

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motions)	
)	No. 09-0592
)	
Adoption of 83 Ill. Adm. Code 412 and 453)	

**BRIEF ON EXCEPTIONS OF
THE ILLINOIS COMPETITIVE ENERGY ASSOCIATION**

The Illinois Competitive Energy Association (“ICEA”)¹ submits this Brief on Exceptions (“BOE”) to the Corrected Proposed First Notice Order (the “PO” or “Proposed Order”) issued by the Administrative Law Judge (“ALJ”) on March 18, 2011 regarding the Proposed Part 412 and 453 Rules (“Proposed Rules”). This BOE is filed pursuant to Section 200.820 and Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (“Commission” or “ICC”), 83 Ill. Admin. Code § 200.820 and 200.830. ICEA hereby respectfully submits the suggested replacement language, which is included in Attachment A of the BOE. ICEA’s failure to address any proposals in this BOE shall not be taken as agreement with any such proposal.

Recommendations

- 1. Section 412.10 Amend the definition of “Complaint” to properly reflect the intent of the PO.**

The PO and Appendix A of the PO define the term complaint differently. In Section II of the PO, the PO adopts the definition for complaint recommended by Staff, the Attorney General’s Office (“AG”) and the Citizens Utility Board (“CUB”), which is the definition supported by

¹ The comments expressed in this filing represent the position of ICEA as an organization but may not represent the views of any particular member of ICEA.

ICEA. (ICEA Initial Brief at 21). Staff, AG/CUB and ICEA recommended that the term “entity” used in the definition of complaint be stricken and replaced with the term “a RES” to add clarity, which the PO adopted. (Staff’s Corrected Reply Comments at 4; ICEA Initial Brief at 21). The definition of complaint contained in Section 412.10 of Appendix A, however, does not reflect the definition of complaint that the PO adopted, which is the definition recommended by the Staff, AG, CUB and supported by ICEA. In an effort to reconcile the PO’s definition with Appendix A, ICEA strikes the term “entity” and replaces it with the term “a RES.” ICEA defines complaint in a manner that ICEA believes is consistent with the PO’s intended definition. ICEA’s recommended change is reflected in Attachment A of this BOE.

2. Section 412.10 Eliminate the definition of "Do Not Market List. Or in the alternative adopt a definition that affords greater flexibility for revision in later years.

As noted in the PO, ICEA does not believe a definition of “Do Not Market List” is necessary. (ICEA Initial Brief at 5-7). ICEA is generally not opposed to the creation of “Do Not Market Lists.” The PO unnecessarily defines “Do Not Market List,” (PO at 3), in too restrictive a manner and in a way that, ICEA believes will adversely impact consumers and Retail Electric Suppliers (“RES”). (ICEA Initial Brief at 5-7). ICEA believes that the definition of a "Do Not Market List" should be flexible and provide enhancements or revisions to the parameters and/or administration of such lists. For example, in future years it may be beneficial for customers to be given more options as to which marketing channels might be acceptable. By locking in a rigid definition, the Commission may inadvertently thwart attempts to allow customers greater choice and control in the use of “Do Not Market Lists.”

The PO further finds that Staff's definition of "Do Not Market List" allows for future flexibility. (PO at 3). ICEA respectfully disagrees. While ICEA still prefers its alternative language to allow customers greater choice and control over their use of "Do Not Market Lists," (ICEA Initial Brief at 6-7), ICEA believes that the simple addition of "at a minimum" to the definition provides parties and the Commission much greater flexibility than the current Appendix A language to make changes in the future. (ICEA Initial Brief at 7). Accordingly, ICEA recommends the addition of "at a minimum" to the definition of "Do Not Market List" as reflected in Section 410.10 of Attachment A of the BOE.

3. Section 412.10 Definition of "Residential Customer" is potentially problematic and Possibly confusing to readers with no utility background.

The PO defines "Residential Customer" in a manner that is potentially problematic. The PO's definition could be read to limit the definition of residential customers to only customers of public utilities. Further, it is unclear to ICEA why the 15,000 kilowatt-hour threshold need be mentioned in the residential definition. ICEA respectfully suggests that a shorter and more pointed definition, such as that proposed by ICEA in its Initial Brief, ICEA (ICEA Initial Brief at 8), be adopted. Accordingly, ICEA requests that the Commission adopt the definition of residential customer set forth in Attachment A of the BOE.

