

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESPONSE TO EXCEPTIONS.....	5
A.	Statutory Framework	6
1.	The Statutory Standard	7
2.	Operation of Law	9
3.	Component “Services”	11
4.	Burden of Proof.....	13
5.	Other Statutory Provisions.....	14
6.	Arguments Made By Staff	15
B.	Identifiable Customer Segment.....	16
C.	Reasonably Equivalent Substitute Service That Is Reasonably Available.....	18
1.	The Fact That Some Customers Remain on Rate 6L Does Not Suggest the Absence of Reasonably Equivalent Alternatives to Rate 6L	19
2.	The Intervenors Seek To Impose an Unrealistic and Unworkable Standard of Reasonable Equivalence	21
3.	Intervenors’ Anecdotal Evidence Is Not Persuasive.....	24
D.	Comparable Price.....	25
E.	Other Providers	28
F.	Loss of Business	30
G.	Transmission Capacity.....	32
H.	Customer Switching.....	35
I.	Wholesale Market Development.....	39

J.	Retail Market Development.....	40
K.	Customer/Supplier Reaction.....	41
L.	Other	42
	1. NewEnergy’s Monitoring Proposal	42
	2. Rate HEP.....	43
M.	Proposed Amendments to Rate 6L	44
	1. New Customers.....	44
	2. Extension of Transition Period For Customers On Rate	45
	3. Extension of Transition Period for Customers Not On Rate	46
N.	Accounting Issues.....	47
III.	CONCLUSION.....	48

I. INTRODUCTION

The Briefs on Exception filed by other parties to this proceeding generically attack the Administrative Law Judge's Proposed Interim Order, arguing that it is both legally deficient and contrary to the substantial weight of the evidence. *See* CACC BOE at 2; IIEC BOE at 3; GCP BOE at 2. However, as a review of the governing statute, the actual record, and the Proposed Interim Order itself would show, the Proposed Interim Order in fact fairly reflects the applicable law and the evidentiary facts.¹

The Proposed Interim Order finds that this proceeding is governed by Section 16-113 of the Public Utilities Act (the "Act"). *See* Proposed Interim Order ("PO") at 12-13. Section 16-113 allows a utility to petition the Commission to declare a tariffed service to be a competitive service, and is the Section pursuant to which ComEd filed the petition that initiated this proceeding. Section 16-113 sets forth the standard to be applied by the Commission and the procedural options for granting or denying such a petition or allowing it into effect by operation of law. As is further explained in Section II(A) below, the Proposed Interim Order applies that standard as written and elects to allow the Petition to take effect by operation of law. The Proposed Interim Order's conclusions in this regard are fully consistent, not only with the governing statutory standard, but also the General Assembly's intent that the Commission use the transitional

¹ ComEd has not attempted to respond here to each and every argument made in the eight Briefs on Exceptions that it received on the evening of Friday, October 18, although it has tried to address the range of arguments made. In its previously filed Reply Brief, ComEd addressed many of the arguments raised by the other parties in their Briefs on Exception. ComEd has not repeated all of its arguments in this Reply Brief on Exceptions, but refers the Commission to its Reply Brief for additional detail on points made below. The lack of a response in this Reply Brief on Exceptions to an individual argument made by one of the other parties should not be read as agreement with that

mechanisms that are set forth in the Act “to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers.” 220 ILCS 5/16-101A(d). There is nothing that is “legally deficient” in the conclusions presented by the Proposed Interim Order.

In attacking the evidentiary conclusions set forth in the Proposed Interim Order, other parties attempt to minimize the evidence that supports it, variously claiming that the Proposed Interim Order simply accepts “Edison assertions as facts” (CACC BOE at 2), and that Edison relied solely on switching statistics that were fundamentally flawed. *See, e.g.*, Staff BOE at 2-3; IIEC BOE at 7-9; GCP BOE at 26-29; Trizec BOE at 7, 12. In fact, there is substantial evidence supporting the Proposed Interim Order. This not only includes the extensive switching data presented by ComEd , which shows that more than 70% of the identified customer segment has left Rate 6L (ComEd Ex. 7 at 4-5), but also includes (i) an analysis of the competitive dynamics in the current market which contradicted the efforts of others to dismiss the validity of the switching data as a “façade”(ComEd Ex. 6 at 3, 6-12, Attachments 1 and 2; Tr. at 1030-32 (Landon)), (ii) an analysis of available supply within the ComEd control area which demonstrated that there is more than enough available supply to assure competitive prices on an ongoing basis (ComEd Ex. 5 at 5-12),² (iii) a study of transmission import capability (ComEd Ex. 5 at

argument.

² This and other evidence shows that despite the efforts of various parties to characterize two different wholesale offerings as “subsidies” that undermined the validity of the switching statistics, those offerings cannot be fairly characterized as “subsidies” and nothing in the market dynamics that prevailed during the time periods in question was shown to have made Rate 6L more attractive to customers than the alternatives (Tr. at 812-813 (Juracek); Tr. at 423-431 (McNeil/Sterling); ComEd Ex. 6 at 7-8; Tr. at 746-47 (Haas)). This evidence is discussed further in Section II(H) below.

13-15), and (iv) a study of the economics of choice which showed that there are substantial savings available to customers in the 3MW and up customer segment and that, accordingly, these customers can be expected to continue to use competitive sources of supply for the foreseeable future (ComEd Ex. 8 at 11-12).

Other evidence supporting the Proposed Interim Order includes testimony from an alternative retail electric supplier that those customers that have taken service from RESs have been able to do so with no cognizable reduction in service quality or reliability (New Energy Ex. 2 at 2), and that the amount of flowed power being provided to customers by alternative suppliers is sufficient to meet the statutory criteria for a competitive declaration (Tr. at 347-349 (O'Connor)). It also includes an analysis showing that the trend of increasing RES enrollments among eligible customers in ComEd's service area has been consistent since the onset of competitive choice (ComEd Ex. 7, Attachment PRC-DFK 7; ComEd Ex. 8, Attachments PRC/DFK R-1 and R-2). In addition, the evidence shows that large customers understand and have actively evaluated the trade-offs between price and risk when deciding whether to continue or stop taking service under Rate 6L. *See* Tr. at 292-99, 302-11 (Fults); Tr. at 755-59 (Brubaker).

In the testimony of its witnesses, ComEd further explained why it was seeking to have Rate 6L declared competitive at this time for those customers that have loads of 3MW or more. ComEd pointed out that many of the customers that have left Rate 6L, and their suppliers, use that rate, and other tariffed options like ComEd's Rider – Power Purchase Option (“PPO”), as a hedge or free option against future market changes. *See* ComEd Ex. 10 at 7-12; ComEd Ex. 11 at 5-6; ComEd Ex. 4 at 4-5; ComEd Ex. 13 at 18-19. ComEd explained that this creates costs for other customers served by

ComEd.³ *See* ComEd Ex. 3 at 12, 23; ComEd Ex. 10 at 11-12, 14; Tr. at 181-84 (McDermott). ComEd further explained that the continued availability of Rate 6L for those customers that have alternative options leaves future pricing and load serving obligations in limbo, promotes a focus on short-term relationships and decisions that is detrimental to ongoing market development, and discourages suppliers from developing additional products and options for meeting customer needs. *See, e.g.*, ComEd Ex. 10 at 10-11, 13-14; ComEd Ex. 11 at 6-7. ComEd concluded that if its Petition were granted, it would be able to commit fewer long-term resources to serve the load represented by this customer segment and that this would both lower its costs over the long term and free-up capacity to the marketplace, thus also benefiting customers and other suppliers, as well as shareholders.

Ignoring the above evidence, the Briefs on Exceptions suggest that the Proposed Interim Order fails to give appropriate weight to claims that if the Petition is granted large customers might return in droves to Rate 6L, that the CTC somehow precludes competition, that although many customers have left Rate 6L for alternative service options those options are not sufficient, that the future of many RESs is tenuous at best, and that the “likely” detrimental impact of such a declaration is “too great” to risk granting the Petition. *See* CACC BOE at 5; GCP BOE at 35-38; IIEC BOE at 20-27. As explained in ComEd’s Reply Brief (pp. 30-53), however, and as further summarized below, these claims are largely speculative and unsupported by any market data. Thus,

³ In their BOEs, intervenors acknowledge that one of their primary motivations in this proceeding is to maintain Rate 6L as such a hedge or free option for those customers that are not taking service under that Rate. *See* GCP BOE at 30-32; DOE BOE at 3; IIEC BOE at 18-19; CACC BOE at 4, 13.

they were properly discounted in the Proposed Interim Order. Perhaps recognizing the weakness of their claims, these parties also heavily rely on what they describe as the “unprecedented unified front that was presented by customer representatives” *See* CACC BOE at 1, n.1. Such a litigation strategy is, of course, not evidence, and cannot be relied on by the Commission in making findings of fact based on the record evidence.⁴

As is further explained below, the Proposed Interim Order carefully reviews the applicable law and the record evidence, properly applies the law to that evidence, and reasonably concludes that granting the Petition by operation of law would be a better course to pursue at this time even though there is sufficient evidence to support the grant of that Petition in a less uncertain environment. For the reasons set forth below, ComEd urges the Commission to deny the exceptions filed by Staff and other parties, and adopt the Proposed Interim Order.

II. RESPONSE TO EXCEPTIONS

The following sections each address one of the conclusions set forth in the Proposed Interim Order. In each section ComEd explains why that conclusion is consistent with the Act and with the record, and why the exceptions relating to that conclusion should be rejected.

⁴ These same parties also attack the Proposed Interim Order as deficient for failure to individually address each of the many arguments these parties raised. *See* IIEC BOE at 4, 26-27, 31; GCP BOE at 21. Illinois law is clear that there is no requirement that each such argument be addressed in a Commission order. *Citizens Utility Board v. Illinois Commerce Commission*, 291 Ill. App. 3d 300, 304-05 (1997); *Lakehead Pipeline v. Illinois Commerce Commission*, 296 Ill. App. 3d 942, 957 (1998). The arguments were acknowledged in the summary of evidence and the conclusion that such arguments should be rejected is clear in each section of the order, and in the final findings and conclusions presented. That is sufficient.

