

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	
Development and adoption of rules	:	12-0456
concerning municipal aggregation	:	
	:	

**VERIFIED REPLY COMMENTS BY METROPOLITAN MAYORS CAUCUS
TO THE STAFF PROPOSED DRAFT RULE ON MUNICIPAL AGGREGATION**

Metropolitan Mayors Caucus (“Caucus”) hereby presents its comments in reply to comments filed on November 28, 2012 by various parties to this rulemaking proceeding in connection with the Staff Proposed Draft Rule on Municipal Aggregation filed on November 1, 2012 (“Draft Rule”) and in accordance with the Administrative Law Judge’s November 7, 2012 Notice of Continuance of Hearing and Notice of Schedule.

I. INTRODUCTION; STATEWIDE SUPPORT

On November, 28, 2012, initial comments in this docket were filed by nine parties, including the Caucus, on the proposed Draft Rule. While comments were filed representing diverse points of view and involving some very detailed comments on the intricacies of the Draft Rule, the Caucus notes that the comments of several of the parties support the Caucus’ initial comments on the Draft Rule as a whole: That the Commission does not have the authority and jurisdiction to adopt the Draft Rule.

Since the Caucus intervened in this proceeding on November 5, 2012, the Caucus has received support from 115 municipalities who are governmental aggregators or considering governmental aggregation—and ten other governmental organizations—not just in the Chicago region, but all around Illinois, who have learned of the Draft Rule. A list of the supporting

municipalities and organizations is attached as Exhibit A and made a part of these Reply Comments. These governmental aggregators and organizations have supported the Caucus because they also have significant concerns about the impact the Draft Rule would have on their local electrical aggregation efforts as well as those that may be initiated by other governmental aggregators in the future.

The Caucus' reply comments will address the comments of the other parties who commented, both as to the question of whether the Commission has the authority and jurisdiction to adopt the Draft Rule, as well as some specific comments on particular sections of the Draft Rule in the event that the Commission elects to proceed to adopt rules.

II. COMMENTS APPLICABLE TO THE DRAFT RULE AS A WHOLE

The Initial Comments filed by several of the parties to this proceeding support the Caucus' Initial Comment that the Commission does not have the authority and jurisdiction to adopt rules governing municipal aggregation.

Illinois Competitive Energy Association ("ICEA")

The ICEA Initial Verified Comments contain three important points that the Caucus urges the Commission to carefully consider:

First, the ICEA is concerned that the Draft Rule "will create mandatory operational requirements which ICEA believes are better left to the discretion of the Governmental Aggregator." ICEA Initial Comments, at p. 2-3.

Second, the ICEA explains that overly prescriptive rules such as those in the Draft Rule will limit each Governmental Aggregator's flexibility in tailoring its respective "aggregation programs and product offerings to the unique needs and circumstances of their community's residents. *Id.*

Third, the ICEA points out that the provisions of the Draft Rule “stray beyond the limits of statutory support,” noting that the Illinois Power Agency Act (“IPA Act”) is “not overly prescriptive and . . . leaves substantial discretion to governmental entities in how they craft their plans of operation and governance.” The ICEA also notes that the Draft Rule may impinge on the discretion left to the Governmental Aggregators. *Id.*

The Caucus supports these comments of the ICEA, because these comments are based on ICEA’s experience with and insight into the very different choices that different Governmental Aggregators have made in the exercise of their authority to create electrical aggregation programs. There is no “one size fits all” approach to governmental aggregation: the General Assembly has recognized the wide variety of communities all around Illinois with different needs and concerns, and that those needs and concerns will change from time to time, because both the communities and the electric supply markets will change in the future.

