STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On its Own Motion	)	Docket No. 15-0512
	)	
Amendment of 83 Ill. Adm. Code 412 and	)	
83 Ill. Adm. Code 453	)	

VERIFIED INITIAL COMMENTS OF
THE RETAIL ENERGY SUPPLY ASSOCIATION

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DRAFT: 12/20/16

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The Retail Energy Supply Association ("RESA")[1], by and through its attorney, Gerard T. Fox, pursuant to the Administrative Law Judges' ("ALJ") Ruling, hereby submits its Verified Initial Comments on the First Notice Rules published in the *Illinois Register* on November 4, 2016. Those First Notice Rules were published pursuant to the September 22, 2016, Order of the Illinois Commerce Commission's ("Commission") in Docket 15-0512, its rule making proceeding to consider amendments to 83 Ill. Adm. Code Parts 412, Obligations of Retail Electric Suppliers, and 453, Internet Enrollment Rules (the "First Notice Order).

I. INTRODUCTION

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

On September 10, 2015, the Commission entered its Initiating Order in this proceeding. The Initiating Order directed the Commission Staff ("Staff") to submit proposed amendments to Parts 412 and 453 within 30 days from the date of the Initiating Order. The Initiating Order further directed the ALJs to prepare a first notice order for the Commission's consideration within 180 days from the date of the Initiating Order.

On October 9, 2015, Staff filed its Proposed Rules for Parts 412 and 453. Pursuant to the procedural schedule established by the ALJs, RESA submitted Verified Initial Comments, Verified Reply Comments, and Verified Sur-Reply Comments in this proceeding, as did Staff and other Parties. RESA's Comments included revisions to Staff's Proposed Rules and the rationale as to why RESA's proposed revisions were necessary. During the course of the proceeding in Docket 15-0512, the Staff filed revised versions of its Proposed Rules.

On January 19, 2016, the ALJs filed their Proposed Order ("ALJPO"), including Attachments A (proposed amendments to Part 412) and Attachment B (proposed amendments to Part 453) (the "ALJPOs' Proposed Rules"). In general, the ALJPO's Proposed Rules were an improvement over the final version of Staff's Proposed Rules, which was attached to Staff's Sur-Reply Comments, which itself was an improvement over the draft filed by Staff on October 9, 2015. RESA submitted a Brief on Exceptions and a Reply to Briefs on Exceptions, setting forth RESA's position as to how the ALJPO's Proposed Rules should be revised so as to result in rules that would reasonably balance the interests of Retail Electric Suppliers (individually "RES" or plural "RESs") and their customers.

On September 22, 2016, the Commission entered its First Notice Order which authorized the publication of First Notice Rules amending Parts 412 and 453 in the *Illinois Register*.

However, instead of accepting the proposed revisions of RESA to provide balance in the rules, the First Notice Rules included many revisions to the ALJPO's Proposed Rules, most of which would, if adopted, be onerous and costly for RESs without providing meaningful benefits to customers.

On November 4, 2016, the First Notice Rules were published in the *Illinois Register*. On November 9, 2016, the ALJs issued their Ruling, setting the dates of December 20, 2016 for Initial Comments and January 17, 2017 for Reply Comments.

RESA has participated fully in this proceeding, as well as in Docket 14-NOI-1, the Notice of Inquiry proceeding which led to Docket 15-0512. From the beginning of the NOI proceeding, RESA has questioned whether there was a need for adoption of additional rules, as opposed to the Commission utilizing the authority it has under the Public Utilities Act ("Public Utilities Act" or "Act") to enforce its existing rules. However, at this stage of the proceeding, RESA will address, in Section II, *infra*, its general concerns regarding the Commission's authority to adopt the First Notice Rules and the issue of competitive parity. In Section III, *infra*, RESA will address the revised sections of Part 412 which cause the greatest concern to RESA. In Section IV, RESA responds to the Commission's direction in its First Notice Order that Parties address certain questions/issues. RESA's specific proposed language revisions to Part 412 are contained in Attachment A to these Initial Comments.

II. GENERAL COMMENTS

A. Commission Authority to Modify Part 412

In general, RESA believes that Section III of the First Notice Order, Commission Authority to Modify Part 412, is overstated. In particular, reliance on Sections 8-501 and 10-101 of the Public Utilities Act is misplaced because those sections apply to public utilities, not RESs.

RESs are not public utilities. Public utilities are defined in Section 3-105 of the PUA, which specifically exempts Alternative Retail Electric Suppliers from the definition: "'Public utility' does not include, however, alternative retail electric suppliers as defined in Article XVI".[2]

The Commission's analysis of Section 10-101 begins with a serious omission in quoting that section: "The Commission is authorized by Section 10-101 of the Act, which states that it 'shall have the power to hold investigations concerning any matters covered by the provisions of this Act…subject to such rules and regulations as the Commission may establish.'" However, the complete sentence demonstrates that Section 10-101 only applies to public utilities: "The Commission, or any Commissioner or hearing examiner designated by the Commission shall have the power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or any other Acts **relating to public utilities** subject to such rules and regulations as the Commission may establish." (emphasis added)