4. Section 412.110(j) Rescission is inconsistent.

The PO language in Section 412.110(j) is inconsistent with the definition of rescind in Section 412.10. ICEA respectfully requests that the Commission make the suggested revision in Attachment A to correct this inconsistency.

5. Section 412.110(n) Requirement that the customer must receive a physical copy of any guaranteed savings terms before the rescission period may toll is unnecessary.

While ICEA agrees that a written statement identifying any guaranteed savings must be provided to the customer pursuant to Section 412.110(n), the PO indicates the rescission period would not begin until the Uniform Disclosure Statement is received by the customer. (PO at 15). Section 412.110(n) references Sections 412.130(e) and 412.130(c), which dictate the time frames for the written disclosure based on the date of the enrollment confirmation from the utility. ICEA is unaware of any policy rationale, in the evidentiary record or otherwise, that would support a delay in the start of the rescission period pending receipt of a physical copy of the Uniform Disclosure Statement. Consequently, ICEA respectfully requests the deletion of the sentence on page 15 of the PO that states, that “we note that under this Section, the rescission period shall not toll until the consumer has received written disclosure of the terms.” (PO at 15). ICEA respectfully requests that the Commission make the suggested revision in Attachment B of the BOE.

6. Section 412.110(o) Uniform Disclosure Statement Price per kWh requirement is problematic, needlessly complex, and puts at risk the rationale for the Uniform Disclosure Statement. Further, the requirement for the inclusion of delivery service charges and related data creates an undue administrative burden on RESs, is unnecessary, needlessly complex and has the potential to lead to customer confusion.

The PO indicates that a RES must include in its Uniform Disclosure Statement a price per kilowatt-hour for power and energy service. (PO at 15). Providing customers with the contracted price of electricity is not in and of itself problematic and is perfectly appropriate in situations

where the contracted price is on a per kWh basis. (PO at 11). However, ICEA believes a blanket mandate to provide a per kWh price as provided for in the PO is fundamentally flawed because such a mandate ignores the reality that not all RES products will lend themselves to a per kWh pricing disclosure requirement. (PO at 17-18).

The PO also requires that RESs provide the “average price” for electric supply plus delivery service at three different usage levels (assuming a particular load factor). (PO at 15). This requirement for RESs to provide the “average price” for electric supply and delivery service fails to accommodate a situation where a RES might offer a fixed amount regardless of usage. In that circumstance, the customer is accepting a fixed total billed energy amount for the right to use as much or as little energy as desired rather than a fixed per kWh price where the total billed energy amount will fluctuate with the amount used. The per kWh requirement also ignores the possibility of time of use rates where the per kWh price will vary with when a customer uses the energy. While consistency in how similar products are marketed, such as requiring that per kWh priced offers include energy and transmission when marketed as a price comparison, are welcome by ICEA, a blanket one size fits all framework will have the affect of stifling innovative offers and confusing customers with information overload.

The language in Section 412.110(o) of Appendix A is problematic, needlessly complex, and puts at risk the ease for which the Uniform Disclosure Statement was designed. Further, the new Section 412.110(o) language ignores the very situation the replaced language was intended to address: situations where a RES offers electric service at a fixed monthly charge regardless of usage. If a supplier makes an offer that does not fluctuate with a customer’s usage, a per kWh price or “average price” offers no useful insight to the customer or any meaningful consumer protection.

The PO fails to acknowledge, much less address, ICEA's specific concerns regarding mandatory per kWh pricing, as expressed in ICEA's Verified Reply Comments and ICEA's Initial Brief. CUB and the AG argue that RES should be required to price their products on a per kWh basis. This proposal is fundamentally flawed, for a number of reasons, and should be rejected. First, this reflects a fundamental lack of understanding about the manner in which the competitive market operates as well as the way RESs conduct business. One of the key benefits of retail competition is providing customers with a choice of products and services that can be tailored to meet a customer's particular needs. By way of example, RES may offer electric supply in the form of a fixed price product, or an index product that fluctuates with the market, or some combination of the two. Implementation of the AG/CUB's proposal would eliminate all but the fixed price option, demanding a "one size fits all" approach. The Commission is not and should not be in the business of regulating the particular products and services that a RES may or may not offer, which is precisely the effect that the AG/CUB's proposal would have.

