

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

**Illinois Commerce Commission** :  
**On its Own Motion** :  
 : **Docket No. 12-0456**  
 :  
**Development and adoption of rules** :  
**Concerning municipal aggregation** :  
 :

**VERIFIED REPLY COMMENTS OF THE STAFF  
OF THE ILLINOIS COMMERCE COMMISSION**

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Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, pursuant to Section 200.800 of the Rules of Practice of the Illinois Commerce Commission (“Commission” or “ICC”) (83 Ill. Adm. Code 200.800) and Section 10-101 of the Public Utilities Act (the “PUA” or “Act”), respectfully submits its Verified Reply Comments in the instant proceeding.

**I. BACKGROUND**

In an Initiating Order dated July 31, 2012, the Commission initiated a proceeding to develop rules regarding municipal aggregation to implement the appropriate provisions of the Illinois Power Agency Act (“IPA Act”) and the PUA. (Initiating Order, Docket No. 12-0456, July 31, 2012, p. 2) The following parties intervened: the People of the State of Illinois (“AG”), Citizens Utility Board (“CUB”), Ameren Illinois Company (“Ameren”), Dominion Retail, Inc. (“Dominion”), the Retail Energy Supply Association (“RESA”), Constellation NewEnergy, Inc. (“Constellation”), Mt. Carmel Public Utility Co. (“Mt. Carmel”), Commonwealth Edison Company (“ComEd”), the Illinois Competitive Energy Association (“ICEA”), the City of Chicago (“City”), Integrys Energy Services, LLC

("Integritys"), Wind on the Wires ("WOW"), CNT Energy ("CNT"), Interstate Gas Supply, Inc. ("IGS"), MC Squared Energy Services, LLC ("MC Squared"), FirstEnergy Solutions Corp. ("FirstEnergy"), National Energy Marketers Association ("NEMA"), Prairie Point Energy, LLC d/b/a Nicor Advanced Energy, LLC ("Prairie Point"), the Coalition of Energy Suppliers ("CES"), Metropolitan Mayors Caucus ("Caucus"), the Building Owners and Managers Association of Chicago ("BOMA"), and the Illinois Power Agency ("IPA"). The parties conducted several workshops throughout the months of September and October, 2012, and Staff circulated a draft rule to workshop participants on October 11, 2012, upon which parties informally commented. On November 1, 2012, Staff filed its Draft Rule which addressed some of the comments received by the parties during the informal workshop and comment process. On November 28, 2012, the parties filed their Initial Comments in response to Staff's Draft Rule.<sup>1</sup>

## **II. COMMENTS**

### **a. Introduction**

Staff notes that several parties that submitted Comments in response to its Draft Rule and Initial Verified Comments question the Commission's authority, to various degrees, to promulgate rules on municipal aggregation. Staff notes that the Commission has already made a general determination that it has the authority to issue rules on this subject, as evidenced by its Initiating Order in this Docket. However, Staff will summarize the fundamental concepts of its position on Commission authority. First, Staff recognizes that Section 1-92 of the IPA Act does not authorize the Commission to

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<sup>1</sup> Parties filing Initial Comments included: Ameren Illinois, CES, CNT, ICEA, the Caucus, WOW, ComEd, Prairie Point and RESA.

regulate municipalities, counties, or townships. 20 ILCS 3855/1-92. However, Staff will demonstrate that the Commission has rulemaking authority over aggregations of electric loads, including municipal aggregations, with respect to utilities and alternative retail electric suppliers (“RESs”). 220 ILCS 5/16-104(b). In promulgating this rulemaking pursuant to the Commission’s authority over aggregations, the Commission is in no way attempting to enforce Section 1-92 of the IPA Act. 20 ILCS 3855/1-92. Instead, Staff is proposing the Commission use its very broad electric aggregation rulemaking authority to effectuate what Staff believes are the most effective regulations over municipal aggregation applicable to utilities and RESs.

Of the three parties questioning the Commission’s authority to promulgate rules in this area, one of those three parties’ positions clearly stands out. While ICEA and ComEd question the Commission authority on a few specific provisions of the Proposed Rule, the Caucus makes the sweeping generalization that the Commission lacks authority and jurisdiction over *any* aspect of electric aggregation. *See generally* Caucus Initial Comments. Moreover, it is worth noting that while the Caucus spends almost 15 pages arguing that the Commission has no authority or jurisdiction over these matters, the Caucus, unlike every other party, does not provide any policy arguments opposing Staff’s Proposed Rule. While the Caucus devotes a separate second section in its Initial Comments to addressing specific sections of the Proposed Rule, the Caucus, almost exclusively, repeats its claim that the Commission lacks authority in any area of the Proposed Rule. In addition, the Caucus does not just claim that the Commission lacks explicit rulemaking authority regarding electric aggregation, the Caucus argues that the Commission lacks *any* statutory authority when it states that “the regulation of electric

aggregation...is out of the scope of the Commission's powers." Caucus Initial Comments at 4.

As demonstrated exhaustively below, the Staff wholly disagrees with such a broad claim. In fact, it would be very surprising for Staff if any other party in this proceeding that agrees with the Caucus' position. Staff reminds the Commission that it was the request for a Commission rulemaking on governmental aggregation by several parties, including ComEd, RESA, and ICEA, that led to the Staff Report accompanying the Initiating Order in this Docket.<sup>2</sup> If the Commission were to fully accept the Caucus' argument, Staff would find it impossible to defend/uphold the Commission's adoption of ComEd's Rate GAP tariff as well as the non-suspension of Ameren Illinois' Governmental Aggregation Services tariff. Again, the Caucus does not simply argue that the Commission lacks rulemaking authority in the area of electric aggregation, the Caucus argues that the Commission lacks *any authority and jurisdiction* regarding electric aggregation. Caucus Initial Comment at 2-8.

Additionally, in its Initial Comments, the Caucus repeatedly claims that "authority over municipal aggregation is vested with the Illinois Power Agency, not the Illinois Commerce Commission." *Id.* at 2-5. However, given the totality of the Caucus' Initial Comments, Staff finds it unlikely that the Caucus would accept any rules by any state agency, even if that agency were the IPA. Two statements in its Initial Comments demonstrate the Caucus' true intent to make its argument that the Commission "is the wrong agency" in this area is a hollow argument. On page 12, and repeated on page 13, the Caucus reveals its position that "if there are specific items about notice that need addressing, the proper venue to do so is by amendment to the IPA Act." *Id.* at 12-13.

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<sup>2</sup> Docket No. 11-0434 at 25-27.

These two statements should dispel any notion that the Caucus would accept any rules by the IPA. The Caucus apparently thinks that only action by the General Assembly would be sufficient.

**b. Commission Authority over Aggregation**

**1. Legal Authority**

As stated repeatedly by Staff as well as the Commission, the Commission has both explicit and implicit rulemaking authority over aggregation of competitive loads under the PUA, including municipal aggregation, authorized by 20 ILCS 3855/1-92 and 220 ILCS 5/16-104(b). More specifically, the PUA states: “[t]he Commission may adopt rules and regulation governing the criteria for aggregation of the loads utilizing delivery services.” 220 ILCS 5/16-104(b). This means that aggregation of any load that has elected to receive power and energy services from suppliers other than the public utility while receiving delivery services from the public utility, including suppliers providing municipal aggregation services, is explicitly within the Commission’s rulemaking authority. *Id.*; see 220 ILCS 5/16-102 (stating that “[d]elivery [s]ervices’ means those services provided by the electric utility that are necessary in order for the transmission and distribution systems to function so that retail customers located in the electric utility’s service area can receive electric power and energy from suppliers other than the electric utility, and shall include, without limitation, standard metering and billing services.”).

Furthermore, the Commission has implicit rulemaking authority through four additional separate provisions of the PUA. See 220 ILCS 5/10-101; 5/8-501; 5/20-110; 5/20-120; and 5/20-130. First, the Commission has general rulemaking authority for

“any matters covered by the provisions of [the Public Utilities] Act, or by any other Acts relating to public utilities.” 220 ILCS 5/10-101.

Second, the Commission has rulemaking authority over “the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility.” 220 ILCS 5/8-501. Municipal aggregation has the character of a service or commodity provided by a public utility, namely electric supply services, and therefore the Commission has been granted the rulemaking authority for municipal aggregation.

Third, the Commission has rulemaking authority in connection with plans developed by the Office of Retail Market Development (“ORMD”). See 220 ILCS 5/20-110. ORMD is “dedicated to the task of actively seeking out ways to promote retail competition in Illinois to benefit all Illinois customers.” 220 ILCS 5/20-110. In doing so, the ORMD must “monitor existing competitive conditions in Illinois . . . and actively explore and propose to the Commission and to the General Assembly solutions to overcome identified barriers . . . [while also] promot[ing] safe, reliable, and affordable electric service.” *Id.* Furthermore, the Director of ORMD is given the authority to include municipal aggregation, among other things, in plans for retail market development. *Id.*

The ORMD is required by statute to develop a “plan designed to promote . . . retail electric competition for residential and small commercial electricity consumers while maintaining safe, reliable, and affordable service.” 220 ILCS 5/20-120. This plan must be presented to the Commission, among other entities, and the Commission is required to “initiate any proceeding or proceedings called for in the final plan.” *Id.*

Moreover, the ORMD must submit an annual report to the Commission and the General Assembly that include suggestions for “administrative and legislative action

necessary to promote further improvements in retail electric competition.” *Id.* Clearly, the ORMD’s obligation to develop a plan for electric competition for residential and small commercial consumers is on-going, and therefore, the Commission is implicitly given the authority to proceed with rulemakings to implement improvements suggested by the ORMD on a continuous basis. *See id.*

Fourth, the Commission was given explicit rulemaking authority “to establish retail choice and referral programs to be administered by an electric utility or the State.” 220 ILCS 5/20-130(a). While this explicit authority is couched in the “[r]etail choice and referral programs” section of the Act, in that same Section, the Legislature indicates its intent to provide the Commission with rulemaking authority in a broader sense: “[n]othing in this Section shall prevent the [ORMD] or the Commission from considering [rulemaking for] retail choice . . . programs in addition to the programs outlined in this Section.” 220 ILCS 5/20-130. Importantly, ORMD is to develop retail choice programs on a continuous basis, working to implement and improve the program with “interested parties.” 220 ILCS 5/20-130(c).

Because municipal aggregation is a form of retail choice, albeit on a large scale, the Commission has the same authority for rulemaking on municipal aggregation issues as it has for all types of retail choice programs under §5/20-130. *See id.*

The Commission, accordingly, has both explicit and implicit rulemaking authority over municipal aggregation. *See e.g., Owens v. Green, 400 Ill. 380, 398 (1948) (stating where there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred.); Abbott Laboratories, Inc. v. The Illinois Commerce*

*Comm'n*, 289 Ill App. 3d 705, 712-713 (1<sup>st</sup> Dist. 1997) (stating that beyond the specific powers granted it in the PUA, the Commission also has the implied powers that may be necessary to fulfill its obligations under the PUA.).

