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December 9, 2011

FORTISBC ENERGY – AES OFFERING PRODUCTS AND SERVICES **EXHIBIT A2-27**

Mr. Shawn Hill
Director, Regulatory Affairs
FortisBC Energy Inc.
16705 Fraser Highway
Surrey, BC V4N 0E8

Dear Mr. Hill:

Re: An Inquiry into FortisBC Energy Inc.
regarding the Offering of Products and Services in
Alternative Energy Solutions and Other New Initiatives

Commission staff submits the following document for the record in this proceeding:

- Illinois 1998 Rulemaking on Non-Discrimination in Affiliate Transactions for Electric Affiliates

Yours truly,

Alanna Gillis

cms
Enclosure
cc: Registered Interveners
(FEI-AES-RI)

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

The People of Cook County, the City of Chicago, the People of the State of Illinois, the Citizens Utility Board, and the Environmental Law & Policy Center of the Midwest	:	**98-0013**
Petition for Rulemaking on Non-Discrimination in Affiliate Transactions for Electric Utilities.	:	**(Cons.)**
-and-	:	
Illinois Commerce Commission On Its Own Motion	:	**98-0035**
Implementation of Section 16-121 of the Public Utilities Act.	:	

HEARING EXAMINER'S PROPOSED ORDER

DATED: May 7, 1998

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ILLINOIS COMMERCE COMMISSION

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HEARING EXAMINER'S PROPOSED ORDER

By the Commission:

I. PROCEDURAL HISTORY

On January 9, 1998, the People of Cook County, the City of Chicago, the People of the State of Illinois, the Citizens Utility Board and the Environmental Law & Policy Center of the Midwest (collectively hereinafter referred to as the "Consumer and Governmental Parties" or "C&GP") filed a verified petition in Docket No. 98-0013 requesting that the Illinois Commerce Commission ("Commission") immediately initiate a rulemaking proceeding to adopt rules on non-discrimination in affiliate transactions for electric utilities pursuant to Section 16-121 of the Public Utilities Act. ("Act") (220 ILCS 5/16-121). A proposed rule was attached to C&GP's petition. On January 20, 1998, the Commission entered an order initiating a rulemaking proceeding in Docket No. 98-0035 to implement Section 16-121 of the Act and consolidating this docket with Docket No. 98-0013.

Petitions to Intervene in these consolidated proceedings were filed by or on behalf of the following: Blackhawk Energy Services ("Blackhawk"); Illinois Power Company ("IP"); Northern Illinois Gas Company, d/b/a Nicor Gas ("Nicor Gas"); Enron Energy Services, Inc. ("Enron"); MidAmerican Energy Company ("MidAmerican"); Mt. Carmel Public Utility Co. ("Mt. Carmel"); The Peoples Gas Light and Coke Company, North Shore Gas Company, Peoples Energy Services Corporation, Peoples Energy Services Corp. and Peoples Energy Ventures Corporation (collectively, hereinafter referred to as "Peoples"); The National Energy Marketers Association, Central Illinois Public Service Company and Union Electric Company (collectively hereinafter referred to as "Ameren"); the Illinois Industrial Energy Consumers ("IIEC"); Commonwealth Edison Company ("ComEd"); mc^2, Inc. ("mc^2"); Central Illinois Light Company (''CILCO"); Interstate Power Company and South Beloit Water, Gas & Electric Company (hereinafter collectively referred to as "Alliant Utilities"); International Brotherhood of Electrical Workers, AFL-CIO Local Unions 15 and 51 ("IBEW"); the Edison Electric Institute ("EEI"); LG&E Energy Marketing, Inc; Shell Energy Services Company,

L.L.C.; and the Illinois Mechanical and Specialty Contractors Association ("IMSCA"). All of these petitions to intervene, except that of IMSCA were granted by the Hearing Examiners. The petition to intervene of IMSCA, which was filed after the evidentiary hearings were concluded, is hereby granted.

Pursuant to proper legal notice, a pre-hearing conference was held in these consolidated dockets before duly authorized Hearing Examiners of the Commission at its offices in Springfield, Illinois on January 28, 1998, at which a schedule was set for the filing of testimony and hearings. Thereafter, procedural matters were discussed at a hearing on March 25, 1998 and evidentiary hearings were held on March 30-31, April 1-3 and April 6-7, 1998. At the evidentiary hearings, appearances were entered by counsel on behalf of ComEd, IP, CILCO, Ameren, Alliant Utilities, MidAmerican, Mt. Carmel, Nicor Gas, Peoples, C&GP, Enron, mc^2, Blackhawk, IBEW, EEI and Commission Staff ("Staff"). At the conclusion of the hearing on April 7, 1998, the record was marked "Heard and Taken."

The witnesses that presented testimony in these dockets and the transcript references for their cross-examination are: for ComEd - John H. Landon, a principal and director of the utility practice of Analysis Group Economics, (Tr. 101-284); Martin Blake, a member and principal of The Prime Group, LLC, (Tr. 749-820); Robert E. Berdelle, ComEd's Comptroller, (Tr. 2116-2184); Andrew J. Morrison, President and CEO of Market Strategies, Inc., (Tr. 648-682); William H. Downey, a Vice President and principal customer officer of ComEd and the President of Unicom Energy Services, (Tr. 1890-2003); and Robert W. Millard, ComEd's Distribution Asset Manager, (Tr. 1678-1687); for IP - Paul L. Lang, IP's Senior Vice President for the Customer Service Business Group, (Tr. 821-1001); Kevin Murphy, a professor of business economics and industrial relations in the Graduate School of Business at the University of Chicago and a Principal at Chicago Partners, L.L.C., (Tr. 564-647); and Lynn M. Shishido-Topel, a principal and director of the Regulation Practice at Chicago Partners L.L.C., (Tr. 2101-2115); for Ameren - Alfred E. Kahn, a professor of Political Economy, Emeritus, at Cornell University and Special Consultant with National Economics Research Associates, Inc. ("NERA"), (Tr. 1419-1442); and Warner M. Baxter, Ameren's Controller, (Tr. 1659-1677); for CILCO - Stan E. Ogden, CILCO's Vice President of Marketing and Sales, (Tr. 1805-1889); for Alliant Utilities - Terry Nicolai, Manager of Regulatory Relations for Wisconsin Power & Light Company, (Tr. 1714-1724); for MidAmerican - James J. Howard, its Vice President of Regulatory Affairs, (Tr. 2004-2012); for EEI - Robert G. Harris, a Professor Emeritus in the Haas School of Business, University of California, Berkeley, and a Principal in the Law & Economics Consulting Group, (Tr. 1177-1225); Mathew J. Morey, Director, Economics at EEI, (Tr. 2025-2049); Samuel G. Tornabene, Director, Communications Services at EEI, (Tr. 718-747); and Kenneth Gordon, Senior Vice President of NERA, (Tr. 688-707); for Peoples - James M. Luebbers, Vice President of Corporate Planning for Peoples Energy Corporation, (Tr. 1699-1714); and Judith L. Pokorny, Director, Trading Risk Management, for Peoples Energy Corporation; for Nicor Gas - George M. Behrens, its Vice President-Accounting, (Tr. 285-341); for Enron - John W. Mayo, Visiting Professor of Economics, Business and Public Policy at Geogetown University, School of Business, (Tr. 1001-1061); and Kathleen E. Magruder, Enron's Vice President of Rates & Tariffs, (Tr. 353-564); for C&GP - Scott Hempling, an attorney at law, (Tr. 1227-1373 and 1399); for Blackhawk - Gregory C. Locke, Executive Director, Energy Marketing at WISVEST Corporation, (Tr. 1375-1398 and 1400-1408); for mc^2 - Howard L. Friedman, a Regulatory Analyst with mc^2, (Tr. 1081-1176); for IIEC - Donald E. Johnstone, a principal with Brubaker & Associates, Inc., (Tr. 1726-1804); for Staff - Richard J. Zuraski, a Senior Economist in the Commission's Energy Division, (Tr. 1443-1658); and Lisa Browy, a Senior Accountant in the Accounting Department of the Commission's Financial Analysis Division, (Tr. 2052-2101); and for IBEW - William H. Starr, President and Business Manager of Local 15, IBEW; and Dominic Rivara, Business Manager/Financial Secretary of Local 51, IBEW.

Initial briefs and reply briefs were filed by Alliant Utilities, Ameren, CILCO, ComEd, C&GP, EEI, Enron, IIEC, IMSCA, IP, mc^2, MidAmerican, Nicor Gas, Peoples and Staff. IBEW filed an initial brief.

II. PURPOSE OF THIS PROCEEDING

The purpose of this proceeding is to adopt rules in compliance with Section 16-121 of the Act, which became effective on December 16, 1997. Section 16-121 provides:

> Non-discrimination; adoption of rules and regulations. The Commission shall adopt rules and regulations no later than 180 days after the effective date of this amendatory Act of 1997 governing the relationship between the electric utility and its affiliates, and ensuring non-discrimination in services provided to the utility's affiliate and any alternative retail electric supplier, including without limitation, cost allocation, cross-subsidization and information sharing.

III. OVERVIEW OF THE PARTIES' POSITIONS

This Section of the Order provides an overview of the parties' positions regarding the rule to be adopted in this proceeding. The positions of the parties that presented rules with their direct testimony are summarized first. Those parties are ComEd, IP, CILCO, Enron, mc^2, C&GP, and Staff. The positions of the other parties that presented testimony and/or filed briefs are summarized second.

