

**REPLY COMMENTS OF LIBERTY POWER
TO CONSUMER PROTECTION RULES DRAFT**
Submitted October 19, 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 this latest version of the Consumer Protection Rules First Notice Draft circulated by the Office of Retail Market Development (“ORMD”) on October 9, 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 reply comments and questions can be reviewed below. Many of Liberty Power’s remaining concerns were previously identified and discussed at the last ORMD workshop (held on Sept. 30 and Oct. 1, 2009), in the company’s comments to the customer protection rules draft (submitted Sept. 25, 2009) and comments to the ORMD Straw Man Version 1.2 (submitted on March 23, 2009). The comments provided herein will not restate each individual argument once again, but will focus on the remaining significant issues and other provisions not previously addressed. Additionally, Liberty Power has provided a red-lined version of the drafted rules (“Appendix A”) based on our recommended modifications for your convenience.

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 412.100 – Application of Subpart B

Liberty Power recommends the proposed rule language be modified to clarify the ORMD’s intent – to apply the rule to residential and small commercial customers with

certain exceptions. In previous comments, Liberty Power explained how the current proposed rule language could potentially be interpreted to mean that the rules apply to all customer classes so long as the RES is “serving or seeking to serve residential and small commercial customers”. Using language found in consumer protection rules in Texas¹ as a model, Liberty Power suggests the following modified language in order to clarify the intent of the rule:

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 412.160 a), b) and c) and 412.170 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 412.200 (Application of Subpart C) and Section 412.300 (Application of Subpart D).

Section 412.120 – Telemarketing

1. Uniform Disclosure Statement Acknowledgement

Liberty Power appreciates that after careful consideration, the requirement to *read* the Uniform Disclosure Statement has been modified in favor of a requirement to *orally disclose* specific items within the disclosure statement. However, other rule language modifications are now necessary to make other requirements within the rule workable. Specifically, any section regarding the use of third-party verifications that contains a requirement to have the customer “verbally acknowledge that he or she understands the uniform disclosure statement” needs to be modified or stricken.

In scenarios where in-person marketing is not utilized (meaning a written copy of the Uniform Disclosure Statement is not provided prior to enrollment), the customer will

¹ §25.475. General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers; <http://www.puc.state.tx.us/rules/subrules/electric/25.475/25.475.doc>

simply have no idea what the Uniform Disclosure Statement is despite the fact that the sales agent would have already orally disclosed to the customer items (d) through (o) as required by Section 412.120(c). To remedy this issue, Liberty Power is providing modified language (below) which carries out the intent of the rule – to have the customer acknowledge they understand the individual items contained within the Uniform Disclosure Statement:

Section 412.120(c)

When third-party verification is used to authorize a customer's enrollment during the telemarketing call, the third-party [verification must contain items \(d\) – \(n\) of](#) ~~verifier must require the customer to verbally acknowledge that he or she understands~~ the uniform disclosure statement.

Section 412.150

~~b) Orally disclose to the customer items (d) – (o) of the uniform disclosure requirements in Section 412.330.~~

[b\) e\)](#) ~~Require the customer to verbally acknowledge that he or she understands the items contained in~~ [The third-party verification must contain items \(d\) – \(n\) of](#) the uniform disclosure statement.

Even in the case of in-person marketing, where the current language is technically workable, consistent with our previous comments, Liberty Power believes third-party verification ("TPV") requirements should be uniform and not vary according to marketing method in order to reduce transaction costs. Therefore, Liberty Power also suggests the following modification:

Section 412.110

If a customer's enrollment is authorized by third-party verification during in-person marketing, the third-party [verification must contain items \(d\) – \(n\) of](#) ~~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.~~

Please note that the modification above also reduces the number of items by one. Liberty Power does not believe it is necessary that the TPV contains “a statement that the RES is an independent seller of power and energy service and that the RES is not representing or acting on behalf of the electric utility, governmental bodies, or consumer groups.” The draft already contains requirements that this statement is made orally to the customer; there is no need to duplicate this effort in the TPV process. This suggested change is further elaborated on later in these comments (*Section 412.330 – Uniform Disclosure Requirements; 3. Arrangement of Items*).

Section 412.150 – Online Marketing

Liberty Power has no issue with the Uniform Disclosure Statement being displayed online for products that allow for online or electronic enrollment. However, Liberty Power seeks to clarify the ORMD’s intent in limiting the amount of information the customer must enter in order to locate their Uniform Disclosure Statement. If the ORMD envisions a customer having the ability to enter “no more than their zip code, electric utility service territory, and/or type of service being sought (residential or commercial)” and having a Uniform Disclosure Statement be generated specific to that customer’s offer, this is not technically feasible under current marketing practices. This would imply, for example, that a RES only has one generic offer for all small commercial electric customers at a specific zip code. This is simply not the case.

