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	)	

REPLY TO BRIEFS ON EXCEPTIONS
THE RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA")[1], by and through its attorney, Gerard T. Fox, pursuant to 83 Ill. Admin. Code Section 200.830 and the Administrative Law Judges' ("ALJ") Ruling, hereby submits its Reply to Briefs on Exceptions to the ALJs' Proposed Order ("ALJPO") in the above-captioned proceeding, the Illinois Commerce Commission's ("Commission") rule making proceeding to consider amendments to 83 Ill. Adm. Code Parts 412, Obligations of Retail Electric Suppliers, and 453, Internet Enrollment Rules.

I. INTRODUCTION

On January 19, 2016, the ALJs filed their ALJPO in this proceeding. In general, the ALJPO reasonably disposed of most of the many contested issues raised in this rule making proceeding. Consequently, RESA limited its Brief on Exceptions, filed on February 9, 2016, to

[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.

nine exceptions to the ALJPO—the nine exceptions that RESA believes are most important and, if implemented, will result in proposed rules that are a reasonable balance of the interests of Retail Electric Suppliers ("RES") and their customers.

On February 9, 2016, the following parties also filed Briefs on Exceptions: the Commission Staff ("Staff"), the Attorney General ("AG"), the Citizens Utility Board ("CUB"), Commonwealth Edison Company ("ComEd"), the Coalition of Energy Suppliers ("CES"), the Environmental Law and Policy Center ("ELPC"), MidAmerican Energy Services, and Nicor Advanced Energy ("NAE"). For the most part, the other parties in this proceeding also demonstrated a willingness to compromise and limited their exceptions. RESA's Reply to Briefs on Exceptions is ordered in the same manner as the ALJPO's First Notice Proposed Rules, followed by matters that do not fall within a particular proposed rule.

II. REPLY TO EXCEPTIONS REGARDING SPECIFIC SECTIONS OF PARTS 412 AND 453

A. Section 412.10, Definitions

1. Inbound Enrollment Call

NAE takes the position that the definition of "Inbound Enrollment Call" should not be expanded (NAE BOE, p. 16). RESA agrees with NAE and took a similar position in its own Brief on Exceptions. (RESA BOE, pp. 7-8) A review of Section 412.140, Inbound Enrollment Calls, demonstrates that the proposed definition of "Inbound Enrollment Call" in Section 412.10 makes no sense. Subsection 412.140 (a) requires the RES agent to fully comply with the requirements of Section 2EE of the Consumer Fraud and Deceptive Business Practices Act. However, Section 2EE only applies to customers who are switching their electric service provider. A customer of a RES who calls that RES to change a "provision of their power or

energy service" is obviously not switching his or her electric service provider. For example, a customer could call his or her RES and request that the RES place the customer on the RES' budget billing plan. This would appear to result in a "change of provision" of the customer's power or energy service. However, it would not require authorization in the manner contemplated by Section 2EE.

2. Variable Rates

CUB proposes that a variable rate is one that changes at any point during its initial contract period. (CUB BOE, sixth page). The ALJPO's Proposed Rules provide that a rate must be fixed for at least six months in order not to be considered a variable rate. In its Brief on Exceptions, RESA proposed that a rate must be fixed for at least three months in order not to be considered a variable rate. (RESA BOE, pp. 8-9) Given the fact that the initial term of a sales contract is often 12 months or is sometimes two years or longer, CUB's proposal goes in the wrong direction and should be rejected. Considering the onerous requirements applied to variable rates in proposed new Section 412.170, it is appropriate to limit their applicability to three months, not extend to a year or longer as proposed by CUB.

B. Section 412.15, Compliance

Staff proposes to modify RESA's proposed Section 412.15, Compliance, primarily because of RESA's provision that RESs be required to implement each requirement as quickly as reasonably practicable, which would create difficulty for Staff to monitor. Staff does not object to RESA's proposed six-month time period. Consequently, Staff proposes to replace RESA's proposed language with the following:

> The Commission shall require implementation of each requirement on [the first day of the month following six months from the date of the Commission's final order], unless the Commission grants an extension of time for cause.

(Staff BOE, pp. 2-5) RESA agrees with Staff's proposed revision to Section 412.15, Compliance.

ComEd also addressed Section 412.15 and proposed an exception to the ALJPO based on ComEd's opinion that because RESA proposed the section in its Sur-Reply Comments, it was untimely. (ComEd BOE, pp. 3-4) RESA disagrees. This is a rulemaking proceeding and the Commission should seek as much input as possible to reach the right decisions. ComEd's proposed language change is unnecessary and should be rejected.