A. Parties That Presented Rules with Their Direct Testimony

1. ComEd

ComEd contends that the rules adopted by the Commission should reflect a "light-handed" regulatory approach. ComEd states that such an approach is appropriate, given the Act's five-year phase-in period for customer choice of electric supplier. ComEd indicates that during the phase-in period, the Commission will be able to observe the newly competitive market and will have ample time to address any problems that may arise. ComEd states that if the Commission is persuaded by convincing empirical evidence that utilities are guilty of abuses that retard the development of competition during the phase-in period, it can implement more detailed rules to prevent such abuses in the future. ComEd asserts that this approach is far better than starting with a "heavy-handed" approach and subsequently moving in the other direction. ComEd indicates that the initial adoption of complex rules preventing the incumbent electric utilities from using their existing economies of scale and scope will reduce the efficiency of their operations. ComEd concludes that the effect of this efficiency loss on overall market competition would be less obvious than the lack of competition resulting from an unsuccessful light-handed approach. (Initial brief, pp. 2-3)

ComEd asserts that the Commission should adopt rules preventing cross-subsidization and ensuring non-discrimination that (1) are congruent with the statutory framework and policies established in the Electric Service Customer Choice and Rate Relief Law of 1997 (the "1997 Amendments"); (2) are consistent with the Commission's policies regarding holding companies and the provision of competitive services through affiliates; (3) are grounded in a realistic appraisal of existing and potential competition in the energy

services market; (4) recognize, based on well-established economic and anti-trust principles, that the critical requirement is ensuring nondiscriminatory access to essential transmission and distribution ("T&D") facilities and to information needed to use these facilities on a non-discriminatory basis; and (5) give primacy to consumer welfare and choice by preserving competition, not individual competitors, and by allowing utilities to compete using their economies of scale and scope. (Id., p.2)

ComEd asserts that its proposed rules are the only rules presented in this proceeding that are consistent with these criteria and an initial light-handed approach to regulation. ComEd states that its rules are modeled on the rules adopted by the Federal Energy Commission ("FERC") with respect to similar information sharing, cross-subsidization, and non-discrimination concerns as are present in this proceeding. (Id., pp. 3-4)

With respect to its first criterion, ComEd states that Section 16-121 of the Act must be interpreted in a manner consistent with the purpose of the 1997 Amendments, which is to introduce competition in the provision of retail electric power. ComEd states that since the 1997 Amendments provide a highly detailed structure establishing the State's policy for such competition, the General Assembly could not have intended for the Commission to adopt rules that set broad policies for other competitive services. ComEd concludes that Section 16-121's focus is primarily to ensure that an electric utility cannot discriminate against unaffiliated alternative retail electric suppliers ("ARES") in its provision of competitive retail electric power. ComEd states that such discrimination could occur only at the T&D level because the unaffiliated ARES will be using the same delivery services from the electric utility as the utility's affiliated ARES, and both unaffiliated and affiliated ARES will need and benefit from the same electric utility-supplied information about the essential T&D system. (Id., p. 5)

With respect to its second criterion, ComEd states that Section 16-121 was not intended to authorize the Commission to destroy or severely restrict the business dealings of electric utility holding companies in Illinois or to require that the Commission reverse its long-standing policy of encouraging utilities to provide competitive services through unregulated entities. ComEd asserts that the rules proposed by Staff and the non-utility parties ignore the fact that the Act encourages utilities to provide competitive services through affiliates, citing Sections 16-108(c), 16-111(g) and the amendments to Section 7-101. (Id., p. 11)

As to its third criterion, ComEd asserts that energy services competition in Illinois is thriving. ComEd further asserts that Illinois electric utilities do not and will not have monopoly power, which it defines as the ability of a market participant to control price and exclude competitors. ComEd states that high market share in and of itself does not constitute monopoly power or present an insurmountable barrier to entry. ComEd further contends that potential competitors have already begun to enter the Illinois energy market and possess the economies of scope and scale to allow them to compete effectively. (Id., pp. 14-19)

As to its fourth criterion, ComEd states that in interpreting what Section 16-121 requires with regard to non-discriminatory treatment of unaffiliated ARES, it is important to keep in mind that antitrust law and economic theory require nondiscrimination toward competitors only for essential facilities. ComEd indicates that "essential facilities" are facilities one firm controls and that other firms need access to in order to compete but cannot feasibly duplicate. MCI v. AT&T, 708 F.2d at 1132. ComEd states that in the electric industry, access to monopoly T&D facilities is essential for competition to occur in other segments of the industry, such as generation and retail power marketing. ComEd further states that in order to use the T&D facilities, the unaffiliated ARES may need access, for example, to data on past usage characteristics or other historical account information.

ComEd concludes that Sections 16-108 and 16-122 of the Act, as well as its proposed rules, provide for access to such essential facilities and information. (Id., p. 19)

As to its fifth criterion, ComEd emphasizes that consumers will be able to receive all of the benefits of competition only if all firms are able to use their economies of scope and scale. (Id., p. 19)

With regard to cross-subsidization and cost allocation, which are referenced in Section 16-121, ComEd asserts that these issues are covered by its Affiliated Interest Agreement ("AIA"), which was approved in the Commission's March 12, 1997 order in Docket No. 95-0615. ComEd notes that the order found that the AIA "safeguards the public interest by preventing cross-subsidization to the maximum extent practicable under Illinois law". ComEd states that the AIA establishes comprehensive policies and procedures for allocating costs related to transactions between ComEd and its Unicom affiliates, thereby assuring that costs are properly tracked. (Id., pp. 24-27) ComEd indicates that to the extent deemed necessary, the Commission could adjust the AIA's provisions to reflect differences among Illinois utilities. ComEd further indicates that the Commission could also broaden the scope of its AIA to include not only Unicom subsidiaries, but also any ComEd subsidiary that engaged in the provision of retail electric power. (Id., p. 4)

In summary, ComEd contends that its proposed rules (ComEd Ex. 11.1), in accordance with Section 16-121, ensure nondiscrimination by the utility in the provision of services to ARES. ComEd states that its rules prohibit discrimination in the application of tariffs (4XX.50), in the brokering, transfer or release of electric transmission system capacity (4XX.50) and in the provision to affiliated and unaffiliated ARES of information related to operational information about the utility's T&D system (4XX.50). ComEd notes that Section 4XX.90 requires that the T&D system and a utility's affiliated ARES be operated independently from one another, and that Section 4XX.100 provides that employees may not be shared between the delivery service function and an affiliated ARES. ComEd states that these two Sections reduce dramatically the likelihood of any unintended information exchanges. (Id., pp. 22-23)

ComEd contends that its rules protect and promote consumer interests in several ways. First, Section 4XX.60 of the rules recognizes the requirements of Section 16-122 of the Act and grants consumers the right to control access to their customer-specific data. Second, Section 4XX.70 places customers first by allowing the utility to take whatever steps are necessary to ensure system reliability or customer safety. Third, Section 4XX.110 protects customers from receiving inaccurate information by prohibiting the utility delivery services personnel from unfairly representing to a customer that its services are of superior quality when power is purchased from its ARES affiliate. ComEd also emphasizes that its rules contain nothing that would (1) preclude a utility from using the benefits of its economies of scale and scope and thus participating as a vigorous competitor in the new market, (2) unduly raise costs for utility competitors merely as a protectionist measure for potential entrants, or (3) undermine existing Commission positions encouraging the use of utility affiliates for competitive services. ComEd concludes that by allowing utilities to run their businesses in the most efficient manner, its rules ensure that all possible downward price pressure and upward pressure on quality will be exerted in the new market to the ultimate benefit of customers. (Id., pp. 23-24)

2. IP

IP contends that consumer welfare will be advanced by rules that ensure market competitors bring all of their advantages to bear in offering low prices and high quality services to consumers and that consumers will be harmed by regulations that interfere with

competitors' abilities to satisfy consumer wants at the lowest possible price. IP states that its rules (IP Exhibit 1.2), not the more draconian regulations proposed by others which will operate to consumers' detriment, should be adopted by the Commission. IP asserts that its proposed rules address issues contemplated by Section 16-121 and work together with other provisions of the Act, existing Commission scrutiny of utility/affiliate transactions, and background legal rules to provide a sensible regulatory framework that permits competition in the retail electricity market to flourish to the maximum degree possible. (Initial brief, pp. 1-2)

Like ComEd, IP recommends that the Commission adopt a "light handed" regulatory approach. However, IP claims that even ComEd's proposed regulations are overly broad in that they impose far more costs and restrictions than necessary to achieve the appropriate goals of this proceeding. (Id., p. 11) IP indicates that the Act requires the Commission to evaluate the competitiveness of the retail electricity business on a regular basis and to propose legislation to address any impediments to the establishment of a fully competitive energy market in Illinois. IP further states that the Commission should allow free markets the opportunity to work before resorting to prophylactic regulations that effectively destroy consumer welfare enhancing efficiencies. Such draconian regulations should be considered if, and only if, the more light handed approach proposed by IP proves unworkable. (Id., pp. 4-5)

IP argues that because Section 16-121 is but one part of the much larger statute, the contemplated affiliate rules should not be viewed in isolation. In discussing non-discrimination and information sharing, IP cites Section 16-122(a) and (b), Section 16-108(a), Section 16-105 and Section 16-109. IP asserts that these provisions, not this Section 16-121 rulemaking, provide the proper fora for identifying the particular services and related information that should be provided on a non-discriminatory basis. (Id., pp. 13-14) In fact, IP asserts that the record of this proceeding lacks any evidence on which to make such a determination. IP states that in this proceeding the Commission should only ensure non-discriminatory access to all of the facilities and information that are subsequently determined to be essential. (Id., p. 3)

IP indicates that the Commission should adopt rules that (1) ensure non-discrimination in access to essential facilities, including related essential information; and (2) continue to prevent cross-subsidization of free market businesses by regulated operations. (Id., p. 7) IP states that its rules directly address the question of discrimination by requiring that any and all services and information that are essential to participating in the retail electricity business be provided to all market participants – utility affiliates and unaffiliated ARES alike – on a non-discriminatory basis. IP indicates that its rules provide for equal access to whatever is subsequently deemed essential. (Id., pp. 20-21)

IP states that the problem of cross-subsidization arose as soon as the Commission permitted utilities and their affiliated to engage in unregulated activities. As a result, IP claims the Commission has authorized affiliate operating agreements to guard against cross-subsidization. (Id., p. 17) Citing Section 16-111(g), IP also asserts that the Act specifically contemplates the use of affiliate operating agreements as a mechanism to govern utility/affiliate transactions. (Id., pp. 12-14) IP states that its rules directly confront the cross-subsidization issue by requiring that transactions between utilities and their affiliates be in compliance with Commission-approved affiliate operating agreements. IP indicates that the kind of affiliate operating agreements that its rules require were promulgated precisely to address cross-subsidization and that they have been proven effective in doing so. (Id., p. 21)

IP asserts its proposed rules address information sharing in three ways: (i) whatever information is adjudged essential in the delivery services and/or other proceedings must be

provided on a non-discriminatory basis; (ii) customer-related information must be provided pursuant to Section 16-122 of the Act and 815 ILCS 505/2HH and; (iii) the utility shall not use employee transfers to circumvent these rules. (Id., pp. 21-22)

IP states that the problem of anti-competitive behavior is not a new one. It also states that a substantial body of antitrust law has been developed over the past century with one goal in mind: to foster competition in order to increase consumer welfare. IP further states that the case-by-case approach of antitrust law is particularly well-suited to addressing claims of alleged discrimination and other anti-competitive behavior in the new electricity business. IP indicates that the Act amends the Illinois Antitrust Act to sharply limit the exemption from state antitrust law historically enjoyed by electric utilities. (Id., pp. 16-17)

3. CILCO

CILCO recommends that the Commission adopt the rules it proposed in this proceeding, which were attached to its initial brief. CILCO states that the Commission must be guided by the primary purpose of the 1997 revisions to the Act, which is to provide a competitive market for electricity in Illinois in order to benefit Illinois consumers. (Initial Brief, p. 1) CILCO asserts there are two overriding considerations that are largely dispositive of the issues raised in this proceeding. The first consideration is the statutory authorization for each Illinois electric utility to compete directly with non-affiliated ARES, both inside and outside the utility's own service area. The second consideration is the distinction between retail electric service by a utility affiliate within the utility's own service area, and retail electric service by the affiliate outside the affiliated utility's service area. (Id., p. 3)

