

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	10-0109
	:	
Adoption of 83 Ill. Adm. Code 455.	:	

**PROPOSED SECOND NOTICE ORDER**

By the Commission:

**I. PROCEDURAL BACKGROUND**

On February 10, 2010, the Illinois Commerce Commission (“Commission”) entered an Order commencing this rulemaking proceeding to adopt new Part 455 that addresses the State of Illinois’ renewable portfolio standard and clean coal standard as applicable to alternative retail electric suppliers (“ARES”) and electric utilities operating outside their service territories. Initiating Order. This same Order directed that a “Notice of Proposed Rulemaking be submitted to the Illinois Secretary of State pursuant to Section 5-40 of the Illinois Administrative Procedure Act to initiate the first notice period for public comment.” *Id.* at 2.

Having provided due notice, on March 29, 2010, a duly authorized Administrative Law Judge (“ALJ”) convened a status hearing. On that date, a schedule was adopted for the submission of formal comments.

Verified initial comments were timely submitted on or before April 9, 2010, by BlueStar Energy Services, Inc. (“BlueStar”), FirstEnergy Solutions Corp. and MidAmerican Energy Company, as the Coalition of Energy Suppliers (collectively, “the Coalition” or “CES”), the Illinois Industrial Energy Consumers (“IIEC”), and the Illinois Competitive Energy Association (“ICEA”). Thereafter, on April 23, 2010, verified reply comments were filed by BlueStar and the Commission Staff. Finally, on April 30, 2010, verified surreply comments were submitted by IIEC, CES and the Coalition.

The ALJ issued a proposed second notice order on May 7, 2010.

**II. PROPOSED RULE CHANGES UNOPPOSED**

**Section 455.10**

In Staff’s reply comments, the following definitional modification was proposed, to wit:

"Supplied," in relation to a quantity of energy, means energy obtained by an ARES or an electric utility serving a retail customer outside its service area and delivered to a retail customer by an electric utility providing delivery services to the retail customer, with the quantity of energy measured at the customer meter; provided, however, that only with respect to determining whether a combined heat and power system in Illinois supplies electricity primarily to or for the benefit of facilities identified in Section 16-115D(h) of the PUA, supplied also includes energy generated by a combined heat and power system and used at those facilities, regardless of whether it passes through the customer meter.

### **Analysis and Conclusion:**

No party takes issue with Staff's proposed revision to Section 455.10. The Commission finds the change to be reasonable and consistent with law.

### **Section 455.100**

Through their discussion and the interexchange of ideas in their respective comments, Staff and the IIEC appear to agree that this section 455.100, is properly modified as follows:

This Subpart does not apply to electric cooperatives or municipal systems making an election under Section 17-300 of the Act [220 ILCS 5/17-300] to become an alternative retail electric supplier or, except as provided in Section 455.140 of this Subpart, to an ARES who is exempt from the requirements of Section 16-115D of the Act [220 ILCS 5116-115D(h)].

### **Analysis and Conclusion**

The language changes that grew out of solid discussions between Staff and the IIEC are appropriate, in conformity with the law.

## **III. RULE SECTIONS IN DISPUTE**

### **Section 455.20**

There are two subsections to Section 455.20. BlueStar, however, directs its comments, and the Commission's attention, solely to subsection (a).

- a) In addition to any other requirements of this Part or of any other applicable law, an ARES or electric utility serving retail customers outside its service areas shall maintain original records of all contracts and bills associated

with Illinois retail customers who received electricity for at least 36 months beyond the end of the compliance period during which the electricity was supplied. All these records and any other documentation or information regarding the compliance by an ARES or electric utility serving retail customers outside its service areas with the renewable portfolio standard and clean coal standard shall be made available to the Commission or its Staff upon written request.

- b) If information contained in any report filed pursuant to this Part or provided to the Commission or Staff upon written request contains or reflects commercially or financially sensitive information or trade secrets, the ARES or electric utility serving retail customers outside its service area may file that information with the Commission on a confidential basis. To be filed confidentially, the information shall be accompanied by an affidavit that sets forth both the reasons for the confidentiality and a public synopsis of the information as required by Section 16-115D(e) of the Act. If a report contains information filed on a confidential basis, the ARES or utility shall file both a "confidential" and a "public" version of the report and attached documentation, with all confidential information marked "Confidential". Commission Staff is authorized to publicly disclose documentation and information provided pursuant to this Part without a confidential designation pursuant to Section 5-108 of the Act [220 ILCS 5/5-108].

