

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Commonwealth Edison Company	)	
	)	
Petition for approval of tariffs implementing	)	No. 12-0484
ComEd's proposed peak time rebate program	)	
	)	

**NOTICE OF FILING**

Please take note that today I submitted the attached *Reply Brief of the Illinois Competitive Energy Association*, for filing in the above-captioned proceedings via e-docket with the Clerk of the Illinois Commerce Commission, 527 E. Capitol Avenue, Springfield, Illinois 62701.

DATED: January 4, 2013

ILLINOIS COMPETITIVE ENERGY ASSOCIATION

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## **II. ComEd's PTR Offering Does Not Comply with the Competitive Neutrality Provision of the Statute**

### **A. ComEd's Narrow Interpretation of the Enabling Statute should be Rejected.**

At the heart of the disagreement between ICEA and ComEd regarding competitive neutrality is the proper interpretation of the portion of 16-108.6(g)<sup>3</sup> that requires a utility to “file a proposed tariff with the Commission that offers an opt-in market-based peak time rebate program to all residential retail customers with smart meters that is designed to provide, in a *competitively neutral manner*, rebates to those residential retail customers that curtail their use of electricity during specific periods that are identified as peak usage periods.” Simply put, ICEA believes the phrase “in a competitively neutral manner” modifies or relates to the word “program” and ComEd takes a narrower position asserting the phrase “in a competitively neutral manner” modifies or relates only to the word “rebates.”<sup>4</sup> The plain language of the statute and statutory interpretation arguments support ICEA’s position and the Commission should reject ComEd’s restrictive interpretation.

As ICEA explained in its testimony and brief, the proper interpretation of the competitive neutrality provision of the PTR statute applies to the entire program.<sup>5</sup> Staff concurred with ICEA’s interpretation that the PTR program, at an operational level, must be designed in a competitively neutral manner.<sup>6</sup> Staff also acknowledged the specific operational issues discussed by ICEA witness Frederick and that these issues needed to be addressed to “assure the Commission that the PTR program will operate in a competitively neutral manner.”<sup>7</sup>

ComEd asserts that competitive neutrality is limited to rebates only and that its proposal satisfies the statutory requirements because it proposes to offer the same rebate amount

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<sup>3</sup> 220 ILCS 5/16

<sup>4</sup> Initial Brief of Commonwealth Edison, (“ComEd Initial Brief”), pgs. 23-24.

<sup>5</sup> Initial Brief of the Illinois Competitive Energy Association, (“ICEA Brief”), pgs. 5-6.

<sup>6</sup> Staff Exhibit 3.0, Clausen testimony, at page 3, lines 43-45.

<sup>7</sup> Staff Exhibit 3.0, Clausen testimony, at page 3, lines 50-57.

regardless of a customer's supplier.<sup>8</sup> As ICEA explained in its Initial Brief, there is nothing in the statute that limits competitively neutrality to rebates and ICEA recommends that the Commission reject this inappropriate interpretation.<sup>9</sup> Further, it makes no sense to believe that the General Assembly intended that the rest of the PTR program can be competitively discriminatory just so long as the rebates are administered in a competitively neutral manner. The definition of "Smart Grid" in the enabling statute shows that the "Smart Grid" envisioned by the General Assembly not be inhibited by aspects harmful to competition.<sup>10</sup> ARES are an important part of this expansion (and are statutorily a member of the Smart Grid Advisory Council) and ComEd's narrow interpretation of the statute is clearly inconsistent with the intent of the General Assembly to expand these services to Illinois consumers.

CUB's support for ComEd's position is weak at best, limited to a single sentence and is devoid of any analysis or evidence to support this conclusion. On the other hand, CUB spends almost a page of its brief arguing ComEd's original position (which ComEd abandoned in its rebuttal testimony) that PTR is competitively neutral because it will be available to all customers, irrespective of the supplier.<sup>11</sup> While ICEA does not disagree with this sentiment, ICEA believes that a deeper analysis is required before concluding that ComEd's PTR program is competitively neutral between its customers and ARES customers. As further explained below, ICEA believes that it is not enough to simply assert that all customers will be treated

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<sup>8</sup> Revised Rebuttal Testimony of Robert Garcia ("Garcia, ComEd 5.0 REV"), lines 418 – 421. ComEd Initial Brief at 23-24.

<sup>9</sup> ICEA Brief, pgs. 5-6.