Products (and subsequently their Uniform Disclosure Statement) will most notably vary by the nature of the product (fixed vs. variable) and the length of the contract. Any variance in these terms as well as other aspects such as price, the presence of guaranteed savings, etc. will also require unique Uniform Disclosure Statements. It is certainly feasible that 20 or more Uniform Disclosure Statements would be necessary to capture all the products available to a specific customer class, for a specific commodity, at a specific zip code. In order to ensure the rule is never interpreted to require a single Uniform Disclosure Statement is produced by solely entering the aforementioned information, Liberty Power has provided two different recommendations for consideration:

Option 1

Each RES offering retail electric products to customers online shall prominently display the Uniform Disclosure Statement for any products offered [through online enrollment](#) ~~without requiring the consumer to enter any personal information other than zip code, electric utility service territory, and/or type of service being sought (residential or commercial).~~

Option 2

Each RES offering retail electric products to customers online shall prominently display the Uniform Disclosure Statement for any products offered [through online enrollment](#) without requiring the consumer to enter any personal information other than zip code, electric utility service territory, and/or type of service being sought (residential or commercial). [Nothing in the section shall prevent the RES from requiring the customer to enter product information such as the nature of the product \(fixed or variable\), the length of the term, the anticipated flow start date, and the applicable rate.](#)

Section 412.230 – Early Termination Fee

1. Early Termination Fee “Waiver Period”

One of Liberty Power’s greatest concerns with the current drafted language pertains to this subsection. As previously discussed during the course of these proceedings, 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, limit the number of fixed-price offers in the market, allow customers to game the market (potentially resulting in a RES going bankrupt), and generally cause undue harm to the competitive market.

While Liberty Power acknowledges that this rule is currently in place in the Illinois competitive gas market, the notion that this fact alone provides justification for applying this same rule to the competitive electric market perversely over-simplifies

the issue. The argument that natural gas and electricity are both commodities and therefore should be governed by similar rules is at best misguided. After all, oil, gold, soybeans, etc. are all commodities, but are subject to different rules as they are unique commodities.

Electricity is very unique as it cannot be stored, and therefore no inventory exists. This fundamental aspect of electricity in large part contributes to the volatility of electricity prices. As discussed in previously submitted comments and during the course of these workshops, in order to manage this volatility, conservative hedging practices dictate that an RES pre-purchase 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 days² 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.

As previously discussed during comments and at the most recent workshop, a provision that allows a customer to cancel a contract ten (10) business days after receiving their first bill would promote an environment of market manipulation. 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.

It is certainly possible that from the time the customer contracts with the RES from the time the customer receives their first bill that market rates could fall by 10% or more. While the financial damage caused from one mass market customer canceling their contract without being subject to early termination fees is perhaps minimal, the damage caused by 100, 1,000, or 10,000 customers canceling under the same

² 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)

conditions is significant and could certainly result in the default of a RES. For illustration purposes, Liberty Power is providing the following hypothetical scenario:

In August, a RES contracts 10,000 aggregated residential customers on two-year fixed price contracts. The total estimated usage over the course of the term is 240,000 MWh³. Shortly thereafter, the RES pre-purchases 240,000 MWh at a price of \$50 per MWh for a total of \$12M. Let's assume market rates continue to fall, and sometime in October, after receiving their first bill all 10,000 customers cancel their contract. Even if those customers must remain with the RES for an additional month before the change can be effectuated, the RES still would have approximately 220,000 MWh that it would need to sell back into the market. If the market rate is at that time \$45 MWh (only a 10% decrease) the RES would lose at a minimum \$5/MWh or \$1.1M. Certainly, the loss of this capital could permanently hinder any undercapitalized RES, even result in bankruptcy, forcing customers to the provider of last resort.

In order to avoid financial repercussions associated with high-risk scenarios such as the one outlined above, a RES will have to make a business decision on how to best mitigate this risk. A RES could choose not to offer fixed-price contracts to mass market customers. Alternatively, a RES may account for this risk by factoring additional protection into their pricing. In other words, if a RES believes market prices could fall 10% between the time the customer is contracted until the time the customer can cancel the contract (without being subjected to early termination fees), then it would not be unreasonable for the offer price to be 10% higher than what it would normally be if early termination fees were still applicable. Another option may be for a RES to socialize this risk factor among all customers, raising prices on all offers rather than the specific fixed contract in question. Not only is it simply unfair for all customers to pay a higher rate to account for the possibility of gaming by others, but all of these approaches contradicts some of the principal benefits and goals of competition – to apply downward pressure on prices and to offer customers a variety of products (including fixed-rate options) so they can choose an option that best suites their energy needs.

