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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 PRAIRIE POINT
ENERGY, L.L.C. D/B/A NICOR ADVANCED ENERGY LLC**

I. INTRODUCTION

Prairie Point Energy, L.L.C. d/b/a Nicor Advanced Energy LLC (“NAE”), through its attorneys, Rooney Rippie & Ratnaswamy LLP, and pursuant to the schedule adopted by the Administrative Law Judge, submits to the Illinois Commerce Commission (“Commission”) these Verified Reply Comments to the Initial Comments (“Init. Com.”) filed by Ameren Illinois Company d/b/a Ameren Illinois (“Ameren Illinois” or “AIC”), the People of the State of Illinois, by and through Lisa Madigan, Attorney General of the State of Illinois (the “AG”), the Citizens Utility Board (“CUB”), Commonwealth Edison Company (“ComEd”), the Environmental Law & Policy Center (“ELPC”), the Illinois Competitive Energy Association (“ICEA”), the Retail Energy Supply Association (“RESA”), and the Staff of the Commission (“Staff”).

NAE is supportive of regulations designed to protect consumer interest in a manner that is reasonable and fair to both consumers and suppliers that conduct themselves in accordance with applicable requirements. As noted in NAE’s Initial Comments, the Staff Draft Revisions to Code Parts 412 and 453 (“Staff Proposed Revisions”) filed by Staff on October 9, 2015 contain some provisions that do not meet this standard and should not be adopted. Some parties proposed significant additions to Staff Proposed Revisions in their Initial Comments. In general, these proposals go too far, are neither needed nor reasonable, and are improperly premised – for

the most part – on an assumption that suppliers will act improperly and contrary to existing requirements. As pointed out by RESA in its Initial Comments, to the extent that there are suppliers in the marketplace acting contrary to existing requirements, adding more requirements for all suppliers is an unreasonable and illogical response that will not further the goal of addressing any such non-compliant behavior. Moreover, those proposals will add significant costs that will ultimately be reflected in the prices paid by consumers, contrary to their best interest.

NAE focuses its reply on the additional proposals made by CUB and the AG. NAE generally supports the arguments advanced by RESA and ICEA in their Initial Comments. The absence of a response to a specific argument raised in the Initial Comments of other parties should not be interpreted as NAE’s agreement with such argument.

II. SECTION 412.10 DEFINITIONS

1. Inbound Enrollment Call

a. Response to AG

The AG proposes to revise Staff’s definition of “inbound enrollment call” to expand it to cover situations where a Retail Electric Supplier (“RES”) is contacted by its existing customer to “change provision of their” power or energy service. AG Init. Com. at 5. CUB supports this proposal. CUB Init. Com. at 3.¹ NAE opposes this proposal. The regulation of inbound enrollment calls has its genesis in Section 16-115A(b) of the Public Utilities Act (“PUA”), which applies only when a customer will be “switched from another supplier.” 220 ILCS 5/16-115A(b). There is no basis to expand the provisions of Section 412.140 beyond situations where

¹ CUB’s Initial Comments do not contain page numbers. The page references are to the “pdf” document page.

a customer will be switched from another supplier; and expanding Section 412.140 in such a manner would be contrary to law.

b. Response to CUB

CUB proposes to revise Staff's proposed definition to exclude transferred calls. CUB Init. Com. at 3. To the contrary, there is no basis to exclude calls transferred to a RES where the customer authorizes the transfer. There is no basis for forcing the customer to dial a number in that situation versus being transferred from, say, the billing or credit department of a RES. *See* NAE Init. Com. at 2-4.

III. SECTION 412.110 MINIMUM CONTRACT TERMS AND CONDITIONS

A. CUB Proposal to Prohibit Automatic Contract Renewal

CUB proposes to add to the minimum contract terms and conditions a requirement that a "customer must take affirmative action to renew contract by end of initial contract term or customer will be returned to utility supply." CUB Init. Com. at 4-5. The same language is also proposed as an addition to the UDS. *Id.* at 5. CUB's proposal should be rejected. First, it is contrary to the Illinois Automatic Contract Renewal Act, 815 ILCS 601/1 et seq., which allows for automatic contract renewals. Similarly, this proposal is not supported by any authority contained in the PUA. Second, CUB's proposal would have a very detrimental effect on the competitive marketplace and undermines customer choice. Competitive suppliers incur significant costs to acquire customers. Providing for an automatic return of customers to utility supply would add significant additional costs for suppliers with no corresponding benefit to customers. Choice customers have made an affirmative choice to receive RES supply and that choice should not be undone absent a customer decision to do so. Finally, CUB's proposal would violate the "contract clauses" of both the Illinois Constitution (Ill. Const. 1970, art. I, §

16) and the United States Constitution (*see* U.S. Const., art. I, § 10, cl. 1). *See* NAE Init. Com. at 10-11.

