STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	)	
	)	
Verified Petition for Expedited Approval of Modifications to Rate GAP-Government Aggregation Protocols	)	**Docket No. 12-0590**

MOTION TO DISMISS OF
THE RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA")[1] by and through its attorney, Gerard T. Fox, pursuant to 83 Illinois Admin. Code Section 200.190, hereby moves that the Illinois Commerce Commission ("Commission") dismiss the above-captioned proceeding and, in support of this motion, states as follows:

1. On January 1, 2010, Section 1-92 of the Illinois Power Agency Act (the "IPA Act") became effective. Section 1-92 provided for the aggregation of electric load by municipalities and counties. Subsection 1-92 (c) (2) of the IPA Act required an electric utility to submit to a requesting Governmental Authority the names and addresses of residential and small commercial retail customers in the aggregate area.

[1] RESA's members include Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd.; and TriEagle Energy, L.P.. 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.

2. On March 3, 2011, Commonwealth Edison Company ("ComEd") filed with the Commission tariff sheets, proposing to create Rate GAP-Government Aggregation Protocols. The Commission did not suspend ComEd's filing and Rate GAP took effect on April 17, 2011.

3. On May 18, 2011, the Commission initiated an investigation of Rate GAP pursuant to Section 9-250 of the Public Utilities Act. The investigation was docketed as Ill. C. C. Docket No. 11-0434.

4. On August 12, 2011, Subsection 1-92 (c) (2) of the IPA Act was amended to require an electric utility to submit to a requesting Governmental Authority the names, addresses, and account numbers of residential and small commercial retail customers in the aggregate area.

5. On April 4, 2012, the Commission entered its Final Order in Ill. C. C. Docket 11-0434, requiring ComEd to file certain tariff changes to Rate GAP within ten days of the effective date of that Order. ComEd filed those revisions to Rate GAP to conform to the Commission's Final Order on April 11, 2012.

6. The Commission's Final Order in Docket 11-0434 also noted that ComEd, RESA and the Illinois Competitive Energy Association ("ICEA") supported a rulemaking proceeding. While Staff concurred that a rulemaking would be beneficial in developing statewide standards for governmental aggregation programs, Staff was unsure as to statutory authority and requested time to further investigate the issue and make a recommendation. The Commission agreed with its Staff and directed Staff to provide its findings and recommendations on this "important matter" within 60 days of the date of the Final Order. (Final Order, p. 27)

7. In response to the Commission's Final Order, Staff prepared a report, dated July 18, 2012, which concluded that the Commission has the statutory authority to promulgate rules regarding

governmental aggregation. Staff's report also identified a non-exclusive list of issues to be considered during the rulemaking.

8. On July 31, 2012, the Commission entered its initiating order in Ill. C. C. Docket 12-0456 to develop rules regarding municipal aggregation to implement the appropriate provisions of the IPA Act and the Public Utilities Act. To date, twenty petitions for leave to intervene have been filed in Docket 12-0456[2]; in addition, appearances have been entered by the Illinois Attorney General and the City of Chicago. Several workshops have been held in Docket 12-0456 regarding development of the proposed rules for governmental aggregation. Subsequent to those workshops, Staff filed and served its proposed rules on November 1, 2012 ("Staff's Proposed Rules"). Thereafter, pursuant to the schedule established by the Administrative Law Judge ("ALJ"), nine parties filed Verified Initial Comments on Staff's Proposed Rules[3] and 13 parties and the Staff filed Verified Reply Comments[4]. The next step in the proceeding is the issuance of an Administrative Law Judge's Proposed Order ("ALJPO").[5]

9. On October 31, 2012, ComEd filed its petition in this proceeding requesting approval of modifications to its Rate GAP. Moreover, ComEd requested expedited treatment of its petition, asking for a final Commission order by March 6, 2012.

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[2] Intervenors in this proceeding included electric utilities (Commonwealth Edison Company ("ComEd"), Ameren Illinois Company ("Ameren"), and Mt. Carmel Public Utility Company); RES associations (RESA, ICEA, the Coalition of Energy Suppliers ("CES"), and the National Energy Marketers Association; RESs (Dominion Retail ("Dominion"), Constellation New Energy, Integrys Energy Services, MC Squared Energy Services LLC, FirstEnergy Solutions Corp., and Prairie Point Energy d/b/a Nicor Advanced Energy ("NAE")); and other parties (the Citizens Utility Board ("CUB"), Wind on the Wires ("WOW"), CNT Energy, the Metropolitan Mayors Caucus ("MMC"), the Building Owners and Managers of Chicago ("BOMA"), and the Illinois Power Agency ("IPA").

[3] Verified Initial Comments were filed by Ameren, CES, CNT Energy, ComEd, ICEA, MMC, NAE, RESA, and WOW.

[4] Verified Reply Comments were filed by Ameren, BOMA, CES, ComEd, Commission Staff, CUB, Dominion, FirstEnergy, ICEA, IPA, MMC, NAE, RESA, and WOW.

[5] On December 12, 2012, one of the Intervenors, the Metropolitan Mayors Caucus, filed a motion to dismiss Docket 12-0456 and the ALJ has set a schedule for briefing on that motion. RESA does not know how this will affect the timing of the ALJPO.