A. The Statutory Framework

Section 16-113 of the Act provides that “[a]n electric utility may, by petition, request the Commission to declare a tariffed service provided by the electric utility to be a competitive service.” *See* 220 ILCS 5/16-113(a). That Section further provides that the Commission

shall declare the service to be a competitive service for some identifiable customer segment or group of customers . . . if the service or a reasonably equivalent substitute service is reasonably available to the customer segment or group . . . at a comparable price from one or more providers other than the electric utility or an affiliate of the electric utility, and the electric utility has lost or there is a reasonable likelihood that the electric utility will lose business for the service to the other provider or providers . . .

Id. That Section also states that the Commission

shall make its determination and issue its final order declaring or refusing to declare the service to be a competitive service within 120 days following the date that the petition is filed, or otherwise the petition shall be deemed to be granted; provided, that if the petition is deemed to be granted by operation of law, the Commission shall not thereby be precluded from finding and ordering, in a subsequent proceeding initiated by the Commission, and after notice and hearing, that the service is not competitive based on the criteria set forth in this subsection.

Id. The Proposed Interim Order concludes that Section 16-113 clearly sets forth the elements to be proved; that the Act contemplates that the provision of electric power and energy in a bundled tariff can be declared to be a “competitive service” such that power and energy is provided on a competitive basis while unbundled delivery services are provided on a regulated, tariffed basis; that the Commission can, and in this instance should, allow the Petition to take effect by operation of law; that the petitioning utility

has the burden of proof and that burden is to be evaluated as of the time the Petition is filed; and that various other statutory provisions that other parties cite as potentially controlling are not relevant to this proceeding. *See* PO at 12-13, 28, 43, 78-79. ComEd respectfully submits that each of these conclusions is correct, despite the contrary claims made in the Briefs on Exceptions. ComEd also submits that Staff's arguments that the Commission has the same power to rescind an order granting or denying a petition as it does with respect to a declaration deemed granted under the operation of law procedure of Section 16-113, and that it has the authority to create a "customer segment" not identified in the Petition, are not in fact correct.

1. The Statutory Standard

As the Proposed Interim Order, Staff, and previously the Governmental and Consumer Parties all observe, the criteria set forth in Section 16-113 are clear and straightforward. *See* PO at 13; Staff BOE at 3; GCP Initial Br. at 12. Yet several parties attempt to confuse or expand this standard. For example, several parties reference the history of competitive declarations under the Telecommunications Act, arguing that the purpose of a competitive declaration should only be to protect a utility against a loss of revenues or free it to more easily compete in offering a particular product or service. *See, e.g.,* GCP BOE at 22-23; CACC BOE at 20-21.⁵ The Telecommunications Act is,

⁵ The GCP also mistakenly argue that the General Assembly already declared the provision of power and energy to be competitive in enacting the 1997 Restructuring Act. GCP BOE at 12. In fact, the General Assembly only provided for the development of competition through the phase in of customer choice; to be deemed to be "competitive" an existing tariffed service has to be declared to be such pursuant to Section 16-113 at the point in time that competitive alternatives have in fact emerged. *See* 220 ILCS 5/16-102 (definition of competitive service); 16-103, 16-104, 16-108, and 16-113. Such declarations play an important role in moving toward a more competitive market. *See*

however, very different from the Electric Service Customer Choice and Rate Relief Law of 1997 (“Restructuring Act”) and the electric industry is very different from the telecommunications industry. Competitive declarations are defined differently and play a different role under the 1997 Restructuring Act.

The clear intent of the Restructuring Act was to introduce choices for customers in the hope that competition would “create opportunities for new products and services for customers and lower costs for users of electricity.” 220 ILCS 5/16-101A(b). Thus utilities were directed to provide unbundled, regulated delivery services and customers were given the opportunity to purchase power and energy from suppliers other than the utility. 220 ILCS 5/16-103, 16-104, 16-108. In order to ensure that all customers continue to have access to safe, reliable and affordable electric service, utilities were directed to continue providing their existing tariffed services until such time as those services were either declared competitive under Section 16-113 or abandoned pursuant to Section 8-508. 220 ILCS 5/16-103(a). Once declared competitive for a particular customer segment, the utility is no longer obligated under the Act to provide that tariffed service to that segment following a three year transitional period for customers taking the service at the time it is declared competitive. *See* 220 ILCS 5/16-103(e), 16-113(b).

ComEd notes that this transition away from an electric utility providing power and energy through bundled tariffed rates is consistent with the regulatory direction pursued by this Commission in other contexts, such as its functional separation

ComEd Ex. 3 at 11-23 (McDermott).

and code of conduct proceedings. Indeed CACC's witness in this proceeding testified that the "idea of getting Edison out of the business of selling the commodity of electricity is not a bad idea" because doing so will "further develop the competitive market." Tr. at 281 (Fults). IIEC's counsel also requested that ComEd's witness affirm that, pursuant to the Commission's orders in the functional separation and code of conduct proceedings, ComEd is an integrated distribution company, and that in a general way ComEd is not supposed to be marketing and selling generation. *See* Tr. at 125 (McDermott). The competitive declaration provided for by Section 16-113 is the next step in this direction.

Various parties also suggest other additions to the statutory standard. *See* Trizec BOE at 2 (no approval until PPO/MVI issues resolved so as to ensure savings); BOMA BOE at 6-7 ("Bodmer test"); CACC BOE at 12 (need to demonstrate availability of "basic functional or economic components"); IIEC BOE at 25 (need to prove working wholesale market as a prerequisite to declaration).⁶ As more fully explained in ComEd's Reply Brief (pp. 5-9), these various "tests" are simply not a part of the applicable statutory standard. The Proposed Interim Order correctly applies the standard that is set forth in Section 16-113, as enacted by the General Assembly.

2. Operation of Law

Various parties argue that the Proposed Interim Order ignores evidence regarding uncertainties affecting retail and wholesale market development or deemed it

⁶ The GCP also criticize the use of the phrase "customer locations" in the Proposed Interim Order at 43, arguing that this is not part of Section 16-113. *See* GCP BOE at 15. Customer locations or "premises" are, however, what defines retail customers under the Act. *See* 220 ILCS 5/16-102 (definition of retail customer). If ComEd is no longer serving those customers, it has necessarily lost their business.

irrelevant. *See, e.g.*, DOE BOE at 4; IIEC BOE at 24-27; CACC BOE at 23-24. This is not correct. It is correct that the Proposed Interim Order finds that such evidence does not contradict the other evidence demonstrating that particular statutory criteria have been met and that findings are not required under Section 16-113 on various aspects of those arguments. *See* PO at 28-29, 36-37, 49-50, 63, 66, 69-70. The Proposed Interim Order, however, does take that evidence into account in making the policy determination of whether the Petition should be granted outright or whether the Commission should enter only an Interim Order and allow the Petition to take effect by operation of law. *See* PO at 78-79. Thus, the findings relating to ComEd having met its burden of proof, and the ultimate recommendation to allow the Petition to take effect by operation of law are not irreconcilable or inherently inconsistent as some parties claim. *See* GCP BOE at 1-8. As other parties have previously noted in this proceeding, the operation of law procedure affords the Commission flexibility to address future market developments. *See* NEMA Initial Br. at 3; NewEnergy Initial Br. at 5. This is an appropriate remedy for the concerns that have been raised here by other parties.⁷

The Governmental and Consumer Parties also warn that going forward under the operation of law procedure may have effects that are legally and practically irreversible. They present denial of the Petition and a minimum six month delay as a safer course. *See* GCP BOE at 18-21; *see also* CACC BOE at 5. ComEd respectfully submits that this is a far more dangerous course. Failure to move forward on the course set by the General Assembly will call into question the Commission's ongoing

⁷ To the extent parties claim that the Commission can only grant the Petition if the burden of proof is met, or deny it if not met, they are improperly reading the operation of law provision out of the statute.

commitment to implementation of the 1997 Restructuring Act. *See* NEMA Initial Br. at 7. This is likely to discourage future entry by new suppliers and limit additional investment. Failure to move forward is also likely to increase the costs and uncertainty associated with obtaining future power supplies. *See, e.g.*, ComEd. Ex. 10 at 11-15; ComEd Ex. 4 at 1-3, 6-10; ComEd Ex. 13 at 18-19, 24-26; ComEd Ex. 14 at 11; Tr. at 1042-43 (Landon). The Commission will have little, if any control, over the decisions of market participants that will drive these effects.

In contrast, moving forward “will send a strong signal to potential market entrants about this Commission’s commitment to encouraging competitive markets and could incent future market entry.” NEMA Initial Br. at 7; ComEd Ex. 13 at 26. The “potential harm” to customers conjured up by parties like the City has been substantially mitigated by the tariff amendments approved in the Proposed Interim Order, and will be further mitigated if the parties reach agreement on the final amendment allowing customers currently on long-term RES contracts to return to Rate 6L, which ComEd has stated it is willing to do. Moving forward will also make the market more liquid and “help keep it from melting down” in the ways feared by these parties. *See, e.g.*, Tr. at 254-55 (McDermott). The Commission can actively monitor emerging market developments and intervene if necessary. Thus the operation of law procedure presents the least risk approach of the options available to the Commission under Section 16-113.

