

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

In the Matter of the)	
Petition of Commonwealth)	Docket No. _____
Edison Company, The Peoples Gas and)	
Light Company, North Shore Gas)	
Company, Ameren Illinois Company,)	
and Northern Illinois Gas Company)	
for Declaratory Ruling)	

**PETITION OF
COMMONWEALTH EDISON COMPANY, THE PEOPLES GAS LIGHT AND COKE
COMPANY, NORTH SHORE GAS COMPANY, AMEREN ILLINOIS COMPANY AND
NORTHERN ILLINOIS GAS COMPANY FOR DECLARATORY RULING**

Pursuant to Rule 220 of the Rules of Practice and Procedure of the Illinois Commerce Commission (“ICC” or “Commission”), 83 Ill. Adm. Code 200.220 (2002), Commonwealth Edison Company (“ComEd”), The Peoples Gas Light and Coke Company (“Peoples Gas”), North Shore Gas Company (“North Shore”), Ameren Illinois Company, d/b/a “Ameren Illinois” (“Ameren Illinois”) and Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas” and, together with ComEd, Peoples Gas, North Shore and Ameren Illinois, the “Utilities”) file this Petition for a declaratory ruling by the Commission that leases entered into by the Utilities and other Illinois public utilities do not constitute “evidences of indebtedness” within the meaning of Sections 6-101 (220 ILCS 5/6-101) and 6-102 (220 ILCS 5/6-102) of the Illinois Public Utilities Act (“PUA” or “Act”).

PRELIMINARY STATEMENT

From time to time, the Utilities find it necessary or advantageous to enter into “leases” to conduct business. These leases include, among others, leases for land, buildings and equipment. Accounting for those leases varies depending upon whether the lease is an “operating lease,” for which no balance sheet recognition is required beyond footnote disclosure, and “capital leases,” for which an asset and long-term liability are generally recognized on the balance sheet. The

for which an asset and long-term liability are generally recognized on the balance sheet. The Utilities anticipate that capital leases may increase in the future due to pending changes in applicable accounting rules, although the fundamental nature of the lease transactions themselves will not have changed. Consequently the Utilities believe it would be prudent for the Commission to address the treatment of leases in a comprehensive versus piece-meal fashion.

Although, as explained below, the Utilities believe the evidence is strong that such leases are not “evidences of indebtedness” as that term is used in Sections 6-101 and 6-102 of the Act, because there are no legal decisions by the Commission or Illinois courts on this issue, the Utilities often feel compelled to obtain assurance of counsel that Commission pre-approval is not required before entering into such leases. With the expected increase in such leases, the Utilities submit that time and cost could be saved, and potentially penalizing uncertainty eliminated, if the Commission were to grant this requested petition for a declaratory ruling. Ratepayers will not in any way be disadvantaged by the requested ruling.

FACTS

ComEd is an Illinois corporation with its principal office in Chicago, Illinois. ComEd is engaged in the business of furnishing electric utility service to the public in the State of Illinois and, as such, is a public utility within the meaning of the Act, 220 ILCS 5/3-105. ComEd is the largest electric utility in Illinois, serving the Chicago and Northern Illinois area. The service territory roughly borders in Iroquois County to the south, the Wisconsin border to the north, the Iowa border to the west, and the Indiana border to the east.

For more than 100 years, ComEd has been the primary electric delivery services company for Northern Illinois and provides electric service to approximately 4 million customers. ComEd is a direct subsidiary of Exelon Energy Delivery, LLC (“EED”), a limited liability company organized and existing under the laws of Delaware, and an indirect subsidiary

of Chicago-based Exelon Corporation (“Exelon”), a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and one of the nation's largest electric and gas utility holding companies.

ComEd's transmission lines operate at voltages of 69,000, 138,000, 345,000, and 765,000 volts, delivering power to their 3.8 million customer base. ComEd's subtransmission voltage is 34,500 volts. Their distribution line voltages are 4,160 volts and 12,470 volts. The company's revenues total more than \$5 billion annually.