Similarly, Section 8-501 of the Act, as demonstrated by the quotation from that section on page 3 of the First Notice Order, covers public utilities, not RESs. However, the First Notice Order accepts Staff's argument that the application of Section 8-501 should be extended beyond public utilities to entities that provide service of the "character" supplied or furnished by public utilities. (*Id*., pp. 3-4) The Commission's logic would suggest that it can regulate any entity that supplies or furnishes a commodity or service of the character supplied or furnished by public

[2] Alternative Retail Electric Suppliers are also Retail Electric Suppliers, which includes electric utilities selling electricity outside their own service territories.

utilities. If the Commission's logic were correct, then electric co-operatives, gas co-operatives, municipally owned gas companies, municipally owned electric companies, municipally owned water and sewer companies, and even propane dealers could be regulated because they provide service of the "character" supplied or furnished by utilities. However, like RESs, these entities are either specifically excluded from the definition of public utility or do not meet the Act's definition and the Commission has never sought to regulate these entities as public utilities.

The Commission, as a creature of statute, has no general powers except those expressly conferred by the legislature. As stated by the Illinois Supreme Court in *Business and Professional People*, "Since the Commission is a statutory creature, its powers are dependent thereon, and it must find within the statute the authority which it claims. [Citations omitted] Such agencies have no general or common law powers." *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 244, 555 N.E.2d 693, 716-17 (Ill. 1990).

The Commission recognized its limitations in its *amicus curiae* brief in the Illinois Supreme Court's Rule 20 Certification in *Zahn v. North American Power & Gas, LLC* (2016 IL. 120526, Dec. 1, 2016). In that case the United States Court of Appeals for the Seventh Circuit[3] certified for instruction from the Illinois Supreme Court the following question of Illinois law: "Does the Illinois Commerce Commission have exclusive jurisdiction over a reparations claim brought by a residential consumer against an Alternative Retail Electric Supplier?" The Commission argued it did not have exclusive jurisdiction over a Section 9-252 reparations claim against an Alternative Retail Electric Supplier ("ARES") by a residential customer, only over such claims brought against public utilities. (ICC Brief, pp. 8-9) The Commission correctly

[3] The citation for the Zahn case is 815 F. 3d 1082 (7th Circuit, 2016).

explained that ARES are not public utilities. (*Id*., pp. 10-15) Consequently, the Commission concluded that Section 9-252 of the Public Utilities Act does not apply to ARES. (*Id*., pp. 15-17)

The Commission noted that the legislature did not make Section 9-252 applicable to ARES. By its express terms, Section 9-252 governs public utilities. Moreover, the provisions of Article XVI of the Public Utilities Act do not incorporate or otherwise make Section 9-252 applicable to ARES. Thus, the Commission concluded, Section 9-252 does not apply to ARES. (*Id*., pp. 15-16)

The Illinois Supreme Court agreed with the Commission, finding that while Section 9-252 of the Public Utilities Act gives the Commission exclusive jurisdiction over reparation claims against public utilities, ARES are not public utilities. (S. Ct. Opinion, at p. 6)

The same analysis applied by the Commission to Section 9-252 in its *amicus curiae* brief in the *Zahn* matter applies to Sections 8-501 and 10-101 of the Public Utilities Act. By their express terms, those sections govern public utilities. Moreover, the provisions of Article XVI of the Public Utilities Act do not incorporate either Section 8-501 or Section 10-101 by reference or otherwise make them applicable to ARES. Therefore, under the Commission's own analysis, Sections 8-501 and 10-101 of the Public Utilities Act do not apply to ARES and provide no basis for the Commission's authority to adopt rules in this proceeding.

The authority to regulate RESs is found in Article XVI of the PUA. Consequently, the ALJPO must rely on its authority under Article XVI of the Public Utilities Act to enact proposed rules in this proceeding. RESA is not arguing that the Commission does not have authority to regulate RESs. However, clearly the General Assembly did not give the Commission the same authority over RESs that it gave the Commission over public utilities. The General Assembly

did not intend for the Commission to regulate RESs as if they were public utilities and, in particular, did not intend for the Commission to micro-manage RESs in the manner that some of the provisions of the First Notice Order would do.

In addition, it is important to keep in mind the limited authority of the Commission over RESs when the Commission proposes to adopt rules that conflict with existing statutes such as the Consumer Fraud and Deceptive Business Practices Act and the Automatic Contract Renewal Act. These conflicts will be addressed in Section III, *infra*, of these Comments, as they relate to specific provisions of the First Notice Rules.

B. Competitive Parity

The First Notice Order appears to reflect only a partial understanding of RESA's argument regarding competitive parity. When considering additional requirements in Illinois retail electric markets it is important to consider the effect such requirements have on the competitive parity between RES products and default supply service from electric utilities. RESA supports consumer protection, but there is a cost to comply with consumer protection rules. If all products in the market abide by the same rules, and are subject to the same costs, additional standards may benefit the market and customers, assuming a resulting efficacy in the rules themselves. However, as is the case in the current retail electric market, regulatory requirements that apply to all RES products often do not apply to default supply service. Moreover, the costs of regulatory requirements that apply to utilities are recovered by them through their distribution rates, not their supply charges, in contrast to RESs which must recover their costs through their supply prices.

