

COMMENTS OF LIBERTY POWER TO CONSUMER PROTECTION RULES DRAFT
Submitted September 25, 2009

Introduction

Liberty Power is certified as a Alternative Retail Electric Supplier (“RES”) in Illinois and has been an active participant in the collaborative workshops leading up to creation of the this Consumer Protection Rules First Notice Draft circulated by the Office of Retail Market Development (“ORMD”) on September 16, 2009.

Liberty Power thanks the ORMD Staff and the other working group participants that have put so much time, effort, and thought into developing these drafted rules. The company appreciates the opportunity to provide comments and questions as it relates to these proposed rules and the further development of a robust competitive marketplace in Illinois.

Our comments and questions can be reviewed below. Many of Liberty Power’s remaining concerns were previously identified and discussed in the company’s comments to the ORMD Straw Man Version 1.2 which were submitted on March 23, 2009. The comments provided herein will not restate each individual argument once again, but focuses on remaining significant issues and other provisions not previously addressed.

Absence of a comment on any particular section should not be viewed as a lack of interest or position by Liberty Power. Liberty Power reserves the right to amend, revise, or otherwise add to any comments and questions provided herein after further discussion and consideration.

Section 410.500 – Application of Subpart F

Liberty Power understands the intent of the rule is to apply certain provisions of the rule to residential and small commercial customers, and other provisions of the rule to all customers. However, we recommend the proposed rule language be modified to clarify this intent. As currently drafted, an interpretation and legal argument could be made that if a RES is marketing to residential or small commercial

customers then all customers are afforded those same protections regardless of their customer class. In other words, the rule could be interpreted to provide a Fortune 500 company the exact same protections of a residential customer simply because the RES soliciting the Fortune 500 company also serves residents. To clarify the intent of the rule, Liberty Power suggests the following modified language:

The provisions of this Subpart shall apply to retail electric suppliers in connection with the provision of service and marketing to ~~servicing or seeking to serve~~ residential or small commercial customers with the following exceptions: Sections 410.560 a), b) and c) and 410.570 shall apply to retail electric suppliers in connection with the provision of service and marketing to ~~servicing or seeking to serve~~ any customer class.

Other similar sections would also need to be modified in the same way, namely: Section 410.600 (Application of Subpart G), Section 410.700 (Application of Subpart H), and Section 410.800 (Application of Subpart I).

Section 410.510 – In-Person Marketing

1. Requirement to Produce Identification

Liberty Power suggests modification be made to Section 410.510(a) and provides suggested edits to the proposed language below. We believe the rule is intended to apply to “cold door-to-door” marketing practices. A requirement for a sales agent to produce identification when they have a prescheduled appointment is unnecessary as their presence is expected and invited:

a) Sales agents who contact customers in person at a location other than the RES’s place of business for the purpose of selling any product or service offered by the RES, without a scheduled appointment, shall produce identification as soon as possible and prior to describing any products or services offered by the RES. This identification shall be visible at all times and prominently display the following:

2. Unique Third Party Verification ("TPV") Requirement for In-Person Marketing

As currently drafted, various marketing methods (in-person, telemarketing, in-bound enrollment calls) contain a requirement that "if third party verification is used to authorize a customer's enrollment, the third-party verifier must require the customer to verbally acknowledge that he or she understands the uniform disclosure statement." However, Section 410.510(e) also requires that a customer acknowledge that they were left with a copy of the Uniform Disclosure Statement. No other form of marketing requires a TPV to verify that the customer was left with a copy of the uniform disclosure statement.

Liberty Power recommends, to the extent possible, the ORMD creates uniform requirements for all marketing methods in order to minimize transaction costs. By having a unique requirement that pertains only to in-person marketing, it would require that a third party verifier design unique TPVs that apply only to customers who were marketed to in-person. Specifically, a TPV applicable to in-person marketing would require the customer to acknowledge they are in possession of the uniform disclosure statement, while all other TPVs only require the customer acknowledge that they understand the contents of the disclosure statement. A process would also have to be put in place to ensure a third party verifier knows by which method the customer was solicited in order to determine which TPV applies (assuming the RES uses multiple forms of marketing). This requirement is impractical, an administrative burden, and would result in higher costs to the RES which would ultimately be passed on to the customer. A requirement to leave the uniform disclosure behind and to verify the customer understands it should be sufficient. Liberty Power suggests the proposed rule be modified in accordance with our argument above:

e) If a customer's enrollment is authorized by a third party verification as a result of in-person marketing, the third party verifier shall require the customer to verbally acknowledge that he or she understands the uniform disclosure statement, ~~and that a copy of the uniform disclosure statement was left with the customer.~~

3. Reading of the Uniform Disclosure Statement

Liberty Power remains concerned over the requirement to read to the customer all the items within the uniform disclosure statement (note: this requirement is not limited to in-person marketing, but applies to telemarketing and in-bound enrollment calls as well). For convenience, we have provided our previously submitted comments and have elaborated further on our argument.

