

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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<b>Illinois Bell Telephone Company,</b>	:	
	:	
<b>Complainant,</b>	:	
	:	
<b>v.</b>	:	<b>Docket No. 01-0078</b>
	:	
<b>Commonwealth Edison Company,</b>	:	
	:	
<b>Respondent.</b>	:	
	:	
<b>Complaint regarding wrongful refusal to</b>	:	
<b>Provide customer-specific customer transition</b>	:	
<b>Charges.</b>	:	

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**BRIEF OF ILLINOIS BELL TELEPHONE COMPANY**

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**BRIEF OF ILLINOIS BELL TELEPHONE COMPANY**

Illinois Bell Telephone Company (“Ameritech Illinois”) submits the following brief on the merits of its claims against Commonwealth Edison Company (“ComEd”).

**SUMMARY**

Ameritech Illinois brought this Complaint against ComEd in January 2001, alleging that ComEd violated §§ 9-240, 9-241, 9-250, and 9-252 of the Public Utilities Act (“PUA”) by failing to comply with one of its tariffs, by unreasonably discriminating against Ameritech Illinois, and by charging Ameritech Illinois an unjust and unreasonable rate for electric service. In particular, Ameritech Illinois alleges that ComEd illegally refused to provide it with individualized customer transition charges (“CTCs”) for 126 Ameritech Illinois facilities governed by an Agreement between the two companies. ComEd’s denial of the custom CTCs prevented Ameritech Illinois from making

appropriate decisions, for each facility, whether to remain on ComEd's bundled rates or to take service on an unbundled basis. Ameritech Illinois seeks damages based on its payment of higher charges from December 1999 to the present.

The Commission should find that ComEd has violated the PUA. The companies' Agreement is a "customer-specific contract" and, as such, it entitles Ameritech Illinois to customer-specific CTCs under the clear language of ComEd's Rate CTC tariff. The Commission also should disregard the secret ComEd policy on CTC calculation that purports to justify its conclusion that the Agreement is not a customer-specific contract. Moreover, ComEd's secret policy incorrectly interprets the provision of the PUA on which it relies.

Because of these violations, the Commission should order ComEd to provide custom CTCs for the facilities served under the Agreement. The evidence shows that 126 were included in the Agreement as of December 1999, and ComEd's tariffs and billing systems provide sufficient information to calculate whether, for each facility, it made economic sense to take service on a bundled or unbundled basis. In addition, there is nothing in the Agreement that prevents Ameritech Illinois from taking service from ComEd on an unbundled basis, so that it would not be liable for penalties for breach of the Agreement.

## FACTS

### **The Parties' Agreement**

Ameritech Illinois and ComEd entered into an Electric Service Contract (“Agreement”) as of July 16, 1997. (Joint Ex. 1). The Agreement is a detailed, eight-page document, containing rates, terms and conditions that were individually negotiated by ComEd and Ameritech Illinois representatives, under which ComEd was to provide service to designated Ameritech Illinois facilities.<sup>1</sup> Am. Ill. Ex. 1.0, p. 8. In general terms, the Agreement combines parts of certain ComEd tariffs (such as Rate 6 and Rider 32), with several provisions that do not appear in any of those tariffs. Am. Ill. Ex. 1.1, pp. 6-7.

The Agreement obligates Ameritech Illinois to curtail its electrical load by a minimum of 5,300 kilowatts (“kW”) when requested by ComEd (Joint Ex. 1, Recital ¶ 2). In exchange, ComEd will make payments to Ameritech Illinois. Id. To meet its curtailment obligation, Ameritech Illinois need not curtail consumption at all the facilities served under the Agreement; it can reduce consumption at any combination of facilities as long as the 5,300 kW target is met. Tr. 293-94, 296. Under the Agreement, Ameritech Illinois’ “Target Service Level During Curtailment” is 0 (zero) kW. Id. § 1.5(b).

Section 1.3 of the Agreement identifies the ComEd tariffs or other documents under which Ameritech Illinois would receive and pay for power. These include the

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<sup>1</sup> The Agreement contains three exhibits, one identifying the original facilities served under the Agreement, one describing charges for facilities rental service (Rider 6), and one describing charges for meter lease service (Rider 7).

Agreement itself, Rates 6 and 6L, various specified riders, and “any other applicable rates, riders or tariffs, . . . on file with the Illinois Commerce Commission.” Joint Ex. 1 § 1.3(a). Under § 1.3(b)(i), Ameritech Illinois is to receive an annual credit of \$35 per kW for its share of load curtailment. ComEd pays the curtailment credit in a lump sum at the end of the year. Tr. 190, 287.<sup>2</sup> The majority of the facilities served under the Agreement otherwise would be served pursuant to Rate 6 and would not be eligible for curtailment payments. Am. Ill. Ex. 1.0, p. 9.

The Agreement limits Ameritech Illinois’ ability to obtain power from sources other than ComEd. In particular, § 1.1(a) obligates Ameritech Illinois to “take and purchase from [ComEd] all present and future electricity” it required for the facilities served under the Agreement. It also prohibits Ameritech Illinois from reducing its power purchases under the Agreement “through the use of alternative energy supply, including but not limited to purchase or manufacture of electricity from sources other than” ComEd, including co-generation and self-generation. Joint Ex. 1 § 1.1(d). In fact, ComEd has the right to terminate the Agreement if Ameritech Illinois obtains power for any of the facilities from a source other than ComEd. Joint Ex. 1 § 2(a)(iv).

Section 2 identifies other actions that would give ComEd the right to terminate the Agreement. For example, ComEd can terminate if Ameritech Illinois’ curtailable load falls below 5,300 kW. See Joint Ex. 1 § 2(a)(iii). If ComEd terminates the

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<sup>2</sup> Ameritech Illinois has received, by year, the following curtailment payments under the Agreement: 1998 - \$358,558; 1999 - \$304,394.74; 2000 - \$318,635.72; 2001 - \$263,701.99. ComEd Ex. 1.0, p. 13.

Agreement either because Ameritech Illinois has failed to provide the minimum curtailable load or because it has obtained power from a source other than ComEd, Ameritech Illinois must pay to ComEd a percentage of the curtailment payments it previously received. See id. § 2(c)(i).

The Agreement only became effective after its approval by the Commission. See Joint Ex. 1 § 1.2. ComEd filed the Agreement for Commission approval on July 18, 1997, and the Commission approved it as of August 27, 1997. Am. Ill. Ex. 1.0, p. 10. It is in effect through the December 31 following the fifth anniversary of the date of Commission approval (i.e., December 31, 2002). See Joint Ex. 1 § 1.2. Ameritech Illinois and ComEd also agreed to keep the terms of the Agreement confidential, although the terms could be disclosed to a regulatory agency in order to obtain approval of the Agreement. See Joint Ex. 1 §§ 3(a) and 3(b).

There is no dispute that the Agreement is one of a kind. ComEd has no other agreement with a customer that combines Rider 32 provisions with Rates 6 and 6L. Tr. 328, 365.<sup>3</sup> Indeed, ComEd stated in its Answer that it has no other agreement “that is identical” to the Agreement (Answer at 17), and its witness David Geraghty confirmed that the Agreement is “unique.” Tr. 329. Moreover, witnesses for both Ameritech Illinois and ComEd testified that the Agreement is a “customer-specific contract” under the ordinary meaning of those terms. See Am. Ill. Ex. 1.0, pp. 7, 9-10 (Ragland); Tr. 329-30 (Geraghty). ComEd also has described the Agreement in letters and on its

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<sup>3</sup> ComEd is a party to three similar agreements that incorporate certain aspects of ComEd’s Rider 30, rather than Rider 32. Tr. 385.