Commonwealth Edison Company’s (“ComEd”)

The Verified Initial Comments of ComEd contain two points that the Caucus urges the Commission to carefully consider:

First, ComEd correctly points out that Section 16-104(b) of the Public Utilities Act (“PUA”) does not provide any support for Commission regulation of the opt-in and opt-out electric aggregation programs authorized by Section 1-92 of the IPA Act. ComEd correctly notes that Section 16-104(b) has not been amended since 1999, and could not have been contemplated to include today’s opt-in and opt-out programs. Indeed, ComEd has independently recommended deletion of all references to Section 16-104(b) in the definitions (Section 470.10). ComEd Verified Initial Comments, at p. 3-4.

Second, ComEd recommends that a section on applicability of the Draft Rules be included to clarify which groups of participants in the electric aggregation process are subject to the Draft Rules. In particular, ComEd notes that there is uncertainty as to “whether or how it applies to municipalities and their agents.” *Id.*, at pp. 2-3. Related to this uncertainty is the lack of clarity about whether the penalties and enforcement provisions in proposed Section 470.600 would apply to any participants in aggregation programs other than a utility or RES. *Id.* at pp. 3, 8.

The Caucus supports these comments of ComEd because they make clear that Section 16-104(b) of the PUA does not provide authority or jurisdiction for the Commission to adopt these Draft Rules. In addition, ComEd’s comments reach the same conclusion about Section 1-92 of the IPA Act that the Caucus has reached: that Section 1-92 does not contain language authorizing the Commission to make these Draft Rules applicable to the municipalities, counties and townships that have been authorized by Section 1-92 of the IPA Act to establish electrical aggregation in their communities.

As explained by the Caucus in its Initial Comments, the Commission staff’s conclusions ignore a key fact: the General Assembly explicitly removed from the Commission the authority to supervise and regulate governmental aggregators effective January 1, 2010. Because the Commission is created by the General Assembly, the Commission “derives its power and authority solely from the statute creating it, and its acts or orders which are beyond the purview of the statute are void.” *City of Chicago v. Illinois Commerce Commission*, 79 Ill.2d 213, 217-18, 402 N.E.2d 595, 597-98 (1980).

III. COMMENTS APPLICABLE TO SPECIFIC RULES IN THE PROPOSED DRAFT RULE

If the Commission intends to adopt rules governing municipal and county aggregation despite its lack of authority and jurisdiction to do so, the Caucus submits the reply comments below regarding specific provisions of the Draft Rule. By submitting the reply comments in this Part III, the Caucus does not waive its right to challenge the Commission's authority and jurisdiction to adopt such rules.

470.010 Definitions.¹

Comment 1: Source of Authority.

The Caucus agrees with the Initial Comments by ComEd, at pp. 3-4, that the definitions of Aggregation Program, Opt-In Aggregation Program and Opt-out Aggregation Program each should be modified to delete any reference to Section 16-104(b) of the Public Utilities Act.

470.100 Transfer of Customer Information.

Comment 1: Competition in the Electricity Marketplace and Consumer Protection.

Two groups representing Retail Electric Suppliers provided initial comments that fall within the umbrella of ensuring competitive neutrality or leveling the playing field among suppliers. Some of these proposals would impact the sharing of customer information that would be governed by this proposed Rule. The Retail Energy Supply Association (“RESA”) and Coalition of Energy Suppliers (“CES”) each advocate in different ways for competitive neutrality among provision of electric supply through municipal aggregation and other non-aggregation-based processes:

¹ The Caucus clarifies its footnote 1 from its Initial Comments to note that there is a potential discrepancy between Public Acts 97-823 and 97-1067 enacted in the 97th General Assembly regarding the inclusion of townships among those governments allowed to aggregate under Section 1-92.

- RESA advocates that unless its definition of “retail customer” is adopted, the full customer information list made available to Governmental Aggregators should be available for purchase by non-aggregation suppliers. RESA Verified Comments, at pp. 7-9.
- CES advocates a rule providing for the mandatory destruction of customer lists by Aggregation Suppliers when their contracts end (Section 470.100(d)), and no termination fee for customers who wish to leave an opt-out aggregation program (Section 470.400(a)). CES Verified Response Comments, at 2-4 and Appendix.