Liberty Power does not believe sales agents should be required *to read* to the customer all the items within the uniform disclosure statement. At most the sales agent should be obligated to provide the customer with the opportunity to read the uniform disclosure statement themselves. If required to have the statement actually read to them, many customers, particularly business owners whose time is very limited, may actually be annoyed by this process. Most, if not all of the items in the uniform disclosure statement would have already been covered during the course of the sales presentation. To require another separate process where these items would once again be disclosed is both duplicative and time consuming. The Commission Staff should focus on requirements that ensure important contractual information is included as part of the sales presentation and provided to the customer but not require a separate process where all the items would have to be read to the customer. Below, Liberty Power has provided suggested modifications to the current language:

- b) If a customer elects to enroll with the RES, the sales agent shall [encourage the customer to](#) read ~~to the customer~~ all items within the uniform disclosure statement. The minimum list of items to be included in the disclosure statement is contained in Section 410.730.

4. Do Not Market List(s)

Section 410.510(h) alludes to a RES's "Do Not Market List" while Section 410.560(d) alludes to the *electric utility's* "Do Not Market List". To prevent confusion (i.e. which list supersedes the other, do the lists need to be synced, etc.) we believe any "Do Not Market List(s)" be maintained and distributed by the utilities. Therefore, Liberty Power has provided suggested modifications to both subsections mentioned above:

h) The sales agent shall [provide to the customer information on how to enroll onto the electric utility's](#) ~~add the person's name to the RES's "Do Not Market List"~~ upon that person's request.

d) A RES and its sales agents shall refrain from any direct marketing or soliciting of electric supply service to customers on the electric utility's "Do Not Market List", which the [electric utility shall provide to the](#) RES ~~shall obtain~~ at least monthly on the 15th calendar day of the month ~~from the electric utility~~. If the 15th calendar day is a non-business day then the [electric utility](#) RES ~~shall obtain~~ [provide](#) the list [to the RES](#) on the next business day following the 15th calendar day of that month. The "Do Not Market List" maintained by the electric utility shall contain the customer's name, address, and phone number(s). [A RES shall use the most current version of the "Do Not Market List" available; however, in assessing compliance with this section, 31 days will be afforded to the RES to account for the time required by the RES to disseminate and process the list.](#)

Section 410.520 – Telemarketing

1. Uniform Disclosure Statement Acknowledgement

In general, Liberty Power is concerned about the redundancy of certain provisions regarding the uniform disclosure statement. We recognize that rules should ensure that customers are well informed about their selected products and services, but should not be overly duplicative. The enrollment process should not only clearly disclose pertinent information to the customer, but should also be part of an easy, convenient process to enhance the customer's experience. In order to create a robust competitive market, the enrollment process should be relatively simple, direct process and not leave the customer believing that switching providers is a "headache" or overly complicated process, deterring them from switching providers in the future.

Specifically, Section 410.510(b), Section 410.520(c), and Section 410.530(2) all require the sales agent *to read* to the customer the uniform disclosure statement. Sections 410.510(e), 410.520(e), 410.530(3), and 410.540(d) all require the customer to verbally acknowledge they understand the uniform disclosure statement when enrolling a customer through a TPV. Additionally, Section 2EE of 815 ILCS 505 (which governs the third-party verification method) must also be adhered to. From a practical standpoint, this creates several redundancies best illustrated by an example.

