Docket Nos. 1-11-0603, 1-11-2715, 1-11-2716

IN THE APPELLATE COURT OF ILLINOIS
FOR THE FIRST JUDICIAL DISTRICT

DOMINION RETAIL, INC., ILLINOIS COMPETITIVE ENERGY ASSOCIATION, RETAIL ENERGY SUPPLY ASSOCIATION Petitioners-Appellants Vs. ILLINOIS COMMERCE COMMISSION; BLUESTAR ENERGY SERVICES, INC.; CITIZENS UTILITY BOARD; COMMONWEALTH EDISON COMPANY; DOMINION RETAIL, INC.; ILLINOIS COMPETITIVE ENERGY ASSOCIATION; ILLINOIS ENERGY MARKETERS COALITION NATIONAL ENERGY MARKETERS ASSOCIATION; RETAIL ENERGY SUPPLY ASSOCIATION Respondents-Appellees	)	Appeals from Order of the Illinois Commerce Commission in ICC Docket No. 10-0138

JOINT REPLY BRIEF OF PETITIONERS-APPELLANTS
ILLINOIS COMPETITIVE ENERGY ASSOCIATION AND
RETAIL ENERGY SUPPLY ASSOCIATION

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ORAL ARGUMENT REQUESTED

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(Overview)

Section 16-118(c) of the Public Utilities Act ("Act"), required the Illinois Commerce Commission ("ICC" or "Commission") to approve a "discount rate" for ComEd's purchase of receivables ("POR") service that was to be based on two elements. These are: (1) the electric utility's historical bad debt; and (2) any reasonable start-up and administrative costs associated with the utility's POR program. 220 ILCS 5/16-118(c). The Commission's Order on Rehearing (August 17, 2011), that the Illinois Competitive Energy Association ("ICEA") and the Retail Energy Supply Association ("RESA") challenge here, entered a final decision on the first of the discount rate elements, i.e., historical bad debt. It approved a single blended uncollectibles rate instead of the separate rates for the two classes of receivables as advocated for by ComEd, ICEA and RESA. The instant Reply Brief addresses the arguments of the Commission and Dominion Retail, Inc. ("Dominion") that attempt to defend the legality of that decision.

It is to be noted that a decision on the second of the discount rate elements, i.e., recovery of start-up and administration costs, had been entered in the Commission's Final Order (December 15, 2010) and left undisturbed in the subsequent Amendatory Order (February 9, 2011). While this decision is being challenged by Dominion in its consolidated appeal, it is one that ICEA and RESA fully support and so address in our Respondent-Appellee brief filed on February 27, 2012. This Reply Brief will indicate where the issues converge.

I. Contrary to the Order on Rehearing, The Statute Does Not Require a Single Rate.

A critical issue to be decided by this Court is what the General Assembly intended when it used the term discount "rate" in Section 16-118 (c) of the Act. [1] ICEA and RESA challenge the Order on Rehearing where, solely for reason of the term "rate" being expressed in the singular, it was determined that the statute, "does not permit this Commission to devise more than one "rate" for POR services." (Order on Rehearing at 5). Thus, for the historical debt element of the discount rate, the Commission rejected ComEd's proposal that would reflect the utility's actual bad debt experience for the residential class and its experience with the non-residential class (as defined by statute). Instead, the Commission approved a blended rate for the two classes as this met with the Order on Rehearing's faulty legal interpretation of the singular "rate." As shown in both our initial brief and here, this legal interpretive error as to what the statute requires, prejudiced the entirety of the Order on Rehearing's decision and requires reversal by this Court.

There is an inconsistency come to light in the course of briefing on the rate v. rates issue as the Commission tries to reconcile what it did in the December 15 Order (when addressing the discount rate element of start-up and implementation costs) with what it decided in its Order on Rehearing (as regards the historical debt element of the discount rate). On one hand, the Commission asserts that for the uncollectibles rate element that ICEA and RESA are challenging on grounds of legal misinterpretation, the Order on Rehearing found there to be no ambiguity in the statute but that it required a single rate. (ICC Br. at 8). Yet, with respect to Dominion's argument that the law requires a single percentage rate for both the element of start-up and administrative cost recovery (as well

[1] Notably, Dominion's appeal in this consolidated matter also involves the question of what the term "rate" means in Section 16-118 (c) of the PUA.

as the historical debt/uncollectibles element), the Commission disagrees, stating that the law is silent on how the discount rated is to be calculated. (Id. at 28). The Commission cannot have it both ways. The word "rate" in Section 16-118(c) can only have *one* meaning. This means that "discount rate" cannot mean one thing when the Commission is dealing with the start-up and implementation cost element of the statute and an entirely different thing when it is dealing with the historical debt element. The law, and logic, abhor such an inconsistency.

