

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	09-0592
Adoption of 83 Ill. Adm. Code 412 And	:	
Amendment of 83 Ill. Adm. Code 453.	:	

**THE ILLINOIS COMPETITIVE ENERGY ASSOCIATION’S
REPLY BRIEF ON EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE’S
POST-PROHIBITION PROPOSED ORDER**

The Illinois Competitive Energy Association (“ICEA”)¹, pursuant to the direction set forth by the Administrative Law Judge (“ALJ”) in her August 22, 2012 notice to all parties of interest in Illinois Commerce Commission (“ICC” or “Commission”) Docket No. 09-0592, and pursuant to Section 200.830 of the Illinois Commerce Commission’s Rules of Practice, hereby respectfully submits the following Reply Brief on Exceptions to the ALJ’s Post-Prohibition Proposed Order and “Appendix A” of that Order (the “Proposed Rule” or “Proposed Part 412 Rules”).

With over 800,000 residential customers on RES supply and the number growing daily, ICEA reiterates its desire to have a final rule in place as quickly as possible. As modified below, ICEA believes that consumer protection and marketing rules set out in the Proposed Rules are important to ensuring a positive customer experience, protecting the overall health of Illinois’

¹ The Illinois Competitive Energy Association (“ICEA”) is an Illinois-based trade association of competitive energy suppliers dedicated to ensuring that Illinois citizens, businesses, and all other energy consumers have the opportunity to enjoy the many benefits that robust competitive energy markets can bring. ICEA members include alternative retail electric suppliers and alternative gas suppliers whose focus is preserving and championing customer choice of energy supply and Illinois’ competitive electric and natural gas markets. ICEA members are some of the most active electricity and natural gas suppliers in the country’s competitive retail markets (including Illinois) and serve commercial, industrial and public sector customers. ICEA members include Champion Energy Services, Constellation NewEnergy, Direct Energy Services, Exelon Energy Company, FirstEnergy Solutions Corp., Homefield Energy, Integrys Energy Services, MC Squared Energy Services, Nordic Energy Services and Reliant. 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 the ICEA.

competitive electricity market and fostering the continued development of retail energy competition in Illinois. The Illinois competitive retail electric market has been and continues to be a success story for Illinois. ICEA and its member companies (all of which operate totally independently of any affiliates) have been, and continue to be, long standing, active and strong supporters for competitive retail electric markets. ICEA looks forward to continuing to work with the Commission, ORMD and other stakeholders to build upon the successes achieved to date.

ICEA's Reply Brief on Exceptions is organized numerically by proposed rule section in the same order as the Proposed Rules. ICEA hereby submits the following Reply to the Briefs on Exceptions of the Retail Energy Supply Association (hereinafter "RESA BoE"), Commonwealth Edison Company (hereinafter "ComEd BoE"), Interstate Gas Supply, Inc. (hereinafter "IGS BoE"), Staff of the Illinois Commerce Commission (hereinafter "Staff BoE"), Prairie Point Energy, L.L.C. d/b/a Nicor Advanced Energy LLC (hereinafter, "NAE BoE"), Illinois Gas & Electric (hereinafter, "ILG&E BoE") and AEP Energy, Inc., f/k/a BlueStar Energy Services, Inc. (hereinafter, "AEP Energy BoE"):

I. SUBPART A: General

412.10 Definitions

ICEA agrees with Staff that an inadvertent typographical error appears to have occurred regarding the definition of a "Residential Customer." Staff recommends that the definition of a "Residential Customer" means a customer receiving residential service as defined in 83 Ill. Admin. Code 280. (Staff BoE at 3.) ICEA recommends that rather than referencing a citation to another code part of the Illinois Administrative Code that the definition of residential service should be self-contained within Part 412. Doing so will make the definition more user-friendly to the general public. In addition, when relying on references to other code part citations, there is no guarantee that the referenced code section will remain the same. ICEA notes, as many parties are undoubtedly aware, that Part 280 is the subject of an ongoing Commission rulemaking proceeding. The ALJ in that proceeding, ICC Docket No. 06-0703, released a proposed First Notice Order on June 6, 2012. In the proposed Part 280 rules attached to that order, the term "residential service" does not appear as a defined term in Section 280.20. For the above reasons,

ICEA continues to recommend that the proposed definition of residential customer be replaced in its entirety with the following:

“Residential Customer” means a customer receiving retail electric service for household purposes, including service provided through a single meter to one or two dwelling units.