Peoples Gas is wholly-owned indirect subsidiary of Integrys Energy Group, Inc. Peoples Gas is engaged in the business of transporting, purchasing, storing, distributing and selling natural gas at retail to approximately 826,000 residential, commercial, and industrial customers within the City of Chicago. This service territory covers an area of about 237 square miles and has a population of approximately three million people. The company owns approximately 4,119 miles of gas distribution mains and approximately 419 miles of transmission lines. Peoples Gas also owns a gas storage field, Manlove Field.

North Shore is a wholly-owned indirect subsidiary of Integrys Energy Group, Inc. engaged in the business of transporting, purchasing, storing, distributing and selling natural gas at retail to approximately 158,000 residential, commercial, and industrial customers within 54 communities in Lake and Cook Counties, Illinois. This service territory covers an area of about 259 square miles. The company owns approximately 2,303 miles of gas distribution mains and approximately 96 miles of transmission lines.

Ameren Illinois is an investor owned electric and gas utility serving a territory that extends throughout southern and central Illinois. Ameren Illinois is a subsidiary company of Ameren Corporation, a holding company formed as a result of the merger of Union Electric Company and Central Illinois Public Service Company (“CIPS”) in 1997. Ameren Corporation

later acquired Central Illinois Light Company and Illinois Power Company. All three Illinois utilities were subsequently merged in 2010 and the succeeding entity was renamed the Ameren Illinois Company. Ameren Illinois is an electric and gas combination utility that presently serves more than 1.2 million electric and 840,000 gas customers.

Nicor Gas is an Illinois corporation with its general office at 1844 Ferry Road, Naperville, Illinois 60563-9600. It is engaged in the business of distributing and selling gas to approximately 2.2 million customers in the northern part of Illinois, and is a public utility subject to Commission jurisdiction pursuant to the Act.

ARGUMENT

Pursuant to Section 6-101 of the Act, the ICC has the power to regulate the issuance by the Utilities of “stock, stock certificates, bonds, notes and other evidences of indebtedness.” 220 ILCS 5/6-101. Pursuant to Section 6-102, a utility must obtain ICC approval for any issuance of “stocks and stock certificates, and bonds, notes and other evidences of indebtedness payable at periods of more than 12 months after the date thereof.” 220 ILCS 5/6-102. The Utilities’ Petition for a declaratory ruling that leases do not constitute “evidences of indebtedness” under either Section 6-101 or 6-102 is fully supported both by the language of the Act and by uniform utility commission decisions in other states that have dealt with the same or a similar issue.

A. Statutory Support

The term “evidences of indebtedness” is principally used in Article VI of the Act, entitled “Capitalization.” It first appears in Section 6-101 (220 ILCS 5/6-101), which states that “[t]he power of public utilities to *issue* stocks, stock certificates, bonds, notes and other *evidences of indebtedness* . . . is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the State, and such power shall be exercised by the Commission” *Id.* (emphasis supplied). The term “evidences of indebtedness” likewise

appears throughout Section 6-102 of the Act (220 ILCS 5/6-102). For example, Section 6-102(a) provides:

(a) Subject to the provisions of this Act and of the order of the Commission issued as provided in this Act, a public utility may *issue stocks and stock certificates, and bonds, notes and other evidences of indebtedness* payable at periods of more than 12 months after the date thereof for any lawful purpose. However, such public utility shall first have secured from the Commission an order *authorizing such issue* and state the amount thereof and the purpose or purposes to which *the issue* or the proceeds thereof are to be applied, and that in the opinion of the Commission, the money, property or labor to be procured or paid for *by such issue* is reasonably required for the purpose or purposes specified in the order.

Id. (emphasis supplied).¹

As these examples illustrate, the term “evidences of indebtedness” as used in Article VI of the Act cannot be separated from the requirement under Sections 6-101 and 6-102 that it be “issued.” Section 6-101 provides that “Subject to the provisions of this Act . . . a public utility may issue . . . evidences of indebtedness.” This is evidence that Sections 6-101 and 6-102 exclusively refer to financial instruments (*e.g.*, stocks, bonds, etc.) that may be *issued* by a public utility. A public utility does not *issue* a lease – it *enters into* a lease. Thus, the mere fact that a lease, for accounting purposes, may be reflected in part as debt in a utility’s financial statements is not sufficient to trigger Sections 6-101 and 6-102.