Imagine a sales agent is presenting an electric product to a customer. During the sales solicitation the sales agent typically discusses items such the name of the RES, the length of the contract, the price and charges related to the product or service, if any early termination fees apply, the fact that the RES is an independent seller of electricity, and other relevant information. Under the proposed rules, if the customer wants to enroll with the RES, then prior to enrollment the sales agent would have *to read* to the customer the uniform disclosure statement. The statement as contemplated in Section 410.730 would disclose the length of contract, the price and charges related to the product or service, if any early termination fees apply, the fact that the RES is an independent seller of electricity, and other relevant information. Once the sales agent has finished reading the uniform disclosure statement the customer can be transferred to an independent third-party verifier to complete the enrollment process. As currently contemplated, the TPV would then require the customer acknowledge that they understand the uniform disclosure statement as well as ask the customer to verify “the price of the service to be supplied and the material terms and conditions of the service being offered, including if any early termination fees apply” in accordance with Section 2EE of 815 ILCS 505.

At this time, Liberty Power does not have any specific language modifications to address this concern. However, we hope by identifying the problem we can facilitate more robust conversation on this issue at the next scheduled workshop where these drafted rules will be further vetted and discussed.

Section 410.560 – Training of Sales Agents

2. Knowledge of RES's Products and Services

Liberty Power has some concerns of Section 410.560 (Training of RES sales agents) applying to all customer classes as currently contemplated by Section 410.500 (Application of Subpart F). Due to its application to all customer classes, as drafted, the language suggests that all sales agents have knowledge of all products and services (Note: Liberty Power has construed the word "should" in the drafted language to mean "shall"). This concern was previously raised by Liberty Power and commented on. For convenience purposes, Liberty has supplied those previous comments once again here and has further elaborated on the issue.

Many RES have sales teams that are dedicated to one customer class versus another. In the opinion of Liberty Power, it is unreasonable and inefficient for a sales agent that is dedicated to sales and marketing of large commercial and industrial customers to have thorough knowledge of all products (including terms and conditions) of residential products and vice-versa (for example). This proposed rule would require all sales agents be trained on all products, regardless whether or not they have been or will ever be responsible for marketing that product. The additional training requirements would result in higher costs to the RES which would ultimately be passed on to the customer with no perceived additional benefit to the customer. Additionally, the rule as currently contemplated seems to discourage a RES from dividing their sales force into divisions that are dedicated to one customer class versus another in order to develop an expertise that pertains to one set of products or services. In Liberty Power's opinion, greater knowledge about a specific suite of products ultimately results in a better customer experience when selecting a product and the ORMD should not discourage the development of "subject matter expertise". In order to address these concerns, Liberty Power has provided suggested modified language below:

- e) All sales agents engaged in sales activity in Illinois ~~should~~ shall be familiar with the RES's products and services offered in Illinois, as they pertain to the customer class that the sales agent is actively marketing to, including the rates, applicable termination fees if any, payment options and the customers' right to cancel. In addition, the sales agents shall have the ability to provide the customer with a toll-free number for billing questions, disputes, and complaints, as well as the Commission's toll-free phone number for

complaints.

Another possible solution that should be considered to address this issue is modifying Section 410.500 (Application of Subpart F) so that all of Subpart F only applies to residential and small commercial customers:

The provisions of this Subpart shall apply to retail electric suppliers in connection with the provision of service and marketing to ~~servicing or seeking to serve residential or small commercial customers with the following exceptions: Sections 410.560 a), b) and c) and 410.570 shall apply to retail electric suppliers serving or seeking to serve any customer class.~~

However, it should be noted that if only Section 410.500 is modified, all sales agents would still be required to be familiar with all residential and small commercial customers, even though they may not be actively marketing that product. Liberty Power believes both modifications suggested above are appropriate and should be adopted.

Section 410.520 – Telemarketing

1. Delivery method of Uniform Disclosure Statement

Liberty Power suggests Section 410.520(f) and similar language in 410.530(4) be modified to allow for other methods for the delivery (i.e. electronic mail or fax) of the uniform disclosure statement and sales contract, if the customer agrees to receive these documents in this manner. This is consistent with arguments both Liberty Power and BlueStar made in previously submitted comments. Suggested modified language is provided below:

The written disclosure statement and sales contract must be provided or mailed to the customer within 3 business days of the utility confirmation of accepted enrollment. The uniform disclosure statement can be either part of the first page of the sales contract or a separate document.

Section 410.630 – Early Termination Fee

1. Early Termination Fee “Waiver Period”

Liberty Power continues to be very concerned with the drafted language of this subsection. Allowing a customer to cancel a contract without early termination fees being applicable up to ten (10) business days after the date of the first bill issued is unreasonable, would harm customers due to higher prices, and cause undue harm on the competitive market. This concern was previously raised by Liberty Power and commented on. For convenience purposes, Liberty has supplied those previous comments once again here and has further elaborated on the issue.

