2000 test year costs. Moreover, acceptance of Enron's arguments would result in “discrimination” between non-residential and residential delivery services customers, because it would result in non-residential delivery

services customers paying rates based on 1997 costs while residential delivery services customers paid rates based on 2000 costs.¹⁵

Second, Enron argues that allowing an increase in non-residential DSTs would add increased uncertainty to the competitive market, penalize parties who entered into long-term contracts, and inhibit the development of the competitive market. (Enron Motion, par. 10-11) However, Enron ignores the fact that for most customers during the mandatory transition period, any increase in delivery services rates will be completely offset by a corresponding decrease in the customer's transition charge. This is because the statutory formula for calculation of transition charges requires the amount the customer will pay IP for delivery services, based on current delivery services rates, to be subtracted out in calculating the transition charge.¹⁶ (See 220 ILCS 5/16-102, definition of "Transition charge".) Moreover, a long-term contract for electric power and energy between a delivery services customer and a retail electric supplier ("RES") should be

¹⁵ This is further evidence that the statutory interpretation of §16-111 advanced by the Enron is illogical. Enron's statutory interpretation is illogical in light of the requirements of §16-104 and 16-108 that each electric utility's initial non-residential DST must be approved and in place by October 1, 1999, and that its initial residential DST must be approved and in place by May 1, 2002. Given the well-established test year concept, which has been recognized by the courts, and of which the General Assembly must be deemed to have been aware in amending the Act to add Article XVI, adoption of Enron's position would mean that the revenue requirement used to establish the residential DSTs would have to be based on a test year two to three years later than the test year used to establish the non-residential DSTs, with likely higher costs. Given the numerous protections for residential customers contained in the Customer Choice Law, it would be illogical and unreasonable to conclude that the General Assembly intended for residential delivery services rates to be based on a different, and almost certainly higher, revenue requirement than non-residential DSTs, during the period 2002 – 2004.

¹⁶ There are a very few IP delivery services customers who currently pay no transition charge. However, the Commission need shed no tears over the prospect of these customers receiving an increase in delivery services rates, because the fact that these customers pay no transition charge means, in essence, that they were formerly paying bundled rates that were less than market prices.

unaffected by an increase in delivery services rates. Finally, the Commission must also consider the impact on competition, and on customers who have switched to a RES, if the Commission were to hold non-residential delivery services rates at their original, 1997 cost levels until 2005 and then order increases in those rates based on 2005 cost levels.

Third, Enron is in no position to make any arguments in this case about impacts of increases in IP's non-residential DSTs on the development of the competitive market, impacts on customers and RESs that have entered into long-term contracts, or "discrimination" among customers. Enron received its ARES certification from the Commission on August 31, 1999, in Docket 99-0390 (but only to serve customers 1 MW and larger, not to serve all eligible customers); however, in the ensuing two-plus years, Enron did not become registered as a RES with Illinois Power in order to be able to sell electric power and energy to delivery services customers in IP's service area. Thus, Enron has not, as a RES, entered into any contracts, long-term or otherwise, with delivery services customers in IP's service area. The non-residential delivery services rates approved by the Commission in this docket probably will be IP's initial non-residential DSTs as far as Enron is concerned.

Finally, Enron asserts that "in an effort to streamline the instant proceeding," it filed its Motion to Strike "now" rather than waiting till the "pre-trial" or briefing stage of this case (Enron Motion, par. 13). In fact, if it truly believed its motion had any merit, Enron undoubtedly would have filed it at the outset of this proceeding, rather than "now", when IP has already filed two rounds of testimony and Staff and other intervenors have filed one round. (Consistent with its level of involvement in the market in IP's service

area, Enron has filed no evidence in this case.) Enron's motion has streamlined nothing, but rather has wasted time and resources of other parties and the Commission.

WHEREFORE, for the reasons set forth above, Enron's Motion to Strike should be DENIED.

Respectfully submitted.

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