Internet site as a “Special Contract.” See Am. Ill. Ex. 1.0, p. 9 & Ex. 1.5, 1.6; Am. Ill. Redirect Ex. 2; see also Tr. 248-50.

### **Rider 32 Contracts**

The Agreement varies materially from ComEd’s Rider 32 contracts. A Rider 32 contract is a one-page agreement between ComEd and a customer taking electric service from ComEd under Rate 6L or Rider CB, in the form of a standardized “Commonwealth Edison Energy Cooperative Membership Agreement.” Such contracts are governed by ComEd’s Rider 32 tariff (Joint Ex. 3). The purpose of Rider 32 is to provide a billing credit to Rate 6L and Rider CB customers that have agreed to curtail load upon notice by ComEd. See Am. Ill. Ex. 1.0, p. 12 & Ex. 1.9 (sample Rider 32 ComEd Energy Cooperative Membership Agreement). The Agreement differs from a standardized Rider 32 contract in several significant ways:

- ? Rider 32 is a standardized, pre-printed one-page form, while the Agreement is an eight-page document individually negotiated by the two companies.
- ? Rider 32 provides that it is only applicable to Rate 6L and Rider CB customers. Of the Ameritech Illinois facilities served under the Agreement, none are Rider CB customers, and only a handful are Rate 6L customers. Most all of the facilities covered by the Agreement are Rate 6 customers. Rate 6 customers are not eligible for Rider 32.
- ? Participation under Rider 32 is limited to the customer locations identified in the contract, while the Agreement allows Ameritech Illinois to add facilities to the Agreement from time to time.
- ? Rider 32 does not require customers to curtail a specified minimum amount of load but simply requires customers to make reasonable efforts to curtail load; customers are allowed to specify the target

load level they will attempt to achieve during curtailment. The Agreement requires Ameritech Illinois to curtail a specified minimum amount of electrical load, allows ComEd to terminate the Agreement if Ameritech Illinois' load falls below that amount, and requires curtailment of the entire load at any given facility.

? Rider 32 contracts are generally not filed with the Commission, while the Agreement was filed with the Commission for approval.

Am. Ill. Ex. 1.0, pp. 13-14. In addition, Rider 32 requires ComEd to provide notice of curtailment at each Rate 6 facility (see Joint Ex. 3, sheet 95.09.9), while the Agreement obligates ComEd to provide Ameritech Illinois with notice of curtailment only at two designated locations (Joint Ex. 1 § 1.3(b)(ii)). Even ComEd's witness Mr. Geraghty conceded that the Agreement's terms vary materially from Rider 32 in some respects, although he asserted that other differences were not material. Tr. 339-41, 352-54.

### **The Facilities Covered By The Agreement**

Under § 1.1(a) the Agreement, Ameritech Illinois could amend the list of facilities to which the Agreement applied – and it did so several times. ComEd Ex. 1.0, pp. 3-4 (Voller).<sup>4</sup> The parties agree that, as of the 1999 curtailment season, there were 51 facilities served under the Agreement. Tr. 210-11 (Ragland), 294 (Voller).

In November 1999, John Ragland, an energy consultant for Ameritech Illinois, sent Delso Hudson of ComEd, via e-mail, a list of 126 facilities that Ameritech Illinois wanted to include under the Agreement. Am. Ill. Ex. 1.1, p. 14; Tr. 56. Mr. Ragland phoned Mr. Hudson later the same day to advise him that the e-mail list included

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<sup>4</sup> Although Ameritech Illinois did not follow the specific process to add (and drop) facilities set forth in Exhibit A of the Agreement, ComEd accepted the addition of those facilities. Tr. 279-80.

facilities to be added to the contract. Tr. 56-57. Mr. Hudson testified that Mr. Ragland sent the list in November 1999 in response to Mr. Hudson's request for information about which Ameritech Illinois facilities had the highest loads or were critical locations. ComEd Ex. 5.0, pp. 1-2. ComEd's records would reveal, however, which facilities had the highest loads and Ameritech Illinois personnel – rather than Mr. Ragland – would be better able to identify facilities that were particularly critical to the company. Tr. 58-59.<sup>5</sup>

### **The Customer Choice Law**

The Customer Choice Law, which was intended to open the retail electric market to competition, was signed into law on December 16, 1997. The law amended the Public Utilities Act (“PUA”) by adding a new Article XVI that addresses, among other things, the “unbundling” of electric service and the provision of delivery service by Illinois electric utilities, such as ComEd. Am. Ill. Ex. 1.0, p. 4. An eligible customer thus could choose, in the first instance, either to continue to take electric service at the “bundled” tariff or contract rates from a utility or purchase service on an “unbundled” basis as a delivery services customer. See Am. Ill. Ex. 1.0, p. 5.

ComEd customers eligible to receive delivery services could take those services in two ways. First, they could purchase both delivery services and power and energy,

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<sup>5</sup> Attached to Mr. Hudson's testimony (ComEd Ex. 5.0) is what he described as a current version of the list Mr. Ragland sent him in November 1999 (ComEd Ex. 5.0, Ex. 1). The list contains nothing to indicate which facilities are more critical than others. Tr. 59. In addition, Mr. Hudson testified that those facilities on the list that were within the scope of the Agreement included a designation that “Rider 32” or “special contract” was applicable and that approximately 20 facilities on the list had this designation. ComEd Ex. 5.0, p. 2. In fact, 31 facilities on the list have a Rider 32 designation and none is designated as a special contract. See ComEd Ex. 5.0, Ex. 1.

from ComEd. Second, they could purchase delivery services from ComEd but purchase power and energy from another source, such as another electric utility or an alternative retail electric supplier. Am. Ill. Ex. 1.0, p. 5. In both circumstances, the customer would pay ComEd a delivery service charge established by tariff (Rate CSDS). See 220 ILCS 5/16-108(a) (requiring utilities to file delivery services tariff). If the customer is purchasing “unbundled” power from ComEd, ComEd’s Rider PPO determines the rate paid for that power and energy. See Am. Ill. Ex. 1.0, p. 5; 220 ILCS 5/16-110 (requiring electric utilities to file tariff for Power Purchase Option).<sup>6</sup> If the customer is purchasing power from another source, the customer’s agreement with that source determines the rate.

The Customer Choice Law also allowed electric utilities to impose transition charges in connection with the offering of delivery services. See 220 ILCS 5/16-108(g) & (h) (allowing electric utilities to file tariffs establishing transition charges). Section 16-102 of the PUA describes the manner in which transition charges are to be calculated. In particular, the transition charge is equal to the “base revenue” of a customer (or customer class), from which is subtracted the customer’s “delivery services revenue,” a “market value credit,” and a “mitigation factor.” 220 ILCS 5/16-102; Am. Ill. Ex. 1.0, p. 6. For delivery services customers in its territory, ComEd applies a tariffed “Customer

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<sup>6</sup> The rates established by ComEd’s Rider PPO changed several times between late 1999 and mid-2001. See ComEd Ex. 2.0, pp. 4-5. The applicable rates were made public at least one month in advance of when they went into effect. Tr. 199-201.

Transition Charge” (or CTC) which is assessed on a cents per kW-hour basis. The charge is governed by ComEd’s Rate CTC (Joint Ex. 2).