One of the attributes of a robust competitive market is the number of product types available to customers, so that each may select an electric product that fits their particular needs. Many customers prefer the budget certainty that can be achieved through a fixed-rate product. This language would effectively eliminate the offering of long-term, fixed-rate contracts in the market. Most RES have prudent, conservative hedging practices to ensure the long-term viability of the company. Conservative hedging practices dictate that an RES pre-purchases 100% (or nearly 100%) of the estimated usage for the contract term within a few days of contract execution. To allow a customer to cancel a fixed-price contract without penalty for as many as 87 days¹ after signing the contract, would preclude an RES from recovering actual incurred damages, and will have a huge detrimental effect on the market's access to products that promote and support budget certainty.

First and foremost, many RES will simply not take on the added risks of offering a fixed-price contract. Those that do, will offer prices at significantly higher rates due to the added risks associated with the possibility of a customer canceling their contract so many days after originally being contracted. Secondly, RES that continue to offer long-term contracts will do so at a great risk to the overall financial viability of the company. If not well managed, subsequent decisions may ultimately force

¹ 87 day scenario: 1 day to contract with customer + 2 days for processing contract and submission of EDI transaction to utility + up to 37 days for switch to occur (if date of switch request is less than 7 days prior to the customer's next meter read date) + 31 day billing cycle + 2 days to process invoice + 14 calendar days for rescission (assumes first bill issued on a Friday)

many RES to go out of business. Aside from the immediate negative effects on customers caused by their electric provider going out of business, fewer retail competitors in the market will ultimately lead to less competitive pricing offers being made available, causing further harm to customers.

As alluded to by BlueStar in previous comments, a provision that allows a customer to cancel a contract ten (10) days after receiving their first bill would create a structure that could be gamed by customers. In a downward market, a customer could lock themselves into a fixed-price contract when they believe market rates to be at their lowest. However, if commodity prices continue to fall during the time period between customer enrollment and the receipt of their first bill, they could cancel the contract, not be subjected to any early termination fees, and sign a new contract at a lower rate. This process could feasibly continue on and on until market rates begin to trend upward. The purpose of a fixed price contract is to provide certainty to risk adverse customers. If a customer prefers to have the lowest possible rate today then the appropriate action would be to suggest to the customer they consider a variable or market rate product, rather than having the option to potentially game the system and continually sign and cancel contracts to the detriment of the RES and the competitive retail market.

Customers are already afforded a sufficient period of time (ten days, potentially more if the tenth day falls on a non-business day) to review their terms and conditions and rescind their contract, if they desire. A ten (10) day rescission period provides adequate protection to the customer and significant additional time to review the terms and conditions of a contract is not warranted.

Liberty Power is in favor of fair and competitive markets and establishing rules that are designed to provide customers a wide-ranging portfolio of products to choose from. This proposed rule is a huge step back from achieving that goal. For all the reasons mentioned above, Liberty Power is suggesting the following language:

Any agreement between a RES and a customer that contains an early termination fee shall disclose the amount of the early termination fee or the formula used to calculate the termination fee. It must also state that the early termination fee does not apply if the customer cancels the contract

~~within the rescission period described above. In addition, any agreement that contains an early termination fee shall provide the customer the opportunity to terminate the agreement without any termination fee or penalty within 10 business days after the date of the first bill issued to the customer for products or services provided by the RES.~~

If the alternative to the recommended modifications provided above, Liberty Power offers a second proposal:

Any agreement between a RES and a customer that contains an early termination fee shall disclose the amount of the early termination fee or the formula used to calculate the termination fee. It must also state that the early termination fee does not apply if the customer cancels the contract within the rescission period described above. In addition, any [non-fixed contract](#) agreement that contains an early termination fee shall provide the customer the opportunity to terminate the agreement without any termination fee or penalty within 10 business days after the date of the first bill issued to the customer for products or services provided by the RES. [A non-fixed contract agreement shall refer to any contract agreement where the contracted rate for the electric supply is expected to change over the term of the agreement.](#)