Regarding the first consideration, CILCO states that Sections 16-102 and 16-116(b) of the Act specifically authorize Illinois electric utilities to enter into special electric service contracts with any customer within its own service area. It is CILCO's position that the legislature clearly specified that each utility must be permitted to compete with ARES to retain the utility's customers, and that competition may be direct or through an affiliate. CILCO indicates the only limitation on this ability, which is specified in Section 16-121, is that the utility not discriminate in favor of its affiliate, whether by subsidizing the affiliate with ratepayer funds, or by sharing information. CILCO asserts that it is not only illogical but also contrary to clear legislative intent to place greater restrictions on an affiliate than on the utility. (Id., pp. 4-5)

Regarding the second consideration, CILCO states that there is no reason why any rule adopted under Section 16-121 should be applicable to affiliates operating exclusively outside the affiliated utility's service area. CILCO asserts that the reasons for imposing restrictions, other than those prohibiting cross-subsidization, do not hold to the extent the affiliate engages in business outside the boundaries of the utility's distribution service area. (Id., pp. 10-11)

CILCO states that there are only two imperatives to ensuring a thriving competitive market for retail electric service. The first is access to the distribution system of the local utility, and the second is access to information related to the customer's electric needs. (Id., p. 6) CILCO states that access to the distribution system is guaranteed both under Illinois law and under tariffs approved by the FERC. CILCO asserts that customer information is solely within the control of the customer under the revised Act, and will be provided or withheld as the customer directs. (Id., p. 6)

CILCO acknowledges that Section 16-121 directs the Commission to consider cost allocation and cross-subsidization issues. However, CILCO states that those issues exist

even if there is no affiliate marketer. CILCO also states that whatever rules are in place to protect against cross-subsidization of non-utility activities within the utility or cross-subsidization of non-ARES affiliates, are equally adequate to protect against cross-subsidization of affiliates that sell electricity at retail. CILCO, therefore, asserts that no separate rule is required for that purpose. (Id., p. 11)

CILCO indicates that it is aware the Commission is currently investigating rules of conduct and possible separation of functions under Section 16-119A, "to prevent undue discrimination and promote efficient competition." CILCO asserts that if the Commission adopts rules to separate or insulate certain operating personnel from other personnel within a utility, once that separation is made, there is no need for additional rules to prevent contact between the non-operating utility personnel and the marketing affiliates of the utility. (Id., p. 8)

4. Enron

Enron intends to become an ARES once the Commission adopts procedures for the certification of ARES. Enron is an indirect subsidiary of Enron Corp, one of the world's largest publicly-held integrated gas and electric companies, with approximately $23 billion in assets. (Initial brief, pp. 4-5)

Enron contends that the rules should reflect a "Competition-Enabling Approach," which promotes the growth of competition in monopoly markets and protects the incipient competitive process as it emerges in formerly monopolized markets. Enron states that this approach is based on the following premise: if a utility retains significant monopoly power at one vertical stage of production, regulatory rules will ultimately succumb to the ingenuity of the vertically integrated firm to devise mechanisms that enable it to circumvent the rules and thereby exploit its monopoly power. Enron indicates that policies should be implemented to maximize the likelihood that the underlying monopoly power is eliminated. (Id., p. 8)

Enron asserts that the rules must effectively deter anti-competitive monopoly leveraging strategies. Enron witness Mayo testified that the Commission should adopt rules that (1) are designed to unbundle elements of the electricity process that may be efficiently provided by companies other than the incumbent monopoly providers; (2) prevent tying or conditional sales by the incumbent monopoly provider so long as the elements are not supplied in effectively competitive markets; (3) deter incumbent monopoly providers of delivery services from engaging in refusals to deal; (4) prevent both price and non-price discrimination by the incumbent monopoly in its provision of delivery services to unaffiliated ARES; (5) include an imputation standard that deters utilities from engaging in vertical price squeezes against unaffiliated ARES; (6) include a substantive and expeditious complaint process that addresses issues of anti-competitive behavior by the incumbent monopoly providers of electricity, and (7) provide a regulatory "front line" against anti-competitive abuses, but allow for the use of an antitrust enforcement back-up. (EES Ex. 1, p. 21) Enron states that its proposed rules (EES Ex. 2, Schedule 3) accomplish these objectives. (Initial brief, pp. 10-11)

Enron contends that the plain language in Section 16-121 provides the Commission with broad authority to establish rules. Enron notes that this Section provides that the Commission must adopt rules (1) governing the relationship between the utility and its affiliates, and (2) ensuring non-discrimination in the services provided by the utility to its affiliate and any ARES. Since Section 16-121 does not place any limitation on the word "services," Enron asserts that "services" is not limited to "delivery services," as defined elsewhere in the Act. Enron also asserts that the 1997 Amendments clarify that the

Commission must promote competition and prevent anti-competitive practices. As support for this position, Enron notes that Section 16-101A(b) provides that " [l]ong -standing regulatory relationships need to be altered to accommodate the competition that could fundamentally alter the structure of the electric services market," and Section 16-101A(d) finds that "the Commission should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." (Initial brief, pp. 12-16)

Enron emphasizes that the Act provides incumbent utilities with numerous advantages that are not available to ARES. Enron indicates that electric utilities are allowed to collect a transition charge from customers who choose to take service from an ARES, have access to billions of dollars of low-cost capital under the Electric Utility Transition Funding Law of 1997 (220 ILCS 5/18-101, et seq.), can apply for a rate increase if they become financially distressed, and are allowed to continue to provide service to most customers under their historic high rates. Enron concludes that the rules should reflect the fact that the "playing field" is not "level." (Id., pp. 16-18)

To ensure that all competitors are treated equally, Enron states that separation of the affiliate from the utility should be required, enforceable standards of conduct governing the utility's relationship with its marketing affiliate should be established, and a service environment in which marketing affiliates do not receive any undue preference should be created. Enron contends that the rules should address four general areas: (1) separation standards, (2) information and disclosure standards, (3) non-discrimination standards and (4) complaint procedures and enforcement provisions. (Id., p. 21)

Enron contends that the only way to ensure that there is no subsidization of a marketing affiliate by a utility is by requiring their complete separation. Enron indicates that its proposed rules require that a utility's operating employees and the employees of its affiliated ARES function independently of each other, be employed by separate corporate entities and reside in separate offices. Enron's rules also require separate books of accounts and records for the utilities and their affiliates. Enron's rules also require that utilities and their affiliates hold themselves out as separate entities. For example, Enron indicates that utilities and their affiliates should not be allowed to confuse consumers by sharing a common name or logo. (Id., pp. 24-26)

Enron contends that the Commission must adopt strict rules on information sharing to ensure that all competitors are treated equally by utility personnel. Enron states that its rules are designed to prevent the disclosure of competitively sensitive information by a utility to its marketing affiliates. Enron further indicates that two ways to restrict information sharing are by prohibiting the ability of employees to transfer back and forth between the utility and its competitive affiliate and by restricting joint marketing activities by the utility and its competitive affiliate. Enron also indicates that the rules should require that utilities contemporaneously provide to all ARES the same information that is given to its affiliates. (Id., pp. 27-34)

With regard to non-discrimination standards, Enron highlights five requirements which it believes are necessary to prevent affiliate preference and monopoly abuse. First, utilities must be required to apply all tariff provisions in the same manner to the same or similarly situated persons, where there is discretion in the application of such provisions. Second, utilities must strictly enforce tariff provisions for which there is no discretion in their application. Third, utilities must not, through a tariff provision or otherwise, give their affiliate or customers of affiliates preference over unaffiliated ARES or their customers. Fourth, if a utility offers its affiliate, or a customer of its affiliate, a discount, rebate or fee waiver for any service offered to marketers, it must contemporaneously make the same offer to all similarly situated non-affiliated suppliers or customers. Fifth, utilities must process all

similar requests for service in the same manner and within the same period of time. (Id., pp. 35-37)

With regard to complaint procedures and enforcement provisions, Enron emphasizes expedited treatment of complaints and strong penalties for violations of the rules. (Id, pp. 38-40) For example, Section 4XX.80 of Enron's proposed rule requires that complaints alleging irreparable harm to the competitive market must be handled within 30 days, and Section 4XX.90(b) requires that all affiliates of a utility be barred from selling any electric service in the utility's service territory if the utility and/or its affiliate have been found to have violated the rule's provisions twice within a ten year period.

5. mc^2

mc^2 is the retail energy marketing subsidiary of MidCon Corp., which is a subsidiary of KN Energy, Inc. KN companies sell or transport approximately 17% of the natural gas in the United States. (Initial brief, p. 2)

mc^2 contends that the plain language of Section 16-121 requires the adoption of comprehensive standards that assure non-discrimination in the provision of all services by an electric utility to its affiliates. (Id., pp. 7, 9-11) mc^2 witness Friedman testified that utilities are in a position to exercise market power because of their decades of monopoly operation. He indicated that there is an immediate need to preclude utilities from providing competitive advantages to their affiliates at the expense of competition. He emphasized that cost advantages of a utility's competitive affiliate that are derived from its association with the utility rather than from the affiliate's internal efficiencies raise market power and entry barrier concerns. (mc^2 Ex. 1, p. 5)

mc^2 states that the rules should apply to any utility affiliate that relies on distribution company-obtained assets, resources, services or customer information. mc^2 contends that such assets were obtained as a result of the utility's monopoly operations and were subsidized by the utility's ratepayers. (Initial brief, p. 4)

mc^2 contends that costs should be allocated between the utility and its affiliates on a forward-looking basis that utilizes current market value. mc^2 asserts that alternative cost allocation bases, such as embedded costs, result in competitive advantages to the affiliate. (Id., p. 4)

Mr. Friedman testified that utility's affiliates should not be allowed to benefit from the utility's economies of scale. He emphasized that ratepayers paid for such economies during a period of monopoly operations. (mc^2 Ex. 1, p. 9)

mc^2 contends that there is no justification under the Act for an electric utility to provide any preference or advantage to any of its affiliates. The proposed rule of mc^2, which is attached to mc^2 Ex. 1, is similar in many respects to Enron's proposed rule. mc^2 proposed 20 standards in its rule. The standards provide, among other matters, that (1) a utility shall offer and supply all terms, conditions and services in a uniform and non-discriminatory manner and shall not grant any affiliate or non-affiliate any preference or advantage; (2) a utility shall make available customer information (e.g. energy usage data, incoming sales leads, market information resulting from distribution service) upon request of a supplier and shall make such information available to non-affiliates upon the same terms and at the same time as made availabe to any affiliate; (3) neither a utility nor its affiliate shall represent that any preference or advantage accrues to an affiliate or its customers in the use of the affiliate's products or services as a result of the utility's relationship with the affiliate, nor give the appearance of doing so; (4) a utility shall not

provide any opinion regarding the reliability, experience, qualifications, financial capability, managerial capability, operational capability, customer service record, consumer practices or market share of any supplier; (5) a utility shall not sell, release, or otherwise transfer utility assets, services or commodities to its affiliates without making a non-discriminatory and comparable offering to the market; and any such sale, release or transfer shall reflect the fair market value of the asset, service or commodity; (6) a utility shall not engage in joint advertising, promotional sales or marketing activities with any affiliate, communicate with customers or prospective customers on behalf of its affiliate, nor give the appearance of doing so; (7) a utility shall maintain physical separation of its operating employees from those of its affiliates and shall not share such employees; and (8) a utility shall make its customer bills available for advertising and promotional materials on a comparable and non-discriminatory basis. mc^2 defines affiliate in its rules as "any entity, its affiliates, subsidiaries, lessees, trustees, receivers, officers, directors, employees, contractors, consultants, agents and facilities, that controls, is controlled by, or is under common control with a utility and is engaged in the production, sale and-or delivery of competitive products and services."

