

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

<b>Illinois Commerce Commission</b>	:	
<b>On Its Own Motion</b>	:	
<b>-vs-</b>	:	
<b>Commonwealth Edison Company</b>	:	<b>11-0434</b>
	:	
<b>Investigation of Rate GAP pursuant to</b>	:	
<b>Section 9-250 of the Public Utilities Act.</b>	:	

**PROPOSED ORDER**

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**I. BACKGROUND**

On March 3, 2011, and to enable pending municipal aggregation activity as authorized in Section 1-92 of the Illinois Power Agency Act ("IPA Act"), Commonwealth Edison Company ("ComEd") filed a tariff, i.e., Rate GAP - Government Aggregation Protocols ("Rate GAP"). This tariff became effective April 17, 2011.

Thereafter, on May 18, 2011, the Illinois Commerce Commission ("Commission") entered an *Order Initiating Investigation* that began the instant proceeding ("*Initiating Order*"). A Staff report, which was the basis for the Commission's action and made a part of record, outlined several issues for consideration with respect to Rate GAP. These issues included defining the term "small commercial retail customer;" the appropriate universe of customers whose information will be provided to the GA; and questions regarding the sufficiency of protections and safeguards in terms of persons who may gain access to customer information during the course of the aggregation process. *Staff Report* dated May, 2011, filed May 20, 2011.

The matter came before a duly appointed Administrative Law Judge ("ALJ") at the Commission. Petitions to Intervene were filed by the FirstEnergy Solutions Corp. ("FES"); Rock River Energy Services, Co. ("RRES"); Retail Energy Supply Association ("RESA"); Dominion Retail, Inc. ("Dominion"); Illinois Competitive Energy Association ("ICEA"); the People of the State of Illinois ("People" or AG); the Illinois Energy Professionals Association ("ILEPA"); MC Squared Energy Services LLC; BlueStar Energy Solutions; Interstate Gas Supply, Inc.; Verde Energy USA Illinois, LLC; and the Illinois Power Agency ("IPA"). Each petition was granted by the ALJ. Further, the Staff of the Commission ("Staff") was an active participant in the proceeding.

Through a series of workshops led by Staff, the parties met regularly to discuss and refine the issues. While progress was made resolving certain matters, other items remained in dispute.

At a status hearing held on November 15, 2011, the ALJ set a schedule (agreed to by the parties) for the filing of verified comments. In accord therewith, ComEd filed Initial Comments on November 28, 2011. Staff, ICEA, RESA, RRES, Dominion, ILEPA, the People, and Verde Energy filed their respective Initial Comments on December 29, 2011.

Thereafter, reply comments were filed on January 12, 2012 by FES", RRES, Staff, RESA, Dominion, ICEA, and the People. Finally, on January 19, 2012, ComEd filed its reply comments.

## **II. THE LAW**

Section 1-92 (c)(2) of the IPA Act provides that:

Notwithstanding Section 16-122 of the Public Utilities Act and Section 2HH of the Consumer Fraud and Deceptive Business Practices Act, an electric utility that provides residential and small commercial retail electric service in the aggregate area must, upon request of the corporate authorities or the county board in the aggregate area, submit to the requesting party, in an electronic format, those account numbers, names, and addresses of residential and small commercial retail customers in the aggregate area that are reflected in the electric utility's records at the time of the request. Any corporate authority or county board receiving customer information from an electric utility shall be subject to the limitations on the disclosure of the information described in Section 16-122 of the Public Utilities Act and Section 2HH of the Consumer Fraud and Deceptive Business Practices Act, and an electric utility shall not be held liable for any claims arising out of the provision of information pursuant to this item (2).

All of issues before us arise from the interpretation of the language set out in this particular statutory provision. 20 ILCS 3855/1 -92 (c)(2).

## **III. THE ISSUES**

### **A. Meaning of the Term "Small Commercial Retail Customer."**

Section 1-92 of the IPA Act provides that the aggregation program is available for "residential and small commercial retail customers." 220 ILCS 3855/1-92(a). The statute, however, does not define the term "small commercial retail customers." Our Initiating Order outlined Staff's belief that a substantial question exists as to whether Rate GAP applies to the appropriate subset of ComEd's commercial customers. *Initiating Order* at 2.

## 1. ComEd's Position

ComEd stated that ambiguity surrounding the meaning of the term “small commercial retail customer” as used in Section 1-92 of the IPA Act has produced differing perspectives as to the appropriate group of non-residential customers that should be included in opt-out aggregation programs. While the IPA Act does not contain a definition of the term, Section 16-102 of the Public Utilities Act defines “small commercial retail customer” as a non-residential customers who consume 15,000 kilowatt-hours (“kWh”) or less annually (220 ILCS 5/16-102). ComEd noted that some parties contend that the PUA definition of the term should be used to define the scope of non-residential customers that may be subject to the aggregation programs, whether for legal or policy reasons.

The legislative history of municipal aggregation involved a program that was once limited to residential customers and required ICC approval of associated plans when set forth under the PUA, but which subsequently was stricken from the PUA and expanded under the IPA Act to include non-residential customers and require only IPA assistance with development of the plan and bidding process. In this light, ComEd believes that “small commercial retail customer” as used in Section 1-92 of the Act is not necessarily tied to the PUA definition in Section 16-102. ComEd stated that the term is used in Section 1-92 in descriptions about the rights and obligations of local municipalities and their constituents and that Section 1-92 does not itself confer jurisdiction in the Commission over any of those matters. On the other hand, Article XVI of the PUA, in which the specific definition of “small commercial retail customer” is contained and to which it applies, deals in great length about matters squarely within the Commission’s jurisdiction.

Absent clear statutory guidance, ComEd stated that it sought to establish a reasonable definition of these small non-residential customers, one that could be readily implemented to address the imminent needs of municipalities that passed aggregation referenda and would also help to promote competition in this under-served area of the retail market. Relying upon its delivery class structure and existing business processes to facilitate the information gathering process, ComEd settled upon the Watt-Hour Delivery Class and Small Load Delivery Class, which includes non-residential customers whose peak demand does not exceed 100 kilowatts in the twelve most recent months. At the time of the Rate GAP filing in March 2011, these were the only non-residential segments for which supply service had not been declared competitive. ComEd further stated that the levels of customer switching in these classes had been historically stagnant and, at the time of filing Rate GAP, were 4.8%, and 17.7%, respectively.

However, since the implementation of Rate GAP, ComEd stated that it has re-analyzed the degree of switching in the Watt-Hour Delivery Class and Small Load Delivery Class. As of October 31, 2011, 14% and 24.9% of the customers in these

classes had switched, respectively. In light of this significant uptick in switching at the class level, ComEd recently has undertaken an analysis of switching by customers in these two classes at the 15,000 kWh usage level. ComEd stated that, as of the twelve months ending in September 2011, roughly 40% (97,063) of the 241,474 customers in the Small Load Delivery Class have usage of 15,000 kWh or less per, compared to the nearly 97% (91,454) of the 93,854 customers Watt-Hour Delivery Class. Of those non-residential customers with usage over 15,000 kWh per year, over 35% had switched from supply service under Rate BES. In light of the current switching levels in these classes, and having been afforded the time to develop an efficient means of identifying such customers in preparation for the next round of referenda, ComEd stated that it now would not oppose limiting the provision of aggregated load and usage data and name, address and account information for non-residential customers to those with usage of 15,000 kWh per year or less.

Furthermore, ComEd proposes that, to the extent that the Commission determines that it has authority to define the non-residential customers eligible for aggregation programs in such a manner, it would identify such non-residential customers and provide associated aggregated load and usage data, names, addresses and account numbers for such customers as follows: (1) ComEd will evaluate commercial customers in March of each year using the previous calendar year's usage data to determine if a customer's usage is 15,000 kWh per year or less and (2) any subsequent requests for aggregated load and usage data, name, address and/or account data under Rate GAP would be limited to those customers whose consumption was marked as being 15,000 kWh per year or less. ComEd noted that the process is similar to processes approved by the Commission for the determination of those customers subject to competitive declarations.

## 2. Staff's Position

Staff recommends the Commission adopt the definition in the PUA as follows:

"Small commercial retail customer" means those nonresidential retail customers of an electric utility consuming 15,000 kilowatt-hours or less of electricity annually in its service area.

220 ILCS 5/16-102.

As a purely legal matter, Staff (and the Commission) may not ignore clear language in its enabling Act, the PUA. Although there may be ambiguity in the IPA Act as to the meaning of "small commercial customer," there is none in the PUA's definition found in Section 16-102. Accordingly, as a creature of statute, the Commission has no general powers except those expressly conferred by the legislature. *Business and Professional People for the Public Interest v. Ill. Commerce Comm'n*, 136 Ill. 2d 192, 244, 555 N.E.2d 693, 716-17 (Ill. 1990). The Commission must follow and implement the PUA's plain language irrespective of its opinion regarding the desirability of the

results surrounding the operation of the statute. *Citizens Util. Bd. v. Ill. Commerce Comm'n*, 275 Ill. App. 3d 329, 341-42, 655 N.E.2d 961, 969-70 (1<sup>st</sup> Dist., 1995). The PUA unambiguously defines “small commercial customers” as those using “15,000 kilowatt-hours or less of electricity annually.” Consequently, even if Staff found certain policy arguments’ results beneficial, Staff (and the Commission) must adhere to the definition of small commercial customers contained in the PUA.