Further evidence that “evidences of indebtedness” as used in Article VI of the Act is limited to financial instruments that may be *issued* by a public utility is provided by the second paragraph of Section 6-101 of the Act. That paragraph states that “[t]he Commission shall provide, by serial number or other device to be placed on the face thereof, for the proper and

¹ The same phrase appears in other provisions of Article VI as well. *See* 220 ILCS 5/6-103, 6-104, 6-105, 6-106, 6-107 and 6-108. Each of these provisions assumes the issuance of such financial instruments pursuant to Sections 6-101 and 6-102, or prescribes a penalty for failing to do so. *See also* 220 ILCS 5/10-204 (providing that such financial instruments issued pursuant to a Commission order shall be valid and binding even if the order is subsequently overturned on appeal).

easy identification of such stocks, stock certificates, bonds, notes *and other evidences of indebtedness as may be issued by public utilities under the provisions of this article.*” 220 ILCS 5/6-101 (emphasis added). One does not place a “serial number” or “other device... for easy identification” on a lease.

The other provision in the Act where the term “evidences of indebtedness” appears that is potentially relevant to the meaning of that term is Section 7-102(A)(e). That Section provides that “[u]nless the consent and approval of the Commission is first obtained . . . (e) No public utility may purchase, acquire, take or receive any stock, stock certificates, bonds, notes *or other evidences of indebtedness* of any other public utility.” 220 ILCS 5/7-102(A)(e). (Emphasis supplied). This provision does not support an argument that “evidences of indebtedness” should be given an interpretation different than that which should be applied in Sections 6-101 and 6-102 of the Act. First, the very same financial instruments are listed in Section 7-102(A)(e) as are listed in Sections 6-101 and 6-102. Second, Section 7-102(A)(e)’s use of the same financial instrument terms as Sections 6-101 and 6-102 makes regulatory sense – if Commission approval is required for an Illinois utility to issue such financial instruments, it makes sense for there to be required Commission approval for an Illinois utility to purchase such financial instruments from another utility. Third, the omission of “lease(s)” in the list of “evidence of indebtedness” in Section 7-102(A)(e), is in stark contrast to the inclusion of “lease” in Sections 7-102(A)(b), (A)(c), (B), (C), (D) and (E). This manifests that the General Assembly did not intend “lease(s)” to be included within “evidences of indebtedness.” *See People ex rel. Sherman v. Cyrus*, 203 Ill.2d 264, 279 (2003) (“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.”).

Where a statutory provision contains a non-exhaustive list, as do Sections 6-101, 6-102, and 7-102(A)(e), the unarticulated items are to be interpreted as “like” the listed objects. *See Board of Trustees of Southern Ill. Univ.*, 159 Ill. 2d 206, 211 (1994) (“doctrine of ejusdem generis” provides that when statute lists several classes of persons or things but provides that the list is not exhaustive, the class of unarticulated persons or things will be interpreted as those things such like the named person or things); *Estate of Powless*, 315 Ill. App. 3d 859, 866 (5th Dist. 2000) (if a legislative body specifically lists certain items in a statute, that same statute is not generally interpreted to include other things not so listed). Under a common sense interpretation, “leases” are not like “stocks, stock certificates, bonds, [or] notes” – the former all being financial instruments. Since a “lease” is quite different than the rest of the list, as it is not simply a “financial instrument,” it can be inferred that “leases” are not meant to be included. *See Board of Trustees of Southern Ill. Univ.*, *supra*, at 211. Accordingly, leases should not be considered as “evidences of indebtedness” in Sections 6-101, 6-102, or 7-102(A)(e).

In addition, the financial instruments listed in Sections 6-101, 6-102 and 7-102(A)(e) – “stocks, stock certificates, bonds, notes” – are issued and sold to investors or lenders as a means of raising capital for the utility concerned, and the funds received, and the obligations incurred in this manner, are reflected in the utility’s capital structure. Leases generally are not entered into to raise capital for the utility; instead, most are in the nature of rental agreements, and are straight-line expensed. In other words, the lease has no effect on the balance sheet. This is particularly true of leases of land and buildings. Even capital leases are generally not a vehicle to raise capital from investors for the utility. Instead, usually because ownership of the leased asset will be transferred to the lessee at the end of the term, the capital lease is recognized as both an asset and as a liability on the balance sheet. This is a way of recognizing that under such a lease, the lessee assumes some of the risks and enjoys some of the benefits of ownership. But in

that sense, it is not fundamentally different than the outright purchase of a capital asset on an installment basis. Such a purchase is not an issuance of stocks, bonds, or other financial instruments that may constitute “evidences of indebtedness.” Accordingly, leases are not issued “evidences of indebtedness” comparable to stocks, stock certificates, bonds or notes.