3. Component “Services”

The CACC and GCP continue to make their twice rejected “component services” argument suggesting that Rate 6L can and should be “unbundled” into various

component services. CACC BOE at 6-7; GCP BOE at 11-13. As was more fully explained in ComEd's Reply Brief at 7-9, and the Proposed Interim Order (pp. 28-29), this argument is without merit. IIEC correctly acknowledges that "Section 16-113(a) was not designed to allow electric tariffed services to be 'unbundled'." IIEC BOE at 10. The only unbundled services utilities are required to offer are delivery services and the PPO. 220 ILCS 5/16-103 (b) and (e). Although CACC repeatedly argues that ComEd "does not and cannot deny that under Rate 6L, Edison provides power and energy, transmission service, distribution service, and metering service . . . [and] provides a straightforward way for customers to hedge against the uncertainties of market prices, transmission rates, distribution rates and CTC charges for the remainder of the transition period," ComEd both can, and repeatedly has, denied this very point. *Compare* CACC BOE at 12; ComEd Response to Joint Motion To Dismiss at 4-5; ComEd Reply Brief at 7-8. Rate 6L is a large general service rate through which customers receive power and energy at their premises. Although ComEd uses its transmission, distribution and metering equipment to provide that service, it does not provide "transmission, distribution or metering services" through that rate. To the extent transmission, distribution or metering are available as separate "services" for customers, they are available through ComEd's delivery services tariff or other unbundled rates. These delivery services are provided precisely so customers can purchase RES supply as an alternative to obtaining electric service under Rate 6L.⁸ The provision of "hedging service" has never been a part of Rate 6L. *See* ComEd Ex. 11 at 5. The Proposed Interim Order correctly concludes (p. 37) that if

⁸ Under CACC's interpretation no bundled service could be declared competitive until delivery services are declared competitive. *See* CACC BOE at 12. This view is inconsistent with the actual wording of Section 16-113 and well as other provisions of the

customers “use it as a hedge against market prices, this is an indication that it is working against the development of a competitive market.” This conclusion is amply supported by the record evidence. *See* ComEd Ex. 3 at 4, 11-23; ComEd Ex. 14 at 2-6.

To the extent both CACC and GCP continue to claim confusion and take exception to language appearing on p. 28 of the Proposed Interim Order, ComEd suggests that that language be clarified as follows:

As required under 16-113(a), the Company properly identified by petition, its request to declare a tariffed service competitive. The Act clearly contemplates that the provision of electric power and energy in a bundled tariff can be declared a “competitive service”. The whole point of obtaining a declaration that a bundled tariffed service is “competitive” is ~~to allow it to be unbundled~~ so that the electric utility, pursuant to Section 16-113(a), is relieved of the obligation to offer that bundled service, ~~and the specific component declared to be a competitive service can be provided on a competitive basis while the electric utility continues to provide the other component or components on a regulated, tariffed basis.~~ customers obtain power and energy on a competitive basis while delivery services are provided by the utility on a regulated, tariffed basis.

4. Burden of Proof

Various parties suggest that the Proposed Interim Order requires that the Commission ignore the evidence that is developed during the course of a Section 16-113 proceeding, or limit its analysis “to a single day.” *See* IIEC BOE at 4; GCP BOE at 16. This is not correct. The Proposed Interim Order does correctly conclude that the Commission must look at the evidence before it relative to the filing, that the burden of proof cannot be defined by a constantly moving target, and that speculation regarding

Act. *See* 220 ILCS 5/16-103, 16-104, and 16-108.

future events and their potential effects cannot trump the hard evidence regarding the customer choices that have been made. *See* PO at 37, 43, 69. This is fully consistent with applicable law. *See In re Annexation of Vill. of Round Lake Park*, 29 Ill. App. 3d 651, 653 (2nd Dist. 1975) (a *prima facie* case cannot be rebutted by merely questioning it); *NLRB v. Clinton Elec. Corp.*, 284 F.3d 731, 738 (7th Cir. 2002) (“speculation is not evidence”). In fact, after arguing that the Proposed Interim Order fails to give appropriate weight to evidence of potential future effects, CACC concedes that “the Proposed Interim Order properly concludes that Section 16-113 of the Act does not mandate that the Commission consider these facts. . .” (CACC BOE at 5.)

5. Other Statutory Provisions⁹

The CACC and the Governmental Parties continue to argue that Section 8-508 somehow precludes the Commission from granting the relief requested here, and CACC argues that Section 9-201(c) and Section 16-111 also apply. *See* CACC BOE at 7-8; GCP BOE at 22; Joint Replacement Language at 1-4. These arguments were fully refuted in ComEd’s Reply Brief (pp. 10-12) and in the Proposed Interim Order itself. *See* PO at 12-13. In their Briefs on Exceptions, CACC and the Governmental Parties simply repeat their original arguments, ignoring the statutory analysis that

⁹ BOMA suggests in its Brief on Exceptions that granting the Petition “could deny customers the provision of public utility service” and raise issues of constitutional due process. BOMA BOE at 5. This is incorrect in at least two respects: (i) all of the 3MW and up customers will continue to have access to public utility services, albeit after a point, not Rate 6L; and (ii) adequate due process protections have been afforded. Unlike the sole case cited by BOMA, customers received notice of the proposed petition, and those who desired to intervene have had an adequate opportunity to be heard. In addition, the Commission has wide discretion in using an operation of law procedure both as to the decision itself and the process used to reach that decision. *See A. Finkl and Sons Company, v. Illinois Commerce Commission*, 325 Ill. App. 3d 142 (2001).

demonstrated that those arguments are incorrect. Thus these exceptions should be denied.

6. Arguments Made By Staff

Staff generally agrees with the Proposed Interim Order's summary of the statutory framework . *See* Staff BOE at 3. Staff suggests, however, that Section 16-113 can be read more expansively in two respects. First, Staff argues that the Commission has a choice other than granting, denying, or allowing the Petition into effect by operation of law. Staff argues that the Commission also has the authority to define a new customer segment other than that specified in the Petition and declare the service competitive with respect to that newly defined segment. *See* Staff BOE at 4-5. This interpretation is, however, inconsistent with the provisions of Section 16-113 that require the utility to first formulate its request in a petition, provide for public notice so that affected customers may be heard, and direct the Commission to consider certain factors in “determining whether to grant or deny a petition to declare the provision of electric power and energy competitive.” Overall Section 16-113 provides for Commission review of a petition, and of the evidence for and against the relief requested in that petition, and a decision to grant, deny, or allow the petition to go into effect by operation of law.

Next, Staff argues that the Commission has the same authority to reopen or rescind a decision to grant or deny a petition to declare a tariffed service to be competitive as it does a decision to allow such a declaration to take effect by operation of law. *See* Staff BOE at 30-33. This argument fails to take account of the rule of statutory construction that the expression of one thing excludes that which is not stated. *See*

Bridgestone/Firestone, Inc. v. Aldridge, 179 Ill.2d 141, 153-54 (1997). The effects of a grant or denial of a petition filed under Section 16-113 are stated in subsections (b) and (c). These do not support Staff’s argument. In contrast, Section 16-113(a) specifically states that if the petition is deemed granted by operation of law, “the Commission shall not thereby be precluded from finding and ordering, in a subsequent proceeding initiated by the Commission, and after notice and hearing, that the service is not competitive based on the criteria set forth in this subsection.”

As Staff acknowledges, the rules of statutory interpretation generally do not allow exceptions that are not in the statutory text to be read into a statute. *See* Staff BOE at 30. Nor does Section 10- 113(a), the primary statutory provision relied on by Staff in support of this argument, apply. Section 16-101 states that Article X of the Act, of which Section 10-113 is a part, applies to a utility’s tariffed services only to the extent that its provisions are not “modified or supplemented” by the provisions of Article XVI. Section 16-113 is such a modification. The cases cited by Staff relating to *res judicata* and *stare decisis* are inapposite as well. These do not address the authority to reopen, but only have applicability to additional requests made in the future. In fact, the basic rule of those cases is codified in Section 16-113(d). Accordingly, these exceptions should be denied.

B. Identifiable Customer Segment

Although a number of parties continue to cast their arguments regarding the availability of reasonably equivalent substitute services under this heading,¹⁰ no party

¹⁰ Those arguments are addressed in Section II(C), below.

to this proceeding seriously disputes the Proposed Interim Order's finding that customers in the 3 MW and greater segment can be "readily identified by examining annual usage data in a manner consistent with the way in which eligibility for Rate 6L is determined" today. *See* PO at 16; ComEd Reply Br. at 15. Furthermore, no party disputes that the 3 MW and greater segment is one specifically recognized by the Restructuring Act itself. *See* 220 ILCS 5/16-108(g) (providing for individually calculated CTCs for customer whose peak demands are 3 MW or greater). Thus, the Proposed Interim Order is entirely correct in its conclusion that "ComEd's identification of a customer segment or group of customers is appropriate provided that the service or a reasonably equivalent substitute service is reasonably available to the specified customers." *See* PO at 16.

In contrast, the Staff's suggestion that, if ComEd's Petition is allowed into effect by operation of law, the Commission should redefine the affected customer segment to include only those customers that choose thereafter to relinquish voluntarily their right to return to Rate 6L is both legally and practically misguided. *See* Staff BOE at 29. As noted above, there is no legal authority for the Commission to take such an action. Moreover, such a "self-selection" method of identifying the affected customer segment is practically unworkable and based upon a flawed reading of Section 16-113. *See* ComEd Reply Br. at 15-16. In order for the proof required by the statute to be presented by the petitioning utility, the customer segment affected by the competitive declaration must already exist and be identifiable. Obviously a customer segment composed entirely of customers who choose RES service *after* the date of the competitive declaration does not yet exist leaving both the petitioning utility and the Commission to guess as to its composition.

C. Reasonably Equivalent Substitute Service That Is Reasonably Available

The Proposed Interim Order concludes that services reasonably equivalent to Rate 6L are reasonably available to customers in the 3 MW and greater group. *See* PO at 29. This conclusion is well-supported and entirely correct, as the data in the record shows that the vast majority of customers in the 3 MW and greater group – over 70% -- have already chosen to take unbundled service in lieu of Rate 6L. *See* ComEd Ex. 7 at 11 and Attachments PRC/DFK 1 and 4; Tr. at 509-10 (Crumrine/Kelter). Of those customers choosing unbundled services 44% were, as of June 2002, taking flowed-power from a RES not affiliated with ComEd. *Id.* Given the magnitude of these numbers, the inescapable inference is that RES-supplied power and energy, taken in conjunction with ComEd's regulated delivery services, is deemed by customers to be a reasonably equivalent substitute for Rate 6L service. *See* ComEd Ex. 7 at 5; Tr. at 570-73, 623 (Crumrine/Kelter); Tr. at 1121-23 (Landon).