Second, this approach places unnecessary barriers to developments in the energy sector. For instance, as customers become more aware of or interested in environmental issues, they may choose to have a larger percentage of their energy supply mix come from renewable resources. Or customers may have an individual preference for one type of renewable resource over another, which necessarily affects price. Additionally, as advanced metering and Smart Grid are being developed in the State, RESs may offer equipment, devices or services that allow customers to manage their energy needs. Adopting such a "one size fits all" scenario may eliminate a customer's ability to obtain those products and services it desires, and would potentially thwart development of new products and services.

Third, a mandatory price per kWh basis does not exist in other areas. As noted by AG/CUB in their initial comments, a set price per therm is not required on the gas side. (AG/CUB Initial Comments at 6). There is no explanation as to why different, and very limiting, requirements should be imposed on electric suppliers.

Fourth, the AG/CUB's proposal fails to acknowledge that suppliers, even though they are not rate regulated, have certain fixed costs just like utilities do that need to be recovered, regardless of the amount of energy that is consumed. Some suppliers may choose to recover those costs via a fixed monthly charge. The Commission recognizes the critical need for utilities to recover fixed cost as evidenced by its orders in Commonwealth Edison and Ameren Illinois Utilities' rate cases, Docket nos. 07-0566 and 09-0307, where the Commission approved decoupling and straight-fixed variable rate design providing public utilities greater certainty that they would recover their fixed cost. RESs need to recover their fixed cost as well. If the Commission adopts the AG/CUB's proposal then it would signal that the Commission is taking a step backwards as it relates to promoting policies that provide certainty that fixed cost should be recovered thus chilling the development of a competitive retail electric market for residential customers and possibly putting RESs in a competitive disadvantage. (ICEA Verified Reply Comments at 4-6; ICEA Initial Brief at 39).

In addition to the complications with a mandatory per kWh charge as advocated by the AG/CUB, the PO creates a new fundamental flaw with the inclusion of a new element — delivery service charges. Disclosure of the delivery service charges should be the responsibility of the public utilities, which levy and calculate the charges. ICEA notes that RESA's support for such an approach was contingent on the public utilities being required to provide data on their charges to the RES community. (RESA Initial Brief at 7). RESA stated that it:

Strongly recommends the utilities be responsible for the calculation of the delivery or utility charges; in fact, RESA's support of including delivery charges in the Uniform Disclosure Label is dependent on it. It should be the responsibility of the utilities to provide this information to the RES community on an easy-to-access website, and provide notifications to RESs when there is a change or update to the utility charges that impact the disclosure label. This is based on the fact that RESs are not always intimately familiar with utility delivery charges and the frequency of changes to various tariff sheets. The utilities taking on the responsibility of calculating delivery charges is the only method to ensure that RESs who pass-through utility delivery charges are accurately and uniformly expressing the appropriate delivery charges. If the utilities are not willing to take on this role, then RESs should not be required to disclose delivery charges, and the Uniform Disclosure Label should simply provide a disclaimer that the label represents supply charges only. (RESA Initial Brief at 7).

ICEA is not aware of any such affirmative commitment from the utilities and the PO itself is less than clear on this issue.

The pricing contained in the Uniform Disclosure Statement is, and must be, unique to the RES making the offer. The offer is independent of the local distribution utility's delivery services charges, or other utility charges and fees. In requiring an average price, including delivery service, the PO blurs the lines between delivery services and supply services, between utility-provided delivery services and competitive supply services – a clear line of demarcation that has always been maintained until now. The setting of RES prices is not within the jurisdiction of the Commission. Yet by requiring that RESs publicly disclose utility-imposed delivery charges, the PO risks a slippery slope of treating RESs as if they were rate-regulated utilities, which they are not. Moreover, the PO would force RESs to constantly monitor and update their Uniform Disclosure Statement to track independent actions of the utility, rather than updating the Uniform Disclosure Statement when the RESs' unique offer changes, as should be the case. Thus, Section 412.110(o) creates a substantial administrative burden for the RESs. In addition, RES' customers could become quite confused when utility controlled data, which was included in a RES' disclosure, subsequently changes even through the RES' product price

framework remains the same. This could lead RES customers to be confused or question the benefit of their bargain.

The additional language has the very real potential to create customer confusion, without any additional benefit to the customer. Barring specific language regarding charges to be used, and a utility “release” of data, RESs may calculate or update those charges differently or at different times, thereby eliminating the purported benefit of inclusion of items in the first instance. Additionally, the new requirement would have the RES determine how a particular load factor would affect the average price, and likewise have the customer ascertain whether or not a 30% load factor was applicable to them and a new explanation of what a load factor even means to them, a concept which is not applicable to a per kWh. The customer has in their possession a copy of their utility bill and could most readily determine the most accurate assessment of the delivery services charges that apply specifically to them. Providing charts at various supply levels and assuming particular demand is quite complex and would likely only create confusion. Moreover, there is no articulated benefit to the customer, given that their delivery service charges will be the same (based on their rate class and usage), regardless of their choice of electric service provider.

