



in Docket No. 12-0456 will have concluded. While briefing the motions to dismiss filed by the Staff of the Commission (“Staff”) and the Retail Energy Supply Association (“RESA”)<sup>1</sup> now forecloses the possibility of the Commission approving the proposed changes to Rate GAP by early March 2013, the recent delays introduced in the rulemaking docket only further underscore the value and efficiency of proceeding in this docket even if the final order is delayed. Indeed, while the separate, pending motion to dismiss the municipal aggregation rulemaking filed by the Metropolitan Mayors Caucus (the “Caucus”) (the “Caucus’ Motion”) itself delays that docket, it also raises serious questions about the viability of the proposed rules in that docket even if that motion is eventually denied. In other words, in the event the Caucus’ Motion is denied and the Commission’s authority affirmed over utilities and retail electric suppliers (“RESs”), the briefing of the Caucus’ Motion indicates that the very parties to whom the proposed draft rules might apply do not understand whether it does in fact apply to them. This is why parties, including ComEd and the Illinois Competitive Energy Association (“ICEA”), recommend a return to the workshop process so that all of the parties, including the Caucus, may revisit the provisions of the draft rules.

Given the confusion in the rulemaking docket, Staff’s and RESA’s Motions are not well founded. *First*, contrary to their arguments regarding judicial inefficiency, the present docket provides the most efficient forum for incorporating the limited changes to Rate GAP described in the Petition. In short, these changes are designed to incorporate enhancements and efficiencies to the process of transferring customer information consistent with Ameren Illinois Company’s d/b/a Ameren Illinois (“Ameren”) aggregation tariff and lessons learned since spring 2011. The amendments also update the language of Rate GAP to conform to recent amendments to Section

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<sup>1</sup> Staff’s December 21, 2012 Motion to Dismiss is referred to herein as “Staff’s Motion.” RESA’s December 21, 2012 Motion to Dismiss is referred to herein as “RESA’s Motion.”

1-92 of the IPA Act. There is nothing inefficient about incorporating these improvements and clarifications during 2013 when the next wave of aggregation activity is anticipated and while awaiting the outcome of the delayed rulemaking. Indeed, the present docket may end up being the *only* docket in which these changes can be considered and applied.

*Second*, Staff and RESA also miss the mark with their claims that this docket should be dismissed due to fears that municipal aggregation rules, if adopted at some point in the future, would be inconsistent with the provisions of Rate GAP. This argument ignores (i) the immediate need to further define the process for the transfer of customer information, (ii) that the proposed changes are consistent with Section 1-92 of the IPA Act and Rate GA – Government Aggregation Services (“Rate GA”) filed by Ameren, and (iii) that, in any event, ComEd would revise Rate GAP to the extent any of its provisions (including those currently reflected in Rate GAP and those proposed in the Petition) were inconsistent with any municipal aggregation rules adopted by the Commission in the same way ComEd revised Rate GAP in compliance with the Commission’s order in ICC Docket No. 11-0434.

Accordingly, Staff’s and RESA’s Motions to Dismiss should be denied.

### **BACKGROUND**

***Passage of Section 1-92 and Filing of Rate GAP.*** On January 1, 2010, Section 1-92 of the IPA Act – Illinois’ new municipal aggregation statute – took effect. Public Act 96-0176. Beginning in October 2010, ORMD convened workshops to address, *inter alia*, the terms and conditions under which the customer information needed to facilitate an opt-out aggregation program would be provided by the utilities to municipalities following passage of a referendum. ICC Docket No. 11-0434 (ComEd’s November 28, 2011 Initial Verified Comments (“2011 Comments”)) at 2-3. In November 2010, the City of Fulton became the first municipality to pass

a referendum authorizing an opt-out aggregation program. 2011 Comments at 3. As the workshop process continued, it became apparent that the issues surrounding the transfer of customer information would not be resolved in time for the anticipated needs of the municipalities participating in the spring 2011 aggregation referenda (of the 24 other municipalities that considered municipal aggregation, 19 would go on to pass referenda). 2011 Comments at 3.

