STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion	))	
	)	Docket No. 11-0434
Commonwealth Edison Company	)	
Investigation of Rate GAP pursuant to Section 9-250 of the Public Utilities Act	))	

STATEMENT OF POSITION OF THE RETAIL ENERGY SUPPLY ASSOCIATION

Pursuant to the schedule established by the Administrative Law Judge, the Retail Energy Supply Association ("RESA")[1] hereby files its Statement of Position in this proceeding.

I. INTRODUCTION

On November 28, 2011, Commonwealth Edison Company ("ComEd") submitted its Initial Verified Comments in this proceeding. On December 29, 2011, Verified Initial Comments were filed by RESA and the following other parties: the Attorney General of Illinois ("AG"), Dominion Retail, Inc. ("Dominion"), the Staff of the Illinois Commerce Commission ("Staff"), the Illinois Competitive Energy Association ("ICEA"), the Illinois Energy Professional Association ("ILEPA"), Verde Energy USA Illinois, LLC ("Verde") and Rock River Energy

[1] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant Energy Northeast LLC and TriEagle Energy, L.P.. Many of RESA's members are licensed ARES in Illinois and certified to serve customers in ComEd's service territory. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

Services Company ("Rock River"). Reply Comments were filed by the following parties on January 12, 2012: the AG, Dominion, Staff, ICEA, RESA, Rock River and FirstEnergy Solutions Corp ("FirstEnergy"). Reply Comments were filed by ComEd on January 19, 2012.

At the request of the Commission Staff and as agreed to by all parties which submitted Comments in this proceeding, the scheduled evidentiary hearings were cancelled as was the filing of briefs. The date for the filing of Position Statements/Proposed Orders was advanced to February 3, 2012.

In general, RESA congratulates the parties, especially the Staff and ComEd, for the manner in which this proceeding has been handled. The meetings conducted by the Commission Staff helped to narrow the issues and eliminate the need for pre-filed testimony and evidentiary hearings. Accordingly, RESA's Statement of Position is limited to the following four issues.

First, the term "small commercial retail customer" should be defined, as it is defined in Section 16-102 of the Public Utilities Act, as a non-residential customer who consumes 15,000 kilowatt-hours ("kWh") or less annually.

Second, the term "retail customers" found in Section 1-92 of the IPA Act should be interpreted to be limited to ComEd's bundled customers, those customers taking both supply and delivery services from ComEd.

Third, in the event that the Commission determines that the term "retail customers" should be defined to include those customers purchasing their supply from RESs, then the provisions in Rate GAP for the proper usage and protection of specific customer information passed from ComEd to a government authority must be improved.

Fourth, the Commission should initiate a rulemaking proceeding to create rules relating to municipal aggregation.

II. "SMALL COMMERCIAL RETAIL CUSTOMER" SHOULD BE DEFINED AS A CUSTOMER UTILIZING 15,000 kWh OR LESS ANNUALLY.

The term "small commercial retail customer" should be defined, as it is defined in Section 16-102 of the Public Utilities Act ("PUA"), as a non-residential customer who consumes 15,000 kilowatt-hours ("kWh") or less annually.

While ComEd originally included two rate classes (Small Commercial Delivery Class and Watt-Hour Delivery Class) which included customers having usage in excess of 15,000 kWh annually, in Rate GAP, ComEd, in its Initial Comments indicated that based on recent experience it "would not oppose limiting the provision of aggregated load and usage data and name, address and account information for non-residential customers to those with usage of 15,000 kWh per year or less". (ComEd Initial Comments, pp. 6-10) In other words, ComEd agrees with utilizing, for purposes of Rate GAP, the definition of small commercial retail customer contained in Section 16-102 of the PUA. ComEd confirmed its acceptance of this interpretation in its Reply Comments. (ComEd Reply Comments, p. 2)