³ Assumes average monthly usage of 1,000 kWh per customer

At the last in-person workshop, the above scenario was discussed, albeit in much less detail. One counterpoint offered was that mass market customers are not sophisticated enough to continually break contractual agreements in order to manipulate their way to better pricing. This is a very dangerous assumption. While initially this may be true for an individual resident, certainly agents, brokers, and consultants (ABCs) will be aware of such a rule and how to take advantage of it. It is quite possible that an ABC's entire business model could center on taking advantage of this apparent "loophole". In fact, one could easily imagine an ABC being quite successful in aggregating a large number of customers using the selling point, "Sign up with me, and I promise you if market rates fall between the time you contract with a RES until the time you receive your first bill, I will get you a new lower rate without any penalties for canceling or switching".

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, other customers, and the competitive retail market.

Additionally, customers are already afforded a sufficient period of time (the current proposal suggest ten calendar 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 rescission period that is 10 days (or more) provides adequate protection to the customer and significant additional time to review the terms and conditions of a contract is not warranted.

During the last workshop, Liberty Power asked advocates of this rule to elaborate on the rule's intent. It was stated that the rule is intended to protect customers that were misled or deceived by "bad actors" in the marketplace and are unaware of this deception until they receive their first bill. Liberty Power supports remedies to protect customers from being misled, deceived, or lied to. However, these remedies must address individual (and rare) instances where rules were violated and not create blanket rules that negate bilateral contracts for all customers just to protect against the mere possibility of fraud being committed.

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 away 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. This requirement does not relieve the customer of obligations for services rendered under the agreement prior to termination.~~

Liberty Power cannot emphasize enough how wholeheartedly opposed and greatly concerned we are by any rule that allows a customer to cancel a contract after receipt of their first bill. It is important to note that this rule is unprecedented in any competitive electric market and Liberty Power is extremely hesitant to offer any suggestions that would ultimately result in a precedent being created that affords a customer the opportunity to cancel a contract after the first bill. However, in the spirit of compromise, Liberty Power is once again proposing an alternative to the recommended modifications provided above:

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.](#) This requirement does not relieve the customer of obligations for services rendered under the agreement prior to termination.

While Liberty Power feels very strongly in its principal argument that the language of concern should be stricken, the alternative proposal may be a fair compromise in balancing customer protection rules and protecting the competitive marketplace. As illustrated in our argument above, the rule provided for in Section 412.230 is not at all appropriate, particularly as it pertains to fixed-rate products. Early termination fees associated with fixed-price contracts normally reflect actual liquidated damages and are an absolute necessity in protecting the long-term viability of the RES. There is no benefit to anyone if a RES goes out of business because they were not permitted to collect actual liquidated damages resulting from a customer's contractual breach. Ultimately, the rule will only result in limiting products that offer budget certainty and raise prices.

That being said, Liberty Power concedes that the proposed alternative language may have some value in protecting customers to the extent the customer is not fully aware of the applicable rate of their contract agreement and the impact to their electric bill (although, it is important to note, this apparently was not the original intent of the rule). 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.

Liberty would also like to note that questions remain to whether or not the ICC has the statutory authority to establish these consumer protection rules. In the June 2009 Annual Report submitted by the ORMD to the General Assembly, the Governor, and the Illinois Commerce Commission the ORMD Staff concluded:

“[T]he Commission lacks the explicit statutory authority to establish these requirements through additional administrative rules. As a result, we recommend the General Assembly either a) amend the Public Utilities Act to provide the Commission with explicit rulemaking authority to establish rules in line with the proposed requirements discussed, or b) turn the recommended requirements into statutory mandates.”

Liberty Power reserves its right to challenge the Commission’s authority, particularly in instances where rules would abrogate a bilateral contract between a customer and the RES.

Section 412.210 – Rescission of sales contract

Although in previously submitted comments, Liberty Power focused our concerns on the “early termination waiver period” and did not opine on the length of the proposed rescission period, we will take the opportunity to comment further on the issue now.

