STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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

SECOND NOTICE ORDER

November 22, 2011

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND 1

II. PROPOSED REVISIONS TO PART 412 2

A. SECTION 412.100 – APPLICATION OF SUBPART B 2
B. SECTION 412.110 UNIFORM DISCLOSURE STATEMENT 3
C. SECTION 412.110 (P) 4
D. SECTION 412.120 DOOR-TO-DOOR SOLICITATION 5
1 Section 412.120 (a) 5
2 Section 412.120 (k) 5
E. SECTION 412.130 (A) 8
F. SECTION 412.140 INBOUND ENROLLMENT CALLS 8
1. Section 412.140(b) 8
2. Section 412.140 (c) 9
G. SECTION 412.150 DIRECT MAIL 9
1. Section 412.150(a) 9
2. Sub - Section 412.150 (c) 10
H. SECTION 412.160 ONLINE MARKETING 11
1. Section 412.160 (a) 11
I. SECTION 412.170 AFFILIATE NAME AND LOGO USE 11
1. Section 412.170 (d) and 412.10 – Do Not Market List 11
J. SECTION 412.190 AFFILIATE NAME AND LOGO USE 12
K. SECTION 412.195 PRODUCT DESCRIPTIONS 15
L. SECTION 412.210 RESCISSION OF SALES CONTRACT 16
M. SECTION 412.230 EARLY TERMINATION FEE 17
N. SECTION 412.310 REQUIRED RES INFORMATION 17
O. SECTION 412.320 DISPUTE RESOLUTION 18

III. PROPOSED REVISIONS TO PART 453. 20

A. SECTION 453.20 CRITERIA BY WHICH TO JUDGE THE VALIDITY OF AN ELECTRONIC SIGNATURE 20

IV. FINDINGS AND ORDERING PARAGRAPHS 20

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SECOND NOTICE ORDER

By the Commission:

I. PROCEDURAL BACKGROUND

On December 2, 2009, the Illinois Commerce Commission ("Commission") entered an order authorizing submission to the Secretary of State of the first notice of the proposed adoption of 83 Ill. Adm. Code 412 ("Part 412") entitled, "Obligations of Retail Electric Suppliers" ("RES") (attached as Appendix A) and amendment of 83 Ill. Adm. Code Part 453 ("Part 453"), entitled "Internet Enrollment Rules" (attached as Appendix B) to be submitted to the Secretary of State pursuant to Section 5-40 of the Illinois Administrative Procedure Act.

Pursuant to notice given in accordance with the rules and regulations of the Commission, this matter came for an initial hearing before a duly authorized Administrative Law Judge ("ALJ") of the Commission at its offices in Chicago, Illinois via teleconference on January 13, 2010. On that date, Commission Staff ("Staff") appeared and the ALJ granted the Petitions to Intervene for the following parties: the Illinois Competitive Energy Association ("ICEA"); MC Squared Energy Services LLC; Retail Energy Supply Association ("RESA"); Liberty Power Holdings LLC ("Liberty Power"); Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Public Service Company d/b/a AmerenCIPS, and Illinois Power Company d/b/a AmerenIP (collectively, "Ameren"); BlueStar Energy Services, Inc. ("BlueStar"); Commonwealth Edison Company ("ComEd"); and the Citizens Utility Board ("CUB"). The ALJ subsequently granted the additional Petitions to Intervene filed by the Attorney General for the People of the State of Illinois (collectively as "CUB", "AG" or "CUB/AG") on January 21, 2010; the Illinois Industrial Energy Consumers ("IIEC") and Dominion Retail, Inc. ("Dominion") on March 16, 2010; the Illinois Energy Marketers Coalition ("IEMC") on July 1, 2010; and the National Energy Marketers Association ("NEMA") on July 12, 2010. No objections were raised to the Petitions to Intervene by any party.

On March 4, 2010, the CUB/AG, ComEd, Ameren, BlueStar, Dominion, ICEA, IIEC, and RESA filed verified initial comments; followed by the verified reply comments filed by Staff, AG, ComEd, Ameren, BlueStar, Dominion, ICEA, IIEC, and RESA on April