As a result, on March 3, 2011 ComEd filed Rate GAP, whose express purpose was (and is) “to define the circumstances when and the terms and conditions under which [ComEd] provides retail customer data to a Government Authority in order for such Government Authority to aggregate retail customer electric power and energy requirements in accordance with Section 1-92 of the [IPA Act]”. Rate GAP, Ill. C. C. No. 10, 1st Revised Sheet No. 406; *see also* 2011 Comments at 3. Although the Commission did not suspend the filing (and Rate GAP took effect on April 17, 2011), thereafter the Commission initiated an investigation of Rate GAP, which concluded with the Commission ordering modest revisions to Rate GAP (effective April 12, 2012), most of which were agreed to or not opposed by the parties to that proceeding. The Commission also directed that Staff prepare a report regarding whether the Commission had authority to conduct a rulemaking regarding municipal aggregation. ICC Docket No. 11-0434 (April 4, 2012 Final Order) at 27, 29.

***Municipal Aggregation Rulemaking.*** Following the issuance of Staff’s report on July 18, 2012 concluding that the Commission has broad authority to conduct a municipal aggregation rulemaking, the Commission commenced Docket No. 12-0456 on July 31, 2012. ICC Docket No. 12-0456 (July 31, 2012 Initiating Order). In September and October 2012, Staff held workshops regarding development of proposed rules, and on November 1, 2012, Staff

submitted a Proposed Draft Rule on Governmental Electric Aggregation (“Draft Rule”). After the parties filed Verified Initial Comments and Reply Comments proposing a myriad of changes to the Draft Rule, the Caucus also filed a motion to dismiss the rulemaking on December 12, 2012, contending that the Commission lacks authority over municipal aggregation and thus lacks authority to promulgate the Draft Rule. Although Staff sharply disagrees with the Caucus regarding whether the Commission has authority over municipal aggregation, Staff announced in its Reply Comments (apparently for the first time) that the Commission “has no authority over municipalities, counties, or townships, with regard to electric aggregation or otherwise.” ICC Docket No. 12-0456 (Verified Reply Comments of the Staff of the Illinois Commerce Commission (“Staff’s Reply Comments”)) at 8-9 (footnote omitted). Nevertheless, because several parties interpret provisions of the Draft Rule as applying *only* to municipalities, ComEd, ICEA and the Caucus recommend that the parties return to workshops to further clarify and refine the Draft Rule, which may include discussion of whether rules are still viable given their limited applicability. ICC Docket No. 12-0456 (ComEd’s Response to Metropolitan Mayors Caucus’ Motion to Dismiss) at 4; ICC Docket No. 12-0456 (ICEA’s Response to Metropolitan Mayors Caucus’ Motion to Dismiss) at 2; ICC Docket No. 12-0456 (Caucus’ Reply in Support of its Motion to Dismiss) at 11.

***Proposed Revisions to Rate GAP.*** As the rulemaking workshop process came to a close, ComEd realized that it would not result in the adoption of a rule prior to the anticipated opt-out processes to be conducted in the spring of 2013, which meant that the refinements and efficiencies gleaned over the past couple of years regarding the transfer of customer information would not be implemented in time for this busy aggregation season. Specifically, the supply contracts for most of the 20 communities that participated in the first wave of municipal

aggregation programs in the spring of 2011 will expire in the spring of 2013. Petition, ¶ 12. As a result, ComEd anticipates that the opt-out processes will be re-run for these communities during this second round of aggregation. Petition, ¶ 12. While ComEd's Petition originally sought an order that could be implemented well before the spring 2013 aggregation processes, this motion to dismiss briefing hinders that schedule. However, even with this delay, the motion to dismiss briefing in the rulemaking docket and confusion regarding applicability of the Draft Rule only further underscore the importance of proceeding in the current docket to ensure the changes are implemented for additional opt-out processes conducted throughout 2013.

