

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY

**Petition for declaration of service currently)
provided under Rate 6L to 3MW and greater)
customers as a competitive service pursuant to)
Section 16-113 of the Public Utilities Act and)
approval of related tariff amendments.)**

Docket No. 02-0479

**BRIEF ON EXCEPTIONS
OF THE UNITED STATES
DEPARTMENT OF ENERGY**

COMES NOW, the United States Department of Energy (“DOE”) on behalf of its two national laboratories (Argonne National Laboratory (“Argonne”) and Fermi National Laboratory (“Fermi”)) and on behalf of other Federal Executive agencies, by its counsel, and pursuant to 83 Ill. Adm. Code Part 200.830, offers the following Brief on Exceptions to the Administrative Law Judges’ Proposed Interim Order (“Proposed Order”) dated October 11, 2002.

EXCEPTIONS

DOE respectfully takes strong exceptions to the Administrative Law Judges’ (“ALJs”) Proposed Order in this case. DOE’s exceptions will address specific findings and conclusions adopted by the ALJs in the Proposed Order. Any issue not addressed by DOE in this Brief on Exceptions should not be considered an endorsement of the Proposed Order’s treatment of that

particular issue. Proposed replacement language for the ALJs' Proposed Interim Order is set forth in Attachment A to this Brief on Exceptions.

V.B. Reasonably Available, Reasonably Equivalent Substitute Service

At page 29, the ALJs conclude the following with respect to the requirements of Section 16-113 of the Public Utilities Act:

“...it is not necessary for the Company to prove the existence of alternative ‘all-in’ service as defined by intervenors to prove the existence of a service or reasonably equivalent substitute service and not the same service. Basically the intervenors espouse an “essentially identical” service standard.”

Essentially, the ALJs define a reasonably available, reasonably equivalent service as the provision of only power and energy. DOE believes the ALJs have erred in using this overly narrow definition of what constitutes a reasonably equivalent service. Indeed, the remainder of the ALJs' findings hinge critically on this erroneous narrow reading.

If 6L service is to be deemed “competitive” it is required that the Company show that there currently exists a reasonably equivalent service for the services that customers get under Rate 6L. Customers obtain much more than simply power and energy under Rate 6L. Rate 6L also provides a mechanism with which customers can manage the risk associated with obtaining power and energy. Every party to the proceeding acknowledged this hedging service that is provided by Rate 6L. To conclude that a reasonably equivalent service is available without addressing whether there exists a service or combination of services that will provide customers with the risk management tool that is provided by Rate 6L is a clear error on the part of the ALJs.

It is not sufficient to conclude, as the ALJs do, that the “intervenors espouse an ‘essentially

identical service standard’.” The intervenors do not require that alternative suppliers provide a product that is identical to Rate 6L. What they have demonstrated, however, is that, given the procedure by which CTC is calculated by the Company, there is not now, nor will there be, an alternative supplier that can provide a fully hedged service, with multiple year, fixed, all-in price. When CTC is no longer imposed, then alternative suppliers will be able to provide such a hedging service. But it does not exist now. Thus, there is no reasonably equivalent service to Rate 6L that is now offered by alternative, non-affiliated suppliers. Since the ALJs’ Proposed Order hinges on this erroneous definition of what constitutes a reasonably equivalent service, the entire thrust of the ALJ Proposed Interim Order is in error.

A number of intervenors, including DOE, provided evidence that few or no offers were obtained from alternative non-affiliated suppliers that resulted in service. Indeed, DOE provided evidence that multiple Requests for Proposals resulted in no bids for RFPs issued by the General Services Administration (GSA); and only one bid that beat Rate 6L and none that beat the PPO for four RFPs issued by the Defense Energy Support Center (DESC). This provides direct evidence from large 6L customers that even power and energy was not reasonably available at a comparable price.

The ALJs chose to dismiss this evidence as anecdotal. In particular, they suggest that the federal government and the City of Chicago have unique and, in some instances unrealistic requirements, making their experience atypical. DOE strongly excepts to this conclusion by the ALJs. As DOE stated in its brief, the loads of the two major federal customers, Argonne National Laboratory and Fermi National Accelerator Laboratory are highly desirable, stable, high load factor customers. These are precisely the kinds of loads that most marketers would like to serve. Further, the ALJs err in

totally ignoring the Affidavit filed by a DESC contracting Officer which describes the fact that DESC has been able to make awards to numerous alternative suppliers in several other states where retail access is permitted. Thus, the federal government's experience in ComEd's service territory is unique. The experience of the intervenor customers is not anecdotal because these customers represent some kind of unique and undesirable loads. They are generally quire desirable loads. Moreover, these experiences provide the only direct evidence on the ability of large desirable customers to obtain reasonably equivalent service at a comparable price. To dismiss this evidence as do the ALJs constitutes a fundamental error in reviewing the evidence.

V.D. Other Providers

A number of parties provided evidence, unrebutted by the Company, that forces are at work in Illinois and in the national energy markets that seriously increases the uncertainty regarding the robustness of the competitive retail market in Illinois in the immediate future. Specifically, several witnesses, including Dr. Swan on behalf of DOE, testified that a recent Appellate Court decision may increase the reciprocity requirements and have the effect of reducing the current number of qualified ARES. In addition, these witnesses also pointed out that the current financial problems that surround the power marketing industry may have the effect of reducing even further the number of alternative suppliers with which customers can do business and further limit the number of new entrants into the Illinois retail market. Thus, it was noted by several parties that the market may be quite uncompetitive in the very near future.

The ALJs' response to this unrebutted evidence is to dismiss it as irrelevant to the

considerations required under Section 16-113. Specifically, they state that all that is relevant is what characterizes the market at the time of ComEd's filing. By this logic, if the Commission knew for certain that, on January 1, 2003, there would be no alternative supplier in Illinois except ComEd's affiliate, Exelon, the ALJs would still argue that this constriction in the number of alternative suppliers is irrelevant because there were five such suppliers offering service to customers on the day ComEd filed its petition. DOE takes strong exception to this logic. The Commission cannot in good conscience ignore the potential risks associated with declaring Rate 6L as "competitive" that are associated with potential and even likely anticompetitive developments in the Illinois retail electric market.

WHEREFORE, DOE respectfully urges that the Proposed Order be modified in accordance with the Proposed Replacement Language contained in Attachment A to this Brief on Exceptions.

Respectfully submitted,

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Dated: October 17, 2002