22, 2010. The Administrative Law Judge held a status hearing on May 6, 2010 where the parties established a schedule for filing verified surreply comments. Staff, AG, ComEd, Ameren, BlueStar, Dominion, ICEA, and RESA filed verified surreply comments on June 23, 2010. Commission Staff, AG, ComEd, Ameren, BlueStar, Dominion, ICEA, IIEC, NEMA, and RESA filed initial briefs on August 27, 2010. An additional intervenor, Interstate Gas Supply of Illinois, Inc. ("IGS"), filed a Verified Petition to Intervene and Verified Initial Brief on August 30, 2010. The Administrative Law Judge issued a ruling granting the Verified Petition to Intervene without objection and noting the Verified Initial Brief of IGS on September 15, 2010. Staff offered the current versions of the proposed rule and amendment as Corrected Attachment A to its Corrected Verified Reply Comments filed on April 22, 2010. Staff subsequently proposed additional revisions to the proposed language via an e-mail to the parties on August 23, 2010. These revisions are memorialized in Attachment A to Staff's Initial Brief. Given the heavily contested nature of this rulemaking, the Commission entered an Interim Order of Withdrawal on October 26, 2010 to withdraw the current draft of Part 412 and Part 453 and allow this docket to remain open for further adjudication. Thus, the Administrative Law Judge issued a proposed First Notice Order on February 18, 2011 and a corrected proposed First Notice Order on March 18, 2011. Briefs on Exceptions and Reply Briefs on Exceptions were filed by the parties. Two final intervenors, Energy Services Providers, Inc. d/b/a Illinois Gas and Electric and Interstate Gas Supply, Inc. filed Brief on Exceptions, without objection. The Commission issued a First Notice Order on July 7, 2011. Additional Interveners, Spark Energy, L.P. and Mid-American Energy Company along with ComEd, NEMA, Dominion, BlueStar, IGS, RESA and ICEA provided comments on the Order prior to the end of the First Notice Period.

II. PROPOSED REVISIONS TO PART 412

A. Section 412.100 – Application of Subpart B

ICEA

ICEA noted the Proposed Rule required the RES to send a document to the customer. ICEA believed a definition of "Send" or "Sent" should be included in the Proposed Rule, to define delivery by electronic means upon the customer's consent. Citing usual customer preference, reduced cost to the RES, and less burden to the environment, electronic delivery allows for faster dissemination of the required information than the U.S. Mail. ICEA proposed the following modification to Section 412.100:

> " "Send' or 'Sent' when used in this Part to describe the action to be taken by a Retail Electric Supplier of sending a document to a residential customer or small commercial retail customer may include if agreed to by the receiving customer transmission of the document to the customer via electronic delivery (e.g. fax or e-mail)."

The Commission finds it is reasonable to include this clarifying definition in the Rules. Since this definition serves to clarify the application of Subpart B, it will be adopted for the proposed second notice rules.

B. Section 412.110 Uniform Disclosure Statement

Dominion

Dominion believed the purpose of the Uniform Disclosure Statement should be to provide an easy to read, highly summarized version of the contract terms and conditions. Dominion argued it was willing to provide such information and understands its value, but it found the Statement contained in the rule is nothing more than a recitation of the exact terms and conditions which should appear in a properly written sales contact. Dominion believed the net result would be that Section 412.110 would require RESs to double the amount of material that they are obligated to send to consumers and double the amount of material that the prudent customer would read. Dominion stated the customer would not receive any incremental value for this additional effort.

Dominion suggested the Commission consider requiring these terms and conditions the minimum standards to be incorporated in a sales contract, rather than make these the terms and conditions of a Uniform Disclosure Statement. It also suggested that if the Commission believes that an additional, highly summarized version of the contract terms and conditions are appropriate, it should direct the Office of Retail Market Development to work with interested parties to develop a form. Dominion proposed revising Section 412.110 as follows:

Section 412.110 ~~Uniform Disclosure Statement~~ Minimum Contract Terms and Conditions

~~In addition to providing the customer with a copy of t~~The sales contract~~,~~ ~~RES agents~~ must disclose the following information to the customer~~, prior to any enrollment for electric service,~~ regardless of the form of marketing used. The sales contract ~~written Uniform Disclosure statement~~ must use 12 point font or larger, and, if it is a separate document, it must not exceed two pages in length:

Commission Analysis & Conclusion:

Part 412 is being adopted to address certain obligations the RES will have to the consumer. We believe one of the most important responsibilities to the consumer is the requirement that the RES fully disclose its product information prior to the customer entering into the RES sales contract. While it is certainly reasonable to expect the requirements enumerated in Section 412.110 to belong in a well-drafted contract, the Commission finds it is best to require the RES to use the Uniform Disclosure Statement to disclose its products to the customer. As such, the Commission will not adopt the language proposed by Dominion above.

C. Section 412.110 (p)

ICEA

ICEA commented that the price per-kWh described in Section 412.110(p) is an estimate for fixed monthly charge products and should exclude the impact of any one-time, or limited-time incentives or introductory pricing that might hinder the customers' ability to fairly evaluate the cost of the product.