In response to the Proposed Interim Order's recognition of the force of this evidence of actual consumer choice, other parties have sought to divert the Commission's attention by repeating arguments that the Proposed Interim Order correctly rejects. Among these are arguments relating to the reliability of the data of customer switching that are addressed in Section II(H), below. In addition, Staff and intervenors also argue (as they have throughout the proceeding) that the Commission should ignore evidence of widespread customer acceptance of RES offerings because: (1) some customers in the 3 MW and greater group have not switched from Rate 6L service; (2) available RES options are not the same as Rate 6L; and (3) some customers have stated that they have

not found service they deem “reasonably equivalent” to Rate 6L in the market.¹¹ The Proposed Interim Order’s dismissal of these arguments is proper for the reasons discussed below.

1. The Fact That Some Customers Remain On Rate 6L Does Not Suggest The Absence Of Reasonably Equivalent Alternatives To Rate 6L

A number of parties continue to suggest that the fact that a number of customers in the 3 MW and greater group remain on bundled service indicates that those customers do not have viable alternatives to Rate 6L. *See, e.g.*, CACC BOE at 17-18; Staff BOE at 14. This conclusion is incorrect for a number of reasons. *See* ComEd Reply Br. at 18-19. First, it should be noted that even if service precisely equivalent to Rate 6L were available, one would not expect all customers to switch from ComEd service. *See* Tr. at 738 (Haas). Accordingly, one cannot infer the absence of service reasonably equivalent to Rate 6L from the mere fact that some customers have not switched. *See* ComEd Ex. 14 at 5-6. Conversely, that fact that a significant majority of

¹¹ BOMA also suggests that the Proposed Interim Order’s conclusion regarding the availability of reasonably equivalent alternatives to Rate 6L should be rejected because the Administrative Law Judges failed to apply the so-called “Bodmer Test.” *See* BOMA BOE at 6. According to BOMA, the Commission should assess the reasonable availability of reasonably equivalent substitute services not by reference to customer choice, or even evidence of actual RES offerings, but rather by determining whether granting ComEd’s petition would be subjectively “bad for customers.” *Id.* BOMA provides no objective way in which the Commission is to make this determination, which is unsupported by the text of Section 16-113. *See* ComEd Reply Br. at 27-30. In any event, there is ample evidence that customers, as a group, particularly those with loads of less than 3 MW for whom fewer choices are currently available, stand to benefit from allowing ComEd’s petition into effect by operation of law which will strengthen the momentum to full competition with its associated advantages. *See* ComEd Ex. 3 at 4, 11-23; ComEd Ex. 10 at 10-14; ComEd Ex. 13 at 11-16; ComEd Ex. 14 at 2-6; Tr. at 181-84 (McDermott).

customers have switched to unbundled services does tangibly confirm the availability of widely accepted alternatives to Rate 6L.

Second, the assertion of some parties (*see* CACC BOE at 17-18) that the number and identity of the customers remaining on bundled service has remained essentially constant since the introduction of choice is not supported by the record. *See* ComEd Ex. 8 at 10 and Attachments PRC/DFK R-1 and R-2. In fact, there has been a consistent and steady trend for customers in the 3 MW and greater group to move from bundled service to RES supply. Therefore, there is no basis for believing that the customers remaining on Rate 6L have some unique set of needs that cannot be met by alternative suppliers. *Id.* In any event, those customers can remain on Rate 6L throughout the 3-year grandfathering period even if ComEd's petition is allowed into effect by operation of law.

Finally, the evidence in the record shows conclusively that many of the customers remaining on bundled service today do, in fact, have competitive alternatives to Rate 6L. The record contains direct evidence that RESs are actively competing to meet the needs of customers in the 3 MW and greater group and offer products they believe to be superior to Rate 6L. *See* New Energy Ex. 1 at 12; NewEnergy Ex. 2 at 4, 11; Tr. at 452-62 (McNeil/Sterling). Moreover, many of the customers that remain on bundled service are taking service pursuant to special contracts or riders (*e.g.*, Rider 27 – Displacement of Self-Generation), their eligibility for which shows that they had viable competitive alternatives to ComEd bundled service – typically the economical provision of on-site generation – even before the Restructuring Act was implemented. *See* ComEd Ex. 7 at 14 and Attachment PRC/DFK 4. It is un rebutted that those competitive

alternatives remain available for those customers remaining on bundled service today.
See Tr. at 149 (McDermott); Tr. at 695-96 (Crumrine/Kelter).

2. The Intervenors Seek To Impose an Unrealistic and Unworkable Standard of Reasonable Equivalence

Several of the intervenors also argue that the Proposed Interim Order errs in characterizing their position as requiring that a substitute service must be “essentially identical” to Rate 6L in order to be “reasonably equivalent.” *See* IIEC BOE at 13; CACC BOE at 11. Yet, as the Proposed Interim Order correctly observes, a review of the features those parties have suggested are necessary in an alternative service reveals that such a standard is the inevitable result of their arguments. *See* PO at 29. As pointed out in ComEd’s Reply Brief (pp. 19-20), these parties have variously suggested that, in order to demonstrate the existence of services reasonably equivalent to Rate 6L, ComEd must show the availability of alternatives that provide:

- an “all in” service providing customers with fixed charges for metering, transmission, distribution, demand and energy through the mandatory transition period (CACC Initial Br. at 22);
- at guaranteed rates that will not exceed the Rate 6L rate (BOMA Initial Br. at 7);
- without any standard contract terms or conditions that might vary from those in Rate 6L (*e.g.*, a requirement that customers provide notice of material variations in expected usage, a point of delivery other than the customer’s premises, force majeure or default clauses, etc.) (IIEC Br. at 11-12);
- that is open indefinitely to all customers in a given class (IIEC Br. at 13-14); and
- that is available without the need to engage in negotiation (IIEC Br. at 13; IIEC Ex. 4.0 at 10-11).

And while these parties now shy away from the “essentially identical” standard they have implicitly advanced throughout this proceeding, they continue to insist on the same thing

using different terms. For example, CACC now suggests that it is ComEd's burden to show that the "basic functional and economic components ... of [Rate 6L] service ... [are] available in the market." *See* CACC BOE at 12. Not surprisingly, however, CACC continues to define those "basic functional and economic components" in a way that would require any substitute product to be, in effect, essentially identical to Rate 6L. *See* CACC BOE at 13 (requiring the availability of a fixed price, fully-hedged "all-in" product ... that would protect customers from increases in delivery services rates, transmission rates, and changes in their transition charges"). *See also* IIEC BOE at 17.¹²

The Proposed Interim Order's rejection of this standard, and its finding of the reasonable availability of reasonably equivalent substitutes to Rate 6L, are entirely appropriate and supported by the evidence. *See* ComEd Ex. 7 at 5; ComEd Ex. 13 at 19-20 and Attachment JHL-2; ComEd Ex. 14 at 5-6; NewEnergy Ex. 2.0 at 2-5; IIEC Ex. 4.0 at 7; Tr. at 570-73, 623; (Crumrine/Kelter); Tr. at 1122-23 (Landon). First, the "essentially identical" standard implicitly advanced by the intervenors is inconsistent with the language of Section 16-113 which requires only that the utility show the availability of "reasonably equivalent," not identical services. *See* ComEd Ex. 8 at 6; Tr. at 1023 (Bodmer).

¹² IIEC argues that the Proposed Interim Order "ignored" the testimony of its witness Robert Stephens which was not "anecdotal, but based upon his experience representing numerous industrial customers in the competitive market." *See* IIEC BOE at 14. During cross-examination, Mr. Stephens agreed that he had no way of knowing all of the options available to customers (Tr. at 943); he was offering an opinion based on his experience in consulting on various contracts but had not relied on any particular contract or contracts (Tr. at 944); and that the determination of whether customers have viable options requires the consideration of different aspects and the use of judgment (Tr. at 956). He further agreed that the judgments of reasonable people could differ. *Id.* Thus, Mr. Stephens' testimony does not tend to establish the lack of reasonably equivalent alternative services

Second, this standard would nullify Section 16-113 by making it impossible for a utility to ever establish the existence of services reasonably equivalent to that provided under tariff. *See* NEMA Initial Br. at 5-6. For example, as the Proposed Interim Order correctly observes, the “hedging” function that other parties deem to be an essential component of Rate 6L is not a part of the rate itself, but rather an unintended form of “socialized insurance” that results from its place in the hybrid regulatory/competitive state of the Illinois electric industry that developed after Rate 6L came into effect. *See* PO at 29, 37; ComEd Ex. 4 at 5; ComEd Ex. 8 at 6. Given Rate 6L’s origins, it is unrealistic and inappropriate to expect RESs will ever offer an essentially identical service in the marketplace. *Id.*; ComEd. Reply Br. at 20-21.

Third, it should be noted that customers clearly do not place the same premium on the particular balance between price and risk that Rate 6L represents since the majority of customers in the 3 MW and greater group have already switched from Rate 6L. Witnesses for the intervenors acknowledge that customers – who are in the best position to evaluate the trade-offs between price and risk – do so in making the decision to switch. *See* Tr. at 292-99, 302-11 (Fults); Tr. at 755-59 (Brubaker). Therefore, the fact that significant numbers of the customers in the 3 MW and greater group have switched indicates that – notwithstanding the alleged absence of some sort of “Rate 6L-like” service that contains the precise elements that intervenors identify – those customers have found those RES alternatives to be “superior to staying on Rate 6L.” Tr. at 1123-24 (Landon). Furthermore, additional “all-in” services are – and, if demanded by customers, will increasingly be – available in the marketplace. *See* ComEd Ex. 13 at 19-20 and

as IIEC suggests.