RESA, Staff, ICEA, and ILEPA agree with ComEd that the term "small commercial retail customer" should be defined, as it is defined in Section 16-102 of the Public Utilities Act, as a non-residential customer who consumes 15,000 kilowatt-hours ("kWh") or less annually. (RESA Initial Comments, pp. 1-2; Staff Initial Comments, pp. 4-6; ICEA Initial Comments, pp. 4-5; ILEPA Initial Comments, pp. 2-4) Only Rock River argues that the term should include a rate classification that includes customers that consume more than 15,000 kWh annually. (Rock

River Initial Comments, p. 3) However, Rock River basically takes the position that its expansive definition would be helpful to customers in ComEd's Small Load Delivery Class and that including this class in Rate GAP would have a large economic benefit for customers in this class. (*Id.*) Rock River also notes that several mayors, village presidents or administrators have supported this expansive definition in letters to the Commission's Chairman. (*Id.*)

Effectively, Rock River is arguing that its perception as to the policy benefits of its expansive interpretation of "small commercial retail customer" should outweigh the appropriate legal interpretation of that phrase. Rock River's position was completely refuted in the Reply Comments of the other parties taking a position on this issue. (RESA Reply Comments, pp. 3-4; Staff Reply Comments, pp. 1-5; ICEA Reply Comments, pp. 2-3)

In particular, Staff rebutted Rock River's policy arguments at length (Staff Reply Comments, pp. 2-4), although, in RESA's opinion, Staff's response was correct but unnecessary because the meaning of the term "small commercial retail customer" is clear. The important point is that, as stated by the Staff, "the Commission cannot ignore the PUA's plain language". Staff goes on to state that the Commission "must follow and implement the PUA's plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute." The PUA does not contain a provision that authorizes the Commission to disregard the express definition of "small commercial retail customer," however, if there were such an exception, that exception would be limited to the terms of that authorization –but, again, there is none. Essentially, if the Commission adopted Rock River's position and expanded the small commercial retail customer definition to include customers that use in excess of 15,000 kWh annually, what then is the limit on such authority? RESA agrees with the Staff that the PUA "unambiguously" defines small commercial customers as those using 15,000 kWh or less

annually and that the Commission "must adhere" to the definition of small commercial customers contained in the PUA. (*Id.*, p. 4). RESA believes that failure to adhere to this definition unnecessarily puts at risk the legal foundations of municipal aggregation as it applies to small commercial retail customers.

In conclusion, the issue is the proper definition of "small commercial retail customer" as used in the Illinois Power Agency Act ("IPA Act"). That a different definition may be advantageous to certain customers and/or municipalities is rendered irrelevant by the express language of the PUA. Based on proper statutory interpretation, the term "small commercial retail customer" should be defined as a non-residential customer with annual usage of 15,000 kWh or less. Thus, Rate GAP should be revised to limit its applicability to residential customers and those non-residential customers having annual usage of 15,000 kWh or less.

III. "RETAIL CUSTOMERS" SHOULD BE DEFINED AS CUSTOMERS RECEIVING BUNDLED SERVICE, BOTH DELIVERY SERVICES AND SUPPLY, FROM COMED.

Unlike the term "small commercial retail customer" where all parties, except one, agree on the proper definition, there has been considerable debate regarding the proper definition of "retail customers". RESA, ICEA, ILEPA, Dominion and Verde take the position that the term "retail customers" found in Section 1-92 of the IPA Act should be limited to ComEd's bundled customers, those customers taking both supply and delivery services from ComEd. (ICEA Initial Comments, pp. 6-7; ILEPA Initial Comments, pp. 4-5; Dominion Initial Comments, pp. 1-5; Verde Initial Comments, pp. 2-3; RESA Reply Comments, pp.4-7) However, Staff, ComEd, Rock River, the AG, and FirstEnergy argue that the term "retail customers" should be interpreted to include all of ComEd's eligible delivery service customers, regardless of whether they

purchase their supply from ComEd or a RES. (Staff Initial Comments, pp. 6-9; Rock River Initial Comments, p. 4; AG Initial Comments, pp. 2-3; FirstEnergy Reply Comments, pp. 2-3)

A. The strongest analyses support defining the term "retail customers" to mean ComEd's bundled service customers.

There are numerous reasons why the term "retail customer" should be limited to ComEd's bundled service customers.