Before this Court is a question of law which is subject to full judicial review. The dispute on all sides, boils down to the same question, i.e., what did the General Assembly intend by the term "rate." Does the singular form of the word preclude anything other than a single percentage rate as Dominion contends throughout and as the Commission itself found - but only in the Order on Rehearing. Or, as ICEA and RESA assert, does giving due attention to the statutory definition of the term "rate" in Section 3-116 of the Public Utilities Act; the construction principles in the Illinois Statute on Statutes; and the vast case law authority set out and left undistinguished in our Initial Brief (at 18-23); and, our Response Brief (at 14-17), amply demonstrate that use of the term rate in the singular, standing alone, does not restrict the Commission from a structure that includes different rates, charges, rules, etc., to address the different elements. Notably, nothing in Dominion's brief or the Commission's brief, provides any reasonable analysis on the law that is to the contrary. (If anything, the Commission relies on some of the very same authority in defending its decision on the recovery of costs element in opposition to Dominion's single rate arguments. (ICC Br. at 29).

ICEA and RESA respectfully assert that the Commission had it right in two respects when it entered its Final Order on December 15, 2010. There, it correctly rejected Dominion's arguments that a "single percentage rate" was required under the law. (Final Order at 24). There too, the Commission recognized and followed traditional regulatory principles in setting a flat fixed charge for the utility's recovery of start-up and implementation costs. (Final Order at 24). In the Order on Rehearing, however, the Commission changed course and, by elevating form over meaning, its decision is rendered contrary to law. It is fundamental that the incorrect interpretation and application of a statute constitutes reversible error even where parties to the litigation had not sought the correct interpretation. Sutherland, Statutory Construction Sec. 45:3 at 24. ICEA and RESA pray this Court to reverse on the misinterpretation of law in these premises.

II. The ICC's Ultimate Decision Is Based on the Improper Use of a Policy Statement.

In its Order on Rehearing, the Commission took on the "role" to promote competition in the residential market, not because of any such directive in subsection (c) of the governing law, but because in its opening introduction to subsection (a), the General Assembly spoke generally of promoting competition as reason for that particular enactment. 220 ILCS 5/16-118 (a) and (c). (Order on Rehearing at 22)

The Commission here contends that it it was only following the rule of construction which holds that statutes should be "read as a whole" with all parts considered. (ICC Br. at 12). While that is true as a broad proposition, statutes also must be read sensibly. Here, everything the Commission needed to implement the law for the

instant proceeding was set out the substantive provisions of Section 16-118 (c) and the terms were clear and unambiguous. The Commission did not need to look elsewhere, i.e., to a policy statement in a different subsection for direction in reaching its decision. It already had, by its own words, "very specific" provisions to follow in the governing statutory subsection (Order on Rehearing at 5).

In their attempts to deflect attention from the Commission's legal error, both Dominion and the Commission fail at the task. This is so because each confuses a policy statement with a law's purposes. (Dominion Br. at 8-10) (ICC Br. at 12) These are, however, two very different things.

The "policy" statement in 16-118(a).

It is well-settled that a "policy statement" is *not* a substantive part of a statute. It simply gives reason for the legislative enactment. *Illinois Independent Telephone Ass'n v. Illinois Commerce Commission*, 183 Ill. App.3d 220, 539 N.E. 2d 717 (4th Dist. 1989). This shows itself where the General Assembly wrote in subsection (a) of Section 16-118, that:

> 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).