## 2. Intervenor General Authority Arguments

Regardless of the express and implied authority discussed above, the Caucus and ComEd make general arguments that the Commission lacks the authority to regulate municipal aggregations. Caucus Initial Comments at 2-8; ComEd Verified Initial Comments at 3-4. The Caucus makes a series of similar authority arguments while ComEd makes only one general argument. Staff will address each of these arguments, which ignore, confuse, or misinterpret the law, in turn.

Generally, the Caucus argues that the Commission is going beyond its rulemaking authority because the General Assembly explicitly removed from the Commission the authority to supervise and regulate governmental aggregators effective January 1, 2010. *Id.* at 2. In expounding on this argument, the Caucus first asserts that the “power of municipalities and counties to engage in aggregation of electric load is established and contained in Section 1-92 of the Illinois Power Agency Act.” *Id.* Here, the Caucus makes one correct statement of the law. The Commission has no authority over municipalities, counties, or townships,<sup>3</sup> with regard to electric aggregation or

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<sup>3</sup> The Caucus insists that townships were removed from the group of governments allowed to aggregate under Section 1-92 of the IPA Act, citing Public Act 97-1067. Caucus Initial Comments at 9, n. 1. Notably, the Caucus inexplicitly, given its argument, goes on in its Initial Comments to include townships in its suggested definition of “Governmental Aggregator.” Caucus Initial Comments at 9. Nonetheless, the Caucus appears to be unaware of the current state of the law and/or how to interpret Legislative style. Public Act 97-1067 does amend Section 1-92 of the IPA Act, but only by making additions to that Section that require persons or entities that provide advice to governmental agencies in selecting an aggregation supplier to disclose any relationship through which that person or entity may receive remuneration as a result of the selection of that supplier. 20 ILCS 3855/1-92 as amended by P.A. 97-1067, effective August 24, 2012. Furthermore, while townships were not initially included in the group of governments permitted

otherwise; the Caucus, however, fails to recognize that the Commission need not, and indeed never does, assert any rulemaking authority over those entities in this proceeding. The Commission is merely exercising its rulemaking authority to regulate alternative retail electric suppliers and utilities, over whom the Commission clearly has regulatory authority. 220 ILCS 5/16-115; 220 ILCS 5/16-115A; 220 ILCS 5/16-115B; 220 ILCS 5/16-104(b).

Importantly, municipal aggregation always involves multiple parties; in its most basic form it involves one governmental entity, one RES, and one public utility. Each of these entities separately received that power from the General Assembly. See 220 ILCS 5/16-104(b); 20 ILCS 3855/1-92. The utilities are required to facilitate electric aggregation, and RESs are given implicit authority to aggregate electricity, pursuant to 220 ILCS 5/16-104(b). 220 ILCS 5/16-104(b). Section 1-92 of the IPA Act merely provides that power to certain governmental entities. 20 ILCS 3855/1-92. While the Commission may choose to fashion a rule that parallels the requirements of Section 1-92 of the IPA Act very closely, that Section has no bearing on its authority to regulate RESs and utilities with respect to any and all aggregations. See 220 ILCS 5/16-104(b); 20 ILCS 3855/1-92.

Problematically, both the Caucus and ComEd are confounding the concept of regulatory authority over electric aggregation with that over the municipalities, counties, and townships themselves. Caucus Initial Comments at 2-5; ComEd Initial Comments at 3-4. Nonetheless, the Commission continues to possess regulatory authority over public utilities and RESs, as the Caucus concedes, and both explicit and implicit regulatory

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to aggregate electricity, townships were added to this group in Public Act 97-0823. 20 ILCS 3855/1-92 as amended by P.A. 97-0823, effective July 18, 2012.

authority over all electric aggregations. 220 ILCS 5/16-104(b); 5/16-115; 5/16-115A; 5/16-115B; see Caucus Initial Comments at 5. To the extent ComEd expressed uncertainty as to whom the rule would apply, including whether or how it applies to municipalities and their agents, Staff asserts that the rule is applicable only to RESs and utilities for all the reasons discussed in Subsections II.a.i and II.a.ii. ComEd Verified Initial Comments at 3. The Commission should reject the general authority arguments of both ComEd and the Caucus.

### **3. Intervener Specific Authority Arguments**

While the Commission has not gone beyond its authority in this proceeding, Staff will address the specific authority concerns enumerated by the Caucus. Turning to those arguments, first, the Caucus recognizes that before January 1, 2012, the Commission had rulemaking authority over municipalities and counties wishing to aggregate electricity pursuant to now repealed Section 17-800 of the PUA,<sup>4</sup> but argues that the General Assembly removed the Commission's supervision and regulatory powers over those aspects of the electric aggregation process with the repeal of that Section. Caucus Initial Comments at 3-4. Staff could not agree more. However, this argument is meaningless in this proceeding; Staff has not attempted to regulate the municipalities, counties, or townships in any manner.

Second, the Caucus offers the novel opinion, totally absent any reference to the law, that the phrase "criteria for aggregation," contained in the Section authorizing Commission regulatory authority over utilities and RESs to aggregate load, is "clearly technical in nature" and limits the Commission to regulating "standards for capacity and

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<sup>4</sup> While no longer published in the PUA, Staff has attached the now defunct Section 17-800 of the PUA for reference as Attachment A for the parties' convenience.

operation of the utility facilities themselves, or the procedures for aggregating a load for electricity delivery.” Caucus Initial Comments at 6; see 220 ILCS 5/16-104(b). While Staff does not believe this innocuous phrase is technical in any manner, we fail to see how, even if it were technical in nature, it would have any bearing. The statute clearly states that: [t]he Commission may adopt rules and regulations governing the criteria for aggregation of the loads utilizing delivery services.” 220 ILCS 5/16-104(b). This is not couched in any limitations that would result in the Commission’s authority applying only to governing standards for public utilities or procedures for aggregating loads for delivery. See *id.* The Commission must adhere to standards of statutory interpretation, not wild assertions without any reference to the statutory language, intent, or history. As the Illinois Supreme Court explained:

The primary rule of statutory construction is to give effect to legislative intent by first looking at the plain meaning of the language. Where the language of a statute is clear and unambiguous, a court must give it effect as written, without 'reading into it exceptions, limitations or conditions that the legislature did not express. Courts will first look to the words of the statute, for the language used by the legislature is the best indication of legislative intent. When the language of a statute is clear, no resort is necessary to other tools of interpretation.

See *Davis v. Toshiba*, 186 Ill. 2d 181, 185 (1999) (internal citations omitted).

The plain meaning of the statute, as demonstrated above by Staff, dictates that the Commission has rulemaking authority over electric aggregations wishing to use public utility delivery services. 220 ILCS 5/16-104(b). Perhaps shockingly for the Caucus, the phrase “criteria for aggregation,” taken in context, means the Commission has the authority to determine the criteria that must be met by the public utility and alternative retail electric suppliers before electric loads may be aggregated. The Caucus

also asserts that this phrase somehow limits the Commission's authority over "business relationships of the electric utility and the municipal or county aggregator." Caucus Initial Comments at 6. Again, Staff has never asserted, nor do the draft rules effectuate, authority over the municipalities, counties, or townships involved in municipal aggregation, including the business relationship with RESs.<sup>5</sup>

Third, the Caucus offers the assertion that the Commission's "power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of [the PUA], or by any other Acts relating to public utilities subject to such rules and regulations as the Commission may establish" means the Commission has authority to adopt procedural rules, but never substantive rules. Caucus Initial Comments at 7; 220 ILCS 5/10-101. Again, the Caucus is inventing limitations that simply do not exist in the law. See 220 ILCS 5/10-101. Clearly, the Commission has the authority from this provision to engage in rulemaking of a substantive nature, a procedural nature, or both; the phrase "any matters" does not imply substantive issues are beyond the Commission's authority, despite the Caucus's arguments to the contrary. See 220 ILCS 5/10-101. The Caucus does point out correctly that municipal and county aggregators are not public utilities, and the Commission does not have the authority through this Section to regulate them. Caucus Initial Comments at 7. Again, Staff is in complete agreement, and has not attempted to regulate municipal or county aggregators (or even for that matter, township regulators). More importantly, as described above, the Draft Rule does not regulate those entities.

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<sup>5</sup> While the Caucus indicates it anticipates there will be some sort of business relationship between a public utility and a municipal or county aggregator, this is nonsensical; utilities will have no such relationship. RESs would provide aggregation supply services for municipal aggregation, and the business relationship would be between the RESs and the municipalities, counties, or townships.

In an interesting turn of events, the Caucus next argues that “[w]ithout any factual or legal support, staff [sic] simply asserts municipal aggregation is subject to Commission regulation” pursuant to Section 5/8-501. Caucus Initial Comments at 7. That Section provides the Commission with authority over “the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility.” 220 ILCS 5/8-501. Staff recognizes that electric public utilities, including ComEd and Ameren, provide the electric supply services for some Illinois electric customers. Alternative retail electric suppliers also provide the electric supply services for some Illinois electric customers. To the extent alternative retail electric suppliers perform a service the character of which is also supplied by any public utility, the Commission has regulatory authority. 220 ILCS 5/8-501. Since the supply services of RESs and electric utilities are of the same character, the Commission has authority over the provision of those services, including in a municipal aggregation setting. See 220 ILCS 5/8-501. Although the Caucus argues this interpretation is “clearly beyond” the Commission’s authority, the plain language of the statute, to which the Commission is obligated to adhere when the statute is clear, dictates otherwise. See *Davis v. Toshiba*, 186 Ill. 2d 181, 185 (1999).

Fifth, the Caucus argues the Commission does not have rulemaking authority pursuant to Section 5/20-110, and that the ORMD cannot gain rulemaking authority based on its annual reports to the General Assembly, but rather that rulemaking authority must come from the General Assembly. Caucus Initial Comments at 7-8 (*citing City of Chicago v. Illinois Commerce Commission*, 79 Ill. 2d 213, 217-18, 402 N.E.2d 595, 597-98 (1980) (stating that 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.”)). Here, the Caucus fails to recognize that Sections 5/20-110 and 5/20-120 should be read together, and that the Commission has rulemaking authority through ORMD granted by the General Assembly pursuant to 220 ILCS 5/20-120. 220 ILCS 5/20-110; 5/20-120. The Illinois Supreme Court explains that:

All provisions of a statutory enactment are viewed as a whole. Therefore, words and phrases must be interpreted in light of other relevant provisions of the statute and must not be construed in isolation. Each word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous. Accordingly, in determining the intent of the General Assembly, we may properly consider not only the language of the statute, but also the purpose and necessity for the law, the evils sought to be remedied, and goals to be achieved. Legislative intent can be ascertained from a consideration of the entire Act, its nature, its object and the consequences that would result from construing it one way or the other. In construing a statute, we presume that the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience or injustice.