The Caucus favors competition in order to allow residential and small commercial electric customers to receive the best prices for their electric supply. However, the Caucus has received many reports from Governmental Aggregators indicating that some electric supply companies that are not the selected Aggregation Supplier in a community have used very aggressive marketing tactics—particularly during the transition period between passage of the opt-out referendum and the start of aggregated supply delivery—that have been misleading to customers and caused great confusion to customers. Some Governmental Aggregators have expended substantial time and effort to assist customers in their communities who have been subjected to aggressive marketing efforts of this type. As an example of this concern, see the Village of Wilmette's Press Release entitled "Village Warns Residents About Misleading Electrical Supply Solicitations," issued July 13, 2012 and attached as Exhibit B and made a part of these Reply Comments.

If the Commission proposes to adopt any of these rules that have been proposed under the umbrella of competitive neutrality or creating a level playing field, the

Commission should give serious consideration to holding evidentiary hearings to identify the extent, scope and nature of these marketing activities. That would allow the Commission to devise rules that will cure identified problems that all parties to the marketplace have experienced.

470.200 Notifications to the Commission.

Comment 1: Fees and Gifts.

Both RESA and CES have recommended that the list of notifications to the Commission's ORMD be expanded:

- RESA suggests that any "payments or donations, including civic contributions and consulting fees" to the Governmental Aggregator by the Aggregation Supplier should be disclosed. RESA Verified Comments, at pp. 7-8.
- CES suggests similar disclosure as to payments to the Governmental Aggregator as well as to their agents, brokers and consultants for aggregation. CES Verified Response Comments, at Appendix p. 4.

It is unclear precisely what problem these groups have identified that these proposed amendments will cure. To the extent that these groups are suggesting that improper payments might be made, Illinois law already contains prohibitions on improper gifts by prohibited sources to government contracts in the State Officials and Employees Ethics Act, 5 ILCS 430/1-1 *et seq.* As to payments to consultants and others who may assist Governmental Aggregators, the Caucus observes that Public Act 97-1067 (effective August 24, 2012) amended Section 1-92 of the IPA Act to add a new subsection (f), requiring disclosure of consultant fees to the Governmental Aggregator.

Section 470.300 Customer Notifications.

Comment 1: Source of Authority.

The authority of the Commission to require that particular notices be given that include specific materials is unsupported: aggregation is governed by Section 1-92, and that Section provides no authority to the Commission in this regard. ICEA correctly notes that there are practical considerations that affect the Governmental Aggregator's use of a governmental logo, and urges that the use of the logo and the manner of its use should be a matter that is left to the Governmental Aggregator. ICEA Verified Comments, at pp. 3-4. Logo use is just one of the aspects of concern raised by the Caucus in its Initial Comments—that the Governmental Aggregator should be allowed to communicate with its residents in the manner that it believes will best communicate the information. Each community develops particular styles for sending various types of official communications to its residents and businesses. While the Caucus understands CNT Energy's concern (Initial Comments, at p. 3) that communications to residents about electrical aggregation should look suitably official, the Commission's mandate of rules such as those proposed here will interfere with local communications protocols and practices and cause customer confusion.

Section 470.400 Opt-out Aggregation Provisions.

Comment 1: Source of Authority.

The ICEA's comments are supportive of the position that the Caucus took in its Initial Comments (at pp. 12-13): that these opt-out rules are a matter best determined by the local Governmental Aggregator rather than by Commission rules. ICEA Verified Comments, at pp. 5-12. The ICEA indicates that there are a variety of considerations

addressed in Subsections (a), (b), and (c) of the proposed Rule that the local Governmental Aggregator can best determine, including to what sorts of notices their residents will best respond, the relative cost of various notices, and the amount of time their residents are likely to require to respond. *Id.*, at pp. 5-11. In addition, the ICEA advocates deletion of Subsection (d) in its entirety, because the need for and timing of future aggregation opt-out notices will depend on the particular circumstances of the aggregation program and agreements in place for that Governmental Aggregator. *Id.*, at pp. 11-12.