BlueStar takes issue with current Section 455.20(a) based on its belief that the "36 months" record retention requirement is excessive, contrary to current administrative rules and provides little benefit while adding unnecessary and excessive costs to ARES. BlueStar states that is unaware of any complaints to the Commission or problems associated with the current 24 month record retention period provided in Section 451.40 Customer Records and Information. Thus, absent greater factual support that identifies a need for the imposition of an additional twelve months record retention requirement, BlueStar maintains that the 24 month record retention period provided in Section 451.40 should apply in these premises.

In its reply comments, Staff explains why the 36 month record retention period was selected and why it is reasonable. At the outset, and particularly because of the provision that usage pursuant to contracts entered into prior to March 15, 2009 is exempt from the calculation of how many MWHs are subject to the RPS, Staff concluded that customer records can be relevant to determining compliance. In greater detail, Staff points out that each compliance period begins June 1 and ends May 31 (this means to Staff, that already 12 months are taken up). Further, Staff notes that reports are submitted on September 1 of the following year (this moves the matter up to 16 months). Staff also assumed it would take approximately two months to review all the ARES reports, uncover matters for further investigation, and initiate any necessary

proceedings to investigate compliance (these steps bring the time to 18 months). From there, Staff expects that it might take another year, i.e., 12 months, to complete litigation, during which time it would want access to customer records relevant to the question of compliance (this now adds up to 30 months). Staff reasons that the additional 6 months would allow for two events. The first is that instance where a case takes longer than one year to resolve. The second is the situation where the records will have to reach back prior to the start of the compliance period and, indeed, may have to reach back prior to March 15, 2009. Staff submits that the basic timeline it has here sketched out is more than sufficient to justify a 36 month records retention requirement.

Further, BlueStar seeks clarification as to whether the rule would require companies to retain the *original paper* records or whether *electronically stored records* would suffice. In an effort to be environmentally-responsible, BlueStar maintains that its business practice is to refrain from printing, storing or sending "paper" customer contracts or bills whenever possible. The imposition of a "paper" requirement, BlueStar asserts, would not only run counter to its business practices and green philosophy, but would also cause BlueStar to incur excessive costs printing and storing such documents as well as requiring a significant change to its billing operations and processes, without any corresponding benefit to anyone.

Staff answers BlueStar request for clarification as to the form of record retention that might be required. To begin, Staff notes that the Commission's Rules of Practice allow and encourage the use and filing of electronic documents. See generally, 83 Ill. Admin. Code Part 200, Subpart F. Further, Staff points out that the admissibility of electronically stored records supported by a proper foundation is recognized under Illinois law. The short answer, Staff posits, is that the proposed rule does not contain an explicit "paper" record requirement, such that electronic records would be compliant provided they are electronic business records that would otherwise be admissible under Illinois law.

### **Analysis and Conclusion**

In response to BlueStar, Staff provided the requested factual support for 36-month record retention in its reply comments. While the desired consistency that BlueStar seeks as between Section 451.50 and 455.20 might be more streamline for a company, it is not always optimal for the regulatory agency dealing with new and different responsibilities.

Given that the Commission is presented with a new range of supervisory matters, it makes good sense to extend the record retention period. Indeed, by detailing the timelines for stages of review, Staff has satisfactorily demonstrated the 36-month retention period to be reasonably necessary. In short, the Commission finds that no change is warranted and thus rejects BlueStar's proposal.

As to the question of form, the Commission agrees that electronic records, properly kept, more than suffice for present purposes. We wonder, however, if the rule itself should not clarify that either paper or electronic records are acceptable in fulfillment of the record retention function.

### **Section 455.120(c)**

In its current form, Section 455.120 (c) provides that:

If metered electricity supplied to Illinois retail customers by an ARES or supplied by an electric utility in Illinois outside the utility's service territory are supplied during the compliance period pursuant to contracts that were not executed or extended after March 15, 2009, the ARES or utility shall provide a list, by utility service territory, of those Illinois retail customers who received electricity that was not supplied pursuant to contracts executed or extended after March 15, 2009. The list shall include the following information: account number(s), and the quantity of electricity (in megawatt-hours) supplied to the account number(s) during the compliance period that was not supplied pursuant to contracts executed or extended after March 15, 2009.