Finally, as with all statutory provisions, it is important to look to the purpose of Sections 6-101 and 6-102 in determining whether “leases” constitute “evidences of indebtedness” under the PUA. *See People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 279 (2003) (“In construing the meaning of a statute, the primary objective of this court is to ascertain and give effect to the intention of the legislature. All other rules of statutory construction are subordinate to this cardinal principle.”). In *United Air Lines, Inc. v. Illinois Commerce Commission*, 32 Ill.2d 516 (1965), the court explained that public utilities present a “proper case for the State to exercise regulatory powers over the issuance of its securities” because the legislature “must necessarily concern itself with the continued financial responsibility and ability of the utility to render its service, and must likewise insure that those who operate do not lead it into paths of ruin.” *Id.* at 522. Here again, this statement of the legislative purpose behind Sections 6-101 and 6-102 focuses on the “issuance” of securities or other types of financial instruments. A lease is not an issued financial instrument or security.

B. Case Law Support

As noted earlier, no Commission or court cases in Illinois have addressed the question of whether leases constitute “evidences of indebtedness” within the meaning of Sections 6-101 or 6-102 of the Act. This issue has been addressed, however, by regulatory or court decisions in other states. Research has revealed no case in these other jurisdictions holding that “evidences of indebtedness,” when following the clause “stock or stock certificates, bonds, or notes” (or similar clauses), includes leases.

A court decision that addresses this issue is *Jones v. Hawaiian Elec. Co., Inc.*, 639 P.2d 1103 (Haw. 1982).² In *Jones*, the Supreme Court of Hawaii held that a 30-year lease of land, which was expensed rather than capitalized by the utility and which provided that the utility purchase the land for no less than \$2,150,000, was not an “evidence of indebtedness” within the meaning of HRS § 269-17 (1976) requiring the approval of the Public Utilities Commission. HRS § 269-17 provided that a “public utility corporation may, on securing the prior approval of the public utilities commission, and not otherwise, issue stocks and stock certificates, bonds, notes and other evidence of indebtedness, payable at periods of more than twelve months after the date thereof.”

The Court considered the following:

- (a) Other authorities have held that leases do not constitute an evidence of indebtedness within the meaning of similar laws;
- (b) Even though the contract was executory, the contract of purchase was “never intended to be issue or sold to others and thus was not a method of generating capital.” *Id.* at 1108; and
- (c) The rule of statutory construction of *ejudem generis* requires that evidence of indebtedness be limited to things of like character to stock and stock certificates, bonds and notes. Stock and stock certificates, bonds and notes are usually issued as a means of raising funds and become part of the utility’s capital structure. The lease, however, was not a means of raising funds for the purchase of the property nor was it part of the capital structure.

In addition, although the Court left open the issue of whether a conditional sale contract was an evidence of indebtedness, the Court held that the lease was not a conditional sale contract because the provision to buy the land was not for zero or nominal consideration.

In another case, *Queen Mgt. Corp. v. Wilder Transp., Inc.*, 243 N.Y.S. 2d 261 (Westchester Cty. Ct. 1963), the Court held that 2-year leases of station wagons did not constitute evidences of indebtedness within the meaning of the Public Service law prohibiting an omnibus corporation from issuing “stocks, bonds, notes, or other evidences of indebtedness