### 3. RESA's Position

The term “small commercial retail customer” should be defined, as it is defined in Section 16-102 of the Public Utilities Act (“PUA”), as a non-residential customer who consumes 15,000 kilowatt-hours (“kWh”) or less annually. While ComEd originally included two rate classes (Small Commercial Delivery Class and Watt-Hour Delivery Class) which included customers having usage in excess of 15,000 kWh annually, in Rate GAP, ComEd, in its Initial Comments indicated that based on recent experience it “would not oppose limiting the provision of aggregated load and usage data and name, address and account information for non-residential customers to those with usage of 15,000 kWh per year or less”. (ComEd Initial Comments, pp. 6-10) In other words, ComEd agrees with utilizing, for purposes of Rate GAP, the definition of small commercial retail customer contained in Section 16-102 of the PUA. ComEd confirmed its acceptance of this interpretation in its Reply Comments. (ComEd Reply Comments, p. 2) RESA, Staff, ICEA, and ILEPA agree with ComEd that the term “small commercial retail customer” should be defined, as it is defined in Section 16-102 of the Public Utilities Act, as a non-residential customer who consumes 15,000 kilowatt-hours (“kWh”) or less annually. (RESA Initial Comments, pp. 1-2; Staff Initial Comments, pp. 4-6; ICEA Initial Comments, pp. 4-5; ILEPA Initial Comments, pp. 2-4) Only Rock River argues that the term should include a rate classification that includes customers that consume more than 15,000 kWh annually. (Rock River Initial Comments, p. 3) However, Rock River basically takes the position that its expansive definition would be helpful to customers in ComEd’s Small Load Delivery Class and that including this class in Rate GAP would have a large economic benefit for customers in this class. (*Id.*) Rock River also notes that several mayors, village presidents or administrators have supported this expansive definition in letters to the Commission’s Chairman. (*Id.*)

Effectively, Rock River is arguing that its perception as to the policy benefits of its expansive interpretation of “small commercial retail customer” should outweigh the appropriate legal interpretation of that phrase. Rock River’s position was completely refuted in the Reply Comments of the other parties taking a position on this issue. (RESA Reply Comments, pp. 3-4; Staff Reply Comments, pp. 1-5; ICEA Reply Comments, pp. 2-3)

In particular, Staff rebutted Rock River’s policy arguments at length (Staff Reply Comments, pp. 2-4), although, in RESA’s opinion, Staff’s response was correct but unnecessary because the meaning of the term “small commercial retail customer” is clear. The important point is that, as stated by the Staff, “the Commission cannot ignore

the PUA's plain language". Staff goes on to state that the Commission "must follow and implement the PUA's plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute." The PUA does not contain a provision that authorizes the Commission to disregard the express definition of "small commercial retail customer," however, if there were such an exception, that exception would be limited to the terms of that authorization –but, again, there is none. Essentially, if the Commission adopted Rock River's position and expanded the small commercial retail customer definition to include customers that use in excess of 15,000 kWh annually, what then is the limit on such authority? RESA agrees with the Staff that the PUA "unambiguously" defines small commercial customers as those using 15,000 kWh or less annually and that the Commission "must adhere" to the definition of small commercial customers contained in the PUA. (*Id.*, p. 4). RESA believes that failure to adhere to this definition unnecessarily puts at risk the legal foundations of municipal aggregation as it applies to small commercial retail customers.

In conclusion, the issue is the proper definition of "small commercial retail customer" as used in the Illinois Power Agency Act ("IPA Act"). That a different definition may be advantageous to certain customers and/or municipalities is rendered irrelevant by the express language of the PUA. Based on proper statutory interpretation, the term "small commercial retail customer" should be defined as a non-residential customer with annual usage of 15,000 kWh or less. Thus, Rate GAP should be revised to limit its applicability to residential customers and those non-residential customers having annual usage of 15,000 kWh or less.

#### **4. RRES Position**

Rock River argues that the term should include a rate classification that includes customers that consume more than 15,000 kWh annually. It claims that this widened definition would be beneficial to ComEd's Small Load Delivery Class and that would be an economic boost to them to include this class in the Rate GAP.

#### **5. ICEA's Position**

ICEA explains that the task of bringing definiteness and uniformity to the term "small commercial retail customers" is effectively assigned to the Commission. Further, ICEA asserts that the term in question has acquired meaning given that the General Assembly expressly set out a definition in Section 16-102 of the Public Utilities Act ("PUA") and that the Commission has adopted this very definition in its Order for the Part 412 rules. ICEA maintains that this law is definite and certain in stating that:

"Small commercial retail customer' means those non-residential retail customers of an electric utility consuming 15,000 kilowatthours (kWh) or less of electricity annually in its service area. 220 ILCS 5/16-102.

It is to be presumed, ICEA asserts, that the General Assembly has knowledge of the PUA's definition of the term and intends consistency between the statutes. Just as well, ICEA maintains, it is reasonable to believe that the General Assembly intended that the Commission would supply a definition of the term, consistent with the PUA and the *in pan materia* rule, to cure any vagueness in the law.

ICEA notes that nearly all of the commenters agree that the term "small commercial retail customer" in Section 1-92 of the IPA Act should be interpreted in accord with the definition set out in Section 16-102 of the PUA. Only RRES takes a different view. But, ICEA points out, this party fails to provide any legal analysis for its position or for its view that the term should embrace the Small 0-100 KW class. ICEA reminds that what the Commission has before it is a question of law. ICEA argues, matters of statutory construction and application are not matters of personal belief or preference. To the contrary, settled principles of interpretation must be consulted and relied on. ICEA maintains that RRES offers nothing in this regard.

Finally, ICEA notes that the revised Rate GAP tariff should apply on a prospective basis only to avoid unintended retroactive ratemaking and unnecessary disruption in the marketplace. ICEA points out that current contracts negotiated by Governmental Authorities are based upon the list of customers provided by ComEd at or about the time of the effective date of the contract, which lists ComEd generated under the March 3, 2011, Rate GAP tariff. The practical effect of this change is that approximately 299 communities have referendums on the March ballot that may be impacted by a Commission order that does not clearly apply to prospective agreements only. There must be certainty in the marketplace under the current tariff since the effective date of the revised tariff is uncertain.

ICEA asserts that the Commission must be clear that customers that have participated in aggregation programs prior to the revised Rate GAP tariff are "grandfathered" and will take service under aggregation programs, whether under the current RES or any future RES agreement, under the March 3, 2011, Rate GAP tariff.

Small commercial retail customers (as defined in the March 3, 2011 Rate GAP tariff) that were part of an aggregation pool resulting from a supply contract between a municipality and a supplier entered into prior to the effective date of the revised Rate GA tariff are "grandfathered" and will take service under the March 3, 2011, Rate GAP tariff unless and until they are no longer part of the aggregation pool. Customers that elect to return to the electric utility or switch to a third party RES, would no longer be eligible to take service under the grandfathered aggregation program.

Again, ICEA asserts the purpose of the clarification is to ensure an orderly transition and not unnecessarily and adversely impact customers.

## **6. Commission Analysis and Conclusion**

~~The Commission understands that it is construing language that resides in the IPA Act and not in the PUA. However, Section 1-92 of the IPA Act use of the term "small commercial retail customer" is not defined. Staff, RESA, ILEPA, ICEA, and the AG all agree that the Commission should conform to the definition of "small commercial retail customers" which appears in Section 16-102 of the PUA. ComEd understands that although there is no direct correlation between Section 1-92 of the IPA Act and Section 1-102 PUA regarding defining~~ remains mindful that it is construing language that resides in the IPA Act and not in the PUA. Yet, we observe that Section 1-92 of the IPA Act uses the term "small commercial retail customer" that is not defined.

In their respective comments and for a variety of reasons, Staff, RESA, ILEPA, ICEA, and the AG urge the Commission to follow the definition of "small commercial retail customers" that appears in Section 16-102 of the PUA to define the universe of non-residential customers that may be subject to the aggregation programs. While ComEd does not necessarily believe that the term "small commercial retail customer" definition, it argues that absent a clear definition in the IPA it makes sense to defer to the PUA which says consumption of 15,000kWh per year or less. as used in Section 1-92 of the IPA Act is tied to the Section 1-102 PUA definition, it gives statistical reasons for not opposing limiting its provision of data for non-residential customers to those having usage of 15,000kWh per year or less. Only RRES disputes the use of the PUA's definition and sets out certain policy-type arguments in favor of keeping the definition currently found in Rate GAP.

To determine how the term in question should be construed, the Commission must be guided by established statutory construction principles. ICEA directs us to the doctrine of *in pari materia*. The rule of *in pari materia* is generally used when there is some doubt or ambiguity in the wording of the statute under consideration. 2B N. Singer, Sutherland Statutes and Statutory Construction §51:3 at 240 (7th ed. 2008). Under this doctrine of construction, two legislative acts that address the same subject are considered with reference to one another. *Land v. Board of Educ. of City of Chicago*, 202 Ill.2d 414, 781 N.E. 2d 249 (2002); *Nussbaum Trucking v. Illinois Commerce Commission*, 99 Ill.App.3d 741, 425 N.E.2d 1229 (2nd Dist.1981) (observing that the PUA and the Illinois Motor Carrier of Property Law are *in pari materia* and should be construed together to determine legislative intent). It is well-settled that characterization of the "object or purpose" is key to determining whether different statutes are "closely enough related" to justify interpreting one in light of the other. 2B N. Singer, Sutherland Statutes and Statutory Construction §51:3 at 240 (7th ed. 2008).

We observe that Article 16 of the PUA is titled the Electric Service Customer Choice and Rate Relief Act. Staff informs that this law regulates both electric utilities and RESs as Illinois moves towards competitive wholesale and retail markets that benefit all Illinois citizens. Section 1-92 is designed to move residential and small commercial retail customers into competition through a particular vehicle. As ICEA points out, the ongoing development of municipal aggregation authorized by Section 1-92 is yet another way for the competitive market to continue to develop in Illinois.

From this analysis, it is obvious that Article 16 of the PUA and Section 1-92 of the IPA Act were each designed to serve the same objective and purpose. Moreover, as Staff notes, there is nothing in the provisions of Section 1-92 that would conflict with the definition of “small commercial retail customer” found in Section 16-102 of the PUA. For these reasons, we find that the PUA is “closely enough related” to Section 1-92 of the IPA Act for the Commission to apply the Section 16-102 definition of “small commercial retail customer” to the situation at hand.

In a similar vein, ICEA asserts that it is to be presumed that the General Assembly has knowledge of the PUA’s definition of the term and intends consistency between the statutes. We observe that the Illinois Supreme Court holds to that very view. *Harvel v. City of Johnston City*, 146 Ill. 2d 277, 586 N.E. 2d 1217, 1222 (1992) (“It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter....[t]hus they should be construed together.” (quoting *Sutherland on Statutory Construction*, Section 51.02 at 453 (4th Ed. 1984)). There is more than an assumption in the situation at hand. Our review of Section 1-92 shows that the General Assembly was more than cognizant of Article 16 of the PUA when it drafted the statute. This is so because Section 1-92 itself specifically references certain provisions of the PUA, i.e. Section 16-103 and Section 16-122. Thus, it is clear that by adopting the definition of “small commercial retail customer” found in Section 16-102 of the PUA for purposes of defining the same term in Section 1-92 we are meeting with the intent of the General Assembly.

On these grounds and as a matter of law, we conclude that the term “small commercial retail customer” for purposes of Section 1-92 of the IPA Act means exactly that which Section 16-102 provides in its definition of the same term.

~~There is only one party, RRES, which disputes the use of the PUA's definition and sets out certain policy type arguments in favor of keeping the definition currently found in Rate GAP. When a definition is lacking in one statutory, as is the IPA, scheme the PUA provides useful guidance.~~

While our decision rests on statutory construction law, the Commission does take note of the statistical analyses presented in this proceeding by both Staff and other commenters. There we find nothing to suggest that defining “small commercial retail customer” for the IPA Act’s purpose would lead to an absurd result.