ICEA first made this suggestion in its Comments on the First Notice Rules at 10, filed with the Commission on September 26, 2011 in ICC Docket No. 09-0592 and in Attachment A to that filing.

412.30 Construction of this Part

RESA seeks to add a sentence to Section 412.30 that clarifies that Part 412 sets forth obligations of RESs to all of their customers, including customers obtained through municipal aggregation programs. (RESA BoE at 3.) ICEA notes that proposed sections 412.100, 412.200 and 412.300 already indicate that each of the subparts of the rule apply to RESs serving or seeking to serve residential or small commercial customers. Accordingly, ICEA is unsure why further clarification is necessary. ICEA believes that Part 412 Rules are presumed to apply to government aggregation program customers unless otherwise stated. ICEA notes that RESA raises a number of issues on page 3 of its Brief on Exceptions that appear best raised in the context of the ongoing government aggregation rulemaking.

II. **SUBPART B: Marketing Practices**

412.110(f) Uniform Disclosure Statement- Early Termination Fees

Please refer to discussion below related to Section 412.230. The Commission should strike the cap on early termination fee language in Section 412.110(f) as set forth on page 6 of ICEA’s BoE.

412.110(l) The six “I am not” Statements.

412.120(a)

412.130(a)

412.140(b)

412.150(a)

412.160(a)

ICEA agrees with ComEd’s desire to avoid customer confusion and prevent the possibility of deception. (ComEd BoE at 3.) However, ComEd has not provided any explanation as to why with regard to Sections 412.120(a), 412.130(a), and 412.140(b), RES agents should be required to physically vocalize these statements (as opposed to having the rule prohibit such claims from being made). ICEA believes such a litany of “I am not” statements leads to an awkward sales presentation and potential customer confusion by the customer as to who the RES agent is representing. ICEA believes the language it provided in its Brief on Exceptions (ICEA BoE at 8-9) provides the same

level of consumer protection that ComEd seeks—there would be no change from what ComEd is seeking to prevent RES agents from saying—without the detrimental side effects identified above. In the same manner, ICEA believes its proposed language addresses IGS’s concerns with Section 412.140. (IGS BoE at 1-3.) Accordingly, the Commission should modify the language in these six provisions as set forth by ICEA in its Brief on Exceptions.

III. SUBPART C: Rescission, Deposit, Early Termination, and Automatic Contract Renewal

412.230 Early Termination of Sales Contract- Early Termination Fees

ICEA remains opposed to the Proposed Rule’s cap on early termination fees. ICEA continues to believe that the \$50 cap is misguided, lacks statutory authority and is contrary to Illinois law. ICEA concurs with the arguments seeking to eliminate the cap raised by Staff (Staff BoE at 6-7); RESA (RESA BoE at 10-11); and Nicor Advanced Energy (NAE BoE at 15-16). Accordingly, the Commission should strike the cap language in Section 412.230 as set forth on page 6 of ICEA’s BoE.

ILG&E’s proposal to raise the cap from \$50 to \$150 (ILG&E BoE at 6-7) and related argument are unsupported by any citation to the record in this proceeding and should therefore be disregarded. In addition, any attempt at setting a regulatory prescribed early termination fee amount, whether it be \$150 as suggested by ILG&E or some other amount, would continue to suffer from the same lack of Commission authority to prescribe limits on early termination fees as the current proposed cap.

IV. SUBPART D: Dispute Resolution and Customer Complaint Reports

412.320 Dispute Resolution

ICEA agrees with NAE’s recommendation to strike the sentence in proposed Section 412.320 that would limit a RES’ discretion to require alternative dispute resolution for contract or other issues. (NAE BoE at 16-18.) NAE’s recommendation is consistent with what ICEA proposed on September 26, 2011 on pages 15-17 of its Comments on the Commission’s First Notice Rules.

V. Arguments to Terminate this Docket and Start a New Rulemaking Should Be Rejected

AEP Energy and RESA assert that the Commission should withdraw the Part 412 Rules and start anew. Their arguments should be rejected for two reasons. One, AEP Energy and RESA’s interpretation of JCAR’s Statement of Objection and Filing Prohibition is incomplete and speculative. Second, the recent migration of over 800,000 residential and small commercial customers from utility service to RES supply service is a highly compelling reason why the Commission should enter immediately a Post Prohibition Proposed Order that provides adequate consumer protections and that governs RES marketing practices in this competitive retail electric market.