The simple, yet operationally important changes proposed by ComEd in this docket included the following:

- ***Increasing operational efficiency in the transfer of customer information.*** To preserve the privacy of customer account information, Rate GAP established a two-step process for providing customer information to Governmental Authorities. Petition, ¶¶ 5-6. The first step requires ComEd, at the request of a Governmental Authority, to provide customer names and addresses in the aggregated area. Petition, ¶ 5. The second step requires ComEd to later provide the account numbers of those customers who have not opted out of an aggregation program. Petition, ¶ 5.

Comments received during the rulemaking docket workshops indicate that changing this two-step process to a one-step process, in which customer names and addresses and corresponding account numbers would be provided in a single list to a Governmental Authority, would increase the operational efficiency of municipal aggregation programs. Petition, ¶ 7. It is believed that a one-step process would not compromise the confidentiality of this customer account information. Petition, ¶ 7.

Changing to a one-step process also would make Rate GAP consistent with Ameren's Rate GA, which provides for a one-step process that requires provision of a single list that includes customer names and addresses and corresponding account numbers. Petition, ¶ 8.

➤ ***References to township boards.*** As modified by Public Act 97-0823, Section 1-92 of the IPA Act now permits a township board, in addition to the corporate authorities of a municipality or a county board, to adopt an aggregation ordinance. 20 ILCS 3855/1-92. Rate GAP thus should be changed to include appropriate references to township boards. Petition, ¶ 10.

➤ ***Uniform verification requirements for Governmental Authorities.*** Public Act 97-0823 also modified Section 1-92 to require that townships verify the accuracy of the names and addresses of retail customers provided by the utility. 20 ILCS 3855/1-92(c)(1.5). Consistent with Ameren's implementation of this requirement in Rate GA, Rate GAP should be changed to apply this verification requirement uniformly to all Governmental Authorities and thereby streamline and increase the accuracy of the process by which customer account information is provided to Governmental Authorities. Petition, ¶ 11. Requiring verification by all Governmental Authorities also would enhance the preservation of customer account information privacy.

## **ARGUMENT**

### **I. Staff's and RESA's Judicial Inefficiency Arguments Are Misplaced and Ignore the Challenges Facing the Rulemaking Docket.**

Given the Caucus' pending Motion in the rulemaking docket and the confusion regarding the applicability of the Draft Rule, ComEd believes it will take months to resolve the Caucus' Motion and, if denied, determine whether each of the Draft Rule's provisions is consistent with

the limits of the Commission’s authority, whether any provisions should be abandoned, and whether the provisions should be revised. RESA concedes, as it must, that it “does not know how [the Caucus’ Motion] will affect the timing of the [Administrative Law Judge’s Proposed Order in the rulemaking docket].” RESA’s Motion, ¶ 8 fn.5. Staff has further noted that the Caucus’ Motion asserting the same points as its initial comments on the Draft Rule “*muddle[s]* the administrative procedure in contravention with Sections 200.25(b), (d) and (e) of the Illinois Administrative Code Part 200 Rules of Practice.” ICC Docket No. 12-0456 (Staff’s Response to Metropolitan Mayors Caucus’ Motion to Dismiss) at 4 (emphasis added).<sup>2</sup> Indeed, the first notice period has not yet commenced (which triggers a one-year deadline), and it is now entirely unclear when that will happen even if the Caucus’ Motion is denied.

In light of this certain delay in the rulemaking docket, what is efficient is to revise Rate GAP in this docket to incorporate the refinements and efficiencies that have been realized since the spring of 2011 and that are already reflected in Ameren’s municipal aggregation tariff. For example, this will permit Rate GAP to include comments received during the rulemaking docket workshops indicating that collapsing the two-step transfer of information process to a one-step process would increase the operational efficiency of municipal aggregation programs. Petition, ¶