6. C&GP

C&GP contends that Section 16-121 requires that the Commission adopt broad rules regulating all aspects of the utility-affiliate relationship. C&GP emphasizes the words "governing the relationship between the utility and its affiliate" that appear in Section 16-121. (Initial brief, p. 4)

C&GP states that electric competition does not currently exist in Illinois, and that the Commission must ensure that the rules comprehensively foster the development of competition. To that end, C&GP emphasizes that the rules should encourage competitive activity, discourage anti-competitive activity, and create proper remedies to punish violators. (Id., p. 1)

CG&P characterizes as wishful thinking the arguments of utilities in this proceeding that antitrust laws, FERC rules and the affiliated interest agreements ("AIA") in place today will foster competition. C&GP indicates that antitrust laws are designed to work in markets where competition is already in place, violations of the law would be relatively rare, entry barriers are low, and incentives for abuses are limited. CG&P indicates that the retail electric market in Illinois is not such a market. C&GP states that the FERC Code of Conduct pertains to wholesale buyers of electricity who are generally sophisticated. In contrast, C&GP indicates that most residential customers are unsophisticated. C&GP states that the AIAs were approved without consideration of their role in a competitive environment. They also indicate that the AIAs of the Illinois electric utilities are inconsistent and have no enforcement procedures. (Id, p. 2, 5-11)

CG&P emphasizes that the rules should recognize that utilities start out with nearly 100% market share in their service territories and that their monopoly status gives their affiliates advantages unavailable to other competitors. (Id., p. 2)

C&GP asserts that their proposed rules (C&GP Ex. 1.2) are consistent with the intent of the Act and provide a proper framework for the development of a competitive market in Illinois. C&GP's proposed rules are similar in many respects to the rules proposed by Enron and mc^2.

C&GP indicates that the broad purpose of Section 4XX. 30 (Nondiscrimination) of their proposed rules is to ensure that the utility's affiliate has no advantage attributable to the utility's history of government protection from competition. C&GP emphasizes that

nondiscrimination should be applicable to matters besides access to the T&D system. The rules in Section 4XX.30, among other matters, (1) prohibit a utility from representing that a customer will receive different treatment from the utility if the customer chooses the utility's affiliate to provide energy, (2) require a utility to provide access to utility information, services, capacity or supply on the same terms to all similarly situated market participants; (3) require a utility to process requests for similar services by its affiliates and all other market participants and their respective customers in the same manner and within the same time period; and (4) prohibit a utility from providing leads to its affiliates and from soliciting business or acquiring information on behalf of its affiliates.

Section 4XX.40 (Disclosure and Information) of C&GP's proposed rules is intended to prevent discrimination in information sharing. CG&P contends that if a utility's affiliates have access to customer information that is not available to non-affiliates, the affiliates will have an unearned competitive advantage. Section 4XX.40, among other matters, (1) requires that when a utility provides non-customer specific information to an affiliate or uses such information in providing competitive services, it must contemporaneously provide such information to non-affiliated entities; and (2) requires utilities to maintain certain basic information about affiliated and non-affiliated electric service providers, use their bills to periodically notify its customers of the availability of such information, and provide this information to customers upon request. (Initial brief, pp. 19-24)

Section 4XX.50 (Maintenance of Books and Records and Access by Commission and Public) of C&GP's rules has three purposes. C&GP indicates that it (1) ensures uniformity in record-keeping regarding utility-affiliate relationships and transactions, (2) ensures that the information related to such relationships and transactions is maintained transparently, and (3) enables the Commission and the public to evaluate how those relationships evolve as the competitive retail electricity market develops. (Id., p. 26)

Section 4XX.60 (Separation) reflects the position of CG&P that there is a greater likelihood that information will be shared if people work within the same building for the same parent corporation. This Section, among other matters, (1) prohibits the sharing by a utility and its affiliates of office space, office equipment, services and systems that are not available on the same terms and conditions to non-affiliates, except with regard to corporate support functions; (2) prohibits the affiliate from using the utility name or logo within Illinois; (3) prohibits a utility and its affiliates from participating in joint advertising or joint marketing; (4) allows the utility's affiliates to advertise in the utility's bills only if competitors are offered the same access on the same terms and conditions; (5) except in relation to corporate support, prohibits the utility and its affiliates from employing the same person; and (6) places restrictions on employee movement between the utility and its affiliates. This Section also contains provisions that reflect CG&P's position that transfers of goods and services between the utility and its affiliate should be at market prices.

CG&P indicates that Section 4XX.70 (Regulatory Oversight) has four components. It requires that utilities file compliance plans not later than October 1, 1998, give notice of the creation of new affiliates, conduct annual independent compliance audits, and make available utility and affiliate witnesses who can testify about issues that arise under the rules. (Initial brief, p. 45) Sections 4XX.80 and 4xx.90 contain provisions relating to complaints and penalties that are similar to those proposed by Enron.

7. Commission Staff

Staff recommends that the Commission adopt the Second Revised Staff Rule attached to its initial brief with the modification to Section 450.20(c) and 450.150(c) identified on page 7 of its reply brief. Staff indicates that the primary focus of this

rulemaking should be to formulate regulatory controls that will assist in the development of a truly competitive marketplace for electric energy, by adequately protecting against anti-competitive practices on the part of utilities. Staff indicates it has fashioned a rule that advances the principle of non-discrimination in the areas of the provision of tariffed services, information sharing, independent functioning, tying arrangements, release of capacity, advertising, and the maintenance of books and records. Staff asserts that its rule strikes a reasonable balance between the interests of intervening utilities and marketers. (Initial Brief, p. 3)

Staff claims that the 1997 Amendments to the Act significantly altered the structure of the electric utility industry in Illinois, as well as the Commission's role as the regulator of that industry. Staff asserts the Commission's role has changed from regulating a monopoly market to the development of a competitive market. Staff claims its rule is designed to help nurture the development of a competitive market for electricity supply by preventing utilities from using anti-competitive practices to artificially support their own affiliates. (Id., p. 4)

Staff indicates there are conflicting views among the parties concerning whether to limit the rule to preventing non-discrimination in electric utilities' provision of essential services or, as Staff argues, to place additional restrictions on electric utilities that are not directly related to the provision of essential services. Staff asserts that the plain language of Section 16-121 indicates that it is not limited in application to "essential services." Staff claims that had the legislature wished to limit the scope of this Section to "essential services" only, it could have easily done so. Staff further asserts that the legislature left it up to the discretion of the Commission to determine what measures will best ensure non-discrimination. Staff states that it is established that the absence of a statutory definition – such as for the term non-discrimination – strongly indicates a legislative desire for a flexible approach that can be provided by an administrative agency such as the Commission. (Id., p. 6)

Staff indicates that in this rulemaking, it has not attempted to determine what specific customer billing and usage data utilities should make available to ARES. Rather, it has simply proposed that whatever information the utility provides, it must do so without preference to its affiliated interests. Staff further indicates that, under its proposed rules, previously approved service agreements would continue to apply, except to the extent that they conflict with the Staff rule. In such event, the Staff rule would supersede any prior rules, guidelines or contracts. (Id., pp. 7-9)

Staff asserts that many services and facilities are not clearly essential or clearly non-essential. Further, Staff states that there is strong justification for rules that directly prohibit discrimination in the provision of obviously essential services, while the justification becomes less pronounced as it becomes less clear that the service or facility is in fact "essential." Staff asserts its rule allows for a rather broad interpretation of essential services. (Id., p. 11)

As an alternative to relying solely on service agreements to prevent cross subsidization, Staff recommends that the Commission require a greater degree of separation between the utility and its affiliates in competition with ARES. Staff states that even if the approved allocation methods were perfect, the Commission has no way of knowing that utilities will record transactions accurately. Staff also indicates that the utilities advocated a variety of cost allocation methods and questions how several different allocation methods could all be correct. Staff asserts that all cost allocations methods can fail to detect what most reasonable observers would consider cross subsidization. Staff also asserts that deficiencies in cost allocation methods become a more acute problem as their application moves from a purely monopoly setting to an unbundled service setting. Staff asserts that in the unbundled service setting, cross subsidization enables the

utility/affiliate pair to leverage the utility's remaining market power into the potentially competitive market for unbundled power. (Id., pp. 12-14)

Staff states that if there is information that only the utility can acquire or that the utility has a very significant cost advantage in acquiring, because of its role as monopoly distributor, and if this information is of considerable value to an ARES, then the utility/affiliate pair can utilize its monopoly control over information to defeat competitors without actually being required to compete. Staff states that ideally, the Commission should be able to specifically define the type of information that is essential and this specific information would be part of the utility's electric delivery service tariff. Staff asserts this would be consistent with its proposal in this proceeding. Staff indicates that information that is clearly essential will be identified early, should be explicitly referenced in delivery service tariffs and, must be provided to non-affiliated ARES under its proposed rules. Other information not specifically identified in delivery service tariffs need not be provided to non-affiliated ARES under the Staff rule, unless it is provided to a utility affiliate. Staff states that information that is clearly not essential is classified as "corporate support" in its rule and need not be provided to non-affiliated firms. Finally, Staff indicates that the primary reason its rule contains provisions concerning separate functioning of electric utilities and their affiliates is to prevent the utility from providing the affiliate with information that provides a significant competitive advantage to the affiliate over non-affiliated ARES. (Id., pp. 14-16)

B. Other Parties

1. Alliant Utilities

Alliant Utilities contend that the context and language of Section 16-121 indicate that the rules should apply only to the utility and its affiliated ARES. They state that the short 180 day time frame for adoption of the rules suggests that the legislature did not intend for the Commission to revisit its entire body of orders pertaining to affiliates. (Initial brief, p. 2)