IV. SECTION 412.115 UNIFORM DISCLOSURE STATEMENT

A. Response to AG

The AG proposes to expand the content of the uniform disclosure statement (“UDS”) to include the following:

For a variable rate product, the UDS shall state that the current rate per kWh price and a one-year price history, or history for the life of the product, if it has been offered less than one year, is available on the RES's website and at a toll-free number. A RES shall not rename a product in order to avoid disclosure of price history.

AG Init. Com. at 5-6. Staff has designed its proposed UDS requirement to be practicable and take into account information that is available to a RES, providing specific requirements for variable rates based on a publicly available index. The AG’s proposal is made with disregard to or a lack of understanding regarding information that exists for such variable rates and is not practicable. For variable rates that are based on an index plus a fixed amount per kilowatt hour (“kWh”), a RES may frequently change the fixed amount component of its offer based on changing market conditions or other factors. When that occurs, there is no comparable history. The added information also makes it less likely or impossible to keep the UDS to a one page length as required by Staff’s proposal. The AG’s proposal should be rejected.

B. Response to CUB

See Section III.B above.

V. SECTION 412.120 IN-PERSON SOLICITATIONS

A. Response to CUB

CUB proposes to require “hat cams” for in-person solicitations. CUB Init. Com. at 5-6. NAE does not currently utilize the door-to-door marketing channel, but notes that this proposed requirement would add significant costs and raises questions as to customer privacy. CUB’s proposal makes no provision for a customer who wants to obtain information but does not want to consent to being both audio and video recorded. CUB has made no showing that the cost of its proposal would justify its alleged benefits, nor has it demonstrated that the ability of customers to pursue alleged violations in the context of door-to-door sales is somehow ineffective. RES complying with the rules should not be subjected to such requirements.

Similarly, CUB’s proposal to require written consent from the building owner for multi-unit buildings appears designed to eliminate that sales channel as building owners (i.e., landlords) would not generally be present at a multi-unit building. There is no basis to deny customers (tenants) occupying a unit in a multi-unit building from consenting to entry for their unit.

VI. SECTION 412.140 INBOUND ENROLLMENT CALLS

A. Response to AG

The AG proposes to modify subsection (c) of Staff’s proposed Section 412.140 to add a requirement to record inbound enrollment calls that do not result in an enrollment for six months similar to Staff’s proposal for telemarketing calls in Section 412.130. AG Init. Com. at 7. NAE objects to this proposal for the same reason it objected to the inclusion of this same language in Section 412.130. NAE Init. Com. at 27.

The AG also proposes to modify subsection (d) of Staff’s proposed Section 412.140 to require telemarketers to include any information required in the UDS required by proposed

Section 412.115 that is not included in the “disclosures required by subsections (a) and (c) through (m) of Section 412.110. AG Init. Com. at 7-8. As noted in NAE’s Initial Comments, what NAE objects to is requiring the same information to be disclosed multiple times in a single call leading to an enrollment. Such duplication is inefficient and considered offensive rather than helpful to consumers.

VII. SECTION 412.150 DIRECT MAIL

A. Response to AG

The AG proposes to modify subsection (b) of Staff’s proposed Section 412.150 to require that the UDS to be included in direct mail solicitations be provided on a separate page from the other marketing materials. AG Init. Com. at 8. NAE opposes the inclusion of a UDS for direct mail solicitation for the reasons stated in its Initial Comments. NAE Init. Com. at 6-7.

VIII. SECTION 412.170 RATE NOTICE TO CUSTOMERS

A. Response to AG

The AG proposes to modify Staff’s proposed revisions to Section 412.170 to expand the required disclosures to include “the variable rate that will be in effect the following monthly billing period.” AG Init. Com. at 8. This section of Staff’s proposed rule was intended to be practicable and fair to all parties, and takes into account the limited space available, costs, and information known at the time. Variable rates based on an index will not be known ahead of the publishing of a monthly index. The AG’s proposal is not practicable, will add unnecessary costs, and should be rejected.