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<sup>2</sup> Notwithstanding ComEd’s and ICEA’s recommendation that the parties to the rulemaking return to workshops, RESA correctly notes that even if the Administrative Law Judge resolves the issues pending in the rulemaking docket and issues a Proposed Order, several more steps that are likely to consume at least several months will be necessary before a rule may be adopted. RESA’s Motion, ¶ 10.a. These steps include: briefs on exceptions; replies to briefs on exceptions; publication of a proposed rule in the Illinois Register, thereby initiating the “first notice period” under Section 5-40(b) of the Administrative Procedure Act (“APA”), 5 ILCS 100/5-40(b); and authorization to submit a proposed rule to the Joint Committee on Administrative Rules (“JCAR”) of the General Assembly, thereby initiating the second notice period under section 5-40(c) of the APA, 5 ILCS 100/5-40(c). RESA’s Motion, ¶ 10.a. Given the confusion regarding the applicability of the Draft Rule in the rulemaking docket, there is additional uncertainty regarding whether JCAR will object to or prohibit the Draft Rule as it recently did in the Part 412 rulemaking. *See generally* ICC Docket No. 09-0592.

7. Reliance on the Rate GAP tariff to govern ComEd's provision of data for municipal aggregation has served the parties reasonably well over the past couple of years, and, given the challenges facing the rulemaking, reliance on a tariff solution is again appropriate and efficient to ensure these process improvements are put in place as quickly as possible. This is a practical, efficient solution that benefits all participants in the aggregation process.

**II. Staff's and RESA's Fears Regarding Potential Inconsistencies between Rate GAP and Any Rules Adopted in the Future Are Speculative and, in Any Event, Easily Addressed Through a Tariff Filing.**

Staff's and RESA's argument that ComEd's Petition should be dismissed due to a possible inconsistency arising in the future between any rules adopted and Rate GAP is wholly unfounded and should be ignored. While it is uncertain whether the rulemaking docket will even proceed and, if so, with what rules, what is certain is that the changes ComEd proposes in this docket either reflect provisions already contained in Ameren's municipal aggregation tariff on file with the Commission or reflect changes to conform to the amended Section 1-92. If anything, then, the Petition's proposed changes to Rate GAP are designed to *ensure* consistency with Ameren's more recently filed aggregation tariff and the recent amendments to Section 1-92. Staff's and RESA's speculation about hypothetical rules and the permutations they may take should not be entertained at this time, and, in any event, the Commission has recognized that its Administrative Rules take precedence over utility tariffs. *Blue Star Energy Servs., Inc. v. Cent. Illinois Light Co. d/b/a AmerenCILCO et al*, ICC Docket No. 09-0460 (April 12, 2011 Order) at 7.

***The Changes to Rate GAP Are Consistent with Ameren's Rate GA and Eliminate the Potential for Confusion.*** Two of the three key changes proposed to Rate GAP merely reflect alignment and consistency with Ameren's more recently filed municipal aggregation tariff – Rate GA. First, the change to consolidate Rate GAP's two-step process for the transfer of customer

information into one step simply mirrors the one-step process already set forth in Ameren's Rate GA. Indeed, based on comments received during the workshop process, ComEd understands that participants prefer this process as operationally superior. Petition, ¶ 7. Second, the proposed change to impose a uniform verification process on all governmental aggregators again replicates Ameren's verification process in Rate GA. Petition, ¶ 11. These two changes thus reconcile two existing inconsistencies between ComEd's and Ameren's tariffs.

***The Changes to Rate GAP Are Consistent with Recent Amendments to Section 1-92.***

As noted earlier, Section 1-92 was recently amended to include "township boards" among the entities included in the definition of a governmental aggregator. Because ComEd's Rate GAP was filed and took effect long before this amendment, ComEd's Petition seeks to revise Rate GAP to include township boards *consistent* with Section 1-92, which ensures townships are appropriately included within the purview of Rate GAP. Petition, ¶10.

***Fears Regarding Inconsistencies Arising in the Future Are Unfounded.*** While these changes will unquestionably result in harmonizing ComEd's Rate GAP with Ameren's Rate GA and Section 1-92, both Staff and RESA ignore this fact and instead speculate about a wholly unknown future. Indeed, it is not known at this time whether the rulemaking proceeding will proceed following the disposition of the motion to dismiss. And, if that docket continues, much work still needs to be done to clarify the scope and applicability of the Draft Rule and whether rules still make sense following Staff's admission that they do not apply to a, if not the, key participant – governmental aggregators. Moreover, even if rules are ultimately adopted at some point in the future, it is expected that Rate GAP will require revision to conform to those rules regardless of whether this docket is dismissed or the changes reflected in the Petition approved. Possible future inconsistency with any rule that eventually may be adopted thus fails to provide a

basis to dismiss the Petition.<sup>3</sup>

**III. Staff’s Argument for Dismissal Based on ComEd’s Purported Attempt to Have the Commission Regulate Governmental Authorities Is Incorrect – But if Credited, Would Require Dismissal of the Rulemaking Docket.**