For example, assume that a RES, in order to recover its costs and earn an appropriate profit, charges six cents/kWh for its supply and that the supply charge of the electric utility is also six cents/kWh. Assume that the Commission adopts a rule that imposes $3 million of additional costs on both RESs and electric utilities. The electric utility would recover that $3 million through its distribution charges, not its supply charges, so the electric utility would continue to charge six cents/kWh. In contrast, the RES would have to recover its increased costs through its supply charges. The result would be that RES customers would pay the increased costs twice—once through the electric utility's distribution charges and, second, through the RES' supply charges. In addition, the result would place RESs at a competitive disadvantage. The First Notice Order does not appear to recognize either of these results.

RESA believes that the presence of a robust and vibrant competitive retail electric market benefits all customers and encourages innovation. However, if the Commission continues to add requirements for RESs' products, and requires no corresponding efforts to create parity between RESs' products and default service, a situation could one day arise where RESs' products are no longer able to compete in the market or against default service. Ultimately, this will greatly diminish the benefits competition has brought consumers in Illinois.

The First Notice Order addresses RESA's competitive parity argument and states that the Commission does consider the costs to RESs of proposed changes in rules and provides some examples. (First Notice Order, p. 7) While RESA appreciates the Commission's consideration of some of RESs' costs in this rule making process, RESA respectfully submits that there should be greater comparison of the costs to RESs of proposed revisions to Part 412 and the expected benefits, if any, to customers of those revisions. In particular, acceptance of RESA's proposed revisions, set forth in these Initial Comments, to the First Notice Rules would eliminate

requirements that would impose significant costs on RESs, with minimal, if any, benefit for customers. However, the competitive parity point is that if the proposed rules, for example, increase the costs of retaining customer calls for RESs, RESs are at a greater comparative disadvantage to the electric utilities which will not experience those same costs (and, even if they did, would recover such costs in their distribution rates, essentially resulting in duplicate payments by customers).

The First Notice Order goes on to state that if RESA is suggesting that more of electric utility supply costs should be recovered through their supply rates, then this suggestion goes beyond the scope of this rulemaking proceeding. (*Id.*) RESA is not making that suggestion in this proceeding. What RESA is requesting here is that the Commission, in this proceeding, eliminate proposed revisions to Parts 412 and 453 which would increase RESs' costs without a corresponding benefit to customers. However, RESA believes that the Commission should, in a separate proceeding, investigate whether there are costs currently recovered by electric utilities through their distribution charges, that should instead be recovered through their supply charges.

III. SPECIFIC COMMENTS

A. Section 412.120, In-person Solicitation

Section 412.120 of the First Notice Rules should be revised by changing the heading back to the current one--Door-to-Door Solicitation--and making conforming changes throughout that section. Other types of face-to-face solicitations should be covered in a new Section 412.125, as proposed by RESA in its Sur-Reply Comments and modified in RESA's Brief on Exceptions.

In support of applying a modified version of the requirements that are currently limited to door-to-door solicitation, the First Notice Order mistakenly relies on the Affidavit of Mr. Peter Muntaner, formerly the Director of the Commission's Consumer Services Division: "Mr. Muntaner has observed trends of common allegations and problems, many of which are face-to-face interactions." (First Notice Order, p. 55, referencing Mr. Muntaner's Affidavit, which was attached to Staff's Verified Initial Comments, at pages 2-11). However, a review of Mr. Muntaner's affidavit at those pages shows only the following two allegations related to in-person solicitation and both of those concern door-to-door marketing:

- (k) RES agents' failure or refusal to observe signs or notices which prohibit soliciting on customer premises. Customers allege that RES agents disregard such notices, and attempt to solicit enrollment on premises where customers have specifically requested that it not take place; and
- (l) Marketing in restricted areas, including in communities where marketing is restricted and in limited access high-rise living centers. Consumers allege that RES agents gain access to a limited-access building either by obtaining the permission of one resident, or based on some pretext, and then attempt to enroll other residents throughout the building without consent to do so.

To the extent that these are problems; they are adequately addressed in proposed Subsections 412.120 (h) and (i) of the First Notice Rules, although they should be appropriately limited to door-to-door solicitation, because these two subsections do not address other types of in-person solicitation

The Commission criticizes RESA's Proposed Section 412.125 by adopting, *verbatim*, the ALJPO's criticism of that section. However, in doing so, the Commission ignores the fact that RESA modified its proposed Section 412.125, as follows, as part of its Brief on Exceptions to address the criticisms of the ALJPO:

- Proposed Section 412.125 clearly applies to any in-person solicitation except door-to-door solicitations;
- Pre-scheduled appointments that are at the customer's premises would be covered by Section 412.120, not 412.125;
- The example of "other in-person solicitations where the enrollment is conducted in a manner consistent with internet enrollment" was deleted from Section 412.125;
- Proposed Section 412.115 (b) includes the requirement that the RES agent make the disclosure that he or she is not representing the utility, a governmental body, or a consumer group.

In short, RESA objects to the First Notice Order's attempt to treat all forms of face-to-face contact in the same manner as traditional door-to-door solicitation. There needs to be some distinction between the situation in which a RES agent goes to a potential customer's residence and other face-to-face contacts in which the customer can choose to initiate the sales discussion. The Commission's expansion of current Section 412.120 to apply to in-person solicitations other than door-to-door would lead to some requirements that defy common sense. For example, Subsection 412.120 (d) would require the RES agent to "leave the premises at the customer's, owner's, or occupant's request", apparently even if the premises were owned or leased by the RES.