The remainder of subsection (a) is, as Dominion describes, a provision requiring all electric utilities to interconnect with RES. (Dominion Br. at 9). This is a subject totally different from the subject of the instant law, i.e., subsection (c) which only concerns the requirement that a utility offer RES a POR program. In short, while each subsection is part of Section 16-118, subsection (a) was adopted by the General Assembly at a much earlier time, concerns a different subject and addresses a purpose different from that in

Subsection (c). By law, a policy statement, such as set out in subsection (a) can only be used to clear up an ambiguity but neither Dominion nor the Commission point to any ambiguity precisely because there is none in Section 16-118(c). At bottom, the above-quoted policy statement in subsection (a) did not, as the Commission found, "proclaim the purpose of Section 16-118(c)." (Order on Rehearing at 16). Nor did it give the Commission authority to go beyond the substantive provisions of subsection (c).

The "purpose" of Section 16-118(c).

A law's purposes are derived from the substantive provisions of the very statute being implemented. This requires a studied look as to why the statute was enacted, i.e., what mischief did the General Assembly want to remedy by its passage of the law. There is a presumption that the lawmaker has a definite purpose in every enactment and has formulated the subsidiary provisions in harmony with the purpose. Sutherland, Statutory Construction, Sec. 46:5 at 218. Ascertaining a statute's purposes is useful when the language of a statute is unclear or ambiguous.

Without question, the purpose of 16-118(c) is to require ComEd to offer retail electric suppliers (RESs) a POR service. This comes from the General Assembly's recognition that a POR program brings an important "tool" for having RES serve the residential and small commercial customers that have yet to experience the many benefits of a fully competitive electric supply market. *See* Legislative History in Appendix B to ComEd's Initial Brief at page 28-30. Among the many benefits of POR programs, the one noted in the legislative debate, is that they eliminate the need for ARES to duplicate costly credit checks that were already performed by the utility (and paid for by the customer through the utility's base rates) when the customer initially signed up for utility

service. Id. The Commission reviewed this legislative history of P.A. 95-0700 and itself found nothing to indicate that the General Assembly intended any class of consumer [receivables] to be the primary beneficiary of this Act. (Final Order at 24). Yet, it ignored the same.

The opinion of *Johnston v. Weil*, 241 Ill. 2d 169 (2011) (cited in the ICC's brief at 12) holds that that the best evidence of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning. *Id.* at 175. Here, however, the Commission gave no attention to the two separate customer receivables that Section 16-118(c), both by its very terms, and in its purposes, was equally concerned with. Instead, it relied repeatedly and exclusively on an improper interpretation and use of a "policy statement," to adopt a blended uncollectibles rate given its misguided view that this would enlarge competition in one customer receivables group, i.e., the residential sector. Moreover, as Dominion's brief reflects, the Commission refused to reconsider the wrongfulness of relying on a policy statement and its assuming a "role" that even the policy statement does not, in any way, authorize. (Dominion Br. at 8). It is well-settled, that statutes should be interpreted and applied as they are written and not re-written to make them consistent with a court's idea of orderliness and public policy. *Kozak v. Retirement Bd. of Fireman's Annuity and Be. Fund of Chicago*, 95 Ill.2d 211, 447 N.E. 2d 394 (1983). Here, the Order on Rehearing has effectively rewritten the law. Being in violation of law on this additional ground, ICEA and RESA pray the Court to reverse the Order on Rehearing.

III. A Misuse of A Policy Statement and Flawed Interpretation of the Term "Rate" Resulted in a Legally Incorrect and Non-Neutral Decision.

The Commission devotes a long paragraph in its brief to show that, procedurally, this case does not differ from any other rate case. (ICC Brief at 14). It makes no mention, however, of any substantive similarities. As this proceeding was, indeed, a rate case, traditional regulatory principles, such as cost of service, avoidance of subsidization, and fairness, came into play. If anything, these principles held even more prominence in this rate proceeding because the Commission was dealing with competitive markets and not regulated monopolies.

This case involved the setting of just and reasonable rates for a new utility POR service established under Section 16-118(c) for the benefit of RES. Thus, different from a typical rate case, the law did not concern customer rates or charges. The discount rate, that was at issue here, is simply a reduction of the amount paid out to a RES for the utility's purchase of a customer receivable. It was for this reason that ComEd worked with interested parties to develop a fair approach to the discount rate that would be proposed to the Commission.