Alliant Utilities contend that the rules should reflect a light-handed regulatory approach. They state that little, if any, evidence was presented in support of various parties' claims that the incumbent utilities have market power or a proclivity for anti-competitive behavior. They indicate that onerous regulations will handicap all utilities, including utilities like them that have small Illinois customer bases. They assert that in light of the existing economic incentives for the development of a competitive market, there is no need to handicap utilities, by eliminating their economies of scale and scope. They indicate that the utilities' AIAs adequately address the issues of cost allocation and cross-subsidization. They conclude that rules that will sufficiently provide competitors and affiliated ARES with non-discriminatory access to the essential facilities and adequately address information sharing can be adopted without the onerous restrictions advanced by intervenors such as Enron and C&GP. (Id., pp. 5, 12-13)

2. Ameren

Ameren concludes that the Commission should adopt rules consistent with those proposed by IP or ComEd. Ameren indicates that the rules proposed by IP and ComEd reflect the appropriate balance between economic efficiency and consumer protection. (Initial brief, pp. 2 and 22)

Ameren states that the advocates of heavy-handed regulation of utilities and their affiliates rely on arguments that contradict established economic principles. Ameren

indicates that the utilities' economies of scope and scale should be available to their affiliates in the competitive market. Ameren notes that Dr. Kahn testified that competitive advantages arising out of economies of scale are the kinds of advantages that should be encouraged under competition since they lead to lower prices to consumers. (Id., pp.2 and 5)

Ameren concludes that the Commission should resist the call to return to heavy-handed regulation, particularly in advance of any experience indicating that relatively "light-handed" approaches cannot be effective. Ameren asserts that if the rules reflect a heavy-handed approach, the danger is great that the market will be distorted and will tend toward cartelization and away from consumer benefits. Ameren states, on the other hand, that if the rules reflect light-handed regulation, the Commission can study progress in the market and fine tune the rules if empirical evidence indicates that problems exist. (Id., p. 26)

3. MidAmerican

MidAmerican witness Howard testified that the rules should reflect the following five standards: (1) there should be non-discriminatory application and enforcement by electric utilities of tariff provisions relating to the delivery of electric energy in Illinois; (2) the electric utility's employees who are engaged in receiving requests for the reservation and/or scheduling of energy over the distribution system shall not be shared with an affiliated interest which is engaged in the retail marketing of electric energy in Illinois; (3) the electric utility shall maintain separate books of account and financial records from any affiliated interest engaged in the retail marketing of electric energy in Illinois; (4) the electric utility shall not disclose information regarding a specific customer (except to the customer or its designee) or relating to the distribution of electricity which is not otherwise available; and (5) the rules must apply in a manner which does not prohibit the electric utility and its affiliates from competing in the retail energy supply markets on the same basis as other retail energy suppliers. (MidAmerican Ex.1.0, pp. 4-5)

MidAmerican states that with a few exceptions, the rules proposed by ComEd are generally consistent with those five standards. Mr. Howard testified that ComEd's proposed rule should be adopted with five modifications for clarification purposes. (Id., pp. 9-10) MidAmerican's proposed rules are attached to its initial brief as Attachment A.

MidAmerican states that the legislative intent of Section 16-121 is to adopt rules applicable to an electric utility's relationship with its affiliated ARES so that non-discriminatory treatment of unafffiliated ARES is assured. MidAmerican emphasizes that Section 16-121 requires rules governing the relationship between the electric utility and its affiliates. MidAmerican states that the term "affiliate" appears several times in Article XVI of the Act, but is not defined therein. MidAmerican indicates that if the General Assembly intended for "affiliates" to mean the same as "affiliated interests" as defined in Section 7-101(2) of the Act, it would have said so. MidAmerican concludes that because of the existence of Section 7-101 of the Act, which governs a utility's contracts and arrangements with its affiliated interests, the legislature did not intend for Section 16-121 to establish a new regime for the regulation of transactions with all affiliated interests. (Initial brief, pp. 3-9)

4. EEI

EEI contends that the Commission should reject the rules proposed by Enron, mc^2 and CG&P as unduly restrictive. EEI concludes that consumers are harmed by excessive restrictions on utility-affiliate relations that deprive the electric utilities of the opportunity to

exploit their economies of scale and scope. EEI emphasizes the following points: (1) Illinois customers will make retail electric supplier choices based on price and service quality and oppose undue restrictions on utilities or affiliates that raise their costs or limit their choices of or access to information about competitors; (2) the advantages of incumbent electric utilities do not constitute market power and do not warrant regulatory oversight; (3) consumer savings must exceed the transaction costs of switching suppliers in order for consumers to switch electric suppliers; (4) consumer inertia or consumer continuity goes far to explain incumbent market shares in the pilot programs; and (5) non-structural safeguards are ultimately in consumers' best interests as demonstrated by the lessons learned from telecommunications industry restructuring. (Initial brief, pp. 1-2, 27)

EEI asserts that its survey of 600 Illinois residential consumers, conducted on March 2, 1998 (EEI Ex. 3.2), indicates that Illinois consumers support utility participation in competitive electric markets and minimal restrictions on utility affiliates. (Initial brief, pp. 3-11)

5. Nicor Gas

Nicor Gas recommends that the Commission adopt the rules proposed by IP. It states that IP's rules create the least conflict with the overall provisions and time line established for implementing competitive electric services under the 1997 Amendments, ensure non-discrimination in access to essential facilities by all market participants, and ensure that the utilities' marketing affiliates will not be selectively and unreasonably discriminated against because of the utilities' position in the marketplace. Nicor concludes that the Commission should continue to address cross-subsidization on a utility-specific basis through AIAs. (Initial brief, pp. 2 and 16)

6. IIEC

IIEC indicates that the Commission is charged with promoting the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers. IIEC asserts that the 1997 Amendments to the Act provide utilities with innumerable benefits and opportunities to compete in the electric services market, opportunities that are not otherwise available to their competitors. IIEC states that from a business and economic perspective, the utility will be inclined to leverage its ownership of the T&D system in ways that benefit the generation side of its business. IIEC also states the utility has acquired resources due to its monopoly function, which provides it advantages over new entrants into the electricity services market and, which cannot be readily duplicated within a reasonable period of time. (Initial Brief, pp. 2-3)

In interpreting Section 16-121, IIEC gives primary weight to the plain and ordinary reading of the statute. IIEC states that there is no expressed restriction on the breadth or scope of the rule as it relates to governing the relationship between the utility and its affiliates. IIEC asserts it is noteworthy that the statute places no limitation or restriction on the term "services." IIEC also states that the General Assembly's use of the phrase "without limitation" in Section 16-121 means the Commission may consider factors besides cost allocation, cross-subsidization and information sharing, that may bear on the requirement that there be non-discrimination in services provided to the utility's affiliates and ARES. (Id., pp. 3-5)

IIEC asserts its understanding of Section 16-121 is consistent with the objectives of the Act, noting the primary rule of statutory construction is to give effect to the true intent of the General Assembly. IIEC states that the General Assembly constructed a structure

and framework that entitles utilities to be full fledged competitors in the electric services market. IIEC asserts that because the utility will be a viable competitor that controls a major component of the energy services industry (T&D systems), the interaction of the electric utility with its affiliates demands scrutiny. (Id., pp. 5-10)

IIEC states that a number of utility witnesses argue the Commission should promulgate a more narrow and limited rule than what might otherwise be considered, in light of the rulemaking proceeding to establish standards of conduct for electric utilities pursuant to Section 16-119A. IIEC asserts that these witnesses fail to comprehend that the customer's access to the distribution system is not inherently controlled by the relationship of the utility with its affiliate, or even with its affiliated ARES. IIEC also asserts that it would be premature to assume what actions or decisions the Commission will take in the Section 16-119A rulemaking, in determining the scope and application of the rule being considered under Section 16-121. (Id., pp. 10-12)

IIEC states that had the General Assembly intended to limit or narrow the categories of information that must be shared between the utility and the ARES, it would have indicated same in Section 16-121, or would have made reference to Section 16-122 in Section 16-121. IIEC concludes that any reasonable analysis must reject the conclusion that only the identified customer information in Section 16-122 should be the subject of this rulemaking. (Id., pp. 13-14)

IIEC recommends that Commission adopt a rule consistent with that proposed by the Staff with specific modifications that are identified in IIEC Ex. 2.0. (Id., pp. 32-37) Unlike the electric utilities that tend to support a "light handed" regulatory approach, IIEC advocates a "competition-enabling" regulatory approach. IIEC states that because the utilities will continue to operate and control the T&D functions, there is an instinctive business mentality to slant access to those systems in favor of its own generation. IIEC asserts that even though the generation side of the utility business is to be competitive, there remains every rational business reason for utilities to insist on lax rules that do not prevent discrimination. (Id., pp. 15-16)

IIEC argues that electric utilities will have a competitive advantage because the utility will simply use the T&D system as it has historically done, whereas the ARES will have to abide by open access tariffs in order to access the system. IIEC states that in the future, rules and regulations could be adopted such that the bundled service customer stands no differently than the unbundled service customer, but today that is not the case. IIEC concludes that the resources utilities bring to the competitive market, and how they came to be, cannot be ignored and it is, therefore, reasonable to adopt a prescriptive affiliate rule. (Id., pp. 17-19)

Regarding cross subsidization, IIEC indicates that some provision in the rule is required for those circumstances not otherwise covered by existing service agreements. IIEC states that it is undisputed that ComEd's AIA does not govern transactions between ComEd and its subsidiaries. IIEC further states that the ComEd AIA does not govern all transactions between ComEd and the other Unicom entities identified in the AIA. IIEC also asserts that the service agreement between Ameren Service Company and various "client companies" is a one-way agreement that is not a service agreement whereby Union Electric Company and Central Illinois Public Service Company are required to provide services to Ameren Services Company. (Id., pp. 21-23)

IIEC states that information sharing and the attendant prohibitions on employee transfers are critical to an affiliate rule that is to have any purpose. IIEC indicates that limiting the ability of an employee to transfer from one position to another should be avoided whenever possible. IIEC notes, however, that restrictive covenants in employment are

sometimes required, typically to protect a legitimate business interest of the employer, subject to reasonable territorial and time limitations. IIEC concludes that Staff's rule on employee sharing is reasonably necessary to protect the legitimate interests of ratepayers. (Id., p. 30)

7. Peoples

Peoples contends that Staff's proposed rules are the most balanced rules and meet the requirements of Section 16-121. Peoples indicates that the rules of the utilities, on the one hand, and those of the marketers and C&GP, on the other, are at opposite extremes. Peoples states that the utilities rules allow them substantial discretion in their dealings with their affiliates, while the marketers and C&GP's rules protect new market entrants instead of promoting competition for the benefit of customers. (Initial brief, pp. 2-3)

Peoples recommends that Staff's rule be adopted with one modification. That modification revises the definition of "corporate support" to include ministerial functions related to risk management.