RESA's proposed revisions to Section 412.120 and its proposed new Section 412.125 make the necessary distinctions between door-to-door marketing and other types of in-person solicitation. Again, RESA is not asserting that types of in-person contacts, other than door-to-door, do not require governing rules, but rather that those rules should be different than those for traditional door-to-door solicitations, which the customer did not solicit.

RESA has a particular concern about two requirements that were added by the Commission to the ALJPO's Proposed Rules. First, Subsection 412.120 (d) would prohibit RES agents, in the absence of local ordinances or regulations, from soliciting customers at residential dwellings before nine a.m. and after seven p.m. or sunset whichever is earlier. Basically, the First Notice Rules would prohibit RESs from marketing when most customers would be home. The Commission's rationale is that this modification is being made "to ensure the safety of all involved". (First Notice Order, p. 59) RESA is not aware of any evidence in the record in Docket 15-0512 that the hourly restrictions that the Commission proposes to impose address any safety issue. If the local authority does not impose such restrictions on solicitation by any entity, it does not make sense that the Commission should limit marketing by RESs in a community where other entities are free to solicit customers regarding storm doors, siding, window replacements, charitable contributions, etc.

Second, Subsection 412.120 (k) would require RESs to perform criminal background checks on all employees and agents engaged in in-person solicitation and further would require that the background check be performed by an "independent contractor that is a licensed private detective or a similarly qualified entity". RESA is not aware of any Commission rule that places a similar requirement on public utility employees that interact with customers, nor is RESA aware of any evidence in this proceeding that indicates that the substantial costs of hiring private

detectives to conduct background checks of RES employees and agents is justified by any benefit for customers. At a minimum, if criminal background checks are to be required, the pertinent rules should be less prescriptive and RESs should be granted the discretion of seeking that service from a public agency or a commercial entity in the business of providing that service.

Finally, RESA questions the Commission's authority to require, in Subsection 412.120 (g), RESs utilizing in-person solicitation, to obtain both a Letter of Agency and a Third Party Verification. This proposed requirement is in direct conflict with Section 2EE of the Consumer Fraud and Deceptive Business Practices Act.

Section 2EE sets forth how an electric service provider, such as a RES, can switch a customer to its electric service including a requirement that the provider confirm the customer's switch using **one** of the procedures set forth in the Consumer Fraud and Deceptive Business Practices Act—a written or electronic Letter of Agency ("LOA") or a Third-Party Verification ("TPV"). For example in a door-to-door solicitation, the RES agent could obtain a written LOA from the customer. Having done so, the RES has complied with Section 2EE and is allowed to switch the customer. However, under the Commission's proposed Subsection 412.120 (g), the RES must not only obtain the written LOA, it must now also obtain a TVP before it can effectuate the switch. The Commission's belief that its proposed Subsection 412.120 (g) does not conflict with Section 2EE strains credibility: "Requiring both a LOA and a TPV for in-person solicitation ensures that the RES has obtained 'the subscriber's express agreement to accept the offer' (815 ILCS 515/2EE)". The Commission's citation of Section 2EE, which requires one form of authorization, as support for requiring a second form of authorization defies response.

People ex rel. Ryan v. Illinois Commerce Com'n involved an argument that the Commission's rules provided additional time for filing beyond that authorized by the Public Utilities Act. Specifically, appellants had argued that 83 Ill. Adm. Code Section 200.150 (c) of the Commission's Rules of Practice entitled them to four additional days beyond the 30-day statutory limit to file their application for rehearing of a Commission order. The Illinois Appellate Court found otherwise. It found that the Commission does not have the power to modify the statutory 30-day period for filing an application for rehearing under Section 10-113 of the Public Utilities Act:

> The Commission derives its power from the Public Utilities Act and only has the authority that is expressly conferred upon it. [citation omitted] Because the Commission is a creature of the legislature, its acts or orders that fall beyond the purview of the statute creating it are avoid. Since the 30-day time period for filing a rehearing petition is statutory, neither the Commission nor the parties may extend it. [citation omitted] (People ex rel Ryan v. Illinois Commerce Com'n, 298 Ill. App. 3d, 483 (2nd District, 1998, at p. 488)

RESA's proposed revisions to Section 412.120 of the First Notice Rules and its proposed Section 412.125 are included in Attachment A to these Initial Comments.

B. <u>Section 412.140, Inbound Enrollment Calls</u>

RESA opposes the retention periods set forth in Section 412.140, Inbound Enrollment Calls. They are unnecessary because Section 2EE of the Consumer Fraud and Deceptive Business Practices Act already establishes a retention period for successful sales calls of a minimum of two years. Section 2EE does not establish a retention period for unsuccessful sales calls; such a retention period is unnecessary.

However, the primary problem with Proposed Section 412.140 is its requirement of a TPV for in-bound enrollment calls, which conflicts with Section 2EE of the Consumer Fraud

and Deceptive Business Practices Act. Section 2EE treats in-bound calls and other types of marketing, such as telemarketing, differently. For inbound enrollment calls, Section 2EE requires that the RES retain a recording of the call; it does not require a TPV. This makes sense because, in the case of in-bound calls, the customer has chosen to switch to the RES. In this situation, subjecting a customer who wants to sign up for service to a lengthy sales call which will be recorded as required by a pertinent statute and then a redundant, lengthy TPV is hardly customer friendly. The Commission's rules should also recognize the difference.