Similarly, NAE does not support the AG’s proposal to expand the applicability of Staff’s proposed rate change notice requirement for rate increases above 30% to rate increases above 20%. See AG Init. Com. at 8-9. NAE’s general disagreement with Staff’s proposal was

explained in its Initial Comments and is applicable to the AG's proposal as well. NAE Init. Com. at 18. The AG's proposal to expand this requirement would add even more costs. NAE continues to make the alternative argument that any such requirement should allow RES to notify the customer by any means the customer has agreed to accept to reduce costs.

B. Response to CUB

CUB proposes to add a new requirement to Staff's proposed rate notice section requiring RES to send a separate written rate notice to customers each month if the RES is prevented from providing such information on a utility consolidated bill. *See* CUB Init. Com. at 9-11. CUB's proposal is unreasonable, would harm the competitive marketplace, and would add extensive costs without a corresponding benefit. Reasonable requirements are one thing, but imposing unreasonable requirements to do indirectly (regulate RES rates) that which cannot be done directly is improper and must be rejected.

CUB also proposes to delete "or a component of the variable rate" from the exclusion for variable rates based on a publicly available index. NAE understands this language to allow for variable rates where one component of the variable rate formula is an index. CUB's deletion appears intended to defeat the purpose of the exception, and should be rejected.

IX. SECTION 412.175 TRAINING OF RES AGENTS

A. Response to AG

The AG proposes to expand the requirements applicable to RES agent training. AG Init. Com. at 9-10. CUB joins in this proposal. CUB Init. Com. at 11-12. The AG's proposal is premised on an assumption of non-compliant behavior. The types of remedies proposed by the AG may be appropriate for a RES engaging in non-compliant activity, but should not be imposed on all RES where they will add additional costs without additional benefit.

In addition, the proposed prohibition against making a record of a customer's account number unless the customer has agreed to enroll with the RES is not practical. In certain cases, RESs may require customer specific information to make a "custom offer" as recognized in the Staff Proposed Revisions. Such custom offers typically require customer specific information which, with the customer's consent, the RES can obtain. The AG's proposal purports to make this legitimate use of a customer's account number impossible or illegal. Indeed, the proposed rule would require a record of that information be obtained and retained in the form of a recorded telephone call.

The AG also proposes to add a prohibition against a RES providing "to any RES agents any commission, bonus, or other incentive payment based directly or indirectly on success in securing customer enrollments." AG Init. Com. at 9. This proposal is ludicrous, as both in the energy sector and all other business sectors sales agents are typically compensated based on their sales performance. The AG's proposal is contrary to fundamental free market principles, and far exceeds any authority granted in the PUA.

X. 412.210 RESCISSION OF SALES CONTRACT

A. Response to AG

The AG proposes several new requirements with respect to Section 412.210 regarding Rescission of Sales Contracts. CUB joins in this proposal. CUB Init. Com. at 12-13. The AG proposes to add language requiring that the utility notice be sent by U. S. mail. No reason to require use of the U.S. mail where a customer has elected to receive communications electronically is offered. The AG also proposes to dramatically expand the right of rescission so that it applies at any time "upon request by the customer, if the RES is unable to provide verifiable proof of authorization of enrollment." AG Init. Com. at 12. As to the termination fee

concern raised by the AG, this addition is not needed to address that concern. If a RES were unable to prove verification of enrollment, the Commission can already determine that a cancellation fee would not be appropriate. Further, if the rescission period has expired and a customer has received service, termination rather than rescission would be the appropriate remedy. Finally, an inadvertently lost or destroyed verification record should not automatically result in a rescission as suggested by the AG's proposal, and does not necessarily mean that applicable requirements were not followed at the time of enrollment.

XI. SECTION 412.230 EARLY TERMINATION OF SALES CONTRACT

A. Response to AG

The AG proposes to delete the existing language in this Section providing that “[a] customer relying on this provision to avoid an early termination fee shall be precluded from relying upon this provision for 12 months following the date the customer terminated his or her sales contract.” AG Init. Com. at 12. CUB joins in this proposal. CUB Init. Com. at 13. This provision is intended to prevent a customer from abusing the right to terminate or otherwise gaming the system, and for that reason it should be retained. If a customer is actually subjected to non-compliant sales tactics as postulated by the AG, the Commission's general authority over RES provides an adequate means to address any such situations.

XII. SECTION 412.240 CONTRACT RENEWAL

A. Response to AG

NAE understood that Staff's omission of any changes to Section 412.240 was intentional to avoid imposing unnecessary or inefficient costs. The AG proposes to add all of subsection (b)(6), not just the underlined text in that section. *See* AG Init. Com at 13 and Appendix A. The

AG's proposal to require not only a written notice of renewal, but also a telephonic notice is unnecessary, duplicative, and costly, and should be rejected.