Accordingly, the electric charges applicable to a customer that chooses to remain on “bundled” service with ComEd would be determined by two general factors: 1) the customer’s usage; and 2) the charges established by the “bundled” tariff applicable to that customer. In contrast, the electric charges applicable to a customer that opts to become a ComEd delivery services customer would be determined by four general factors: 1) the customer’s usage; 2) the delivery services charge established by ComEd’s tariff; 3) the energy charge established by ComEd’s Rider PPO; and 4) the CTC established by ComEd’s Rate CTC.<sup>7</sup>

### **Applicability of ComEd’s Rate CTC**

Section 16-108(g) required electric utilities to provide an individualized transition charge calculation to only one class of customers, but gives them discretion to provide such individualized calculations for other customers by tariff. See 220 ILCS 5/16-108(g). ComEd chose to provide for such calculations in its Rate CTC tariff, and it is that tariff that ultimately defines a particular customer’s eligibility for a custom CTC calculation.

In general, ComEd calculates a customer’s CTC on a customer-class wide basis, with the class assignment generally correlating to the size of a customer’s load in terms of kW. See Am. Ill. Ex. 1.0, p. 6; Joint Ex. 2, sheets 134-35. ComEd’s Rate CTC

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<sup>7</sup> The exhibit attached to Mr. Leick’s testimony calculating a sample unbundled rate includes an additional factor: a transmission service charge. ComEd Ex. 2.0, Ex. 10. His testimony does not otherwise explain this charge, but it presumably is set forth in ComEd’s tariffs and can be determined using the billing system query program he describes. See ComEd Ex. 2.0, p. 11.

provides, however, that certain non-residential retail customers are entitled to customer-specific CTC calculations:

- ? Customers equal or exceeding 3 megawatts (“MW”) of demand
- ? Rate 18 – Standby Service
- ? Rider 26 – Interruptible Service
- ? Rider 27 – Displacement of Self Generation
- ? Customer-specific Electric Service Contracts

Joint Ex. 2, sheet 137 (emphasis added). The phrase “customer-specific electric service contract” is not defined, or limited, by the Rate CTC tariff (see Tr. 330-31) or anything else in ComEd’s tariffs. Indeed, in drafting the Rate CTC tariff, Mr. Geraghty conceded that ComEd took a broad view and did not “necessarily consider the particular type contracts that were in existence.” Tr. 382.

At some point after the Rate CTC tariff was filed with the Commission, ComEd developed a policy addressing the calculation of CTCs in various situations. Tr. 334-35, 372. That policy is set forth in a confidential legal memorandum (ComEd Cross Ex. 5) and has not been filed with the Commission or approved by it. Tr. 336. ComEd also has not amended the Rate CTC tariff to reflect the secret policy. Tr. 335-36, 372-73. Ameritech Illinois was never informed of the policy until ComEd provided it, in a redacted version, through discovery in this case. Am. Ill. Ex. 1.1P, p. 4. Indeed, the purpose of keeping the policy secret was to avoid disclosing it to affected customers unless and until they approached ComEd regarding the availability of a customer-specific CTC calculation. Tr. 336,37, 366-67.

In the excerpt of the secret policy produced to Ameritech Illinois, ComEd states that it will not provide customer-specific CTCs to customers with “[c]ustomer-specific electric service contracts that incorporate Rider 30/32 type provisions.” ComEd Cross Ex. 5, p. CE 0262.<sup>8</sup> The policy states that, if a customer “is taking service under a customer-specific electric service contract” involving curtailment under special contracts incorporating provisions of Riders 30 and 32, “the contract rate associated with such interruption or curtailment is not an applicable contract rate to be used in the calculation of transition charges.” *Id.* This portion of the secret policy was directed to a specific set of ComEd customers who did not have options to bypass ComEd’s service and with whom ComEd thus would not negotiate a discount from its “base rates.” Tr. 389-90. Although the policy states that its conclusion regarding Rider 30/32-type contracts was necessary to treat “interruptible/curtailable rates” consistently (*id.*), the policy – and Rate CTC – nevertheless identify “Rider 26 – Interruptible Service” as a rate for which customer-specific CTC calculations are provided. *See id.*; Joint Ex. 2, sheet 137.

### **Ameritech Illinois’ CTC Request**

In a November 1, 1999, letter, Ameritech Illinois asked ComEd to provide the CTC charge for the facilities served under the Agreement. Joint Ex. 4. In its November 3 response, ComEd stated that it was “not appropriate” to provide Ameritech Illinois with customer-specific CTCs for the facilities because the charges for electric service to those facilities were not “customer-specific,” but were the same as “those paid by any customer

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<sup>8</sup> Rider 30 is another tariff available to certain ComEd customers under which ComEd pays them to curtail usage. Tr. 360-61.

electing the same electric service rates.” Joint Ex. 5. It advised Ameritech Illinois that the appropriate customer-class CTCs would instead apply to the facilities. Id.<sup>9</sup>

Ameritech Illinois and ComEd personnel met shortly thereafter to discuss the matter further. ComEd reiterated its position that Ameritech Illinois would not receive a customer-specific CTC for the facilities served under the Agreement. Am. Ill. Ex. 1.0, pp. 11-12; ComEd Ex. 1.0, pp. 6-7. Although the secret policy provided the basis for ComEd’s refusal to provide customer-specific CTCs (Tr. 338), ComEd did not mention the policy in its contacts with Ameritech Illinois on this issue. Tr. 338-39.

### **Relief**

The Complaint alleges that ComEd’s failure to provide a customer-specific CTC for the facilities served under the Agreement violates §§ 9-240, 9-241, 9-250, and 9-252 of the PUA. See Complaint ¶¶ 19-21. As a remedy for these violations, Ameritech Illinois asks that ComEd be required to provide a customer-specific CTC for each of the facilities as of December 1999. Am. Ill. Ex. 1.0, p. 16. The customer-specific CTCs would be used to determine, for each facility and for each time ComEd’s Rate PPO changed, if the facility should stay on ComEd’s bundled rates or if it should become a ComEd delivery services customer. Am. Ill. Ex. 1.1, pp. 17-18; Tr. 253-54. Ameritech Illinois could then make the most economic choice for each facility at each decision

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<sup>9</sup> ComEd did provide a customer-specific CTC for accounts at two Ameritech Illinois facilities (2000 West Ameritech Center and 225 W. Randolph) because those locations each had a demand of at least 3 MW. Tr. 231, 232.

point. Tr. 241, 253-54.<sup>10</sup> More specifically, if the charges for unbundled rates at a particular facility would lead to negative savings, that facility would remain on bundled rates for the particular period. If both the bundled and unbundled rates for a facility produced a positive savings, that facility would opt for the rate that would provide the greater savings. See Am Ill. Ex. 1.1, p. 18. Ameritech Illinois' damages would be based on how much less it would have paid ComEd for electric service from December 1999 to the present, had it been provided with customer-specific CTCs, as it should have been, in 1999. Am. Ill. Ex. 1.1, p. 18.

To calculate its damages precisely, Ameritech Illinois needed additional information from ComEd regarding the data its witness John Leick used to prepare his charts calculating Ameritech Illinois' damages, so that Ameritech Illinois could correct several invalid assumptions in Mr. Leick's calculations. See Am. Ill. Ex. 1.1, p. 16-17 (explaining corrections needed), 19. ComEd did not provide this information in advance of the hearing. Id. Accordingly, Ameritech Illinois requests that the Commission direct ComEd not only provide customer-specific CTCs for the facilities, but also to perform the necessary calculations to determine Ameritech Illinois' damages here, and to provide credits based on those calculations.

