

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motions)	
)	No. 10-0108
)	
Amendment of 83 Ill. Adm. Code 451)	

**REPLY BRIEF ON EXCEPTIONS OF
THE ILLINOIS COMPETITIVE ENERGY ASSOCIATION**

The Illinois Competitive Energy Association (“ICEA”), by and through its counsel, DLA Piper LLP (US), respectfully submits this Reply Brief on Exceptions regarding the Proposed Order on the Proposed Amendments to Part 451 Rules (“Proposed Amended Rules”) issued by the Illinois Commerce Commission (“Commission”).¹ ICEA properly intervened in, and is a party to, this proceeding. Although ICEA did not find it necessary to submit comments or briefs before this time, an issue has arisen during the Brief on Exceptions stage that warrants ICEA’s direct participation.

ICEA is concerned with certain proposed modifications to the Proposed Order articulated in Commonwealth Edison Company’s (“ComEd”) Brief on Exceptions (“BOE”) pertaining to financial qualifications of Alternative Retail Electric Suppliers (“ARES”). Specifically, ICEA’s concern lies with ComEd’s suggestion that the language in subsections 451.110(a)(4), 451.220(a)(4), and 411.320(a)(4) be modified to require that an ARES’ obligation to reimburse Illinois retail customers be in the form of an unconditional guarantee, payment bond, or letter of credit made “payable to the applicant’s Illinois retail customers”, as reflected below.

¹ The positions expressed in this filing represent the position of ICEA as an organization but may not represent the views of any particular member of ICEA.

~~The applicant certifies that it will offer to reimburse its Illinois retail customers for the additional costs those customers incur to acquire electric energy as a result of the applicant's failure to comply with a contractual obligation to supply that such energy. Any resulting The applicant's prospective obligation of the applicant to reimburse Illinois retail customers shall be covered by an unconditional guarantee, payment bond, or letter of credit payable to the incumbent utility in favor of the applicant's Illinois retail customers. bundled rate customers to be credited through the applicable purchased power rider for each service territory the applicant serves.~~

(ComEd BOE at 2-4.) The proposed language creates a number of logistical problems, with potential negative impacts on the competitive retail market as a whole.

The Proposed Language Is Unworkable

ComEd's proposed language change would create logistical difficulties that are impractical and insurmountable. An instrument payable to an unidentifiable group such as "the applicant's Illinois retail customers" is simply not possible. Rather, a guarantee, bond, or letter of credit must be made in the name of a single, identifiable identity. Given that limitation, the proposed language would appear to force ARES into effecting instruments in the name of each of the ARES' existing customers, which creates logistical problems on a number of levels. For instance, the list of a particular ARES' customers necessarily changes on a month by month basis based on contract expirations or other terminations, and thus would be extremely burdensome as it would require constant updating. The enormity of resources required to perform these functions is difficult to ascertain with any reasonable degree of certainty, but is sure to be onerous on the ARES, with such costs necessarily passed along to their customers.

Moreover, in the case of a letter of credit issued by a financial institution, the institution is required to perform due diligence regarding every single counter-party. The financial institution's due diligence efforts are further complicated by the fact that the Patriot Act requires that financial institutions undertake sufficient effort to ensure that a potential payee is not a

terrorist or member of a terror organization. Once again, the resources required to perform the necessary due diligence/background checks on an almost continuous basis would be an enormous undertaking, and not an activity in which a financial institution would agree to engage.

The proposed language modification is problematic for any ARES desiring to serve customers under the relevant subsections of Part 451. That burden is exacerbated for ARES serving residential customers, of which there are millions within the State of Illinois. In all likelihood, the resources required to comply with the subsections as modified would mean that no ARES would be able to meet the requirements, thus making that option wholly illusory, and potentially precluding a financially viable ARES from providing service to Illinois customers.

Identification Of The Appropriate Counter-Party

It is not clear what burden ComEd is attempting to insulate itself against in removing reference to the incumbent utility from the language included in the Proposed Order. In the event that an ARES defaults, it is the incumbent utility that would likely undertake the responsibility to serve the retail customers of that ARES without interruption, for which the utility would presumably and reasonably expect remuneration. Additionally, the utilities should be familiar with letters of credit being issued in their name, as that is a required element for taking service under their respective Single Billing Option tariffs. Given the fact that ICEA is not aware of any guarantee, bond, or letter of credit having been exercised in the ten years of retail competition in the electric market, and since ComEd fails to cite any such instances, it would seem that ComEd's fears are misplaced.

If utilities are deemed an unacceptable counter-party, the Commission must decide who the appropriate counter-party would be. ICEA suggests that the guarantee, bond, or letter of credit be payable to the People of the State of Illinois, as proposed by the Commission Staff in its

Brief on Exceptions. (See Staff BOE at 3.) ICEA notes that the “People of the State of Illinois” may be too broad for a financial institution issuing a letter of credit to negotiate, and thus may not necessarily be the appropriate payee. ICEA is not suggesting any change to Staff’s proposed language, but ICEA suggests that an ARES submitting its application under this section work with Staff to identify the appropriate counter-party within the State of Illinois, as well as the government department or official authorized to negotiate and execute an agreement on behalf of that counter-party.

~~The applicant shall execute and maintain certifies that it will offer to reimburse its Illinois retail customers for the additional costs those customers incur to acquire electric energy as a result of the applicant's failure to comply with a contractual obligation to supply such energy. Any resulting The applicant's prospective obligation of the applicant to reimburse Illinois retail customers shall be covered by an unconditional guarantee, payment bond, or letter of credit that, upon failure to comply with its contractual obligations to supply energy to its customers, shall be payable to the People of the State of Illinoispayable to its Illinois retail customers. Any dollar limitation~~

(Staff BOE at 3.)

WHEREFORE, ICEA respectfully requests that the Commission reject Commonwealth Edison’s proposed modifications to the Proposed Order regarding the Part 451 Rules as discussed in this Reply Brief on Exceptions, and that it instead make the modifications proposed by ICEA as stated in this Reply Brief on Exceptions and as embodied in the language for the Rule proposed by Commission Staff in its Brief on Exceptions.

Respectfully Submitted,

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DATED: June 8, 2010