

ORAL ARGUMENT REQUESTED

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Commonwealth Edison Company) Docket 10-0138
Proposal to establish Rider PORCB)
(Purchase of Receivables with Consolidated Billing))
And to Revise Other Related Tariffs)

**JOINT BRIEF ON EXCEPTIONS ON REHEARING OF
THE ILLINOIS COMPETITIVE ENERGY ASSOCIATION AND THE RETAIL
ENERGY SUPPLY ASSOCIATION**

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On July 19, 2011, the Administrative Law Judge (“ALJ”) served her Proposed Order (“ALJPO”) in this proceeding. Pursuant to the schedule set out in the ALJPO and 83. Ill. Admin. Code Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), the Illinois Competitive Energy Association (“ICEA”)¹ and the Retail Energy Supply Association (“RESA”)² jointly submit Exceptions to the ALJPO. The proposed

¹ ICEA’s members include Ameren Energy Marketing Company; Champion Energy, LLC; Direct Energy Services, LLC; Exelon Energy Company; FirstEnergy Solutions Corp.; Integrys Energy Solutions, In.; MC Squared Energy Services, LLC; Midwest Generation; EME-Edison Mission Solutions. LLC; Nordic Energy Solutions, LLC; and Reliant Energy Northeast.

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exceptions to the ALJPO are set forth on Attachment A to this Brief on Exceptions. This Brief on Exceptions sets forth our arguments in support of the proposed exceptions.

In addition, ICEA and RESA request, pursuant to 83 Ill. Admin. Code Section 280.850 that the Commission grant oral argument in this proceeding.

I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

The matter at hand involves issues of law that are essential to a correct and sustainable order. A reading of the ALJPO raises serious concerns both for its construction and application of Section 16-118, and more precisely, the language set out in subsections (a) and subsection (c) (enacted at a much later date) of this statute. This is the first time that the Illinois Commerce Commission (“Commission”) is put to interpreting Section 16-118 in such detail and, as will be shown below, this is made necessary because the ALJPO largely rests its recommended conclusions on a partial and incorrect interpretation of this statute. The ICEA and RESA, strongly disagree with the both the analysis and conclusions derived in the ALJPO and with this Exceptions Brief are providing a complete and different analysis for the Commission’s consideration.

While there are other errors, it is misguided statutory interpretation more than anything else that drives the ALJPO’s conclusion that a single blended rate is required in this case. We strongly submit that in this as indeed in any proceeding, it is highly important that the Commission be right on the law. Oral argument, will allow the Commission to probe all of the many critical and telling aspects of the law at hand, before coming to a decision. It will further allow ICEA and RESA to fully explain why their Proposed Exceptions Language, developed on a reasoned study of the law and a full assessment of the record, should be adopted. In addition, the ALJPO fails to consider important regulatory principles and other policy factors, which are addressed in this Brief on Exceptions.

Wherefore, ICEA and RESA jointly, and respectfully urge the Commission to grant oral argument in this matter.

II. INTRODUCTION

On March 9, 2011, ICEA, pursuant to Section 10-113 of the Public Utilities Act and 83 Ill. Admin. Code Section 200.880 filed a Petition for Rehearing, requesting that the Illinois Commerce Commission (“Commission”) grant rehearing of the Commission’s Amending Order, dated February 9, 2011, in this proceeding and its Order upon Emergency Motion for Clarification, dated February 23, 2011 in this proceeding (hereinafter referred to as the “Amending Orders”). On March 11, 2011, RESA also filed a Petition for Rehearing. Both petitions for rehearing were limited to a single issue—the Commission’s improper adoption of a single, blended uncollectible rate to be applied to both residential and non-residential customers under Commonwealth Edison Company’s (“ComEd”) Rider PORCB (Purchase of Receivables with Consolidated Billing). On March 24, 2011, the Commission granted both petitions for rehearing.

The following parties sponsored evidence on rehearing: RESA, ICEA, ComEd, the Commission Staff and Dominion Retail Inc. (“Dominion”). RESA submitted the Direct and Rebuttal Testimony of Roy Boston, Strategic Planning and Policy Manager-East, for the Retail Electric Supplier (“RES”), Noble Americas Energy Solutions LLC. ICEA submitted the Direct and Rebuttal Testimony of Kevin Wright, President of ICEA. ComEd submitted the Direct and Rebuttal Testimony of Robert Garcia, Manager, Regulatory Strategies and Solutions. The Commission Staff submitted the Direct and Rebuttal Testimony of Torsten Clausen, Director of the Commission’s Office of Retail Market Development. Dominion submitted the Direct and Rebuttal Testimony of James Crist, President of the Lumen Group. All parties waived cross-examination and the testimony of all parties was admitted by affidavit.

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exceptions to the ALJPO are set forth on Attachment A to this Brief on Exceptions. This Brief on Exceptions sets forth our arguments in support of the proposed exceptions.

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I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

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With respect to the only issue in this proceeding—whether to reverse the Commission’s decision in the Amendatory Orders to utilize a single, blended uncollectibles rates for residential and non-residential customers—the witnesses for RESA, ICEA, and ComEd all agreed that that decision should be reversed and the Commission, on rehearing, should revert to its decision in its December 15, 2010 Order (“Commission’s Final Order”) in this proceeding to utilize separate uncollectible rates for residential and eligible non-residential customers. The Commission Staff witness was neutral on this issue. Only the witness for Dominion supported continuation of a single uncollectible rate.