~~Staff has noted that there would be no conflict in adopting the PUA definition.— Absent a clear one in the IPA and based on the above this is the most logical and equitable conclusion.— Additionally, the only party to object to the PUA definition did so based on policy.— As Staff was correct in observing the Commission must not ignore the plain language of the PUA regardless of the “desirability of results”.~~

~~Therefore, “small commercial retail customer” as referred to in Section 1-92 of the IPA Act shall be defined in accord with the Section 16-102 of the PUA as a non-residential customer who consumes 15,000 kWh or less annually.~~

**B. Whether the term “retail customer found in Section 1-92 of the IPA Act should be interpreted to mean only ComEd bundled service customers**

The issue here is that the Rate GAP does not ~~place a cap on~~limit the ~~customers~~customer data that ComEd will surrender to ~~government~~governments operating aggregation programs. [Initiating Order at 2.](#)

In relevant part, Section 1-92(c) of the IPA Act provides that: an electric utility that provides residential and small commercial retail electric service in the aggregate area must, upon request of the corporate authorities or the county board in the aggregate area, submit to the requesting party, in an electronic format, those account numbers, names, and addresses of residential and small commercial retail customers in the aggregate area that are reflected in the electric utility's records at the time of the request. 20 ILCS 3835/1 -92(c)(2).

**1. ComEd's Position**

ComEd stated that various parties had expressed concern regarding the provision to Government Authorities of names and addresses of customers not on ComEd's default, fixed-price supply tariff, Rate BES, and that it disagreed with those parties for both legal and policy reasons. ComEd explained that, while the term “retail customers” as used in Section 1-92 is not currently defined it subscribes to following the plain meaning of the term. ComEd is obligated to provide the names and addresses of all customers within the Government Authority's jurisdiction, regardless of their source of energy supply. It further stated that all electricity consumers take delivery service from ComEd under Rate RDS and are, therefore, retail customers of ComEd. As a matter of public policy, ComEd believes that it is necessary and appropriate that a Government Authority have a full and complete list of names and addresses of electric customers within its jurisdiction for the purpose of ensuring that it has the ability to contact and properly inform all of its constituents regarding the municipal aggregation plan and associated electric supply options, respond to questions regarding the program, and generally avoid customer confusion. Further, it is ComEd's position that any correspondence regarding the aggregation program should bear the official seal of Government Authority – not the logo of the winning RES – in order to improve the likelihood that it will be opened and read by the customer. ComEd argued that, in light of the fact that this is a matter that rises to the level of requiring a vote of the affected citizenry, all customers should be properly notified by the Government Authority.

## 2. Staff's Position

Section 16-102 of the PUA defines a retail customer as follows:

[A] single entity using electric power or energy at a single premises and that (A) *either (i) is receiving or is eligible to receive tariffed services from an electric utility, or (ii) that is served by a municipal system or electric cooperative within any area in which the municipal system or electric cooperative is or would be entitled to provide service under the law in effect immediately prior to the effective date of this amendatory Act of 1997, or (B) an entity which on the effective date of this Act was receiving electric service from a public utility and (i) was engaged in the practice of resale and redistribution of such electricity within a building prior to January 2, 1957, or (ii) was providing lighting services to tenants in a multi-occupancy building, but only to the extent such resale, redistribution or lighting service is authorized by the electric utility's tariffs that were on file with the Commission on the effective date of this Act.*

220 ILCS 5/16-102 (emphasis added).

It is undisputed that an ARES customer “is receiving or is eligible to receive tariffed services from an electric utility.” Even if a party argued that delivery service is not a tariffed service (which it clearly is), and therefore only the utility’s bundled service (meaning both delivery and supply service) is considered a tariffed service, an ARES customer is still eligible to receive tariffed service from an electric utility. Furthermore, the PUA also uses the term “retail customer” when it describes the requirements and activities of ARES. Staff notes that Section 16-111.5 contains a definition of a subset of all retail customers. This subset of retail customers, termed “eligible retail customers” specifically excludes ARES customers and hourly-pricing customers.

When it comes to the PUA, Staff believes there is no ambiguity with respect to the term retail customer. Any customer receiving or eligible to receive tariffed service from an electric utility is a retail customer, and this clearly includes ARES customers receiving service under Rate RDS.

Aside from the legal interpretation of “retail customers,” Staff does not see a compelling policy purpose to limit ComEd to providing information to customers receiving both delivery and supply service from ComEd. Staff agrees with ComEd that it is appropriate for a municipality to have a full and complete list of customer names and addresses of its residential and small commercial customers. This allows the municipality to inform all potential customers of the details of the aggregation program, even if those customers are not included in the universe of opt-out aggregation customers.

### **3. Dominion's Position**

In its Initial and Reply Comments, Dominion showed that ComEd has interpreted the Act incorrectly when it argues that it must provide government bodies with RES customer information because the Act requires it to provide information on any customer receiving any tariffed service of ComEd, including RES customers that are only receiving delivery service. Dominion showed that the definition of “retail customer” being used by ComEd is too broad and results in the dissemination of customer data of RESs that could be used in an anticompetitive manner. A better definition of the term “retail customer” would be retail customers of ComEd’s commodity services. That definition, which is consistent with the Illinois Power Agency Act (“IPA Act”), eliminates the need to provide RES customer data to governmental bodies, where it could be misused in an anticompetitive manner by agents and RESs chosen by those governmental bodies.

ComEd attempts to minimize the importance of releasing this data when it claims in its Reply Comments that “the names and addresses associated with residences and businesses within the ComEd service territory are not proprietary information that is unavailable through other means.” p. 3. ComEd misses the point. While data bases with generic names and addresses are available, no data base shows which customers are receiving electric service from a RES. *That* is the data ComEd now intends to turn over to governmental bodies with no ability of ComEd to control who will see it.

### **4. RESA's Position**

Unlike the term “small commercial retail customer” where all parties, except one, agree on the proper definition, there has been considerable debate regarding the proper definition of “retail customers”. RESA, ICEA, ILEPA, Dominion and Verde take the position that the term “retail customers” found in Section 1-92 of the IPA Act should be limited to ComEd’s bundled customers, those customers taking both supply and delivery services from ComEd. (ICEA Initial Comments, pp. 6-7; ILEPA Initial Comments, pp. 4-5; Dominion Initial Comments, pp. 1-5; Verde Initial Comments, pp. 2-3; RESA Reply Comments, pp.4-7) However, Staff, ComEd, Rock River, the AG, and FirstEnergy argue that the term “retail customers” should be interpreted to include all of ComEd’s eligible delivery service customers, regardless of whether they purchase their supply from ComEd or a RES. (Staff Initial Comments, pp. 6-9; Rock River Initial Comments, p. 4; AG Initial Comments, pp. 2-3; FirstEnergy Reply Comments, pp. 2-3)

### **5. The AG's Position**

The People maintain that the proper definition of “retail customer” is one that includes all customers of ComEd. As ICC Staff correctly points out, while the Illinois Power Agency Act, 20 ILCS 3855/1-92 (“IPA Act”), does not identify who is a “retail customer,” the Public Utilities Act does define a retail customer as “[A] single entity

using electric power or energy at a single premises and that .... (i) *is receiving or is eligible to receive* tariffed services from an electric utility..." Staff Comments in Response to ComEd at 7, citing Section 16-102 of the Public Utilities Act, 220 ILCS 5/16-102 (emphasis added). Arguably, this includes any customer in ComEd's service territory, no matter from what entity they purchase power, as any such customer is eligible to purchase a variety of tariffed services from ComEd.

While the relevant provisions of the IPA Act at issue here apply only to residential and small commercial customers, there is nothing in the IPA Act that any party can point to that contradicts this plain language. All residential and small commercial customers are eligible to receive tariffed services from ComEd. Therefore all residential and small commercial customers are "retail customers." This definition holds regardless of whether any residential or small commercial customers have previously exercised their option to purchase power supply from an alternative provider. Exercising that choice does not render those customers something other than "retail customers," and receiving written notification, in the form of a letter from municipal or county officials, about the existence of a planned aggregation program and the customer's right to participate or not participate in that program, does not interfere with any contract the customer may have with an alternative provider.

This interpretation is wholly consistent with subsection (e) in the IPA Act, which states that "...it shall be the duty of the aggregated entity to fully inform residential and small commercial retail customers in advance that they have the right to opt out of the aggregation program." 20 ILCS 3855/1-92(e). Very simply, government aggregators cannot meet this requirement without obtaining the names and addresses of all ComEd customers in the municipality or county.

## **6. ICEA's Position**

Within the context of the whole of Section 1-92 of the IPA Act, and the law's purposes, ICEA maintains that the most reasonable interpretation of the term "retail customers" in subsection (c)(2) of the statute means those utility customers receiving bundled service. According to ICEA, the construction that ComEd urges is broader than necessary to implement governmental aggregation and, as such, is not consistent with the subject matter, purposes or intents of Section 1-92 of the IPA Act. Where as here, different interpretations are urged, ICEA observes that a court must look to reasons for the enactment of the statute and the purposes to be gained by it and construe the statute in the manner which is consistent with such purpose. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:7 at 258 (7th ed. 2007).

At a high level, ICEA explains, Section 1-92 of the IPA Act is yet another way by which the state is attempting to bring the benefits of retail electric supply competition to residential and small commercial customers. In all likelihood, however, there will be consumers in an aggregating area that have already availed themselves of existing retail choice opportunities and have entered into contracts with an ARES for energy

supply. Nothing in Section 1-92 of the IPA Act, ICEA points out, shows the General Assembly to have intended to interfere with any existing contracts between those customers and the ARES 5 they have chosen.

ICEA questions ComEd's assertion that all electricity customers take delivery service from ComEd, including RDS customers, and for this reason are retail customers of ComEd. In ICEA's view, this simplistic argument overlooks the very subject matter of the statute at hand. As ICEA observes the law's subject matter and purposes, it is apparent that only the electric supply of utility customers matters. It is abundantly clear, ICEA argues, that both the opt-out and the out-in programs that Section 1-92 of the IPA Act authorizes are solely concerned with electric supply. If delivery service is not of interest or material to the purposes of the aggregation plan, ICEA asserts that the confidential and competitively-sensitive information of delivery services-only customers is of no relevance. Stated another way by ICEA, "delivery service only" retail customers of ComEd are outside the scope of the law.

ICEA notes Staff to rely on Section 16-102 of the PUA which defines a "retail customer" in relevant part, as:

a single entity using electric power or energy at a single premises and that... is receiving or is eligible to receive tariffed services from an electric utility. 220 ILCS 5/1 6-1 02.

The words of Section 16-102, standing alone, are general and indefinite, ICEA claims, and thus do not unequivocally lead to the conclusion advanced by Staff. ICEA maintains that, as with many statutes, the definition in Section 16-102 is the broadest that it can be for reasons that it will be applied in a number of different situations and circumstances. In this instance, when dealing with the use of the term in Section 1-92, ICEA avers that the Commission must read the statute as a whole and with attentiveness to the purposes and intents expressed therein.

