STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion	))	
	)	Docket No. 12-0456
Development and adoption of rules concerning municipal aggregation	))	

THE RETAIL ENERGY SUPPLY ASSOCIATION
VERIFIED REPLY COMMENTS ON PROPOSED FIRST NOTICE RULES

I. INTRODUCTION

Pursuant to the schedule established by the Administrative Law Judge ("ALJ") in this proceeding, the Retail Energy Supply Association ("RESA")[1] submits its Verified Reply Comments on the Illinois Commerce Commission's ("Commission") Proposed First Notice Rules for governmental aggregation, which were attached to the Commission's November 6, 2013 First Notice Order ("First Notice Order") and published in the *Illinois Register* on December 27, 2013 ("Proposed First Notice Rules"). On February 10, 2014, RESA filed its Verified Initial Comments in this proceeding. Those Comments indicated that in one major respect, the Proposed First Notice Rules are significantly worse than the proposed rules which were attached to the ALJ's Proposed Order ("ALJPO"), dated June 26, 2013, in this proceeding ("ALJPO Proposed Rules").

The ALJPO carefully analyzed the positions of the parties in this proceeding and the ALJPO Proposed Rules reflected appropriate modifications to the rules proposed by the Commission Staff in this proceeding, which would have tilted the playing field in favor of those Retail Electric Suppliers

[1] RESA's members include AEP Energy, Inc.; Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc., Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd.; and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

("RES") who emphasize municipal aggregation as their preferred marketing channel, at the expense of those RESs employing direct methods requiring affirmative action on the part of the customer. The Proposed First Notice Rules inappropriately, and without justification, reverse the competitively neutral position of the ALJPO Proposed Rules, and provide a competitive advantage to Aggregation Suppliers, those RESs who have obtained customers through Aggregation Programs. RESA's Initial Comments concluded that if Illinois is to have a dynamic, competitive market that supports both municipal aggregation as well as direct marketing, then the Commission needs to ensure that both types of competitive activity operate on a level playing field.

In addition to RESA, Initial Comments were filed by the following parties: the Coalition of Energy Suppliers, Commonwealth Edison Company, the Citizens Utility Board ("CUB"), Dominion Retail, the Commission Staff, the Illinois Competitive Energy Association ("ICEA"), the Metropolitan Mayors Caucus (the "Caucus"), and Nicor Advanced Energy ("NAE"). Although their proposals differ as to how to accomplish it, the Coalition of Energy Suppliers, Dominion Retail and NAE are basically in agreement with RESA that the First Notice Proposed Rules should be revised to restore competitively neutrality. RESA will comment briefly on the Initial Comments of the Coalition of Energy Suppliers, Dominion Retail, and NAE.

In these Reply Comments, RESA will also address the Initial Comments of the Caucus and, in particularity, the Initial Comments of the Commission Staff. Just as the Commission Staff basically proposed to gut the ALJPO Proposed Rules and reinstate the rules proposed by the Staff in this proceeding (the "Staff's Draft Rules"), rules that would tilt the playing field in favor of Aggregation Suppliers, Staff now wants to gut the Commission's First Notice Proposed Rules and again substitute Staff's Draft Rules. In addition, Staff wants to eliminate two important safeguards from Proposed Section 470.110, Protection of Customer Information.

II. RESPONSE TO COALITION OF ENERGY SUPPLIERS, DOMINON RETAIL AND NICOR ADVANCED ENERGY.

The Coalition of Energy Suppliers states that the revised Proposed Section 470.240 requirement that RES customer receive disclosures about a governmental aggregation program inappropriately shifts the balance in favor of Aggregation Suppliers and threatens to result in customer confusion and unfair, potentially illegal customer switching. (Coalition of Energy Suppliers Initial Comments, pp. 4, 8-10) Similarly, NAE states that the requirement in revised Proposed Section 470.240 that Aggregation Suppliers provide notices about governmental aggregation programs to RES customers creates an improper competitive preference for Aggregation Suppliers and is based on arguments that are inaccurate, incorrect and contrary to law. (NAE Initial Comments, pp. 4-11) Finally, Dominion states that the definition of "retail customer" should be revised to prevent RES customers from receiving notices about governmental aggregation programs. (Dominion Initial Comments, pp. 2-6) While RESA, the Coalition of Energy Suppliers, NAE and Dominion propose different revisions to the First Notice Proposed Rules, they all seek the same result—elimination of the inappropriate requirement that Aggregation Suppliers send notices about governmental aggregation programs to RES customers.