10. This proceeding should be dismissed and the subject matter of ComEd's petition should be resolved in the rulemaking proceeding, Docket 12-0456, basically for reasons of efficiency and fairness. The advantages of a rulemaking proceeding over adjudication on a case-by-case basis are explained in the authoritative treatise on administrative law, authored by Richard J. Pierce, Jr. (ADMINISTRATIVE LAW TREATISE, Fifth Edition, Aspen Publishers, (2010)) In general, the rulemaking process is more efficient, provides superior notice to the public, and is inherently fairer. While the treatise is comparing the relative efficiency of establishing a rule through a rulemaking process versus establishing a "rule" through a series of adjudicative proceedings, most of the basic principles apply in the case at hand, namely whether it makes sense to litigate the same issues in both the instant proceeding (which will result in a tariff that is only applicable to ComEd) and in the Commission's rulemaking in Docket 12-0456 (which will result in a rule of general applicability). For the following reasons, this proceeding should be dismissed and the issues raised in ComEd's petition be resolved in the existing proceeding to adopt rules for municipal aggregation, Docket 12-0456:

a. A rulemaking can be expected to produce higher quality rules than adjudication on a case-by-case basis because all potentially affected members of the public are given an opportunity to participate in a rulemaking proceeding. (Pierce, pp. 496-497) As demonstrated, *supra*, there are 22 intervenors, as well as Commission Staff, in Docket 12-0456. Nine parties have submitted Verified Initial Comments and 13 parties and the Commission Staff have submitted Verified Reply Comments. Under the procedural schedule in Docket 12-0456, there will be an opportunity for Briefs on Exceptions and Replies to Briefs on Exceptions after the Administrative Law Judge issues a Proposed Order. Thereafter, the Commission will presumably authorize publication of proposed rules in the Illinois Register, thereby initiating the "first notice period" under Section 5-40 (b) of the

Illinois Administrative Procedure Act ("Illinois APA") (5 ILCS 100/5-40 (b)) Subsequently, the Commission will authorize submission of proposed rules to the Joint Committee on Administrative Rules ("JCAR") of the Illinois General Assembly, thereby initiating the second notice period under Section 5-40 (c) of the Illinois APA. (5 ILCS 100/5-40 (c)) After JCAR's review, the Commission will be able to publish adopted rules in the *Illinois Register*. Simply put, the instant proceeding will not involve the thorough analysis by all interested parties that will result by use of the rulemaking process in Illinois.

b. The second advantage of the rulemaking proceeding is the enhanced political accountability of agency policy decisions adopted through the rulemaking process. (Pierce, p. 497) As demonstrated above, before rules can be adopted in Docket 12-0456, they will have been vetted through the statutory requirements of the Illinois APA, including review by JCAR.

c. Third, the rulemaking procedure is more efficient. Rulemaking eliminates the need to engage in expensive and time-consuming adjudicatory hearings. (*Id.*, pp. 497-498) That is clearly the case in the instant proceeding. The issues involved in ComEd's petition will be resolved in the rulemaking proceeding in Docket 12-0456. To the extent that ComEd's petition appears to assume that this would be a simple, uncontested hearing when it notes that some participants in the workshop process in Docket 12-0456 have requested the sort of tariff revisions proposed by ComEd (ComEd Petition, p. 4), this assumption is clearly false. Other parties, including RESA, object to the tariff revisions proposed by ComEd in the instant proceeding and, if this proceeding is not dismissed, will be required to litigate this proceeding as well as the rulemaking proceeding in Docket 12-0456.

d. Fourth, rulemakings eliminate the need to relitigate recurring issues. (Pierce, p. 497) Again, this is clearly the case here. The same issues involved in the instant proceeding are involved in the rulemaking proceeding in Docket 12-0456. Moreover, the Commission's rules take precedence over

conflicting utility tariffs. Consequently, if the Commission adopts rules in Docket 12-0456 that are inconsistent with the tariff provisions ultimately approved in the instant proceeding, the Commission's rules would control. From a consistency perspective, if the Commission were to allow the proposed revisions to ComEd's Rate GAP to become effective prior to the adoption of municipal aggregation rules, there is a substantial risk that issues addressed in that tariff will be resolved differently from those addressed in the rulemaking, leading to inconsistent resolution of similar fact patterns or, perhaps even vintage program practices. Even though the later rules would control, it may require an unwinding of an inconsistent prior structure.

e. Fifth, the rulemaking process is fairer in that the process provides affected parties with clearer advance notice. (*Id.*, p. 500) As discussed previously, the adoption of rules in Illinois requires notice to the public under the Illinois APA.

f. Sixth, the rulemaking process enhances fairness by permitting all potentially affected members of the public an opportunity to be heard. (*Id.*, p. 501) As previously discussed, all parties interested in commenting on the proposed rules in Docket 12-0456 will have that opportunity and the Commission is required under Section 5-40 (b) of the Illinois APA to consider those comments before authorizing submission of second notice rules to JCAR. (5 ILCS 100/5-40 (b))

WHEREFORE, for the foregoing reasons, the Retail Energy Supply Association requests that its Motion to Dismiss be granted and that this proceeding be dismissed.

Dated: December 21, 2012

Respectfully submitted,

Retail Energy Supply Association

By: /s/Gerard T. Fox
Gerard T. Fox

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STATE OF ILLINOIS)
) **SS**
COUNTY OF COOK)

VERIFICATION

Gerard T. Fox, being first duly sworn, on oath deposes and says that he is an attorney for the Retail Energy Supply Association, that he has read the foregoing Motion to Dismiss, that he knows of the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

/s/Gerard T. Fox
Gerard T. Fox

Subscribed and sworn to me
This 21st day of December, 2012

OFFICIAL SEAL
CHRISTINA V. HOLSTON
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES NOV. 18, 2016

NOTICE OF FILING

Please take note that on December 21, 2012, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Motion to Dismiss of the Retail Energy Supply Association in this proceeding.

Dated: December 21, 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 Motion to Dismiss 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 December 21, 2012.

/s/ GERARD T. FOX
Gerard T. Fox