ICEA notes that Section 1-92 (c)(2) requires an electric utility that provides "residential and small commercial retail electric service" in the aggregate area to provide names, addresses, and account numbers of residential and small commercial retail customers in that area that are reflected in the electric utility's records. 20 ILCS 3855/1-92. Without question, ICEA asserts, the General Assembly is, here, flatly concerned with those customers obtaining "electric service" from the utility, i.e., its bundled customers. ICEA here calls attention to the maxim of *noscitur a sociis*, which in statutory construction holds that the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases. 2A N. Singer, Sutherland Statutes and Statutory Construction § 47:16 at 347-8 (7th ed. 2007). According to ICEA, a textual interpretation of Section 1-92 will have the Commission limit the customer information being provided by ComEd to the intended beneficiaries of the statute, i.e. bundled electric customers.

ICEA points out that considering the effect and consequences of interpreting a statute one way or another is an important undertaking for the Commission. Without question, ICEA asserts, RES customer information is highly confidential and competitively-sensitive. As the statute is currently written, and as even ComEd itself recognizes, there are substantial and fatal gaps in the protections and safeguards afforded this information. Notably, ICEA observes, the potential for mischief, i.e., an absurd result, arises only if "retail customer" is construed in the broadest possible way and inconsistently with the law's purposes. Authority cautions that, if the literal import of the text of an act is inconsistent with the legislative meaning or intent or would lead to absurd results, the words of the statute will be construed to agree with the intent of the legislature. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:7 at 253-7 (7th ed. 2007). Where, as here, it is shown that providing the names of customers already with a RES is simply unnecessary for the law's purposes, ICEA maintains that there is no reason to put this confidential and competitively-sensitive information at risk.

ICEA agrees with Verde Energy's observation that the practicality arguments (e.g. full customer lists provided to Governmental Authorities in order to help in informing their citizens and responding to questions) set out as reasons for providing the Governmental Authority with all of ComEd's confidential customer information are not convincing. ICEA believes Verde Energy is correct in noting that Governmental Authorities have ample opportunities and ways to inform and educate their citizens. Some have already fashioned outreach efforts that include public meetings, two statutorily-required public hearings, surveys, press releases, news articles and even the creation of a energy committee. At best, in ICEA's view, there may be an extra convenience to having the Governmental Authority take possession of the customer data that is irrelevant to its mission. But, ICEA asserts, mere convenience does not trump law. Nor does it outweigh the clear and present risk of putting out confidential RES customer information that is wholly superfluous for the law's purposes.

Above all, ICEA submits, statutes need to be construed sensibly. In the instance of municipal aggregation as provided for under Section 1-92 of the IPA Act, the General Assembly clearly intended the reach of aggregation to be limited to the electric utility's own commodity customers. As such, ICEA notes, the law does not require ARES 5 to provide customer data for their customers to the Government Authorities. In the same vein, ICEA asserts, Section 1-92 (c)(2), when reasonably read, does not require ComEd to provide confidential RES customer information to the Governmental Authority. Only the names, addresses and account numbers of the utility's bundled customers need be provided. ICEA asks the Commission to define "retail customer in this way and direct appropriate revisions to be made to Rate GAP.

## 7. Commission Analysis and Conclusion

Section 1-92 of the IPA Act does not ~~currently define "retail customers." Again, turning to the PUA the Commission finds a clear definition. An ARES customer is "receiving or eligible to receive" tariffed services from the utility. ComEd points out that all~~

~~electricity customers take delivery service from them and are therefore retail customers. Although, the Commission understands the argument of ICEA, RESA, and Dominion that such unbundled customers have already made an electric supplier decision the Commission has reviewed no policy reason for placing such a limit on ComEd. The Commission agrees with ComEd that it would be most appropriate for the municipality to have a complete list of customers. A thorough list which includes both delivery and supply customers allows the municipality to contact all potential customers regarding its aggregation program. The Commission is persuaded to adopt the PUA's definition of "retail customer" as was Staff's argument. Opposing views have given no persuasive reason to deviate from the definition from the statute we administer. The is also consistent with the issue as to the term small retail customer.~~ include a definition for the term "retail customers." From all of the comments put before us, the Commission is compelled to acknowledge that the term is ambiguous. Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses. 2A N. Singer, Sutherland Statutes and Statutory Construction § 45:2 at 13 (7th ed. 2007). Here, ComEd, Staff, the AG, FES, and RRES would have the term "retail customer" be construed to have the electric utility provide the names and addresses of the customers within the Governmental Authority's jurisdiction, regardless of their source of energy supply.

On the other hand, ICEA, RESA, Dominion, ILEPA, and Verde Energy view the statutory language differently. These commenters maintain that the term "retail customer" is intended to mean the electric utility's bundled customers such that RES customer data need not be provided to the aggregating authority.

Whether the term "retail customer" in Section 1-92 of the IPA Act means the utility's bundled customers or also those customers only taking delivery service, is a matter of statutory construction and a question of law for the Commission to determine. Our singular task in this instance is to determine what the General Assembly intended by its use of the term "retail customer." We are guided by the primary rule in statutory construction which is to ascertain and give effect to the intention of the legislature. *Land v. Board of Educ. of City of Chicago*, 202 Ill.2d 414, 781 N.E. 2d 249 (2002). The Commission begins now to consider the arguments of the parties together with the settled rules of statutory interpretation.

#### **a. The PUA definition**

We observe Staff to assert that that the term "retail customer" is defined in the PUA and, as such, it proposes that the Commission apply that definition in these premises. It would be consistent, Staff argues, for the Commission to use the definitions for both "small commercial customer" and "retail customer" as these terms are each defined in Section 16-102 and Section 16-115 (a) of the PUA, respectively. The Commission is not persuaded.

We note that the doctrine of *in pari materia*, highly useful in clearing up the ambiguity that surrounds the term "small commercial retail customer," does not apply in

the same sense when we turn our attention to the meaning of the term “retail customer.” This is because related statutes vary in probative value. 2B N. Singer, Sutherland Statutes and Statutory Interpretation § 51:1 at 199 (7th ed. 2008). It is obvious to the Commission that the definition of “retail customer” that appears in the PUA does not provide as definitive, specific or final a meaning for the term as Section 16-102 does provide for “small commercial retail customer.” To the contrary, and as ICEA points out, the term “retail customer” is broadly defined in the PUA as it will apply to a number of different situations. In other words, unlike the definition of “small commercial retail customer,” the definition of the term “retail customer” in the PUA does not stand alone. It needs a referent. This means that, for purposes of application, the PUA’s definition must be construed together with the full text of Section 1-92 of the IPA Act including the statutes subject matter and purposes. This follows from the rule that two statutory provisions containing similar or identical language are not necessarily subject to the same interpretation, as there are other interpretive factors to consider such as the purpose and context of the legislation. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:5 at 224 (7th ed. 2007).

#### **b. Common meaning for the term**

The Commission notes FES to suggest that the term “retail customer,” in the electricity context, is widely understood to mean an end use customer and that this term applies to all portions of a customer’s service, i.e., transmission, distribution, and supply, unless otherwise specified. Giving this term its commonly understood meaning as advocated by FES, however, compels us to note that while it certainly applies to the utility’s customers, RES customers, being delivery customers only, are a subset neither specified in Section 1-92 nor understood from its provisions. It seems logical to the Commission, however, that if the General Assembly intended to include these two different groups in the definition of “retail customer” it would have stated so in the statute. We understand FES to be asserting the rule which states that the words in a statute are generally given their commonly understood meaning. 2A N. Singer, Sutherland Statutes and Statutory Construction §47:27 at 443 (7th ed. 2007). The same authority informs, however, that the customary meaning of words will be disregarded when it is obvious from the act itself that the legislature intended they be used in a sense different from their common meaning. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:1 at 156 (7th ed. 2007). Other commenters maintain just such an argument and thus, we proceed further with our analysis.

#### **c. Context for the term in question**

ICEA proposes that the Commission examine the relevant provision of Section 1-92 (c)(2) closely and again calls our attention to the maxim of *noscitur a sociis*. In this regard, ICEA points out that Section 1-92 (c)(2) requires an electric utility that provides “residential and small commercial retail electric service” in the aggregate area to provide names, addresses, and account numbers of residential and small commercial retail customers in that area that are reflected in the electric utility’s records. 20 ILCS 3855/1-92. We understand ICEA to be asserting that when the term “retail customer”

(referencing the provision of data) is read in context with the direction to an electric utility that “provides residential and small commercial retail electric service.” it is shown that the General Assembly is only concerned with those customers obtaining “electric service” from the utility, i.e., its bundled customers. The Commission agrees that this advances the position advocated by ICEA and others. But, there is far more that we need to consider.

#### **d. Subject matter and purposes**

There is a presumption that the lawmaker has a definite purpose in every enactment and has adapted and formulated the subsidiary provisions in harmony with the purpose. That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. This intention also affords the key to the sense and scope of minor provisions. From this assumption proceeds the cardinal rule that the general purpose, intent, or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction. 2A N. Singer, Sutherland Statutes and Statutory Construction § 46:5 at 218-221 (7th ed. 2007).

Where, as here, different interpretations are urged, a court must look to the reasons for the enactment of the statute and the purposes to be gained by it and construe the statute in the manner which is consistent with such purpose. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:7 at 258 (7th ed. 2007).

The subject matter and the purpose of the statute at hand is clear. Section 1-92 of the IPA Act authorizes the Governmental Authority to adopt an ordinance under which it may aggregate the retail electrical loads of the residential and small commercial customers within its respective jurisdiction, solicit bids, select a retail electric supplier (“RES”) and enter into a service agreement for the purchase of electricity and related services and equipment. 20 ILCS 3855/1-92(a). This relatively new law, titled “Aggregation of electrical load by municipalities and counties,” is yet another way by which the state is attempting to bring the benefits of competitive retail electric supply to residential and small commercial customers.

We observe ICEA to point out that in light of its subject matter, only the electric supply of the utility’s customers matters in carrying out the law’s purposes. In ICEA’s view, RES customer information is neither of interest nor is it material or relevant to the aggregation scheme that Section 1-92 authorizes. We note that ICEA is not alone in making these observations.

As other commenters point out, and as the Commission itself concludes from its review of the entirety of Section 1-92 of the IPA Act, nothing shows the General Assembly to have intended to interfere with any existing contracts between delivery service only customers and the AREs they have chosen for their supply. This is an important consideration as the Commission moves forward with our analysis. We are

persuaded, however, that the definition of the term “retail customer” ought not to be narrower or broader than necessary to implement governmental aggregation, consistent with the subject matter, purposes or intents of Section 1-92 of the IPA Act.

#### **e. Whole act construction**

The Commission draws meaning for the term “retail customers” by a reading of the Section 1-92 in its entirety, guided by the admonition that in construing a statute, every part must be considered together. *People v. Warren*, 800 N.E. 2d 700 (1996) *Behe v. Industrial Commission*, 848 N.E.2d 611 (2d Dist. 2006). A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. See 2A N. Singer, Sutherland Statutes and Statutory Construction §46:5 at 189 (7th ed. 2007).