The ICEA's comments are consistent with the Caucus' Initial Comments, at pp. 12-13. Section 1-92 of the IPA Act grants no power to the Commission to specify the details of notices to residential and small commercial customers at the level of detail provided in this proposed rule. Instead, such details are frequently provided for by the governmental aggregator in the plan of operation and governance, and these proposed rule provisions interfere with that local authority.

Section 470.500 Opt-in Aggregation Provisions.

Comment 1: Source of Authority.

As with the Opt-Out provisions above, the ICEA's comments are supportive of the position that the Caucus took in its Initial Comments (at pp. 13-14). The ICEA notes that the key issues in these opt-in rules are matters best determined by the local Governmental Aggregator rather than by Commission rules. ICEA Verified Comments, at pp. 12-14. The ICEA indicates that there are a variety of considerations addressed in Subsections (a), (b), and (c) of the proposed Rule that the local Governmental Aggregator can best

determine, as stated above in connection with Section 470.400. *Id.*, at pp. 12-14. These proposed Rules will interfere with that local judgment.

Section 470.600 Failure to Comply.

Comment 1: Applicability.

ComEd has commented that this proposed Section's impact will be affected by any modifications that clarify which parties will ultimately be subject to the Draft Rules. As a result, ComEd has commented that this proposed Rule should be deleted as redundant of the PUA, or fully expanded to outline its full scope and application. ComEd Verified Comments, at pp. 3, 8. The Commission agrees that this proposed Rule should be deleted. If it is to be included, the Commission should consider holding hearings to take evidence as to how enforcement should be addressed.

IV. CONCLUSION

In light of the foregoing, the Caucus respectfully requests that the Commission reconsider the extent of its authority and jurisdiction to adopt the Draft Rule, and that the Commission withdraw the Rule and take no further action. In the alternative, if the Commission elects to proceed without regard to its authority to do so, the Caucus urges careful consideration of the Caucus' responses (submitted in Part III above) to the comments made by the other parties on the Draft Rule.

Dated this 12th day of December, 2012.

METROPOLITAN MAYORS CAUCUS

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VERIFICATION

I, David E. Bennett, being duly sworn, hereby affirm that I am the Executive Director of the Metropolitan Mayors Caucus and have knowledge of the contents of these Verified Reply Comments By Metropolitan Mayors Caucus To The Staff Proposed Draft Rule On Municipal Aggregation and the exhibits thereto, and they are true and accurate to the best of my knowledge and belief.

David E. Bennett

Subscribed and sworn to before me
this 12 day of December, 2012.

Dorienne A. Preer
Notary Public

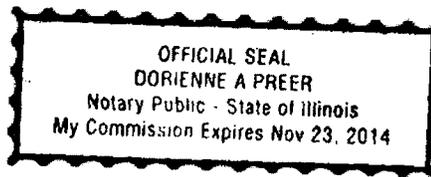


Exhibit A to Reply Comments
Municipalities and Organizations Supporting the Metropolitan Mayors Caucus
in Illinois Commerce Commission Docket 12-0456
(as of December 12, 2012)

Supporting Organizations

DuPage Mayors and Managers Conference
Illinois Municipal League
Lake County Municipal League
McHenry County Council of Governments
Metro West Council of Governments
Northwest Municipal Conference
South Suburban Mayors and Managers Association
Southwest Conference of Mayors
West Central Municipal Conference
Will County Governmental League