Two proposals have been set out in respect to this rule. Proposal A is that the rule should be deleted in its entirety. Proposal B is for amending the rule in the event that Proposal A fails.

#### Proposal A: Section 455.120(c) should be deleted.

In their respective comments, the Coalition and BlueStar express concern for placing into jeopardy their obligations to maintain the privacy of confidential customer information. According to the Coalition, its members operate in a manner that respects the privacy of their customers' data and further strive to protect from disclosure aggregate information regarding their provision of electric service in the competitive market as such non-public information is competitively sensitive and public disclosure could impede a supplier's ability to effectively compete. As a result of this heightened sensitivity to the potential disclosure of confidential information, the Coalition recommends deleting Section 455.120(c) in its entirety. BlueStar shares this view.

Both parties point out that nothing in the underlying statute requires or authorizes a provision such as Section 455.120(c). Under Section 5/16-115D(a)(6) of the Act, they note, the required procurement of renewable energy resources applies to electricity metered under post-March 15, 2009 contracts. See 220 ILCS 5/16-115D(a)(6). In other words, they argue, the statutory obligation does not apply to electricity metered under pre-March 16, 2009 contracts or contract extensions. As such, there is no statutory basis to require the submission of information about pre-March 16, 2009 contracts or contract extensions, as Section 455.120(c) of the Proposed Rules would require. These

parties also find no policy justification to require reporting of information about pre-March 16, 2009 contracts or contract extensions.

For its part, Staff notes that ARES are effectively exempt from the RPS to the extent to which they supply electricity to Illinois retail customers pursuant to contracts that were not executed or extended prior to March 15, 2009. 220 ILCS 5/16-115D(a)(6). Further Staff observes that the information required by Section 455.120(c) is a list, by utility service territory, of those Illinois retail customers who received electricity that was not supplied pursuant to contracts executed or extended after March 15, 2009. More specifically, Staff sees Section 455.120(c) to require the following data: account number(s), and the quantity of electricity (in megawatt-hours) supplied to the account number(s) during the compliance period that was not supplied pursuant to contracts executed or extended after March 15, 2009.

Staff maintains that it needs this data to check and determine if an ARES is making valid exemption claims. In Staff's view, the Coalition's claims to the contrary have no merit. More egregiously, Staff says, the Coalition's proposal would deprive the Commission of a factual basis by which to determine if ARES are properly complying with the law.

### **Analysis and Conclusion**

The Commission does not take lightly the confidentiality concerns voiced by the Coalition and BlueStar. At the same time, however, we observe Staff to tell us that the information called for in the rule is necessary in order to determine compliance with the law. At bottom, however, we do not need to choose between these two values.

In our view, the parties opposing the provision of the requested information confuse the submission of confidential information to the Commission with the public disclosure of the information. In this regard, the Commission observes that there is in Section 455.20 of the proposed rule a specific provision allowing for the special treatment of confidential or proprietary information. This provision offers reasonable and adequate protection to both the ARES and its customers and, at the same time, allows Staff access to the information needed to do its work. Thus, the rule as a whole works the right balancing of interests. For this reason, we reject the proposal to delete 455.120(c).

BlueStar makes mention of the need for a standardized form that would guide the ARES to provide the relevant information in a step-by-step fashion to reduce confusion and ultimately result in standardized reporting compliance across all suppliers. We agree and believe that Staff should develop such a form outside the rulemaking process.

Alternative Proposal B - Section 455.120(c) Should Be Modified

In the event that Section 455.120(c) is retained in the Proposed Rules, the Coalition respectfully requests that it be revised as follows:

If metered electricity supplied to Illinois retail customers by an ARES or supplied by an electric utility in Illinois outside the utility's service territory are supplied during the compliance period pursuant to contracts that were not executed or extended after March 15, 2009, the ARES or utility shall provide the total number of customers and aggregated load (in megawatt-hours)~~a list, by utility service territory~~, of those Illinois retail customers who received electricity that was not delivered pursuant to contracts executed or extended after March 15, 2009. ~~The list shall include the following information: account number(s), and the quantity of electricity (in megawatt-hours) supplied to the account number(s) during the compliance period that was not delivered pursuant to contracts executed or extended after March 15, 2009.~~ Unless a request for non-confidential treatment is submitted with the information, all such information provided under this sub-section shall be accorded confidential treatment by the Commission for a period of not less than five years from the date of submission.