We observe, as Dominion has noted, that the term “retail customer” appears some eleven (11) times in the whole of Section 1-92 of the IPA Act. The definition ascribed to the term must, of course, apply consistently throughout these statutory provisions. The same words used twice in the same act are presumed to have the same meaning. 2A N. Singer, Sutherland Statutes and Statutory Construction §46:6 at 249 (7th ed. 2007). According to Dominion, every single use of the term in the statute is clearly in the context of providing governmental aggregation opportunity to an electric utility’s bundled customers, i.e., RES electric supply. We observe that where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute. 2A N. Singer, Sutherland Statutes and Statutory Construction §47:16 at 357 (7th ed. 2007).

Just as well, the Commission observes that the full term being used, each and every time, is actually “residential and small commercial retail customer.” By virtue of our sound *in pari materia* construction above, we define “small commercial retail customer” in part, as “nonresidential customers of an electric utility.” Given that, as Dominion points out, a RES is not a utility, we are compelled to conclude that small commercial RES customers are not intended for aggregation purposes. This strongly suggests to the Commission that confidential RES customer data need not be provided under the statute.

Having examined the whole of Section 1-92 (c)(2) of IPA Act, with due attention to its subject matter and purposes, the Commission now turns its attention to a final argument.

#### **f. Results of different interpretations**

Courts often consider the consequences of interpreting a statute one way or the other. This is based on the presumption that the legislature would not have intended an absurdity, hardship or injustice.

The Commission observes several commenters to assert that giving the term “retail customers” its broadest possible meaning raises the risk of competitive harm. On record, we see ICEA’s concern that the GA’s employment of third parties will give them access to competitively-sensitive information that could be misused by the third party to further their commercial interests outside of implementing the aggregation. Voicing similar concerns, RESA believes that its interpretation of the IPA Act’s confidentiality provisions shows these laws to be inadequate and incomplete for the task. According to Dominion, the release of RES customer information could result in slamming--either inadvertent or intentional--by the RES that obtains this sensitive information from a Governmental Authority. ILEPA and Verde Energy state similar views. All of these arguments, effectively showing the Commission that the General Assembly did not properly provide necessary protections for the confidential and competitively-sensitive RES information, lead the Commission to only one conclusion. The reason that the General Assembly it did include proper and explicit protections for this particular type of customer information is because it did not intend RES customer information to be provided to the GA

We see that a whole set of problems attach when construing the term “retail customer” in the way that ComEd, Staff and others would have us do. In such a circumstance, the GA is not only getting confidential customer data of the utility’s customers--it would be receiving competitively-sensitive data of RES customers. This is the type of data that we note ComEd to itself observe has insufficient restrictions provided for in the statute. Indeed, ICEA, RESA, ILEPA, Verde Energy, and Dominion are all gravely concerned that this information will be passed by the GA to third-party’s without proper protections. We are to presume, however, that the legislature did not intend absurdity, inconvenience or injustice. *Michigan Avenue Nat’l Bank v. County of Cook*, 191 Ill.2d 493, 732 N.E.2d 528 (2000). The Commission is compelled to observe that a construction of the term “retail customer” that includes only the utility’s bundled customers averts the problem altogether. Illinois courts have held that if the language of a statute admits of two constructions, one of which makes the enactment mischievous, if not absurd, and the other renders it reasonable and wholesome, the construction leading to an absurd result should be avoided. *Secco v. Chicago Transit Authority*, 2 Ill.App.2d 239, 119 N.E. 2d 471 (1st Dist. 1954). We believe that had the General Assembly intended the release of RES customer data, it would have specified the same and provided ample protections regarding its use. Nothing of the type appears in Section 1-92 (c)(2).

Where, as here, it is shown that providing the names of customers already with a RES is simply unnecessary to carry out the law’s purposes, the Commission is compelled to agree that there is no reason to put this confidential and competitively-sensitive information at risk.

#### **g. Conclusion**

We recognize that there are many convincing arguments that would favor interpreting “retail customers” in a way that would have ComEd provide to the GA

confidential and competitively-sensitive RES customer information in addition to the utility's bundled customer data that it is unquestionably required to provide. In essence, however, all these arguments go to matters of practicality, convenience and retaining the status quo. In the end, and Staff points out, the Commission must follow the law as written and irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute. *Citizens Utility Bd. v. Ill. Commerce Comm'n*, 655 N.E. 2d 961, 969-70 (1st Dist.1995). The General Assembly wrote what it intended and the Commission is required to have ComEd apply the law consistent with its intents and purposes. Thus, Rate GAP will be modified in application such that ComEd will only provide the GA with the customer data of those residential and small commercial customers that are receiving commodity service from the electric utility, i.e. its bundled customers.

~~As a matter of law the best statement of the General Assembly's intent is the plain meaning of the statute. In determining the plain meaning of statutory terms, consideration should be made of the statute in its entirety, the subject it address and the apparent intent of the legislature in enacting the statute. (In re C.C and SOC., 2011 IL 111795 at 30, 959 N.E.2d 53 (2011)).~~

### **C. Rate Gap should be revised to protect the confidentiality of the customer data of retail electric supplier's customers**

The Initiating Order for this proceeding recognized that there were questions regarding the sufficiency of protections and safeguards in terms of persons who may gain access to customer information during the course of the aggregation process. Order Initiating Investigation at 3. In this proceeding, ComEd is proposing certain revisions.

The portion of Section 1-92 (c)(2) that is of concern here, states that:  
Any corporate authority or county board receiving customer information from an electric utility shall be subject to the limitations on the disclosure of the information described in Section 16-122 of the Public Utilities Act and Section 2HH of the Consumer Fraud and Deceptive Business Practices Act, and an electric utility shall not be held liable for any claims arising out of the provision of information pursuant to this item

#### **1. ComEd's Position**

In its comments, ComEd stated that, regarding the use of customer-specific information passed from an electric utility to a corporate authority or county board, subsection 1-92(c)(2) of the IPA Act clearly states that such information is:

subject to the limitations on the disclosure of the information described in Section

16-122 of the Public Utilities Act and Section 2HH of the Consumer Fraud and Deceptive Business Practices Act, and an electric utility shall not be held liable for any claims arising out of the provision of information pursuant to this item.

While ComEd acknowledges that legislative provisions for limiting the disclosure of information provided by ComEd to a governmental entity are apparent, it stated that certain parties expressed a concern that the provisions included under Section 1-92 of the Act are insufficient and potentially anti-competitive because they do not properly regulate what information the corporate authority or county board may provide to the RES(s) that wins the competitive solicitation processes or, in turn, how such winning RES(s) may use the information that the corporate authority or county board receives from ComEd. As a result, there was a concern that access to the customer-specific names, addresses and account numbers may confer an uncompetitive advantage to the RES(s) that win such solicitations.

In response, ComEd stated that it believes that it lacks the express authority under Section 1-92 to impose further restrictions and, more importantly, the ability to monitor or enforce such restrictions upon corporate authorities, county boards or the RESs that serve their programs.

ComEd noted that, while certain parties are expected to advance more stringent limitations in this proceeding, the parties reached general agreement that, at a minimum, Sheet No. 410 of Rate GAP should be revised to include the following:

The Government Authority warrants that any customer-specific information provided by the Company in accordance with the provisions of this tariff is treated as confidential information. Such Government Authority also warrants that any such information is used only to effectuate the provisions of Section 1-92 of the IPA Act. Such Government Authority is responsible for ensuring the confidentiality of such customer-specific information and the limitation of the use of such customer-specific information to only effectuate the provisions of Section 1-92 of the IPA Act.

ComEd stated that, to the best of its knowledge, no party objected to the amended tariff language. But ComEd wanted it known that it does not control the extent to which information obtained by the Government Authority will be maintained as confidential; nor does ComEd accept as its obligation the responsibility for enforcing such provisions under Rate GAP beyond obtaining such warrants.

## **2. Staff's Position**

Staff believes that the parties reached agreement that Sheet No. 410 of Rate GAP should be revised as follows:

*The Government Authority warrants that any customer-specific information*

*provided by the Company in accordance with the provisions of this tariff is treated as confidential information. Such Government Authority also warrants that any such information is used only to effectuate the provisions of Section 1-92 of the IPA Act. Such Government Authority is responsible for ensuring the confidentiality of such customer-specific information and the limitation of the use of such customer-specific information to only effectuate the provisions of Section 1-92 of the IPA Act.*

Staff also notes that the parties have reached agreement that the form used by the municipality to request information from ComEd (called the Municipal Authority Aggregation Data Request Form) contain the following language:

*In requesting the information provided below, the undersigned authorized representative for the municipality/township/county identified below acknowledges that all information provided by ComEd pursuant to this Form is and shall remain subject to the confidentiality requirements of 20 ILCS 3855/1-92(c)(2) (incorporating 220 ILCS 5/16-122, and 815 ILCS 505/2HH) and such information will be used only to effectuate the provisions of Section 1-92 of the IPA Act and no other purpose.*

Staff supports these additions and views them as useful vehicles to remind the municipalities of their statutory obligation to comply with Section 16-122 of the PUA and Section 2HH of the Consumer Fraud and Deceptive Business Practices Act.

On page 10 of its Initial Comments, the Illinois Competitive Energy Association (“ICEA”) proposes to include the following language in the Rate GAP tariff:

To ensure compliance with the law, and particularly with regard to protecting customer-specific information described in Items 18 through 23 of the Company Obligations Section of this Rate GAP, the Government Authority will require, as a material condition to a contract or other written agreement with both the RES selected to procure the aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority and with any third party it has engaged to assist in any aspect of the aggregation process, that there be established and followed appropriate protocols to preserve the confidentiality of customer-specific information and limit the use of such customer-specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act. The GA will ensure that these protocols, at the minimum, reasonably limit the number of authorized representatives of the selected RES and any other third party who need access to the customer-specific information; provide that the RES or any third party will not disclose, use, sell, or provide customer-specific information to any person, firm or entity for any purpose outside of the aggregation program; and, acknowledge that the customer-specific information remains the

property of the GA and that breaches of confidentiality will have certain, specified, and sufficient consequences.

Similarly, on page 5 of its Initial Comments, the Retail Energy Supply Association (“RESA”) proposes to include the following language on 1<sup>st</sup> Revised Sheet No. 410 of the Rate GAP tariff:

Specifically, the Government Authority will require, by contract, the RES it has selected to procure the aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority to maintain the confidentiality of customer-specific information and to use such customer-specific information only to effectuate the provisions of Section 1-92 of the IPA Act. To that end, the municipality/township/county will, and will require the selected RES to, only allow authorized representatives needing access to customer-specific information to effectuate the provisions of Section 1-92 to have access to the customer-specific information described in Items 18 through 23 of the Company Obligations section of Rate GAP. Moreover, the municipality/township/county will, and will require the selected RES to, delete and/or destroy the customer-specific information described in said Items 18 through 23 within 60 days after the Company provides said information.