The parties have spent a great deal of time in this proceeding as well as the workshop process establishing a workable framework for the Plug In Illinois website, which allows customers to compare current energy charges of the local utility and competing RES offers. There has been no indication that the current model is unworkable or problematic in any way. Yet, before it has been given a chance to work, the PO disregards those efforts, muddying the waters with inclusion of utility-dictated delivery services charges (which are not in control of any RES) as well as energy supply charges.

Previous discussions on the Uniform Disclosure Statement, and the Appendix to the PO, contemplate that the Uniform Disclosure Statement must be a minimum of 12 point font, and limited to two pages. Using double-side print, the Uniform Disclosure Statement that was contemplated prior to the PO could fit on a single sheet of paper. In contrast, the PO's requirement that the Uniform Disclosure Statement include an average price at different usage levels, assuming a particular load factor, and delivery service charges, requires additional charts and explanation that puts that page limit into jeopardy.

For the reasons enumerated above, ICEA respectfully requests that the PO's Section 412.110(o) be returned to its original intended purpose as reflected in Attachment A of the BOE.

7. Section 412.110(p) Uniform Disclosure Statement on Early Termination Fees is redundant.

The new subsection (p) is redundant and should be deleted as shown in Attachment A of the BOE. The identical requirement is already contained in subsection 412.110(f).

8. 412.120(a) Door-To-Door Solicitation is redundant.

Section 412.120 (a) requires that a RES sales agent “affirmatively represent that it is not affiliated with the electric utility, government bodies, or consumer groups.” (PO at 19); Appendix A at 7). Such a requirement, however, is already contained in Section 412.110(k) of the Uniform Disclosure Statement, which must be physically provided to the customer under Sections 412.120(d) and (e). Additionally, that same information must be verbally disclosed during the sales presentation pursuant to Section 412.120(e). Given those facts, 412.120(a) is redundant, unnecessary and should be deleted.

Furthermore, Section 412.120(b) needs clarification. It specifies that “If any sales solicitation, agreement, contract, or verification is translated into another language and provided to a customer, all of the documents must be provided to the customer in that other language.” (Appendix A at 7). However, it is not at all clear to what “all of the documents” refers. This is even more puzzling in that this was not a recommendation made by any party, nor even raised as an issue by any party, and the PO provides no additional explanation for the inclusion of this recommendation. Accordingly, ICEA respectfully requests that this language be stricken from the proposed rule as shown in Attachment A of the BOE. If this provision were to be included, at a minimum, the language should be made clear that only legal documents that bind the customer or documents that are required to be provided under the Uniform Disclosure Statement rules need be translated into the alternative language and made available to the customer.

9. Section 412.230 Early Termination Fee.

ICEA requests that the language requiring the formula if used to calculate a termination fee be provided in instances where the fee is not a single set amount for the life of a contract. It is possible that the early termination fee could be calculated based on number of months remaining in the contract in which case the amount would not be a set fee but rather a formula (For example, \$ x remaining months = early termination fee). Accordingly, ICEA respectfully suggests that the language set forth in Section 412.230 of Attachment A be adopted.

10. Section 412.200 and 412.300 Application Sections

Sections 412.200 Application of Subpart C and 412.300 Application of Subpart D should be amended to make clear that the rules promulgated under these two sections are not intended to

apply retroactively but are prospective in nature from the date of their adoption. ICEA is unaware of any party who has sought retroactive application of these rules but believes the addition of clarifying language to this effect will provide additional certainty on this issue. In addition, clarifying language is needed to address the situation of a customer agreement signed before the rules were adopted but that comes up for renewal after the rules are adopted. In such circumstances, ICEA believes the new rules would apply to the contract renewal. ICEA has proposed language in Attachment A that addresses both of these situations.

Conclusion

The approach taken by ICEA appropriately balances the need for adequate consumer protections with the equally important goal of preserving and developing retail market competition.

WHEREFORE, ICEA respectfully requests the Commission modify the Proposed Order and associated Appendix A for the proposed Part 412 and 453 Proposed Rules in accordance with the foregoing BOE.

Respectfully Submitted,

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