At the least, the Coalition and BlueStar contend, this Section 455.120 (c) should be modified to eliminate the requirement of customer-specific information. In the view of these parties, the most that should be required is aggregate information, and even this should be accorded automatic confidential treatment under Section 5/4-404 of the Act, which provides:

Protection of confidential and proprietary information. The Commission *shall* provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person, corporation or other entity.220 ILCS 5/4-404. (Emphasis added.)

According to the Coalition, the provision of aggregated data that is subject to automatic confidential treatment in accordance with Section 5/4-404 of the Act, would surely permit the Commission to make whatever analysis it needs or wants to undertake to ensure compliance with the Act. It is only after something is found amiss, the Coalition suggests, that the provision of more specific information should be required. BlueStar strongly supports the Coalition's proposed modification for all of the same reasons.

Staff understands the Coalition to propose modifying Section 455.120(c) so as to only require the provision of aggregate data. Staff points out, however, that the

information that would be provided under the proposed rule modifications, would be of no help in checking if the ARES was making valid exemption claims. Staff also notes that Section 455.20 of the proposed rule contains provisions allowing for the confidential treatment of confidential or proprietary information.

### **Analysis and Conclusion**

The Commission understands Staff to need the information just as it is specified in Section 544.120 (c). This means that the modification proposal set out by the Coalition and supported by BlueStar would not provide a viable substitute. As we see it, the real concern that is driving these parties' proposal is the confidential nature of the requested data. Nothing however, precludes the ARES or utility from submitting that requisite information to the Commission on a confidential basis. In short, following the procedures set out in Section 455.20 will satisfy both the data provider's confidentiality concerns and still allow the Commission to fulfill its responsibilities. Notably, BlueStar itself observed that Section 455.20(b) permits ARES and utilities covered by new Part 455 to designate commercially sensitive information as confidential consistent with Section 16-115D(e) of the Act. Thus, no change to 544.120(c) is warranted and the alternative proposal is rejected.

### **IV. PROPOSED RULE CHANGES EVOLVING**

Subsection (h) of Section 16-115D of the Public Utilities Act provides, in full, as follows:

The provisions of this Section and the provisions of subsection (d) of Section 16-115 of this Act relating to procurement of renewable energy resources shall not apply to an alternative retail electric supplier that operates a combined heat and power system in this State or that has a corporate affiliate that operates such a combined heat and power system in this State that supplies electricity primarily to or for the benefit of: (i) facilities owned by the supplier, its subsidiary, or other corporate affiliate; (ii) facilities electrically integrated with the electrical system of facilities owned by the supplier, its subsidiary, or other corporate affiliate; or (iii) facilities that are adjacent to the site on which the combined heat and power system is located. 220 ILCS 5/16-115D(h).

In reviewing the initial comments of the IIEC together with the above Section 16-115D of the Public Utilities Act, Staff took a studied consideration of that party's various proposals with respect to Section 455.140. In large part, Staff agreed with the legal and factual matters that the IIEC discussed but had its own ideas for the exact language structure. There were also strong differences on some aspects of the rule viewed as being so important to Staff that it would not compromise. In the end,

however, Staff reworked a substantial amount of modifications into Section 455.140 and presented this proposal as Attachment A to its Reply Comments.

We now consider all the changes for all subsections of Section 455.140 together with further proposals as set out in IIEC's surreply comments.