III. BACKGROUND

The purpose of Rider PORCB is to implement Section 16-118 (c) of the Public Utilities Act, which requires ComEd to provide a tariffed service under which a RES may, at its option, sell to ComEd receivables for its residential customers and its non-residential retail customers with a non-coincident peak demand of less than 400 kilowatts (hereinafter referred to simply as the “non-residential customers”), at a discount rate. The discount rate is to be based on both the costs the utility incurs in setting up and administering the program and historic bad debt. (RESA Ex. 1.0 on Rehearing, p. 4)

Consistent with the requirements of Section 16-118 (c) of the Public Utilities Act, Rider PORCB, as originally proposed by ComEd, established a two-part discount rate applicable to the receivables it purchases from RESs: (1) percentage reductions for the recovery of uncollectible costs associated with the purchased receivables that are based on ComEd’s historic bad debt rates for residential and non-residential customers, and (2) a fixed, \$0.50 per bill charge for the recovery of start-up and administrative costs associated with ComEd’s purchase of receivables. Note that the Commission accepted use of the fixed \$0.50 per bill charge to recover start-up and

administrative costs and this is not an issue on rehearing (although it is an issue in an appeal brought by Dominion). The discount rate for uncollectible costs, specifically whether it should be a single, blended rate or separate rates for residential and non-residential customers, is the sole issue on rehearing. (*Id.*, pp. 4-5) The two-part cost recovery mechanism (including the feature of separate uncollectible rates for residential and non-residential customers) was agreed to by ComEd, RESA, and ICEA, as memorialized in a Memorandum of Understanding (ComEd Ex. 1.3). The Citizens Utility Board also agreed with ComEd's two-part cost recovery mechanism. (Commission's Final Order, p. 24)

As directed by the Commission's Final Order, ComEd's compliance filing reflected separate uncollectible rates for residential customers (2.239%) and non-residential customers (0.774%). The Commission accepted ComEd's compliance filing. (RESA Ex. 1.0 on Rehearing, p. 5) However, pursuant to the Amendatory Orders, ComEd made a compliance filing which reflected a single, blended uncollectible rate applicable to both residential and non-residential customers. That rate was 1.8453%. ComEd determined the number by calculating a weighted average of the residential uncollectible factor of 1.0244 and the uncollectible factor for non-residential customers with a demand lower than 400 kW of 1.0070. The weighting was on the basis of gross charge-offs and base revenues.³ (*Id.*, p. 6)

³

Note that while ComEd calculated the single, blended uncollectible rate, ComEd did not support use of that rate. The Notice of Administrative Law Judge's Ruling directed ComEd to calculate a single uncollectible rate. ComEd had no choice except to prepare the calculation; however, ComEd reiterated its objection to using such a methodology. ComEd indicated that the only purpose served by averaging historic residential and non-residential uncollectible rates is to further disconnect the discount rate charged for the purchase of receivables from ComEd's cost of service and the traditional ratemaking principle of cost causation. ComEd stated that such an averaging will cause the charges to RESs serving residential customers under Rider PORCB to be below cost (below ComEd's bad debt risk), while increasing the charges to RESs serving non-residential customers above cost (above ComEd's bad debt risk). ComEd further stated that in addition to discouraging RESs from utilizing PORCB to serve their non-residential customers, averaging the rates will likely cause an under recovery of bad debt expense associated with residential customers

For the one year period which began June 1, 2011, the new single, blended uncollectible rate is 1.84%. The uncollectible rate for residential customers would be 2.23% and the uncollectible rate for non-residential customers with demands under 400 kW would be 1.19%. (RESA Ex. 2.0 on Rehearing, p. 4)

IV. THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

On July 19, 2011, the ALJPO was served in this proceeding. The ALJPO affirms the Commission's decision in its Amendatory Orders to utilize a single, blended rate uncollectible rate for residential and non-residential customers. The ALJPO makes this decision on three bases. First, the ALJPO agrees with the argument of Dominion that Section 16-118 (c) of the Public Utilities Act requires that there be a single uncollectible rate and, as such, the Commission has no discretion in the matter. (ALJPO, pp. 4-5) Second, without any analysis of the arguments presented, the ALJPO concludes that, even if Section 16-118 (c) allows separate uncollectible rates for residential and non-residential customers, the Commission, from a policy standpoint, should require a single uncollectible rate. (*Id.*, pp. 11-12, p. 17) Third, the ALJPO declines to consider the statistics provided by RESA which clearly demonstrated that the use of a single, blended rate discourages RESs from utilizing Rider PORCB for their non-residential customers. (*Id.*, p. 11)

V. SUMMARY OF POSITION

First, the ALJPO's legal analysis that concludes that Section 16-118 (c) of the Public Utilities Act requires use of a single, blended rate is erroneous.

served via Rider PORCB. (Verified Reply to Notice of Administrative Law Judge's Ruling, dated November 8, 2010, Attachment 1)

Second, the ALJPO's failure to construe and apply the provisions of Section 16-118 (c) to the issues in this case, is legal error.

Third, the ALJPO's complete reliance on a policy statement in another subsection of 16-118, not at issue and failing any sort of interpretive analysis, renders its ultimate conclusion legally erroneous.