ICEA points out that ComEd's interpretation of "retail customer" to include customers purchasing supply from RESs is broader than necessary to implement governmental aggregation and, therefore, is not consistent with the subject matter, purposes or intent of Section 1-92 of the IPA Act. Customers purchasing from RESs have already availed themselves of existing retail choice opportunities and nothing in Section 1-92 of the IPA Act shows that the General Assembly intended to interfere with the existing contracts between those customers and the RESs they have chosen. Thus, ICEA concludes that there is no reason for the government authority to contact those customers with opt-out information. Given that there is no reason for such contact, there is also no reason to put this confidential and competitively-sensitive information (the names and addresses of customers already with a RES) at risk. (ICEA Initial Comments, pp. 6-7)

Similarly, ILEPA disagrees with ComEd's interpretation that the municipality has a legal right to obtain the names and address of residents who have already elected to purchase their supply from a RES. Customers who have already exercised their right to choose should be able to do so without governmental interference. (ILEPA Initial Comments, p. 4)

Dominion also takes the position that the term "retail customer" should be limited to ComEd's bundled service customers, arguing that ComEd's interpretation is not consistent with

Section 1-92 of the IPA Act. Dominion notes that there is no indication in the IPA Act that the General Assembly intended to interfere with existing contracts between customers and RESs. Moreover, Dominion notes that requiring the distribution of proprietary information such as customer lists to competitors that could use that information, results in an unconstitutional impairment of contracts between a RES and its customers, citing the United States Constitution. (Dominion Initial Comments, pp. 2-3) Dominion also notes that the recent amendment (in Public Act 097-0338) to Section 1-92 of the IPA Act supports the argument that the General Assembly did not intend "retail customers" to include customers receiving supply from RESs. That amendment requires account numbers to be provided to the governmental authorities. Because the only possible need for such numbers is to effectuate an enrollment, which cannot be done if a customer is already under contract with a RES, the General Assembly would not have required electric utilities to provide such information for customers for which there would be no use for such information. (*Id*., p. 3) In addition, Dominion notes that the State of Ohio has governmental aggregation rules which withhold RES customer data from governmental authorities. (*Id*., pp. 4-5)

Verde takes the position that information regarding customers who are already taking supply from RESs should not be provided to government authorities because such customers have already made an electric supplier decision. Such customers have already made informed choices about switching to RESs; moreover, they will be aware of their municipalities' aggregation program by virtue of the public referenda. Verde concludes that failure to limit the definition of "retail customers" to ComEd's bundled customers will have an adverse impact on RESs, is inherently unfair and discourages competition. (Verde Comments, pp. 2-3)

B. The arguments supporting the definition of "retail customers" as all of ComEd's delivery services customers are flawed.

ComEd admits that from a "legal perspective", the term "retail customers" as used in Section 1-92 of the IPA Act is "not currently defined". (ComEd Initial Comments, p. 11). Nevertheless, ComEd takes the "view" that it is obligated to provide customer information to government authorities, regardless of their source of energy supply. ComEd asserts that there are policy matters that support its view. Namely, ComEd believes that a government authority should have a full list of the names and addresses of all electric customers within its jurisdiction to ensure that it has the ability to contact and properly inform all of its constituents "regarding the municipal aggregation plan and associated electric supply options; respond to questions regarding the program; and generally avoid customer confusion". (*Id*., pp. 11-12)

ICEA effectively refuted ComEd's "simplistic argument", pointing out that it overlooks the subject matter of the IPA Act. The opt-out programs authorized by Section 1-92 of the IPA Act are solely concerned with electric supply. There is no opting out of delivery services provided by ComEd. Therefore, delivery service only customers (those customers buying their supply from a RES) are outside the scope of the municipal aggregation provisions of the IPA Act. (ICEA Initial Comments, pp. 6-7)