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<sup>10</sup> Both Ameritech Illinois and ComEd witnesses testified that the usage loads at the individual facilities served under the Agreement did not vary substantially from year to year. Tr. 163 (Ragland); ComEd Ex. 2.0, p. 10 (Leick).

## ARGUMENT

### **I. THE AGREEMENT IS A CUSTOMER-SPECIFIC CONTRACT FOR PURPOSES OF COMED RATE CTC.**

There can be no doubt that the Agreement is a customer-specific contract and that it entitles Ameritech Illinois to customer-specific CTCs. The terms of ComEd's Rate CTC tariff are clear, and its own witness admitted that the Agreement is, in plain English, a customer-specific contract. The Commission also should not consider ComEd's secret policy on CTC calculation, which demonstrates, according to ComEd, that the Agreement is not a customer-specific contract. In any event, the secret policy incorrectly interprets the provision of the PUA on which it purports to rely. Because the Agreement qualifies as a customer-specific contract, ComEd was obligated to provide customer-specific CTCs for the facilities served under it.

#### **A. The Agreement is customer-specific under the plain language of the Rate CTC Tariff.**

ComEd's Rate CTC tariff provides that it will calculate customer-specific CTCs for customers taking service under "Customer-specific Electric Service Contracts." Joint Ex. 2, sheet 137. Based on the generally understood meaning of this phrase, the Agreement unquestionably qualifies as such a contract.

There can be no doubt that the Agreement is one of a kind and specific to the relationship between ComEd and Ameritech Illinois. ComEd's witness, Mr. Geraghty, admitted that the Agreement was "unique" (Tr. 329) and that ComEd had no other

customer contract that combined portions of Rate 6 and Rider 32. Tr. 328, 365.

ComEd's Answer also admits that it has no other agreement "that is identical" to the Agreement. Answer at 17. ComEd's secret policy on Rate CTC even contains multiple references to contracts like the Agreement as "customer-specific electric service contracts." ComEd Cross Ex. 5, p. CE 0262. In fact, witnesses for both Ameritech Illinois and ComEd testified that the Agreement is a "customer-specific contract" under the ordinary meaning of those words. See Am. Ill. Ex. 1.0, pp. 7, 9-10 (Ragland); Tr. 329-30 (Geraghty).

The phrase "customer-specific electric service contract" is not defined in the Rate CTC tariff (see Tr. 330-31) or apparently anywhere else in ComEd's tariffs. Indeed, both Mr. Geraghty and the Administrative Law Judge recognized that, had ComEd only bothered to include a definition of "customer-specific electric service contract" in its tariff, there probably would be no dispute between the parties here. Tr. 334, 371-72.

When a tariff does not define a particular term, that term "must take on its generally understood and accepted meaning." Couzens Warehouse & Distributors, Inc. v. Fred Olson Motor Service Co., 544 F.2d 919, 921 (7<sup>th</sup> Cir. 1976) (collecting cases); cf. Illinois Telephone Ass'n v. Illinois Commerce Comm'n., 67 Ill.2d 15, 20, 364 N.E.2d 63, 64 (1977) (holding that statutory language should generally be given its ordinary meaning). ComEd's own witness admitted that the Agreement is a "customer-specific contract" under the ordinary meaning of those words. See Tr. 329-30 (Geraghty).

Accordingly, the facilities served under the Agreement are entitled to customer-specific CTCs.

**B. ComEd's Confidential Policy Cannot Justify Denying Ameritech Illinois a Customer-Specific CTC.**

ComEd justifies its conclusion that the Agreement is not a customer-specific contract through its secret policy on CTC calculation (ComEd Cross Ex. 5). Relying on this policy, ComEd determined that Ameritech Illinois does not qualify for customer-specific CTCs because the Agreement does not represent a reduction in ComEd's base rates. See ComEd Ex. 4.0, pp. 6-7 (Crumrine); ComEd Ex. 3.0, p. 8 (Geraghty).

The Commission should not even consider the secret policy for several reasons.<sup>11</sup> First, the language of the Rate CTC tariff is not ambiguous. Second, application of the policy to vary the express language of the tariff would violate the filed rate doctrine. Third, consideration of the policy would violate the provisions of the PUA requiring a utility's rates be available for public inspection. Fourth, even if the tariff were ambiguous, it should be construed against its drafter: ComEd. Fifth, to construe the tariff to exclude the Agreement would cause an absurd and unjust result. Finally, the policy, which represents the unilateral and hidden intent of one party regarding the meaning of the tariff, is not the sort of evidence that the Commission can properly consider in resolving any ambiguity in the tariff language.

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<sup>11</sup> During the hearing, Ameritech Illinois moved to exclude the policy and any testimony regarding ComEd's application of it. See Tr. 113-15, 322-24. This section of Ameritech Illinois' brief constitutes its legal arguments in support of the motion.

Moreover, the secret policy is based on an incorrect interpretation of the law. The statutory definition of “base rate” on which the policy relies specifically excludes rates under special contracts. In addition, the term “rate” is broadly defined both by the PUA and by precedent, and this definition would include the overall rate established through the Agreement.

1. The Commission Should Not Consider the Secret Policy.

ComEd’s secret policy is irrelevant to this case. The Rate CTC tariff is not ambiguous. Even if it were, giving effect to the policy would undercut established utility law precedent. In addition, various canons of construction counsel against construing the tariff as ComEd proposes.

As an initial matter, it is a fundamental principle that, in applying a tariff, a court should resort to extrinsic materials and canons of construction only when the tariff under consideration is ambiguous. “[I]nterpretation is permitted only when the tariff is ambiguous, so that a literal reading is impossible.” Western Transportation Co. v. Wilson and Co., 682 F.2d 1227, 1231 (7<sup>th</sup> Cir. 1982); cf. People v. Pullen, 192 Ill.2d 36, 42, 733 N.E.2d 1235, 1238 (2000) (construing statute). ComEd’s Rate CTC tariff is not ambiguous, so that the Commission has no need to examine the secret policy to determine whether the Agreement qualifies as a “customer-specific electric service contract.”

A “literal reading” of the phrase “customer-specific electric service contract” is easy. As discussed above, ComEd’s own witness, Mr. Geraghty, admitted that the

Agreement is a “customer-specific contract” under the ordinary meaning of those words. See Tr. 329-30. He also admitted that the Agreement is for “electric service” (Tr. 326), that Ameritech Illinois and ComEd are the parties to the Agreement (Tr. 328), and that no other agreements contain the same terms and conditions. Tr. 328. This is clearly a customer-specific agreement as a matter of plain English, and there is simply no room for interpretation of that language through extrinsic evidence.

Even assuming that there is ambiguity in the phrase “customer-specific electric service contract,” there are several reasons why the Commission should interpret the tariff without regard to ComEd’s secret policy. First, applying the policy to vary the plain language of the Rate CTC tariff would violate the filed rate doctrine, as embodied in the PUA. The doctrine’s goal is to prevent a utility from engaging in unjust discrimination in rates. See American Telephone and Telegraph Co. v. Central Office Telephone, Inc. 524 U.S. 214, 221-22 (1998) (“Central Office”). Under the PUA’s statement of the doctrine, a public utility such as ComEd is prohibited from charging or receiving payment other than at the “rates or other charges applicable to [a] product or commodity or service as specified in its schedules on file and in effect at the time.” 220 ILCS 5/9-240; see also 220 ILCS 5/9-241 (prohibiting public utility from discriminating in its rates). “Once a tariff is filed and until it is amended, modified, superceded, or disapproved, the carrier may not deviate from its terms.” Cahnmann v. Sprint Corp., 133 F.3d 484, 487 (7<sup>th</sup> Cir. 1998). Indeed, even if a carrier misrepresents its rate, and the customer relies on that misrepresentation, the carrier cannot be compelled to provide the promised rate if that rate conflicts with the published tariff. Central Office, 524 U.S. at

222; see Maurice Transport, 144 Ill. App. 3d at 162, 494 N.E.2d at 742 (holding that requirement established by contract is enforceable only if it is included in carrier's tariff).