C. Section 412.110, Minimum Contract Terms and Conditions

NAE asserts that Section 412.110, Minimum Contract Terms and Conditions, should be revised to provide RESs with flexibility regarding the presentation of important terms and conditions. (NAE BOE, pp. 17-18) RESA agreed and took a similar position in its own Brief on Exceptions. (RESA BOE, pp. 9-10) The requirement that each RES's sales contracts must follow the exact order of Section 412.110 should be deleted.

As long as the information required for sales contracts is included and clearly articulated in such contracts, the RES should be able to put such information in the order it sees fit. First, RESs already have contracts that they have submitted to the Commission's Consumer Services Division. Those contracts may already meet the proposed requirements of the Staff's Proposed Rules or require very little revision to do so. (For the most part, there are no substantive revisions to the terms and conditions set forth in Section 412.110.) Therefore, subjecting those contracts to major revisions, simply to put them in the order that the Staff desires, and the

ALJPO accepts, is an expensive undertaking, with no meaningful benefit to customers. Second, many RESs operate in different states and attempt to make their sales contracts as uniform as possible for efficiency purposes. The ALJPO's proposed requirement would defeat this purpose, again without any customer benefit to justify it. Thus, the ALJPO's proposed requirement would add costs but provide no benefit.

NAE also proposes to eliminate the maximum two-page limit for sales contracts. (NAE BOE, pp. 19-20) RESA agrees with NAE's analysis and supports its proposal to delete the maximum two-page limit for sales contracts.

D. Section 412.115, Uniform Disclosure Statement

Both the AG and CUB argue against the ALJPO's rejection of their recommendation that RES provide a 12-month history of variable-priced products in their UDSs. (AG BOE, pp. 2-4, CUB BOE, pages 8 and 9) However, they provide the same arguments that were already rejected by the ALJPO at page 43. Repeating those arguments give them no more weight. Moreover, RESA and other parties have already pointed out that historical information does not provide any meaningful information to customers regarding what their rates will be in the future.

E. <u>Section 412.120, In Person Solicitation</u>

Staff proposes to modify Section 412.120 (d) to provide that the customer can only require the RES agent to leave a premise if the customers owns or occupies the premises. This modification is necessary to avoid the absurd result if a customer demands that the RES agent leave his or her own office in the situation in which the customer visits a RES's office. (Staff BOE, pp. 8-9) While this is an improvement over the proposed Section 412.120 (d), it does not go nearly far enough to distinguish between a door-to-door solicitation and an in-person

solicitation that takes place somewhere other than the person's home. For the reasons stated in RESA's Brief on Exceptions at pages 12-14, the ALJPO's Section 412.120 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. RESA is not asserting that these types of in-person contacts do not require governing rules, simply that those rules should be different than those for traditional door-to-door solicitations, which the customer did not solicit. RESA proposes appropriate requirements in its new Section 412.125, In-person solicitation.

CUB proposes to amend Section 412.120 to require that "in person solicitations" be audio and video recorded. (CUB BOE, pages 9-11). The ALJPO analyzes CUB's arguments in support of its proposal and properly rejects them at page 61. CUB's Brief on Exceptions adds nothing of merit to detract from the ALJPO's reasoned rejection.

F. <u>Section 412.140, Inbound Calls</u>

Both NAE and ICEA propose deleting the proposal that inbound enrollment calls be required to have a Third Party Verification. (NAE BOE, pp. 11-15; ICEA BOE, pp. 9-12) RESA made the same proposal during the proceeding and in its Brief on Exceptions. (RESA BOE, pp.16-17) RESA agrees with NAE and ICEA that this requirement is unnecessary, costly, contrary to the best interests of both customers and suppliers, and contrary to law. The requirement should be deleted from the ALJPO's Proposed Rules.

NAE proposes to limit the retention of successful sales calls to the lesser of five years or the time a customer remains a customer of the RES. (NAE BOE, pp. 15-16) RESA objected to the

ALJPO's proposed retention period in its Brief on Exceptions and indicated that it was willing to consider a retention period longer than two years, so long as the retention period was finite. (RESA BOE, p. 16) RESA does not object to NAE's proposed five year retention period.

ICEA proposes to limit the retention of unsuccessful sales calls to 30 days. (ICEA BOE, pp. 14-15). RESA agrees that a 30-day retention period is much more reasonable than the six-month retention period set forth in the ALJPO's Proposed Rules; however, RESA still believes that there should be no retention period at all for calls that do not result in an enrollment. (RESA BOE, p. 16)

G. Section 412.160, On-line Marketing

Section 412.115 (b) (4) contains an exception to the requirement that a UDS disclose the contract price. The exception is when the offer is for a custom price or a price tied to a publicly available index. However, Section 412.160 requires the RES to make all of the disclosures, in an on-line marketing situation, set forth in Section 412.110, which are substantially the same as the UDS requirement, except for the exception for custom pricing or prices tied to a publicly available index. This appears to be an oversight which can be readily corrected by revising Section 412.160 (a) to remove the reference to "Section 412.110" in the first sentence and replace it with a reference to "Section 412.115".