Participating Municipalities

Addison	Hanover Park	New Lenox	Schiller Park
Arlington Heights	Harvard	Niles	Shorewood
Aurora	Hawthorn Woods	Norridge	Skokie
Bannockburn	Hickory Hills	North Aurora	South Barrington
Barrington	Highland Park	North Barrington	South Chicago Heights
Bedford Park	Highwood	Northbrook	Stickney
Bensenville	Hinsdale	Northfield	Sugar Grove
Berwyn	Hoffman Estates	Oak Brook	Tinley Park
Braidwood	Homer Glen	Oak Park	Trenton*
Bolingbrook	Island Lake	O'Fallon*	Vernon Hills
Buffalo Grove	Itasca	Orland Hills	Villa Park
Carol Stream	Joliet	Orland Park	Warrenville
Clarendon Hills	Kappa*	Oswego	Wayne
Columbia*	LaGrange	Palatine	West Chicago
Crest Hill	LaGrange Park	Palos Heights	West Dundee
Crystal Lake	Lake Barrington	Palos Hills	Westchester
Deerfield	Lake Bluff	Palos Park	Westmont
Deer Park	Lake Forest	Paris*	Wheeling
DeKalb*	Lake Zurich	Park Ridge	Willowbrook
Delavan*	Lemont	Plainfield	Wilmette
Diamond	Lincoln*	Prairie Grove	Wilmington
Downers Grove	Lindenhurst	River Forest	Wood Dale
Elmhurst	Lisle	Riverside	Woodridge
Forest Park	Lombard	Riverwoods	Woodstock
Frankfort	Loves Park*	Rockford*	Worth
Glen Carbon*	Machesney Park*	Rolling Meadows	
Glencoe	Morris*	Roselle	
Glen Ellyn	Mt. Prospect	Rosemont	
Glenwood	Mt. Zion*	Round Lake Beach	
Grayslake	New Baden*	Schaumburg	

*Downstate Illinois/Non-Chicago Area municipality



Press Release

Village Manager's
Office

(847) 853-7509
Fax: (847) 853-7700

FOR IMMEDIATE RELEASE

Date: July 13, 2012
Contact: John Prejzner, Assistant to the Village Manager
Phone: (847) 853-7502
Email: prejznerj@wilmette.com

Village Warns Residents about Misleading Electrical Supply Solicitations

Wilmette, IL – With the recent agreement with mc² for the Wilmette Power Purchasing Program (WP3), residents have seen an increased number of calls and mail solicitations to switch their supply of electricity from ComEd to other suppliers. Please be advised that any mailings not on Village letterhead are not related to WP3 and should be read carefully. The Village, or mc², will not contact you by phone and will never ask you for your ComEd account number.

The Village has received several complaints from residents about misleading solicitors' calls regarding the supply of electricity. In some instances, residents have even reported receiving calls from companies claiming they were from ComEd asking for ComEd account numbers and offering lower rates to stay with ComEd. Please know that ComEd will never contact you asking you for your account number. ComEd is not offering lower rates to stay with ComEd and these calls are from third party suppliers. If you provide your ComEd account number over the phone, companies are able to switch your electricity supply from ComEd, or WP3, to another supplier. In some cases, this switch may be unwanted. If you feel you are being misled by these phone calls or mailings, the Village urges you to file a complaint with the Illinois Commerce Commission by calling 1-(800) 524-0795 or by going to www.icc.illinois.gov/consumer/complaint/.

To protect yourself from making an unwanted switch to an electricity supplier, follow these steps:

- When you receive a call from a company regarding the supply of electricity, ask the caller to identify what company they work for.
 - If they do not identify themselves, or claim they work for ComEd or represent the Village, do not provide any further information and report the call to the ICC.

- Ask the caller to provide you with a call back number or general phone number for the business.
 - If the caller does not provide you with a phone number, do not provide any further information and report the call to the ICC.
- If the caller asks for your ComEd account, **do not** provide it unless you are sure you want to enroll with that company.
- If you receive a mailing regarding the supply of electricity, check to see if it is printed on Village letterhead. If not, the mailing is a solicitation and is not affiliated with WP3.

Please know that some solicitations may be from legitimate companies. To weigh your options with alternative suppliers and compare the offers to WP3, visit www.pluginillinois.org or go to www.wilmette.com/wp3.aspx.

For more information on WP3, go to the Village's website at www.wilmette.com/wp3.aspx or contact John Prejzner, Assistant to the Village Manager, at (847) 853-7502 or prejznerj@wilmette.com.