ComEd's secret policy is an attempt to deviate from the express terms of the Rate CTC tariff and to exclude a specific set of customers from the tariff's application. Just as ComEd could successfully invoke the filed rate doctrine (as embodied in § 9-240) to prevent a customer from arguing that it is entitled to a deal better than what ComEd's tariff provides (see, e.g., CGH Medical Center v. Commonwealth Edison Co., ICC Dkt. No. 96-0086, 1998 Ill. PUC LEXIS 46 (Jan. 22, 1998) (attached hereto)), ComEd should be similarly bound by the doctrine and precluded from using material outside the four corners of its tariff to justify giving some customers a less favorable deal.

Second, consideration of the policy would condone secretive behavior by ComEd regarding negotiated contracts similar to what the Illinois Appellate Court has previously found unlawful. In 1993, ComEd filed its Rate CS "load retention" tariff with the Commission under which it hoped to retain load by offering negotiated electric service contracts to certain large commercial and industrial customers. See Citizens Utility Board v. Illinois Commerce Commission, 275 Ill. App. 3d 329, 332, 655 N.E.2d 961, 963 (1<sup>st</sup> Dist. 1995) ("CUB"). The Rate CS tariff simply provided a parameter for possible rates, whereas the actual charges for service under Rate CS were contained in the individual contracts for each customer. Id. at 333, 655 N.E.2d at 963-64. These contracts were submitted to the Commission for informational purposes, rather than

approval, and the rates set by the contracts were confidential and not open to public inspection. Id., 655 N.E.2d at 964.

The appellate court reversed the Commission's approval of Rate CS. The court found that the Rate CS scheme violated §§ 9-102 and 9-103 of the PUA (220 ILCS 5/9-102, 5/9-103) because ComEd had not filed its rates (and any related contracts) with the Commission for public inspection. 273 Ill. App. 3d at 340-41, 655 N.E.2d at 968-69. In addition, the court found that, because Rate CS contained no actual rates, it violated §§ 9-240 and 9-243 of the PUA (220 ILCS 5/9-240, 5/9-243), which prohibit a utility from charging other than its tariffed rates. 275 Ill. App. 3d at 343, 655 N.E.2d at 970.

ComEd's secret policy interpreting Rate CTC raises similar concerns under the PUA. Section 9-102 requires ComEd to file, as part of its rate schedules, "all rules, regulations, . . . privileges and contracts that in any manner affect the rates charged or to be charged for any service." 220 ILCS 5/9-102; see 220 ILCS 5/3-116 (defining "rate" to include "every individual or joint rate, fare, toll, charge, . . . and any rule, regulation, charge, practice or contract relating thereto"). The secret policy is clearly a rule, regulation, or practice affecting what Ameritech Illinois – and other customers – are to be charged under Rate CTC. ComEd, by its own admission (Tr. 336), has not advised the Commission of the policy, and the policy is certainly not available for public inspection.

The legislature's addition of § 9-102.1 to the PUA (220 ILCS 5/9-102.1), following the CUB decision, does not relieve ComEd of its obligations here under § 9-

102. Section 9-102.1(d) allows any contract filed pursuant to § 9-102.1(a) to be given confidential treatment and to be exempt from various disclosure requirements in the PUA. See 220 ILCS 5/9-102.1(d). Section 9-102.1(d) refers only to contracts, however, so that it does not exempt from disclosure a unilateral policy interpreting a tariff, such as ComEd’s secret policy on Rate CTC. Moreover, since the policy relates to services that are not within the ambit of § 9-102.1 (e.g., Rider 30 and 32 contracts), § 9-102 would apply to compel disclosure of the policy because of its effect on those other services.<sup>12</sup>

ComEd’s apparent violation of § 9-102 through its use of a secret policy to limit the scope of the Rate CTC tariff means that the Commission should not consult the policy if it determines that the phrase “customer-specific electric service contracts” in Rate CTC is somehow ambiguous. To consider the policy would condone ComEd’s continuing practice of hiding its tariffed rates – and its policies for implementing those rates – from public scrutiny.<sup>13</sup> Third, it is well established that, where the interpretation of an ambiguous tariff is at issue, the tariff should be construed against its drafter, since the drafter “is presumed to have used language necessary to protect its interest.” Indiana Harbor Belt R.R. Co. v. Budd Co., 110 Ill. App. 3d 76, 79, 441 N.E.2d 1301, 1304 (1<sup>st</sup> Dist. 1982); Maurice Transport Co. v. Amoco Oil Co., 144 Ill. App. 3d 156, 162, 494 N.E.2d 738, 742 (4<sup>th</sup> Dist. 1986). ComEd drafted the Rate CTC tariff. If there is any ambiguity in the language of that tariff, it should be construed in favor of Ameritech

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<sup>12</sup> Indeed, ComEd took great pains during the hearing to argue that the Agreement fell within § 9-102, rather than § 9-102.1. See Tr. 139-43, 259 (“Our position is this is a 9-102 contract tariff”).

<sup>13</sup> Mr. Geraghty testified at the hearing that ComEd has developed numerous policies and procedures to implement its tariffs that it does not make publicly available. Tr. 378. It might be appropriate for the Commission to initiate an investigation into these other secret policies and their potential impact on ComEd customers.

Illinois and against ComEd. Such a construction is especially appropriate where, as here, ComEd chose not to include a “definitions” section to the Rate CTC tariff (Tr. 371-72) and made no attempt to amend the tariff, after its policy was developed, to include further explanation of the phrase at issue. Tr. 372-73.<sup>14</sup>

Fourth, another well established rule of construction is that a tariff should be interpreted to avoid “unjust, absurd, or improbable results.” Western Transportation, supra, 682 F.2d at 1231; cf. Pullen, supra, 192 Ill.2d at 42, 733 N.E.2d at 1238 (construing statute). Given that even ComEd admits that the Agreement, in ordinary English, is a “customer-specific electric service contract” (see Tr. 329-30), it would be absurd to construe that phrase in the tariff as meaning something different. Moreover, it would be unjust to allow ComEd to vary the fundamental meaning of the tariff language based on a secret policy, the existence of which it disclosed neither to the Commission nor to the affected customers.