The First Notice Order does not provide any valid basis for the Commission's authority to expand the requirements of the Consumer Fraud and Deceptive Business Practices Act. By requiring a TPV, the Commission is not simply requiring additional information as it claims, it is requiring a second, redundant form of verification which provides no additional customer benefit. The ALJPO does not provide any valid basis for its authority to require this second, redundant form of verification for inbound enrollment calls. RESA has already demonstrated, in its discussion of Proposed Section 412.120, that the Commission lacks the authority to adopt rules that conflict with the Consumer Fraud and Deceptive Business Practices Act. That demonstration is equally applicable here.

In addition to the legal infirmity of requiring a TPV for in-bound calls, the proposed TPV requirement, the requirement is a disservice to customers. Today's customers are used to speed in their business transactions. When a customer calls to request a service or product, he or she is not expecting to be subjected to a lengthy telephone, let alone a second TPV call which is completely redundant.

In addition to speed of service, requiring a TPV for inbound calls can prevent suppliers from accommodating requests from customers. TPV scripts need to be approved by internal legal and regulatory channels and sent to vendors sometimes weeks ahead of time to ensure they are loaded properly for external vendors. This prevents retailer customer service representatives from offering products to current customers that are not pre-approved. For instance, if a current customer asks a supplier to beat an advertised rate for a certain term, the retailer would be unable to accommodate the customer because the TPV vendor who is reading a pre-approved script would not have this rate/ term/ condition information prior to the caller requesting it.

If somehow the supplier was able to work out some automated communication with external TPV vendors (at significant cost), the process would still be cumbersome for the customer. Assuming a customer were to call into customer service and the representative worked out with the customer new terms/ conditions/ *etc.*, if there were any issues with the TPV (for instance, customer accidentally presses the wrong number) the customer would have his or her call terminated and would have to call back to the call center to start the process all over again with a representative who would most likely not be aware of the customer's previous terms/ rates/ *etc.* Although there may be solutions to accomplish this goal, this would significantly increase costs for suppliers and create a very frustrating experience for customers.

RESA's proposed Section 412.140 is included in Attachment A to these Initial Comments.

C. <u>Section 412.170, Rate Notice to Customers</u>

Proposed Section 412.170 is an example of an inappropriate attempt to over-regulate competitively priced services. Moreover, this proposed section demonstrates the futility of attempting to micro-manage a business without an understanding of how it works. Proposed

Section 412.170 assumes that there is a single variable rate that generally begins on the first day of every month and that it applies to all customers. This assumption has no basis in reality. A RES' variable rate may change due to a variety of factors at any time during the month so long as it is submitted to the electric utility during its prescribed window for billing. For this reason, there may be hundreds of rates provided to customers depending upon the meter read date, when they entered the contract, the term of the contract, the sales channel used to enroll them, *etc*. While proposed Section 412.170 might be workable if there were a single monthly variable rate applicable to all customers, it does not work in the real world. In the real world, RESs would have to develop individual customer portals to access their information, in addition to requiring RES to provide individual rates on those portals. The result would be significant additional costs for RESs which would be passed on the customers, assuming the ability to pass on such costs. If RESs were unable to pass along such costs to their customers, they might very well be unable to offer variable rates to their customers.

Subsection (a) would require RESs to publish variable rates on their websites at least one month in advance of the start of a calendar month.[4] RESs are not able to predict prices in future months and price indices are not available that far in advance. The result would be an end of products that are tied to an index. Moreover, there would be greater month-to-month uncertainty for customers as RESs attempt to avoid increasing rates more than 20% from month to month.

There is no explanation as to why a 30-day requirement is appropriate. While a 30-day requirement may be reasonable for some RESs, it may not be for others. That is why Proposed Section 412.170, if it is not deleted in its entirety, should be stated in terms of a "reasonable" time period. In addition, the longer the period of advance notice required for a RES to publish its

[4] The use of the term "Calendar month" is confusing because billing months are rarely the same as calendar months.

variable rates, the greater the risk that the RES must hedge, which would result in higher prices for customers. Subsection (b) would dictate how RESs use their limited bill message space on a utility's bill. However, a RES has other messages that are equally as important or more important than this information. RESs should be able to decide which messages should be placed on the utility's bill.

Subsection (c) of the ALJPO's Proposed Rules would have required a separate written notice of a variable rate increase of more than 30% from one billing period to the next, a Staff proposal. This is information that is obvious on the face of the bills. However, the First Notice Rules are worse—the Commission accepted a CUB proposal, opposed by Staff and other parties, to require a separate written notice of a variable rate increase of more than 20%. The requirement of a separate written notice, whether at 20% or 30%, is an unnecessary micro-management of RESs' business and subsection (c) should be deleted.

Subsection (d) of the ALJPO's Proposed Rules created an appropriate exception for variable price products that are based on an index. However, the First Notice Rules eliminated that exception, accepting an argument by CUB that this exception "incentivizes a RES to make a small component of each rate determined on a publicly available index, thereby avoid[ing] the vital notification provisions outlined in this rule". (First Notice Order, p. 94) However, the Commission accepted an argument that had no merit because Subsection 412.170(d) of the ALJPO's Proposed Rules clearly stated that "Subsections (a) through (c) shall not apply to contracts which determine the variable rate **solely** on a publicly available index or benchmark".

