
**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Commonwealth Edison Company :

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Petition for declaration of service currently : **Docket No. 02-0479**
provided under Rate 6L to 3MW and :
greater customers as a competitive service :
pursuant to Section 16-113 of the Public :
Utilities Act and approval of related :
tariff amendments :

**INITIAL BRIEF OF
THE NATIONAL ENERGY MARKETERS ASSOCIATION**

September 24, 2002

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**INITIAL BRIEF OF
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This Initial Brief is submitted by The National Energy Marketers Association (“NEM”) in the above-referenced proceeding. NEM is a national, non-profit trade association representing wholesale and retail marketers of energy, telecom and financial-related products, services, information and related technologies throughout the United States, Canada and the U.K. NEM's Membership includes wholesale and retail suppliers of electricity and natural gas, independent power producers, suppliers of distributed generation, energy brokers, power traders, and electronic trading exchanges, advanced metering and load management firms, billing and information technology providers, credit, risk management and financial services firms, software developers, clean coal technology firms as well as energy-related telecom, broadband and internet companies.

This regionally diverse, broad-based coalition of energy, financial services and technology firms has come together under NEM's auspices to forge consensus and to help resolve as many issues as possible that would delay competition. NEM members urge lawmakers and regulators to implement:

- Laws and regulations that open markets for natural gas, electricity and related products, services, information and technology in a competitively neutral fashion;
- Rates, tariffs, taxes and operating procedures that unbundle competitive services from monopoly services and encourage true competition on the basis of price, quality of service and provision of value-added services;
- Competitively neutral standards of conduct that protect all market participants;
- Accounting and disclosure standards to promote the proper valuation of energy assets, equity securities and forward energy contracts, including derivatives; and
- Policies that encourage investments in new technologies, including the integration of energy, telecommunications and Internet services to lower the cost of energy and related services.

NEM asserts that declaring service to customers 3 MW or greater under Rate 6L to be competitive will help support the development of the retail market in ComEd's service territory and throughout the state. NEM submits that granting Commonwealth Edison's [hereinafter "ComEd's"] petition by operation of law will provide the Commission with the requisite flexibility to reevaluate the competitive service declaration as conditions may warrant and may be particularly appropriate given the novelty of the issues attendant with ComEd's petition.

I. Overview of Statutory Standards and Objectives

A. Section 16-113

This proceeding entails the review of ComEd's petition requesting a declaration that service provided to customers 3 MW or greater under Rate 6L is a competitive service. Section 16-113(a) of the Electric Service Customer Choice and Rate Relief Law of 1997 provides with respect to an electric utility's petition for declaration of a competitive service that,

The Commission shall declare the service to be a competitive service for some identifiable customer segment or group of customers, or some clearly defined geographical area within the electric utility's service area, if the service or a reasonably equivalent substitute service is reasonably available to the customer segment or group or in the defined geographical area 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;

Section 16-113(a) also requires the Commission to consider,

whether there is adequate transmission capacity into the service area of the petitioning electric utility to make electric power and energy reasonably available to the customer segment or group or in the defined geographical area from one or more providers other than the electric utility or an affiliate of the electric utility

Section 16-113 also sets forth a timetable for Commission review of a petition for competitive service declaration. Section 16-113(a) requires 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 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 more fully explained herein, NEM submits that the statutory requirements attendant with granting ComEd's petition have been satisfied and urges that the Commission grant ComEd's petition by operation of law.

II. Evidence Relating to Section 16-113

B. Reasonably Equivalent Substitute Service That is Reasonably Available

One of the preconditions set forth in Section 16-113(a) for declaration of a service as competitive is that, "the service or a reasonably equivalent substitute service is reasonably available." NEM strongly urges that the interpretation of "reasonably equivalent substitute service" proposed by many intervenors, such that the term would be construed to mean "exact equivalent" not be adopted. (See Fults Direct Testimony, lines 302-208; Bodmer Direct Testimony, lines 634-641; Stephens Direct Testimony, pages 5-13). Adoption of this interpretation could effectively preclude competitively provided products, services, information and technology from ever satisfying the "reasonably equivalent substitute service" test.

One of the underlying premises behind restructuring is the promise of competitively provided products, services, information and technology that provide customers with a reduction in price and/or an innovative offering different from that offered by the utility. Competitive offerings should be encouraged to be unique from those in the current menu offered in the utility's tariff. AES New Energy witness O'Connor noted that, "there are features of RES and ARES service

that may well prove to be better than that provided under 6L." (P. O'Connor Rebuttal Testimony, lines 69-70). He expressed his belief that competitive suppliers, "take more time to understand [their] customers' needs than ComEd traditionally did since the failure to please them means they will go elsewhere." (P. O'Connor Rebuttal Testimony, lines 71-73). O'Connor also noted that with respect to competitive supplier service, "there is flexibility in terms and condition not available through a tariffed service, providing for re-negotiation of terms, price reductions, extensions of contract time periods and the tailoring of pricing to meet individual customer needs." (P. O'Connor Rebuttal Testimony, lines 73-76). NEM submits that the values of competitive supplier service discussed by AES NewEnergy witness O'Connor must be encouraged. Accordingly, the Commission should not adopt an unreasonably restrictive interpretation of "reasonably equivalent substitute service," that has the effect of discouraging entry of better and innovative competitive offerings from reaching the market.