Attachment JHL-2; Tr. at 380-81 (O'Connor).¹³ Indeed, one of the principal benefits of ComEd's proposal is that it will encourage more customers in the 3 MW and greater group to seek products that suit their particular needs. When faced with such demand, RESs will respond, as they have already, with offerings tailored to the customers' specific requirements. *See* ComEd Ex. 13 at 19; NewEnergy Ex. 2.0 at 3-4. That the resulting products will not be identical to Rate 6L is not surprising as "it is the expectation of change that lies at the heart of the decision to embark on the competitive journey in the first place." *See* NewEnergy Ex. 2.0 at 3. The un rebutted evidence in the record indicates that, at present, the availability of Rate 6L retards the development of a full-range of such products. *See* ComEd Ex. 13 at 19.

3. Intervenor's Anecdotal Evidence Is Not Persuasive

A number of parties suggest that the Proposed Interim Order does not properly credit the experiences of a few specific customers from which they conclude that reasonably equivalent alternatives to Rate 6L are not generally available. *See* CACC BOE at 19; GCP BOE at 31; DOE BOE at 3. The Proposed Interim Order correctly concluded that this "anecdotal evidence ... is not persuasive." *See* PO at 29. As explained in ComEd's Reply Brief, the preferences and characteristics of the City of Chicago and the federal government make their experiences highly atypical. *See* ComEd

¹³ Although intervenors denigrate Dr. Landon's review of available RES offerings because he did not review the terms of the actual deals that RESs have entered with their customers (*see, e.g.*, CACC BOE at 19; GCP BOE at 34), Dr. Landon correctly observed that the advertising of such offers shows both their feasibility and their availability at viable prices, since firms do not generally advertise offers they are unwilling to provide or that are available only on terms unlikely to be attractive to potential customers. *See* Tr. at 1038 (Landon). In any event, it is curious that these parties would continue to make this point since elsewhere in their briefs they now expressly disavow the notion that ComEd was required to present evidence concerning the content of actual RES offerings.

Reply Br. at 24-25. As for the industrial customers that submitted testimony, Caterpillar and Ford Motor Company, their very limited recent efforts to solicit new offers hardly suggests a lack of alternatives Rate 6L. *Id.* at 26. In fact, notwithstanding the apparent desire of Caterpillar and Ford to retain indefinitely the free option to return to Rate 6L whenever they might choose, the fact is that both firms have actually found RES offerings that they deemed sufficiently attractive to induce them to leave Rate 6L service altogether. *See* IIEC Ex. 5.0 at 4; IIEC Ex. 6.0 at 2. Indeed, the unrebutted evidence in the record indicates that 67% of the industrial customers that actively participated in this proceeding prior to the close of the record were, as of August 2002, taking service from a RES that is not affiliated with ComEd. *See* ComEd Ex. 8 at 19.¹⁴ In the face of this evidence, the CACC's contention that "experienced, capable purchasers of electricity service have been uniformly unsuccessful in seeking to obtain Rate 6L substitutes" (*see* CACC BOE at 19) is startlingly and demonstrably false.

D. Comparable Price

Based on the fact that customers have chosen to take RES service over Rate 6L, the Proposed Interim Order correctly states that one "can reach no other conclusion than that comparable prices for power and energy are available." *See* PO at 37. The Proposed Interim Order bases this conclusion on the fundamentally sound premise that customers would not have chosen to take service from other providers in lieu of Rate 6L "if they were not receiving a reasonably equivalent service at a comparable price." *Id.* The Proposed Interim Order also correctly concludes that the Commission

See, e.g., GCP BOE at 26; IIEC BOE at 14.

¹⁴ These figures do not include information concerning ExxonMobil because it intervened in this proceeding after the close of the record.

need not assess the hypothetical cost of the supposed “hedge” provided by Rate 6L since Rate 6L itself was not intended to serve as such a “hedge” and therefore no cost for that function is built into the Rate 6L rate. *Id.* Furthermore, to the extent that Rate 6L does serve as such a hedge, the Proposed Interim Order rightly observes that its continued availability impedes the development of appropriate market-based alternatives. *Id.*

In response to the Proposed Interim Order’s sound reasoning, intervenors repeat their arguments attacking CTCs and suggest that they are an impediment to comparably priced alternatives to Rate 6L. *See, e.g.,* IIEC BOE at 17-19; GCP BOE at 32; BOMA BOE at 11. The Proposed Interim Order disposes of such arguments by reasoning that the CTC need not be considered by the Commission in evaluating whether comparably priced power and energy is available. *See* PO at 36. This conclusion is correct in that the CTC is not a power and energy charge at all, but rather a component of delivery services charges designed to allow utilities to collect a portion of the historic investment that was made by the utility for the benefit of these customers. *See* PO at 36; ComEd Ex. 11 at 9; Tr. at 1105-06, 1098-1101 (Landon); 220 ILCS 5/16-108(f). Although the CTC is part of the delivery services that customers take in conjunction with the power and energy provided by alternative suppliers, the high level of customer switching that has already occurred among customers in the 3 MW and greater category undermines the notion that the CTC itself presents an insurmountable obstacle to the ability of providers to offer, and customers to obtain, attractively priced alternatives to Rate 6L service. *See* PO at 36; ComEd Ex. 14 at 13.¹⁵ Indeed, the fact that the degree of

¹⁵ Because RES customers take power and energy in conjunction with delivery services, the effects of the CTC, if any, would be captured in the review of the “loss of business” factor in Section 16-113. ComEd further notes that Staff is incorrect when it argues that

customer switching is greater in ComEd's service area than in other areas of the state in which CTCs are not collected (*see* Tr. at 1017 (Bodmer)) confirms the fact that CTCs do not themselves prevent competition. Furthermore, the evidence in the record confirms that, contrary to intervenors' speculation, significant savings as compared to Rate 6L are available even taking CTCs into account. *See* ComEd Reply Br. at 49; ComEd Ex. 8 at 11-14 and Attachments PRC/DFK R-1 and R-2.

Other parties also take issue with the Proposed Interim Order's conclusion that "the statutory requirement is that comparable prices be available at the time the Petition is filed, not 3 years from now." *See* PO at 37; IIEC BOE at 20. However, the Proposed Interim Order's interpretation is clearly correct for, if a petitioning utility were required to show with complete certainty that market-based prices would remain indefinitely at or below the bundled tariffed rate as the intervenors have suggested (*see* CACC Initial Br. at 26; BOMA Initial Br. at 7), a declaration under Section 16-113 could never be granted. Furthermore, such a standard -- designed as it is to shield customers from all price risk -- fails to recognize that one of the keys to achieving the benefits of competition is the exposure of customers to market-based price signals that lead, in turn, to the more efficient allocation of resources. *See* ComEd Ex. 4 at 6-11.

CTCs are an "artificial adder" not paid by customers on the PPO or Rate 6L. *See* Staff BOE at 15. As noted above, the CTC represents costs that ComEd incurred for the benefit of its customers and has a legal right to recover. PPO customers, like RES customers, take delivery services and pay CTCs. *See* 220 ILCS 5/16-110. As IIEC correctly observes, Rate 6L also includes the costs that are reflected in transition charges. *See* IIEC BOE at 17. In fact, Rate 6L includes a higher percentage of such costs. This is because delivery services customers have their portion of such costs reduced by the "mitigation factor" used in calculating CTCs. *See* 220 ILCS 5/16-102 (definition of "transition charges").

In any event, the intervenors' speculation that comparably priced alternatives to Rate 6L will not be available in the future is unfounded. In fact, the evidence in the record shows that significant savings over Rate 6L are available now, a fact which at least one intervenor explicitly recognizes. *See* ComEd Ex. 8 at 11-14 and Attachments R-3 and R-4; Trizec Initial Br. at 11. And significant savings over Rate 6L are likely to be available for the next several years, even assuming significant increases in market prices that are extremely unlikely given the fact that available capacity within the ComEd service area will far exceed expected demand for the foreseeable future. *See* ComEd Reply Br. at 49; ComEd Ex. 8 at 11-14; ComEd Ex. 6 at 3. Moreover, because CTCs decrease in direct proportion to any increases in distribution and transmission services rates, potential increases in those rates will not diminish the potential future savings available to customers opting for unbundled services over Rate 6L. *See* ComEd Ex. 8 at 14.

In short, the fact that significant numbers of customers have opted to switch from Rate 6L to RES offerings demonstrates conclusively that those offerings are priced comparably to Rate 6L. And apart from speculative concerns raised by intervenors, there is every reason to believe that such comparably priced offerings will continue to be available for the foreseeable future.

E. Other Providers

Given that five RESs unaffiliated with ComEd are presently serving customers in the 3 MW and greater group, there can be no principled objection to the Proposed Interim Order's conclusion that ComEd "has met its burden" (PO at 43) to

show that reasonably equivalent substitute services are available from “*one or more providers* other than the electric utility or an affiliate of the electric utility.” *See* 220 ILCS 5/16-113(a) (emphasis added).