### **Section 455.140 (a)**

- a) An Any-ARES certified only to serve (i) facilities owned by itself or its affiliate, (ii) facilities electrically integrated with the electrical system of facilities owned by itself or its affiliate, and/or (iii) facilities adjacent to a site on which a combined heat and power system is located may seek a determination that it is exempt from application of Section 16-115D and Section 16-115(d) of the Act pursuant to Section 16-115D(h) of the Act. An ARES whose certificate is not so limited and grants it authority to serve retail customers generally is not eligible for the exemption pursuant to Section 16-115D(h) of the Act. or electric utility serving retail customers outside its service areas. An ARES claiming that Section 16-115D and Section 16-115(d) of the Act do not apply to it pursuant to Section 16-115D(h) of the Act must first request a determination that it is exempt under Section 16-115D(h) of the Act either in its original application for certification as an ARES or subsequently in a separate petition to the Commission filed file a petition pursuant to the Commission's Rules of Practice (83 Ill. Adm. Code 200) for this determination ("Section 16-115D(h) Request-Petition") and receive an order from the Commission granting its request for this determination. If the Commission enters an order granting a Section 16-115D(h) Request-Petition, the ARES or utility shall start or continue to file annual reports under this Part and must certify and demonstrate in each annual report that the conditions giving rise to the exemption-exception from application of the provisions of Section 16-115D and Section 16-115(d) of the Act relating to procurement of renewable energy resources continue to apply or exist in each compliance year. A new petition must be filed if, in subsequent compliance years, new or additional conditions give rise to the exemption-exception from application of the provisions of Section 16-115D and Section 16-115(d) of the Act relating to procurement of renewable energy resources.

### Further Proposals:

The revised language provided by Staff appears to be largely acceptable to the IIEC. In its Surreply Comments, however, the IIEC proposes adding the term “and/or” after the first comma in the first sentence. IIEC notes that Staff has already added the phrase “and/or” between Commission (ii) and condition (“iii”) in this revised version of Section 455.140. Staff did so, IIEC believes, in order to indicate that the conditions are not cumulative. IIEC contends that its proposed change adds further clarification and of the same type.

The IIEC further proposes striking out the last full sentence of this subsection (a). According to the IIEC, read literally, this sentence would require that an ARES that has already met the requirements for exemption and that continues to meet those requirements would *be mandated to* file a new petition seeking exemption, if in subsequent years, new or additional conditions arise that would entitle the already exempt ARES to an exemption. The IIEC truly believes that Staff did not intend to require an ARES that is already exempt and that remains exempt to file a new petition for exemption simply because new or additional conditions arise that would entitle the ARES to obtain an exemption if it were not already exempt. Such a requirement, IIEC maintains, would impose an unreasonable burden on the ARES and an unnecessary workload on the Commission and the Staff for no good reason.

### Analysis and Conclusion:

We agree with both of the IIEC’s proposals for subsection (a). The first amendment brings clarity and consistency. Plainly speaking, it is an assist to the reader. The second amendment is necessary to correct a lost idea. The Commission is not sure as to what might have been intended or envisioned here. As phrased, however, the last sentence sets up a wholly unnecessary situation. With these further modifications to Staff’s changes, Section 455.140 (a) is accepted.

### Section 455.140 (b)

- b) To obtain a determination that the provisions of Section 16-115D and Section 16-115(d) of the Act relating to procurement of renewable energy resources do not apply to it pursuant to Section 16-115D(h) of the Act, an ARES ~~or electric utility serving retail customers outside its service areas~~ shall demonstrate, at a minimum, the following:
  - 1) that it operates a combined heat and power system in Illinois or that it has a corporate affiliate that operates a combined heat and power system in this State; and

- 2) that this combined heat and power system supplies electricity primarily to or for the benefit of:
  - A) facilities owned by the ARES or electric utility serving retail customers outside its service areas, its subsidiary, or other corporate affiliate;
  - B) facilities electrically integrated with the electrical system of facilities owned by the ARES or electric utility serving retail customers outside its service areas, its subsidiary, or other corporate affiliate; or
  - C) facilities that are adjacent to the site on which the combined heat and power system is located.
- 3) that it is certified, or requesting certification, only to serve (i) facilities owned by itself or its affiliate, (ii) facilities electrically integrated with the electrical system of facilities owned by itself or its affiliate, or (iii) facilities adjacent to a site on which a combined heat and power system is located.

### Further Proposals

In their Surreply Comments, the IIEC propose an additional change to 455.140 (b) (3). The IIEC recommends that it be made clear that conditions (i) (ii) and (iii) are not cumulative – meaning that they can be met alone or in combination with one another. To accomplish this, the IIEC proposes to add the phrase “and/or” between conditions (i) and (ii), and also between (ii) and (iii).

### Analysis and Conclusion:

The IIEC proposal, while it may appear minor, brings clarity and understandability to the reader of the rule. It is accepted by the Commission. Both the Staff modifications and the IIEC changes are reasonable, consistent with law and are accepted

### Section 455.140 (c)

- c) For purposes of this Part, a combined heat and power system means a cogeneration facility, as defined in 18 CFR 292.202, and which meets the criteria for qualifying cogeneration facilities, specified in 18 CFR 292.205. These incorporations of federal standards are as of January 1, 2010. No later amendment or edition is included.