<sup>10</sup> 220 ILCS 5/16, Subsection 16-108.6(a). The definition of "Smart Grid" includes (but is not limited to) investments and policies that together promote one or more of the following goals: (1) Increased use of digital information and controls technology to improve reliability, security, and efficiency of the electric grid; (4) Development and incorporation of demand-response, demand-side resources, and energy efficiency resources; (8) Provision to consumers of timely information and control options; **(10) Identification and lowering of unreasonable or unnecessary barriers** to adoption of Smart Grid technologies, practices, services, and business models that support energy efficiency, demand-response, and distributed generation. (emphasis added).

<sup>11</sup> CUB Brief, pg. 11.

equally irrespective of the supplier. ComEd must be held to demonstrate in this proceeding how the operation of PTR will work with ARES customers.

The Commission should adopt ICEA's interpretation of the statute and reject ComEd's proposed PTR plan with instructions to return with a PTR program plan that is competitively neutral in all aspects (not just rebate payments) for Commission consideration.

**B. The Commission Lacks the Necessary Information to Determine whether the PTR Program Proposed by ComEd is Competitively Neutral.**

ICEA also demonstrated that ComEd's Petition, draft tariffs, and testimony do not provide sufficient details describing how its PTR program will operate with customers of ARES.<sup>12</sup> There are numerous unanswered questions that need to be addressed and the Commission should reject ComEd's petition so those issues can be resolved prior to Commission action.<sup>13</sup> Staff agreed with ICEA in its rebuttal testimony that competitive neutrality requires an investigation of the operational aspects of PTR. Further, Staff requested specific information to help determine if ComEd's PTR program was competitively neutral.<sup>14</sup> Unfortunately, ComEd failed to take full advantage of this opportunity to provide additional information. ComEd failed to provide enough information for the Commission to determine whether its proposed PTR program is competitively neutral and therefore the Commission should reject ComEd's proposal.

ComEd also argues in its Initial Brief that ICEA "fails to raise reasonable competitive concerns because the operational areas of the PTR program identified by ICEA have little, if any, nexus to competition or competitive concerns."<sup>15</sup> However, until more details about the operational aspects of the program are known, it is not possible to ascertain whether there are, or are not any competitive concerns. Further, the aspects identified by ICEA have a clear nexus to

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<sup>12</sup> Frederick testimony at page 4, lines 61-68. ICEA Initial Brief at 6-12.

<sup>13</sup> ICEA Brief, pg. 6 – 12.

<sup>14</sup> Initial Brief of the Staff of the Illinois Commerce Commission, ("Staff Brief"), pg. 11.

<sup>15</sup> ComEd Initial Brief at 26.

competition inasmuch as each of them could greatly affect the operational capabilities of an ARES and therefore the ability to offer an effective demand response program. These basic, simple operational issues must be addressed before the Commission approves ComEd's PTR tariffs. The plain fact is that ComEd's PTR program is not yet ready. In this proceeding, ICEA presented evidence showing six operational areas where ComEd has not presented enough information to make a determination that ComEd will implement its PTR program in a competitively neutral manner.<sup>16</sup> Even after providing some answers to the issues raised by Staff and ICEA, there is still plenty of work to be done in the areas of concern raised by ICEA witness Frederick,<sup>17</sup> otherwise there would be no need for the continued workshops suggested by Staff.

Staff discusses the remedies ComEd did provide in rebuttal testimony but states that the Commission should "[s]imply require ComEd to treat all customers the same, regardless of supply choice"<sup>18</sup> and should order the Staff's Office of Retail Market Development ("ORMD") to hold workshops to resolve "several issues" that need addressed before a RES can offer demand response and energy efficiency programs through Rider PORCB."<sup>19</sup> ICEA appreciates Staff's proactive suggestion but respectfully disagrees with this approach. As explained in ICEA's testimony and brief, ComEd has yet to describe how the most basic operation functions of PTR will operate with ARES customers.<sup>20</sup> ICEA believes there are just too many unanswered questions and the better path is to reject the Petition and start over entirely. The solutions to the issues to be discussed in the workshop offered by Staff should not be constrained by decisions that the Commission would make in this docket. Figuring out the answers to the remaining

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<sup>16</sup> ICEA Ex 1 at pgs 6-9.

<sup>17</sup> Staff Brief at 11-17.

<sup>18</sup> Id., pg. 14.

<sup>19</sup> Staff Brief at 17.

<sup>20</sup> For example, with respect to customer enrollment, ComEd does not provide any useful information as to how RES customers enroll with PTR. Do RES customers enroll in the PTR program via the customer's RES? Do they enroll directly with ComEd? If the later, how do the RES learn of their customer's enrollment with PTR?

unanswered questions after a Commission order might artificially limit the solutions that might be considered by the group or could possibly require the Commission to reverse itself to adopt a solution identified by the workshop participants.