By its very terms, Section 16-118 (c) was intended for both RES residential customers receivables and RES non-residential customer receivables. Neither the statute nor the legislative history shows a preference for one class of receivables over the other. By law, the discount rate was required to be based, in part, on the utility's historical debt factors. The record showed ComEd's historic bad debt experience with residential customer class to be 2.23%. It further showed ComEd's historical bad debt experience with non-residential customer class as defined by statute, to be 1.17%. (ICEA/RESA Initial Brief at 34). The Order on Rehearing, however, imposed a blended rate of 1.84%,

thus lowering the discount rate for one class of receivables, and raising the discount rate for the other, for reasons that Section 16-118 (c) does not permit more than one "rate" for POR services (Order on Rehearing at 5), and that the policy statement in subsection (a) of Section 16-118 controls over subsection (c). (Order on Rehearing at 16).

Here, the Commission itself boldly asserts that Section 16-118(c) of the PUA does not provide for preferential or discriminatory treatment of the two customer classes of receivables. (ICC Br. at 15, Heading No. III). As such, it effectively agrees there was no statutory authority for the Commission to do anything other than create a discount rate in accordance with ComEd's historical bad debt experience for the two classes of receivables just as the utility proposed and ICEA/RESA supported. It did something different, however, on the basis of two legal errors. First, it finds, without reasoned legal analysis, that a single rate was required. (*See* Issue I above). Second, it assumes a "role" devised from a policy statement in another subsection of the statute and, at the same time ignores provisions of the substantive law at hand. (*See* Issue II above).

The Commission attempts to defend its decision on brief by claiming that its choice of a single blended uncollectible rate is a "neutral" one. (ICC Br. at 16). This is not borne out in the Order on Rehearing, however, when the Commission found that its role "necessarily favors" including the interests of the vast majority of Illinois customers." (Vol. 13, C-03177, Order of Rehearing at 22). All total, the Commission's assertion of "neutrality" is based solely on its claim that all customer receivables are subject to a single rate. (ICC Brief at 16). This is a false claim of neutrality when the unmistakable outcome is that one class of receivables is made to subsidize the other. True neutrality, is having each class of receivables reflect the true and actual bad debt experience that is

reflected in the utility's records. This is fair, non-preferential and meets with the statute's purposes of growing competition in both the residential and small commercial customer classes. And, as the Commission itself here recognizes, this is what the law requires.

The Commission further seeks to defend its decision on the grounds that another major electric utility, i.e., Ameren, did not create separate PORCB discount rates such that it was acting consistently in this matter concerning ComEd. (ICC Brief at 17). This argument has no value for several reasons. First, the Commission had already made a change from the single percentage rate it approved for Ameren in its December 15 Final Order for this proceeding when it correctly adopted a fixed charge for the statutory-mandated recovery of costs element. Second, as even the Commission admits, there was evidence before it showing that the Ameren POR program (based on a single percentage rate for both elements of the discount rate) was not working. (ICC Br. at 33; noting that record evidence showed "enrollment in the Ameren PORCB service was dismal."); (ICEA and RESA Response Brief at 19). Finally, as even the Commission is forced to admit, it has the power to decide similar cases differently provided that it has a reasonable basis for doing so. *Mississippi River Fuel Corporation v. Illinois Commerce Commission*, 1 Ill.2d 509, 116 N.E. 2d 394 (1953). Thus, the Commission's argument here fails on multiple grounds.

All in all, there are two major legal flaws that render the Order on Rehearing erroneous and have prejudiced the correctness and sustainability of the decision. Taking out these two legal errors would have led the Commission to a wholly different result. A proper legal construction of the term "rate" would have opened the Commission to accepting separate rates for residential customer based on the actual historical debt

recorded by the utility for these classes (a matter not in dispute). Further, had the Commission not turned to the policy statement (from another subsection) as a legal basis for its decision, it would have followed the substantive provisions of the actual governing law, i.e., Section 16-118 (c) which, as the Commission here confirms on brief, provides for no preferential or discriminatory treatment of any customer class. of receivables. This shows that the legal errors at issue in this appeal are definitely not harmless. As such, reversal of the Order on Rehearing is plainly warranted.