Fourth, the policy arguments used to support the ALJPO are faulty; from a policy standpoint, the Commission should require the use of separate uncollectible rates for residential and non-residential customers, for the following reasons:

- Contrary to the ALJPO, the record shows that the difference between application of a single, blended rate and the appropriate separate rate to non-residential customers is material.
- The Commission's acceptance of ComEd's proposed 50 cent per bill fixed charge to recover the implementation costs of Rider PORCB does not support the use of a single uncollectible rate.
- While a single, blended rate might encourage more activity in the residential market that does not make it a good policy decision for the Commission.
 - ComEd has calculated separate uncollectible rates for residential and non-residential customers and they are substantially different; consequently, failure to use separate uncollectible rates would violate cost causation principles and result in a subsidy paid by RESs providing service to non-residential customers to those providing service to residential customers.

- Since a blended POR discount rate charges above-cost rates to RESs serving non-residential customers and charges below-cost rates to RESs serving residential customers, the blended rate in this case is wrong twice—it inappropriately sends the signal to the former that the service is more expensive than it is (and discourages the economic use of the service), and to the latter that it is less expensive than it is (and encourages uneconomic use)—the evidence in this case clearly supports two separate rates.
- Use of a single, blended rate would heavily discourage RESs from enrolling non-residential customers in Rider PORCB.
- The Illinois General Assembly intended purchase of receivables/utility consolidated billing programs to be available to RESs providing service to non-residential customers.

Fifth, while Rider PORCB is relatively new, the statistics on the record that are currently available clearly indicate that use of a single uncollectible rate has discouraged participation in Rider PORCB for non-residential customers. As of May 31, 2011, there were 21,276 residential customers taking service from a RES and 19,359, or 91%, of those customers were taking service under Rider PORCB. In contrast, as of May 31, 2011, there were 63,823 eligible (Watt Hour Delivery, Small Load Delivery, and Medium Load Delivery) non-residential customers taking service from a RES, but only 1,738, or 2.7%, were taking service under Rider PORCB. (RESA Ex. 2.0 on Rehearing, p. 7) Moreover, there is a consequence to discouraging RESs from utilizing Rider PORCB for non-residential customers. If only residential customers are enrolled

in Rider PORCB, ComEd will not recover its uncollectible costs associated with Rider PORCB from those customers.

VI. EXCEPTIONS TO ALJPO

Exception 1: The ALJPO misconstrues the term “rate” in its legal analysis and this renders its ultimate conclusion erroneous.

The ALJPO frames the specific legal issue for this proceeding (which it further finds to be controlling on the ultimate decision in the matter) as being “whether a rate or rates” shall be used in ComEd’s Purchase of Receivables tariff. (ALJPO at 5). It would appear that the ALJPO was led into framing the issue thusly, by looking to the arguments presented by Dominion that press a real and definitive difference in these terms.

It is also on the basis of Dominion’s arguments that the ALJPO finds that the Commission has no discretion to do anything in this matter but establish a “single blended” discount rate for both residential customers and commercial customers. According to the ALJPO, this is so because (as Dominion had argued) the statute, i.e., Section 16-118 (c) of the Public Utilities Act provides, in four places, that a rate shall be formed, not “rates.” (ALJPO at 4). Taking what might be viewed as a strict and literal interpretation of a single term, the ALJPO concludes that the use of the singular “rate” precludes the Commission from devising more than one rate for POR services. (ALJPO at 5, 17).

Every statute is in need of construction by the reader. To assist in this endeavor there are canons of construction along with theories of how a statute should be interpreted. Sometimes too, there are laws enacted that provide direct guidance. The ALJPO ignores these resources to simply and flatly conclude that, “[i]n English, the ‘s’ on the end of the word connotes plurality.” The ALJPO’s emphasis and reliance upon the singular “rate” as written in the statute is simply not in keeping with the canons of statutory interpretation. It has long been observed that common

usage in the English language does not scrupulously observe a difference between singular and plural word forms, and this is especially true when speaking in the abstract, as in legislation. Sutherland, *Statutory Interpretation*, 7th Ed. 47:34. In recognition of this, it is widely and well established by case law that legislative terms which are singular in form may apply to multiple subjects or objects. *Id.* See *Lindley v. Murphy*, 387 Ill. 506, 56 N.E. 2d 832 (1944); *Smith v. Zachery*, 255 F.3d 446 (7th Cir. 2001).

In Illinois, as in practically every other state, this rule of “singular/plural” construction has been codified, meaning that the General Assembly has prescribed, by law, how its statutes are to be construed.

Section 1.03 of the Illinois Statute on Statutes provides that:

Words importing the singular number may extend and be applied to several persons or things; and words importing the plural number may include the singular. 5 ILCS 70/1.03.

For present purposes, this means that the term “rate” when used in Section 16-118 (c) also means “rates.” There is nothing to indicate otherwise. Under all of the authority presented here, the statute must now be read and interpreted in just such a way. The significance of this construct is that it leaves the Commission with the authority to consider whether a single rate or separate rate is appropriate under the entirety of the circumstances.