Staff sees no reason to object to including ICEA’s and RESA’s proposed tariff language. However, it appears that the first two sentences of RESA’s proposed language are very similar to the language proposed by ICEA. As such, Staff recommends combining the last sentence of RESA’s proposed language with ICEA’s proposed language. Thus, Staff proposes the following additional tariff language:

To ensure compliance with the law, and particularly with regard to protecting customer-specific information described in Items 18 through 23 of the Company Obligations Section of this Rate GAP, the Government Authority will require, as a material condition to a contract or other written agreement with both the RES selected to procure the aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority and with any third party it has engaged to assist in any aspect of the aggregation process, that there be established and followed appropriate protocols to preserve the confidentiality of customer-specific information and limit the use of such customer-specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act. The GA will ensure that these protocols, at the minimum, reasonably limit the number of authorized representatives of the selected RES and any other third party who need access to the customer-specific information; provide that the RES or any third party will not disclose, use, sell, or provide customer-specific information to any person, firm or entity for any purpose outside of the aggregation program;

and, acknowledge that the customer-specific information remains the property of the GA and that breaches of confidentiality will have certain, specified, and sufficient consequences. Moreover, the municipality/township/county will, and will require the selected RES to, delete and/or destroy the customer-specific information described in said Items 18 through 23 within 60 days after the Company provides said information.

Additionally, on page 2 of its Initial Comments, the People of the State of Illinois (“AG”) offer the following modification to the language on 1<sup>st</sup> Revised Sheet No. 410:

Any warrant from a Government Authority submitted in accordance with the provisions of this tariff must be submitted to the Company in writing by a responsible official of such Government Authority, in the form of a sworn and notarized affidavit, attesting to the truth of the statement contained in the warrant.

Staff supports the AG’s proposed revision to the Rate GAP tariff and recommends that the Commission adopt it.

### **3. AG's Position**

In order to ensure that such customer-specific information is conveyed to the governmental authority under circumstances which guarantee that the corporate authorities, county boards or RESs<sup>1</sup> take such information with full knowledge of their duty to protect customer-specific information under the Illinois Power Agency Act, 20 ILCS 3855/1-2, (“IPA Act”), the parties agreed to tariff language referencing those provisions of that law. Specifically, the agreed-upon language in the tariff states: As defined in Attachment B, page 1 on Ill.C.C. No. 10, Original Sheet No. 406, in ComEd’s proposed Rate GAP tariff, “RES” refers to retail electric supplier. The Government Authority warrants that any retail customer-specific information provided by the Company in accordance with the provisions of this tariff is treated as confidential information. Such Government Authority also warrants that such information is used only to effectuate the provisions of Section 1-92 of the IPA Act. Such Government Authority is responsible for ensuring the confidentiality of such information and the limitation of the use of such information to only effectuate the provisions of Section 1-92 of the IPA Act. Any warrant from a Government Authority submitted in accordance with the provisions of this tariff must be submitted to the Company in writing by a responsible official of such Government Authority.

See Attachment B, page 6, Rate GAP, Ill.C.C. No. 10, 1st Revised Sheet No. 410 (Canceling Original Sheet No. 410).

In order to strengthen this portion of the tariff, the People recommend that the warrant referenced include a sworn and notarized affidavit, attesting to the truth of the

statements contained in the warrant. Accordingly, the People recommend the following modification to the language appearing on the 1st Revised Sheet No. 410:

Any warrant from a Government Authority submitted in accordance with the provisions of this tariff must be submitted to the Company in writing by a responsible official of such Government Authority, in the form of a sworn and notarized affidavit, attesting to the truth of the statement contained in the warrant.

#### **4. RESA's Position**

If the Commission accepts the definition of “retail customer” to exclude customers already taking service from a RES, then the confidentiality provisions of Rate GAP are adequate. However, if the Commission determines that the term “retail customer” includes a customer taking service from a RES, then there needs to be additional protection for the confidentiality of customer information. Numerous parties agreed with this need for additional protection including ICEA (ICEA Initial Comments, pp. 7-10); the AG (AG Initial Comments, pp. 1-2); ILEPA (ILEPA Initial Comments, p. 5); and the Commission Staff (Staff Reply Comments, pp. 9-10). Specifically, the Commission Staff indicated in its Reply Comments that it would not object to a combination of the language proposed by ICEA and RESA being added to Rate GAP. That language would read:

To ensure compliance with the law, and particularly with regard to protecting customer-specific information described in Items 18 through 23 of the Company Obligations Section of this Rate GAP, the Government Authority will require, as a material condition to a contract or other written agreement with both the RES selected to procure the aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority and with any third party it has engaged to assist in any aspect of the aggregation process, that there be established and followed appropriate protocols to preserve the confidentiality of customer-specific information and limit the use of such customer-specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act. The GA will ensure that these protocols, at the minimum, reasonably limit the number of authorized representatives of the selected RES and any other third party who need access to the customer-specific information; provide that the RES or any third party will not disclose, use, sell, or provide customer-specific information to any person, firm or entity for any purpose outside of the aggregation program; and, acknowledge that the customer-specific information remains the property of the GA and that breaches of confidentiality will have certain, specified, and sufficient consequences. Moreover, the municipality/township/county will, and will require the selected RES to, delete and/or destroy the customer-specific information described in said items 18 through 23 within 60 days after the Company provides said information.

RESA agrees that the Commission Staff's combination of its language with that

of ICEA provides acceptable protection of the confidentiality concerns of RESs' customers. The best protection, of course, is for ComEd not to provide information about customers of RESs to government authorities. However, if the Commission adopts a definition of "retail customers" which is not limited to ComEd's bundled services customers, then RESA recommends that that the language quoted above be added to Rate GAP. Moreover, similar language should be added to ComEd's Municipal Aggregation Data Request Form.

## 5. ICEA's Position

~~If the Commission were to determine that ComEd may release RES customer data to the GA, ICEA asserts that there arises a compelling need for more specific controls relative to the dissemination and use of the confidential RES customer data. In the application of its provisions, ICEA maintains, this is just what Section 1-92 (c)(2) of the IPA Act reasonably requires.~~

~~ICEA submits that what is implicit in the language of the subsection (c)(2) of the IPA Act needs to be made explicit in the Rate Gap tariff, i.e., that entities other than the local governments gaining access to this confidential and competitively sensitive information will be held to appropriate and enforceable restrictions. As a practical matter, ICEA asserts, there are many tasks required to implement an aggregation program. While the GA may execute these tasks on its own, ICEA explains that it is far more likely that a third party perhaps an ICC licensed agent, broker or consultant and/or the "winning" RES selected by the municipality will be involved to a large degree. ICEA's concern is ensuring that these third parties are not given unrestricted access to competitively sensitive information that could be misused by the third party to further their commercial interests outside of implementing the aggregation.~~

~~While ComEd's proposed language for Rate GAP is a good start, ICEA maintains that it is not enough to address the real risks at hand. ICEA points out that even ComEd recognizes that Section 1-92 of the IPA Act lacks appropriate restrictions on the use of data acquired from electric utilities. If reasonably construed, however, ICEA contends that the statute is sufficient to bring about certain necessary additions to Rate GAP. The General Assembly, being a "reasonable legislative body," ICEA asserts, would understand and expect that confidential and competitively sensitive customer information being tendered by the electric utility to the GA be given necessary protection at each link in the chain of disclosure.~~

~~It is to be assumed, ICEA asserts, that the General Assembly intended a reasonable discretion be afforded to those construing and applying its provisions to put into effect, with particularity, what the statute reasonably intends. See generally, *Sangamon County Fair, Etc. V. Stanard*, 9 Ill. 2d 267, 137 N. E. 2d 487 (1956) (words in a statute spell out the framework of the legislative intent and leave the details to the reasonable discretion of the administrative officer who administers the law). Here, ICEA observes, the Commission is faced a strong showing that much needs to be done~~

~~to protect and safeguard private, confidential and competitively sensitive information that will, in all probability, be disclosed to entities beyond the GA.~~

~~According to ICEA, the GA lacks essential guidance at a time when it is assuming legal responsibilities that are new and unfamiliar. But, ICEA points out, the Commission has solid experience and an acquired sensitivity for construing confidentiality laws and addressing confidentiality concerns. It frequently addresses such matters when approving protective agreements and petitions seeking confidential treatment of information. In other words, the Commission well understands that private, confidential and competitively sensitive customer information must be protected in a meaningful way.~~

~~As a practical matter, ICEA believes that some GAs will have experience with confidentiality protection laws, and thus put into their Plans and/or contracts (with both consultants and the winning supplier) appropriate provisions to both safeguard and enforce the strict confidentiality of customer information. Other GAs, however, perhaps being overwhelmed by the depth and breadth of the aggregation implementation process, or short on resources, may either inadvertently omit including such provisions or believe such confidentiality to be simply understood and not in need of a binding restrictions. In either case, ICEA believes that GAs would welcome guidance from the Commission on ways to effectuate their confidential obligations under Section 1-92 (c) (2) of the IPA Act.~~

~~Accordingly, ICEA proposes that the following italicized language be added to what ComEd has already proposed for Rate GAP:~~

~~*To ensure compliance with the law, and particularly with regard to protecting customer specific information described in Items 18 through 23 of the Company Obligations Section of this Rate GAP, the Government Authority will require, as a material condition to a contract or other written agreement with both the RES selected to procure the aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority and with any third party it has engaged to assist in any aspect of the aggregation process, that there be established and followed appropriate protocols to preserve the confidentiality of customer specific information and limit the use of such customer specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act. The GA will ensure that these protocols, at the minimum, reasonably limit the number of authorized representatives of the selected RES and any other third party who need access to the customer specific information, provide that the RES or any third party will not disclose, use, sell, or provide customer specific information to any person, firm or entity for any purpose outside of the aggregation program; and, acknowledge that the customer specific information remains the property of the GA and that breaches of confidentiality will have certain, specified, and sufficient consequences.*~~

ICEA ~~further~~ supports ComEd's proposed modification to Rate GAP as being reasonable and effective. That said, ICEA would still support the strengthening of ~~ComEd's proposed~~ Rate GAP language in the way that the AG recommends. ~~According to~~ ICEA's view, this ~~proposed~~ modification -- adding the requirement of a sworn and notarized affidavit for the warrant -- brings an important level of alertness and seriousness to the Governmental Authority's heavy duty of protecting confidential customer data.