Similarly, the AG's proposal to require a notice call and then subject that call to the telemarketing requirements is illogical and improper. Such a call should not be required, and given the mandatory nature of the contact it should not be treated as a RES marketing call. That requirement will also add unnecessary costs.

XIII. SECTION 412.320 DISPUTE RESOLUTION

A. Response to AG

The AG proposes to delete the existing language limiting the requirement to advise a customer of the ability to pursue their claim before the Commission to situations where "a complainant is dissatisfied with the results of an RES' complaint investigation." AG Init. Com. at 14. First, a RES already provides a customer information on how to contact the Commission to pursue a complaint. 83 Ill. Adm. Code 412.110(c). If the customer has not expressed dissatisfaction with a RES' complaint investigation, there is no need to again advise the customer of their ability to pursue a complaint at the Commission. That requirement would add needless costs, and encourage escalation where it would otherwise not be warranted.

XIV. OTHER NEW PROPOSALS

A. AG Proposed Section 412.XXX General Disclosure Requirements

The AG proposes adding a new General Disclosure Requirement. AG Init. Com. at 14-15. CUB supports this proposal. CUB Init. Com. at 3. The proposed addition is not needed, and duplicates in large measure existing requirements. To the extent it goes beyond current provisions, the AG appears to make a proposal that is not within the Commission's general authority.

B. AG Proposed Section 412.XXX Use of Utility Name or Logo Prohibited

The AG proposal to add new restrictions on references to a utility name or logo in any RES material. AG Init. Com. at 15-16. CUB echoes this same proposal. CUB Init. Com. at 4. While the AG's proposed restriction appears to be intended to deter improper conduct, it is worded broadly so as to prohibit any mention of a utility name in RES material. This goes too far, as a RES is required to advise consumers that their electric utility remains responsible for the delivery of power and energy to the customer's premises and will continue to respond to any service calls and emergencies. 83 Ill. Adm. Code 412.110(m). These requirements are retained in the Staff Proposed Revisions. RESs are similarly required to provide contact information for the electric utility. Proposed Section 412.110(n). Thus, the AG's proposal should be rejected because it would prohibit appropriate references to the customer's electric utility, and would conflict with other requirements.

The AG's citation to *Illinois Power Co. v. Illinois Commerce Comm'n*, 316 Ill. App. 3d 254 (5th Dist. 2000) does not support its argument. See AG Init. Com. at 15-16. In *Illinois Power* the appellate court recognized that the regulation of commercial speech is subject to the intermediate level of scrutiny that requires application of "a four-part analysis: (1) the expression must be protected by the first amendment, (2) the asserted government interest must be substantial, (3) the regulation must directly advance the governmental interest asserted, and (4) the regulation must be no more extensive than necessary to serve the interest." *Id.* at 259-60 (citations omitted). The court in *Illinois Power* found that advertising and marketing was protected by the First Amendment as commercial free speech, and that insuring nondiscrimination among affiliated and non-affiliated entities in the development of a competitive market for electric supply was a substantial governmental interest directly advanced by the ban on joint marketing and advertising. *Id.* at 260. Significantly, the court found that the

ban on joint marketing and advertising under Section 450.25 was no more extensive than necessary because it “still allows all utilities and ARES to advertise on their own behalf ... [and] also **allows affiliated ARES to use the utilities' corporate name and logo.**” *Id.* at 261 (emphasis added).

In contrast, the AG’s proposal would impose a ban on any use of a utility’s name or logo to market residential electric supply services, is not specifically tailored to serve a substantial governmental interest, and would purport to prohibit the allowed use of a utility’s name or logo that was the basis for the *Illinois Power* court’s determination that Section 450.25 was narrowly tailored and not more extensive than necessary to serve the state’s interest in creating a competitive market.

Finally, as explained in NAE’s Initial Comments with respect to the name and logo restrictions proposed by Staff, any name and logo restrictions designed to ensure a RES or RES agent does not impersonate a customer’s electric utility or suggest an affiliation with the customer’s electric utility when in fact no such authorized affiliation exists should contain the following disclaimer language for the reasons indicated in NAE’s Initial Comments: “However, nothing in this subsection shall be construed as prohibiting an affiliated interest in competition with ARES from using the corporate name or logo of an electric utility or electric utility holding company.” NAE Init. Com. at 19-20.