Subsection 412.170 (e) of the ALJPO's Proposed Rules required written notice when a fixed rate changed to a variable rate pursuant to the sales contract. This is an unnecessary and

redundant requirement-- the sales contract between the RES and its customer sets forth the time at which a fixed rate switches to a variable rate. Moreover, once again, the First Notice Rules were modified to make them worse for RESs. Subsection 412.170 (e) of the First Notice Rules is no longer limited to when a fixed rate changes to a variable rate pursuant to the sales contract. All changes in rates would be the subject of separate written notices. Subsection (e) should be deleted.

Subsection 412.170(f) of the First Notice Rules mandates RESs to post on their websites and through toll-free numbers up to a year of historical price data, data which, as pointed out by RESA and other parties in the NOI proceeding and in the instant proceeding, provides no value to customers as to future rates. There is nothing in such historical information that would help a customer to predict future prices nor predict which supplier would provide him or her with the lowest costs in the future.

It appears that in Proposed Section 412.170, the Commission is attempting to accomplish indirectly what it does not have the authority to accomplish directly—regulate RESs' rates. It is clear that the Commission does not have the authority to regulate RESs' rates. For example, no one would dispute that the Commission cannot prohibit RESs from offering variable rates. However, the numerous onerous and burdensome additional requirements set forth in Proposed Section 412.170 would effectively prohibit RESs from offering variable rates that are tied in any way to an index. This would remove transparency for customers who were able to accurately find out their month's rate as it was tied to a publically available index. This end result is one that the Commission does not have the authority to achieve and results in less transparency for customers.

Given all of the problems with Proposed Section 412.170, it should be deleted in its entirety. In the alternative, RESA's proposal for a more limited Section 412.170 is contained in Attachment A to these Initial Comments.

D. Section 412.240, Contract Renewal

Neither the Staff's Proposed Rules nor the ALJPO's Proposed Rules modified Section 412.240 of the existing rules. Staff did not express any concerns regarding the manner in which RESs have handled contract renewals. Notwithstanding this, the First Notice Rules accept revisions to Section 412.240 proposed by the Attorney General and CUB—revisions which are unnecessary, costly to RESs while providing no benefit to customers, and conflict with the requirements of the Automatic Contract Renewal Act.

The First Notice Rules add a requirement that if the renewal contract's terms differ from those of the existing contract, the RES must include a side-by-side comparison of the existing terms and the new terms. Section 412.240 already requires "a clear disclosure of the contract terms". Requiring a side-by-side comparison is redundant and another example of unnecessary micromanagement of the RESs' operations.

The First Notice Rules require that, in addition to the written notice required by Section 412.170 for changes in rates, the RES must call the customer at least 30 days but not more than 60 days before the end of the initial contract term to notify the customer of the renewal process. Moreover, a second call must be made within 14 days of the first call if the first call does not reach a person or an answering machine. In addition, the First Notice Rules include a requirement that the RES make a record of the calls and retain the record for two years. Staff's Proposed Rules, as originally drafted, included a similar provision for telephonic notice;

however, Staff dropped this requirement because such calls run afoul of the rules of the Federal Communications Commission ("FCC") under the Telephone Consumer Protection Act ("TCPA"). The proposed rules related to RESs being required to make phone calls and follow-up phone calls to Customers is completely at odds with the TCPA. Additionally, the risk of lawsuits against RESs for making such calls is all too real. TCPA is enforced by the FCC and is designed to protect consumers against unsolicited telemarketing calls, prerecorded messages, text messages, automated dialers and faxes. **The TCPA provides for either actual damages or statutory damages ranging from $500.00 to $1,500.00 per violation. 47 U.S.C. § 227**[5] As such, several Companies have been subject to multi-million dollar class action law suits for violations of the TCPA**.** (See for example: AT&T Mobility filed a proposed $45 million settlement agreement in a Montana federal court brought under the TCPA*; Joel Hageman et. al. vs. AT&T Mobility*, LLC CV-13-50-DLC-RWA; September 30, 2014; and Wells Fargo Bank, N.A. will pay approximately $16.3 million to end a proposed class action lawsuit pursuant to the TCPA; *Markos v. Well Fargo Bank, N.A.* (United States District Court for the Northern District of Georgia, Case No. 1:15-CV-01156); April 14, 2015). RESs should not be put at risk of potentially violating, or from even having to defend themselves pursuant to the Federal law under TCPA for such telephone calls under the proposed rules.

Section 412.240 of the First Notice Rules also includes two requirements which make no sense. First, as already stated, the First Notice Rules provide that the phone call requirement is in addition to the written notice required by Section 412.170 for changes in rates during the term of the sales contract. However, Section 412.240 covers contract renewal, whether or not there is a change in rates, and the type of notice required. There is no need to send another written

[5] https://transition.fcc.gov/cgb/policy/TCPA-Rules.pdf

notice. Second, the First Notice Rules provide that telephone calls made pursuant to Subsection 412.240 (b) must comply with the requirements of Section 412.130, Telemarketing. Again, Section 412.130 does not apply here—it covers marketing to a new customer—and includes requirements that make no sense in the context of contract renewal, including making the disclosures contained in Section 412.110 and requiring a Third Party Verification of a customer's decision to switch suppliers.

