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 RESPONSE OF
THE RETAIL ENERGY SUPPLY ASSOCIATION
TO MOTION TO COMPEL OF THE
ENVIRONMENTAL LAW AND POLICY CENTER

The Retail Energy Supply Association ("RESA")[1], by and through its attorney, Gerard T. Fox, pursuant to Section 200.190 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), submits its Verified Response to the Motion to Compel ("Motion") of the Environmental Law and Policy Center ("ELPC") directed to RESA 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. ELPC's Motion should be denied for the reasons set forth in this Verified Response.

[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.

I. INTRODUCTION

On November 5, 2015, RESA filed its Verified Initial Comments in this proceeding. On November 19, 2015, RESA filed its Verified Reply Comments in this proceeding. On November 19, 2015, ELPC served its "First Set of Data Requests" to RESA. ELPC requested a response by November 30, 2015. RESA served its response to ELPC's First Set of Data Requests on November 30, 2015, well in advance of the 28-day period allowed for data responses in Commission proceedings. (83 Ill. Admin. Code Section 200.410 (b)) On December 10, 2015, ELPC filed its Motion.

II. ELPC'S MOTION FAILS TO COMPLY WITH THE COMMISSION'S RULES OF PRACTICE BECAUSE IT IS NOT VERIFIED.

Subsection (c) of Section 200.190, Motions, of the Commission's Rules of Practice requires that motions be verified: "Motions based on matter which does not appear of record shall be supported by an affidavit." This is not a mere technicality. ELPC's motion is, for the most part, based on matter which does not appear of record, including matter from its First Set of Data Requests, RESA's responses thereto, and statements of fact that have no basis in the record of this proceeding or elsewhere. For example, ELPC's motion states on page 3: "The burden on RESA to collect this information [the information requested in ELPC's First Set of Data Requests] and provide it to ELPC is also very minimal". There is no support in the record for this statement.

As another example, Paragraph 10 to the Motion is not based on matter which appears of record; rather it addresses a telephone conversation between counsel for ELPC and counsel for RESA. Paragraph 10 includes the statement that ELPC's counsel "made reasonable attempts to

resolve discovery differences". In fact, ELPC's counsel basically asked if RESA was willing to provide the information set forth in its First Set of Data Requests. RESA's counsel explained that RESA did not have the information in its possession and had no access to that information, but that he would ask RESA members if they were willing to produce the information. RESA members either declined to do so or did not offer to do so.

III. THE INFORMATION AND DOCUMENTS SOUGHT BY ELPC'S FIRST SET OF DATA REQUESTS ARE NOT IN RESA'S POSSESSION, NOR DOES RESA HAVE ACCESS TO THAT INFORMATION AND DOCUMENTS.

To clear up any implication in Paragraph 4 of the Motion, RESA's statement, in its responses to ELPC's First Set of Data Requests, that it could not provide the information and documents requested because they were not in RESA's possession, was not an objection; it was a response to the data requests. While ELPC's First Set of Data Requests referred to Supreme Court Rule 214 when it states that that a document "includes all materials subject to discovery pursuant to Illinois Supreme Court Rule 214", it ignores the fundamental principle of that rule—that a party cannot produce documents of which it does not have possession and control.

Supreme Court Rule 214 (c) states, in relevant part:

> A party served with the written request shall (1) identify all materials **in the party's possession** responsive to the request and copy or provide reasonable opportunity for copying or inspections. Production of documents shall be as they are kept in the usual course of business…**if the party claims that the item is not in his or her possession or control…the party may be ordered to submit to examination in open court or by deposition regarding such claim.** (emphasis added)

As stated in RESA's response to ELPC's First Set of Data Requests, RESA is the party in this proceeding. Its individual members are not parties. RESA does not have information regarding which of its members market renewable energy, let alone possess documents related to the marketing of renewable energy by its members.

ELPC in its Motion essentially ignores this fundamental flaw in its First Set of Data Requests by offering rhetoric instead of rationale, claiming that individual Retail Electric Suppliers "should not be able to essentially 'hide behind' trade associations in regulatory proceedings such as this". ELPC's claim has no basis. RESA is the party in this proceeding, having been granted intervenor status by the Administrative Law Judge. RESA's Petition to Intervene and all of its Comments filed in this proceeding clearly state the following: "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." As a party, RESA is obligated to produce information and documents in its possession in response to a properly framed data request. Such is not the case here.

By way of analogy, the Citizens Utility Board ("CUB") is a "statewide organization of residential customers" (CUB Verified Petition to Intervene in Docket 15-0512, page 1). Under ELPC's "logic", a party would be able to serve CUB with a data request asking for information and documents from each of its members regarding statements made by CUB in this proceeding, an absurd result.