Finally, the secret policy represents ComEd’s unilateral vision of what the Rate CTC tariff should mean, and it is not binding. Under general principles of contract construction, the particular interpretation that one of the parties may have placed on a

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<sup>14</sup> At least one Illinois case holds that a tariff should not be construed against its drafter where it can be construed consistently with its intent. See General Mills, Inc. v. Illinois Commerce Comm’n, 201 Ill. App. 3d 715, 721, 559 N.E.2d 225, 228 (1<sup>st</sup> Dist. 1990). That case is distinguishable for two reasons. First, ComEd, the drafter of the revised tariff at issue in General Mills, revised the tariff specifically to comply with a prior Commission order regarding the scope of that tariff. See id. at 721-22, 559 N.E.2d at 229. ComEd did not include the phrase “customer-specific electric service contract” in the Rate CTC tariff here to comply with a specific prior Commission order. Second, the drafters of Rate CTC apparently had no intent regarding contracts such as the Agreement because, in drafting the tariff, they did not “necessarily consider the particular type contracts that were in existence” (Tr. 382), and the secret policy was developed only after the tariff had been filed with the Commission. Tr. 334-35, 372.

contract provision is immaterial. Klemp v. Hergott Group, Inc., 267 Ill. App. 3d 574, 582, 641 N.E.2d 957, 963 (1<sup>st</sup> Dist. 1994); Metro East Sanitary Dist. v. Village of Sauget, 131 Ill. App. 3d 653, 658, 475 N.E.2d 1327, 1331 (5<sup>th</sup> Dist. 1985). Accordingly, to the extent that a tariff is construed like a contract (see Penn Central Co. v. General Mills, Inc., 439 F.2d 1338, 1340 (8<sup>th</sup> Cir. 1971)), ComEd's secret view of what its tariff should mean is immaterial to the Commission's interpretation of that tariff. Cf. Saunders v. Michigan Ave. Nat'l Bank, 278 Ill. App. 3d 307, 315, 662 N.E.2d 602, 609 (1<sup>st</sup> Dist. 1996) (holding that internal policy which bank allegedly applied to other customers could not be used to vary express terms of bank's agreement with plaintiff).

For all of the foregoing reasons, the Commission should exclude from the record the policy and any testimony related to it.<sup>15</sup> The policy certainly should not be used to interpret the Rate CTC Tariff.

2. ComEd's Secret Policy Incorrectly Applies the Law to Ameritech Illinois.

ComEd's secret policy states that only customers that receive a reduction from ComEd's base rates, as that term is defined in 220 ILCS 5/16-102, are entitled to a customer-specific CTC. See ComEd Cross Ex. 5, p. CE 0262. ComEd concluded that Ameritech Illinois does not qualify for customer-specific CTCs because it is simply paying ComEd's base rates under the Agreement and does not receive a reduction from them. See ComEd Ex. 4.0, pp. 6-7 (Crumrine); ComEd Ex. 3.0, p. 8 (Geraghty).

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<sup>15</sup> The portions of ComEd Ex. 3.0 and 3.0P which should be excluded are set forth at Tr. 323. Those portions of Mr. Geraghty's oral testimony discussing the policy and any cross examination of Mr. Ragland regarding Com Ex. Cross Ex. 5 also should be excluded.

ComEd’s application of its policy to Ameritech Illinois misreads § 16-102 and ignores relevant case law on what constitutes a “rate.”

Section § 16-102 of the PUA defines “base rates” explicitly to exclude “special or negotiated contract rates.” 220 ILCS 5/16-102. ComEd has described the Agreement as a “special contract” on numerous occasions (see Am. Ill. Ex. 1.0, p. 9 & Ex. 1.5, 1.6; Am. Ill. Redirect Ex. 2; see also Tr. 248-50), and its terms were negotiated between Ameritech Illinois and ComEd. See Am. Ill. Ex. 1.0, p. 8; Tr. 327-28. Accordingly, Ameritech Illinois must be paying a special contract rate, rather than ComEd’s “base rates,” under the Agreement. The premise of the secret policy – that customers paying base rates do not qualify for customer-specific CTCs – therefore does not pertain to Ameritech Illinois or prevent it from obtaining customer-specific CTCs for its facilities.

Moreover, the provision of § 16-102 defining “transition charges” requires that they be calculated using either “base rates” or “to the extent applicable, any contract rates.” 220 ILCS 5/16-102. Since Ameritech Illinois is paying a “contract rate” (as explained above), that is the rate “applicable” to the calculation of its transition charges. ComEd’s policy, as applied to Ameritech Illinois, contradicts the language of § 16-102.

Furthermore, the term “rate” is broadly defined both by the PUA and by relevant precedent, so that it includes not only the monetary charges imposed by the utility, but also all price and non-price elements of the parties’ deal. ComEd cannot ignore this

expansive definition in deciding upon whom it will bestow a customer-specific CTC. For example, the United States Supreme Court has recognized that “rates” include more than just the dollar amounts of charges set forth on a tariff sheet:

Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. . . . “An unreasonable ‘discrimination in charges,’ . . . can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.” The Communications Act recognizes this when it requires the filed tariff to show not only “charges,” but also “the classifications, practices, and regulations affecting such charges.”

Central Office, *supra*, 524 U.S. at 223 (citations omitted).

The PUA takes a similarly expansive view of rates, defining them to include “every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility . . . or any schedule or tariff thereof, and any rule, regulation, charge, practice or contract relating thereto.” 220 ILCS 5/3-116. The Illinois appellate court found that this definition was broad enough to include “refunds which affect the ultimate price paid by taxpayers.” Illinois Bell Tel. Co. v. Illinois Commerce Comm’n, 203 Ill. App. 3d 424, 437, 561 N.E.2d 426, 435 (2<sup>nd</sup> Dist. 1990) (discussing proposed tariff under which Ameritech Illinois would provide customers with annual refund based on percentage of company earnings). The court similarly found that the definition included ComEd’s Rider 30, another tariff under which ComEd provides credits to customers for reducing their usage. See Bloom Twp. High School v. Illinois Commerce Comm’n, 309 Ill. App. 3d 163, 175, 722 N.E.2d 676, 686 (1<sup>st</sup> Dist. 1999).<sup>16</sup>

Under the broad definition endorsed by these holdings, the “rate” Ameritech Illinois pays under the Agreement includes not only the charges assessed under the tariffs otherwise applicable to its facilities (e.g., Rate 6 or 6L), but also any payments ComEd refunds to it through a curtailment program. Such refunds obviously lessen “the ultimate price” paid by Ameritech Illinois to ComEd, so that Ameritech Illinois is receiving a reduction from ComEd’s rates. Under the terms of § 16-102, Ameritech Illinois is entitled to customer-specific CTCs for its facilities served under the Agreement.

In summary, the Agreement is a customer-specific contract under the plain language of Rate CTC, and Ameritech Illinois is not paying ComEd’s base rates under the Agreement. The facilities served under the Agreement therefore are entitled to customer-specific CTCs. ComEd’s refusal to provide these CTCs is a violation of §§ 9-240, 9-241, 9-250, and 9-252 of the PUA.

**II. AMERITECH ILLINOIS’ DAMAGES SHOULD BE BASED ON THE OPTIMAL RATES APPLICABLE TO 126 FACILITIES, WITHOUT ANY REDUCTION FOR CURTAILMENT PAYMENTS.**

As a remedy for these violations, Ameritech Illinois asks that ComEd be required to provide a customer-specific CTC for each of the facilities as of December 1999. Am. Ill. Ex. 1.0, p. 16. Had ComEd provided such customer-specific CTCs when requested, Ameritech Illinois would have been able to determine, for each facility and for each time ComEd’s Rate PPO changed, if the facility should have stayed on ComEd’s bundled rates or if it should have become a ComEd delivery services customer, based on which option

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<sup>16</sup> As ComEd has pointed out, Riders 30 and 32 are similar because both provide payments for curtailment. Tr. 361.

created greater savings. Am. Ill. Ex. 1.1, pp. 17-18; Tr. 253-54. Ameritech Illinois' damages here are based on how much less it would have paid ComEd for electric service from December 1999 to the present, had it been able to optimize its accounts in this manner. Am. Ill. Ex. 1.1, p. 18.