² The substantive holding of *Jones* has not been disturbed. The precedential value of *Jones* has been called into some doubt, however, by *Peterson v. Hawaii Elec. Light Co. Inc.*, 944 P.2d 1265 (Haw. 1997) (finding that Supreme Court of Hawaii only had jurisdiction to hear rate appeals)

payable for a period of more than twelve (12) months, without the express consent and approval of the Public Service Commission.” *Id.* at 262. Other cases have had similar holdings. *See, e.g., Columbus & Southern Ohio Elec. Co. v. Peck*, 118 N.E. 2d 142 (Sup. Ct. Ohio 1954) (following the rule of *ejusdem generis*), and *Webster Mfg. Co. v. Byrnes*, 280 P. 101, 105 (Cal. 1929) (finding that a deed of trust or mortgage is not an “evidence of indebtedness,” explaining that “we reach [this] conclusion by an application of the rule of *ejusdem generis*, from which it must be concluded that by use of the word ‘other’ was meant such ‘evidences of indebtedness’ as had preceded it, to wit, bonds, notes, etc.”). Research has not revealed any cases holding that “evidences of indebtedness,” when following the clause “stock or stock certificates, bonds, or notes” (or similar clauses), included a lease.

Similarly, decisions by utility commissions addressing this issue confirm that lease transactions are not considered to be “evidences of indebtedness.” There have been several such decisions in Indiana. For example, in a case before the Public Service Commission of Indiana (the “Indiana PSC”), a supplier of electric energy purchased coal cars and assigned its interest therein to a leasing corporation. The financing of the purchase was provided for by Merchants National Bank & Trust Company (which also served as trustee), with the lease serving as collateral. The Indiana PSC stated that “such lease and security arrangement is not a note or other evidence of indebtedness contemplated by I.C. 8-1-2-78 requiring the approval of [the] Commission” *In the Matter of Hoosier Energy Division of Indiana Statewide Rural Electric Cooperative, Inc.*, 1980 Ind. PUC LEXIS 33, 2. Nearly a decade later, the Indiana Utility Regulatory Commission³ decided that a public utility’s obligations under a proposed nuclear fuel lease did not constitute an “evidence of indebtedness” since such “proposed lease transaction [would] not increase [the utility’s] outstanding long-term debt or other forms of

³ The Indiana Utility Regulatory Commission was re-named the “Public Service Commission of Indiana” in 1913. In 1987, the agency’s name was changed back to “Indiana Utility Regulatory Commission.” *See* <http://www.in.gov/iurc/2504.htm>.

capital.” *In the Matter of Indiana Michigan Power Company*, 1990 Ind. PUC LEXIS 420, 5 (Dec. 5, 1990).

In yet another Indiana case, the Indiana Utility Regulatory Commission found that a utility’s lease agreement for nuclear fuel was not an “evidence of indebtedness.” The question arose because the lessor was to issue notes to, and receive loans from, a special purpose commercial paper funding entity in order to fulfill its obligations under the proposed lease. According the Indiana Commission, “[b]ecause all evidence of indebtedness to be issued in connection with the New Lease will be issued by [the lessor], not [the utility], we find that [the utility’s] obligations pursuant to the proposed lease transaction do not constitute an evidence of indebtedness within the meaning of [the state statute].” *See In the Matter of Indiana Michigan Power Co.*, 2000 Ind. PUC LEXIS 386, at *9 (September 27, 2000).

Regulatory commissions in other states have come to the same conclusion. For example, absent special circumstances or conditions which would require regulatory approval, the California Public Utilities Commission has announced that “there is a clear line of decisions holding that the Commission does not have jurisdiction over transactions in which a utility is a lessee.” *See In the Matter of The Pacific Telephone and Telegraph Company*, 1983 Cal. PUC LEXIS 283, 5 (April 6, 1983). Similarly, in *In re Hawaii Elec. Co., Inc.*, 2005 WL 1415211 (Haw. P.U.C., May 13, 2005), the Hawaii Public Utilities Commission issued a declaratory order that a lease of land does not constitute an “evidence of indebtedness” and thus does not require commission approval, since a lease is unlike stock and other evidences of indebtedness. The opinion cites to a Vermont Public Service Board decision that reached a similar conclusion. *See*

In re Green Mountain Power Corp., 76 PUR 4th 270 (Vt. Pub. Serv. Bd., July 24, 1986) (holding that capital leases are not “evidences of indebtedness under a similar statute”).⁴

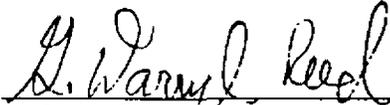
CONCLUSION

WHEREFORE, for the foregoing reasons, the Utilities respectfully requests that the Commission make a declaratory ruling that leases entered into by Illinois public utilities do not constitute “evidences of indebtedness” within the meaning of Sections 6-101 (220 ILCS 5/6-101) and 6-102 (220 ILCS 5/6-102) of the Act.