IV. Contrary to the Commission's Arguments, its Order on Rehearing Is Not Supported by Substantial Evidence.

The Commission claims that, contrary to ICEA's and RESA's position, its Order on Rehearing is based on substantial evidence. (ICC Br. at 18-25). Yet, despite devoting a lengthy section of its Brief to this position, the Commission never cites to what evidence it actually relied on to support the conclusion that a single uncollectible rate should be used. Instead of identifying affirmative evidence to support its decision of a single, blended uncollectible rate, the Commission simply says that it did not find the evidence in support of separate uncollectible rates for residential and non-residential customers to be "compelling." (Id., at 18).

Next, the Commission claims that there was no evidence on the subject of single rather than separate uncollectible rates *until* the proceeding on rehearing. (Id., at18-19). While it is indeed true that there was *no* evidence supporting a single uncollectible rate in the case in chief and thus no basis for the Amendatory Orders (ALJ Memorandum to the Commission; Vol.10, C-02512), there was overwhelming evidence supporting separate uncollectible rates (ICEA/RESA Opening Br. at 32-46). At bottom, the Commission provides no sound reason to avoid the whole of the record and focus only on one side of

the dispute. While the rehearing was made necessary by the Commission's abrupt decisional change to a single uncollectible rate (as reflected in the Amendatory Orders), its decision-making in the rehearing proceeding surely was not restricted to considering only the evidence to affirm that change. Such action implicates due process.

The Commission further makes the accurate, but irrelevant suggestion, that there could be seven uncollectible rates utilized in Rider PORCB. (ICC Br. at 20). While this may have been possible in the abstract, it is irrelevant because no party, either in the main case or on rehearing, proposed seven uncollectible rates. Thus, this argument is a red herring.

The Commission next claims, that whether it used a single uncollectible rate, separate uncollectible rates for residential and non-residential customers, or seven uncollectible rates, "all the rates are designed to recover ComEd's historical bad debt expense." (*Id.*, at 20). This is true in the abstract, but wrong to the extent the Commission suggests that there is no consequence to any rate design. The record shows that if only residential customers are enrolled in Rider PORCB, there is a substantial risk that ComEd will not be able to not recover its uncollectible costs associated with Rider PORCB from the customers served thereunder. (Vol.16,Tab 23,ComEd Ex. 12.0 at 7). This is because, pursuant to the Amendatory Orders and the Order on Rehearing, ComEd is currently compensating RESs for their receivables based on a discount rate of 1.84%. The record shows, however, that ComEd's historic bad debt experience for residential customers, the vast majority of the customers being served under Rider PORCB, is substantially higher than that—2.23%. In short, ComEd will be unable to recover its uncollectible costs associated with Rider PORCB from those customers alone, and, as explained below,

there is no reason for RESs to utilize Rider PORCB for their non-residential customers. (Vol. 16 Tab 33, RESA Ex. 1.0 at 8) The result will be that these unrecovered costs will have to be recovered from all eligible customers, not just those served under Rider PORCB. (Vol. 16 Tab 23, ComEd Ex. 12.0 at 7). The Commission did not properly consider these skewed economic effects of its decision (and has not attempted to defend them here).

The Commission also claims, incorrectly, that the December 15, 2010 Order did not expressly approve separate uncollectible rates for residential and non-residential customers. (ICC Br.at 20-21) This, however, is irrelevant. The December 15, 2010 Order "permanently cancelled and annulled" ComEd's proposed tariff sheets and authorized it to file tariff sheets in conformance with the Order. (Final Order at 52) Thus, ComEd filed tariff sheets for Rider PORCB reflecting separate uncollectible rates for residential and non-residential customers, consistent with the Commission's Order which stated that:

> No party contested ComEd's proposal that, to determine the percentage reduction for the recovery of uncollectible costs that are associated with the purchase of receivables, ComEd will apply the same supply-related uncollectible cost factors set forth in its Rider UF – Uncollectible Factors ("Rider UGF") that it applies to its own supply charges under Rate BES, ComEd's fixed-price bundled electric service tariff. This proposal links the historic bad debt rates used in setting ComEd's supply charges with those used in the PORCB discount. (*Id.*, at 5).