ICEA argued that Section 412.110(p) contains a mechanism for consumers to evaluate the costs of products that have fixed monthly charges which do not change with the customer's usage. This requires a RES to provide an estimated price per kWh for the RES's power and energy service using sample monthly usage levels of 500, 1,000, and 1,500 kWh. ICEA suggested a RES could offer a one-time or other limited-time incentive or introductory pricing that, if not excluded from the RES' estimate could make it difficult for consumers to fairly evaluate the cost of the product. ICEA recommended including the following language to exclude any introductory pricing or incentives be excluded from any estimate provided by the RES:

> "A price per-kilowatt hour (kWh) for the power and energy service. If a product is being offered at a fixed monthly charge that does not change with the customer's usage and the fixed monthly charge does not include delivery service charges, the RES must provide a statement to the customer that the fixed monthly charge is for supply charges only and that it does not include delivery service charges and applicable taxes; therefore, the fixed monthly charge is not the total monthly amount for electric service. For any product that includes a fixed monthly charge that does not change with the customer's usage, the RES must provide an estimated price-per-kilowatt hour for the power and energy service using sample monthly usage levels of 500, 1000 and 1,500 kWh. <u>The estimated price per-per-kilowatt hour shall exclude any one time or other limited-time incentives or introductory pricing programs offered by the RES that may impact the customer's price.</u>"

Commission Analysis & Conclusion:

ICEA has not offered any data to support its position that excluding one-time or limited incentives would have substantive effect on consumer pricing such that it would necessitate the Commission to include the additional language proposed by ICEA. Therefore, we will not adopt the additional language in the Second Notice Order.

D. Section 412.120 Door-to-Door Solicitation

1 Section 412.120 (a)

ComEd

Com Ed maintained that 412.120 (a) includes an appropriate requirement mandating the RES agent to disclose they are not representing the electric utility. ComEd stated the provision should also include a prohibition against the display or use of the electric utility's logo so as to avoid any customer confusion:

> a) A RES agent shall state that it is an independent seller of power and energy service, certified by the Illinois Commerce Commission, and that it is not employed by, representing, endorsed by or acting on behalf of the electric utility, governmental body, or consumer group. The agent shall not display the logo of the electric utility on its apparel or identification or use or show any material containing that logo.

Commission Analysis & Conclusion:

The Commission finds the language proposed by ComEd serves to further support the position that RES agent is not a representative of the electric utility when soliciting the consumer for service. We believe it is prudent and reasonable to prohibit the use of electric utility logos to avoid any confusion or the perception the utility endorses the RES while its RES agent is soliciting the customer. The Commission will adopt the language above as a revision to Section 412.120 (a).

2 Section 412.120 (k)

ICEA

ICEA stated that Section 412.120 (k) (which, as published in the Illinois Register is incomplete, and has been corrected as attached) appeared to usurp local government regulations regarding the acceptable hours for door-to-door sales activity. ICEA presumed the Commission has not sought to impose narrower time parameters for door-to-door sales in communities that have ordinances with longer time frames. ICEA argues the "default" time frames for permissible door-to-door sales—10 am to 6 pm—are unreasonably narrow and not in line with similar regulations in other states. ICEA cited a similar regulation in Pennsylvania that sets the permissible hours for door-to-door solicitation at 9 a.m. and 7 p.m. beginning October 1 through March 31, and between 9 a.m. and 8 p.m. starting April 1 through September 30. ICEA stated this time frame is more reasonable than the 10 am to 6 pm restriction included in Section 412.120(k). Accordingly, the ICEA recommended that Section 412.120(k) be revised as set forth below:

> "Persons conducting door-to-door sales may do so only during the hours established as being permissible by the jurisdiction within which the door-to-door sales take place. In jurisdictions where no such permissible hours have been established, permissible hours for the door-to-door sale of power and energy service shall be between the hours of 9 a.m. and 7 p.m. during the months beginning October 1 and ending March 31, and between 9 a.m. and 8 p.m. during the months beginning April 1 and ending September 30. ~~10 am to 6 pm unless the jurisdiction where the door-to-door sales take place have rules for door-to-door solicitation that are more restrictive, in which case, the~~"

Spark Energy

Spark Energy also argued that the door-to-door hours proposed in Section 412.120(k) are too restrictive and noted that, while the parties in this Docket have expressed the desire for disclosure, appearance, and behavior rules governing door-to-door sales, no party has presented evidence of the need for such a severe restriction to hours of operation.

Spark Energy believed the practical effect of Section 412.120(k) is to prevent door-to-door activity during the early evening, when many residents who are away all day are returning home from work. Spark Energy noted early evening is the most critical period for door-to-door agents and believed that if agents are denied the opportunity to sell during their most productive part of the day, the door-to-door marketing channel will become less viable, and perhaps non-viable.

Spark Energy recommended the Commission amend Section 412.120(k) to use language recently adopted by the Pennsylvania Public Utility Commission for door-to-door marketing:

> A Supplier shall limit door-to-door marketing or sales activities to the hours between 9 a.m. and 7 p.m. during the 6 months beginning October 1 and ending March 31, and between 9 a.m. and 8 p.m. during the months beginning April 1 and ending September 30. When a local ordinance has stricter limitations, a supplier shall comply with the local ordinance.
>
> (Docket L-2010-2208332, February 10, 2011, Proposed Rulemaking Order, Annex A, Section 111.9)

Spark Energy believed the language used in Pennsylvania strikes a reasonable balance between maintaining benefits of door-to-door marketing and restricting activity to socially acceptable hours. This approach preserves both the economic benefits of door-to-door employment and the educational benefit of door-to-door selling for Illinois consumers.