## 6. Commission Analysis and Conclusion

~~Having observed that the parties to this proceeding have reached an agreement on revisions to the following:~~

~~Sheet No. 410 of the Rate GAP--~~

~~The Government Authority warrants that any customer-specific information provided by the Company in accordance with the provisions of this tariff is treated as confidential information. Such Government Authority also warrants that any such information is used only to effectuate the provisions of Section 1-92 of the IPA Act. Such Government Authority is responsible for ensuring the confidentiality of such customer-specific information and the limitation of the use of such customer-specific information to only effectuate the provisions of Section 1-92 of the IPA Act.~~

~~Municipal Authority Aggregation Data Request Form~~

~~In requesting the information provided below, the undersigned authorized representative for the municipality/township/county identified below acknowledges that all information provided by ComEd pursuant to this Form is and shall remain subject to the confidentiality requirements of 20 ILCS 3855/1-92(c)(2) (incorporating 220 ILCS 5/16-122, and 815 ILCS 505/2HH) and such information will be used only to effectuate the provisions of Section 1-92 of the IPA Act and no other purpose.~~

~~Additionally, the ICEA proposed the following:~~

~~In requesting the information provided below, the undersigned authorized representative for the municipality/township/county identified below acknowledges that all information provided by ComEd pursuant to this Form is and shall remain subject to the confidentiality requirements of 20 ILCS 3855/1-92(c)(2) (incorporating 220 ILCS 5/16-122, and 815 ILCS 505/2HH) and such information will be used only to effectuate the provisions of Section 1-92 of the IPA Act and no other purpose.~~

~~Staff proposed the following language:~~

~~To ensure compliance with the law, and particularly with regard to protecting customer-specific information described in Items 18 through 23~~

~~of the Company Obligations Section of this Rate GAP, the Government Authority will require, as a material condition to a contract or other written agreement with both the RES selected to procure the aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority and with any third party it has engaged to assist in any aspect of the aggregation process, that there be established and followed appropriate protocols to preserve the confidentiality of customer-specific information and limit the use of such customer-specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act. The GA will ensure that these protocols, at the minimum, reasonably limit the number of authorized representatives of the selected RES and any other third party who need access to the customer-specific information; provide that the RES or any third party will not disclose, use, sell, or provide customer-specific information to any person, firm or entity for any purpose outside of the aggregation program; and, acknowledge that the customer-specific information remains the property of the GA and that breaches of confidentiality will have certain, specified, and sufficient consequences. Moreover, the municipality/township/county will, and will require the selected RES to, delete and/or destroy the customer-specific information described in said Items 18 through 23 within 60 days after the Company provides said information.~~

RESA proposed to include the following language:

~~To ensure compliance with the law, and particularly with regard to protecting customer-specific information described in Items 18 through 23 of the Company Obligations Section of this Rate GAP, the Government Authority will require, as a material condition to a contract or other written agreement with both the RES selected to procure the aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority and with any third party it has engaged to assist in any aspect of the aggregation process, that there be established and followed appropriate protocols to preserve the confidentiality of customer-specific information and limit the use of such customer-specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act. The GA will ensure that these protocols, at the minimum, reasonably limit the number of authorized representatives of the selected RES and any other third party who need access to the customer-specific information; provide that the RES or any third party will not disclose, use, sell, or provide customer-specific information to any person, firm or entity for any purpose outside of the aggregation program; and, acknowledge that the customer-specific information remains the property of the GA and that breaches of confidentiality will have certain, specified, and sufficient consequences. Moreover, the municipality/township/county will, and will require the selected RES to,~~

~~delete and/or destroy the customer-specific information described in said Items 18 through 23 within 60 days after the Company provides said information.~~

In light of our decision on the proper interpretation of “retail customers” above, the Commission is persuaded that the language for modifying Rate GAP that ComEd proposes is largely sufficient. We note further, however, that Staff, ICEA and RESA agree that adding the language proposed by AG will strengthen the tariff.

~~The AG proposed as follows:~~

~~We agree to this modification, which added to ComEd's language, will state that:~~

Any warrant from a Government Authority submitted in accordance with the provisions of this tariff must be submitted to the Company in writing by a responsible official of such Government Authority, in the form of a sworn and notarized affidavit, attesting to the truth of the statement contained in the warrant.

### **Commission Analysis and Conclusion**

~~The Commission realizes the need to protect sensitive information relating to customer information. The Commission understands that although ComEd has no standing objection to the proposed revisions it does not control how a Government Authority maintains such information. The Commission concurs with Staff and has been provided no legal reasons why the above revisions should not be included.~~

~~Therefore, the Commission agrees with Staff that such revisions shall be incorporated into the Rate GAP~~

Modification: 1st Revised Sheet No. 410

#### **D. Date Request Fees**

This issue pertains to ComEd proposal to charge Government Authorities for the information it provides.

##### **1. ComEd Postion**

ComEd stated that it proposes to charge Government Authorities for the provision of aggregated usage data and customer-specific name, address and account number lists under Rate GAP. While subsection 16-122(c) of the PUA (220 ILCS 5/16-112(c)) expressly authorizes utilities to assess a reasonable fee for the provision of electricity usage data to units of local government, such as the data provided under Rate GAP, ComEd argues that it is also appropriate from a cost causation perspective to allocate the cost of the time of the personnel required to develop customer lists and data bases, which is more than trivial. ComEd further stated that it has derived its proposed charges by accounting for the labor hours needed to retrieve, sort, and categorize data in manner that is pragmatically useful and meets the requirements of the requesting Government Authorities aggregation program.

##### **2. Staff's Position**

In order to ensure there are no issues of potential double-recovery of costs from Government Authorities and ratepayers generally, Staff proposes, and ComEd does not oppose, that the Commission include the following in its final Order in this proceeding:

IT IS FURTHER ORDERED that the administrative costs recovered through the data request fees be recorded in account 451 Miscellaneous Service Revenues and that these revenues be reflected as a reduction to the revenue requirement approved in base rates established for the years 2012 and following.

### **3. Dominion's Postion**

Dominion argued in its initial comments that it appears that ComEd is including in its costs of governmental aggregation a cost it called "Affiliated Interest Agreement Common and Non-Common Back Office Rate" that represent nearly 25 % of the total. Dominion argued that these are fixed overhead costs that would be incurred regardless of whether a RES requests a customer list for governmental aggregation. ComEd agreed in its reply comments to reduce its costs by 25%, although it reserved the right to revisit that issue in the future. Dominion is satisfied with ComEd's offer.

### **4. Commission Analysis and Conclusion**

In regard to this issue, or what now appears to be a lack thereof, the Commission agrees with Staff and the inclusion of its recommended language. Further, the Commission notes Dominion's proposal to reduce ComEd charges on this issue by 25% and ComEd's agreement to do so.

## **E. Additional Proposed Tariff Modification**

### **1. ComEd's Position**

ICEA requested certain tariff modifications related to specific "peak load contributions ("PLCs") and generic profiles. Subsection 1-92(c)(2) of the IPA Act refers to Subsection 16-122(c) of the PUA (220 ILCS 5/16-112 (c)) concerning data provided to the municipality. In particular, this provision directs the electric utility to provide the aggregated load and usage data, which ComEd fulfills via the Rate GAP data request process. To further assist municipalities, ComEd provides non-residential customer PLCs in aggregated format. ComEd stated that residential PLCs can be calculated by multiplying the number of residential customers in the residential class, which is also provided via the Rate GAP data request process, by the publicly available class PLCs, which are posted on the ComEd website. ComEd can also provide load shape curves by customer classification, as directed in Subsection 16-122(c) of the PUA, in the form

of the generic load profiles, which are also publicly available on the ComEd website. Therefore, ComEd stated that it will not change the tariff to remove generic profiles.

Further, ComEd stated that individual PLCs are unique to each customer and provide their specific contribution to the ComEd peak load and are used as a billing determinant for wholesale transmission and capacity billing. ComEd believes that it cannot release the customer-specific PLCs, as recommended by ICEA, as that would provide customer specific data related to billing, usage or load shape. Subsection 16-122(c) of the PUA (220 ILCS 5/16-112 (c)) prohibits the release of this customer-specific data unless authorization is provided by the customer.

## 2. ICEA's Position

ICEA observes that Revised Sheet of No. 411 of Rate GAP explains the use of "Generic Load Profiles" that are used in Company Obligations section of the tariff. ICEA proposes that ComEd be required to provide customer specific Peak Load Contribution/Network Service Peak Load (PLC/NSPL) information in lieu of Generic Load Profiles. In ICEA's view, the provision of such customer-specific information will better allow suppliers to prepare bids for the governmental authorities for the ultimate benefit of the aggregated customers of the Municipal Authorities.

## 3. Commission Analysis and Conclusion

~~ICEA's proposes to have the utility provide Customer specific Peak Load Contribution/Network Service Peak Load ("PLC/NS PL") information in lieu of generic load profiles. In support of its position it claims in its view suppliers would be in a better position when preparing bids for governmental authorities. ComEd cites Subsection 16-122(c) of the PUA which~~  
We observe that ComEd opposes ICEA's proposal to have the utility provide Customer-specific Peak Load Contribution/Network Service Peak Load ("PLC/NSPL") information in lieu of generic load profiles. ComEd contends that it is unable to release the customer-specific PLCs for reason that Section 16-122(c) of the PUA prohibits the release of customer specific data. Absent any evidence to the contrary the Commission finds ComEd to be correct. For this reason the Commission agrees that generic profiles are proper as supported by ComEd. Therefore, no revision shall be required  
this customer-specific data unless authorization is provided by the customer. The Commission is not persuaded by ComEd's position. Our reading of Section 1-92(c)(2) of the IPA Act shows that it makes reference to Section 16-122(c) of the PUA, in a very particular way. In relevant part, the law states that:

Notwithstanding Section 16-122 of the Public Utilities Act and Section 2HH on the Consumers Fraud and Deceptive Business Practices Act... 20 ILCS 3855/1-92 (c)(2).

The Commission understands that this language frees ComEd from the restrictions imposed by Section 16-122 and is the basis for the utility's provision of otherwise confidential data. This means that the request put to ComEd by ICEA is permissible under the law. Moreover, we observe ICEA's assertion, that the provision of such customer-specific information will better allow suppliers to prepare bids for the governmental authorities for the ultimate benefit of the aggregated customers of the Municipal Authorities, is undisputed. For these reasons, we conclude that ComEd will revise Revised Sheet of No. 411 of Rate GAP to accommodate ICEA's proposal.

## **F. Rulemaking Proposals**

### **1. ComEd's Position**

ComEd noted that the parties have worked cooperatively to address a variety of issues stemming from aggregation programs, narrowed the issues and developed further refinements. It argued that the terms and conditions for the provision of retail customer data set forth in Rate GAP are just and reasonable and consistent with the requirements of Section 1-92 of the IPA Act and that this investigation proceeding will reveal the underlying ambiguities in, and perceived deficiencies of, the statute creating opt-out aggregation programs – not of Rate GAP. As aggregation programs spread and grow, these issues will require resolution. While ComEd believes that the General Assembly should continue the review of the enabling legislation that it began last spring, it also encourages the Commission, to the extent it believes it has the authority to address these issues and any other issues, to exercise such authority by initiating a rulemaking proceeding that brings greater structure and clarity to the operation of these programs and creates a coherent policy on retail competition. While the instant proceeding creates a convenient forum for attempting to address these issues, ComEd argues that ruling on utility tariffs is not the appropriate vehicle for promulgating State policies concerning the parties implementing aggregation programs and the aggregation programs themselves.