*People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 280 (2003)(internal citations omitted).

These sections provide the following, among other things: ORMD is “dedicated to the task of actively seeking out ways to promote retail competition in Illinois to benefit all Illinois customers[,]” and in doing so, must “actively explore and propose to the Commission . . . solutions to overcome identified barriers . . . including municipal aggregation.” 220 ILCS 5/20-120. Additionally, ORMD is required to develop a “plan . . . to promote . . . retail electric competition for residential and small commercial electricity customers” and present that plan to the Commission, and the Commission is required to “initiate any proceeding or proceedings called for in the plan.” 220 ILCS 5/20-120.

Clearly, through these provisions, the Commission has authority to initiate any proceeding, including rulemakings, called for in ORMD’s plan to promote retail electric

competition. 220 ILCS 5/20-110; 220 ILCS 5/20-120. Moreover, this authority is granted to the Commission via statute, which is promulgated by the General Assembly. Since the General Assembly granted the Commission rulemaking authority for any proceeding pursuant to ORMD plan, this rulemaking is well within the purview of that statute. See 220 ILCS 5/20-110; 220 ILCS 5/20-120; *City of Chicago vs. Illinois Commerce Commission*, 79 Ill. 2d at 217-18.

Finally, the Caucus argues that while the Commission is authorized to establish retail choice and referral programs, this does not mean the Commission can establish retail choice and referral programs for municipal aggregation. Caucus Initial Comments at 8. However, as discussed above, the Legislature indicates its intent to provide the Commission with rulemaking authority in a broader sense: “[n]othing in this Section shall prevent the [ORMD] or the Commission from considering [rulemaking for] retail choice . . . programs in addition to the programs outlined in this Section.” 220 ILCS 5/20-130. The Commission, through ORMD, is required to develop retail choice programs on a continuous basis, and may develop programs beyond those outlined in the statute. 220 ILCS 5/20-130. The Commission is doing just that in this proceeding, and it is well within the Commission’s authority to do so. See *id.* For the reasons set out above, the Commission should reject the Caucus’s arguments.

**c. 470.10 Definitions**

First, the Caucus again argues that municipal aggregation is authorized by Section 1-92 of the IPA Act, not Section 16-104(b), and therefore all references to Section 16-104(b) should be removed from the definitions of “Aggregation Program,” “Opt-In Aggregation Program,” and “Opt-out Aggregation Program.” Caucus Initial

Comments at 9. As discussed above, each party to the municipal aggregation must have the authority granted to it from the General Assembly. Only municipalities, townships, and counties receive that authority via Section 1-92 of the IPA Act. See 20 ILCS 3855/1-92. If the Commission accepted the Caucus's suggested position that only Section 1-92 affords the authority for municipal aggregation, no RES would be able to offer supply to any municipality, township, or county; in short, there would be no municipal aggregation.<sup>6</sup> See 20 ILCS 3855/1-92. The Commission should reject the Caucus's argument.

Second, parties discuss the definition of "Governmental Aggregator." Caucus Initial Comments at 9; ComEd Verified Initial Comments at 4. The Caucus asserts that the definition of "Governmental Aggregator" should read "[a] municipality, a township, or a county" as it argues the definition should refer to the local governments involved as corporate entities, rather than by their elected officials. The Commission should reject this argument. Caucus Initial Comments at 9. Staff has chosen to reflect the statutory language of Section 1-92 as closely as possible here, and that statute only allows "[t]he corporate authorities of a municipality, township board, or county board of a county [to] adopt an ordinance under which it may aggregate in accordance with [Section 1-92]." 220 ILCS 3855/1-92 as amended by P.A. 97-0823, effective July 18, 2012. The Caucus is requesting the Commission grant authority to corporate entities that only the General Assembly can grant. See *City of Chicago vs. Illinois Commerce Commission*; 20 ILCS

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<sup>6</sup> Even if the Commission lacked the authority to regulate RESs and utilities for aggregation or municipal aggregation, municipalities, counties, and townships would not have the authority to do so. Municipalities, counties, and townships enjoy only those authorities given them by the General Assembly. Moreover, "municipal control over public utilities has been preempted by the statewide regulatory authority of the Commission under the Public Utilities Act." *Orland Hills v. Citizens Utilities Co. of Illinois*, 347 Ill. App. 3d 504, 596 (1<sup>st</sup> Dist. 1999).

3855/1-92. The Commission should reject this argument. Meanwhile, ComEd states that Staff's Proposed Rule defines the term "Governmental Aggregator" but not the term "aggregated entity," as found in Section 1-92(e) of the IPA Act. ComEd Verified Initial Comments at 4. ComEd proposes to revise the definition of "Governmental Aggregator" to clarify that an "aggregated entity" has the same meaning as "Governmental Aggregator." *Id.* Staff has no objection to this proposed modification. Therefore, the definition of "Governmental Aggregator" should be revised as follows:

**Governmental Aggregator:** The corporate authorities of a municipality, a township board, or a county board in the aggregate area; "Governmental Aggregator" shall have the same meaning as "aggregate entity," as used in Section 1-92 of the IPA Act.

Next, RESA argues that the draft rule's definition of "retail customers" means customers receiving bundled service, both delivery services and electricity supply, from an electric utility. RESA Initial Comments at 3. RESA then interprets Section 1-92 of the IPA Act and states that since no definition of "retail customers" is provided in that Section, the statute must be applied as written. *Id.* at 4.

Staff disagrees with RESA; the definition of "retail customers" is generally understood in this context, and, moreover, this issue has already been litigated at the Commission. See ComEd, Investigation of Rate GAP pursuant to Section 9-250 of the PUA, Order, Docket No. 11-0434 (April 4, 2012). The Commission recently issued a final Order in Docket No. 11-0434 where the definition of "retail customer" in the context of municipal aggregation was raised and fully litigated. *Id.* at 13. The Commission agreed with Staff that the term "retail customers" in this context should be adopted from the PUA, and that "retail customer" means:

[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.*

*Id.*; 220 ILCS 5/16-102 (emphasis added). Again, there is no need to formulate a new definition of “retail customers” because the PUA is clear, and the Commission has spoken on this issue.<sup>7</sup>

**d. 470.30 Statement of Authority**

The Caucus asserts that there is no statutory authority for this rulemaking, and that all Sections, other than Section 1-92 of the IPA Act, referenced in this Section should be deleted. Caucus Initial Comments at 9. As Staff has at great length enumerated above, the Commission does indeed have authority over utilities and RESs in the context of municipal aggregation. 220 ILCS 5/16-104(b); see 20 ILCS 3855/1-92. Moreover, the Commission has the authority to require RESs to comply with its requirements to first obtain, and then retain their certificates pursuant to Sections 16-115 and Section 16-115A. Once the municipal aggregation rulemaking is approved,

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<sup>7</sup> The Commission stated that “[t]he fact remains that the IPA Act is silent as to the definition of retail customer. The Commission concludes that this is because the General Assembly was completely aware that it had previously clearly defined this term in the PUA. Further case law supports this. [See *Illinois Native Bar Association v. The University of Illinois*, 368 Ill. App. 3d 321, 327 (Ill. App. 2006) (*holding* the legislature is aware of all previous enactments when it enacts new legislation.); *Lily Lake Road Defenders v. The County of McHenry*, 156 Ill. 2d 1, 9, 619 N.E.2d 137, 140, (Ill. App. 1993) (*holding* “[c]ourts presume that the legislature envisions a consistent body of law when it enacts new legislation”).] This conclusion is based not only case law, but also logic, and a suggestion to the contrary evinces a belief that General Assembly had forgotten its previous work.” ComEd, Investigation of Rate GAP pursuant to Section 9-250 of the PUA, Order, Docket No. 11-0434 at 13.

RESs will have to comply with the regulation or risk losing their certificates. 220 ILCS 5/16-115; 5/16-115A; see 5/16-115B. Again, the Commission should reject the Caucus' argument.

**e. 470.100 Transfer of Customer Information**

First, the Caucus argues that subsections 470.100(a) and (b) of the proposed rule are governed by Section 1-92 of the IPA Act, and are therefore unnecessary and should be deleted. Caucus Initial Brief at 10. Here the Caucus is again missing the distinction between the authority granted to municipalities, counties, and townships in Section 1-92 of the IPA Act and that granted to utilities and RESs through 220 ILCS 5/16-104(b). See *id.*; 20 ILCS 3855/1-92; 220 ILCS 5/16-104(b). While these are distinct, the Commission may mirror the provisions of Section 1-92 of the IPA Act if it chooses to do so. Moreover, in order for these provisions to have applicability to RESs, the Commission must make it so, pursuant to its rulemaking authority granted in Section 16-104(b) of the PUA. 220 ILCS 5/16-104(b). Therefore, the Commission should reject the Caucus' argument.

Second, the Caucus asserts that the content of the provisions of 470.100(c) and (d) are normally dealt with in the negotiated agreement between the Governmental Aggregator and the selected RES, and is without the authority to adopt these rules. Caucus Initial Comments at 10. However, because the PUA preempted municipal powers to regulate public utilities, the Governmental Aggregator may not supersede or replace the Commission's authority with its own authority, even if by contract. *Village of Orland Hills v. Citizens Utilities Co. of Illinois*, 347 Ill. App.3d 504, 513-14 (1<sup>st</sup> Dist. 2004) ("preemption applies not only where a municipality attempts to regulate a public utility by

a municipal ordinance, but also where it attempts to do so through a franchise agreement or a contract.).

Third, as discussed fully above, the Commission has authority to regulate the RESs and does not attempt to regulate the Governmental Aggregator. Staff Verified Comments, Att. A at 3. These subsections make it clear how RESs must transfer and protect customer information. *Id.* Moreover, while subsection 470.100(c) does state “[t]he plan of operation and governance developed pursuant to Section 1-92 of the IPA Act should specify the circumstances and processes, if any, under which” late coming residential and small commercial customers could join the aggregation program, it never requires consideration or inclusion of such information. *Id.* This commentary is suggestive in nature, and does not go beyond the Commission’s authority. *Id.*; 220 ILCS 5/16-104(b).