The ALJPO did not consider or apply relevant legal interpretive authority, in construing a term that is controlling on the issue in this proceeding and thus, stands in error. Given that the ALJPO elevates the term “rate” in a manner outside of both traditional interpretive norms and the law, the legal analysis and conclusion set out at pages 4-5 of the Proposed Order are in error and must be corrected. Further, the erroneous legal conclusion carries over and is repeated at page 17 of the ALJPO and this too must be changed.

We might further observe that the ALJPO's attempt at a literal and strict construction would fail in another sense. There is no language in the statute to require the use of a "blended" rate. Indeed, had the General Assembly intended the use of a "single" rate for both residential customers and commercial customers, it could have easily, clearly and expressly inserted language to that effect into the statute. That is, the General Assembly could have stated with specificity just how the discount rate would be calculated. It did not do so. Instead, it left the the task of determining the appropriate discount rate(s) to the discretion of the Commission. In contrast, it should be noted that the General Assembly had no problem being specific when it defined what are informally termed the "commercial" customers in this proceeding as "non-residential customers with a non-coincident peak demand of less than 400 kilowatts." Likewise, the General Assembly was very detailed in stating what it required ComEd to place into its POR tariff. This too shows that the ALJPO is in error and needs to be corrected.

Exception 2: The ALJPO errs by not analyzing or applying the provisions in Section 16-118 (c) either standing alone or in relation to other telling law.

This is a proceeding that involves the interpretation and application of subsection (c) of Section 16-118 of the Illinois Public Utilities Act. The ALJPO, however, utterly fails to rely on the provisions of this case-governing law in its conclusions on the main issue in this proceeding. The one exception is a reference to the "rate/rates" issue (discussed in Exceptions 1 arguments above), where the ALJPO concludes that "the blended rate ...is required pursuant to the language in Section 16-118 (c)." (ALJPO at 17)

In writing Section 16-118 (c), the General Assembly had much that it wanted the Commission to consider. What Section 16-118 (c) does show, plainly and without question and of importance to the Commission's decision-making in this proceeding, is that the General Assembly wanted to allow for the electric utility's purchase of receivables from two classes of

customers: (1) residential retail customers; and (2) non-residential customers “with a non-coincident peak demand of less than 400 kilowatts.” 220 ILCS 16-118 (c). The ALJPO makes no mention of this.

From this language, and the remainder of the provisions, the Commission finds nothing in Section 16-118 (c) to suggest that one class of customer receivables is to be favored over the other in the whole of this statutory scheme. Among all the many detailed mandates set out in Section 16-118 (c), there is no direction to either the electric utility (ComEd) or to the Commission to treat these two classes any differently one from another. In these premises, omissions in the law with respect to picking favorites between the receivables classes, are just as valid in determining legislative intent as is express language.

We note that the ALJPO does admit, at one point, but *only* in reference to Section 16-118 (a) that:

No preference was stated therein as to whether preference should be given to commercial or residential customers. (ALJPO at 4) (emphasis added).

But even this acknowledgement, a significant factor in the way that the ALJ frames its decision in this matter - a singular reliance on a policy statement in Section 16-118 (a) -is given no meaning. It stands alone, awkwardly placed and bereft of either analysis or consideration. In other words, having made this assessment, the ALJPO never mentions same in the context of the main issue in this proceeding. Nor does the ALJPO give this statement any meaning by virtue of an analysis. In the end, this vital observation is left to wither. While it is highly questionable for the ALJPO to rely so heavily on the policy statement in Section (a) and not on Section 116-118

(c) to reach the ultimate decision in this proceeding, such an error is compounded by the failure to consider and give meaning to what the policy statement actually says.

Actually considering this ALJPO observation on Section 16 -118 (a) together with the statutory provisions in Section 16-118 (c) makes abundantly clear that there is no conflict between these two statutes. Simply put, the General Assembly's intent to have the receivables of both customers classes on a equal footing, as evidenced in Section 16-118 (c) remains undisturbed. If anything, it is strengthened.

Still another statutory provision that the ALJPO does not analyze or address is Section 20-102 of the Public Utilities Act. 220 ILCS 5/20-102. This policy section is similarly valid in showing that the General Assembly was concerned in having alternative energy supply be available to *both* residential and small commercial customers. Here, as in Section 16-118 (c) and in Section 16-118 (a), the plain and unadulterated wording of the General Assembly is to put these classes of customers on an equal footing. Stated another way, there is no conflict between the legislative intent expressed in Section 16-118 (c) and that which is set out in Section 20-102. By virtue of a studied analysis, it is amply demonstrated that none of the law that concerns or touches on growing competition for both the residential and commercial customers expresses any favoring of one group over the other. In the end, the policy of equal treatment expressed by the General Assembly is, and should be a valid factor for consideration by the Commission in this proceeding.

Exception 3: The Proposed Order unlawfully relies on a policy statement from another subsection of 16-118 as its sole support for the ultimate conclusion in this proceeding.

Each law is written for a purpose. It may confer rights in some situations. It may impose duties in other situations. The elements or particulars of a law will identify who is subject to its provisions and who is disqualified. Overall, a state's policies and goals are reflected in the actual

substantive provisions that the legislature has fashioned on any particular subject matter. Thus, by adhering to the language of a statute, an agency is fulfilling its mission and effectively carrying out that policy.