H. Section 412.170, Rate Notice to Customers

Staff proposes to add back numerous disclosure requirements to Section 412.170, requirements that were properly rejected in the ALJPO. (Staff BOE, pp. 9-25) Contrary to Staff's position, the ALJPO's Proposed Section 412.170, while an improvement to Staff's proposal for that section, still contains too many unnecessary disclosure requirements and is an

example of inappropriate over-regulation of competitively priced services. For this reason, during this proceeding and in its Brief on Exceptions, RESA recommends deleting most of the subsections of this new section of Part 412, leaving the following, along with an appropriate exemption in subsection (b) for index products:

Section 412.170 Rate Notice to Customers

(a) At a reasonable time prior to the start of a calendar month, the RES must publish on its website the variable rate(s) for its residential customers applicable for the calendar month in question. In addition, the RES must provide requesting variable rate customers with this rate information via telephone. The customer's contract must contain the website address and toll-free phone number for the customer to retrieve the variable rate information in accordance with this section.

(b) Subsection (a) shall not apply to contracts which determine the variable rate solely on a publicly available index or benchmark. Contracts which determine the variable rate solely on a publicly available index or benchmark shall disclose the formula that will allow a customer to determine the variable rate, based on a publicly available index or benchmark. Each RES shall publish on its website sufficient information to identify the inputs to the formula used to calculate the variable rate, including the timing and location of the index prices and any information necessary to calculate the rate. Unless the RES provides the index or benchmark information to the customer free of charge, the RES shall disclose the charge to obtain the index or benchmark on the UDS and in the contract. If any portion of a customer's supply service is subject to a variable rate that is not based on an index, subsection (a) of this part applies to that variable rate.

If RESA's exception is not adopted, at a minimum, Staff's proposed additional disclosures should be rejected.

I. Section 412.175, RES Agent Training

The AG proposes to add four requirements to Section 412.175, requirements that were considered and rejected by the ALJPO on the basis that they do not add to the proposed rules and

would add significant costs to RESs. (AG BOE, p. 6) RESA agrees with the ALJPO's rejection of the AG's proposal. (ALJPO, pp. 95-96) The AG offers nothing of merit in its Brief on Exceptions that would justify the reversal of the ALJPO's rejection of the four requirements.

J. Section 412.190, Renewable Energy Product Disclosure

While admitting that the ALJPO's Proposed Section 412.190 is an "improvement" over the currently existing section, ELPC argues that "greater disclosure requirements are necessary for customers to be able to fully and evaluate renewable energy electricity products". (ELPC BOE, p. 1) For example, ELPC continues to argue for "up-front disclosures" of the sources of renewable energy product offerings. This was a feature of Staff's originally proposed Section 412.190 which Staff subsequently abandoned in response to the comments of RESA and others which pointed out that this is not how the market works. First, the RES markets renewable energy products to potential customers. Once the RES is able to determine the amount of electricity that is being provided to customers accepting the offer, then the RES can procure the necessary renewable energy resources. The ALJPO recognized this in supporting the version of Section 412.190 contained in the ALJPO's Proposed Rules:

> Staff modified its proposal in its Surreply Comments, to recognize that RESs cannot always know ahead of time the particularities of the renewable energy resources it will procure. This change recognizes the explanations provided by ICEA, RESA, and Ethical regarding the manner in which RESs generally participate in the renewable energy market.

(ALJPO, p. 112) ELPC's proposals to amend Section 412.190 should continue to be rejected.

K. Section 412.230, Early Termination of Sales Contract

The Attorney General proposes to add an additional circumstance under which a customer can terminate a sales contract before the end of the initial term without paying an early termination fee—when the customer entered into a sales contract as a result of a door-to-door solicitation, the customer can terminate the contract within six months without paying an early termination fee. The only support for this proposal is that an Illinois Appellate Court recently affirmed the Commission's approval of a similar proposal for a small-volume gas transportation program that the Commission directed Ameren to implement. (AG BOE, pp. 9-10) There are a number of problems with the AG's proposal. First, the Commission's imposition of this provision was based on the record in the Ameren case, Docket 13-0192. A similar record does not exist in the instant proceeding. Second, this is a rulemaking proceeding applicable to more than one company. Third, Ameren has still not implemented any small-volume transportation gas program so there is no indication whether the six-month termination period without an early termination fee was a good idea. The AG's proposal should be rejected.