Staff’s vague (and last ditch) argument that ComEd purportedly is seeking to have the Commission regulate Governmental Authorities and that the Petition thus is improper and should be dismissed “to the extent ComEd’s proposed tariff revisions impose requirements on Governmental Authorities” (Staff’s Motion, ¶¶ 7, 9) is incorrect. If, however, it is somehow credited, it would require dismissal of the rulemaking docket.

*First*, the Petition proposes to change Rate GAP to provide that ComEd’s obligation to submit customer information to a Governmental Authority is not triggered until the Governmental Authority first provides an accurate and verified list of all retail customers in the aggregated area. This proposed change seeks to modify ComEd’s obligations. It does not attempt to impose requirements on Governmental Authorities. Moreover, ComEd’s approach is consistent with the regulatory framework of the Public Utilities Act (“PUA”), which is replete with provisions that regulate utilities and, in doing so, impact those persons and entities that interact with utilities. For example, Section 16-122(c) of the PUA sets forth the conditions under which an electric utility may make available certain aggregated customer usage information to units of local governmental, which indirectly require that the unit of local government first satisfy the conditions precedent to the utility’s obligations. 220 ILCS 5/16-122(c) (“*Upon request from a unit of local government and payment of a reasonable fee*, an electric utility shall make

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<sup>3</sup> Indeed, in ICC Docket No. 10-0138, Staff ultimately withdrew its objection to certain provisions of proposed Rider PORCB – Purchase of Receivables with Consolidated Billing that had the potential to overlap or conflict with the rules being developed in the then pending Part 412 rulemaking. Staff withdrew its objection on the condition that Rider PORCB be revised to conform to any rules ultimately adopted in the Part 412 rulemaking, which is the same approach proposed by ComEd here. *See* ICC Docket No. 10-0138 (February 9, 2011 Amendatory Order) at 7-12.

available information concerning the usage, load shape curves, and other characteristics of customers by customer classification and location within the boundaries of the unit of local government, however, no customer specific billing, usage, or load shape data shall be provided under this subsection unless authorization to provide that information is provided by the customer”) (emphasis added).

*Second*, Staff submitted a Draft Rule that has several proposed provisions that would regulate Government Authorities.<sup>4</sup> If a proceeding must be dismissed merely based on the suggestion that the proposed tariff or proposed rule at issue in the proceeding may include provisions that (if adopted) would exceed the Commission’s authority, then the rulemaking docket must be dismissed – because it has been suggested that the Draft Rule includes provisions that (if adopted) would exceed the Commission’s authority.

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<sup>4</sup> In Section 470.100 (concerning transfer of customer information), the Draft Rule provides that “[i]f however, the governmental aggregator is a township board, then that township board must first provide an accurate customer list to the electric utility.” Section 470.300(a) (concerning customer notifications) would require that aggregation disclosures to customers include the governmental aggregator’s name and logo (if it has a logo), thereby compelling use of a governmental aggregator’s property. The four provisions in Section 470.400 concerning opt-out aggregation programs and the three provisions in Section 470.500 concerning opt-in aggregation programs each would extensively regulate a key feature of governmental units’ electric aggregation programs, by mandating customer disclosures and by specifying the content of these disclosures.

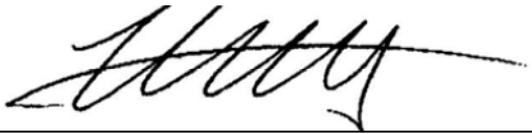
**CONCLUSION**

In light of the foregoing and for all of the reasons stated above, Staff's and RESA's Motions to Dismiss the Petition should be denied.

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Respectfully submitted,

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