8. IMSCA

IMSCA favors a level playing field in a competitive electric market. IMSCA supports the rules proposed by C&GP and Enron. IMSCA concludes that these rules promote competition without giving an undue advantage to the utility or its affiliate. (Initial brief, p. 2 and 8)

9. Blackhawk

Blackhawk witness Locke testified that in order to fairly and efficiently introduce competitive forces to the electric market, the rules must prevent the electric utilities' marketing affiliates from receiving an unfair advantage because of their affiliation with the utilities. He stated that the rules must (1) eliminate, to the extent practical, cross-subsidization; (2) provide a means to prevent, to the extent practicable, cost shifting to the utility by its affiliate and allow for monitoring and detection of such cost shifting; (3) prevent discriminatory activities; (4) prevent sharing of competitive market information by an electric utility with its affiliates; and (5) establish an equitable and timely complaint resolution process. He also indicated that the employees of the electric utilities and their affiliates should receive training regarding appropriate conduct and transactions in the competitive market. (Blackhawk Ex. 1, pp. 3-7)

10. IBEW

IBEW expressed its concern that Section 450.120 of Staff's initial proposed rule, which addressed employees of electric utilities and their affiliated interests in competition with ARES would conflict with work force mobility under the collective bargaining agreements between IBEW and Illinois electric utilities. IBEW indicated that its concerns were satisfied when Staff added Section 450.120(d), which provides "[t]his Section shall not apply to any employee covered by a collective bargaining agreement subject to federal labor law, including the Labor Management Relations Act and the National Labor Relations Act." (Initial brief, pp.2-3)

IV. Commission's Analysis and Conclusion

In arriving at the rules that are appended to this Order, the Commission is faced with two threshold issues: first, the extent to which the legislature intended that these rules apply to the various affiliated interests of utilities, as that term is defined in Section 7-101 of the Act (220 ILCS 5/7-101(2)(a)-(h)); and second, the extent to which transactions between utilities and affiliated interests should be subject to regulation in a recently deregulated environment. Once those matters are determined, the Commission must promulgate rules that accord with those decisions. The remainder of this order resolves those issues, seriatim. The portions of the order discussing the actual rules are organized by first setting forth the rule that is promulgated, followed by our reasoning for adopting it.

A. Meaning of "affiliate"

Newly enacted Section 16-121 (220 ILCS 5/16-121) requires the Commission to adopt rules "governing the relationship between [an] . . . electric utility and its affiliates, and ensuring non-discrimination in services provided to the utilities affiliate and any alternative retail electric supplier . . . . " The parties to this proceeding have argued variously, that this must be read as: limiting the rules applicability to only affiliated ARES or; requiring the Commission to enact rules binding all of an electric utility's affiliated interests, without limitation or; some middle ground, which would allow, but not require the Commission to enact rules that may apply to affiliated interests, but must apply to affiliated ARES.

Based upon its review of the statute, the Commission concludes that the middle ground approach is warranted. The Commission notes that the statute speaks to rules governing the relationship between and electric utility and "its affiliates," but mandates non-discrimination in the dealings between services provided to its affiliate and non-affiliated ARES. The Commission notes that, while the legislature has defined "affiliated interests" and "ARES," the term "affiliates" is undefined. The Commission agrees with the position taken by MidAmerican in its briefs, that Section 16-121 must be construed in light of the Commission's previous authority under Section 7-101 of the Act. The Commission's authority over affiliated interests under section 7-101 is comprehensive. MidAmerican posits that, if the legislature had intended that the Commission were to exercise the same type of comprehensive authority over all of a utilities affiliated interests under the Electric Service Customer Choice and Rate Relief Law of 1997, it would surely have used that term. It did not, using instead the undefined term "affiliates." MidAmerican argues, and the Commission agrees, that by using the undefined term, the legislature must have meant something other than "affiliated interest."

MidAmerican then argues that the legislature must have meant "affiliated ARES" when it used the term "affiliates," based primarily upon the fact that this section of the new legislation deals with the market entry of ARES. The Commission is unconvinced. MidAmerican's conclusion is subject to the same criticism as it leveled against the parties who argue for the conclusion that "affiliates" means "affiliated interests." "Affiliated interests" is a defined term that the legislature would surely have used if it had intended such a conclusion. It did not. Instead, it used the generic term "affiliates," from which the Commission concludes that the legislature intended that the Commission's authority to enact rules extend to both its "affiliated interests" and its affiliated ARES, as the situation warrants. This interpretation coincides with the Commission's reading of the last sentence of Section 16-121, which ensures non-discrimination in services provided to the utility's affiliate (in the singular and which the Commission reads as the utility's affiliated ARES) and any other ARES. Under this view of the Commission's charge, it is empowered to enact rules applicable to either or both of a utility's affiliated interests or its affiliates ARES. This power is necessary to allow the Commission to forfend the use of a utility affiliate as the

means of providing discriminatory treatment to affiliated and non-affiliated ARES. Based upon this determination, the rules that have been promulgated speak only to "affiliated interests" (which would include affiliated ARES) or "affiliated ARES." The term "affiliate(s)" is neither defined nor used.

B. Regulatory Regime

The next threshold issue that must be decided is the extent to which the Commission should regulate the transactions between a utility, its affiliated interests and its affiliated ARES. The proposals of the parties run the gamut of possibilities and are styled variously as "light handed," "draconian," "competition enabling," "playing field leveling," "heavy handed," and others. All differ primarily in the nature of control over transactions that the Commission would exercise and the manner in which the utility and its affiliated ARES would be organized. All are congruent in recognizing that the Commission must take steps to effectively eliminate opportunities for undue discrimination and cross subsidization, the differences being primarily in the nature of any restrictions that are to bear on the utility and its affiliated interests.

The Commission has reviewed the extensive record of evidence and testimony, as well the proposals of the parties and concludes that, at this point in the evolution of competition in the Illinois energy market, an approach which imposes fewer rather than greater controls on the utilities and their affiliated interests is warranted. This view is supported by substantial evidence. The Commission agrees with the assertions of many utility witnesses that enhancing consumer welfare must be the benchmark of any deregulatory scheme and that consumer welfare is enhanced when prices are low and products are varied and plentiful. The Commission agrees further with witnesses Landon and Kahn, that the only real way to test a market is to observe it over a reasonable period of time and to draw conclusions based upon empirical observations. Further, by keeping regulation at a minimum at the outset of competition, the empirical observations are more reliable because market forces have had an opportunity to operate unfettered.

In addition to the fact that the "light handed" approach was supported by substantial evidence, the proposals of parties suggesting tight regulation were subjected to convincing criticism. Rather than judging the market by consumer welfare standards, the parties proposing tight regulation looked to the number of market participants as the most prominent feature of a well functioning market. In accordance with this view, the rules under this proposed regime were uniform in attempting to "level the playing field" to offset the perceived advantages possessed by the various regulated electric utilities. This generally called for the installation of a layer of insulation between the incumbent and its affiliates that resulted in imposing costs on the incumbent that would not be borne by new entrants, despite the fact that the new entrants could include affiliates of companies who were regulated in different jurisdictions. There was no plausible reason given for disparate treatment of similarly situated entities. Further, if the Commission initially adopted a “heavy handed” regulatory regime, it would be unable to evaluate the possibility that a competitive market would have developed under a “light handed” regulatory regime.

Based upon the conclusions above, the Commission rejects the rules promulgated by the various energy marketers and C&GP. In addition, while the Commission has concluded that a "light handed" approach is warranted at this time, the Commission is convinced that some hand must be laid upon the rudder and, accordingly rejects the proposals of the utilities, which do too little to assure the development of a competitive market for electricity in Illinois. Staff's rules, which were recognized by most parties as a middle ground, are adopted as a starting point for the discussion which follows, in which we set forth modified rules and our reasons for adopting them.

C. The Commission's Approved Rule

Each section of the rule adopted by the Commission is listed below, followed by the reasons for its adoption.

1. Section 450.10 Definitions

"Act" means the Public Utilities Act [220 ILCS 5].

"Affiliated interest" has the same meaning as in Section 7-101(2) of the Act.

"Affiliated interests in competition with alternative retail electric suppliers" shall include affiliated alternative retail electric suppliers, as well as affiliated interests that broker, sell, or market electricity, or that provide consulting services directly related to the sale of electricity.

"Alternative retail electric supplier" has the same meaning as in Section 16-102 of the Act.

"Corporate support" means joint corporate oversight, governance, support systems and personnel, involving payroll, shareholder services, financial reporting, employee records, pension management, state and federal regulatory affairs, lobbying, marketing and, research and development activities.

"Electric utility" has the same meaning as in Section 16-102 of the Act.

"Emergency support" means the temporary provision of personnel and other resources to help maintain service during emergencies where interruption of service can only be avoided or reduced through the sharing of employees.

"Unaffiliated entity" means any entity other than either the electric utility or any of the electric utility's affiliated interests.

We have discussed the distinctions between "affiliated interests," "affiliates" and "affiliated ARES" above. The statutory definition of "affiliated interest" and "ARES" are adopted in the rules. We have also included a definition of "affiliated interests in competition with alternative retail electric suppliers" which expands Staff's proposed definition by including affiliated interests that provide consulting services directly related to the sale of electricity. We include these entities due to our charge to assure non-discrimination in information sharing because of our view that consultants of the utility that are privy to information related to the sale of electricity could bestow a competitive advantage on an affiliated ARES if the information was not shared contemporaneously with other ARES.

We have also expanded Staff's definition of corporate support (which, in Staff's rule may be shared between a utility and its affiliated interests in competition with ARES) to address several functions including: payroll, shareholder services, financial reporting, employee records, pension management, state and federal regulatory affairs, lobbying, marketing and research and development activities. The Commission concludes that none of the functions added would competitively advantage the affiliated ARES *vis a vis*

competitors because competitors are likely to enjoy corporate support of a similar nature from the umbrella corporation with which they are affiliated.

2. Section 450.20 Non-Discrimination

a) Electric utilities shall not provide affiliated interests or customers of affiliated interests preferential treatment or advantages relative to unaffiliated entities or their customers in connection with services provided under tariffs on file with the Illinois Commerce Commission ("Commission"). This provision applies broadly to all aspects of service, including, but not limited to, responsiveness to requests for service, the availability of firm versus interruptible services, the imposition of special metering requirements, and all terms and conditions and charges specified in the tariff.

b) Transactions between an electric utility and its affiliated interests that are not governed by tariff sheets on file with the Commission shall not result in the subsidization of the affiliated interest. Transactions between an electric utility and one or more of its affiliated interests in competition with alternative retail electric suppliers that are not governed by tariff sheets on file with the Commission shall not be discriminatory in relation to unaffiliated alternative retail electric suppliers.

c) Electric utilities and affiliated interests shall not notify potential or actual customers, either directly or indirectly, advertise to the public, or otherwise communicate that the electric utility provides any advantages to affiliated interests or their customers relative to unaffiliated entities and their customers in any matters governed by tariffs filed with the Commission.

d) In joint marketing of services and/or facilities with an affiliated interest in competition with alternative retail electric suppliers, the utility shall explicitly, in writing, notify potential or actual customers that the electric utility provides no advantages to affiliated interests in competition with ARES or their customers relative to unaffiliated ARES and their customers.

e) A utility shall process requests for similar services provided by the utility in the same manner and within the same time period for its affiliated interests in competition with alternative retail electric suppliers and for all unaffiliated alternative retail electric suppliers and their respective customers.