NEMA

NEMA offered a position that was aligned with the other parties in that it argued restricting door-to-door activity from 10:00AM to 6:00PM in the evening would significantly restrict the effectiveness of home solicitation since many consumers would not be at home during these hours. NEMA also argued the RESs are already subject to consumer restrictions based upon the do not call constraints in these Proposed Rules.

NEMA also suggested the Commission model Section 412.120 (k) after the rule used in Pennsylvania. NEMA proposed language that balances consumer protection concerns and the fact that certain localities have taken a stricter approach in their ordinances. NEMA recommended the following revisions to Proposed Section 412.120(k):

> "Persons conducting door-to-door sales may do so ~~only~~ between the hours of 9~~10~~ am to 7~~6~~ pm during the period of October 1 through March 31, and between the hours of 9 am and 8 pm during the period of April 1 through September 30**,** unless the jurisdiction where the door-to-door sales take place has rules for door-to-door solicitation that are more restrictive, in which case, the [sic] latter shall apply."

RESA

RESA argued Section 412.120 (k) should be eliminated in its entirety. RESA found it unreasonable to restrict door-to-door sales to a time period when most people are not at home. Further RESA stated it was not reasonable for Section 412.120 (k) to give the effect of granting an exception for electric sales when none exists for other services or products, including gas suppliers. RESA also thought the restricted hours would also directly impact the income of potentially hundreds of citizens of Illinois who earn a living selling energy products door-to-door. It argued the proposed restriction on the hours of solicitation would eliminate the ability for the RES to market to customers during times when the consumer is most available to consider an offer. RESA also argued the solicitation restrictions would serve to usurp the authority municipalities in regulating solicitors.

Finally, RESA argued that the Commission should reject this proposal as an attempt by a single supplier to garner an unfair competitive advantage and proposed subsection 412.120 (k) should be eliminated.

Commission Analysis & Conclusion:

The Commission finds that the proposed language Section 412.120 (k) is reasonable to allow the RES ample opportunity to contact potential customers when they are at home. Since this language also provides for stricter regulations in certain municipalities, the Commission will revise Subsection 412.120 (k) using the language proposed by ICEA.

E. Section 412.130 (a)

ComEd

ComEd stated that the RESs telemarketers should be subject to the same disclosures as those required of the door-to-door solicitors. Therefore, ComEd proposes incorporating the proposed language in Section 412.120(a) into Section 412.130(a) as shown below:

> a) In addition to complying with the Telephone Solicitations Act [815 ILCS 413], an RES agent who contacts customers by telephone for the purpose of selling power and energy service shall provide the agent's name and, on request, the identification number if available. The RES agent shall state that it is an independent seller of power and energy service, certified by the Illinois Commerce Commission, and that it is not an employee of, representing, endorsed by or acting on behalf of the electric utility, governmental body, or consumer group.

Commission Analysis & Conclusion:

For the reasons stated in Section 412.120 (a), the Commission will adopt the proposed language for Section 412.130 (a) as revised.

F. Section 412.140 Inbound Enrollment Calls

1. Section 412.140(b)

ComEd

Similarly, ComEd argued inbound enrollment contacts should be subject to the same declaratory requirements as those set forth for as door-to-door solicitors. ComEd also proposed that the revised language from Section 412.120(a) should be incorporated into Section 412.140(b):

> b) Verbally disclose to the customer items (d) through (p) of the Uniform Disclosure Statement (Section 412.110(d) through (p)). A RES agent may disclose the items in any order so long as all applicable items are explained to the customer during the sales presentation. The RES agent shall state that it is an independent seller of power and energy service, certified by the Illinois Commerce Commission, and that it is not an employee of, representing, endorsed by or acting on behalf of the electric utility, governmental body, or consumer group; and

Commission Analysis & Conclusion:

For the reasons stated in Section 412.120 (a), the Commission will adopt the proposed language for Section 412.140 (a) as revised.

2. Section 412.140 (c)

Dominion

Dominion argued that when a customer initiates a call, Section 412.140 (c) requires a RES to send the Uniform Disclosure Statement and contract to the customer within three (3) business days after the electric utility's confirmation to the RES of an accepted enrollment. Yet, Dominion argued Section 412.130(f) provides that telemarketers can wait seven (7) days before sending the same information. Dominion believed there should be no distinction between the two obligations as both involve enrollments being made over the telephone. Dominion proposed Section 412.140(c) should be modified to provide for a seven day period, to be consistent with the telemarketing obligation as shown below:

> Send the Uniform Disclosure Statement and contract to the customer within ~~3~~ 7 business days after the electric utility's confirmation to the RES of an accepted enrollment.