Finally, the pre-filing workshop process did not result in ComEd addressing these issues and as a result ICEA is concerned that ComEd will not have the appropriate incentive to make sure it will work in the future if ComEd's tariffs are approved in this proceeding.<sup>21</sup> Commission approval of the proposed tariff with changes to be made through the workshop process would strengthen ComEd's hand and make it easier to disregard ARES concerns as it relates to implementation of the multitude of program operational details that need to be finalized. A simple rejection of the proposed program to start over entirely with a blank slate would provide a more level playing field for negotiations between all parties to accomplish implementation of the statute in the competitively neutral manner required by the General Assembly.

**C. The Commission should Find that ComEd Can and Must Bill for PTR and Other Demand Response Programs under Rider PORCB.**

In its Initial Brief, ComEd questions whether an ARES can use Rider PORCB to bill demand response programs like PTR because demand response programs like PTR do not constitute "power and energy."<sup>22</sup> Conspicuously absent from ComEd's Initial Brief is any detailed analysis to support this erroneous conclusion. The only analysis provided by ComEd is an unsupported contention that "[d]emand response programs like PTR does not constitute or

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<sup>21</sup> In the workshops leading up to the filing of the Petition in this case, ComEd did not respond with clear, meaningful information to ARES information requests. For example, during the stakeholder process described by ComEd, ARES specifically requested information regarding the relationship between PTR billing and Rider PORCB. Staff Initial Brief at 16. Since the vast majority of RESs use Rider PORCB to bill residential customers, it was vital that RES understood how demand response programs like PTR would be billed in a PORCB environment. ComEd did respond in writing for the first time in its rebuttal testimony that demand response programs in general and PTR specifically, cannot in ComEd's view be billed under Rider PORCB. ComEd Exhibit 5.0, Garcia Rebuttal, at pg. 21, lines 458-473. According to ComEd, it is unlawful to bill such programs with Rider PORCB and ICEA is concerned that ComEd's view will preclude resolution in a workshop.

<sup>22</sup> ComEd Initial Brief at 37-38.

involve the provision of ‘power and energy.’”<sup>23</sup> This argument is does not make sense. The key characteristic of demand response programs like PTR is to reduce “energy and power” at critical times, thus, reducing power required to serve the entire grid. With respect to PTR, if an emergency event is called and the customer agrees to curtail usage, there is less power required to serve that customer. As a result, the customer will see less usage on his or her bill along with a credit to reflect the value of curtailed usage. To suggest that demand response programs are not equivalent to energy and power and therefore cannot be billed under Rider PORCB is not rational and requires far more discussion and analysis than ComEd’s simple, unsupported contention.

ICEA requests the Commission explicitly find that ComEd can and must bill for demand response products on Rider PORCB. Even the prospect of this issue remaining unresolved has the potential to greatly chill the development of PTR programs by ARES during this critical program time development. If RESs are prohibited from using Rider PORCB to bill demand response programs such as PTR due to ComEd’s overly restrictive interpretation, then RESs will have little choice but to either abandon Rider PORCB for another billing option or not allow its customers to subscribe to PTR.<sup>24</sup> The plain reality is that virtually every RES utilizes Rider PORCB for its primary product offerings and Commission adoption of ComEd’s position would ensure that RESs do not offer their own PTR programs. If the Commission adopts ComEd’s position, then the workshops would be unnecessary as no ARES will offer a PTR product. Such a result must be inconsistent with the intent of the General Assembly.

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<sup>23</sup> ComEd Brief, pg. 37 (footnote omitted).

<sup>24</sup> ICEA Brief, pg. 7.

### **III. ComEd's PTR Offering Does Not Comply with the Cost Recovery Provision of the Statute.**

ICEA believes that the costs of rebates as well as the administrative programs costs must be recovered from the “applicable regional transmission organization,” as referenced in 16-108.6(g). ComEd believes that only rebate costs should be recovered from the “applicable regional transmission organization” and that administrative program costs should be recovered from all residential customers through distribution rates. ComEd estimated its program costs to be approximately \$132 million.<sup>25</sup> For the reasons below the Commission should reject ComEd’s proposed plan inasmuch as it is inconsistent with the statute and is bad public policy.

#### **A. ComEd's Proposal to Collect Administrative Program Costs from All Customers Does Not Comply with the Statute and should be Rejected.**

As plainly stated in the statute, ComEd must seek recovery for both the costs of the rebates as well as the program costs “through markets or programs at the applicable regional transmission organization.”<sup>26</sup> ICEA explained in its Initial Brief why the Commission should reject ComEd’s incorrect interpretation of the statute. The Commission should reject ComEd’s proposal and direct ComEd to recover administrative program costs from PJM.