Staff acknowledges that Section 1-92 of the IPA Act does not contain a definition of "retail customer". (Staff Initial Comments, p. 7) However, Staff believes that the definition of retail customer contained in the PUA should apply and that the only support for use of a definition other than that contained in the PUA is that ComEd's Rate GAP originates from a requirement of the IPA Act, not the PUA. (*Id*., pp. 7-8)

However, in looking at the definition of "retail customer", Staff also needs to look at terms that are defined within that definition. Section 16-102 of the PUA provides, in pertinent part, that:

> "Retail customer" means a single entity using electric power or energy at a single premises and the (A) either (i) is receiving or is eligible to receive **tariffed services** from an electric utility…" [Section 16-102, emphasis added]

Section 16-102 of the PUA also includes a definition of "tariffed services": "Tariffed service" means services provided to retail customers…but shall not include competitive services." Thus, the term *"tariffed service" expressly excludes competitive services, that is, services that have been declared competitive pursuant to Section 16-113 of the PUA.* As a result, a customer that is eligible to receive competitive service is not a "retail customer" as defined in the PUA for purposes of Article XVI. Logically, if a customer that is eligible to receive competitive services is not a "retail customer", then it stands to reason that one that IS receiving competitive services is also not a "retail customer." Interpreting these two statutory definitions in harmony, if a fully bundled retail utility customer is not being served with competitive service, then their usage data should be provided to the requesting municipality. However, in contrast, if a retail delivery-services-only customer of ComEd's receives competitive services it is also not properly considered a "retail customer" as defined in the PUA. Moreover, this definition squares completely with the subject matter of the IPA Act in limiting "retail customer" to only those customers not already receiving competitive services from a RES, and the competitive services from ComEd, under the PUA.

Moreover, contrary to Staff's claim,, the fact that ComEd's Rate GAP originates from a requirement of the IPA Act, not the PUA, is not the "only support" for properly defining the term "retail customers" to include only ComEd's bundled service customers, as shown in Section III

(A), *supra*. In addition, Staff's interpretation was effectively rebutted by ICEA, Dominion, and RESA.

ICEA correctly points out that it is not enough that the IPA Act and the PUA both contain the term "retail customer". When dealing with the use of the term "retail customer" in Section 1-92 of the IPA Act, the Commission must examine the whole of Section 1-92 of the IPA Act to derive a proper meaning of the term. By failing to examine the whole of Section 1-92 of the IPA Act, the Staff is basically ignoring the subject matter of that statute. While Staff is correct that all of ComEd's customers receive delivery service from ComEd, delivery service is not the focus of Section 1-92 of the IPA Act. Section 1-92 of the IPA is not concerned with delivery service customers but with those customers who are obtaining their electricity supply from ComEd, its bundled service customers. (ICEA Reply Comments, pp. 4-5) The very real danger of ignoring the subject matter on Section 1-92 of the IPA Act is that if the Commission were to ignore these limits, regardless of good intentions, would there be no limits to how far the Commission could expand the scope of municipal aggregation? Specifically, is the Commission free to ignore that this section of the IPA Act applies to residential and small commercial retail customers and expand it to cover all industrial customers, or all natural gas customers? Those who argue well-intentioned departures from the law put at risk the viability of the municipal aggregation structure and, in this case, perhaps even competition.

Dominion also rebutted Staff's analysis supporting its interpretation of the term "retail customer". Dominion examined the use of the term "retail customer", a term used repeatedly in Section 1-92 of the IPA Act, and demonstrated that the term does not apply to customers of RESs. (Dominion Reply Comments, pp. 2-4) RESA stated its agreement with ICEA and Dominion, noting that interpreting "retail customer" as used in the IPA Act in the same manner

as the term is defined in the PUA would be inconsistent with the provisions of the IPA Act. (RESA Reply Comments, p. 5)