Commission Analysis & Conclusion:

The Commission will not adopt the language proposed by Dominion and notes the RES is given three business days to send the Uniform Disclosure Statement and contract to the customer in Section 412.130 (f) as well as Section 412.140 (c), however we will provide clarifying language to Section 412.130 (f) so it is parallel with Section 412.140 (c).

G. Section 412.150 Direct Mail

1. Section 412.150(a)

ComEd

ComEd proposed that to avoid any customer confusion, Subsection 412.150 (a) should include a clear prohibition against the display or use of the electric utility's logo in direct mail material:

> a) RES agents contacting customers for enrollment for power and energy service by direct mail shall include the items of the Uniform Disclosure Statement (Section 412.110) for the service being solicited. Direct mail material shall not display or otherwise use the electric utility's logo nor make any statements of representation of,

endorsement by or acting on behalf of the electric utility, governmental body or consumer group.

ICEA

ICEA rejected the Commission's position that the Uniform Disclosure Statement should be included with every direct mailing. ICEA based its objection on the assumption that all direct mail is sent via U.S. Mail. Frequently, it stated direct mailings can channel the customer to a RESs' website or to an inbound call center where they can locate the disclosure requirements. ICEA stated the mandate that every direct mailing include a Uniform Disclosure Statement would completely eliminate postcard mailings to inform the customer of their product options; could lead to increased postage; and could cause the RES to limit the consumer's exposure to the full range of RES products, assuming the RES is required to send a disclosure statement for each product. Accordingly, the ICEA recommended the following revision be incorporated in Section 412.150 (a):

> RES agents contacting customers for enrollment for power and energy service by direct mail shall include the items of the Uniform Disclosure Statement (Section 412.110) for the service being solicited if customer enrollment is being performed via written enrollment or Letter of Agency. If the customer enrollment process is being completed via another channel, the requirements relating to the Uniform Disclosure Statement for that channel shall control.

Commission Analysis & Conclusion:

The Commission finds this language offered by ComEd is reasonable and will protect the consumer from any confusion brought about in instances were the electric utility logo could be construed to be an endorsement of a RES. The Commission will adopt the proposed language presented by ComEd and will not include the additional language proposed by ICEA.

2. Sub - Section 412.150 (c)

Dominion

Dominion challenged the requirement that customers who are solicited through direct mail receive a copy of the sales contract within three business days under Section 412.150 (c). While Dominion agreed with the requirement that customers receive a copy of the sales contract, it disagreed with the three business day requirement. Dominion argued this timeline would result the consumer receiving duplicate contracts. Dominion offered proposed language to clarify direct mail customers are only required to receive a single contract.

412.150(c)

A copy of the sales contract must be sent to the customer within three business days after the electric utility's confirmation to the RES of an accepted enrollment. The provision of a sales contract as part of the direct sales marketing to the customer shall be deemed to be compliance with this provision.

Commission Analysis & Conclusion:

The Commission will not adopt the language proposed by Dominion.

H. Section 412.160 Online Marketing

1. Section 412.160 (a)

ComEd

ComEd also introduced language in Section 412.160 (a) that is similar to the language originally proposed in Sections 412.120 (a), 412.130 (a), 412.140(b), and 412.150 (a). ComEd argued that the same prohibitions regarding the use of the electric utility's logo in other marketing methods should apply to any Internet marketing/sales activity:

a) Each RES offering power and energy service to customers online shall display the items of the Uniform Disclosure Statement (Section 412.110) for any services offered through online enrollment before requiring the customer to enter any personal information other than zip code, electric utility service territory, and/or type of service sought. The RES's Internet and electronic material shall not display or otherwise use the electric utility's logo nor make any statements of representation of, endorsement by or acting on behalf of the electric utility, governmental body or consumer group.

Commission Analysis & Conclusion:

For the reasons stated in Section 412.120 (a), the Commission will adopt the proposed language for Section 412.160 (a) as revised.

I. Section 412.170 Affiliate Name and Logo Use

1. Section 412.170 (d) and 412.10 – Do Not Market List

NEMA

NEMA objected to the concept of requiring the utility to maintain Do Not Market List. NEMA pointed to several issues associated with allowing such lists that it believed

have not yet been fully vetted and considered by the stakeholders. NEMA questioned whether it is appropriate to designate the responsibility of maintaining the Do Not Market List to the utility in a competitive marketplace. In particular, NEMA sought to justify the utility would notify the consumer about the list in a competitively neutral fashion; what would constitute consumer consent to be included on the list; what would be the length of time that a consumer would remain on the list; and the cost to the utility to implement and maintain the list.