Finally, Section 412.240 is inconsistent with the Automatic Contract Renewal Act (815 ILCS 601/1 *et seq.*), which sets forth requirements for the automatic renewal of contracts in Illinois. The Automatic Contract Renewal Act contains the disclosure requirements for every contract, with some exceptions, entered into in Illinois which automatically renews absent cancellation by the customer. Section 412.240 conflicts with that Act by imposing numerous additional requirements. The Commission, in its First Notice Order, does not even attempt to justify the need for additional requirements beyond those contained in the Automatic Contract Renewal Act.

IV. RESPONSES TO QUESTIONS RAISED BY THE COMMISSION IN THE FIRST NOTICE ORDER

The First Notice Order contains a number of questions for which the Commission requested comments by the parties. In this section, RESA responds to those questions.

A. Section 412.10, Definition of "Variable rate"

The Commission, in its First Notice Order, adopted CUB's definition of "Variable rate" in Proposed Section 412.10: "'Variable rate' means the charge for electric service changes at any time during the term of the contract. The Commission then ordered the Parties "during the First

Notice Period to provide comment on what effect this definition may have on dynamic or time of use rates". (First Notice Order, p. 18)

Unless the Commission modifies Proposed Section 412.170 of the First Notice Rules, Rate Notice to Customers, it would basically be impossible to offer dynamic or time of use rates. Proposed Section 412.170 clearly contemplates a variable rate that changes monthly, not a dynamic or time of use rate that can change hourly. For example, Proposed Section 412.170 states that at least 30 days prior to the start of a calendar month, a RES must make available on its website, or through the customer's account log-in, the variable rates for its residential customers applicable for the billing cycle starting during the calendar month. Dynamic or real-time rates are clearly not available a month, before customer usage.

B. Section 412.10, "Contract Term"

The Commission orders the Parties during the First Notice Period to "provide comment on whether there is ambiguity between the use of the phrases "contract term", "term of the contract" and "length of the contract". (*Id*.)

RESA sees latent ambiguity among the phrases "contract term", "term of the contract", and "length of the contract". "Contract term" could mean the predetermined length of a contractual relationship or a term or express provision within a contract. The phrase "term of the contract" could mean a predetermined period during which express duties and obligations are to be performed or the period of time during which a contractual relationship exists between a customer and a RES. The term "length of the contract" could be interpreted to mean the length of time during which a contractual relationship exists, but could be interpreted to mean a

predetermined period during which certain duties and obligations exist between the contracting parties.

C. Section 412.115, Uniform Disclosure Statement

The Commission ordered Parties to submit comments on whether Subsection 412.115 (b) (12) should "include language requiring that a new RES customer's first bill include information regarding the customer's right to cancel the contract". (First Notice Order, p. 43)

There are a number of problems here. First, Subsection 412.115 (b) (12) is erroneous and needs to be corrected. The right to terminate a contract within 10 business days after the date of the first bill only applies to contracts which contain an early termination fee (see Section 412.230, Early Termination of Sales Contract). Second, Subsection 412.115 (b) (12) sets forth what needs to be included in the UDS, it is not the appropriate place to set forth a requirement as to what must be included in the sales contract. Third, both the sales contract and the UDS inform the customer of his or her right, if the contract contains an early termination fee, of terminating the sales contract within 10 business days after the date of the first bill with the RES charges on it, without payment of the early termination fee. There is no need to include the same language on the utility bill, especially given the fact that other provisions of the First Notice Rules already interfere with RES's limited space on the electric utility's bill.

D. Section 412.120, In-Person Solicitation—Identification Badges

The Commission ordered the Parties to "provide comment on whether the Commission should require a standard format for the identification badge to be visible on a RES agent's outer garment, including badge size, layout, font size and other characteristics". (First Notice Order, p. 58)

The Commission's consideration of whether to regulate identification badges is a clear example of micro-management. Proposed Section 412.120 already requires the identification badge to "**prominently**" display the RES's agent's full name in "reasonable size font", the agent's ID number, the RES agent's photograph, and the trade name and logo of the RES. The concept of further regulating identification badges borders on the absurd. RESA also notes that the Commission does not have regulations governing the identification badges of public utility employees.

E. Section 412.120 (i), In-Person Solicitation—Multi-Unit Buildings

The Commission orders the Parties to provide comment on what type of consent is required under Proposed Subsection 412.120 (i) and who is authorized to provide consent. (First Notice Order, p. 62)

Proposed Subsection 412.120 (i) is an example of attempting to establish regulations in a vacuum: "The RES agent shall obtain consent to enter multi-unit buildings. Consent obtained to enter a multi-unit building from one prospective customer or occupant of the building shall not constitute consent to market to any other prospective customers in the building without separate consent."

Proposed Subsection 412.120 (i) is too vague for RESA to provide comments on the Commission's questions; rather the Commission's language begs additional questions. For example, is the multi-unit building an apartment building, a condominium, a strip mall? If it's an apartment building, is it a two-flat or a hundred-unit building? If it's a two flat, is there one access door that must be unlocked or can the RES agent walk up or down the stairs and knock on both doors. If it's a condominium unit, do the by-laws permit the condominium association to

allow access to all of the units? If it's a strip mall, why can't the RES agent go into each business? In RESA's opinion, Section 412.120 (i) should be deleted.