D. Other Providers

ComEd witnesses Crumrine and Kelter indicated that "five non-affiliated RES were directly serving customers in the 3 MW or greater group in ComEd's service territory," and "there are another six RESs, for a total of eleven, that have been certified by the ICC and have passed the certification and testing process required by ComEd to deliver electric power and energy to customers within the ComEd service territory." (Direct Panel Testimony of Crumrine and Kelter, lines 210-215). This indicates the strong interest of competitive providers in serving the

customers at issue. This is further supported by the testimony of AES NewEnergy witness O'Connor who noted, "NewEnergy's experience is that competition among ARES for the opportunity to serve customers over 1 MW is intense and that ARES competition for Rate 6L customers 3 MW and greater is especially intense." (P. O'Connor Direct Testimony, lines 6-8). NEM submits that declaration of service to customers 3 MW or above on Rate 6L as competitive will send a strong signal to potential market entrants about this Commission's commitment to encouraging competitive markets and could incent further market entry. NEM also urges that service to customers 1 MW or greater be declared competitive on an expeditious basis.

G. Customer Switching

ComEd witnesses Crumrine and Kelter testified that,

after just over two-and-one-half years of choice, more than 70% of the customers in the 3 MW or greater group that are eligible to take bundled service under Rate 6L (as defined in the Petition) have opted for an unbundled alternative. By this, we mean that those customers are taking unbundled delivery service under Rate RCDS – Retail Customer Delivery Services (“Rate RCDS”) and unbundled electric power and energy under ComEd’s Rider PPO – Power Purchase Option (“Rider PPO”), Rider ISS – Interim Supply Service (“Rider ISS”), or from a Retail Energy Supplier (“RES”). And, of those 266 customers, nearly 44% are currently taking service from a RES not affiliated with ComEd. (Direct Panel Testimony of Crumrine and Kelter, lines 63-71).

NEM urges the Commission to recognize the significant customer switching numbers described by ComEd. AES NewEnergy witness O'Connor suggested that, "[a] market penetration by unaffiliated RES/ARES of about one-third among

6L customers over 3 MW in less than three years following the commencement of phased open access should be considered a success story overall." (P. O'Connor Rebuttal Testimony, lines 250-252). NEM submits that the assessment of AES NewEnergy is correct.

H. Wholesale Market Development

NEM submits that the wholesale market is sufficiently developed to support competitive retail provision of service to customers 3MW and above. AES NewEnergy witness O'Connor noted that, "reasonably ascertainable empirical information as well as [AES NewEnergy's] own experience and that of other ARES support the contention that the wholesale market in Illinois and the Midwest is now and will increasingly be capable of providing competitively priced supplies for ARES service to larger customers, especially those over one megawatt." (P. O'Connor Direct Testimony at page 8). NEM supports O'Connor's assessment.

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.

I. Retail Market Development

The retail market in ComEd has continued to develop since the opening of the market. Market participants, both consumers and competitive suppliers, have become increasingly knowledgeable about market workings. This is evidenced by the increasing share of retail load in the ComEd service territory served by ARES. For instance, estimated combined peak load schedules of ARES into ComEd increased from 1340 MW in 2001 to 2515 MW in 2002. (See P. O'Connor Direct Testimony, lines 12-16). Furthermore, a number of different ARES are serving these retail customers. (P. O'Connor Direct Testimony, lines 16-19). The customers at issue in the instant case are sophisticated customers that are able to analyze competitive offerings on a fully-informed basis. NEM submits that declaration of service to the customers at issue as competitive is justified by the current state of retail market and will act to further promote the development of the market for these and other customer classes in the future.

V. Other

NEM shares the concerns expressed by many of the intervenors about the market value index and associated charges. AES NewEnergy witness O'Connor stated that, "the market value index (MVI) is inherently flawed and produces market value of energy charges (MVEC) that are below the real market for power and

energy to service retail customers. The MVI and [sic] produces transition charges (CTC) that are too high." (P. O'Connor Rebuttal Testimony, lines 140-144). NEM urges that the problems associated with the MVI must be remedied. However, NEM submits that the Commission should not forestall the competitive service declaration in the instant case pending resolution of the MVI issue. To the contrary, NEM submits that a competitive service declaration could provide the necessary incentive for all market participants to review and resolve the MVI issue in a fair and final manner to the benefit of the retail market as a whole.

VI. CONCLUSION

For the reasons set forth herein, NEM respectfully requests the Commission enter an Order in this docket consistent with the following:

1. Grant ComEd's petition by operation of law.
2. Enter an Order in conformance with the arguments presented.

Respectfully submitted,

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