Fourth, ComEd argues that the Commission should revise Section 470.100 of the proposed rule to: (1) clarify that a Governmental Aggregator may only request customer information following passage of an ordinance authorizing municipal aggregation; (2) require all Governmental Aggregators, not merely township boards, to provide a utility with an accurate list of customers before the utility provides the Governmental Aggregator with the current account numbers, names, and addresses for these customers;<sup>8</sup> and (3) clarify the information that the current Aggregation Supplier must submit to the Governmental Aggregator and that the same confidentiality and

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<sup>8</sup> ComEd couches this suggested revision in terms of what the Commission should require of Governmental Aggregators, but the Commission has no regulatory authority over Governmental Aggregators, and the section of the proposed rule in question regulates the circumstances under which utilities must supply information to Governmental Aggregators upon their request (exercising regulatory authority over utility, not Governmental Aggregator). ComEd Verified Initial Comments at 5; Staff Verified Comments, Att. A at 2; 220 ILCS 5/16-104(b).

liability provisions set forth in Section 1-92 of the IPA Act apply to all submissions of information required by the proposed rule. ComEd Verified Initial Comments at 5.

Taking each of these requests in turn, first, ComEd argues the Commission should assert regulatory authority over when a Governmental Aggregator is allowed to receive information from a utility. *Id.* The Commission, however, does not have regulatory authority over the Governmental Aggregators, as discussed in detail above, and should reject this argument. In addition, when it comes to opt-out aggregations, ComEd's current Rate GAP tariff does not require a Governmental Aggregator to wait until it has passed an ordinance and developed an opt-out plan for the aggregation program in order to request generic load profiles and customer names and addresses. ComEd's current tariff requires a Governmental Aggregator to submit a warrant that it has passed an ordinance and developed an opt-out plan for the aggregation program prior to receiving the customer account numbers from ComEd. ComEd's proposed rule language would put further restrictions on the Governmental Aggregator and Staff recommends that the Commission reject ComEd's proposed language.

Second, ComEd argues the Commission should require utilities to provide the account numbers, names, and addresses of all residential and small commercial customers to the Governmental Aggregator only after the Governmental Aggregator satisfies a requirement ComEd hopes the Commission would set. ComEd Verified Initial Comments at 5; see Staff Verified Comments, Att. A at 2. The Commission should reject this argument. While the proposed rule only allows utilities to provide that information to township boards after a customer list has been provided to the utility, the language imposes a requirement on the utility, not on a Governmental Aggregator. Staff

Verified Comments, Att. A at 2-3. This requirement on the utilities mirrors a similar requirement of township boards in Section 1-92 of the IPA Act, but does not impose any requirements on township boards. *Id.*; see 20 ILCS 3855/1-92. However, ComEd's suggested revision would require the Commission to attempt to regulate Governmental Aggregators improperly, and should be rejected. Although Ameren Illinois has an effective tariff doing exactly what ComEd requests here, the Commission "passed to file" this tariff, which means the Commission did not reach any conclusions as to whether the filed tariff is just and reasonable nor did the Commission assert its authority over Governmental Aggregators. See *Antioch Milling Co. v. Public Service Co. of Northern Illinois*, 4 Ill.2d 200, 206 (1954).

Third, ComEd proposes the addition of a release of liability for an electric utility for any claims arising out of the provision of customer-specific information pursuant to this Part, Section 1-92 of the IPA Act, or Section 16-104 of the PUA. ComEd Verified Initial Comments, Att. A at 4. Staff believes ComEd's proposed language is too broad. However, if the Commission wishes to address electric utility liability in these rules, Staff proposes that it simply reflect the provision of Section 1-92 of the IPA Act. Section 470.100(e), accordingly, would read as follows:

(e) An electric utility shall not be held liable for any claims arising out of the provision of information pursuant to Section 1-92(c)(2) of the IPA Act.

Fourth, Prairie Point proposes that the rule specify that the Aggregation Supplier obtaining customer-specific information "shall not use such customer-specific information to market products other than RES service." Prairie Point Initial Comments at 1. Staff does not disagree with Prairie Point's apparent intentions here, but finds that

the Proposed Rule adequately addresses Prairie Point's concerns. The Proposed Rule already limits "the use of such customer-specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act." Staff Verified Comments, Att. A at 3. In Staff's view, Prairie Point's proposed additional language would not provide any additional protection. In fact, Prairie Point's proposed use of the term "RES service" could be interpreted to limit the universe of allowable services to less than that allowed pursuant to Section 1-92 of the IPA Act. 20 ILCS 3855/1-92. Section 1-92 of the IPA Act refers to "service agreements" for "the sale and purchase of electricity and related services and equipment." *Id.* As a result, Staff believes the Proposed Rule's provision to limit "the use of such customer-specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act" is sufficient to address Prairie Point's concerns and parallels Section 1-92 of the IPA Act. *See id.*

RESA argues that in the event the Commission does not adopt RESA's proposed definition of "Retail Customer", Section 470.100 should be amended to require the electric utility to give a "heads-up" notice to the suppliers which have existing customers in the Aggregated Area. RESA Initial Comments at 4-5. This notice would require the electric utility to provide the names, addresses, and account numbers of existing RES customers to their respective RES. While Staff is sympathetic to concerns about respecting customers' previous electric supply decisions (see Sections 470.400(b) and (c) as well as Sections 470.500(b) and (c) of Staff's Proposed Rule), RESA's proposal goes too far. Nothing is stopping any RES from assisting its customers to educated decisions about whether to join an aggregation program. In fact, many of the provisions in the Staff Proposed Rule are focused towards helping customers to be more informed

customers. Furthermore, a RES of an existing customer gets a notification from the electric utility when one of its customers is about to switch away from its service. This should allow an incumbent RES sufficient opportunity to contact its customers to inform them about municipal aggregation. Also, Illinois seems to be unique in providing a public and up-to-date list of communities implementing or pursuing aggregation programs. This is another opportunity for an incumbent supplier to pro-actively reach out to its customers if it so desires. Therefore, Staff recommends rejecting RESA's proposed language for Section 470.100 (*See Section II. C of RESA's Verified Comments*).

**f. 470.200 Notifications to the Commission**

The Caucus argues that the Commission does not have the authority to require the filing of notices of aggregation with the Commission. Caucus Initial Comments at 10. The Commission should reject this argument because the Commission has the authority to regulate RESs in the context of an aggregation, as discussed above. 220 ILCS 5/16-104(b).

While the Caucus makes several arguments regarding its perceived lack of statutory authority, it is nonetheless striking that the Caucus makes this argument for this particular section of the Proposed Rule. Caucus Initial Comments at 10. It could not be any clearer that the proposed Section 470.200 applies to RESs, over which the Commission obviously has jurisdiction, and not to Governmental Aggregators. *See Staff Verified Comments, Att. A at 4.* Even more telling is the fact that not a single RES has argued that the Commission has no authority to require the filing of the items contained in Section 470.200. It showcases how extreme the position of the Caucus is in this

Docket; even the entities which are expected to comply with this requirement do not object to the proposed provisions.

The Caucus also claims that “the deadline for filing the information is unclear as written” because it “it is not clear whether the information is made public upon contract approval, contract execution, or another date.” Caucus Initial Comments at 11. First, no other party has argued that Section 470.200 is unclear, including the entities required to comply with it, the RESs. Second, the Caucus does not provide any proposed language to rectify this perceived lack of clarity. See *id.* Third, the Caucus proposes that the Commission pick a “specific number of days following the postmark date of the customer notices.” *Id.* The Caucus does not even provide a suggested range of days or any kind of source or basis for this suggestion. This proposal is rather ironic given that the Caucus criticizes Staff for not providing a “source or basis of the 18 day notice period” in Section 470.400. *Id.* at 13. Fourth, the proposed Section 470.200 is not “unclear” as the Caucus claims. *Id.* The requested information must be filed whenever the Governmental Aggregator decides to make the information in question public, but no later than three business days after the postmark of the customer disclosure. Staff Verified Comments, Att. A at 4. Whether the Governmental Aggregator makes this information public “upon contract approval, contract execution or another date” is entirely up to the Governmental Aggregator. *Id.* at 11. Staff simply fails to see any kind of vagueness or lack of clarity in the proposed Section 470.200. Apparently neither do any of the other parties to this proceeding, as no other Party expresses this concern.

Next, RESA states that “some Aggregation Suppliers provide some form of compensation or other consideration to the Governmental Authority.” RESA Initial

Comments at 7. Because of this, RESA proposes to add the following to the list of information to be provided pursuant to proposed Section 470.200:

Any payments or donations, including civic contributions and consulting fees, made by the Aggregation Supplier, either directly or indirectly, to the Governmental Aggregator.

RESA Verified Comments, Att. A at 6. While Staff does not oppose such disclosure requirements in principle, Staff is unsure that this rule is the appropriate vehicle to address such situations. If there are payments going from the Aggregation Supplier to the Governmental Aggregator that are subsequently recovered from retail customers through the aggregation rate(s), it might result in a violation of two separate statutes.

First, Section 1-92 of the IPA Act allows a Governmental Aggregator to “solicit bids and enter into service agreements to facilitate [...] the sale and purchase of electricity and related services and equipment.” 20 ILCS 3855/1-92. Thus, if the Commission were to be asked to decide whether payments from the Aggregation Supplier to the Governmental Aggregator went beyond entering “service agreements for electricity and related services and equipment” it would look to the statute to determine if there was a violation. Simply having a list of communities that received payments from the Aggregation Supplier would not indicate that all, or any, of those payments would violate Section 1-92 of the IPA Act.

Second, Section 16-118(c) of the PUA limits the requirements of electric utilities to purchase the suppliers’ receivables for power and energy service. 220 ILCS 5/16-118(c). Currently, all Aggregation Suppliers sell the receivables of their aggregation customers to the electric utility pursuant to the electric utility’s tariff. As a result, an Aggregation Supplier selling receivables to the electric utility for services other than

power and energy may violate the electric utility's tariff. However, the Commission could not find a violation without reviewing the specific record evidence on a case-by-case basis. Again, possessing a list of communities that received payments from an aggregation Supplier would not provide any guidance regarding the purpose of the various payments. In other words, Staff is not sure what RESA's proposed language would accomplish in the context of this rule.

WOW argues that the list of information provided by the Aggregation Supplier be expanded to include (a) the number "of members/customers and [the] expected annual load participating in the municipal program;" and (b) "whether the municipality set a clean energy or renewable requirement and what that requirement is." WOW Initial Comments at 2. WOW argues "[p]osting of this information for public review and consideration is beneficial to the public, other RES and electricity providers/generators." *Id.* However, Staff views this proposal as problematic for two different reasons.

First, while WOW claims that public posting of this information is beneficial, it failed to provide any rationale for its belief that publication of such data is beneficial "to the public, other RES and electricity providers/generators." *Id.* Second, to the extent WOW is suggesting the public posting of RES customer numbers and the corresponding annual load, Staff believes that such information is potentially proprietary and confidential. See 220 ILCS 5/4-404. Having said that, the current list of aggregation communities on the Commission's website contains hyperlinks to almost all aggregation programs and thus allows for the review of the details of each individual aggregation program, including any potential renewable energy components. In addition, Staff anticipates providing a breakdown of residential switching customers in its next annual

report pursuant to Section 20-110.<sup>9</sup> See 220 ILCS 5/20-110. As it did in its 2012 annual report, the ORMD will state how many of the residential RES customers are aggregation customers and how many are RES customers outside of aggregation programs. For reference, 17% of all Illinois residential customers were aggregation customers as of May 2012. ORMD 2012 Annual Report at 15.