⁴ The *In re Green Mountain Power Corp.*, order was later vacated for jurisdictional issues in *Petition of Green Mountain Power Corp.*, 148 Vt. 333 (1987).

Dated: April 25, 2013

RESPECTFULLY SUBMITTED,

By: 
One of its Attorneys

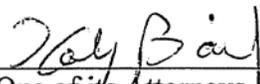
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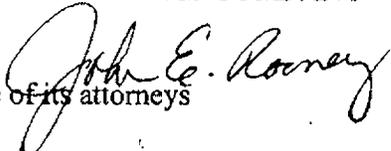
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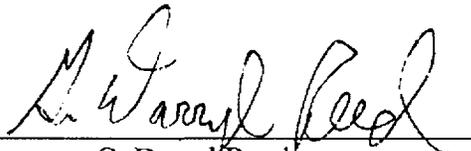
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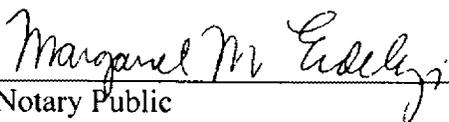
VERIFICATION

I, G. Darryl Reed, being first duly sworn, state that I am authorized to sign this verification on behalf of Commonwealth Edison Company, that I have read the foregoing Petition of Commonwealth Edison Company, the Peoples Gas Light and Coke Company, North Shore Gas Company, Ameren Illinois Company and Northern Illinois Gas Company For Declaratory Ruling, that I am knowledgeable of the facts stated therein, and that the same are true and correct to the best of my knowledge and belief.

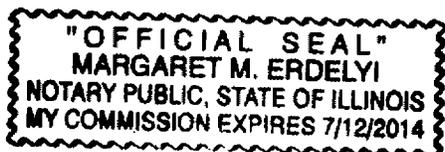


G. Darryl Reed

Subscribed and sworn to before
me this 25th day of April, 2013.



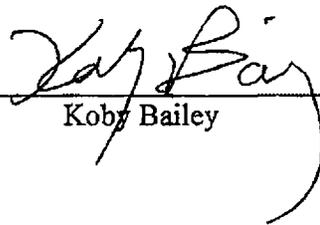
Notary Public



STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

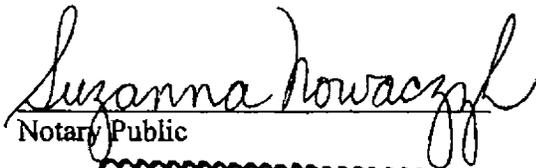
VERIFICATION

I, Koby Bailey, being first duly sworn, state that I am authorized to sign this verification on behalf of The Peoples Gas Light and Coke Company and the North Shore Gas Company, that I have read the foregoing Petition of Commonwealth Edison Company, the Peoples Gas Light and Coke Company, North Shore Gas Company, Ameren Illinois Company and Northern Illinois Gas Company For Declaratory Ruling, that I am knowledgeable of the facts stated therein, and that the same are true and correct to the best of my knowledge and belief.

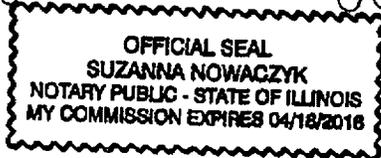


Koby Bailey

Subscribed and sworn to before
me this 24th day of April, 2013.



Notary Public



STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

VERIFICATION

I, Matthew R. Tomc, being first duly sworn, state that I am authorized to sign this verification on behalf of Ameren Illinois Company, that I have read the foregoing Petition of Commonwealth Edison Company, the Peoples Gas Light and Coke Company, North Shore Gas Company, Ameren Illinois Company and Northern Illinois Gas Company For Declaratory Ruling, that I am knowledgeable of the facts stated therein, and that the same are true and correct to the best of my knowledge and belief.


Matthew R. Tomc

Subscribed and sworn to before
me this 24th day of April, 2013.


Notary Public