With no analysis and no support, the ALJPO bases its ultimate decision on the conclusion that “this Commission’s role, as was *defined by the General Assembly*, is to promote competition generally.” (ALJPO at 17).(emphasis added). This is a clear misstatement in the context of this case. There is nothing in Section 16-118 (c) that assigns to the Commission this particular task. What the statute requires is that the Commission review (upon notice and hearing) and approve just and reasonable discount rates for the purchase of receivables and that it periodically review the rates. It is highly improper, by the rules of construction if not common sense, to read into a statute either rights or obligations that are not expressly provided for.

While not even identified in the ALJPO’s ultimate conclusion at page 17, this notion of it being the Commission’s “role” to promote competition has likely arisen from certain statutory language that appears in other parts of the ALJPO. (See ALJPO’s “Background” section at 1, and Conclusion on the Law Argument at 4).

Section 16-118 (a), a provision not at issue in this proceeding, opens with the following words:

It is in the best interest of Illinois energy consumers to promote fair and open competition in the provision of electric power and energy and to prevent anticompetitive practices in the provision of electric power and energy. Therefore... 220 ILCS 5/16-118 (a).

In examining the whole of this section, it is clear that the word “therefore” that follows the full first sentence in this statute is key to showing that the General Assembly did not make this policy statement as a general and broad proposition. Nor did intend a directive. To the contrary, it was expressing the rationale for its action in enacting the much detailed and novel substantive

provisions that follow in Section 16-118(a). To be sure, there is a real question as to whether the policy statement placed in 16-118 (a) and enacted at a much earlier date for one specific purpose, even applies to the provisions of section 16-118 (c) that were adopted at a later date for a different purpose. Again, there is no analysis on the matter in the ALJPO and this is a serious flaw. Be that as it may, even if the policy statement set out in subsection (a) is to be read into subsection (c), the word “therefore” would also have to be imported. That is because the General Assembly is not just stating a policy in the subsection. In each situation, in both subsections (a) and (c) it is *itself* setting out specific and detailed substantive provisions *to carry out its policy*.

It has become common for legislators to include a policy statement or declaration which states the general object of the law so that administrators know *its* purpose for enacting a law. While this section, like a preamble, is available to clarify “ambiguous” sections of a statute, it may not itself create ambiguity. This is so because a declaration of policy “is *not* a part of the substantive portion of the statute.” *Sutherland, Statutory Interpretation, 7th Ed. 20:12. (emphasis added)*.

This means that it is the substantive provisions (elements) of the law, *e.g.*, who has a duty to do what, when, and how, along with other details in statute, that are the basis for sound decision-making. By implementing the law as written, the Commission is effectively and correctly carrying out the purposes and policies set out by the law’s makers.

Here, however, based solely on this policy statement in Section 16-118 (a) and considered outside of the governing provisions of Section 16-118 (a) the ALJPO concludes that, [t]he promotion of competition necessarily favors including the interests of the vast majority of customers.” (ALJPO at 17). All of the above authority amply shows that a policy statement is no authority on which to base a decision. Moreover, as our Exceptions 2 argument above demonstrates, the ALJPO has not considered the policy statement in 16-118(a) together with the

substantive provisions of Section 16-118(c). As such, the ALJPO is mistaken in the belief that the Commission might simply ignore specific substantive statutory provisions under a self-proclaimed right to enforce a policy statement that itself was clearly intended to supply a reason for the General Assembly's enactment of the law. Further, what the ALJPO effectively does is read into this policy statement a preference for residential receivables discounts over commercial receivables discounts that is of the ALJPO's very own making. This Commission well knows that a law is what it is and not what the parties say it is or even what an agency wants it to be. See generally, Application of the City of Naperville, Order at 21, Docket 03-0779 (where it reasoned that "any changes to the law ...must come out of the General Assembly and not this Commission.")

In the final analysis, statutory language of this type i.e., a policy statement, is not open to use by the Commission as the sole basis upon which to make a decision in this proceeding. Stated another way, any determinations to be made in this proceeding must be based on and supported by the substantive provisions of Section 16-118 (c), the law that the Commission is required to apply in this proceeding. In the exceptions arguments above, ICEA and RESA have provided solid authority to show that the ALJPO is wrong on the law and, as such the conclusions derived therefrom are flawed. Because these legal errors affect the credibility and sustainability of the order to be entered in this proceeding, the ALJPO must be corrected.

Exception 4: The ALJPO errs in finding that the difference between application of the single, blended uncollectible rate and the appropriate separate uncollectible rate to non-residential customers is not material.

The ALJPO, while stating that the most compelling argument by proponents of separate uncollectible rates is that the single rate does not accurately reflect the actual uncollectible rates for residential and non-residential customers, proceeds to attempt to minimize that argument by indicating that the difference between the blended rate (1.84%) and the separate rates (2.23% for

residential and 1.19% for non-residential) is less than 1%, “approximately one-half of one percent”. To the ALJ this difference “appears to be small”. The ALJPO claims that the parties could have, but did not, present evidence establishing that this difference is material to them or is a material obstacle to competition in Illinois. The ALJPO concludes, on this point, that because “there is no such evidence, we cannot conclude that the difference between the two rates is material”. (ALJPO, p. 11)

