

COMMENTS OF CONSTELLATION NEWENERGY, INC.
ON THE ORMD STRAWMAN

Constellation NewEnergy, Inc. (“Constellation”) is a certified Alternative Retail Electric Supplier (“ARES”) in Illinois. Since the introduction of customer choice in the Illinois electric industry in 1999, Constellation has been an active participant in the Illinois retail market. Constellation has been active in virtually all of the regulatory proceedings before the Illinois Commerce Commission (“ICC” or “Commission”) involving electric industry restructuring and has served as an advocate for fair and competitive open markets and appropriate rules that are designed to provide customers with an array of competitive options. Similarly, Constellation has been an active participant in all of the collaborative workshops processes administered by the Office of Retail Market Development (“ORMD”) to implement SB 1299.

Constellation appreciates the efforts of the ORMD to adopt measures that will help advance the development of competition for residential and small commercial customers as envisioned in SB 1299. Constellation supports the efforts of the ORMD, the Citizens Utility Board, the Attorney General, and others to provide residential and small commercial customers with an appropriate level of consumer protections as we work towards the development of competition for residential and small commercial customers.

Constellation below provides its Comments regarding the ORMD Strawman distributed on December 23, 2008. The absence of a Comment on any one specific section or issue should not be construed as a lack of interest or concern related to such question.

APPLICABILITY

Constellation recommends that the focus of any new or enhanced consumer protections, including marketing rules, commercial legal or contractual requirements, dispute resolution, reporting requirements, and enforcement mechanisms should be limited to measures to protect residential and small commercial customers that are served by ARES or retail electric suppliers (“RES”).¹ The first step in developing or refining appropriate measures must be to clarify the scope and applicability of the proposed legislation or administrative rules. We are pleased that the Strawman attempts to do just that.

As a threshold recommendation, the Strawman proposes the use of the existing statutory definition of “small commercial customer” in the Public Utilities Act (“PUA”) (someone who consumes no more than 15,000 kWhs of electricity annually)² as the “cut-off” for the proposed enhanced consumer protections so that they would only apply to ARES or RES seeking to serve or actually serving residential and small commercial customers (with certain limited exceptions). As will be discussed below, we strongly support the ORMD’s recommendation to use the existing statutory definition as not only the starting point, but

¹ A RES is an electric utility providing competitive retail electric service outside of their franchised service territory.

² 220 ILCS 5/16-102.

also believe that it should be the end point, for the applicability of the items contained in the Strawman.

The reasons for applying the proposed new and enhanced consumer protections, marketing rules, commercial legal or contractual requirements, dispute resolution, reporting, and enforcement mechanisms upon ARES and RES serving or seeking to serve residential and small commercial customers can be summed up as follows:

- Will not upset the well-developed competitive retail electric marketplace that currently exists in Illinois;
- Consistent with the existing regulatory and consumer protection regime that differentiates from the level of certification, marketing, and other requirements based upon the size of the customers that the ARES seeks to serve; and
- Consistent with a recently completed legislative package that was adopted for the retail natural gas industry.

As we move from general principle to specific language, any proposed amendments to the PUA and/or the Consumer Fraud and Deceptive Business Practices Act (“Consumer Fraud Act”) should be properly tailored to protect residential and small commercial customers that are being solicited for electric service and served by ARES and RES. To do otherwise would not only add unnecessary costs to other market segments, but would also add requirements that could very well jeopardize the current well-functioning competitive retail electric industry that exists for commercial and industrial customers.