NEMA argued the Do Not Market list, in conjunction with state and federal telemarketing restrictions, and the door-to-door solicitation limitations serve to drastically limit the effective sales channel available to the RES. NEMA suggested the best course of action is for the utility to maintain the Do-Not-Market List is to provide the consumers participate on an opt-out feature. NEMA believed allowing the consumer to opt out from the customer list would serve the identical purpose as the Do Not Market list but would be more consistent with the goals of the legislature and this Commission to encourage meaningful consumer choice.

Commission Analysis & Conclusion:

The Commission notes the comments offered above. However, since no party has proposed any revisions to these Subsections, we will adopt the language as drafted in the First Notice Order.

J. Section 412.190 Affiliate Name and Logo Use

Spark Energy

Spark Energy argued that the Section 412.190 has not gone far enough to prevent consumer confusion from various RES and utility naming combinations.

Spark Energy believed the intent of Section 412.190 should be to prevent a RES from using the well-established and recognized name or brand of an Illinois utility to fool consumers into believing the RES is affiliated with, associated with or endorsed by the utility. To avoid customer confusion, Spark Energy stated the restriction on RES name and logo use should apply 1) to electric *and* gas Illinois utilities; and 2) regardless of whether the RES is an affiliate of the utility.

Spark Energy's argument was made in anticipation that although Illinois consumers have historically received natural gas and electricity supply service from separate utilities, these consumers will have the opportunity to purchase supply service for both fuels from the same competitive supplier if they are licensed as both a RES and AGS.

Spark Energy acknowledged it is appropriate for the Commission to prevent a utility from selling (or giving) the use of its name or logo to a RES. Spark Energy notes the value of name recognition and brand awareness is immense for a RES. It also

stated brand recognition is an important asset that most suppliers spend a great deal of money to create. Spark Energy suggested that should the Commission choose to permit a utility to sell its name or logo to a RES, the Commission should ensure that the transaction compensates the customers of that utility for the market value of the brand recognition being sold to the RES. Without such oversight Spark Energy contends, these transactions would undermine the integrity of the competitive market by giving undue advantage to certain suppliers. Spark Energy recommended Section 412.190 be re-titled to "Name and Logo Use" and modified as shown below:

> "A RES shall not be permitted to market power and energy services to customers using a similar name or logo to that of an existing electric or natural gas utility in Illinois. An existing electric or natural gas utility in Illinois shall not give or sell the use of its name or logo to a RES without ICC approval."

NEMA

NEMA stated that it is unclear which entities are subject to Section 412.190. NEMA argued the focus of the regulations should be on proper disclosure regardless of the entity's affiliation.

NEMA believed that as a long-standing principle, a utility should not speak on behalf an unregulated affiliate or give the appearance that it is operating on behalf of its unregulated affiliate. NEMA also argued a utility and its unregulated affiliate should not trade upon, promote or suggest to any customer, supplier or third-party that they may receive preferential treatment as a result of this affiliation. NEMA points to the Section 412.110(l) which requires every RES to disclose it, "is an independent seller of power and energy service, certified by the Illinois Commerce Commission and that the agent is not representing or acting on behalf of the electric utility, governmental bodies or consumer groups," and Section 412.110(a) which additionally requires the disclosure of, "The legal name of the RES and the name under which the RES will market its products, if different." NEMA took the position these proposed regulations would require the RES to disclose the nature of its relationship to the electric utility and believed proper disclosure of the relationship between an entity and a utility is the appropriate focus of the regulations to promote consumer understanding and protection.

With these principles and proposed regulatory requirements in mind, NEMA sought clarification of the intent and language in Section 412.190.

ICEA

ICEA noted Section 412.190 appeared to allow an unaffiliated RES to market power and energy service while using a similar name or logo to that of an electric utility or natural gas utility in Illinois. The ICEA did not believe this was what the Commission intended, and thus recommended Section 412.190 be revised as set forth below:

"Section 412.190 ~~Affiliate~~ Utility Name and Logo Use

A RES shall not be permitted to market power and energy service to residential customers using a similar name (where any part of the RES name contains any part of the utility name) or logo to that of an existing electric utility or natural gas utility ~~affiliated~~ in Illinois."

Mid-American

Mid-American noted Part 412 defines "RES" to include, "Both alternative retail electric suppliers and electric utilities serving or seeking to serve retail customers pursuant to Section 16-116 of the Act." Mid-American believed that since it provides competitive electric service to customers outside its electric utility service area under Section 16-116 of the Act, Mid-American would be deemed to be a RES under this definition. It argued the purpose of Section 412.190 appeared to be to reduce the possibility of the customer would be confused by an offer from the RES for competitive being perceived to be having been made by the underlying electric utility which already provides service to the customer. While, Mid-American fully supported the intent of this Section; it argued Section 412.190 as drafted appears to be unintentionally over-inclusive.