This new section combines Staff's proposed Sections 450.20 and 450.25 on tariffed and non-tariffed items, both of which addressed non-discrimination issues. Staff's proposed Section 450.25 was modified and adopted as subsection (b) to provide that transactions between utilities and affiliated interests in competition with ARES do not produce discriminatory results. Staff's proposed Section 450.20(d) was modified and adopted as subsection (c) to remove a qualifying sentence that would have limited the rules' application to "matters governed by tariffs filed with the Commission." The Commission can detect no reason for limiting the prohibition on the types of communications addressed in the rule to tariffed matters. Subsection (d) is new and is inserted as a compliment to subsection (c).

All parties agreed that there should be no advantage (real or perceived) to an affiliated ARES simply as a result of its affiliation. Most of the parties who proffered tight regulatory rules did so, in part, because of their belief that customers of a utility would have the impression that an affiliated ARES would be advantaged by virtue of its affiliation. To that end, they generally precluded joint marketing efforts. While our rule allows joint marketing, it requires the disclaimer contained in subsection (d) to address the concerns about the advantages of corporate identity. Subsection (e) is also new. It requires parity in the treatment of affiliated and non-affiliated ARES and the customers of both.

In addition to the changes to this Section of the Rules, we have also deleted Section 450.20(b) and (c) of Staff's proposed rule. Subsection (b), which required the maintenance of a log detailing every exercise of discretion in the administration of utility tariffs, was removed as unduly burdensome. Subsection (c) was removed as redundant to the admonitions of subsection (a).

3. Section 450.30 Non-Discrimination Concerning Services Provided Pursuant to Section 16-118 of the Public Utilities Act

In providing any service or engaging in any activity pursuant to Section 16-118 of the Act, whether such service or activity is governed by tariffs filed with the Commission or by other agreements, electric utilities shall not discriminate or provide preferential treatment in favor of their affiliated interests. Offers to provide service pursuant to Section 16-118 of the Act, whether through tariffs or agreements, shall be made concurrently to all alternative retail electric suppliers or electric utilities other than the electric utility in whose service area retail customers are located.

Section 450.30 of Staff's rule embodies the Act's requirements for non-discriminatory treatment of all takers of services from a utility, whether through tariff or through an agreement. The section has been modified slightly to include within its ambit all offers to provide service, whether through agreement or tariff. There was no objection to this section of Staff's proposed rule.

4. Section 450.40 Tying

Electric utilities shall not tie or otherwise condition the provision of any services, discounts, rebates, fee waivers, or waivers of the electric utilities' ordinary terms and conditions of service, including but not limited to tariff provisions, to the taking of any goods and services from the electric utilities' affiliated interests.

This section simply codifies a basic principle of anti-trust law that prevents the holder of a bottleneck service from leveraging that bottleneck into a competitive advantage in an otherwise competitive market. There was no substantive objection to Section 450.40 of Staff's rule.

5. Section 450.50 Release, Assignment, Transfer, and Brokering of Capacity

Except to the extent as reserved to the sole and exclusive jurisdiction of the Federal Energy Regulatory Commission

("FERC"), electric utilities shall not grant preferences regarding the release, assignment, transfer, or brokering of electric transmission system capacity to affiliated interests or their customers.

Similarly to the immediately preceding section, this rule prevents discrimination by a utility in the manner in which it provides access to the transmission and distribution system, which, all parties agree, will remain a regulated monopoly service. No party opposed Section 450.50 of Staff's rule.

6. Section 450.60 Nondiscriminatory Provision of Information to Unaffiliated Entities

a) Any certificated ARES may submit, to an electric utility, a standing request for information related to the electric utility's transmission or distribution system that is provided by the utility to the electric utilities affiliated ARES.

b) Employees of the electric utility's affiliated interests in competition with alternative retail electric suppliers shall not have preferential access to any information about the electric utility's delivery services system that is not contemporaneously available to an unaffiliated alternative retail electric supplier that has submitted a request pursuant to subsection (a) of this section.

This rule protects new entrants from the discriminatory distribution of information related to a utility's distribution system to an affiliated ARES by requiring the contemporaneous distribution of such information to all unaffiliated ARES that have requested such information. No party objected to the idea that essential information concerning the T & D system should be available to all parties, due to the ongoing monopoly nature of the T & D system. Several parties proposed the distribution of all information communicated between the utility and its affiliated interests, which the Commission finds is not justified and overly burdensome.

7. Section 450.70 Customer Information

a) Customer information shall be made available in accordance with Section 16-122 of the Public Utilities Act [220 ILCS 5/16-122], without preference to affiliated interests or their customers. Electric utilities shall not provide any preferences to affiliated interests in requesting authorization for the release of customer information.

b) A certificated unaffiliated ARES may submit, to an electric utility, a standing request for any generic customer information that the electric utility provides to an affiliated ARES.

c) The electric utility shall contemporaneously make available to any unaffiliated alternative retail electric suppliers that have submitted a standing request pursuant to subsection (b) of this section, any generic information concerning the usage, load shape curve or other general characteristics of customers by rate

classification that the utility makes available to its affiliated interests in competition with alternative retail electric suppliers.

In addition to Section 450.80 proposed by Staff, the Commission has added subsection (b) requiring the contemporaneous distribution of generic customer information to unaffiliated ARES that have a standing request for such information. This provides congruity between the distribution of generic customer information and T & D system related information.

8. Section 450.80 Exception for Corporate Support Information

Electric utilities may share information concerning corporate support with affiliated interests without being required to share such information with unaffiliated entities.

Section 450.90 of Staff's rule allows a utility and its affiliated interests to share information concerning corporate support. The rule rests on the Commission's determination that certain functions of a utility and its affiliated interests may be undertaken jointly without impacting the competitive balance of the energy market in Illinois, while allowing economies of scope and scale to inure to the benefit of consumers.

9. Section 450.90 Confidentiality of Alternative Retail Electric Supplier Information

Electric utilities shall treat all information concerning an alternative retail electric supplier as confidential information, and shall not provide such information to its affiliated interests or to unaffiliated entities unless the alternative retail electric supplier provides authorization to do so.

This section protects against disclosure of all information obtained by a utility in its dealings with an ARES. No party objected to Section 450.100 of Staff's rule.

10. Section 450.100 Independent Functioning

Except in relation to corporate support and emergency support, electric utilities and affiliated interests in competition with alternative retail electric suppliers shall function independently of each other and shall not share services or facilities, unless such services or facilities are dedicated to corporate support or emergency support.

This rule provides for the structural separation of the utility and its affiliated ARES, except for those functions defined as corporate and/or emergency support. The utilities argued generally against any kind of separation, contending that separation was simply a means of imposing unnecessary costs on the utility, thereby providing a competitive advantage to the new entrants. The Commission disagrees. While the Commission has adopted a "light handed" approach in this docket, this is one of the hands that must remain on the rudder. To allow unfettered collusion between the utility and its affiliated ARES would simply be a recipe for allowing the utility to have two identical entrants in the field, since the utility itself can participate in the market. The Commission concludes instead, that it is appropriate for the utility's affiliated ARES to have certain "stand alone" aspects. Section 450.110 of Staff's rule accomplishes that goal, while allowing the utility's affiliated

ARES to benefit from the type of corporate support that will, in all likelihood, be available to unaffiliated ARES from their corporate superstructures. This should result in a level playing field to the extent necessary to allow for the development of competition.

11. Section 450.110 Employees

a) Except in relation to corporate support and emergency support, electric utilities and their affiliated interests in competition with alternative retail electric suppliers shall not jointly employ or otherwise share the same employees.

b) Electric utilities shall not jointly employ or otherwise share employees engaged in providing delivery services with their affiliated interests in competition with alternative retail electric suppliers.

c) This Section shall not apply to any employee covered by a collective bargaining agreement subject to federal labor law, including the Labor Management Relations Act and the National Labor Relations Act.

This rule adopts the same approach to the sharing of employees as was previously adopted for the sharing of information. The parties' arguments in support of and in opposition to this aspect of the rule were also the same. The Commission has modified Staff's proposed Section 450.120 in several respects. Staff's proposed rule required the utility to maintain a log of employees that transferred between the utility and an affiliated ARES and imposed a one year moratorium following an employee's transfer from a utility to an affiliated ARES during which the employee could not return to the utility, and a one year moratorium upon the employees return to the utility during which the employee could not be transferred back to the affiliated ARES. In addition, Staff's proposed rule required the electric utility to maintain a log of all transfers of employees between the utility and its affiliated ARES. These sections of Staff's proposed rule have been eliminated as unduly burdensome in relation to the perceived evils (the sharing of information between a utility and its affiliated ARES) they were intended to address. The Commission notes that none of the new entrants will face similar constraints on employment opportunities and finds that it is much more likely that a utility wishing to violate the Commission's rule proscribing the sharing of non-customer support with an affiliate, could do so in a less burdensome manner than transferring employees back and forth between companies.

In addition to deleting portions of Staff's proposed rule, the Commission has added subsection (b) proscribing the sharing of utility employees that perform delivery service functions with its affiliated interests in competition with ARES. This prohibition is necessary given the continued bottleneck status of the T & D system and the likelihood that competitively significant information could be obtained as a result of the utility's operation of the T & D system.

12. 450.120 Transfer of Goods and Services

a) In connection with an application for a certificate of service authority filed by an affiliated interest of an electric utility, pursuant to Section 16-115 of the Act, the affiliated interest shall provide a copy of a Commission approved services and facilities or affiliated interest agreement that explicitly addresses the

allocation and valuation methodology to be applied to any transfer of goods and services between an electric utility and its affiliated alternative retail electric suppliers. In the event that there is no Commission approved agreement addressing these issues, the applicant shall submit such an agreement for approval as part of its application.

b) Costs associated with the transfer of goods and services between an electric utility and its affiliated interests, including affiliated interests in competition with alternative retail electric suppliers, shall be priced as specified in, and allocated pursuant to the Commission approved services and facilities agreement or affiliated interests agreement presented in the affiliated ARES certification proceeding. Any transfer of goods and services between an electric utility and its affiliated interests, including affiliated interests in competition with alternative retail electric suppliers, that is not explicitly addressed in a Commission approved services and facilities or affiliated interests agreement is prohibited.