**Further Proposals:**

In Surreply Comments, the IIEC propose a minor change. Having reviewed 18 CFR 292.205, the IIEC notes that some of the provisions of that rule are effective as of June 1, 2010. IIEC respectfully suggests that the "January 1, 2010" date referenced in the last two sentences of Section 455.140(c) of the new rule be changed to "June 1, 2010". This change conforms with the effective date described for some of the provisions of 18 CFR 292.205 and is also closer to the date when these modified provisions of Part 455 will take effect.

**Analysis and Conclusion:**

The IIEC's proposed change is accepted for the rule. The January 1, 2010 date is stricken and it is replaced with the date of June 1, 2010.

**Section 455.140 (d)**

- d) A Section 16-115D(h) Request ~~Petition~~ shall include, at a minimum, the following:
- 1) A description of the combined heat and power system or systems in Illinois relied upon pursuant to Section 16-115D(h) for the exemption ~~exception~~ from application of the provisions of Section 16-115D and Section 16-115(d) of the Act;
  - 2) For each system identified in subsection (d)(1), documentation of compliance with the information collection requirements established by the Federal Energy Regulatory Commission (FERC) in FERC Form No. 556, or any successor information collection requirements established by FERC, to obtain and maintain status as a qualifying facility (See 18 C.F.R. 131.80 as of January 1, 2010. No later amendment or edition is included). This documentation shall include a copy of all applications for self-certification, self-recertification, certification, and recertification, and their associated FERC docket numbers. In the alternative, a petitioner may provide this documentation with the testimony submitted with its petition, but shall indicate in the petition that the documentation is attached to its testimony.
  - 3) For each combined heat and power system identified in subsection (d)(1), a proposed method to demonstrate that, for the initial and

each subsequent compliance period, the petitioner or its corporate affiliate operated the system and that the system supplied electricity primarily to or for the benefit of:

- A) facilities owned by the petitioner, its subsidiary, or other corporate affiliate;
- B) facilities electrically integrated with the electrical system of facilities owned by the petitioner, its subsidiary, or other corporate affiliate; or
- C) facilities that are adjacent to the site on which the combined heat and power system is located.

### **Further Proposals**

In surreply comments, the IIEC observes Section 455.140(d)(2) to describe the minimum information required for a Section 16-115D(h) request, and also to appear to require that the combined heat and power system relied upon by the ARES to support its exemption must be certified as a qualifying facility (“QF”) under rules of the Federal Energy Regulatory Commission (FERC).

IIEC states that it understands Staff’s desire to have available technical criteria that the Commission can use to determine that the facility in question is actually a combined heat and power facility and is applying electricity primarily to or for the benefit of facilities owned by the ARES or its subsidiary or other corporate affiliate, etc. Indeed, Staff notes that under applicable FERC rules, a QF facility must demonstrate that no more than 50% of the aggregate thermal and electric output of the unit can be provided to a utility. See Staff Reply Comments at 12. IIEC suggests that it is possible that a large industrial customer certified to serve only facilities owned by it or its affiliate, may not wish to become a QF, even where its combined heat and power unit meets all the technical requirements in FERC’s rules for a QF. IIEC understands that those technical requirements are described in 18 CFR 292.205. Therefore, IIEC proposes that language be added to Section 455.140(d)(2) in the new rule to indicate that if the ARES can demonstrate that the combined heat and power system that supports its eligibility for the Section 16-115D(5)(h) exemption otherwise meets the technical criteria for a FERC QF, it would be able to include that demonstration in the minimum requirements for a Section 16-115D(h) request and obtain the exemption even if the combined heat and power system is not certified by the FERC as a QF.

The language proposed by the IIEC states that:

In the further alternative, if designation of the subject combined heat and power system as a qualifying facility has not been sought

from the FERC, petitioner may present information and documentation demonstrating that the system meets the criteria for a qualifying facility specified in 18 CFR 292.205 in its testimony. (See, 18 CFR 292.205 as of June 1, 2010) No amendment or later addition is included.