While Liberty Power feels strongly in its principal argument that the language of concern should be struck, the alternative proposal may be a fair compromise in balancing customer protection rules and protecting the competitive marketplace. Liberty Power assumes the main intent of the proposed language is to ensure that if a customer is not fully aware of the applicable rate of their contract agreement and the impact to their electric bill, the customer has additional opportunities to cancel the contract without being subjected to any additional fees. For example, if a customer agreed to a variable product that changed at the discretion of the RES, or was tied to a market index, the customer may not know the exact rate they will experience until they receive their first bill. While the customer should be fully aware that such a product is subject to change, due the variable nature of the product, there will always be some level of uncertainty. Some stakeholders may argue that the added uncertainty warrants additional layers of customer protection

rules. While Liberty Power may not necessarily agree with this position, we acknowledge the argument. However, under the scenario when a customer is on a fixed-price contract they know the exact rate they will pay for their electric supply, agreed to that exact rate, and was afforded a ten (10) day rescission period to change their mind. As the customer is 100% certain of their energy-supply rate, any additional “waiver period” of early termination fees and the canceling of a contract is simply unwarranted and only allows for the customer to game the market, creating a detrimental effect on the competitive retail electric market.

Other Modifications

Below, Liberty Power has provided a number of other suggested language modifications. As most of the remaining suggested modifications are minor changes, we will not provide specific arguments supporting those recommendations as they are self-evident.

Section 410.510(g)

Where it is apparent that the customer’s English language skills are insufficient to allow the customer to understand and respond to the information conveyed by the sales agent or where the customer or another third party informs the sales agent of this circumstance, the sales agent shall either find [another sales representative of the RES in the area](#) who is fluent in the customer’s language to continue the marketing activity in his/her stead, use an interpreter at the premise, or terminate the in-person contact with the customer. When the use of an interpreter is necessary, a form consistent with Section 2N of the Consumer Fraud and Deceptive Business Practices Act [815 ILCS 505/2N] must be completed. The sales agent shall leave the premises of a customer when requested to do so by the customer or the owner or occupant of the premises.

Section 410.520(a)

In addition to complying with the Telephone Solicitations Act [815 ILCS 15], RES sales agents who contact customers by telephone for the purpose of

selling any product or service shall provide the sales agent's name and, on request, the identification [information, if available](#) ~~number~~;

Section 410.540(a)

Each RES that ~~contacts~~ [solicits](#) customers for enrollment [power and energy services](#) by direct mail shall include a Uniform Disclosure Statement for the product or service being solicited.

Section 410.540(e)

If a customer elects to enroll on-line as a result of [a direct mail solicitation](#) ~~an outbound telemarketing call~~, the requirements of Section 410.550 shall apply.

Section 410.610

Within one business day after accepting a valid electronic enrollment request from the RES, the electric utility will notify the customer in writing of the scheduled enrollment and the name of the RES that will be providing power and energy service. If the customer wishes to rescind its enrollment with the supplier, the customer will not incur any early termination fees if the customer contacts either the electric utility or the RES within ten calendar days of the electric utility's processing of the enrollment request. If the tenth calendar day falls on a non-business day, the rescission period will be extended through the next business day. The written enrollment notice from the electric utility will state the last day for making a request to rescind the enrollment. [In the event the customer provides notice of such rescission to the electric utility, the electric utility shall notify the RES within one business day of receipt of such notice.](#)

Section 410.640(6)

Section should be struck as it is duplication of Section 410.640(3)

Section 410.640(a)(2)

The [estimated](#) date when the existing contract will expire;

(Note: A similar modification must be made to Section 410.640(a)(5) and 410.640(b)(2))

Section 410.710(a)

~~In any dispute between a customer and a RES concerning the terms of a contract, any vagueness, obscurity, or ambiguity in the contract will be construed in favor of the customer.~~

Section 410.730(a)(7)

For a [customer that will not be placed on a utility's UCB-POR tariff](#), ~~RES using Dual-Billing or SBO~~, any possible requirement to pay a deposit, the estimated amount of the deposit or basis on which it is calculated, when the deposit will be returned, and if the deposit will accrue interest;

Section 410.730(a)(8)

Any fees [assessed by the RES](#) to the applicant for switching to the RES;

Conclusion

Again, Liberty Power would like to express its appreciation in being included in this process. We humbly request that the ORMD and other working group participants consider supporting Liberty Power's suggested modifications and we look forward to further cooperative discussions.