C. AG Proposed Section 412.XXX Supplier Liability for its Agent

The AG proposes to add a new section regarding supplier liability for its agent. AG Init. Com. at 16. CUB supports this proposal. CUB Init. Com. at 4. The proponents fail to establish a need for this provision. Illinois agency law generally provides that a principal is responsible for the acts of its agent. There is simply no issue here that requires a rule to address it.

D. AG Proposed Section 412.XXX Price Comparison Required

The AG proposes to add yet another disclosure requirement to the UDS. AG Init. Com. at 16-17. This requirement is not needed and suffers from the same issues with respect to the UDS previously identified, including causing the UDS to exceed the specified one page limit.

E. AG Proposed Section 412.XXX Acceptance of Transferred Utility Calls Prohibited

The AG proposes to add a new section prohibiting RES from accepting a call transferred from a utility. AG Init. Com. at 17-18. CUB joins in this proposal. CUB Init. Com. at 8. The AG and CUB propose restricting a RES from taking any customer telephone calls that are transferred to it from an electric utility potentially for any reason including a supplier billing problem, other service related matter concerning the customer's choice account, or conceivably some other sales/marketing initiative offered by the RES. First, NAE is unaware of any current practice described where an electric utility routinely forwards calls to a RES for these purposes as described. Even if it were the case that such a practice existed, the proposed restriction by AG and CUB is faulty on numerous fronts.

First, there is no way, unless the transferring party introduces itself to the receiving party at the point of the transferred call (i.e. "warm" transfer) that the receiving party would ever be aware of who is actually transferring the call to the receiving party. Therefore, if a RES happened to receive an incidental transferred call from an electric utility, the RES would have no idea the call originated from the utility if the utility did not introduce itself at the point of the transferred call (i.e. "cold" transfer). This circumstance would make it virtually impossible for a RES to comply with such a rule. Second, if an electric utility did have a practice whereby they routinely transferred calls to a supplier for a service matter, it would be improper to prohibit the RES from taking a call from one of its customers and this would certainly result in a very

frustrating and dissatisfactory experience for the customer. It could even lead to complaints, something most RES try to avoid through positive interaction with the customer. The AG's proposal is also based on its assumption of improper and non-compliant conduct, which is inappropriate and provides no basis for the proposal. There is no basis in law that would prevent a RES from accepting a call that is transferred from a utility. Further, there is no valid basis offered for this deprivation of protected commercial free speech.

F. AG Proposed Section 412.XXX Vagueness, Ambiguity, or Obscurity of Contract Terms Construed in Favor of the Customer

The AG proposes to add a new section that would address construction of RES contracts. AG Init. Com. at 18. There is simply no need for this provision, as RESs are typically the drafters of contracts and any ambiguity is already resolved against the drafter under general principles of contract construction. Moreover, the proposal clearly goes beyond the Commission's authority, purporting to address "any dispute between a customer and a RES" and not just disputes brought before the Commission.

G. CUB Proposals to Reintroduce Language Rejected by Staff

Without supporting argument, CUB states it supports incorporating language rejected by Staff in its filed rule. CUB Init. Com. at 13-14. Most of CUB's proposals are addressed above in responding to the AG. To the extent CUB's has additional proposals, they should also be rejected because Staff properly excluded proposals that were either not practical or too costly for any related benefit.

XV. CONCLUSION

WHEREFORE, for all the foregoing reasons, NAE respectfully requests that the proposed rule be modified as proposed herein.

Dated: November 19, 2015

Respectfully submitted,
Prairie Point Energy, L.L.C. d/b/a
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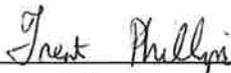
VERIFICATION

Paul DeLacey, being first duly sworn, deposes and states that he is Director of Corporate Development for Prairie Point Energy, L.L.C. d/b/a Nicor Advanced Energy LLC, that he has read the foregoing Verified Reply Comments of Prairie Point Energy, L.L.C. d/b/a Nicor Advanced Energy LLC, that he knows the contents thereof, and that the statements contained therein are true and correct to the best of his knowledge, information and belief.


Paul DeLacey

Subscribed and sworn to before me
this 19th day of November, 2015

My commission expires: 06/05/18



Notary Public



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Verified Reply Comments of Prairie Point Energy, L.L.C. d/b/a Nicor Advanced Energy has been served upon all parties on the attached service list by electronic mail, on the 19th day of November, 2015.


Carmen L. Fosco