WOW also states that the term “customer notice” in Section 470.200(a) is not defined in the rule and is not used in other portions of the rule. WOW Initial Comments at 3. Staff agrees that replacing the term “customer notice” with “customer disclosure” is appropriate and consistent with the use of that term in other Sections of the rule. Staff’s Verified Reply Comments Attachment B reflects this change.

Finally, WOW argues that the date for submitting the required information be pushed back to “two weeks after the opt-out responses are due.” WOW Initial Comments at 3. WOW argues that this will “ensure the Aggregation Supplier can more completely provide information ORMD can use to monitor competitive market activity.” *Id.* Staff sees no benefit in pushing back the deadline by several weeks, depending on the opt-out period adopted by the Commission. The three pieces of required information (contract end date, aggregation rate(s), and early termination fees, if any) are readily available because they will be included in the required customer disclosures. See Staff Verified Comments, Att. A at 4. As a result, Staff recommends the Commission adopt Staff’s proposed deadline for submitting the limited information.

Staff identified a typographic error from its initial Verified Comments in Attachment A, and has addressed that error in Section 470.200 attached to these Reply Comments as Attachment B.

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<sup>9</sup> For a list of prior reports, see <http://www.icc.illinois.gov/reports/results.aspx?t=20>.

**g. 470.300 Customer Notifications**

First, the Caucus argues the Commission lacks the authority to require disclosures be made to potential municipal aggregation customers informing them of the opt-out program, among other things, and that the proposed rules interfere with the governmental aggregator's business operations. Caucus Initial Comments at 11. The Commission should reject this argument for all the reasons discussed at length above.

The Caucus and ICEA then question which party should be required to notify the customers. Caucus Initial Comments at 11; ICEA Initial Verified Comments at 3-4. The Caucus bemoans the fact that the proposed rule requires notifications to customers without specifying who should give them, without suggesting a solution, and although ICEA never discusses this issue in its Comments, it suggests new language that seems to address it. Caucus Initial Comments at 11; ICEA Initial Verified Comments at 3-4. Nonetheless, Staff recommends the Commission continue to allow either entity to give these notifications. Section 1-92 of the IPA Act requires notifications be made to customers regarding specific issues related to the opt-out municipal aggregation program. See 20 ILCS 3855/1-92. In this instance, Staff believes the parties are more than capable of determining which party, the Aggregation Supplier or the Governmental Aggregator, should send the notifications. However, this Section ensures that notifications will be sent, without requiring the Governmental Aggregator to send them, and provides a basis for which the RES may be required to send notifications if the Governmental Aggregator does not, which is not required by Section 1-92 of the IPA Act. Staff Verified Comments at 4; see 20 ILCS 3855/1-92. ICEA goes further than the Caucus, and suggests the following language be included, apparently to address this issue: "All aggregation disclosures . . . are to be conducted by or on behalf of the

Governmental Aggregator.” ICEA Initial Verified Comments at 4.<sup>10</sup> The Commission should reject this suggestion. First, the Commission does not have the authority to require a Governmental Aggregator to conduct these notifications, as discussed above in detail; therefore, it cannot require the disclosures be conducted *by* the Governmental Aggregator. See 220 ILCS 5/16-104(b); 20 ILCS 3855/1-92. Second, requiring the disclosure be made on *behalf* of the Governmental Aggregator is unnecessary. The disclosures will only be sent after the Aggregation Supplier and Governmental Aggregators have come to a municipal aggregation agreement, there is no need to specify in these rules that the disclosures are on behalf of the Governmental Aggregator. See Staff Verified Comments, Att. A. at 4.

Nonetheless, Staff agrees that a portion of subsection (a) should be altered to more clearly indicate the intended requirements. Staff suggests the following language change:

(a) All aggregation disclosures to residential and small commercial retail customers, detailed below, must include the Governmental Aggregator’s name and, if available upon request by the Aggregation Supplier ~~applicable~~, the Governmental Aggregator’s logo, on the envelope and first page of any included letter.

This language makes Staff’s intent more clear in that the rule would require the Aggregation Supplier to request use of the Governmental Aggregator’s logo and to use that logo if the Governmental Aggregator is willing and able to provide it, but does not require the Governmental Aggregator to do so.

Similarly, the Caucus also points out that the Proposed Rule requires a toll-free number for customer inquiries on aggregation without specifying whether the

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<sup>10</sup> ICEA argues there is a typo in Section 470.300(a), and suggests that the word “Government” should be “Governmental.” ICEA Initial Verified Comments at 3. Staff, however, notes the word “Government” never appears in Section 470.300(a). Staff Initial Comments, Att. A at 4.

Governmental Aggregator or the RES must provide and pay for that service. Caucus Initial Comments at 12. Here, Staff again believes that the parties can determine which party should shoulder those responsibilities, but Section 470.300(c) provides a minimum requirement that ensures customers will have access to a toll-free customer information line, and provides a basis for which the RES may be required to set up the line if the Governmental Aggregator does not, which is not required by Section 1-92 of the IPA Act. Staff Verified Comments at 4; see 20 ILCS 3855/1-92. Moreover, the Proposed Rule clarifies that it is not the electric utility who will be providing the toll-free customer information line. See Staff Initial Verified Comments Att. A at 4.

Next, the Caucus states that the terms “notifications” and “disclosures” are both used in Section 470.300 and that is unclear to the Caucus “if they are being used as interchangeable terms or if each term is intended to have a different meaning.” Caucus Initial Comments at 11. While the Caucus requests that this be clarified, the Caucus does not offer any proposed language. *Id.* Staff notes that while Section 470.300 does indeed contain the term “notifications,” it only appears once and this appearance is in the Section header. Everywhere else in the Section, the term “disclosures” is used exclusively. However, in order to address this perceived inconsistency, Staff recommends that the header of Section 470.300 be modified to read “Customer Disclosures.”

Finally, ICEA claims that Staff’s proposed disclosure language in Section 470.300(b), reminding customers that they are able to purchase their electricity supply from a Retail Electric Supplier or the electric utility, “will inevitably confuse customers.” ICEA Initial Verified Comments at 4-5. ICEA further argues the purpose of the

disclosure is to inform customers of the opportunity to participate in the municipal aggregation program. *Id.* Staff fails to see how such a statement invites confusion. In fact, Staff is proposing this statement precisely to reduce potential customer confusion by putting the customer's governmental aggregation program in the proper context of electric choice in general. ICEA is well aware that Illinois residential customers have only very recently seen electricity supply offers directed at them. Put differently, Staff believes the purpose of the disclosures is to inform customers of the opt-out and to facilitate those customers in making informed electric supply decisions. Staff further believes that in order to fully understand their electric supply opportunities, the customers should know what services are available to them, including, but not limited to, the Aggregation Supplier's services. Importantly, CNT Energy "agrees with Staff's view that this statement will help raise awareness of customer choice in general, and is a useful educational tool." CNT Initial Verified Comments at 4. Therefore, the Commission should reject ICEA's argument.

#### **h. 470.400 Opt-Out Aggregation Provisions**

First, the Caucus argues that the Commission lacks the authority to specify what should be included in the disclosures to residential and small commercial customers, and ICEA argues the Commission lacks the authority to require at least two methods of opting-out, because the Commission was not granted that authority in Section 1-92 of the IPA Act. Caucus Initial Comments at 12; ICEA Initial Verified Comments at 5. The Caucus also argues the appropriate venue for specifying the requirements of the disclosure is in the General Assembly with amendments to Section 1-92 of the IPA Act; the Commission should reject this argument. Caucus Initial Comments at 12. Next,

Prairie Point argues that the rules should make it clear that current customers of non-aggregation RESs are eligible for municipal aggregation. Prairie Point Initial Comments at 2. Fourth, ComEd argues that customers who opt-out should affirmatively confirm this decision. ComEd Initial Verified Comments at 7. Finally, ICEA argues that: (1) opt-out disclosures should not include any mention of the possible forfeiture of net metering credits; (2) the multiple opt-out methods requirement goes beyond a reasonable interpretation of Section 1-92 of the IPA Act; (3) customers should not be provided with pre-paid postage in order to facilitate one method to opt-out; and (4) the 18 day opt-out period is too long. ICEA Initial Verified Comments at 5, 6-7, 9, 12, 14.

Taking each of these arguments in turn, the Commission certainly has the authority to specify what must be included in the disclosures. 220 ILCS 5/16-104(b).

Illinois courts have long held that:

Express legislative grants of powers or duties to administrative agencies include the power to do all that is reasonably necessary to execute those powers or duties. Moreover, administrative agencies are to be given wide latitude in determining what actions are reasonably necessary, and a court may not overturn an agency policy or action simply because the court considers the policy unwise or inappropriate.

See *Gersch v. Zollar*, 308 Ill. App. 3d 649, 658 (1st Dist. 1999) (internal citations omitted).

This rulemaking is pursuant to the Commission's authority in the PUA under which the Commission has the authority to regulate electric aggregations, as discussed above in much more detail; Section 1-92 of the IPA, which allows Governmental Aggregators to aggregate in certain circumstances, has no bearing on that authority. 220 ILCS 5/16-104(b); see 20 ILCS 3855/1-92. The Commission, however, may choose to promulgate rules for aggregation that reflect or mirror Section 1-92 of the IPA Act as

much or as little as it deems appropriate. 220 ILCS 5/16-104(b). Furthermore, the Commission has the authority to address the specifics of the disclosure in this rulemaking, and need not wait for the General Assembly to amend a Section of the IPA Act, which has no bearing on the Commission, the utilities, or the RESs. 220 ILCS 5/16-104(b); see 20 ILCS 3855/1-92. Second, the Aggregation Suppliers are the entity required to ensure the disclosures satisfy these requirements, and the Commission is well within its authority to regulate these entities in this context. 220 ILCS 5/16-104(b).

Prairie Point proposes adding a new subparagraph (a) to Section 470.400. Prairie Point's proposed language purports to make it clear that "customers who have already selected a supplier may not be automatically enrolled by a RES through an opt-out aggregation program." Prairie Point Initial Comments at 2. In Staff's view, Prairie Point's language does not add anything of substance to the rule, and Staff finds that its proposed Section 470.400(c) sufficiently addresses this situation. See Staff Verified Comments, Att. A at 6. Section 470.400(c) provides that "the disclosure must also describe the affirmative actions needed in order to join the aggregation program" and that "the aggregation supplier must verify such a customer's request to join an aggregation program in the same manner as an electric service provider confirms a change in a customer's selection of a provider of electric service under subsections (a) through (c) of Section 505/2EE of the Consumer Fraud and Deceptive Business Practices Act." *Id.* As a result, Staff sees no need for an additional subparagraph (a) in Section 470.400.