This tariff remained in place until ComEd made its compliance filing pursuant to the Commission's Order on Emergency Motion for Clarification entered on February 23, 2012. Besides being wrong, this argument adds no support for the Order on Rehearing.

The Commission further attempts to refute ICEA's and RESA's argument that its approval of a single uncollectible rate violates principles of cost causation. It is unclear,

however, whether the Commission is arguing that principles of cost causation do not matter at all, or if they do not matter here because, according to the Commission, the difference between the appropriate uncollectible rate for non-residential customers (1.17%) and the single blended uncollectible rate of 1.84% is not "material." As part of its argument, the Commission makes the absurd claim that a logical extension of ICEA's and RESA's argument is "that no ARES would be willing to serve residential customers at all with their 2.23% discount." (ICC Br. at 21-23) In this regard, the Commission's displays a complete misunderstanding of both the costs involved and the principles of cost causation. A brief explanation might help to clear up this misunderstanding. ComEd's historical uncollectible rate for residential customers is 2.23%. Consequently, ARES serving residential customers (either singly or in the aggregate) under Rider PORCB are being fully compensated for their uncollectible costs and would not be discouraged from signing up such residential customers for Rider PORCB. In contrast, ComEd's historical uncollectible rate for non-residential customers is 1.17%. ARES serving non-residential customers would be discouraged from signing up such non-residential customers for Rider PORCB if they are going to pay ComEd a higher uncollectible rate (1.84%) than the 1.17% uncollectible rate that they would expect to experience from these non-residential customers. Thus, there is an imbalance in the use of the POR service that the Commission intends to promote.

As to the long-standing regulatory principle of cost causation, the point is simple. Where, as here, it is wholly possible to apply the correct uncollectible rate to residential (2.23%) and non-residential (1.17%) customers, the Commission's decision to apply an incorrect blended rate (1.84%) violates the principle of cost causation. As such, it creates

a distortion, i.e., improper subsidy, in a competitive market. Notably, the Commission recognized the importance of maintaining faithfulness to traditional regulatory principles in other parts of its Final and Amendatory Orders, but flatly abandoned these here with no explanation for the inconsistency.

In the context of its argument regarding cost causation, the Commission makes the mistaken claim that the difference between the single, blended uncollectible rate and the separate rate for non-residential customers is not "material". (ICC Br. at 22). It never really defines or explains its use of the term "material". Ignoring for the moment the implication that a subsidy is acceptable if it is not "material," this argument is plainly 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. This is so because it makes no economic sense for a RES to enroll non-residential customers (for which ComEd experiences an uncollectible rate of 1.17%) and pay the higher discount of 1.84% to ComEd. (Vol. 16, Tab 33, RESA Ex. 1.0 at 7).

Next, the Commission refers to Staff's position that the "best reason" for having a single uncollectible rate was the imposition of the $0.50 fixed bill charge to recover start-up and implementation costs[2], but then makes the confusing statement that it will not respond to ICEA's and RESA's arguments regarding the $0.50 fixed bill charge because it "has little to do with the single uncollectible rate versus multiple rates issue." (ICC Br. at 24). Indeed, ICEA's and RESA's arguments demonstrated that, indeed, the

[2] Note that while the Commission's Brief cites Staff witness' testimony to defend the Commission's decision to impose a single uncollectible rate instead of separate uncollectible rates, the Commission Staff witness clearly stated that "Staff does not prefer one method over the other." (R.17, Tab 57, Staff Ex. 2.0 on Rehearing, p. 2)

Commission's adoption of the $0.50 fixed bill charge has *nothing* to do with the single uncollectible rate versus separate uncollectible rates issue given that the Commission decided, on its own merits and correctly so, that the $0.50 per bill charge was the appropriate way to recover the start-up and implementation cost element of the discount rate. Unlike what happened here, with the Order on Rehearing, the Commission's decision on the recovery of costs element rested in large part on the regulatory principles of cost causation, fairness and neutrality.