Even if the Commission accepts (which ICEA does not) that ComEd is not required to recover its program costs from PJM, ComEd’s proposed funding methodology for administrative program costs should be rejected inasmuch as ComEd has not made “all reasonable attempts to secure funding for the peak time rebate program through markets or programs at the applicable regional transmission organization.”<sup>27</sup> Instead, ComEd attempts to illegally shift the burden to

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<sup>25</sup> ICEA Initial Brief at 13, FN 58.

<sup>26</sup> 220 ILCS 5/16.

<sup>27</sup> 220 ILCS 5/16

ICEA or another party to identify a means by which ComEd could recover these costs from PJM.<sup>28</sup>

ComEd challenges ICEA's rationale that the last sentence in section 16-108.6(g) authorizes ComEd to seek recovery of its program costs from PJM. ComEd contends that the last sentence which references funding for the PTR program is in fact, "[a] reference to the same 'rebates' referred to in the prior sentence."<sup>29</sup> ComEd then contends that the two sentences cannot be read, "[i]ndependently and in isolation from each other."<sup>30</sup> Again, ComEd has misinterpreted the statute. First, the last sentence of the statute clearly refers to "securing funding for the peak time rebate program." Contrary to ComEd's assertion, there is absolutely nothing in this sentence to suggest that this language somehow refers to rebates. Second, it does not violate the rule of statutory construction to read these two sentences independently from each other. The primary intent of the General Assembly was to specifically mention the funding source for rebates in one sentence and the funding source for program costs in the second. When read as a whole, as ComEd suggests, the statute directs ComEd to seek funding for two different functions from the same source. If the General Assembly had intended for the statute to read as ComEd suggests, there would be no reason to include the last sentence.

Further, in its Initial Brief ComEd completely misrepresents ICEA's testimony and asserts that ICEA advocates for program costs to be recovered only from customers that participate in the program."<sup>31</sup> In support of this statement, ComEd cites to page 3, lines 45 – 47 of ICEA witness Frederick's rebuttal testimony. However, page 3, lines 45 – 47 of Frederick's rebuttal testimony begins the discussion of how ComEd's cost recovery proposal is bad public

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<sup>28</sup> ComEd initial Brief at 39.

<sup>29</sup> ComEd Brief, pg. 39.

<sup>30</sup> Id.

<sup>31</sup> ComEd Initial Brief at 34.

policy since it virtually ensures that RESs will not be able to compete in the demand response market. ComEd's citation is misplaced and so is its contention that ICEA's position is somehow inconsistent with section 16-108.6(g). ICEA never made the argument that PTR customers must pay for all the costs. Rather, ICEA has consistently argued that ComEd must comply with the statute and seek cost recovery for its program costs from the regional transmission organization. As a result, ICEA's position is not in conflict with section 16-108.6(g) but reflects the statutory directive and intent of the General Assembly.

Finally, ComEd argues that PTR program costs should be recovered from all residential ratepayers because the Commission has approved similar cost recovery mechanisms.<sup>32</sup> This argument is not relevant and should be rejected. The General Assembly constructed the PTR statute and specifically directed ComEd to seek funding for its administrative program costs from PJM. Based on this clear and unambiguous statutory language, past Commission decisions in unrelated dockets are not relevant.

**B. ComEd's Reaction to the Staff's Proposal to Require ComEd to Provide PTR Services to ARES Demonstrates why the Commission should simply Reject ComEd's Proposed PTR program.**

Staff agrees with ComEd that the statute only explicitly addresses cost recovery for rebates. With respect to the implementation costs, Staff believes that the statute is silent and therefore "does not object" to ComEd's proposal to recover these costs from all residential ratepayers.<sup>33</sup> However, Staff also recognizes that such a proposal disadvantages ARES, and concludes that, "[T]here is an inherent cost advantage in favor of ComEd over any ARES or CSP when ComEd is allowed to socialize PTR-related administrative costs among all customers. Any customer enrolling in an ARES or CSP provided PTR program would be required to pay

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<sup>32</sup> ComEd Initial Brief, pg. 35.