Next, ComEd proposes to revise Section 470.400(a) in order "[t]o avoid erroneously *excluding* a customer from an Aggregation Program." ComEd Initial Verified

Comments at 7 (emphasis in original). Specifically, ComEd proposes that customers wishing to opt-out of an aggregation program need to provide a wet signature, go through a third-party verification by telephone, or provide an electronic Letter of Authorization pursuant to sections (a) through (c) of Section 505/2EE of the Consumer Fraud and Deceptive Business Practices Act. *Id.*; see 815 ILCS 505/2EE. Staff fails to see the benefit in requiring such steps for customers simply wishing to not be part of the aggregation program. In addition, such customer is not authorizing a switch in electric service providers, unlike the situation addressed by sections (a) through (c) of Section 505/2EE of the Consumer Fraud and Deceptive Business Practices Act. See 815 ILCS 505/2EE. Also, Staff is not aware of any customer having made an informal complaint about not being included in an aggregation program. For these reasons, Staff recommends not making it more cumbersome for customers to opt-out of aggregation programs.

ICEA also “opposes any requirement that mandates that disclosure notices require information with respect to forfeiting net metering credits.” ICEA Initial Verified Comments at 7. First, ICEA states that suppliers marketing to potential customers outside of aggregation are not required to make such disclosures. ICEA Initial Verified Comments at 8. While that is currently true, Staff believes that the admittedly small but growing number of net metering customers should be fully informed about their aggregation choice through the aggregation disclosures. Moreover, while a similar disclosure is currently not required outside of aggregations, nothing prohibits a supplier from alerting potential customers about net metering consequences when signing up customers outside of aggregation. Furthermore, potential non-aggregation customers

have a more active role in signing up for service than in the case of opt-out aggregations. It is reasonable that customers taking affirmative action to sign up for service with a RES are more likely to inquire about impacts on their status as a net metering customer. Moreover, the individual sign-up process outside of aggregation offers different opportunities to alert net metering customers, be it via telephone, on the supplier's website, or in any type of written material provided to the customer. In contrast, opt-out aggregation, by definition, automatically enrolls a customer unless the customer actively opts-out. Likely the only communication from the Aggregation Supplier to the potential customer, prior to them actually becoming a customer of the Aggregation Supplier, is through the required customer disclosures. In addition, Section 1-92 of the IPA Act states disclosures should be sent to potential opt-out customers, and shall include "the cost to obtain service." 20 ILCS 3855/1-92. Net metering credits have the potential to lower customer's electric costs, and forfeiture of those credits amounts to a cost to obtain the aggregation service. 220 ILCS 5/16-107.5. While the Commission is not required to parallel or mirror provisions of Section 1-92 of the IPA Act, it should do so here.

ICEA suggests that this disclosure should occur when customers are certified for net metering by the relevant utility. *Id.* at 8. Staff does not disagree that such a notification by the electric utility would be an improvement over the current situation. However, there are still benefits to informing net metering customers at the start of an aggregation program in their community even if the electric utility provides a notification at the time of becoming a net metering customer. Several months, or even years, could pass between a customer becoming a net metering customer and the start of an

aggregation program in the customer's community. Staff therefore believes the disclosure is an appropriate vehicle to inform customers of the potential for net metering credit forfeiture.

ICEA opposes Staff's proposal to provide residential and small commercial customers with an additional opt-out method besides the physical mailing of a postcard or similar document. ICEA Comments at 14. Tellingly, ICEA does not state that Staff's proposal is bad public policy or violates the law. ICEA simply argues that the law does not require this second opt-out method. *Id.* at 13-14.

ICEA is correct when it states that the IPA Act does not specify the "particular method or methods by which a resident in the aggregate area may opt-out of the Governmental Aggregator's program." *Id.* at 5. For precisely this reason Staff recommends that the Commission establish a flexible, yet consistent framework for the methods a customer may use to opt-out of a governmental aggregation program. Staff's proposal does not dictate the form of the second opt-out method but rather leaves it up to the Governmental Aggregator and/or Aggregation Supplier to choose from three different methods (phone, e-mail, or Internet notice). Staff Initial Comments, Att. A at 5. ICEA states that it is "not opposed to a provision that establishes as a minimum requirement the ability of residents to return a postcard or similar notice via U.S. Mail" because "it is reasonable to interpret the IPA Act as at least requiring the U.S. mail as a default method of opting out." ICEA Comments at 5. Staff does not view such a proposed "minimum requirement" as a requirement at all, especially given that ICEA argues that the customers should have to pay in order to express their desire to opt-out. As will be discussed in more detail below, Staff finds it unreasonable to not even

provide customers with postage pre-paid post cards. This is especially ironic in light of ICEA claims that a second opt-out method “can impose additional program administration costs.” *Id.* at 6. Yet ICEA does not seem to be concerned about customers paying a fee (albeit a small one) for their right to opt out of the aggregation program. The potential customers who wish to opt-out of the aggregation program, and who must respond or become customers, should not have to pay to effectuate their choice.

As for ICEA’s claim that a second opt-out method adds to their members’ administration costs, Staff notes that ICEA is not opposed to the proposed provision in the rule that requires a toll-free phone number for customers. Staff fails to see how the ability to opt-out of an aggregation program via phone will materially increase (if at all) any administration costs when a toll-free number has to be staffed regardless of opt-out method. While ICEA does not even explain how the administration costs might be increased with a second opt-out method, Staff finds it equally unlikely that an e-mail opt-out option will add material administration costs. The same can be said for the set up or modification of a website where customers are able to submit their intent to opt-out. Again, Staff’s proposal does not dictate which one of the three additional opt-out methods should be used. If there are any administration costs associated with any of the three options for a particular Aggregation Supplier, Staff trusts that the Aggregation Suppliers will choose the no-cost or least-cost option(s).

ICEA also argues that the 18 day opt-out period is too long. ICEA Verified Comments at 6-7. When it comes to Staff’s proposed opt-out period of 18 days, Staff stated in its Verified Comments that the 18 calendar day minimum opt-out period is a

compromise of proposals made by parties during the workshop process. Staff Verified Comments, Att. A at 5. The Verified Comments by the parties in this proceeding confirm that Staff's proposed 18 calendar days is indeed a middle ground between the proposals made by the other parties. Staff continues to believe that anything longer than 18 calendar days will be seen as detrimental to the vast majority of the customers who do not opt-out of the aggregation program and want the monetary savings to start as soon as possible. In addition, both utilities have a lengthy enrollment period that allows suppliers and retail customers to rescind their enrollment before the actual switch takes place. For these reasons, we recommend that the Commission not adopt CNT Energy's proposal of "21 days or more" or CES' proposal "of one full billing cycle" following the disclosure postmark date. CNT Energy Initial Comments at 6; CES Initial Comments at Appendix 5.

While Staff agrees with CNT Energy that some customers "go on vacations or business trips that can easily last 10-15 days" and that some customers "misplace mail for a few days or do not open it until they pay their bills every two weeks," Staff does not recommend going beyond 18-calendar days for the opt-out period. *Id.* CES goes even quite a bit further by recommending that the opt-out period be extended until the end of a full billing cycle after the disclosure postmark date.<sup>11</sup> *Id.* Staff agrees with ICEA that selecting the "right" length of the opt-out period involves an "appropriate balance between the needs those receiving the notice to have time to consider their choice, and the practical considerations of the lead time that is needed to enroll residents who are eager to take advantage of the aggregation program's offerings." ICEA Comments at 7.

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<sup>11</sup> CES does not actually address this recommended language change in its Verified Comments other than including its proposed language in a red-line of Staff's Proposed Rules.

Staff has no reason to doubt ICEA's claim that its members have had "experience with residents that are disgruntled when they do not receive the benefits of an aggregation program in the billing period following their receipt of the opt-out notice." *Id.* In addition, there is an opportunity for customers to rescind a pending enrollment even after the opt-out period has ended. Staff, nonetheless, does not agree with ICEA's proposal to reduce the minimum opt-out period to just 14 days.

ICEA argues that it "finds it hard to imagine an aggregation program that is so complicated it takes a notice recipient more than two weeks to decide whether the program is right for them or not." *Id.* First, ICEA assumes that every customer is at home the day the disclosure is received, let alone that he or she reads the disclosure the same day it is received. Second, a due date of 18 calendar days from the disclosure postmark date results in an effective opt-out period of barely more than two weeks. Depending on the geographic origination of the disclosure and the speed of the U.S. postal service, customers will likely have 15-17 calendar days from the day they receive the disclosure until the opt-out due date. ICEA's proposal to cut the opt-out period to 14 calendar days from the disclosure postmark date would result in customers having only 11-13 calendar days as their effective opt-out period. Staff acknowledges that an appropriate length of the opt-out period involves a judgment call, but Staff believes 18 calendar days is a solid compromise among the proposals made by the parties.

Next, ICEA argues that the pre-paid postage requirement could impose additional program administration costs, and should be deleted because some Governmental Aggregators want the lowest cost possible for their eligible customers. ICEA Initial Verified Comments at 6. The Commission should reject this argument. Staff

points out that the process of an opt-out aggregation requires potential customers to affirmatively respond to an opt-out notice if they do not wish to obtain supply service from the Aggregation Supplier. See 20 ILCS 3855/1-92. Staff believes imposing a cost on customers in order to allow them to choose their service provider is unreasonable, and Aggregation Suppliers are the appropriate parties to absorb those costs. The potential customers who wish to opt-out of the aggregation, and who must respond or become customers, should not have to pay to effectuate their choice.

Four parties commented on the issue of sending disclosures to existing RES customers. All four commenting parties are retail electric suppliers, commenting individually (Prairie Point) or as part of a group of suppliers (CES, RESA, and ICEA). All four parties oppose Staff's proposed language for Section 470.400(c), albeit for different reasons. While the Caucus makes some general statutory authority arguments regarding its perceived lack of Commission authority to specify the details of disclosures going to *any* customer,<sup>12</sup> none of the four RES parties argue that the Commission has no authority to create uniform rules regarding the disclosure notices. Caucus Initial Comments at 12. In fact, RESA and CES argue that Staff's proposal does not go far enough and Prairie Point, while agreeing with Staff's proposal, wants to add language to make Staff's proposal clearer.<sup>13</sup> RESA Initial Verified Comments at 2-6.; CES Initial Verified Comments at 4-5; Prairie Point Initial Verified Comments at 2.

RESA and CES want the rules to prohibit any kind of disclosures going to existing RES customers. RESA Initial Verified Comments at 2-6. CES Initial Verified Comments at 4-5. ICEA argues that it should be left to the Governmental Aggregator to

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<sup>12</sup> The Caucus argues that only the General Assembly is able to specify such details. Caucus Initial Comments at 12.