In particular, Mid-American sought to have the Commission revise Section 412.190 to clarify that an electric utility providing competitive electric service outside of its service area and pursuant to Section 16-116 would be allowed to use its name and logo for marketing purposes. As written, Mid-American argued Section 412.190 might be interpreted in a manner that would preclude a utility operating under Section 16-116 from continuing to use its name, even though there would be no possibility of customer confusion. Mid-American noted it presently competes outside its service territory and appropriately uses its corporate name. Mid-American suggested Section 412.190 might be interpreted in a manner that would suggest that a RES would be required to use a different name, which in turn would suggest to the customer that it is an entirely different corporate entity. As a result, ironically, Section 412.190 might be read to require that customers be misled.

Mid-American maintained that since it provides competitive service under Section 16-116 of the Act and its competitive service may *only* be offered to "customers located outside its service area, there is no possibility of customer confusion due to its marketing efforts. Mid-American proposed the Commission modify Section 412.190 to clarify it is not intended to apply to an electric utility that uses its name and logo to provide competitive service outside of its service area pursuant to Section 16-116. Mid-American offered the following modification to Section 412.190:

An Alternative Retail Electric Supplier (ARES) ~~RES~~ shall not be permitted to market power and energy service to residential customers using a similar name (where any part of the ARES name contains any part of the utility name) or logo to that of an existing electric utility affiliated in Illinois.

This section does not apply to an electric utility serving or seeking to serve retail customers, including residential customers, pursuant to Section 16-116 of the Public Utilities Act.

Commission Analysis & Conclusion:

The Commission does not foresee the relevance of modifying Section 412.190 to accommodate or oversee transactions where the RES would compensate the utility for use of its name or logo. We note NEMA's request for clarification of the intent of Section 412.190 and find we will make certain modifications in response to this request. The Commission will incorporate the proposed modification presented by ICEA to expand the rule to include gas utilities. In addition, we will modify this Section to include the exception for electric utilities operating under Section 16-116 of the Public Utilities Act. The modified language shall appear as follows:

Section 412.190 ~~Affiliate~~ Utility Name and Logo Use

A RES shall not be permitted to market power and energy service to residential customers using a similar name (where any part of the RES name contains any part of the utility name) or logo to that of an existing electric utility or natural gas utility ~~affiliated~~ in Illinois. This section does not apply to an electric utility serving or seeking to serve retail customers, including residential customers, pursuant to Section 16-116 of the Public Utilities Act.

K. Section 412.195 Product Descriptions

RESA

RESA re-introduced concerns originally raised by BlueStar, ICEA and Staff in comments addressed in the First Notice Order. RESA continued to object to what it believed were unintended consequences of the effect of Section 412.195 in the First Notice Order.

RESA believed that an in-depth discussion in an ORMD workshop is necessary before the implications and consequences of any rule restricting the use of the terms – 'green', 'renewable energy', and 'environmentally friendly' should occur. Based on this argument, RESA sought to eliminate Section 412.195 entirely or alternatively, to include the following revision that it stated would accomplish the Commission's goal of promoting product transparency:

Section 412.195 Product Descriptions

Only ~~power and~~ renewable energy ~~service~~ resources that ~~includes power and energy purchased entirely separate and apart from~~ are in excess of those

required to meet the renewable portfolio standard requirements applicable to RESs under Public Act 96-0159 can be marketed as "green," "renewable energy", or "environmentally friendly.

Commission Analysis & Conclusion:

The Commission finds there is no relevance to RESA's attempt to regurgitate arguments that have already been addressed in the First Notice Order. We will not consider the proposed revisions above and will adopt the language as drafted.

L. Section 412.210 Rescission of Sales Contract

RESA

RESA argued it is inappropriate to set rescission timelines based upon the length of time the utility takes to process an enrollment request. RESA offered a modification to Section 412.210 that would tie rescission rights to the execution of the contract. RESA noted this differs from what is currently incorporated in the rule, which ties the rescission time period to the processing of a pending enrollment, not a contract. Although RESA maintained the position that rescission should be tied to the contract and not a utility's notice, it also offered an alternative position, which was to allow enrollment based on a future start date.

RESA argued that the enrollment window should be significantly expanded to allow the RES to immediately submit the Direct Access Service Request (enrollment) after the contract is executed and suggested a period of six months to do so. As such, RESA proposed Section 412.210 should be modified to explicitly require the utilities to accept enrollments 6-months in advance of a flow start date:

Section 412.210 Rescission of Sales Contract

The electric utility shall accept valid electronic enrollment requests from a RES as long as they are submitted no more than six months before the commencement of RES service…

RESA suggested further, that if its proposed language is not adopted, it would recommend the Commission conduct a workshop so that its findings and recommendations regarding the feasibility and impact of expanding the timeline can be provided to the Commission within 180 days from the final date of this order.