III. RESPONSE TO COMMISSION STAFF

Effectively, Staff wants to substitute Staff's Draft Rules in place of the Proposed First Notice Rules. Specifically, Staff wants to:

- delete Proposed Section 470.210, Customer Disclosures, of the Proposed First Notice Rules in its entirety and substitute its own language,
- delete Proposed Section 470.220, Opt-out Aggregation Provisions, in its entirety and substitute its own language,

- delete most of Proposed Section 470.230, Opt-in Aggregation Provisions, and substitute its own language,
- delete Proposed Section 470.240, RES Customers, and
- delete Proposed Section 470.250, Customers on Utility Hourly Service.

While Staff proposes to basically gut the Proposed First Notice Rules and replace them with the Staff's Draft Rules, both the Proposed First Notice Rules and Staff's Draft Rules suffer the same infirmity.[2] They evidence a distinct preference for governmental aggregation over other marketing approaches to mass market customers and tilt the playing field in favor of Aggregation Suppliers on the basis of incorrect interpretations of the law and bad policy, as demonstrated in the Verified Initial Comments of RESA, the Coalition of Energy Suppliers, Dominion Retail, and NAE. Consequently, neither the Proposed First Notice Rules nor the Staff's Draft Rules should constitute the second notice proposed rules that would be sent to the Joint Committee on Administrative Rules pursuant to the Illinois Administrative Procedure Act. Again, RESA supports the ALJPO Proposed Rules because those rules provide a balanced approach towards marketing to mass market customers, and appropriately recognize that both direct marketing and governmental aggregation should be made available to RESs.

RESA specifically objects to Staff's proposed elimination of two provisions of the First Proposed Rules which reflect protections requested by RESA during the proceeding. Section 470.110, Protection of Information, of the ALJPO Proposed Rules was amended to add another category of customers for which destruction of information is appropriate: customers opting out of the Aggregation Program. In making this amendment the Commission specifically rejected Staff's objection to RESA's proposal:

[2] Curiously, Staff's Initial Comments basically treat the Commission's First Notice Order as an ALJPO and propose numerous revisions to the text of the First Notice Order (see, for example, Staff's Initial Comments, pp. 5-9).

> In addition, RESA stated in its Brief on Exceptions, that there was one more category of customers for which destruction of information is appropriate—customers opting out of the Aggregation Program. In its Reply Brief on Exceptions, Staff opposes RESA's proposal and states that if the information related to a customer that opted-out has been destroyed, the Aggregation Supplier would be unable to defend its exclusion of that customer from the Aggregation Program. The Commission finds that RESA's proposal will stop Aggregation Suppliers from having the competitive advantage to this customer information and is not outweighed by Staff's hypothetical customer complaint scenario. (First Notice Order, p. 23)

Staff argues that destroying the customer information of customers opting out of the Aggregation Program would lead to actual customer complaints, not just hypothetical ones. Staff cites an argument by ICEA that such information needs to be retained so that a customer who opts out is not "inadvertently" sent another opt-out notice. (Staff Initial Comments, pp. 23-24)

However, Staff's argument makes no sense in light of its opposition to a second revision made by the Commission to the ALJPO at RESA's request—the addition of a sentence to Section 470.110 that an Aggregation Supplier may not use customer information obtained through Aggregation Programs for marketing purposes:

> RES also requested in its BOE the addition of a sentence to Part 470.110 (a) (3) clarifying that, although an Aggregation Supplier may need to retain certain customer-specific information due to record retention requirements, the Aggregation Supplier may not use such information for marketing purposes. The Commission agrees that this is a reasonable clarification and should be added to Proposed Subsection 470.110 (a) (3). (First Notice Order, p. 23)

Thus, it appears that while Staff objects to a requirement that information about customers opting to should be destroyed because it could lead to "inadvertent" marketing by an Aggregation Supplier to such a customer, Staff's objection to a requirement that information gained from an Aggregation Program not be used by an Aggregation Supplier for marketing purposes indicates that Staff finds deliberate marketing by an Aggregation Supplier using information obtained through Aggregation Programs is acceptable. Staff's opposition to both of these protections should be rejected because Staff's opposition is contrary to the basic principle of Section 470.110, Protection of Customer

Information, that the use of customer-specific information should be strictly and only used to effectuate the provisions of Section 1-92 of the Illinois Power Agency Act (20 ILCS 3855/1-1 *et seq.*).