Finally, the Commission concludes its argument by restating that its determination to use a single uncollectible rate is supported by evidence. (ICC Br. at 24) Unfortunately, the Commission fails to cite any such evidence anywhere between the beginning and end of its argument. This is because, as demonstrated by ICEA and RESA in their Joint Appellant Brief, the Commission's decision to use a single uncollectible rate is not supported by substantial evidence and is against the manifest weight of the evidence.

V. Contrary to Dominion's Arguments, the Commission's Order on Rehearing Is Not Supported by Substantial Evidence.

A. The Order on Rehearing is Not Consistent With Cost of Service Principles.

Dominion claims that the single blended uncollectible rate is based on ComEd's historical uncollectibles because the figure adopted in the Order (1.84%) is a weighted average of the historical uncollectibles of all customers eligible for PORCB service. (Dominion Br. at 12) Dominion's argument makes no sense as a simple example will show. If ComEd's cost of service were $1 million and ComEd had 1000 customers divided between two classes with Class 1 having 900 customers and a cost of service of

$950,000 and Class 2 having 100 customers and a cost of service of $50,000, Dominion would argue that charging each customer in both classes $1000 would not violate cost of service principles because ComEd would collect $1 million in total and that is its total cost of service. Long-standing cost causation principles, however, dictate that Class 1 customers should pay approximately $1055 ($950,000 divided by 900) each, while Class 2 customers should pay $500 ($50,000 divided by 100) each. Similarly, in this case, RESs should pay an uncollectible rate of 2.23% for residential customers (because that is ComEd's uncollectible cost for residential customers) and 1.17% for non-residential customers (because that is ComEd's uncollectible cost for non-residential customers). This is a neutral, fair, and proper end that Dominion ignores.

As part of its cost of service argument, Dominion points to its own bad debt experience for its gas customers in the service territory of Northern Illinois Gas Company based on its own business practices. (Dominion Br. at16) Initially, ICEA and RESA would point out that Dominion is forced to talk about its gas customers because, at the record shows, it has no relevant experience with electric customers and no electric customers in Illinois. (C-02796, Dominion Revised Ex. 1.0R, p. 3). In any event, under Section 16-118 (c), ComEd's discount rate is to be based, in part, on "the electric utility's historical bad debt..." (220 ILCS 5/16-118 (c)), and not on the debt of Dominion or any particular RES. Thus, Dominion's own bad debt experience with its gas customers is irrelevant to ComEd's cost of service here.

B. The ICC's Adoption of a Single Blended Uncollectible Charge Has Discouraged RESs from Utilizing Rider PORCB for Non-residential Customer Receivables.

Dominion claims that ICEA and RESA are wrong in stating that use of a single uncollectible rate discourages non-residential participation in Rider PORCB. According

to Dominion, RESs enrolled 365 non-residential customers under Rider PORCB during its first two months of operation when the tariff reflected separate uncollectible rates, but 2058 non-residential customers after Rider PORCB was revised to reflect the single blended uncollectible rate. Dominion's numbers are meaningless, however, at this short-term stage, evidencing nothing more than would be expected from the start-up of a new program.

On rehearing, meaningful and telling evidence was introduced to demonstrate that the use of a single uncollectible rate discouraged RESs from utilizing Ride PORCB for non-residential customers. These statistics, on record, showed a major difference between residential and non-residential participation in Rider PORCB. The most recent information available before the close of the record in the rehearing proceeding showed that, 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. (Vol. 16 Tab 34 RESA Ex. 2.0 at 7). In other words, RESs were almost 34 times more likely to place their residential customers than their non-residential customers on Rider PORCB.

RESA offered the best and most recent evidence available, consistent with the requirement on the Commission to enter an order on rehearing in five months. It was responsive to the Commission's concerns and should not have been dismissed out of hand. The Commission's failure to consider that evidence results in an Order on Rehearing that should be reversed because it is against the manifest weight of the

evidence. *Citizens Utilities v. Illinois Commerce Comm'n,* 124 Ill. 2d 195, 206; 529 N.E. 2d 510, 516 (1988).

C. By Failing to Consider All of the Evidence, and Relying on Selective Positions That Would Affirm the Amendatory Order's Decision, the Order on Rehearing is Against the Manifest Weight of the Evidence.