<sup>13</sup> For reasons described above, Staff believes Prairie Point's suggested amendment is not necessary.

decide whether existing RES customers should get a disclosure. It is not clear from ICEA's proposed language whether existing RES customers should be allowed to be automatically included in the opt-out aggregation program or not.

Staff believes it is helpful to provide an overview of the universe of possible scenarios when it comes to disclosures to existing RES customers. In Staff's view, there are six possible (logical) ways the Commission could decide to address this issue. At the opposite sides of the spectrum of possible outcomes are two extremes: (a) automatically including existing RES customers in the aggregation program and (b) prohibiting any type of disclosure to existing RES customers. Between these two extremes are four different possible customer disclosures. To better illustrate the spectrum of the six potential disclosure requirements, each outcome is assigned a numerical value from one to six, with one being the prohibition of any type of disclosure and six being the automatic inclusion of RES customers into the aggregation program. Labeling the automatic inclusion of RES customers as requiring an "opt-out disclosure", identical to the required opt-out disclosure for utility fixed-price service customers in proposed Section 470.400(a), and labeling the disclosure notices in proposed Section 470.400(c) as an "informational disclosure", the following is the range of possible treatments in the rule:

1. Prohibiting any type of disclosure
2. Allowing informational disclosures but prohibiting opt-out disclosures
3. Allowing informational disclosures and allowing opt-out disclosures
4. Requiring informational disclosures but prohibiting opt-out disclosures
5. Requiring informational disclosures and allowing opt-out disclosures

## 6. Prohibiting informational disclosures and requiring opt-out disclosures

Outcome number three above is akin to the rule not addressing disclosures to existing RES customers at all. CES and RESA propose outcome number one, Staff and Prairie Point propose outcome number four. It is unclear whether ICEA proposes outcome number two or number three. ICEA's proposed language makes it clear that informational disclosures should be allowed and not required. ICEA Initial Verified Comments at 11. However, ICEA's language does not make it clear whether opt-out disclosures should be allowed or not. *Id.*

In Staff's view, Staff's proposal strikes the right balance to achieve the goals of properly informing all residential and small commercial customers in a community pursuing governmental aggregation and recognizing the fact that some customers have previously taken affirmative action to pick their preferred choice of electricity supply. Staff recently expressed the same view in ComEd's Rate GAP tariff investigation.<sup>14</sup>

Both CES and RESA go to great lengths to describe the horrors of existing RES customers receiving any form of disclosure letters from the Governmental Aggregator/Aggregation Supplier. RESA Initial Verified Comments at 2-6; CES Initial Verified Comments at 4-5. However, with more than 30 suppliers currently marketing to ComEd's residential customers, it is very likely that existing RES customers will be the subject of marketing from several suppliers. RESA argues that it would be "very difficult for RESs using direct marketing channels to be competitive because the Aggregation Suppliers will be given information that puts them at a competitive advantage." RESA Initial Verified Comments at 2. It is true that only the Aggregation Supplier (if it is the entity sending out the disclosures) has the names and addresses of residential and

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<sup>14</sup> Docket No. 11-0434, Staff Verified Comments at 9.

small commercial customers in any aggregation community, but this is simply a fact of the requirements found in Section 1-92 of the IPA Act.

Interestingly, RESA acknowledges that customers not receiving any type of disclosure might wonder why that is. RESA proposes that if any customer “calls to question why they did not receive an opt-out letter, the representative can simply ask if the resident is purchasing from a RES and then explain why the customer is not eligible.” RESA Initial Comments at 5. In other words, RESA does not seem to be opposed to the notion of explaining why a customer has not received the same disclosure his or her neighbor has received. However, RESA prefers that such explanation only be given if a customer is curious enough to call someone about it. Perhaps not surprisingly, Staff does not consider this to be a reasonable alternative to its proposal of making sure even existing RES customers receive an informational disclosure from the Governmental Aggregator/Aggregation Supplier.

Moreover, contrary to RESA’s and CES’ characterization, Staff’s proposed Section 470.400(c) has been drafted to expressly avoid the potential “slamming”, or improper switching, of existing RES customers. RESA Initial Verified Comments at 2; CES Initial Verified Comments at 4-5. Staff’s proposed Section 470.400(c) not only requires the customer disclosures to include a statement to “remind customers that their current RES contract might include fees for early contract termination” and prohibits the disclosures from containing “any comparison of the proposed aggregation rate to the electric utility’s fixed-price service rate”, it also makes it clear that an existing RES customer has to take affirmative action to join an aggregation program.<sup>15</sup>

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<sup>15</sup> Section 470.440(c) of Staff’s Proposed Rule.

ICEA provides two arguments against Staff's proposed Sections 470.400(b) and (c). Besides making the same argument as CES and RESA regarding existing RES customers being potentially subject to early termination fees, ICEA also makes the argument that existing RES customers and customers on utility hourly service "are less likely to switch" and therefore the expense of sending disclosures to those customers is simply not worth the effort. ICEA Initial Verified Comments at 9. Given the variety of opinions expressed by the different RES parties in this proceeding, Staff points out that out of the more than 30 suppliers currently offering residential service, only eight suppliers have become an Aggregation Supplier in the more than 450 aggregation communities in the State of Illinois. As ICEA itself acknowledges, all of those eight suppliers are members of ICEA. ICEA Initial Verified Comments at 1. In fact, of its eleven members, only two members of ICEA are currently not Aggregation Suppliers in Illinois.<sup>16</sup> Staff is highlighting this fact in case the Commission is surprised to see parties such as CES and RESA putting forth strong arguments against any type of disclosures to existing RES customers based on fears of "slamming", maintaining "a level playing field", creating an unfair "competitive advantage", not protecting "the substantial investments that RESs have made in acquiring customers", while ICEA, on the other hand, seems not principally opposed to such disclosures and simply notes that it adds expenses for a little return. RESA Initial Verified Comments at 3; ICEA Initial Verified Comments at 9.

The Commission should reject the arguments against proposed Section 470(c) of both CES and RESA on the one side, and ICEA on the other. Staff believes this portion

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<sup>16</sup> As shown in footnote 1 of RESA's Initial Verified Comments, several suppliers are members of both RESA and ICEA.

of the rules should parallel the requirements of Section 1-92 of the IPA Act, which requires “residential and small commercial retail customers” to be fully informed that they have the right to opt out of the aggregation program. 20 ILCS 3855/1-92(e). To the extent the Commission wishes to implement rules in parallel with those requirements, it should not limit the recipients of these disclosures.

ICEA also argues against the informational disclosures required in subsections 470.400(b) and states that the Governmental Aggregator should decide whether utility hourly service customers receive disclosures regarding the aggregation. ICEA Initial Verified Comments at 10. The Commission should reject this argument. Staff believes this portion of the rules should reflect the requirements of Section 1-92 of the IPA Act, which requires “residential and small commercial retail customers” to be fully informed that they have the right to opt out of the aggregation program. 20 ILCS 3855/1-92(e). To the extent the Commission wishes to implement rules in parallel with those requirements, it should not limit the recipients of these disclosures.

Moreover, ICEA’s argument that only certain customers should be given the option of participating in governmental aggregation, even if dictated by the Governmental Aggregator, violates the requirements already in place for all RESs pursuant to the PUA:

(d) An alternative retail electric supplier that is certified to serve residential or small commercial retail customers shall not:

- (1) deny service to a customer or group of customers nor establish any differences as to prices, terms, conditions, services, products, facilities, or in any other respect, whereby such denial or difference are based on race, gender, or income.

- (2) deny service to a customer or group of customers based on locality nor establish any unreasonable difference as to prices, terms, conditions, services, products, or facilities as between localities.

220 ILCS 5/16-115A(d).

RESs, including Aggregation Suppliers, must not discriminate amongst potential customers based on locality or establish an unreasonable difference in services or products as between localities. *Id.* If, as ICEA asserts, Governmental Aggregators selected which customers were eligible to receive disclosures informing them of the opportunity to participate in governmental aggregation, or as implied, selected which customers were eligible for governmental aggregation, the Aggregation Supplier would be impermissibly discriminating amongst customers based on what each Governmental Aggregator (each locality) determined. *See id.* Furthermore, asserting that because customers are currently receiving utility hourly service, they should not be allowed to receive information, or the opportunity, to switch to a retail electric supplier violates the underpinnings of the very market for competitive alternative retail electric suppliers desired by the General Assembly. Again, Staff's proposal would not automatically include utility hourly service customers in an aggregation program. Instead, proposed Section 470.400(b) requires utility hourly customers to take affirmative action to join an aggregation program.

Staff's proposed Section 470.400(d) would allow customers to exit an aggregation program every two years without paying an early termination fee if the aggregation program features such a fee. CNT Energy expressly supports such a provision while CES and ICEA oppose it. CNT Initial Comments at 8; CES Response Comments at 4; ICEA Comments at 11.

CES believes such an early termination fee-free opportunity every two years is not sufficient and instead argues for an outright prohibition on early termination fees in opt-out aggregation programs. CES Response Comments at 5. CES argues that imposing an early termination fee “upon a customer who did not provide affirmative consent to be bound by such a fee would lead to customer confusion and potentially to suspicion about the competitive market and municipal aggregation generally.” *Id.* at 4. In Docket No. 09-0592, Staff has argued against imposing an early termination fee cap of \$50. Staff views early termination fees as an acceptable part of the terms and conditions of any electric supply offer as long as the fee is properly disclosed in advance. However, there is a difference between a customer affirmatively choosing an electric supply offer with an early termination fee and a customer automatically being subject to an early termination fee unless she takes affirmative action to opt-out of the offer. Hence, Staff is sympathetic to CES’s position on this issue but Staff finds that an outright prohibition, even in the context of opt-out aggregations, is too extreme of a remedy. Allowing an early termination fee-free opportunity every two years appears to be a more appropriate balance between allowing aggregation suppliers to offer a wide variety of electric supply options and allowing retail customers to exit an aggregation program, for which no affirmative action is required, without paying a fee.

ICEA, on the other hand, argues that the Commission should not allow customers the opportunity to leave an opt-out aggregation program every two years without paying an early termination fee. ICEA Comments at 11. Besides a legal argument that such a provision would “potentially reach beyond the Commission’s statutory authority” and “invite problems with JCAR or affected municipal entities”, ICEA

appears to make a policy argument against such a provision. *Id.*, at 12. ICEA argues that the opportunity to leave the aggregation program every two years without incurring a termination fee “will essentially impose a two-year cap on the term lengths for the RES supplying the aggregation.” Staff disagrees.

First, the termination fee-free opt-out notice is only required when the aggregation program features an early termination fee. If there is no termination fee, Section 470.400(d) does not apply. To clarify this distinction in the Proposed Rule, Staff recommends adding a sentence at the beginning of Section 470.400(d). The revised language for Section 470.400(d) appears below and in the attached Appendix. Therefore, there is no “two-year cap” for all of the aggregation programs that do not call for an early termination fee.