Further, the IIEC propose that the January 1, 2010 date referenced in Section 455.140(d)(2) be changed to "June 1, 2010" for essentially the same reasons that the January 1, 2010 date specified in Section 455.140(c) should be changed to June 1, 2010. IIEC has explained its reasoning in its discussion of its modifications to 455.140(c) above.

IIEC notes that Section 455.140(d)(2)(A) and (B) identify the demonstrations that must be made in order to obtain a determination from the Commission on a Section 16-115D(h) exemption. IIEC observe that elsewhere in the Staff's new version of Section 455.140, references to "electric utilities serving outside their service area" have been eliminated. Yet, such references were not eliminated from Section 455.140(d)(2)(A) and (B). To be consistent, IIEC recommends that the phrase "or electric utilities serving retail customers outside its service areas" be eliminated from this section.

### **Analysis and Conclusion**

The Commission accepts the Staff modifications and all of the IIEC proposals discussed above. More particularly, we accept IIEC's proposed language that allows a showing under 18 CFR 292.205; the IIEC's proposal for a change in date from January 1, 2010 to June 1, 2010; and, its further proposal to eliminate what we observe to be an unnecessary phrase, i.e., "or electric utilities serving retail customers outside its service areas."

#### **Section 455.140 (e),(f),(g),(h)**

- e) Direct testimony shall be filed at the time the petition is filed. At a minimum, this testimony shall demonstrate that, for the initial compliance period over which the exemption is sought, using, to the extent practicable, the methods provided in subsection (d)(3), the petitioner or its corporate affiliate operated (or will operate) the system and that the system supplied (or will supply) electricity primarily to or for the benefit of:
- 1) facilities owned by the petitioner, its subsidiary, or other corporate affiliate;
  - 2) facilities electrically integrated with the electrical system of facilities owned by the petitioner, its subsidiary, or other corporate affiliate;
- or

- 3) facilities that are adjacent to the site on which the combined heat and power system is located.
- f) ~~The Commission shall enter an order listing which, if any, of the combined heat and power systems identified in the petition meet the criteria listed in Section 16-115D(h) of the Act for the initial compliance period identified in the petition. The Commission shall also specify the method or methods it adopted for making the demonstrations described in subsection (d)(3), and annual reports shall utilize the same method or methods to make these demonstrations for future compliance periods.~~
- g) For any subsequent compliance period, the ARES ~~or electric utility serving retail customers outside its service areas~~ shall include within the annual report required by Section 455.120, information and documentation sufficient to make the demonstrations described in subsection (d)(3) using the methods adopted by the Commission pursuant to subsection (f) for the combined heat and power systems found by the Commission to meet the criteria listed in Section 16-115D(h) of the Act for the initial compliance period.
- h) In the case of any Section 16-115D(h) Request submitted by separate petition filed on or before June 15, 2010, the Commission shall enter an order granting or denying the request no more than 60 days after the petition is filed. If the Commission enters an order granting a Section 16-115D(h) ~~Request Petition~~, the provisions of Section 16-115D and Section 16-115(d) of the Act relating to procurement of renewable energy resources shall not apply to the ARES pursuant to any metered electricity supplied from the combined heat and power systems determined by the Commission to give rise to the exception under Section 16-115D(h) of the Act.

### Further Proposals:

The IIEC present, in their surreply comments, a proposal for a new subsection (i) to be added to Staff's revised version of Section 455.140. This new subsection (i) would read as follows:

Unless otherwise ordered by the Commission, the order granting or denying any petition filed under this Section 455.140 shall be entered within ninety (90) days after the petition is filed.

The IIEC notes that the Staff has modified Section 455.140(h) to provide that, in the case of any Section 16-115D(h) Request submitted by a separate petition filed on or before June 15, 2010, the Commission shall enter an order granting or denying the request no more than sixty (60) days after the Petition is filed. While IIEC appreciates this modification, it still believes that a timely and expeditious determination in the case of a Section 16-115D(h) request is important and necessary given the timing of the RPS standard requirements and the need to comply with same in any given year. At the same time, IIEC recognizes that the Commission may, for any number of reasons, desire to take a longer period of time to consider a Section 16-115D(h) request.