F. Section 412.120 (k), In-Person Solicitation, RES Agent Uniforms

The Commission ordered the Parties to submit comment on whether RES agents should be required to wear a uniform of some type while conducting in-person solicitation. (First Notice Order, p. 63)

In RESA's opinion, requiring RES agents to wear uniforms is just another example of extreme micro-management. A RES should enjoy the discretion to require representatives to wear different business attire, such as suits, rather than uniforms, as long as the representatives wear the required identification badge appropriately and prominently identifying the RES which they represent.

G. Section 412.210 (a), Rescission of the Sales Contract

The Commission ordered the Parties to "explore ways to make it easier for customers to cancel contracts that were enrolled in error or were entered into without the requisite consent". (First Notice Order, p. 120)

RESA notes that there is nothing in the First Notice Order that suggests that it is difficult for customers to cancel contracts that were enrolled in error or were unauthorized. Similarly, RESA is not aware of any evidence offered in this proceeding that makes such a suggestion. Consequently, RESA does not think the "exploration" contemplated by the First Notice Order is necessary.

H. Section 412.210 (e), Rescission of Sales Contract

The Commission ordered the parties to submit comments on "when the utility should notify the RES of rescission under subsection (e). (*Id*.)

RESA does not believe that it would be a burden for electric utilities to provide such notice within one business day.

I. Section 412.250, Assignment

The Commission ordered the parties to "submit comment on whether the information contained in subsection (e) should be provided to the customer before the assignment is effective". (*Id*., p. 123) Subsection (e) states: "Within 30 days after the assignment, the new RES provides the customer with a toll-free phone number for billing questions, disputes, and complaints."

The information required by Subsection 412.250 (e) should not be provided in advance of the assignment because, typically, the assignment is part of a business deal which most likely is confidential prior to execution. Moreover, the existing provision has been in effect since Part 412 was adopted and RESA is unaware of any complaints that the notice currently provided is inadequate.

J. Section 412.310 (b), Required RES Information

The Commission ordered Parties to "submit comment on whether subsection (b) should include language requiring that CSD be informed prior to any changes in the documents referenced in subsection (a). (*Id*., p. 124)

RESA would agree that Subsection 412.310 (b) be revised to require that CSD be informed prior to any changes in the documents referenced in Subsection 412.310 (a) but only if the Subsection 412.310 (b) is also revised to require the CSD to inform the RES of any problems or

concerns it has with the changed documents within 10 days after receipt. Absent such a revision, the submission appears to be simply informational, and no change would be necessary.

K. Section 412.310 (c), Required RES Information

The Commission ordered the parties to "submit comment on what information should be included in the notice referred to in subsection (c). (*Id*.) Subsection (c) currently states: "If the RES has declared force majeure within the past 10 years on any contracts to deliver electric services, the RES shall provide notice to the Commission Staff prior to marketing to residential and small commercial customers."

In RESA's opinion, the notice required by Subsection 412.310 (c) would be adequate if it explains where, when and why force majeure was declared.

L. Section 412.320, Dispute Resolution

The Commission ordered the Parties to "submit comment on when the RES must inform the complainant of his/her ability to file an informal complaint with CSD". (*Id*, p. 125)

The current version of Subsection 412.320 (c) states when the RES must inform the complainant of his/her ability to file an informal complaint with CSD—it is when the complainant expresses dissatisfaction with the results of a RES' complaint investigation. Deleting this language from Subsection 412.320 (c) makes no sense and the language should be restored.

For example, assume a customer complained that his or her bill had the wrong rate and the RES corrected the rate and stated that a refund would be issued and this satisfied the customer, the Proposed Subsection 41.320 (c) would require the RES to inform the customer of his or her

right to file an informal complaint with CSD. Why should a RES tell a satisfied customer that he or she can call CSD to file an informal complaint? RESA notes that the Commission would be creating a different informal complaint process for RESs than for public utilities. 83 Ill. Admin. Code Section 280.220 (l) provides that once a final answer is provided to the customer, if the customer indicates non-acceptance of the response, then the utility shall advise the customer of the right to appeal the public utility's answer to CSD for an informal complaint. It makes no more sense to advise RES customers who are satisfied with the RES' resolution of their complaint of the right to file an informal complaint with CSD, then to advise utility customers who are satisfied with the utility's resolution of their complaint with that right.

V. CONCLUSION

For the reasons set forth in these Verified Initial Comments, RESA requests that the First Notice Rules be modified in the manner described herein. The First Notice Rules, as currently drafted, do not represent a fair balance of the interests of Retail Electric Suppliers and their customers. Rather, they would impose significant financial burdens on Retail Electric Suppliers, without supplying any measurable benefit to their customers.

Respectfully submitted,

s/s GERARD T. FOX
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NOTICE OF FILING

Please take note that on December 20, 2016, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Verified Initial Comments of the Retail Energy Supply Association in this proceeding.

/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 Initial 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 15-0512 via electronic delivery on December 20, 2016.

/s/ GERARD T. FOX

Gerard T. Fox