Second, even for aggregation programs with an early termination fee, Staff fails to see how its proposed provision will “essentially impose a two-year cap.” Nothing would prevent an Aggregation Supplier from entering into a contract with a duration of more than two years. All that is required is to give retail customers a chance to opt-out after two years without paying a fee. A supplier would still be able to offer a fixed rate for a term that exceeds two years. Staff further notes that the vast majority of offers by suppliers is two years or less in length. This applies to governmental aggregation programs as well as individual offers for residential customers. In sum, Staff finds that its proposal is an appropriate middle ground between prohibiting termination fees altogether (the proposal by CES) and no restrictions regarding termination fees at all (the proposal by ICEA).

The Caucus states that proposed Section 470.400(d) “raises several timing issues.” Caucus Initial Comments at 12. First, the Caucus states that the rules are unclear as to what constitutes the “commencement of the aggregation program.” *Id.* Given that the Caucus seems to prefer that the Commission not prescribe any rules around aggregation programs, Staff is surprised that the Caucus does not want to leave the decision as to what exact date constitutes the commencement of an aggregation program to the individual Governmental Aggregator. However, if the Commission agrees that there should be more specificity in this Section, Staff recommends that the month the first customers in a community are being switched to the Aggregation Supplier be used as the commencement of the aggregation program.

The Caucus also argues that Section 470.400(d) could be read such as that “multiple notices may be required at various intervals and will result in more customer confusion than information.” Caucus Initial Comments at 12. While no other party offers this particular interpretation of the proposed Section 470.400(d), Staff offers the following language to make it clear that a disclosure being sent in the case of a change in (1) the supplier, (2) the rate or rates, or (3) the duration of the contract satisfies the proposed “at least every two years” disclosure requirements:

The following should apply to aggregation programs that feature an early termination fee to be paid by residential or small commercial customers: In case of any change in the aggregation rate or rates, duration of the contract, or supplier of the aggregation program, the aggregation customers must receive a disclosure informing them of their right to terminate their participation in the aggregation program without an early termination fee. In the absence of any changes to the aggregation program, the aggregation customers must receive a disclosure informing them of their right to terminate their participation in the aggregation program without an early termination fee at least every two years from the initial commencement of the aggregation program. Absent an alternative agreement between the Aggregation Supplier and the Governmental

Aggregator, the month the first customers are being switched to the Aggregation Supplier constitutes the initial commencement of the aggregation program. The disclosure must state the duration within which customers may exercise their right to terminate the aggregation program without an early termination fee, provided, however, that aggregation customers must have at least 18 calendar days from the disclosure's postmark date within which to exercise this right.

The Caucus states that the terms "notice" and "disclosures" are both used in Section 470.400 and that is unclear to the Caucus "if they are being used as interchangeable terms or if each term is intended to have a different meaning." Caucus Initial Comments at 13. While the Caucus requests that this be clarified, the Caucus does not offer any proposed language. Staff notes that, again, no other party perceived any "unclear terminology" in this Section. Staff fails to see any lack of clarity and believes that the following part from proposed Section 470.400(a) is sufficiently clear even though it contains the words "notice" and "disclosure in the same sentence: "[...] every residential and small commercial retail customer receiving or pending to receive utility fixed-price service or an incumbent aggregation service, must receive, by mail, a disclosure that prominently states all charges to be made, and shall include full notice of the cost to obtain service pursuant to Section 16-103 of the Public Utilities Act [...]"

**i. 470.500 Opt-in Aggregation Provisions**

The Caucus again argues that the Commission lacks the authority to specify what should be included in the disclosures to residential and small commercial customers because it was not granted that authority in Section 1-92 of the IPA Act. Caucus Initial Comments at 13. The Commission certainly has the authority to specify what must be included in the disclosures. Again, a legislature can establish broad policy guidelines, and leave the detailed application of those guidelines to the

administrative agency charged with carrying them out. *Lake County Bd. of Review v. Illinois Property Tax Bd. of Appeal*, 119 Ill. 2d 419, 427 (1988).

First, the RESs are the entity required to ensure the disclosures satisfy these requirements, and the RESs are well within the Commission's authority to regulate in this context. 220 ILCS 5/16-104(b). Second, while the Caucus argues the appropriate venue for specifying the requirements of the disclosure is in the General Assembly with amendments to Section 1-92 of the IPA Act, the Commission should reject this argument. Caucus Initial Comments at 13. The Commission has the authority to address the specifics of the disclosure in this rulemaking, and need not wait for the General Assembly to amend a Section of the IPA Act, which has no bearing on the Commission, the utilities, nor the RESs. 220 ILCS 5/16-104(b); see 20 ILCS 3855/1-92; *Lake County Bd. of Review v. Illinois Property Tax Bd. of Appeal*, 119 Ill. 2d at 427. Similar to its opposition to the disclosure requirement in Section 470.400, ICEA argues the disclosures should not include a statement that customers may forfeit net metering credits should they decide to switch to the Aggregation Supplier. ICEA Initial Verified Comments, at 14. ICEA also argues the mandatory disclosures required in subsection 470.500(b) and (c) should be eliminated and the Governmental Aggregator should decide which customers receive disclosures regarding the aggregation. *Id.* at 9 and 13. For the same reasons Staff discussed above, the Commission should reject both of these ICEA arguments.

The Caucus states that "it is unclear whether the Commission would consider this Section to apply to long standing 'affinity' programs that have provided the ability for customers to sign up for a group rate for electricity." Caucus Initial Comments at 13.

First, Staff is unsure what exactly The Caucus considers to be “long-standing ‘affinity’ programs” as the Caucus does not further define or explain this term, which is also nowhere to be found in Staff’s Proposed Rule. See *id.* Second, Section 470.500 applies only to Aggregation Programs “offered in accordance with Section 1-92 of the Illinois Power Agency Act and Section 16-104(b) of the Public Utilities Act”, as clearly provided for in Staff’s proposed definition of “Opt-In Aggregation Program” in Section 470.100. Staff Verified Comments, Att. A at 7-8, 2.

The Caucus states that the terms “notice” and “disclosures” are both used in Section 470.500 and that is unclear to the Caucus “if they are being used as interchangeable terms or if each term is intended to have a different meaning.” Caucus Initial Comments at 14. While the Caucus requests that this be clarified, the Caucus does not offer any proposed language. *Id.* Staff agrees that Section 470.500(b) uses the term “notice” in places where other subsections use the term “disclosure.” In order to remove any perceived inconsistencies, Staff offers the following revised language:

- b) If the Governmental Aggregator operates under an opt-in program, then every residential and small commercial retail customer receiving, or pending to receive, non-aggregation RES service, must receive, by mail, a ~~notice~~ disclosure that adequately discloses, in plain language, the prices, terms and conditions of the products and services being offered to the customer. If the aggregation program contains a fee for the early termination of the program by the customer, the amount of such a fee must be included in the ~~notice~~ disclosure. The ~~notice~~ disclosure must remind customers that their current RES contract might include fees for early contract termination. The ~~notice~~ disclosure must not contain any comparison of the proposed aggregation rate to the electric utility’s fixed-price service rate. The ~~notice~~ disclosure must also describe the affirmative actions needed in order to join the aggregation program. The aggregation supplier must verify such a customer’s request to join an aggregation program in the same manner as an electric service provider confirms a change in a customer’s selection of a provider of electric service under

subsections (a) through (c) of Section 505/2EE of the Consumer Fraud and Deceptive Business Practices Act.

On page 13 of its Verified Comments, ICEA “corrected what it believes to be a typo in the Proposed Rule” because ICEA believes subsection 470.500(a) “should be limited to utility fixed-price service since an opt-in aggregation service and an ‘existing aggregation service’ is mutually exclusive.” ICEA Verified Comments at 13. However, subsection 470.500(a), like subsection 470.400(a), applies to initial as well as subsequent aggregation programs. Staff Verified Comments, Att. A at 7, see *id.* at 5. Therefore, it is important to cover both scenarios, initial and subsequent aggregation disclosures, in this Proposed Rule. Staff recommends rejecting ICEA’s proposed deletion of “or an existing aggregation service” in Section 470.500(a).

**j. 470.600 Failure to Comply**

ComEd and the Caucus each make arguments concerning the proposed Failure to Comply section. First, ComEd argues that the section is repetitive, and should be deleted. ComEd Verified Initial Comments at 8. Second, the Caucus asserts, and ComEd alludes to an argument, that it is unclear whether the Commission proposes to have the authority to impose fines and penalties on Governmental Aggregators under Section 470.600, and the Caucus asserts the Commission does not have that authority, while ComEd seems to request Commission regulation over the Governmental Aggregators. Caucus Initial Comments at 14; ComEd Verified Initial Comments at 8.

First, while the PUA provides for fines and penalties for RESs for failing to comply with the requirements of the PUA and regulations applicable to them, the Commission is well within its authority to restate that these penalties and fines are applicable for violations or failures to comply with the proposed rules. *City of Chicago v.*

*Illinois Commerce Commission*; 220 ILCS 5/16-104(b); see 220 ILCS 5/16-115B; 220 ILCS 5/202; 220 ILCS 5/203. The Commission should reject ComEd's argument to the contrary, as Staff believes this subsection clarifies the potential fines and penalties faced by utilities and RESs for violations of these proposed rules, and indeed, clarifies the parties against whom fines and penalties could be assessed. See Staff Verified Comments, Att. A at 8. Second, as stated repeatedly, the Proposed Rule does not apply to Governmental Aggregators, and Staff recognizes that the Commission does not have regulatory authority over Governmental Aggregators. Staff Verified Comments, Att. A at 8. Furthermore, the rules set out requirements only applicable to utilities and RESs, so logically, "any violation of any rules set out in this Part" would only be applicable to utilities and RESs. *Id.* Therefore, the Commission should reject the arguments of the Caucus and ComEd.

### **III. CONCLUSION**

Staff recommends that the Commission approve Staff's recommendations to its Proposed Rule 470 made herein.

Respectfully submitted,

KIMBERLY SWAN  
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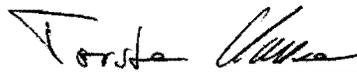
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December 12, 2012

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VERIFICATION

I, TORSTEN CLAUSEN, being first duly sworn, depose and state that I am the Director of the Office of Retail Market Development of the Illinois Commerce Commission; that I sponsor the foregoing Verified Reply Comments; that I have personal knowledge of the information stated in the foregoing Verified Reply Comments; and that such information is true and correct to the best of my knowledge, information and belief.

  
\_\_\_\_\_  
TORSTEN CLAUSEN  
Illinois Commerce Commission

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

  
\_\_\_\_\_  
Notary Public