<sup>33</sup> Staff Initial Brief, pg. 8.

administrative costs for both ComEd's program and the alternative program."<sup>34</sup> To resolve this cost disadvantage, Staff recommends that the, "[t]he Commission order ComEd to provide ARES, at no additional costs to the ARES or its customers, with services for their PTR customers associated with the PTR-related costs that ComEd seeks to socialize."<sup>35</sup>

ComEd states it is open to considering Staff's concept, but ultimately concludes its proposal is not ripe for consideration at this time. ComEd criticizes Staff's proposal because no RES currently operating in Illinois currently offers its own demand response program and that ComEd is currently unaware of any RES anywhere in the country offering such a program.<sup>36</sup> Additionally, ComEd opines that Staff's proposal is "vague and over-simplified."<sup>37</sup> ComEd devotes three pages of its brief to cite multiple concerns with the calculation of specific customer baselines, billing PTR service, and whether a RES will seek to employ and sell DLCs as part of its own demand response program and impose any charges or penalties for such.<sup>38</sup> ComEd makes it clear these would be just a few of the issues that would need to be resolved if the Commission adopts Staff's proposal.

Initially, ICEA appreciates Staff's attempt to develop a solution to minimize the inherent cost advantage that would result if ComEd's position is adopted and believes that Staff's recommendation could be a workable alternative but agrees with staff that "[t]he exact nature of the capabilities that will be built into ComEd's systems is not yet known. However, more importantly, the issues raised by ComEd to Staff's proposal acutely demonstrate how any attempts to remedy the deficiencies of ComEd's proposed program may create even more difficult questions with solutions that might be constrained by a Commission order. The better

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<sup>34</sup> Staff Initial Brief, pg. 9.

<sup>35</sup> Staff Initial Brief, pg. 9.

<sup>36</sup> ComEd Initial Brief at 36.

<sup>37</sup> ComEd Initial Brief at 36.

<sup>38</sup> ComEd Initial Brief at 36-38.

route is for the Commission to reject ComEd's proposal and to start over. All of the issues raised in this case can better be taken up by the stakeholders in a fresh start negotiation process where all the options are on the table. And, similar to ICEA's position, Staff's proposal to determine services for ComEd to provide to ARES will be moot without a ruling that ARES can bill a PTR product under Rider PORCB.

#### **IV. ComEd's Request for Commission Approval of its PTR Tariffs by March 1, 2013.**

ICEA argued that ComEd's PTR Petition and tariffs are not ripe for a decision for a variety of reasons. First, PTR will not be implemented until sometime in 2015. Second, there are many PTR business functions that have yet to be developed. Third, ComEd has yet to announce the methodology used for determining a Customer Baseline Load ("CBL") Profile.<sup>39</sup> On the other hand, ComEd argues in its brief that approval of its PTR program by March 1, 2013 allows ComEd to participate in the Base Auction scheduled for May 2013 for the 2016/2017 planning year.<sup>40</sup>

Contrary to ComEd's argument, there is nothing in the record that suggests that ComEd may participate in the May 2013 auction without an approved CBL. According to ComEd, the CBL is an estimate of the hourly loads of the customer during any curtailment period absent any curtailment response and is used to measure the demand response reduction performance of PTR participants. Given its role in the PTR process, the CBL is a critical component to the success of PTR.<sup>41</sup> Nevertheless, ComEd has yet to decide on a CBL, has yet to seek approval for its CBL with either the Commission or PJM, and most importantly, has failed to state whether PJM will

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<sup>39</sup> ICEA Brief, pgs. 17-18. See also Staff Brief, pg. 4; "[S]taff advises the Commission to require ComEd to include [the CBL] methodology in the tariff."

<sup>40</sup> ComEd Initial Brief, pg. 41.

<sup>41</sup> ICEA Initial Brief, pg. 17-18.

allow ComEd to bid PTR resources into the May 2013 auction without an approved CBL.<sup>42</sup> It appears that ComEd's request for a March 1, 2013 approval date is a red-herring. Until a CBL has been filed and approved by both this Commission and PJM, ComEd is prohibited from bidding its PTR resources into the May 2013 auction.

## V. Conclusion

As described above, ComEd has failed to comply with the requirements contained in the PTR statute. With respect to competitive neutrality, ComEd has yet to complete the development of the requisite business processes. With respect to cost recovery, ComEd proposes to have all residential customers pay for PTR in direct violation of the statute. Finally, ComEd's arguments for a March 1, 2013 decision are without merit. For these reasons, ICEA respectfully requests that the Commission reject ComEd's PTR Petition and draft tariffs.

DATED: January 4, 2013

ILLINOIS COMPETITIVE ENERGY ASSOCIATION

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<sup>42</sup> ICEA Initial Brief, pg. 17-18.

**CERTIFICATE OF SERVICE**

I, Barton J. O'Brien certify that a copy of the above *Notice of Filing*, together with a copy of the *Reply Brief of the Illinois Competitive Energy Association* referred to therein, have been served upon all parties on the service list in the above-listed docket by electronic mail on the 4<sup>th</sup> day of January, 2013.

/s/ Barton J. O'Brien \_\_\_\_\_