Rock River and the AG also support defining "retail customer" to include customers purchasing electricity from RESs (Rock River Initial Comments, p. 4; AG Initial Comments, p. 3); however, they offer only opinion, without any supporting analysis. RESA points out that Rock River's suggested expansion of the scope of municipal aggregation beyond that which is permissible under the PUA, is ill-advised given the express limitation in the PUA cited above, that specifically excludes those customers that are receiving competitive services from a RES or the utility. Rock River only states its belief, without analysis, that the intent of the General Assembly was to include more than ComEd's bundled customers in municipal aggregation programs. As shown above, the General Assembly's intent was not to include, in municipal aggregation programs, customers already purchasing supply from RESs. Similarly, the other supporter of ComEd's definition, the AG, simply states, without analysis, that excluding customers who are already purchasing supply from RESs "would be arbitrary and inconsistent with the notion of choice underlying the IPA Act". The AG ignores the fact, as demonstrated above, that customers purchasing supply from RESs have already made a choice, a choice made available to them under the Public Utilities Act. Neither of these two parties offers anything of merit to support the expansive interpretations of ComEd and Staff. (RESA Reply Comments, pp. 5-6)

For the first time in reply comments, FirstEnergy supports the definition of "retail customer" advanced by ComEd, Staff and Rock River. (FirstEnergy Reply Comments, pp. 2-3) While admitting that the Commission has discretion and is not bound to interpret "retail customer" as used in Section 1-92 of the IPA Act in the same manner as used in Section 16-102

of the PUA, FirstEnergy claims that the term "retail customer" is "clearly unambiguous" and that it refers to all end use customers. (*Id*., p. 2) However, while RESA agrees with FirstEnergy that the term "retail customer" is not ambiguous, it clearly refers to an electric utility's bundled service customers, as demonstrated in Section III (A) *supra*.

In conclusion, the strongest arguments support the positions of RESA, ICEA, ILEPA, Dominion and Verde. The term "retail customer" should be defined to include only ComEd's bundled service customers, excluding customers already taking supply service from RESs.

IV. RATE GAP SHOULD BE REVISED TO PROTECT THE CONFIDENTIALITY OF THE CUSTOMER DATA OF RETAIL ELECTRIC SUPPLIERS' CUSTOMERS.

If the Commission accepts the definition of "retail customer" to exclude customers already taking service from a RES, then the confidentiality provisions of Rate GAP are adequate. However, if the Commission determines that the term "retail customer" includes a customer taking service from a RES, then there needs to be additional protection for the confidentiality of customer information. Numerous parties agreed with this need for additional protection including ICEA (ICEA Initial Comments, pp. 7-10); the AG (AG Initial Comments, pp. 1-2); ILEPA (ILEPA Initial Comments, p. 5); and the Commission Staff (Staff Reply Comments, pp. 9-10).

Specifically, the Commission Staff indicated in its Reply Comments that it would not object to a combination of the language proposed by ICEA and RESA being added to Rate GAP. That language would read:

> To ensure compliance with the law, and particularly with regard to protecting customer-specific information described in Items 18 through 23 of the Company Obligations Section of this Rate GAP, the Government Authority will require, as a material condition to a contract or other written agreement with both the RES selected to procure the

> aggregated electric power and energy supply service to eligible customers within the boundaries of the Government Authority and with any third party it has engaged to assist in any aspect of the aggregation process, that there be established and followed appropriate protocols to preserve the confidentiality of customer-specific information and limit the use of such customer-specific information strictly and only to effectuate the provisions of Section 1-92 of the IPA Act. The GA will ensure that these protocols, at the minimum, reasonably limit the number of authorized representatives of the selected RES and any other third party who need access to the customer-specific information; provide that the RES or any third party will not disclose, use, sell, or provide customer-specific information to any person, firm or entity for any purpose outside of the aggregation program; and, acknowledge that the customer-specific information remains the property of the GA and that breaches of confidentiality will have certain, specified, and sufficient consequences. Moreover, the municipality/township/county will, and will require the selected RES to, delete and/or destroy the customer-specific information described in said items 18 through 23 within 60 days after the Company provides said information.