IV. RESPONSE TO THE CAUCUS

The Caucus supports the requirement that notice about aggregation programs be given to RES customers. (Caucus Initial Comments, pp. 4-6) For the reasons stated in the Initial Comments of RESA, the Coalition of Energy Suppliers, Dominion and NAE, this requirement should be eliminated. However, RESA feels compelled to respond to one of the arguments the Caucus makes in support of its position. The Caucus argues that Governmental Aggregators have found that many RES customers first find out that they are RES customers when they call to find out why they did not receive an opt-out notice for an aggregation program, thereupon finding out that they had been "slammed", switched without their knowledge or consent by their RES. (*Id.*, pp. 4-5) Interestingly, the Caucus never raised this argument before in its many pleadings in this proceeding. The Caucus also states: "In these cases, the Governmental Aggregator assists its residents and local businesses in determining what has occurred and how they may be able to remedy the supplier switch that the customer did not want." (*Id.*, p. 5) RESA would like to point out that "slamming" is a violation of the Public Utilities Act, the Consumer Fraud and Deceptive Business Practices Act, and the Commission's rules and suggests that filing a complaint would have been an appropriate remedy. In this regard, RESA is not aware of any complaint brought before the Commission that indicates that a customer alleges that it has learned of slamming as a result of governmental aggregation programs. The Commission should reject the self-serving, late-filed anecdotal statements of the Caucus.

V. CONCLUSION

In conclusion, the Proposed First Notice Rules are an adverse departure from the ALJPO's reasonable effort to create competitive neutrality between those Retail Electric Suppliers which favor municipal aggregation as their marketing channel and those Retail Electric Suppliers which use direct marketing channels. The Commission's revisions to the ALJPO Proposed Rules completely undermine the reasoned analysis of the ALJPO and facilitate the unauthorized switching of RES customers. The Commission should reverse its position on this important matter and reinstate the provisions of the ALJPO relating to RES customers, namely Section 470.240 of the ALJPO Proposed Rules. At a minimum, the Commission should reject the Staff's proposal to eliminate two important safeguards from Proposed Section 470.110, Protection of Customer Information.

Dated: March 3, 2014

Respectfully submitted,

Retail Energy Supply Association

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

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

STATE OF ILLINOIS)
) **SS**
COUNTY OF DUPAGE)

VERIFICATION

Roy Boston, being first duly sworn, on oath deposes and says that he is the Strategic Planning & Policy Manager- East for Noble Americas Energy Solutions - a member of the Retail Energy Supply Association, that he has read the foregoing Verified Reply Comments of the Retail Energy Supply Association, that he knows of the contents thereof, and that the same are true and accurate to the best of his knowledge, information, and belief.

/s/Roy Boston
Roy Boston
Strategic Planning and Policy Manager-East
Noble Americas Energy Solutions
1901 Butterfield Road
Suite 660
Downers Grove, IL 60515
(630) 390-2715

OFFICIAL SEAL
GINA L BATTAGLIA
Notary Public - State of Illinois
My Commission Expires Jun 15, 2017

Subscribed and sworn to me
This 3rd day of March 2014

NOTICE OF FILING

Please take note that on March 3, 2014, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Verified Reply Comments of the Retail Energy Supply Association in this proceeding.

Dated: March 3, 2014

/s/GERARD T. FOX
Gerard T. Fox

CERTIFICATE OF SERVICE

I, Gerard T. Fox, certify that I caused to be served copies of the foregoing Verified Reply Comments of the Retail Energy Supply Association upon the parties on the service list maintained on the Illinois Commerce Commission's eDocket system for Ill. C. C. Docket 12-0456 via electronic delivery on March 3, 2014.

/s/ GERARD T. FOX
Gerard T. Fox