The Competitive Retail Electric Market Is Well Developed in Illinois

As you are aware, retail competition began in Illinois on October 1, 1999 for the largest industrial customers. Since that time, a growing number of commercial and industrial customers have been buying competitive retail electric service from RES in Illinois. In fact, today only Texas has more RES sales than Illinois.³ Some of the relevant statistics regarding the amount of load being served by RES include:

- In the ComEd service territory, **over 74%** of the total electric load (based upon kWh) sales to non-residential customers are by RES⁴:
 - 100% of the Railroad class;
 - 92% of the high voltage class;
 - 97% of the extra large or over 10 megawatt (MW) class;
 - 97% of the very large or between 1MW and 10MW class;
 - 90% of the 400kW-1MW class;
 - 62% of the 100kW-400kW class; and
 - 24% of the 0-100kW class.
- In the ComEd service territory, when you include the residential electric load, **over 50%** of the kWhs are purchased from RES.⁵

³ Commonwealth Edison Company, Load Forecast for Five-Year Planning Period, submitted to the Illinois Power Agency, p. 9, July 15, 2008.

⁴ Commonwealth Edison Company, Direct Access Service Request (“DASR”) Report, as of November 30, 2008.

⁵ Id.

- In the AmerenIP service territory, **98%** of the large commercial and industrial (“C&I”) accounts (greater than 1 MW) (based upon kWh) and **40%** of the small C&I accounts (between 0 and 1MW) (based upon kWh) are purchasing their electricity from RES.⁶ When you include the residential electric load, **over 54%** of the kWhs are purchased from RES.⁷
- In the AmerenCIPS service territory, **98%** of the large C&I accounts and **35%** of the small C&I accounts are purchasing their electricity from RES.⁸ When you include the residential electric load, almost **54%** of the kWhs are purchased from RES.⁹
- In the AmerenCILCO service territory, **62%** of the large C&I accounts (based upon kWh), **84%** of the large C&I accounts (based upon number of customers) and **47%** of the small C&I accounts (based upon kWh) are purchasing their electricity from RES.¹⁰ When you include the residential electric load, almost **40%** of the kWhs are purchased from RES.¹¹

Another metric that shows the development of retail competition in Illinois is the number of ARES licensed by the ICC. According to the ICC’s website, at present there are thirty-nine (39) ARES certified by the ICC to serve retail customers in Illinois, eight (8) of which are certified to serve residential and small commercial customers.¹² The enactment of Public Act 95-0700, which was designed to remove certain barriers to competition for residential and small commercial customers, led to the application and certification of four (4) such ARES to serve residential and small commercial customers.¹³

It is also important to keep in mind that this robust competitive electric marketplace, especially for commercial and industrial customers, has developed over the course of the past decade without any consumer protection problems, inappropriate marketing activities, slamming, or complaints of note. In fact, the number of complaints filed against ARES is relatively few, if any, over the past nine (9) years.

Consistent With Existing Regulatory Paradigm and Certification Rules

Any competitive supplier seeking to serve retail customers in Illinois must first become licensed by the ICC as an ARES.¹⁴ In order to become certified by the ICC, an applicant must satisfy a number of financial, technical, and managerial requirements. Each year, an ARES must file a Report of Continuing Compliance with the ICC.¹⁵ The certification requirements and the specific financial, managerial, and technical requirements are different depending upon the size of the customers that the applicant seeks to serve.

⁶ AmerenIP DASR Report, as of November 30, 2008.

⁷ Id.

⁸ AmerenCIPS DASR Report, as of November 30, 2008.

⁹ Id.

¹⁰ AmerenCILCO DASR Report, as of November 30, 2008.

¹¹ Id.

¹² <http://www.icc.illinois.gov/utility/list.aspx?type=ares>

¹³ Office of Retail Market Development 2008 Annual Report, Pursuant to Section 20-110 of the Public Utilities Act, p. 2, June 2008.

¹⁴ RESs are not required to be certified by the Commission nor are they subject to the financial, managerial, technical, and other reporting requirements that are imposed upon ARES under the PUA and Section 451 of the Illinois Administrative Code.

¹⁵ 83 Ill. Adm. Code Part 451.700 et seq.

Not surprisingly, the most rigorous certification requirements are for ARES seeking to serve residential and small commercial customers.