Just as wrongfully, the ALJPO fails to recognize that the most compelling argument in support of separate uncollectible rates, and of critical consideration by the Commission, is that the single rate produces an improper subsidy. As RESA’s witness testified, the use of a blended rate violates principles of cost causation and results in a subsidy. ComEd’s historic bad debt experience with residential customers is 2.239%. The blended discount rate is 1.8354%.⁴ To the extent that RES sign up their residential customers under Rider PORCB they will be receiving an amount for their receivables greater than the amount that ComEd will recover, based on its historic bad debt experience. (RESA Ex. 1.0 on Rehearing, p. 7) ComEd’s witness agreed that the Commission’s use of a single rate represents a significant departure from traditional ratemaking practices and the principle of cost causation. (ComEd Ex. 12.0, p. 6) ICEA’s witness agreed that use of the single rate creates an inappropriate cross-subsidy. (ICEA Ex. 3.0, p. 4) Even Staff witness Clausen, who is neutral on the issue, agreed that this is the strongest argument in favor of using separate uncollectibles charges for residential and non-residential customers. (ICC Staff Ex. 2.0, p. 10)

⁴ These were the rates reflected in the Commission’s orders in this proceeding. However, the comparable rates for the period beginning June 1, 2011 are extremely similar: as stated previously, for the one year period which began June 1, 2011, the new single, blended uncollectible rate is 1.84%. The uncollectible rate for residential customers would be 2.23%.

Ignoring for the moment the implications that a subsidy is okay if it's not "material", the ALJPO's statements are simply erroneous. The record shows that the difference between application of the single, blended rate to non-residential customers and the separate rate is material enough to stop RESs from signing up non-residential customers under Rider PORCB. For example, Mr. Boston, on behalf of RESA, testified that it makes no economic sense for a RES to enroll non-residential customers (for which ComEd experiences an uncollectible rate of 1.19%, based on the June 1, 2011 factors) and receive the higher discount of 1.84% from ComEd. (RESA Ex. 1.0 on Rehearing, p. 7)

Further, even assuming for the sake of argument that the difference between the two rates was not material, it would simply be bad policy to base a Commission decision on materiality that can, and will, change over time due to a host of economic and other variable factors. What is immaterial today can become material tomorrow. Further, if the difference is so small as to be immaterial, then why not permit separate rates if in fact there is no material difference? ICEA and RESA believe that materiality arguments provide no support for having a single blended rate instead of two separate rates for RESs serving residential and non-residential customers.

Moreover, as demonstrated in detail in Exception 7, *infra*, the most recent information available shows that the use of a single, blended uncollectible rate has clearly resulted in RESs not signing up non-residential customers for Rider PORCB. This is certainly evidence on the record demonstrating that the difference between the single, blended rate and the separate rates is material to RESs.

In addition, no party in this proceeding made the argument that the difference between the single rate and separate rates is not material, so parties were not aware that this would be an

issue until it was raised for the first time in the ALJPO. However, if the ALJPO is claiming that parties should have offered for the record some unidentified quantitative evidence regarding the materiality of this difference, there is, in fact, evidence in the record that allows one to determine the impact of this difference on RESs serving non-residential customers. For example, on an individual customer basis, using numbers from the ALJPO demonstrates the materiality of the ALJPO's approach. Page 14 of the ALJPO cites Mr. Clausen's example of a theoretical residential customer with \$49 in monthly supply charges (assuming 700 kWh at \$0.07 per kWh); the monthly difference between charging that customer the residential uncollectible rate of 2.23% and the single, blended uncollectible rate of 1.84% would be approximately 20 cents. In contrast, page 13 of the ALJPO (footnote 2) indicates that a Medium Load Delivery customer in the 50th percentile would incur monthly energy charges of \$3,032 (43,318 kWh times \$0.07 per kWh); that customer would be charged \$19.70 more under than single rate than the applicable non-residential uncollectible rate.

Moreover, the materiality of the ALJPO's inappropriate use of a single uncollectible rate can be demonstrated in the aggregate basis by using ComEd's switching statistics on file with the Illinois Commerce Commission. As of April, 2011, RESs would be negatively impacted by \$4.6 million on an annualized basis, with RESs serving residential customers receiving a benefit of approximately \$12,500.⁵

⁵ The overall increased cost to RESs would be \$4,655,852 consisting of an increased cost related to small commercial customers of \$1,677,693; an increased cost related to medium commercial customers of \$2,990,624; and a reduced cost related to residential customers of \$12,464. (Supply Options Chosen by Customers of Commonwealth Edison Company as of April 30, 2011, as reported to the Commission and set forth on the Commission's website)

Exception 5. The ALJPO erred to the extent that it relied upon the Commission's acceptance of ComEd's proposal to utilize a 50 cent per bill fixed charge to recover implementation and administrative costs associated with Rider PORCB as support for a single, blended uncollectible rate.