RESA agrees that the Commission Staff's combination of its language with that of ICEA provides acceptable protection of the confidentiality concerns of RESs' customers. The best protection, of course, is for ComEd not to provide information about customers of RESs to government authorities. However, if the Commission adopts a definition of "retail customers" which is not limited to ComEd's bundled services customers, then RESA recommends that that the language quoted above be added to Rate GAP. Moreover, similar language should be added to ComEd's Municipal Aggregation Data Request Form.

V. THE COMMISSION SHOULD INITIATE A RULEMAKING PROCEEDING TO ESTABLISH APPROPRIATE RULES FOR MUNICIPAL AGGREGATION PROGRAMS.

In its Initial Comments, ComEd encouraged the Commission to initiate a rulemaking proceeding. (ComEd Initial Comments, pp. 13-14) In its Initial Comments, RESA also took the position that there should be uniform rules applicable to municipal aggregation. RESA's understanding is that there will be many more municipalities, in both ComEd's and Ameren Illinois Company's ("Ameren") service territories, with opt-out municipal aggregation referenda in the March 2012 elections. A rulemaking is appropriate so that there are uniform rules

applying to ComEd and Ameren. In addition, ComEd has expressed concerns regarding its authority to impose restrictions on the use of data by municipalities. Commission rules would provide the electric utilities with the requisite authority to impose appropriate restrictions of the use of data by municipalities.

ICEA also took the position that a rulemaking proceeding would bring structure and clarity to the operation of municipal aggregation programs. (ICEA Initial Comments, p. 11) In contrast, Staff, while agreeing in principle that a rulemaking proceeding would be helpful, stated that the Commission's statutory authority to initiate such a rulemaking is "far from obvious". (Staff Initial Comments, p. 11) While Staff will apparently be exploring the Commission's authority, it recommends that the Commission not order a rulemaking proceeding in this proceeding. Instead Staff proposes to "explore this option further and present its findings to the Commission outside of this Docket". (*Id.*, p. 12)

RESA does not take a position as to whether the rulemaking proceeding should be ordered as an outcome of this docket or outside of this docket; however, the rulemaking proceeding should begin soon. There will be numerous governmental authorities holding referenda in March 2012 regarding aggregation programs. Consequently, it would be beneficial for the rulemaking proceeding to begin and conclude as soon as possible. With respect to the Commission's authority, RESA notes that the Commission has jurisdiction over the electric utilities, as well as over the RESs who will be participating in aggregation programs. It appears clear to RESA that, at a minimum, the Commission has authority to adopt rules regarding aggregation programs that are applicable to electric utilities and RESs.

VI. CONCLUSION

In conclusion, the Commission should adopt a definition of "small commercial retail customer" to include non-residential customers with annual usage of 15,000 kWh or less. In addition, the Commission should adopt a definition of "retail customer" to include only bundled service customers of ComEd. However, if the Commission adopts a definition of "retail customer" which includes customers taking service from Retail Electric Suppliers, then it should require ComEd to revise its tariffs to provide appropriate protection to confidential customer information utilizing Staff's proposed language, as set forth in Section IV of this Statement of Position. Finally, the Commission should initiate a rulemaking, either in its Order in this proceeding or outside of this proceeding, to adopt appropriate rules for purposes of implementing municipal aggregation programs.

Respectfully submitted,

/s/ GERARD T. FOX
Gerard T. Fox
An Attorney for the Retail Energy Supply Association

Gerard T. Fox
Two Prudential Plaza
180 N. Stetson
Suite 3500
Chicago, IL 60601
gerardtfox@aol.com
(312) 268-5674

NOTICE OF FILING

Please take note that on February 3, 2012 I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Statement of Position of the Retail Energy Supply Association in this proceeding.

Dated: February 3, 2012

/s/Gerard T. Fox
Gerard T. Fox

CERTIFICATE OF SERVICE

I, Gerard T. Fox, certify that I caused to be served copies of the foregoing Statement of Position of the Retail Energy Supply Association upon the parties on the service list maintained on the Illinois Commerce Commission's eDocket system for the instant docket via electronic delivery on February 3, 2012.

/s/ Gerard T. Fox
Gerard T. Fox