Mr. Leick's testimony includes a sample calculation of the difference between bundled and unbundled rates for one Ameritech facility. (see ComEd Ex. 2.0, pp. 9-11 & Ex. 10, 11), although his calculations contained certain incorrect assumptions. See Am. Ill Ex. 1.1 pp. 16-18. ComEd did not provide the same calculations for all 126 facilities under the Agreement, or the back-up detail necessary to support such calculations. Id., p. 19. Ameritech Illinois thus could not make the appropriate refinements to Mr. Leick's calculations for all 126 facilities and request a specific dollar amount in damages. As a result, Ameritech Illinois requests as part of its relief that ComEd be required to perform the calculations necessary to determine Ameritech Illinois' damages here.

ComEd's testimony at the hearing raised four arguments affecting the calculation of Ameritech Illinois' damages and reducing the amount of its recovery: 1) Ameritech Illinois would have to pay ComEd termination liability if it became a delivery services customer, because it would be in violation of the Agreement; 2) Ameritech Illinois' damages theory allows it to take advantage today of information that was not available during the previous three years; 3) curtailment payments Ameritech Illinois received should be omitted from the calculation of its customer-specific CTCs; and 4) the

Agreement included only 51, rather than 126, Ameritech Illinois facilities. As discussed in detail below, none of these arguments has merit.

**A. Ameritech Illinois Would Not Breach the Agreement by Receiving Customer-Specific CTCs.**

Nevertheless, ComEd justified its refusal to provide customer-specific CTCs by claiming that Ameritech Illinois would be breaching the Agreement if it became a delivery services customer. See ComEd Ex. 3.0, p. 23 (Geraghty); ComEd Ex. 2.0, p. 8 (Leick). Based on this supposed breach, it claims that Ameritech Illinois would have to pay the termination penalties set forth in § 2 of the Agreement. ComEd Ex. 2.0, pp. 12-14 (Leick); see ComEd Ex. 3.0, pp. 13-14 (Geraghty). ComEd's position is based on the misreading of the Agreement, however.

As an initial matter, Ameritech Illinois' mere request for customer-specific CTCs, and consideration of its billing options once it received the CTCs, would not breach the Agreement. Ameritech Illinois wanted the CTCs to be able to gauge whether, for particular facilities served under the Agreement, it would make economic sense to become a ComEd delivery services customer or even to obtain service from an alternative supplier. See Am. Ill. Ex. 1.1, pp. 13-14.

Assuming that some or all of the facilities became ComEd delivery services customers, Ameritech Illinois still would be fulfilling its contractual obligations. Under the Agreement, Ameritech Illinois was obligated to take service from ComEd pursuant to the Agreement itself, Rates 6 and 6L, various specified riders, and "any other applicable

rates, riders or tariffs, . . . on file with the Illinois Commerce Commission.” Joint Ex. 1 § 1.3(a). Rider PPO is one of the “other applicable rates, riders or tariffs” to which § 1.3(a)(vi) refers (see Am. Ill. Ex. 1.1, pp. 13; Tr. 239), so that taking service under that rider would not violate the Agreement.<sup>17</sup> Similarly, if Ameritech Illinois were purchasing power from ComEd as a delivery services customer, it would still be compliant with § 1.1(d) of the Agreement, which prohibits only “the use of alternative energy supply, including but not limited to purchase or manufacture of electricity from sources other than” ComEd. Joint Ex. 1 § 1.1(d).

Although ComEd may argue otherwise, there is nothing in the plain language of the Agreement that limits Ameritech Illinois to purchasing power at ComEd’s “bundled” rates. Taking unbundled service from ComEd is not a termination event under the Agreement. Ameritech Illinois, as a delivery services customer, would still be purchasing all of its power and energy from ComEd (albeit under Rider PPO, rather than Rates 6 and 6L), it would not be in breach of the Agreement or obligated to pay any termination penalty. See Am. Ill. Ex. 1.1, pp. 13. Accordingly, there is no basis to argue that Ameritech Illinois’ damages should be offset by the curtailment payments it received under the Agreement.

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<sup>17</sup> If the provision “other applicable rates, riders or tariffs” merely duplicated the rates and riders specifically listed in § 1.3(a), it would be superfluous. All provisions of a contract are presumed to have been inserted for a reason, and the contract should be interpreted to give meaning to each provision. Dolezal v. Plastic and Reconstructive Surgery, S.C., 266 Ill. App. 3d 1070, 1081, 640 N.E.2d 1359, 1366 (1<sup>st</sup> Dist. 1994).

**B. Ameritech Illinois' Damages Can Reflect the Rate Choices It Would Have Made Over Time with a Customer-Specific CTC.**

Ameritech Illinois' damages theory is based on its ability to switch facilities served under the Agreement from "bundled" to "unbundled" rates, depending on which rates were less expensive for each facility. Am. Ill. Ex. 1.1, pp. 17-18. Ameritech Illinois witness John Ragland described this process as "optimizing" Ameritech Illinois' rates because it assumes that the company would have always made the most economic choice between bundled rates and Rider PPO. Tr. 241. Such optimization would have to be performed at several points between late 1999 and the present, because the rates established by ComEd's Rider PPO changed several times. See ComEd Ex. 2.0, pp. 4-5; Am. Ill. Ex. 1.1, p. 18.

ComEd's cross-examination of Mr. Ragland insinuated that such optimization constitutes 20/20 hindsight and allows Ameritech Illinois to take advantage today of information that was not available during 1999 through 2001, when it would have had to make choices between bundled and unbundled rates. See Tr. 163-66. Such an insinuation is groundless, however, because all the information to make the optimal choices was either available or predictable before the choices had to be made. Indeed, ComEd's witness, Mr. Leick, had no problem performing these calculations for at least one Ameritech Illinois facility. See ComEd Ex. 2.0, pp. 9-11.

To optimize its electric charges, Ameritech Illinois would have had to compare the rates for bundled and unbundled service for each facility, at each point when the

Rider PPO rates changed. Am. Ill. Ex. 1.1, pp. 17-18. In general, calculation of the charges for bundled service depends on two factors: 1) the usage for a facility; and 2) the charges established by the “bundled” tariff (i.e., Rate 6 or 6L) applicable to that facility. See ComEd Ex. 2.0, p. 11 & Ex. 11 (explaining calculation method). The usage at the individual facilities did not vary substantially from year to year (Tr. 163; ComEd Ex. 2.0, p. 10) and thus were predictable. The charges applicable under Rate 6 and 6L were set forth in ComEd’s tariffs and thus were known.

Calculation of the charges for unbundled service at a particular facility depends on four general factors: 1) the usage for that facility; 2) the delivery services charge established by ComEd’s tariff (Rate CSDS); 3) the energy charge established by ComEd’s Rider PPO; and 4) the CTC established by ComEd’s Rate CTC (Joint Ex. 2). See Am. Ill. Ex. 1.1, pp. 17-18; ComEd Ex. 2.0, pp. 10-11 & Ex. 10 (explaining calculation method).<sup>18</sup> As discussed above, the usage at particular facilities did not vary substantially from year to year and thus was predictable. ComEd’s tariff for delivery services (Rate CSDS), Rider PPO, and Rate CTC established the applicable rates for the other three factors. Although the rates established by ComEd’s Rider PPO changed several times between late 1999 and mid-2001 (see ComEd Ex. 2.0, pp. 4-5), they were made public at least one month in advance of when they went into effect. Tr. 199-201. It thus would have been possible for Ameritech Illinois to calculate the approximate charges for unbundled service at its facilities.