Liberty Power believes that a rescission period that begins after the electric utility’s acceptance of enrollment request and continues for a minimum of ten business days (and is extended if the 10th calendar day falls on a non-business day) is excessive. As currently drafted, the rescission period could last as long as 17 calendar days from the time the customer is contracted until the time they rescind. This is best illustrated through an example:

A customer is contracted on a Friday. Typically, it takes a RES two days to submit an enrollment request. Let’s assume the RES makes the enrollment request on

Tuesday after 3PM. The utility will not accept the enrollment request until Wednesday. If Wednesday starts the "10-day clock" then the tenth day would fall on the next Friday. If Friday happens to fall on a holiday (i.e. Christmas Day 2010), the rescission period will be extended to Monday, marking 17 full days from the time the customer was contracted until their last day to rescind.

The purpose of a rescission period is to protect buyers from their own impulses, or "buyer's remorse". Typical rescission periods are three (3) business days, and in fact there is already an existing precedent for a three (3) business day rescission period in the competitive Illinois electric market. Section 453.40(a)(4) of Title 83 of the Illinois Administrative Code states:

[An electronic LOA must provide the following information...]

A conspicuous statement, within the body of the electronic version of the contract, that residential customers may cancel the enrollment **within 3 business days after the Internet enrollment** [emphasis added].

Just as the ability for a customer to cancel a contract (without being subject to early termination fees) almost three months after contracting with a RES (as contemplated in Section 412.230) adds costs to the product offering to reflect the added risks involved, so too does the ability for a customer to rescind a contract more than two weeks after entering into that contract.

As individual rule provisions, both the length of the rescission period and the "early termination fee waiver period" (which is more or less an additional, extended rescission period for fixed-price products) is a concern to Liberty Power due to the impact it will have on consumer prices. However, the combined risk of both rules would establish the Illinois competitive electric market as undoubtedly the riskiest restructured market for doing business with mass market customers. These added risks will ultimately result in added costs and higher prices.

In Liberty Power's previous argument regarding the "early termination fee waiver period" (as contemplated in Section 412.230), it was stated that one reason why this rule is not necessary because the ten (10) calendar day rescission period is already more than sufficient time to allow a customer to review their contract and cancel if

necessary. If the ORMD does not adopt either of Liberty Power's previously suggested modifications regarding the "early termination fee waiver period" then Liberty recommends the rescission period be reduced to ensure customers don't experience significantly higher prices than would otherwise be afforded to them due the "double whammy" associated with risks caused by what basically amounts to a two week and a three month rescission period. While Liberty Power remains vehemently opposed to any rule provision that allows a customer to cancel a contract after receiving their first bill, thus creating a rescission period that grossly exceeds 10 calendar days, the following modification is recommended if Section 412.230 remains in its current form:

Section 412.210

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 three business ~~ten calendar~~ days of the electric utility's acceptance 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.

Section 412.330 – Uniform Disclosure Requirements

1. Placement of Subsection

This subsection currently seems to be out of place in Subpart D (Dispute Resolution and Customer Complaint Reports). Liberty Power believes it is more appropriate to include this in Subpart B (Marketing Practices)

2. Deposit Details

Liberty Power believes the Uniform Disclosure Statement should disclose the most pertinent information to the customer and should otherwise be kept to a minimum to reduce the time it takes to complete a transaction, which increases customer satisfaction. This is of particular importance when using TPVs. While a requirement to pay a deposit is highly relevant to the customer, the specifics behind the deposit (which are contained in the terms of service) are secondary and not nearly as important as other items within the Uniform Disclosure Statement. For the reasons stated above, Liberty Power recommends Section 412.330(g) be modified as follows:

Any requirement to pay a deposit for power and energy service, and 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,~~

3. Arrangement of Items

In order to carry-out revisions proposed by Liberty Power in regards to what items should be required in the TPV, Liberty Power has re-ordered the individually lettered items. The revised order can be reviewed in detail in "Appendix A". The substantive change (as discussed earlier) is item (k) has now become item (o), and when combined with previously suggested modifications⁴, would not be included in the TPV. Again, in accordance with Section 412.120(c) (and similar sections that apply to other forms of marketing), a RES sales agent already must disclose "that the RES is an independent seller of power and energy service and that the RES is not representing or acting on behalf of the electric utility. It is overly duplicative to require the TPV to once again make this statement.

Other Modifications

Below, Liberty Power has provided a number of other suggested language modifications. As most of the remaining suggested modifications are minor changes,

⁴ Uniform Disclosure Statement Acknowledgement, pg. 3

we will not provide specific arguments supporting those recommendations as they are self-evident and/or were previously discussed during the workshop proceedings.

Section 412.240(b)(2)

The [bill cycle in which](#) ~~date service under~~ the new term will begin;

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.