Therefore, the IIEC proposes that any order granting or denying a petition making such a request be entered within ninety (90) days unless the Commission, in its discretion, or even at the request of an interested party, such as the Staff, orders otherwise. IIEC believes this is a reasonable compromise and would go along way toward ensuring timely consideration of, and action on, a petition making a Section 16-115D(h) request.

#### **Analysis and Conclusion:**

The Commission accepts the IIEC's proposed new subsection for the rule. This new provision suggests a reasonable timeline for expediting a petition. At the same time, however, it affords the Commission the flexibility needed to deal with individual and unknown circumstances.

#### **V. ITEMS OUTSIDE THE RULE**

- **RPS Compliance Report Spreadsheet**

At the early outset and in its initial comments, the ICEA proposed that the Rule include a formal compliance spreadsheet. Staff made know that it recognizes the advantage to having some type of compliance spreadsheet, but would prefer an "informal" compliance spreadsheet.

On further and full consideration, the ICEA now agrees that the compliance spreadsheet need not be part of the formal final Rule, provided that this item is made available to affected suppliers sufficiently in advance of the reporting due date and is developed through a collaborative process between Staff and those suppliers. In particular, if an "informal" spreadsheet is used, the ICEA would have the Commission direct Staff to maintain a current "informal/sample" compliance spreadsheet on the Commission's website. Further, the ICEA urges that this spreadsheet be posted on the website well in advance of the September 1 annual compliance deadline.

The comments show that ICEA and Staff do not agree on a methodology for the REC/ACP compliance calculations. The ICEA contends that it has provided strong

reasons showing that any “informal” spreadsheet issued by Staff should reflect the ICEA’s proposed REC/ACP methodology. At the same time, ICEA recognizes that the compliance issues involved are somewhat complex. Accordingly, to ensure that the compliance reporting process runs as smoothly and efficiently as possible, the ICEA asks the Commission to direct Staff to meet with suppliers and other stakeholder and finalize a Year 1 Compliance Spreadsheet that incorporates ICEA’s methodology expeditiously after the issuance of the Order in the instant proceeding.

### **Analysis and Conclusion**

The Commission agrees with Staff and the ICEA that a spreadsheet is useful but need not be part of the rule. In further regard to the development of an appropriate spreadsheet, we expect that use of a collaborative process will ensure the best product. While we do not intend to prejudge the discussions, suffice it to say that the methodology provided by the ICEA appears to have merit and does not appear to be effectively or meaningfully challenged by Staff. To move the matter along, we direct Staff to engage the parties fully and promptly in the collaborative process and to maintain a current “informal/sample” compliance spreadsheet on the Commission’s website that is to be posted well in advance of the September 1 annual compliance deadline.

- **List of Qualifying Renewable Energy Resources**

The ICEA initially recommended that in the event that the IPA creates the required list of qualifying renewable energy resources pursuant to Section 16-115D(a)(4) of the Act, any RECs purchased within the PJM and MISO footprint should be deemed to be from qualifying renewable resources for purposes of RPS compliance. This was meant to ensure that any RECs purchased for RPS compliance prior to the IPA providing its list to M-RETS or GATS would be qualified, thereby avoiding a compliance issue for ARESs that proactively have taken steps to fulfill their obligation.

ICEA now claims that its proposal was an attempt at “simplification” of the Rules relating to qualifying renewable energy resources. Recognizing Staff’s reply comments to raise thoughtful and legitimate points about this issue, the ICEA has withdrawn its proposal on surrepley. The Commission, therefore, has no cause to touch on the matter.

### **VI. Findings and Ordering Paragraphs**

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) the Commission has jurisdiction over the subject matter herein;

- (2) the recitals of fact set forth in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;
- (3) the proposed amendment 83 Ill. Adm. Code 455, as reflected in the attached Appendix to this Order, should be submitted to the Joint Committee on Administrative Rules of the Illinois General Assembly to begin the second notice period;
- (4) this proceeding is a rulemaking and should be conducted as such.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed amendment to the Emergency Rules of 83 Ill. Adm. Code 455, as reflected in the attached Appendix, be submitted to the Joint Committee on Administrative Rules of the Illinois General Assembly, pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this order is not final and is not subject to the Administrative Review Law.

DATED:	May 7, 2010
BRIEFS ON EXCEPTIONS DUE:	May 14, 2010
REPLY BRIEFS ON EXCEPTIONS DUE:	May 18, 2010

Eve Moran,  
Administrative Law Judge