L. Section 412.240, Contract Renewal

CUB proposes that RESs should be required to call customers to inform them that their contract is about to be automatically renewed. (CUB BOE, pages 13-14) However, customers have already been notified at least twice—once in the sales contract itself and again when written notice is provided to the customer. Moreover, under the ALJPO's Proposed Rules, a customer receives a third notice—in the UDS, Section 412.115. Finally, the ALJPO's Proposed Section 412.240 is consistent with the Illinois Automatic Contract Renewal Act. The ALJPO properly

rejected CUB's proposal for the reasons set forth in the ALJPO at page 118. CUB offers nothing of merit to change the ALJPO's finding.

ELPC proposes a major change to Section 412.240. ELPC proposes to revise Section 412.240 to provide that "RESs be prohibited from substantively changing the material terms and conditions of contracts when these contracts are automatically renewed". (ELPC BOE, p. 9) ELPC's proposal suffers a number of problems. First, the proposed language is too broad and ambiguous for a rule. What is "substantive"? What is "material"? Certainly one material term would be the price and ELPC's proposal would not allow a reduction or an increase in the price, which in the case of even a one-year term, is most likely necessary to reflect market conditions. Second, ELPC's proposal ignores the fact that Section 412.240 (b) (5) requires the RES to clearly disclose the terms of the renewal contract. Third, ELPC argues that its proposal does not violate the constitutional rights of RESs because "the revisions would not substantially impair any contractual relationship". (ELPC BOE, p. 11) ELPC's argument is absurd. ELPC's proposal takes away a RES' right to renew a contract with changed terms and conditions, subject to the customer's right to reject the renewal offer. Those changes in terms and conditions have to be disclosed to the customer and the contract renewal notice must advise the customer how to cancel the contract. Thus, the customer can refuse to accept any revised terms and conditions and the contract will terminate at the end of its initial term.

M. <u>Section 412.320, Dispute Resolution</u>

Both ICEA and NAE propose revisions to Section 412.320 to attempt to avoid unnecessary disputes. (ICEA BOE, pp.20-21; NAE BOE, p. 21) RESA agrees. Section 412.230, as currently drafted, encourages customers who are satisfied with the RES's resolution of their complaint to

escalate the matter to the Commission's Consumer Services Division. This is a waste of time for the customer, the RES, and the Consumer Services Division.

N. Section 453.20, Criteria by which to Judge the Validity of an Electronic Signature

Staff proposes to revise Section 453.20 to provide that an IP address is not an acceptable method of authorizing a switch to a RES. (Staff BOE, p. 25) RESA agrees that Staff's proposal is appropriate and should be accepted.

III. REPLIES TO OTHER EXCEPTIONS

A. CUB's Purchase of Receivables Proposal

While agreeing that its proposal to open another proceeding to revise the Purchase of Receivables ("POR") tariffs of Ameren and ComEd--to limit the amount of receivables RESs can receive under those tariffs—is outside the scope of this rulemaking proceeding, CUB continues to make this request. (CUB BOE, pages 14-15) CUB notes that the ALJPO states that the Commission has "wide latitude" to regulate POR tariffs pursuant to Section 16-118 (b) (iv) of the Public Utilities Act. (*Id*., p. 15)

However, both the ALJPO and CUB are wrong in relying of this section of the Public Utilities Act. As pointed out by ComEd in its Brief on Exceptions, Section 16-118 (b) does not govern utilities' POR tariffs, it governs electric utilities' tariffs allowing for single billing by RESs. (ComEd BOE, p. 3). Section 16-118 (c) governs utilities' POR tariffs, and provides, in relevant part: "The discount rate shall be based on the electric utility's historical bad debt and any reasonable start-up costs and administrative costs associated with the electric utility's purchase of receivables." (*Id*., p. 2)

The ALJPO properly rejected CUB's POR proposal in this proceeding. That rejection should not be reversed. However, the ALJPO should be revised as proposed by ComEd in its Brief on Exceptions.

B. ICEA Proposal for Annual Compliance Workshops

ICEA recommends that the Commission order a mandatory, annual compliance workshop to be led by Staff. (ICEA BOE, pp. 23-24) RESA agrees with ICEA that such a workshop would be appropriate and helpful. In RESA's opinion, there appears to be some confusion among RESs regarding the meaning of the existing Part 412 and Part 453 rules. Moreover, this confusion will only worsen with the many new rule changes set forth in the ALJPO's Proposed Rules. RESA does not believe that an annual compliance workshop would create an undue burden for the Staff. Therefore, RESA recommends that the ALJPO be modified as proposed by ICEA in this regard.

IV. CONCLUSION

The ALJPO's Proposed 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. They should be modified in the manner set forth in RESA's Brief on Exceptions and this Reply to Briefs on Exceptions.

Respectfully submitted,

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NOTICE OF FILING

Please take note that on February 23, 2016, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Retail Energy Supply Association's Reply to Briefs on Exceptions 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 Retail Energy Supply Association's Reply to Briefs on Exceptions, 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 February 23, 2016.

/s/ GERARD T. FOX

Gerard T. Fox