Dominion's arguments do not detract from RESA's and ICEA's showings on pages 41-46 of their Opening Brief, that the Commission accepted the position of Dominion wholesale and rejected the position of ICEA and RESA (and ComEd) without due consideration or critical analysis of the entirety of the record. Dominion would claim that such is the nature of litigation. (Dominion Br. at 20). But, rate-setting is a legislative not a judicial function, requiring more than just picking winners and losers. Here, the Order on Rehearing accepted all the arguments of a single RES; but gave no weight to the evidence or legal positions of associations representing the majority of the RES community that was entitled, under Section 16-118 (c), to a fair and reasonable discount rate. (Vol. 16, Tab 24, ComEd Ex. 1.3). Clear from the way the Order on Rehearing framed the issues for decisions, and the law it selected to apply, the Commission did not consider *all* the evidence but merely that which would affirm the decision once summarily announced in its Amendatory Orders.

All total, Dominion claims there was evidence supporting its arguments that the Commission accepted. (*Id.* at 22) This, however, says nothing about what the manifest weight of the evidence showed, or the law or regulatory principles required.

CONCLUSION

The legal errors discussed above and in our opening brief show that the Order on Rehearing is fatally flawed. For these and all the reasons set out above, ICEA and RESA jointly pray that the Court reverse and remand the Order on Rehearing entered by the Illinois Commerce Commission on August 17, 2011.

Dated: March 19, 2012

Illinois Competitive Energy Association

By one of its Counsel

Residential Energy Supply Association

By one of its Counsel

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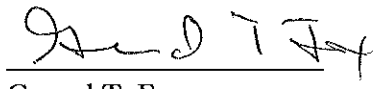
CERTIFICATE OF COMPLIANCE

I certify that this Joint Reply Brief conforms to the requirements of Illinois Supreme Court Rules 341 (a) and (b). The length of the Joint Reply Brief of Petitioners-Appellants Illinois Competitive Energy Association and Retail Energy Supply Association, excluding the pages containing the Rule 341 (d) cover, the Rule 341 (h) (1) statement of points and authorities, the Rule 341 (c) certificate of compliance, and the certificate of service is no more than 20 pages.



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Docket Nos. 1-11-0603, 1-11-2715, 1-11-2716

IN THE APPELLATE COURT OF ILLINOIS
FOR THE FIRST JUDICIAL DISTRICT

DOMINION RETAIL, INC., ILLINOIS COMPETITIVE ENERGY ASSOCIATION, RETAIL ENERGY SUPPLY ASSOCIATION Petitioners-Appellants	)	Appeals from Order of the Illinois Commerce Commission in ICC Docket No. 10-0138
Vs.	)	
ILLINOIS COMMERCE COMMISSION; BLUESTAR ENERGY SERVICES, INC.; CITIZENS UTILITY BOARD; COMMONWEALTH EDISON COMPANY; DOMINION RETAIL, INC.; ILLINOIS COMPETITIVE ENERGY ASSOCIATION; ILLINOIS ENERGY MARKETERS COALITION NATIONAL ENERGY MARKETERS ASSOCIATION; RETAIL ENERGY SUPPLY ASSOCIATION Respondents-Appellees	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that on March 19, 2012, the undersigned caused to be filied with the Clerk of the Court, First District Appellate Court, 160 N. LaSalle Street, Chicago, IL 60601, the attached Reply Brief of Appellants-Petitioners Illinois Competitive Energy Association and Retail Energy Supply Association, a copy of which is hereby served upon you.

Dated: March 19, 2012

By: _____

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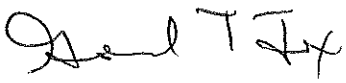
CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused to be served three copies of the Joint Reply Brief of Petitioners-Appellants Illinois Competitive Energy Association and Retail Energy Supply Association upon each of the parties identified in the attached Service List at the addresses indicated by personal delivery or by deposit in the United States mail, with proper postage prepaid at 200 East Randolph, Chicago, IL 60601, before 5:00 p.m., on this 19th day of March, 2012.



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SERVICE LIST
First District Appellate Ct. Nos. 1-11-0603, 1-11-2715, & 1-11-2716
ICC No. 10-0138
Dominion Retail, Inc. *et al.* v. ICC, *et al.*
November 4, 2011

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