### **2. Staff's Position**

In its Initial Verified Comments, ComEd explains that the Illinois General Assembly should continue to review the municipal aggregation enabling legislation. ComEd also encourages the Commission to initiate a rulemaking proceeding, and ComEd argues that utility tariffs are not the appropriate vehicle to establish policies concerning programs such as municipal aggregation.

While Staff agrees in principle that a rulemaking may assist to develop statewide standards for the municipal aggregation program, the statutory authority for such a rulemaking is far from obvious, mainly due to the bi-furcated statutory scheme under both the PUA and the IPA. Before Staff is ready to recommend that the Commission

undertake a rulemaking proceeding, Staff will need to explore the Commission's statutory authority for promulgating rules implementing provisions of the IPA Act. However, even if such authority exists, Staff recommends that the Commission not use this tariff investigation to initiate a new rulemaking.

Moreover, a rulemaking would be primarily beneficial for situations where a municipality nears the end of its initial aggregation contract and seeks to explore aggregation options after the initial contracts ends. Staff understands that such a situation will arise for the first time in calendar year 2013. From its experience in informal workshop discussions, it has become clear to Staff that several novel issues associated with a municipality pursuing a follow-up aggregation program are not addressed in ComEd's Rate GAP tariff and will likely need to be addressed in the future. Also, a rulemaking will not be a substitute for the current Rate GAP tariff since a rulemaking will not be completed in time for the next round of initial municipal aggregations as described above.

As a result, Staff recommends that the Commission direct Staff to further explore the Commission's rulemaking authority and present its findings to the Commission outside of this Docket.

### **3. RESA's Position**

In its Initial Comments, ComEd encouraged the Commission to initiate a rulemaking proceeding. (ComEd Initial Comments, pp. 13-14) In its Initial Comments, RESA also took the position that there should be uniform rules applicable to municipal aggregation. RESA's understanding is that there will be many more municipalities, in both ComEd's and Ameren Illinois Company's ("Ameren") service territories, with opt-out municipal aggregation referenda in the March 2012 elections. A rulemaking is appropriate so that there are uniform rules applying to ComEd and Ameren. In addition, ComEd has expressed concerns regarding its authority to impose restrictions on the use of data by municipalities. Commission rules would provide the electric utilities with the requisite authority to impose appropriate restrictions of the use of data by municipalities. ICEA also took the position that a rulemaking proceeding would bring structure and clarity to the operation of municipal aggregation programs. (ICEA Initial Comments, p. 11) In contrast, Staff, while agreeing in principle that a rulemaking proceeding would be helpful, stated that the Commission's statutory authority to initiate such a rulemaking is "far from obvious". (Staff Initial Comments, p. 11) While Staff will apparently be exploring the Commission's authority, it recommends that the Commission not order a rulemaking proceeding in this proceeding. Instead Staff proposes to "explore this option further and present its findings to the Commission outside of this Docket". (*Id.*, p. 12)

RESA does not take a position as to whether the rulemaking proceeding should be ordered as an outcome of this docket or outside of this docket; however, the rulemaking proceeding should begin soon. There will be numerous governmental authorities holding referenda in March 2012 regarding aggregation programs. Consequently, it would be beneficial for the rulemaking proceeding to begin and conclude as soon as possible. With respect to the Commission's authority, RESA notes that the Commission has jurisdiction over the electric utilities, as well as over the RESs who will be participating in aggregation programs. It appears clear to RESA that, at a minimum, the Commission has authority to adopt rules regarding aggregation programs that are applicable to electric utilities and RESs.

### **4. ICEA's Position**

ICEA supports ComEd's view and encouragement of the initiation of a rulemaking proceeding that would bring greater structure and clarity to the operation of municipal aggregation programs. ICEA believes all participants would benefit from having state-wide standards and rules on governmental aggregations. A rulemaking, ICEA asserts, would bring greater definition, clarity, competitive-sensitivity, and a discussion of best practices to the aggregation process providing valuable assistance to the governmental authorities, to the utilities, to RES and, as importantly, to the residential and small commercial customers.

To the extent that the Commission believes it has the authority to initiate a rulemaking, ICEA strongly encourages the Commission to exercise such authority. ICEA recognizes, however, that whether such a rulemaking proceeds under the auspices of the Commission or the IPA or both, is an open question. To this end, ICEA has observed the Commission to recognize the value of coordination and/or exchange of information between different agencies. The instant situation, ICEA argues, suggests itself to be an excellent opportunity for the Commission and the IPA (given its assigned role in municipal aggregation) to share concerns and work together toward the goal of establishing rules and standards pertaining to municipal aggregation. ICEA stands ready to serve as resource for both the Commission and the IPA in moving such a process forward.

## **5. Commission Analysis and Conclusion**

ComEd, ICEA and RESA have all weighed in on this matter in support of a rulemaking procedure. Staff has concurred that a rulemaking can be most beneficial in developing statewide standards for the municipal aggregation program. However, Staff is unsure as to statutory authority for such a rulemaking. Therefore, rather than giving a recommendation either way Staff has requested time to further investigate this issue and then make a recommendation.

There is no problem in allowing Staff to make a more informed recommendation. This solely allows Staff to research this issue and substantively changes nothing. Once Staff has made its recommendation the Commission at that time can review all the recommendations and law behind them. This has no effect or bias as to the outcome of this issue. Thus, affording Staff the opportunity to properly research its conclusions is proper.

The Commission agrees with Staff's recommendations. We further will have Staff provide its findings and recommendations on this important matter within 60 days of the date of the entry of the Final Order in the instant proceeding.

### **g. Effect of Revised Rate GAP Tariff**

#### **1. ICEA Position**

ICEA raises an exception in its brief on exceptions that has not been discussed but is of importance to the implementation of a tariff filed pursuant and in conformance with the Final Order in this matter. ICEA notes that the consequences of a newly filed tariff on existing aggregation programs should be considered and addressed.

ICEA notes that the ALJPO should also make clear that any modifications to the tariff, as with any and all other tariff provisions being here approved, only applies

prospectively (and not retroactively). While it has never been disputed that the tariff changes apply on a prospective basis only, ICEA notes that the Commission should make this clear so as to avoid any unnecessary disruption or confusion in the marketplace.

ICEA notes that current contracts negotiated by Governmental Authorities are based upon the list of customers provided by ComEd at or about the time of the effective date of the contract, which lists ComEd generated under the March 3, 2011, Rate GAP tariff. The practical effect of this change is that approximately 299 communities have referendums on the March ballot that may be impacted by a Commission order that does not clearly apply to prospective agreements only. ICEA notes the importance of certainty in the marketplace under the current tariff since the effective date of the revised tariff is uncertain.

As a result, ICEA raises this issue in its Brief on Exceptions as an important issue that the ALJPO must address. ICEA states that the ALJPO must make clear that customers that have participated in aggregation programs prior to the revised Rate GAP tariff are “grandfathered” and will take service under aggregation programs, whether under the current RES or any future RES agreement, under the March 3, 2011, Rate GAP tariff.

ICEA suggests in the interests of the consumers and Governmental Authorities that small commercial retail customers (as defined in the March 3, 2011 Rate GAP tariff) that were part of an aggregation pool resulting from a supply contract between a municipality and a supplier entered into prior to the effective date of the revised Rate GAP tariff are “grandfathered” and will take service under the March 3, 2011, Rate GAP tariff unless and until they are no longer part of the aggregation pool. Customers that elect to return to the electric utility or switch to a third party RES, would no longer be eligible to take service under the grandfathered aggregation programs.

## 2. Conclusion

Although this issue has not been addressed, the Commission is mindful of the unintended consequences of a Final Order that does not make the prospective application application of the revised tariff clear and unambiguous. Therefore, the Commission adopts the ICEA position.

## **IV. FINDINGS AND ORDERING PARAGRAPHS**

The Commission, having given due consideration to the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) Commonwealth Edison Company is an Illinois corporation engaged in the transmission, sale and distribution of electricity to the public in Illinois, and is a public utility as defined in Section 3-105 of the Public Utilities Act;

- (2) The Commission has jurisdiction over the Company and the subject matter herein;
- (3) The recitals of fact and conclusions of law reached in the prefatory portion of this Order are supported by the evidence of record, and are hereby adopted as findings of fact and conclusions of law;
- (4) The term “small commercial retail” customer shall be defined in accord with the Public Utilities Act as those nonresidential retail customers of an electric utility consuming 15, 000 kilowatt-hours or less of electricity annually in its service are;
- (5) The definition of “retail customer” shall include customers that are receiving or eligible to receive tariffed services from an electric utility;
- (6) The revisions of Staff, Illinois Competitive Energy Association, Retail Energy Supply Association, and the Attorney General shall be incorporated in the Rate GAP regarding the usage and protection of customer information;
- (7) The language proposed by Staff and the twenty five percent fee reduction shall be adopted as agreed to by ComED;
- (8) There will be no additional tariff modifications;
- (9) The revisions to the tariff pursuant to this Order shall apply on a prospective basis only and make allowance for customers (as defined in the March 3, 2011 Rate GAP tariff) that were part of an aggregation pool resulting from a supply contract between a municipality and a supplier entered into prior to the effective date of the revised Rate GAP tariff are “grandfathered” and to take service under the March 3, 2011, Rate GAP tariff unless and until they are no longer part of the aggregation pool.
- (10) ~~(9)~~ Staff will be given 60 days to research the Commission’s rulemaking authority and present its findings to the Commission outside of the Docket.

IT IS THEREFORE ORDERED that the term “small commercial retail” customer shall be defined in accord with the Public Utilities Act as those nonresidential retail customers of an electric utility consuming 15, 000 kilowatt-hours or less of electricity annually in its service are;

IT IS FURTHER ORDERED that the definition of “retail customer” shall include customers that are receiving or eligible to receive tariffed services from an electric utility.

IT IS FURTHER ORDERED that Staff, Illinois Competitive Energy Association, Retail Energy Supply Association, and the Attorney General revisions shall be shall be adopted into the Rate GAP regarding the usage and protection of customer information.

IT IS FURTHER ORDERED that language proposed by Staff and the twenty five percent fee reduction shall be adopted as agreed to by ComED.

IT IS FURTHER ORDERED that there will be no further tariff modifications.

IT IS FURTHER ORDERED that Staff will given 60 days to present its finding to the Commission as to Commissions rulemaking authority regarding the issues presented in this Docket.

IT IS FURTHER ORDERED that, subject to the provision of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:

March 5, 2012

BRIEFS ON EXCEPTION DUE:

March 12, 2012

Katina Baker  
Administrative Law Judge