Drafting Recommendations

Any legislation that seeks to amend the PUA or the Consumer Fraud Act must be consistent, and should be limited to ARES serving or seeking to serve residential and small commercial customers. Those parameters ensure that consumer protection measures are applied only to those customer segments where problems have arisen in other industries, and to customers that may benefit from additional protections. Commercial and industrial customers that have procured their electric supplies from ARES and RES in Illinois for almost 10 years without customer complaints or the types of problems that these consumer protection measures are designed to guard against; thus, expanding customer protections measures for those customers has been shown to be unnecessary, and would only serve to change a well-functioning market.

Recent Legislation for the Natural Gas Industry

The General Assembly recently adopted Senate Bill 171 to provide additional consumer protections for residential and small commercial customers when receiving offers or taking service from alternative retail natural gas suppliers. The legislation provides the Commission with enhanced marketing, managerial and certification requirements for alternative retail natural gas suppliers.

During the negotiations that led to the passage of Senate Bill 171, the parties were able to achieve consensus and recognize that due to the well-developed nature of the competitive marketplace for commercial and industrial customers, there was no need to impose a new set of regulatory requirements to serve those customer segments.

Below are brief comments on certain specific provisions in the Strawman:

Section I, 1. Training of Sales Agents

The term “relevant sales agents” needs to be defined. Also, the scope of the “intimate knowledge” needs to be properly tailored. For instance, it make no sense to have now-lawyer sales agents explaining legal terms (such as any “right” to cancel or terminate), interpreting statutes, rules, and regulations.

Section I, 2. Do Not Contact List

Any rules adopted implementing this provision should reflect commercial and operational realities regarding the competitive retail electric industry. The rule should reflect the fact that these lists are subject to change, the lag in time between the sending and receipt of mail and other similar commercial realities. As a result, there should not be any retroactive applicability and resulting penalty or other legal right created due to those commercial realities. For example, what would happen if an ARES or RES sent a letter to a potential customer on the 14th of the month and on the 15th of the month found out that this potential customer is now on the Do Not Contact List? Similarly, certain ARES or RES may utilize the services of outside sale agents or sales channels. Any rules adopted pursuant

to these rules should provide a commercially reasonable amount of time for the ARES or RES to distribute such lists after receipt from the electric utility.

Section II, 4. Assigning Customers to a Different Supplier

With mergers and acquisitions and other normal transactions that occur in the retail electric industry, the ability to assign contracts is a very important contracting element that is governed by retail contracts in general. In addition, the written notice requirement in sub condition (3) may not be feasible or allowed for publicly traded companies due to standard non-disclosure laws or requirements as well as standard provisions in agreements concerning mergers, acquisitions, or other similar commercial transactions.

Overall, while the four (4) proposed conditions regarding the ability of an ARES to assign agreements do not appear to be overly onerous, Constellation does not see any rational basis to impose this requirement on all customers served by ARES. It has been our experience that commercial and industrial customers are sophisticated enough to address similar concerns during contract negotiations. Again, this type of protection appears more appropriate for residential and small commercial customers.

Section IV. 3. Disclosure of ARES' level of customer complaints

Constellation has a number of questions about the specific type of reporting that is sought with this proposed requirement:

- What is meant by the term “complaints”? For example, would a call inquiring about a specific charge on a bill be considered a complaint? Similarly, would a call inquiring about the distribution portion of the bill be considered a complaint? Would the answer be different if the ARES was or was not an SBO supplier?
- Is the requirement seeking to substitute a monthly customer call center report in the place of the current annual call center requirement?

In any event, with greater specificity, such a reporting requirement may have some value for ARES seeking to serve or serving residential and small commercial customers. However, based upon the fact that there have been virtually no complaints against ARES or RES since the advent of retail competition over 9 years ago, there has been no demonstrated need or value for that type of enhanced consumer protection for larger commercial and industrial customers and reporting obligation on the part of ARES and RES. No similar requirements are imposed in the natural gas or telecommunications industries in Illinois, especially for competitive providers serving or seeking to serve commercial and industrial customers.

CONCLUSION

Constellation appreciates the opportunity to comment on the ORMD’s Strawman proposal and looks forward to working with all stakeholders in developing an appropriate level of consumer protections and other rules as we work towards the development of competition for residential and small commercial customers.