The ALJPO also accepts Dominion's argument that the Commission's decision to accept ComEd's proposal to utilize a fixed charge of 50 cents per bill to recover the implementation and administrative costs of Rider PORCB supports use of a single, blended uncollectible rate. The ALJPO does this despite acknowledging that ICEA and RESA are correct in pointing out that the propriety of the fifty cent per bill charge is not an issue here, asserting that the Commission "has a responsibility to view the impact of the PORCB elements, as a whole, upon customers". (ALJPO, p. 11)

Simply put, the Commission's acceptance of ComEd's proposal to recover implementation and administrative costs through a fixed 50 cent per bill charge does not have any bearing on whether a single or separate uncollectible rates should be used in Rider PORCB. The Commission adopted use of the 50 cent per bill fixed charge (which is not an issue on rehearing, but is an issue in Dominion's appeal from the Commission's Final Order) after a careful analysis. (Commission's Final Order, pp. 24-25) In particular, the Commission found:

Under the fixed charge approach, RESs are billed a fixed charge for what are fixed start-up and implementation costs that do not change with usage. In this way, all RESs are treated fairly and RESs serving high-use customers are not forced to subsidize RESs serving low-use customers. (Commission's Final Order, p. 24)

The Commission, after its careful analysis, concluded as follows:

Therefore, we conclude that ComEd's proffered \$0.50 cent, per-bill, fixed charge is in accord with the General Assembly's articulated purpose, which is contained in 220 ILCS 5-16-118(a), and is cited above. We are of the opinion that a fixed charge will serve to promote the development of an effectively competitive and fair electricity market because, according to record evidence, it provides the best opportunity to maximize participation for both residential and commercial customers. (*Id.*, p. 25)

The Commission clearly adopted the 50 cent per bill fee because the evidence in this case supported a finding that it reflected the actual costs of providing the bill, which has no relationship to the amount of the actual bill itself (“costs that do not change with usage”). Consistent with this reasoning, it is appropriate for the Commission to continue the implementation of both the 50 cent per bill fee as well as separate discount rates for residential and non-residential customers. RESA believes that cost causation principles support both findings and should be adopted by the Commission in this case.

Exception 6. The ALJPO errs in considering the adoption of subsidies as an appropriate means to promote competition for residential customers.

The ALJPO asserts that the Commission’s role, as defined by the General Assembly is to promote competition, generally, and that the promotion of competition necessarily favors including the interests of the vast majority of Illinois consumers. Directing this policy argument at the parties advocating separate uncollectible rates, the ALJPO states that neither RESA nor ICEA nor ComEd have stated any reason why “it is best to ignore what is more than 90% of the potential PORCB customers”. (ALJPO, p. 17)

Initially, ICEA and RESA note that they never argued that the Commission should ignore the interests of residential customers. Their point is that while a single, blended rate might encourage more activity in the residential market that does not make it a good policy decision for the Commission. There are many ways to encourage shopping in the residential market.

A policy decision which violates principles of cost causation and results in subsidization, as well as under recovery of ComEd’s uncollectible costs from the customers responsible for such costs is not appropriate. As a general matter, whenever there are two customer groups with one paying above-actual utility cost and the other receiving service below actual utility cost it is

understandable that the subsidized (e.g. Dominion when it decides to provide electric service in ComEd's service territory and utilize ComEd's Rider PORCB at some undisclosed time in the future) will favor that structure whereas the subsidizing customer group will avoid it if possible. (RESA Ex. 1.0 on Rehearing, p. 6) Arguments that such subsidies are justified because they are beneficial to supporting increased residential participation are not well taken because they depart from known and measurable costs, and once such a departure is adopted as policy, such arguments would also support much larger departures, such as a negative discount for one customer group at the expense of the other customer group. Although no party to this case has advocated for such a subsidy, it logically follows once the rate departs from cost causation principles. In sum, ICEA and RESA believe that it is simply best to not depart from actual cost causation principles and to allow cost causers to incur the actual cost of service by adopting separate discount rates for residential and non-residential custom groups in this instance.

Moreover, the ALJPO's implication that the General Assembly intended a purchase of receivables/consolidated billing program to only be utilized by residential customers is erroneous. the Illinois General Assembly intended that POR/UCB programs, like ComEd's Rider PORCB, be available for non-residential customers. Section 16-118 (c) requires ComEd to give RESs the option to have ComEd purchase their receivables not only for residential customers, but for non-residential customers with a non-coincident peak demand of less than 400 kilowatts:

An electric utility with more than 100,000 customers shall file a tariff pursuant to Article IX of this Act that provides alternative retail electric suppliers, and electric utilities other than the electric utility in whose service area the retail customers are located, with the option to have the electric utility purchase their receivables for power and energy service to residential retail customers *and non-residential retail customers with a non-coincident peak demand of less than 400 kW*. (220 ILCS 5/118 (c), emphasis added)

The Commission's decision to use a single, blended uncollectible rate results in a discount rate that is higher than historical uncollectibles for non-residential customers and renders this legislative demarcation point irrelevant and rendering this RES option illusory. (RESA Ex. 1.0 on Rehearing, p. 9) This is demonstrated by the extremely low participation rate (2.7%) by eligible non-residential customers in Rider PORCB, based on the most recent information available.

Finally, the implication of the ALJPO is that use of separate uncollectible rates would discourage RESs from utilizing Rider PORCB for their residential customers is clearly wrong. As previously stated, the Commission's December 15, 2010 order in this proceeding established separate uncollectible rates for residential and non-residential customers. However, contrary, to the implication of the ALJPO, residential customers receiving service from RESs were enrolled in Rider PORCB before the Commission's Amendatory Orders reversed the original decision and required ComEd to utilize a single, blended rate. In addition, using the logic of the ALJPO, in order for separate uncollectible rates to discourage use of Rider PORCB for residential customers, the difference between the single blended rate (1.84%) and the separate rate for residential customers (2.24%) is 40 basis points. This is less than the difference between the single blended rate and the separate rate for non-residential customers (1.84% minus 1.19%=65 basis points. Moreover, disregarding that the customer who uses Rider PORCB is the RES and not the retail customer, as stated previously, applying an increase of .40% to a typical monthly residential bill would result in an increase of only 20 cents. However, apparently the ALJPO considers 20 cents to be material to a residential customer, but not \$19.70 to an average medium delivery service customer.