Although the Governmental and Consumer Parties previously asserted that the Commission should focus only on whether the requirements of Section 16-113 are met “now,” and not whether they will be satisfied at some point in the future (*see* GCP Initial Br. at 7-8, 10), those parties now take exception to the Proposed Interim Order’s conclusion that the Commission should do just that – focus on whether the requirements are met now. *See* GCP BOE at 35. In response to speculative concerns regarding the future prospects of RESs serving the 3 MW and greater group, the Proposed Interim Order rightly concludes that the Commission should “make its determination based upon evidence and testimony in support of or opposition to the competitive declaration criteria as set forth in Section 16-113 as of the time of the filing of the petition.” *See* PO at 43. To do otherwise would, as the Proposed Interim Order rightly notes, “require all parties to hit a moving target.” *Id.*

That being said, the various “uncertainties” affecting RESs active in Illinois cited by Staff and intervenors do not warrant denial of ComEd’s Petition. In particular, the recent decision of the Illinois Supreme Court not to review the Fifth Appellate Court’s decision in *Local Unions, Nos. 15, 51, and 702, International Brotherhood of Electrical Workers v. Illinois Commerce Commission*, 331 Ill. App. 3d 607, 772 N.E.2d 340 (2002) (“*IBEW*”), is not likely to doom competition as intervenors appear to fear. *See* IIEC BOE at 21; CACC BOE at 24. Indeed, in opposing WPS Energy Services, Inc.’s Petition for Leave to Appeal, the IBEW itself made clear that the

most potentially expansive and troubling application of the reciprocity requirement interpreted in *IBEW* to ARES that do not own or are not affiliated with an entity that owns facilities for the transmission or distribution of electricity to end users is untenable. *See* Resp. By Local Unions Nos. 15, 51, and 702, International Brotherhood of Electrical Workers, to WPS Energy Services Inc.’s Petition for Leave to Appeal As a Matter of Right, Or In The Alternative, For Leave to Appeal, dated August 19, 2002, p. 3. Given the Supreme Court’s apparent acceptance of this view, it appears unlikely that the *IBEW* decision will have the negative impact that parties once feared.

In any event, speculative concerns regarding the impact of the *IBEW* decision, the financial strength of energy traders, the ongoing development of regional transmission organizations, and the like are precisely the types of developments that the Commission can monitor and address by allowing ComEd’s Petition into effect by operation of law. Indeed, allowing ComEd’s Petition into effect will enhance the prospects of RESs in the ComEd service area, and will, as the National Energy Marketers Association observes, “send a strong signal to potential market entrants about this Commission’s commitment to encouraging competitive markets and could incent further market entry.” *See* NEMA Initial Br. at 7; ComEd Ex. 7 at 12-14.

F. Loss of Business

Given that ComEd has lost nearly one-third of the customers in the 3 MW and greater segment to alternative suppliers, the Proposed Interim Order is plainly correct in concluding that “it is irrefutable that ComEd has ... lost business to other providers and therefore met its statutory requirement.” *See* PO at 46.

In the face of the strength of this conclusion, CACC and the Governmental and Consumer Parties continue to suggest that the Commission ignore the terms of Section 16-113 and impose an “economic loss” test of those parties’ own creation. *See* CACC BOE at 20; GCP BOE at 15. As the Proposed Interim Order correctly observes, not only is there is no statutory support for such a requirement, an economic loss requirement of this type is actually contrary to the terms of Section 16-113. *See* PO at 46; ComEd Reply Br. at 31. Even assuming *arguendo* that such a test were appropriate, the record is clear that ComEd has, in fact, lost revenue as a result of the movement of customers from Rate 6L to services provided by RESs unaffiliated with ComEd. *See* ComEd Ex. 7 at 6 and Attachment PRC/DFK 2 (noting that ComEd’s most recent Section 16-130 report indicates that it has lost almost \$200 million in revenue as a result of customers in the 3 MW and greater segment opting for unbundled services rather than Rate 6L). The record is also clear that the CACC’s continuing assertion (*see* CACC BOE at 20) that the CTC fully insulates ComEd from any revenue loss is frivolous. *See* ComEd Reply Br. at 32. Because of the inclusion of the mitigation factor, the CTC does not and cannot, by definition, allow ComEd to recover the full difference between the revenues it would have received if the customer had remained on bundled rates and those it may receive when a customer switches to unbundled service. *See* 220 ILCS 5/16-102 (definition of “transition charge”).

In short, it is beyond credible dispute that ComEd has lost “business” for Rate 6L to other providers not affiliated with ComEd. Thus, the statutory requirement of Section 16-113 in that regard has been met. It is equally clear that, as a result of this loss of business, ComEd has also actually lost revenue that it otherwise would have received.

G. Transmission Capacity

The Proposed Interim Order concludes that ComEd has shown that adequate transmission capacity into the service area exists to make electric power and energy reasonably available to customers in the 3 MW and greater group. *See* PO at 50. In reaching this conclusion, the Proposed Interim Order correctly rejects conjecture regarding the potential existence of isolated load pockets with the ComEd service territory, as well as unsupported questions about whether the full amount of the simultaneous import capacity shown to exist by a study presented by ComEd is truly available.¹⁶ *Id.* The Proposed Interim Order's conclusions in this regard are entirely consistent with the record. In fact, although most intervenors rely heavily on the speculative testimony of Staff witness Haas to support their arguments relating to transmission capacity, Staff itself did not take exception to the Proposed Interim Order's findings in this regard, suggesting its recognition that such concerns are unfounded.¹⁷

First, with respect to the issues of internal constraints and potential load pockets within ComEd's service area, ComEd provided substantial evidence that its

¹⁶ Given that ComEd presented the results of its simultaneous import capacity study in testimony submitted with its Petition several months ago, CACC's assertion in its Brief on Exceptions (at 21) that ComEd "failed to present" such a "study" is both mystifying and incorrect.

¹⁷ One example of intervenors' misuse of Dr. Haas' testimony is BOMA's reliance on it to support the proposition that ComEd has somehow "frustrated the development of a regional RTO/ISO." *See* BOMA BOE at 12. Notably, Staff did not advance such an argument in its Brief on Exceptions. Their decision not to do so is understandable since Dr. Haas testified on cross-examination that it was not his position that ComEd had failed exercised proper diligence in seeking to form or participate in an RTO. *See* Tr. at 740-41 (Haas). In fact, although other parties have questioned ComEd's commitment to joining PJM Interconnection LLC, the uncontroverted evidence in the record is that ComEd's commitment to do so is unequivocal. *See* ComEd Ex. 6 at 13.

transmission system is not significantly internally constrained (*see* ComEd Ex. 5 at 16), a fact which is corroborated by the only RES to have offered testimony on the subject (*see* NewEnergy Br. at 7-8; NewEnergy Ex. 1.0 at 5-6). In contrast, the Staff and intervenors offered no evidence supporting the existence of such constraints or load pockets. *See* ComEd Reply Br. at 34. In the face of the substantial and unrebutted evidence offered by ComEd, the Proposed Interim Order is therefore correct to conclude that “nothing in the record supports the proposition that the Company’s transmission capacity is internally constrained so as to limit the availability of competitive sources of power to customers.” *See* PO at 50.

Likewise, the Proposed Interim Order is correct to credit the testimony offered by ComEd witnesses William McNeil and Jennifer Sterling demonstrating the availability of 4,700 MW of simultaneous import capacity through which power and energy from outside the ComEd control area can be imported to serve loads of customers in the 3 MW and greater group. *See* ComEd Ex. 5 at 15; ComEd Ex. 6 at 5-6. In response to this testimony, intervenors suggest only that “a portion” of that capacity would be subsumed to satisfy Transmission Reliability Margin (“TRM”) and Capacity Benefit Margin (“CBM”) requirements. *See* IIEC Ex. 3.0 at 8. Given that the total coincident load of the customers in the 3 MW and greater group served on Rate 6L is only 900 MW (*see* ComEd Ex. 5 at 5), the Proposed Interim Order reasonably concludes that “the record does not indicate that such [TRM and CBM] assignments would inhibit the Company’s transmission capacity such that there would be inadequate transmission capacity into the service area.” *See* PO at 50.

Finally, several parties suggest that the Proposed Interim Order's conclusion regarding the adequacy of transmission capacity is deficient because it allegedly does not take into account alleged "market power" concerns. *See* CACC BOE at 21-22; IIEC BOE at 23; BOMA BOE at 14-15. However, while intervenors postulate the existence of, and potential for generators to exercise, market power, their analyses admittedly fail to go beyond an initial calculation of measures of industry concentration. *See* ComEd Reply Br. at 42. As discussed thoroughly in the Rebuttal Testimony of Dr. John H. Landon, a more searching analysis of the prevailing market dynamics is required to assess market power issues. *See* ComEd Ex. 14 at 7-10. In this case, looking beyond the numbers it becomes clear that it is exceedingly unlikely that generators in ComEd's control area could or would exercise market power. *Id.* This is true because concentration in the ComEd service area is lowest at times of peak demand, when concerns about the existence or exercise of market power are normally most acute. *Id.* at 9. As for off-peak periods, the unrebutted evidence in the record indicates that it is very unlikely that baseload generators could or would exercise market power because they have a strong economic incentive to maximize output, and little operational flexibility to withhold capacity. *See* ComEd Ex. 14 at 9; ComEd Ex. 6 at 3-4 and Attachment 1. As a result of this dynamic, which was explicitly recognized by the FERC in approving the merger of ComEd and PECO, the concentration ratios upon which intervenors base their market power concerns are essentially meaningless as stand-alone indicators of the existence of market power or ability of generators in the ComEd control area to successfully exercise it. *See* ComEd Ex. 14 at 9; ComEd Reply Br. at 43-44 and n. 23.

H. Customer Switching

The Proposed Interim Order concludes that switching data, when substantial, can be used to satisfy the requirements of Section 16-113. *See* PO at 55-56. This conclusion is consistent with the statutory language of Section 16-113 and sound policy, which should favor reliance upon the most direct and reliable evidence of consumer choice available. *See* ComEd Reply Br. at 36. The Proposed Interim Order further concludes that the evidence of substantial customer switching in this case is compelling enough to satisfy the statutory standard for a declaration that Rate 6L is competitive for customers in the 3 MW and greater group. *See* PO at 56.

Despite the substantial support for these conclusions in the record, a number of other parties assert they are erroneous. First, they challenge a contention – not actually advanced by ComEd or in the Proposed Interim Order – that any amount of switching, no matter how small, would justify a competitive declaration. *See, e.g.*, Staff BOE at 11; CACC BOE at 10. Second, they contend that the switching data presented by ComEd is tainted by the fact that ComEd and its affiliate, Exelon Generation Company, LLC (“ExGen”), have, in the past, made wholesale offerings available to RESs active in ComEd’s service territory. *See, e.g.*, Staff BOE at 21-23; IIEC BOE at 7-8; CACC BOE at 25; GCP BOE at 27-28. For the reasons discussed below, the Proposed Interim Order correctly rejects these concerns.