The manner in which the Commission is to prevent the cross subsidization of a utility's affiliated ARES to the detriment of competitors was one of the principal areas of contention in this proceeding. The utilities generally took which the Commission was familiar and an issue that existed any time a regulated utility the position that the issue of cross subsidies was one with engaged in unregulated activities. The utilities went on to note that most, if not all, electric utilities were currently dealing with cross subsidy issues through Commission approved affiliated interest or services and facilities agreements. The utilities argued that to the extent that current agreements dealt with these issues, they should continue to do so. The utilities admitted that all of the agreements were approved prior to the passage of the 1997 Amendments to the Act and, in some cases, might need to be revised.

The non-utility parties generally favored some form of organizational separation between the utility and its affiliated ARES, to which the utilities responded that separations were inefficient and simply an attempt to impose costs on the utility and to remove the benefits of the economies of scope and scale that integrated firms enjoy. The utilities also noted that Section 16-119A of the Act grants the Commission the authority to investigate the need for functional separation between a utility's competitive and non-competitive services after January 1, 2003, from which the utilities argue that imposing separations at this time would be premature.

The Commission has reviewed the evidence and arguments of the parties and has concluded that, at this time, the utilities should be allowed to deal with cross subsidization through affiliate interest or services and facilities agreements. The Commission has serious reservations, however, about the efficacy of the current agreements in light of the fact that all were approved prior to the passage of the 1997 Amendments to the Act that prompted this rulemaking. The Commission notes that ComEd's AIA, for instance, outlines relationships between Unicom (ComEd's holding company) and its subsidiaries, but is silent regarding transactions between ComEd and its affiliates. Similarly, Ameren's Commission approved Service Agreement addresses relationships between a service corporation and Ameren affiliates, but does not address relationships between CIPS and its affiliates or Union Electric and its affiliates. Because of our concerns over the state of the current agreements, we have adopted, in conjunction with the utilities wishes to utilize individual agreements, a requirement that, in connection with an application for certification of a utility affiliated ARES, the applicant must submit a Commission approved affiliated interest or

services and facilities agreements that addresses cross subsidization of the affiliated ARES by the utility. In addition, the rule prohibits any transfers of goods or services between a utility and an affiliated ARES until such transactions are explicitly addressed in a Commission approved AIA or services and facilities agreement.

13. Section 450.130 Lists of Affiliated Interests and Alternative Electric Suppliers

a) Each electric utility shall maintain an accurate list of all its affiliated interests. Such list shall include the name and address of each affiliated interest and the name and business telephone number of at least one officer of each affiliated interest. The electric utility shall make this list available to the public upon request.

b) The electric utility shall file this list and any subsequent changes to the list with the Chief Clerk of the Commission. The electric utility shall also send copies of the list and subsequent changes to the Director of the Accounting Department and the Manager of the Consumer Services Division of the Commission. The Chief Clerk of the Commission shall make the most recent list of each electric utility available to the public upon request.

c) All ARES, including any utility affiliated ARES shall, upon certification, but prior to commencing marketing operations, provide to each electric utility in each area of the ARES' certification, notice of the ARES' certification, its trade name, local address and address for service of process, local telephone number and telephone number of its parent company, local fax number and fax number of its parent company and Internet address, if any, of it and its parent company.

Section 450.140 of Staff's proposed rule required electric utilities to keep and make available a list of their affiliated interests. Staff also proposed, in Section 450.60 of its rule, that utilities be required to maintain a list of the alternative electric suppliers operating in their service territory. We have incorporated both requirements in this section of the rule. In addition, we have included a requirement that each ARES, upon being certificated but prior to commencing operations, provide the incumbent utility in each service area in which the ARES is certified to conduct business, with a notice of its certification as well as its trade name, local address and address for service of process, local telephone number and telephone number of its parent company, local fax number and fax number of its parent company and Internet address, if any, of it and its parent company.

The utilities were generally opposed to maintaining the list of unaffiliated ARES, arguing variously that: section 16-117(g)(4)(b) of the Act requires the Commission to maintain such a list; the burden and potential liability placed upon the utility outweighs the benefits provided to the public and; requiring a utility to provide the list upon request forces the utility to associate with speech and entities with which it disagrees. The Commission finds none of these arguments compelling. One ingredient of a competitive market is educated consumers. While the Commission is obligated to gather and disperse a list of ARES, the Commission finds that it is much more likely that a consumer seeking information on ARES will seek it in the first instance from the local utility, rather than the Commission or the Internet. Additionally, the Commission fails to see how the distribution of a list can be seen as an endorsement of the entities listed. Finally, we have obligated the unaffiliated ARES to provide the utility with the

requisite information, thereby leveling the playing field and obligating both parties to substantially the same degree.

14. Access Section 450.140 Maintenance of Books and Records and Commission Access

a) An electric utility shall maintain books, accounts, and records separate from those of its affiliated interests.

b) In connection with an application for a certificate of service authority filed by an affiliated interest of an electric utility, pursuant to Section 16-115 of the Act, the affiliated interest shall provide a copy of a Commission approved services and facilities or affiliated interest agreement that explicitly addresses the accounting treatment to be applied to any transactions between an electric utility and its affiliated alternative retail electric suppliers. In the event that there is no Commission approved agreement addressing these issues, the applicant shall submit such an agreement for approval as part of its application.

c) Upon the request of the Commission, electric utilities shall make personnel available who are competent to respond to the Commission's inquiries regarding the nature of any transactions that have taken place between the electric utility and its affiliated interests, including but not limited to the goods and services provided, the prices, terms and conditions, and other considerations given for the goods and services provided.

In Section 450.150 of its rules, Staff originally proposed a uniform system of accounting for transactions between a utility and its affiliated interests that utilizes subaccounts. Staff modified its proposal to recognize the fact that not all utilities have adopted separate subaccounts for each affiliate transaction. The utilities continue to object to Staff's proposal, arguing that utilities are currently using the various AIAs and services and facilities agreements to account for these transactions and that they should be allowed to continue to do so.

The Commission concludes that the utilities should be free to utilize accounting conventions adopted in the AIAs and services and facilities agreements, but has the same reservations as it did when discussing the issues of cross subsidies pertaining to Section 450.120 of the rule. There, we addressed our concerns over the fact that the various AIAs and services and facilities agreements were entered into and approved prior to the passage of the 1997 Amendments to the Act by requiring any utility wishing to form an affiliated ARES, to provide the Commission with proof that a Commission approved AIA or service agreement dealt appropriately with the elimination of cross subsidies. Because the Commission believes that individual AIAs are more appropriate than hard and fast accounting rules in a deregulated environment, but has concerns over the fact that all existing agreements were approved prior to the passage of the current amendments, the Commission has reached the same conclusion here. The Commission has, accordingly, modified Staff's rule to require, that any utility wishing to form an affiliated ARES, must submit proof to the Commission that a Commission approved AIA or services and facilities agreement adequately addresses the manner in which accounting issues detailing transactions between the utility and its affiliated ARES are recorded.

The remainder of Section 450.150 of Staff's rule is left intact. We agree that a utility should maintain separate books and records and should make competent personnel available to respond to Commission inquiries.

15. Section 450.150 Internal Audits

a) Electric utilities shall conduct biennial internal audits on transactions with affiliated interests. These audits shall test compliance with this Part, with any applicable Commission orders, with the electric utility's affiliated interest operating agreement(s) and/or guidelines, with 83 Ill. Adm. Code 415, and with 83 Ill. Adm. Code 420. The audits shall include written reports of conclusions and associated workpapers which shall be available to the Commission Staff for review. The audit reports shall be submitted to the Commission's Director of Accounting within 30 days of completion.

b) The first such internal audit report shall be submitted on or before December 1, 1998. Succeeding audit reports shall be submitted on or before December 1 of each even numbered succeeding year.

c) Section 450.150 shall not apply to transactions with corporations that are affiliated interests of the electric utility solely because they share a common director or transactions with individuals that are affiliated interests of the electric utility solely because they are an elective officer or director of the electric utility.

The Commission agrees with Staff that biennial internal audits at the outset of deregulation is called for. While the utilities complained long and loud about the expense of the audits, none provided any evidence of the actual costs, which the Commission finds supports Staff's view that utilities currently employ a sufficient number of auditing personnel to perform the audits at a reasonable cost.

16. Section 450.160 Complaint Procedures

a) Complaints alleging violations of this Part shall be filed pursuant to 83 Ill. Adm. Code 200.

b) Pursuant to Section 16-115B(b) of the Act, after notice and hearing held on complaint or on the Commission's own motion, the Commission may:

1) Order the affiliated alternative retail electric supplier to cease and desist, or correct, any violation of or non-conformance with the provisions of Section 16-115 or 16-115A of the Act;

2) Impose financial penalties for violations of or non-conformance with the provisions of Section 16-115 or 16-115A of the Act, not to exceed $10,000 per occurrence or $30,000 per day for those violations or non-conformance which continue after the Commission issues a cease-and-desist order; and

3) Alter, modify or suspend the certificate of service authority of an electric utility's affiliated alternative retail electric supplier for substantial or repeated violations of or non-

conformance with the provisions of Section 16-115 or 16-115A of the Act.

The Commission agrees with Staff that complaints should proceed under the normal formal complaint procedures already in place. The Commission rejects the proposals of the parties who sought an expedited procedure. In the event that a particular complaint requires expedited treatment, the parties are free to request this in their pleadings. We have modified Staff's rule slightly by adding the penalty provisions of the Act.

V. NEED FOR EMERGENCY RULES

Section 16-121 of the Act requires the adoption of rules no later than 180 days after December 16, 1997, which is the effective date of the 1997 Amendments. Because of the complexity of the numerous issues to be decided in this proceeding, as evidenced by the voluminous record, it was not possible to arrive at a final rule through the normal rulemaking process by the statutory deadline. Therefore, the rules approved herein should be adopted on an emergency basis.

VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein, is of the opinion and finds that:

(1) the Commission has jurisdiction over the subject matter of this proceeding;

(2) the recitals of fact and conclusions reached in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;

(3) the rules at 83 Ill. Adm. Code 450, as reflected in the Appendix to this Order, should be adopted on an emergency basis pursuant to Section 5-45 of the Illinois Administrative Procedure Act ("IAPA") and a Notice of Emergency Rules should be submitted to the Secretary of State pursuant to Section 5-45 of the IAPA;

(4) the Notice of Proposed Rules for 83 Ill. Adm. Code 450 should be submitted to the Secretary of State pursuant to Section 5-40 of the IAPA.

IT IS THEREFORE ORDERED that the rules at 83 Ill. Adm. Code 450, as reflected in the attached Appendix, are adopted on an emergency basis pursuant to Section 5-45 of the Illinois Administrative Procedure Act, to be effective June 15, 1998, and that the Notice of Emergency Rules be submitted to the Secretary of State.

IT IS FURTHER ORDERED that the Notice of Proposed Rules for 83 Ill. Adm. Code 450, as reflected in the attached Appendix, be submitted to the Secretary of State pursuant to Section 5-40 of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this Order is not final; it is not subject to the Administrative Review Law.

DATED: May 7, 1998

Hearing Examiners