The simple fact is that RESA does not have possession or control of the information and documents requested by ELPC, nor does it have the right to demand such information and documents from its members. As stated previously, RESA asked members if they wanted to product such information and documents voluntarily and no member agreed to do so.

IV. CONTRARY TO ELPC'S ARGUMENTS, RESA'S OBJECTIONS TO ELPC'S FIRST SET OF DATA REQUESTS WERE VALID.

A. ELPC'S DATA REQUESTS WERE VAGUE.

Contrary to ELPC's claims in paragraph 5 of its Motion, ELPC's data requests were far from "narrowly-tailored". They were not limited geographically. Some of RESA's members do not market in Illinois so on their face ELPC's data requests appear to seek information from RESA members which offer renewable energy products, but not in Illinois. Also, some of RESA's members that do operate in Illinois also operate in numerous other jurisdictions. Thus, on their face, ELPC's data requests appear to seek information from such RESA members regarding their marketing of renewable energy products in jurisdictions other than Illinois.

In addition, three of the five data requests have no temporal limitation. Thus, for example, ELPC Data Request 1.2 would seek the production of all marketing materials for an unlimited period of time.

B. ELPC'S DATA REQUESTS WERE OVERLY BROAD, ONEROUS AND BURDENSOME.

To the extent that ELPC's data requests on their face would apply to RESA members who do not market in Illinois and to RESA's members' marketing of renewable energy outside of Illinois, both for an unlimited period of time, the data requests are overly broad, onerous and burdensome. Even if the requests were limited to Illinois and a three-year period, the requests would be overly broad in that RESA would be expected to produce from an unknown number of RESA members the following information:

- Copies of their marketing materials for each renewable product;
- The total percentage of each customer's electricity for which the RESA member purchased corresponding RECs;

- The total percentage of RECs purchased that are bundled and unbundled;
- The location (state) and resource type of each specific renewable energy project or facility from which RECs were sourced, and the percentage of RECs sourced from each project or facility; and
- The vintage of the RECs procured and, if multiple REC vintages were procured for a single year, the corresponding percentages for each REC vintage.

Simply put, it is obvious that ELPC's unverified claim that providing "these records to RESA would create a minimal burden on RESA's member RESs" (Motion, p. 3, par. 6) is patently false.

V. ELPC'S DATA REQUESTS WERE NOT REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

First, ELPC's data requests were not reasonably calculated to lead to the discovery of admissible evidence because they were untimely served. As stated previously, ELPC's First Set of Data Requests was served on RESA on November 19, 2015. Had RESA taken the full 28 days to reply, as it was entitled to, RESA's responses would have been due on December 17, 2015. The final date for Surreply Comments in this proceeding was December 3, 2015. The next step in this proceeding is that the Administrative Law Judge ("ALJ") is to issue a Proposed Order ("ALJPO"), which is expected on January 19, 2016. The next step for the parties is to file Briefs on Exceptions on February 9, 2016. However, pursuant to 83 Ill. Admin. Code Section 200.830 (e), [s]tatements of fact in briefs on exceptions and replies to briefs on exceptions shall be supported by citation to the record". Note that in Ill. C. C. Docket 11-0170, the Commission's Chief ALJ issued a ruling striking the portions of a Brief on Exceptions filed by

Chicago Clean Energy, which attempted to introduce new evidence as an attachment to its Brief on Exceptions, finding that to allow such material in the record would violate the Commission's rules and the due process rights of the other parties in the proceeding. (Chief ALJ Ruling in Docket 11-0170, May 14, 2012)

In short, there is no opportunity for ELPC to offer admissible evidence in this proceeding, let alone allow other parties an ability to respond to such evidence. Thus, ELPC's data requests are not reasonably calculated to lead to the discovery of admissible evidence.

Second, ELPC's data requests seek information and documents from non-parties to this proceeding. It is not clear how ELPC expected such information and documents to be admitted into the evidence of this proceeding.

VI. CONCLUSION

For the reasons set forth in this Response, ELPC's Motion to Compel should be denied.

Respectfully submitted,

s/s GERARD T. FOX
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NOTICE OF FILING

Please take note that on December 24, 2015, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Verified Response of the Retail Energy Supply Association to the Motion to Compel of the Environmental Law and Policy Center 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 Response of the Retail Energy Supply Association to the Motion to Compel of the Environmental Law and Policy Center 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 24, 2015.

/s/ GERARD T. FOX

Gerard T. Fox