As an initial matter, it should be noted that neither ComEd or the Proposed Interim Order take the position that *any* switching, no matter how insignificant, would justify a competitive declaration pursuant to Section 16-113. Indeed, both the Proposed

Interim Order and ComEd explicitly eschew such a position, recognizing that “in some circumstances switching data may not be compelling enough to satisfy the statutory requirement.” *See* PO at 56; ComEd Reply Br. at 17, 36. This, however, is not such a case.

Likewise, the other parties’ attempts to diminish the force of the data of customer switching in the record by mischaracterizing and overstating the impact of wholesale offerings by ComEd and ExGen are unavailing as explained in the Proposed Interim Order. *See* PO at 56; ComEd Reply Br. at 37-40. First, the Proposed Interim Order is correct to suggest the Commission was informed of, and indirectly approved, both of the offerings in question notwithstanding their wholesale nature. *See* PO at 56. In the case of the May 2000 offering by ComEd, the Commission explicitly found that the offer in question would “promote the development of an efficiently competitive electricity market that operates efficiently and is equitable to all customers.” *See* Interim Order (April 27, 2000), ICC Docket No. 00-259 (“Interim Order”), p. 36; Tr. at 743 (Haas). Likewise, the Commission approved ComEd’s May 16, 2002 petition for special permission to modify its Rider PPO that was integral to the implementation of ExGen’s May 2002 wholesale offering. Accordingly, the Proposed Interim Order’s finding (at p. 56) that those offerings were “consistent with the promotion and development of an effectively competitive electricity market” is entirely appropriate.

Second, the Proposed Interim Order’s rejection of the characterization of those offerings as “subsidies” is also well-supported. ComEd’s May 2000 offering provided RESs with full-requirements wholesale power at MVEC prices, and was offered not to prop up artificially the RESs, but to demonstrate ComEd’s faith that the MVI

methodology that was being implemented at that time would accurately reflect market-based prices. *See* Tr. at 742-43 (Haas); Interim Order, pp. 8, 36. [

].¹⁸ [

] And the evidence in the record indicates that the [] element of the May 2002 wholesale offering was analogous to a “curtailment agreement” with the RESs – that is, it was an agreement that the RESs would not put certain load on the PPO for the upcoming summer months which ExGen would be obligated to supply. *See* Tr. at 813 (Juracek). Such curtailment agreements – in which a load serving entity pays a customer to reduce its load – have long been recognized as an essential element of demand-side management and are in no way improper. *See* Tr. at 812-13 (Juracek); Tr. at 766-68 (Brubaker). Nor can those agreements, or ExGen’s May 2002 offering, be properly characterized as providing the customer with a “subsidy.” *Id.*; *see also* Tr. at 423-34 (McNeil/Sterling); Tr. 178, 230, 247 (McDermott). In light of this evidence, the Proposed Interim Order’s rejection of the pejorative “subsidy” label for the ComEd and ExGen wholesale offerings is well-founded.

Finally, the Proposed Interim Order’s conclusion that those offerings do not undermine the significance of the switching data presented in this proceeding is

¹⁸ The assertion that ExGen’s May 2002 offering provided RESs with power and energy at below-market prices is contrary to the evidence in the record. *See* Tr. at 423-25 (McNeil/Sterling).

amply supported in the record. As ComEd explained in its Reply Brief (pp. 39-40), even if, in the absence of ExGen's May 2002 wholesale offering, RESs would have switched some of their customers back to the PPO, such a transient movement of customers could not be taken to suggest a failure of the competitive market. *See also* ComEd Initial Br. at 20-21. Significantly, the evidence in the record indicates that the potential movement of customers back to the PPO would in no way have suggested the absence of attractive alternatives to *Rate 6L*, a point which Staff and intervenors never address. *See* ComEd Reply Br. at 40. Furthermore, the evidence in the record indicates that most customers affected by such an assignment to the PPO would have retained their relationships with their RESs who were threatening essentially to use the PPO as a wholesale supply source. *Id.* Accordingly, to the customers in question, the wholesale supply strategy employed by the RESs would have been invisible, and would not have reflected their withdrawal from the competitive market. *Id.*¹⁹ And, in any event, the Proposed Interim Order quite correctly observes that the *only evidence* in the record suggests that, at the time ExGen initiated its May 2002 wholesale offering, the RESs were threatening to move only 36% of their customers to the PPO. *See* PO at 53, 56 (citing IIEC Ex. 3.0 at 6). Given the relatively small-size of this anticipated customer movement, and the fact that – no matter how large -- such customer assignments do not suggest a failure of the market or an absence of attractive alternatives to Rate 6L, the Proposed Interim Order's conclusion

¹⁹ As noted in ComEd's Reply Brief (p. 40), the wholesale supply strategy employed by RESs is legally irrelevant as well because Section 16-113 does not require a petitioning utility to make any showing as to the manner in which unaffiliated RESs obtain their wholesale supply.

that the ExGen May 2002 offering does not undermine the weight of the switching statistics in the record is unassailable.²⁰

I. Wholesale Market Development

As a number of parties clearly recognize, the Proposed Interim Order is entirely correct in concluding that “Section 16-113 contains no requirement that the wholesale market for power and energy be competitive.” *See* PO at 63; CACC BOE at 23 (“competition at the wholesale market is not a direct condition of declaring a service competitive”); Staff BOE at 25 (“Section 16-113 contains no explicit requirement that the wholesale market for power and energy be competitive ...”). To the extent that such evidence is deemed relevant, however, it should be noted that ComEd presented significant evidence indicating that the wholesale market had developed sufficiently to ensure that RESs, and their customers, will have continued access to competitively priced power and energy for the foreseeable future. *See* ComEd Initial Br. at 22-24. This view is shared by both NewEnergy and NEMA, who as actual market participants (or representatives thereof) ought to know. *See* NewEnergy Ex. 1.0 at 4-5, 8; NewEnergy Initial Br. at 8; NEMA Initial Br. at 8.

Nevertheless, other parties assert that the Proposed Interim Order fails to address the uncertainties at the wholesale level related to matters such as ComEd’s participation in PJM and the FERC’s ongoing Standard Market Design rulemaking. *See*

²⁰ The strength of the switching data is also confirmed by the fact that the trend of increasing RES enrollments has been largely consistent throughout those period when full requirements wholesale offerings have been made available (*i.e.*, June 2000 to May 2001) and in those periods when such offerings have not been available (*i.e.*, June 2001 through May 2002). *See* ComEd Initial Br. at 21; ComEd Reply Br. at 40-41.

IIEC BOE at 26; CACC BOE at 23-24. They are incorrect. The Proposed Interim Order explicitly recognizes such uncertainties in deciding to permit ComEd's Petition to go into effect by operation of law rather than by an affirmative determination of the Commission. In fact, the record contains support for taking such a course in the face of the uncertainties alleged by Staff and intervenors with respect to the ongoing development of competition at the wholesale level. *See* NewEnergy Ex. 2.0 at 10. Furthermore, as NEMA suggests, allowing ComEd's Petition into effect by operation of law will encourage the development of helpful wholesale market institutions:

NEM strongly urges the Commission not to forestall further efforts to foster competitive retail markets pending implementation of FERC's Standard Market Design and ComEd's membership in PJM. In fact, NEM asserts that ensuring a properly functioning retail market will aid in the development of a properly functioning wholesale market. For example, permitting customers to see and respond to accurate price signals will promote demand side response, one of the many desired outcomes of FERC's rulemaking. NEM urges the Commission to continue to work toward the development of a robust and competitive retail market, including providing consumers with access to market-based rates as a concurrent measure to complement FERC's standard market design rulemaking.

See NEMA Br. at 8-9. *See also* ComEd Ex. 14 at 13; Tr. 254-55 (McDermott).

J. Retail Market Development

As with its conclusion concerning market development at the wholesale level, the Proposed Interim Order is clearly correct in concluding that "Section 16-113 does not require the Commission to make a determination as to the issue of future retail market development." *See* PO at 66. To the extent that other parties have raised arguments under this heading going to the reasonable availability of reasonably

equivalent substitute services at comparable prices from providers unaffiliated with ComEd, those arguments were addressed by the Proposed Interim Order (as they are in this Reply Brief on Exceptions) in the sections set forth above. In any event, to the extent that Staff or intervenors have raised any concerns about the vitality of the retail market, those concerns do not warrant denial of ComEd's Petition. *See* ComEd Reply Br. at 47-51. There is ample support for the conclusion that allowing ComEd's Petition into effect by operation of law will enhance the prospects of RESs in the ComEd control area, strengthen the development of competition at the retail level, and encourage additional competitive entry. *See* NEMA Initial Br. at 7; ComEd Ex. 4 at 11-23; ComEd Ex. 7 at 12-14; ComEd Ex. 10 at 12-14; ComEd Ex. 13 at 11-16, 25-26.

K. Customer/Supplier Reaction

The Proposed Interim Order correctly points out that there is nothing in Section 16-113 that requires the Commission to consider customer and supplier reaction. *See* PO at 69. Indeed, the reaction of a party unsupported by any data or analysis is not evidence on which the Commission can base a finding of fact, nor are the number of people that vote for or against a particular position necessarily evidence of its correctness. The ALJs correctly considered what motivated customers and their opposition to the petition filed by ComEd. In this respect, the ALJs correctly observed that, to the extent that customers are using, and desire to continue to use, Rate 6L as a hedge against market uncertainty, that itself is evidence that the continued availability of Rate 6L is an impediment to further market development. *See* PO at 37. The ALJs also correctly considered the disconnect between what customers were saying in this proceeding and the choices they have made in the market place. As the evidence shows, many of the

customers that claim that Rate 6L should not be declared competitive have already left Rate 6L for other suppliers. *See* ComEd Initial Br. at 29; IIEC Ex. 5.0 at 4; IIEC Ex. 6.0 at 2.