Exception 7 Contrary to the ALJPO, the record shows that the use of a single, blended uncollectible rate has discouraged retail electric suppliers from utilizing Rider PORCB for non-residential customers.

The ALJPO asserts that, at this point in time, the use of statistics is not valuable because Rider PORCB is “just too new”. On this basis, the ALJPO declines to consider the statistics put on the record by RESA. (ALJPO, p. 11) While ICEA and RESA agree that the more statistical data is available, the better, ICEA and RESA disagree that the statistics that are available on the record in this proceeding are not valuable, given that these statistics show a startling difference between residential and non-residential participation in Rider PORCB. The most recent information available demonstrates that the use of a single uncollectible rate has discouraged the enrollment of non-residential customers under Rider PORCB. As of May 31, 2011, there were 21,276 residential customers taking service from a RES and 19,359, or 91%, of those customers were taking service under Rider PORCB. In contrast, as of May 31, 2011, there were 63,823 eligible (Watt Hour Delivery, Small Load Delivery, and Medium Load Delivery) non-residential customers taking service from a RES, but only 1,738, or 2.7%, were taking service under Rider PORCB. (RESA Ex. 2.0 on Rehearing, p. 7)⁶

Moreover, there is a consequence to the fact that non-residential customers are not being served under Rider PORCB. If only residential customers are enrolled in Rider PORCB, ComEd will not recover its uncollectible costs associated with Rider PORCB customers from those customers. Pursuant to the Amendatory Orders, ComEd is currently compensating RESs for their receivables based on a discount rate of 1.84%. However, ComEd’s historic bad debt experience for residential customers is substantially higher than that—2.23%. Obviously,

⁶ If the Commission or the ALJ desire more recent information, the ALJ should submit a post-record data request to ComEd seeking a verified response showing similar statistics for June 30, 2011.

ComEd will not be able to recover its uncollectible costs associated with Rider PORCB customers from those customers. (RESA Ex. 1.0 on Rehearing, p. 8) ComEd's witness acknowledged that the result will be that these unrecovered costs will have to be recovered from all eligible customers, not just those served under Rider PORCB. (ComEd Ex. 12.0, p. 7)

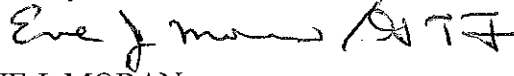
VII. CONCLUSION

A proper analysis of the law clearly demonstrates that the Commission is not required by Section 16-118 (c) of the Public Utilities Act to adopt a single, blended uncollectible rate for Rider PORCB. If anything, a full, complete review and a fair interpretation of the law strongly support ICEA and RESA's position, shared by ComEd, that the Commission should adopt separate, uncollectible rates for residential and non-residential customers.

Further, the evidence on rehearing in this proceeding overwhelming demonstrates that the Commission should reverse its decision approving a single POR/UCB discount rate for residential and non-residential customers and, instead, implement separate discount rates that reflect the historical uncollectible cost differences that are caused by both customer groups. The ALJPO, which reaches the opposite position, mainly by accepting, to the exclusion of other parties' sound and principles-based arguments, the self-serving arguments offered by Dominion,

the only party in this proceeding to advocate retention of the single, blended uncollectible rate, should be rejected by the Commission.

Respectfully submitted,



/S/ EVE J. MORAN

Eve J. Moran

An Attorney for the Illinois Competitive Energy Association

Respectfully submitted,



/S/ GERARD T. FOX

Gerard T. Fox

An Attorney for the Retail Energy Supply Association

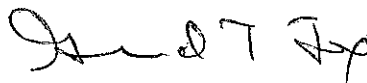
Eve Moran
Law Office of Eve Moran
128 S. Halsted
Chicago, IL 60661
(312) 720-5807
eve.jean.moran@gmail.com

Gerard T. Fox
Law Offices of Gerard T. Fox
Two Prudential Plaza
180 North Stetson, Suite 3500
Chicago, IL 60601
(312) 909-5583
gerardtfox@aol.com

NOTICE OF FILING

Please take note that on July 26, 2011, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Brief on Exceptions On Rehearing of the Illinois Competitive Energy Association and the Retail Energy Supply Association in this proceeding.

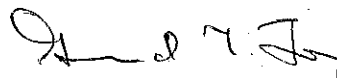
Dated: July 26, 2011



/s/GERARD T. FOX
Gerard T. Fox

CERTIFICATE OF SERVICE

I, Gerard T. Fox, certify that I served copies of the foregoing Brief On Exceptions on Rehearing of the Illinois Competitive Energy Association Retail Energy Supply Association, upon the parties on the service list maintained on the Illinois Commerce Commission's eDocket system for the instant docket via electronic delivery on July 26, 2011.



/s/ GERARD T. FOX
Gerard T. Fox