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<sup>18</sup> The exhibit attached to Mr. Leick’s testimony calculating a sample unbundled rate includes an additional factor: a transmission service charge. ComEd Ex. 2.0, Ex. 10. His testimony does not otherwise explain this charge, but it presumably is set forth in ComEd’s tariffs and can be determined using the billing system query program he describes. See ComEd Ex. 2.0, p. 11.

Ameritech Illinois clearly would have had sufficient information available, prior to each date by which it had to choose between bundled and unbundled rates, to make the most economic choice for each facility. Tr. 241; see Tr. 252-54 (explaining optimization process). Accordingly, it would be appropriate for any damage calculation here to optimize Ameritech Illinois' charges by disregarding any negative savings that would result from the selection of unbundled rates and, if each billing option produced a savings, by selecting the billing option that would provide the greater savings for each individual facility. See Am Ill. Ex. 1.1, p. 18.

**C. Curtailment Payments Should Be Taken into Account When Calculating Customer-Specific CTCs.**

Section 16-102 of the PUA describes the manner in which transition charges are to be calculated. One of the figures used for the calculation is the base revenue of a customer (or customer class), defined as “the amount of revenue” that the electric utility would have received had it served the customer pursuant to tariffed service. 220 ILCS 5/16-102. The utility computes this base revenue by multiplying the customer's actual usage over a three-year period by either “base rates” during the specified time period or “to the extent applicable, any contract rates . . . under which such customers were receiving electric power and energy” during the specified period. Id.

The Commission should not give credence to ComEd's testimony that the curtailment payments must be ignored in calculating the CTCs because those payments

did not alter the “base rates” Ameritech Illinois paid. See ComEd Ex. 3.0P, p. 18-19 (Geraghty), ComEd Ex. 2.0P, Ex. 4 & 5 (Leick); cf. Am. Ill. Ex. 1.1, p. 17 (discussing how Mr. Leick, in making CTC calculations, failed to deduct curtailment payments from base revenue variable). ComEd’s position ignores the “transition charge” definition in § 16-102 which allows the charge to be calculated either with “base rates” or “to the extent applicable, any contract rates.” 220 ILCS 5/16-102; see Am. Ill. Ex. 1.1, p. 9. The Agreement established the “rates” at which Ameritech Illinois received service from ComEd, so that its transition charges should be calculated using its contract rate, rather than ComEd’s “base rates.” Ameritech Illinois’ “rate” under the Agreement includes not only the charges it paid pursuant to ComEd’s tariffs (i.e., Rate 6 or 6L), but also any curtailment payments it received from ComEd for a given year.

In addition, for the reasons explained above (see Section I.B.2, supra), even “base rate” should be broadly defined to mean “the ultimate price” (see Illinois Bell, supra, 203 Ill. App. 3d at 437, 561 N.E.2d at 435), that Ameritech Illinois paid under the Agreement: i.e., the charges under the applicable tariffs, less the amount of curtailment payments. Accordingly, ComEd should be required to take the curtailment payments into account when it calculates the customer-specific CTCs for Ameritech Illinois’ facilities.

**D. The Agreement Covered 126 Facilities During the Period for which Ameritech Illinois Seeks Damages.**

The credible evidence in the record here indicates that, as of December 1999, there were 126 Ameritech Illinois facilities served pursuant to the Agreement. Ameritech Illinois thus was entitled to customer-specific CTCs for each of those facilities, and the Commission should award damages based on an optimization of Ameritech Illinois' electric charges for each facility.

The parties presented conflicting evidence on the number of facilities served under the Agreement, and neither party appears to have kept perfect records on this issue. ComEd's witness William Voller testified that the Agreement included 51 facilities in late 1999 and that Ameritech Illinois last updated the list of covered facilities in May 1999. See ComEd Ex. 1.0, pp. 3-4 & Ex. 2. John Ragland testified for Ameritech Illinois that he notified ComEd to expand the list to 126 facilities in November 1999. Am. Ill. Ex. 1.1, pp. 14-16.

The parties do agree that Mr. Ragland sent Delso Hudson of ComEd an expanded list of facilities in November 1999 (see id., p. 14; ComEd Ex. 5.0, pp. 1-2), but they disagree about the purpose of the list. Mr. Ragland testified that he spent a substantial amount of time preparing an updated list of facilities that Ameritech Illinois wanted to include in the Agreement, that he transmitted the list to Mr. Hudson via e-mail, and that he phoned Mr. Hudson later the same day to advise him that the e-mail list included facilities to be added to the contract. See Am. Ill. Ex. 1.1, p. 14-16; Tr. 56-57. In

contrast, Mr. Hudson testified that Mr. Ragland sent the list in response to Mr. Hudson's earlier request for information about which Ameritech Illinois facilities had the highest loads or were critical locations. ComEd Ex. 5.0, pp. 1-2. Mr. Hudson's testimony included what he described as a current version of the list Mr. Ragland sent him in November 1999 (ComEd Ex. 5.0, Ex. 1).

Mr. Hudson's explanation of the list's origin does not make sense, however, because he asked the wrong source for the information he was supposedly seeking. ComEd, rather than Ameritech Illinois, would be in a better position to know which facilities had the highest loads. Tr. 58. Similarly, Ameritech Illinois personnel, rather than its outside consultant Mr. Ragland, would be better able to identify which facilities were particularly critical to the company. Tr. 58-59. In fact, the list attached to Mr. Hudson's testimony contains nothing to indicate which of the listed facilities are more critical than others (Tr. 59), so that it was not responsive to Mr. Hudson's request.

Moreover, Mr. Hudson's statements regarding the list attached to his testimony are inconsistent with other evidence submitted by ComEd. He testified that those facilities on the list that were within the scope of the Agreement included a designation that "Rider 32" or "special contract" was applicable and that approximately 20 facilities on the list had this designation. ComEd Ex. 5.0, p. 2. However, 31 facilities on the list have a Rider 32 designation and none is designated as a special contract. See ComEd Ex. 5.0, Ex. 1. In addition, Mr. Hudson's apparent belief that the Agreement only covered 20 facilities in November 1999 contradicts ComEd's assertion that 51 facilities were

included in the Agreement as of December 1999. See ComEd Ex. 1.0, p. 4; Tr. 294. Indeed, Mr. Hudson's list contains no indication that the Ameritech Illinois facility at 641 N. Dearborn, Chicago, is governed either by Rider 32 or a special contract. See ComEd Ex. 5.0, Ex. 1, p. 1. Yet that facility was the one chosen by Mr. Leick for his sample calculation of a customer-specific CTC. See ComEd Ex. 2.0, p. 9.

Because the testimony Ameritech Illinois offered on the number of facilities covered by the Agreement does not have such credibility problems, the Commission should accept Ameritech Illinois' position that the Agreement included 126 facilities. ComEd accordingly should be directed to provide CTC calculations for each of those facilities, so that it will be possible to calculate the optimal charges for each facility from December 1999 to the present.

## CONCLUSION

Therefore, for all the reasons stated above, Ameritech Illinois requests that the Commission find that ComEd, through its refusal to provide customer-specific CTCs, has violated §§ 9-240, 9-241, 9-250, and 9-252 of the Public Utilities Act. The Commission should order ComEd to provide such CTCs for the 126 facilities covered under the Agreement, to perform the calculations necessary to calculate Ameritech Illinois' damages for each facility, and to provide credits based on those calculations.

Respectfully submitted,

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