L. Other

1. NewEnergy's Monitoring Proposal

NewEnergy proposes that the Commission immediately initiate a proceeding as an ongoing forum and mechanism for the monitoring of competition. *See* NewEnergy BOE at 7-8. ComEd respectfully submits that this exception should be denied. All parties should monitor competitive conditions on an ongoing basis and the Commission can require such reports with respect to competitive developments as it deems necessary. However, the current requirement that a petition be filed prior to the opening of a Commission proceeding, or that the Commission itself state the reasons for opening such a proceeding on its own motion, serves a useful purpose of giving all parties notice of the basis for the proceeding and the nature and scope of the issues to be addressed. In the past, the Commission has been able to move quickly when necessary to address issues that it deems serious. Finally, the incorporation of the current record into the record of a future proceeding with respect to competitive development is not necessary for the Commission to make a reasoned determination based upon future conditions. An open proceeding can also create unnecessary uncertainty both in energy and financial markets. Accordingly, NewEnergy's request that such a proceeding be preemptively initiated should be denied.

2. Rate HEP

On August 19, 2002, IIEC, the City of Chicago, the People of Cook County, BOMA, and CACC jointly moved to dismiss ComEd's Petition or to bifurcate the hearing on the proposed modifications to Rate HEP – Hourly Energy Pricing (“Rate HEP”) that ComEd initially proposed in connection with its Petition. The ALJs denied the joint movants' request to dismiss, but granted their request to bifurcate the Rate HEP issues. The ALJs' September 4, 2002 ruling provided that, if ComEd's Petition were subsequently granted by the Commission, a hearing with respect to Rate HEP would commence thereafter on an established schedule. If, however, ComEd's Petition with respect to Rate 6L was subsequently denied by the Commission, the Commission's order would be final and no hearing with respect to Rate HEP would be necessary. *See* PO at 2.

Notwithstanding the clear disposition of this motion, in their Joint Proposed Replacement Language the Governmental and Consumer Parties, CACC, IIEC, and BOMA suggest that the Commission both deny ComEd's Petition but nevertheless require ComEd to file its related “ tariff amendments to Rate HEP within 10 days of the date of this Interim Order.” *See* Joint Proposed Replacement Language at 26. There is no basis for such a result. If the Commission denies ComEd's Petition (and it should not), ComEd should not be required to file tariff amendments relating to Rate HEP.

M. Proposed Amendments to Rate 6L

1. New Customers

DOE and those parties submitting the “Joint Proposed Replacement Language” advocate a change to the Proposed Interim Order’s analysis and conclusion with respect to tariff amendments to accommodate new customers. None of these parties touch on the issue in their briefs, however; they simply submit proposed language revisions without explaining why the Proposed Interim Order’s treatment of the issue is erroneous.

The Proposed Interim Order correctly concludes that since ComEd did not object to the proposed amendment to accommodate new customers as long as its provision of such service is deemed a non-competitive it would be appropriate to permit new customers to the ComEd system with demands of 3 MW or greater to initiate Rate 6L service during the 3-year statutory transition period under Section 16-113. The above-noted intervenors, in contrast, advocate replacing that reasoned approach with language which would compel ComEd to make Rate 6L available to all new 3 MW or greater customers for the duration of the “mandatory transition period” – i.e., not the 3-year transition period under section 16-113.

The Commission should reject the proposed language both because it is offered without explanation as to why the Proposed Interim Order’s resolution of the issue is erroneous, and because Section 16-113 neither requires such a provision nor provides any basis for an order compelling its imposition. As the Proposed Interim Order

correctly noted in addressing a different proposed amendment, Section 16-113(b) specifically states that:

This subsection shall not require the electric utility to offer or provide on a tariffed basis any service to any customer ... that was not taking such service on a tariffed basis on the date the service was declared to be competitive.

Thus, there is no statutory basis for the Commission to require that ComEd make Rate 6L available to new large customers after the provision of that service to customers in the 3 MW and greater group is deemed competitive. Moreover, intervenors' proposed language is unnecessary since, if the Proposed Interim Order is adopted by the Commission, new customers will have access to Rate 6L in any event. Thus, the proposed exceptions on this issue should be rejected.

2. Extension of transition period for customers on rate.

In the same vein, the same parties advocate a change to the Proposed Interim Order's analysis and conclusion with respect to tariff amendments to extend the availability of Rate 6L to the end of 2006 to those 3 MW and greater customers on the rate at the end of the 3-year statutory transition period.

The Proposed Interim Order properly concludes that, since ComEd has no objection to such an extension provided that the customers give ComEd a binding notice of their intent to stay on the rate by December 2005, there is no reason not to permit those customers to stay on Rate 6L for that period as a non-competitive service.

However, once again without dealing with the issue in their briefs or otherwise explaining why the Proposed Interim Order is in error on this issue, the above-

noted parties advocate replacing that reasoned approach with language which would compel ComEd to make Rate 6L available to ≥ 3 MW customers “throughout [sic] the end of the mandatory transition period.”

The Commission also should reject this proposed language because:

(i) the intervenors have offered no explanation as to why the language in the Proposed Interim Order should be changed, (ii) the statute does not authorize such a requirement; and (iii) the proposed change is unnecessary, since customers will be given the option to remain on Rate 6L through the end of 2006 in any event.

3. Extension of return option for customers not on rate

With respect the issue of permitting existing customers not on Rate 6L to elect to take the service after June 2003, the Proposed Interim Order, as noted above, correctly observes that there is no statutory basis for imposing such a requirement. The parties that take exception to this conclusion have failed to cite any such authority in their briefs on exceptions.

Some parties argue that it would be “unfair” not to allow such customers to return to Rate 6L service. See Trizec BOE (at 13-16); IIEC BOE at 30-31. This, however, is not unfair. Section 16-113 has been in existence since 1997 and ComEd has been engaged in a public discussion relating to limiting its obligations to provide certain tariffed services, including Rate 6L, for nearly a year and a half. ComEd Ex. 10 at 8 –9. CACC witness Fults testified that the customers he advised were aware of this risk. See Tr. 302 (Fults). These customers also have found competitive alternatives that they were comfortable locking into for some period of time.

In light of all of the above, the Proposed Interim Order correctly concludes that the Act not only does not require, but also prohibits the imposition of a requirement that the utility permit non-current customers of Rate 6L to elect the service after it has been declared competitive and after the commencement of the statutory grandfather period. However, as the Proposed Interim Order correctly notes, ComEd has offered, and will continue to pursue a reasonable accommodation with the other parties on this point. That accommodation cannot, however, come at the expense of ComEd's other customers by granting additional free options or providing inadequate time for power procurement as Trizec requests. See Trizec BOE at 14-15; ComEd Reply Brief at 62. As the Proposed Interim Order notes, if an agreement on this point is reached, it can be presented to the Commission in the context of ComEd's tariff filing implementing the final order in this proceeding.

N. Accounting Issues

Staff has proposed the addition of a single sentence to the Proposed Interim Order's summary of Staff's position on the ratemaking treatment of Rate 6L revenues and costs under Section 16-111(d). That sentence correctly reflects the fact that Staff does not take issue with ComEd's position that tariffed services provided during the transition period provided for under Section 16-113(b) are not "competitive services" for the purpose of Section 16-111(d). ComEd has no objection to Staff's suggested language change in this regard.

III. CONCLUSION

As BOMA correctly observed in its Brief on Exceptions:

The creation of competitive markets is something that requires significant effort and is often the result of trial and error. The General Assembly acknowledged this situation in the Act and implemented a transition period where the details of the market could be ironed-out, and all parties, including utilities, marketers and consumers each receive certain levels of protection and benefit from the transition from traditional regulation to a competitive market.

See BOMA BOE at 3. One such transitional mechanism and protection for utilities is the opportunity to limit their obligation to provide bundled tariffed services as competition for those services emerges. Use of this mechanism is critical to the ongoing development of competitive markets. *See* ComEd Ex. 3 at 4-5, 11-23; ComEd Ex. 13 at 11-16, 24-25; ComEd Ex. 14 at 2-6. As ComEd witness Arlene Juracek observed:

We can't get there if customers resist change, refuse to take full responsibility for their market supplies, and seek to hold onto the safety blanket of frozen bundled rates.

See ComEd Ex. 11 at 6.

The reasons for moving forward are clear:

- Large customers with loads of 3MW or more have been steadily leaving Rate 6L for competitive alternatives;
- Over 30% of those customers are receiving power and energy from RESs not affiliated with ComEd;
- If these customers are allowed to maintain an option to return to Rate 6L despite choosing competitive supply, ComEd must keep additional capacity in reserve for that event, thus limiting the supply available for competitive options;

- Allowing these customers to maintain the option to return to Rate 6L raises the long-term cost of service for all customers;
- Maintaining that option makes planning for future supply difficult at best; and
- Eliminating that option reduces uncertainty, frees up supply to the competitive market, and has the potential to further the ongoing development of “efficient and effective” competition in both ComEd’s service area and throughout the State.

The fact that there are uncertainties in the market may be a reason to move forward cautiously, using the operation of law procedure which allows for ongoing monitoring and a second look if that proves necessary, but it is not a reason to ignore the progress that has been made to date or fail to pursue the opportunity to make further progress by moving forward now. If the concerns raised by other parties come to fruition, the Commission will be able to take appropriate action at that time. If, as ComEd believes, customers continue to pursue the substantial savings available from alternative suppliers, there will be no need for further action. Under the tariff amendments that are approved in the Proposed Interim Order, those customers that are particularly risk adverse will be able to remain on Rate 6L throughout the mandatory transition period. Given the potential for savings offered by alternative suppliers, however, ComEd believes few of the 3 MW and greater customer group will do so. Accordingly, for all of the reasons stated above and in its Initial and Reply Briefs, ComEd respectfully requests that the Proposed Interim Order

be adopted as the Commission's order in this proceeding and that the exceptions filed by the other parties be denied.

Respectfully submitted,
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