AEP Energy urges the Commission to terminate this rulemaking and start fresh, thereby leaving behind the procedural irregularities and other difficulties that led to the JCAR's clear rejection of the proposed rules. (AEP Energy BoE at 3.) To support its argument, AEP Energy cites JCAR's June 12, 2012, "Statement of Objection to and Filing Prohibition of Proposed Rulemaking" in which JCAR prohibited the Commission from filing the proposed rules with the Secretary of State "because unresolved issues remain in the rulemaking that JCAR deems a serious threat to the public interest and that it is particularly concerned that the ICC has not been able to cite specific statutory authority for various policies established in the proposed rulemaking." (AEP Energy BoE at 3.) Similarly, citing the same JCAR Statement, RESA recommends that the Commission withdraw the rules submitted to JCAR and republish proposed rules in order to allow sufficient time to devise rules that will be acceptable to JCAR. (RESA BoE at 3.)

ICEA agrees with ComEd that the JCAR Statement did not identify which policies that JCAR had in mind and it did not state JCAR's objections with any more particularity. (ComEd BoE at 2.) However, ICEA believes that the JCAR Statement, alone, should not be the sole source of JCAR communication that the Commission should rely upon to satisfy this legislative committee's Statement of Objection and Filing Prohibition action. ICEA agrees with Staff that JCAR provides additional guidance in this matter (Staff BoE at 1 and 2) in "The Flinn Report: Illinois Regulation," an official publication of weekly regulatory decisions of State agencies published in the Illinois Register and action taken by JCAR. The stated purpose of "The Flinn Report" is **to inform** and involve the public in changes taking place in agency administration. (emphasis added). For convenience of the ALJ, ICEA re-states JCAR's action regarding its Statement of Objection and Filing Prohibition of the Commission's Part 412 Rules from "The Flinn Report" as follows:

"JCAR is particularly concerned that ICC has not been able to cite specific statutory authority for various policies established in the proposed rulemaking. The rulemaking addresses consumer protection and marketing practices of retail electric suppliers. Provisions at issue include rules governing early termination fees and use of utility names and logos." *The Flinn Report: Illinois Regulation, Vol. 36, Issue 24, June 15, 2012 at 2.*

That JCAR identified two specific provisions at issue in "The Flinn Report" is very instructive. A plain reading of this regulatory decision summary in JCAR's official publication leads a reasonable mind to conclude that should the Commission remove these two specific provisions from its proposed Part 412 Rules then, presumably, JCAR will lift its filing prohibition and will issue a Certificate of No Objection. Arguments that JCAR has or may have other objections that could or would imperil this rulemaking beyond the two specific provisions stated in "The Flinn Report" are pure conjecture.

Today, over 800,000 residential and small commercial customers have switched from utility service to RES supply service, a testament to the benefits of a competitive retail electric market. That there are no Part 412 Rules -- essentially, the "RES Code of Conduct" -- in place at this time governing RES obligations to these specific electric consumers is an untenable situation that begs for immediate action. Based on its

understanding of the JCAR Rulemaking Process, ICEA believes that the Commission must act expeditiously to meet the 180-day JCAR rulemaking deadline in order to implement the Part 412 Rules. JCAR's rulemaking deadline is approaching quickly. ICEA believes, based on its calculation of JCAR's Rulemaking Process timeline, that JCAR's action on the Commission's Part 412 Rules must occur no later than JCAR's November, 2012, meeting. Failure to submit the Part 412 Rules to JCAR before this 180-day deadline will require the Commission to re-start this proceeding from square one. ICEA believes that a further delay to implementing RES Obligation Rules is not a viable option for this growing and vibrant market. Moreover, ICEA believes that improvements to the Part 412 Rules can be executed through ORMD-lead workshops and other Commission rulemaking proceedings.

DATED: September 13, 2012

Respectfully Submitted,

**THE ILLINOIS COMPETITIVE
ENERGY ASSOCIATION**

By: /s/ Erin K. Lynch
Attorney for the
Illinois Competitive Energy Association