NEMA

NEMA recommended the consumer should be provided with a three-day right of rescission that begins with the date of the consumer signs the contract and suggested the Commission may alternatively consider providing the consumer with a three-day right of rescission which runs from the date of the customer receives of the contract,

thus effectively extending the period in most cases. NEMA stated it was cognizant of the concern consumers are provided with adequate time to rescind a contract. NEMA suggested that providing the consumers with a three day right of rescission would satisfy this concern. By comparison, NEMA noted the possibility of a ten-day rescission period in would significantly increase the RESs business risk which would be reflected in a higher energy price for consumers.

Commission Analysis & Conclusion:

The Commission will not comment on the arguments presented by RESA and NEMA since they have already been considered in the First Notice Order. We will adopt the language as drafted.

M. Section 412.230 Early Termination Fee

RESA

RESA argued the proposed rules will have a negative impact on retail customers and the marketplace. RESA's proposed the $50 early termination fee cap and the early termination fee waiver should be eliminated. In the alternative, RESA also suggested that the Office of Retail Market Development should be required to maintain a database to track contract cancellations. ICEA and NEMA offered similar arguments to eliminate the $50 early termination fee cap and early termination fee waiver based upon positions of the parties previously brought before the Commission prior to the First Notice Order.

Commission Analysis & Conclusion:

The Commission will not revisit arguments which have already been considered in the First Notice Order. We will adopt the language as drafted.

N. Section 412.310 Required RES Information

Dominion

Dominion noted Section 412.310 requires a RES disclose to whether it has ever declared *force majeure* within the past 10 years to the Commission prior to marketing to the customer. Dominion argued there is no purpose in providing this information to Commission Staff and stated is was not clear in the rule or on the record what Staff would do with this information once it has been compiled. Dominion further argued it would be discriminatory and anticompetitive to request comparable information from retail energy suppliers. It proposed the Commission eliminate Section 412.310 entirely.

Commission Analysis & Conclusion:

The Commission notes the argument presented by Dominion, but we find the purpose for compiling this information is obvious to allow this Commission to be aware which RESs have declared *force majeure* within the 10-year time period. We find the eventual purpose of keeping the consumers informed of the RESs *force majeure* declarations is of the utmost importance. In addition, we find Dominion has failed to demonstrate how compiling this data would be discriminatory or anticompetitive in any manner. As such, we will include Section 412.310 as drafted.

O. Section 412.320 Dispute Resolution

ICEA

ICEA argued Section 412.320 as drafted, is contrary to a series of well-established U.S. Supreme Court and Illinois case law regarding alternative dispute resolution.[1] ICEA also maintained the Section 412.320 (a) would lead to increased costs to the consumer by forcing disputes into expensive court litigation, when the parties have the option of alternative dispute resolution available.

ICEA stated Section 412.320 (a) could be revised to clarify the intent of the rule is to ensure the consumer understands that contractual arbitration agreements do not preclude them from filing a complaint with the Commission. ICEA sought to revise Section 412.320 (a) to ensure it complies with well-established federal and state law; and affords the Commission is provided ample opportunity to hear from consumers who wish to bring a complaint to the Commission while still allowing consumers to have the option to pursue arbitration. ICEA recommended Section 412.320 (a) be revised as follows:

> A residential or small commercial retail customer has the right to make a formal or informal complaint to the Commission, and a RES contract cannot impair this right. A RES shall not require a residential or small commercial retail customer, as part of the terms of service, to engage in alternative dispute resolution <u>of complaints to the Commission</u>, including

[1] ., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S.265, 278, 130 L. Ed. 2d 753, 767, 115 S. Ct. 834, 841 (1995)); Preston v. Ferrer, 552 U.S. 346 (2008) (Federal Arbitration Act preempts state laws which attempt to block arbitration); Circuit City Stores, Inc. v. Adams 532 U.S. 105, 123 (2001); R.A. Bright Construction Inc. v. Weis Builders Inc., No. 3-09-0910 (Ill. 3rd June 9, 2010) (Federal Arbitration Act was preempts the Illinois Building and Construction Contract Act which attempted to restrict contractual arbitration provisions); Triad Health Mgmt of Ga. III, LLC v. Johnson, 2009 WL 1532509 (Ga. Ct. App. 2009) (Georgia court held that a state law which attempted to preclude enforcement of pre-dispute arbitration agreements unenforceable and preempted by the federal arbitration act); Estate of Ruszala v. Brookdale Living Communities, Inc. 1 A.3d 806 (N.J. 2010) (New Jersey court held that a state law which banned arbitration agreements unenforceable and contrary to the Federal Arbitration Act); e.g., Carter v. SSC Odin Operating Co., 237 Ill. 2d 30, 927 N.E.2d 1207 (2010).

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requiring such complaints to be submitted to arbitration or mediation by third parties.

Dominion

Dominion argued it was unnecessary and potentially misleading for the Commission to list informal complaints on its website as set forth in Section 412.320 (c)(3). It also challenged the underlying definition of a "complaint" as being too broad. Dominion suggested that unless the Consumer Affairs Division considers separating each complaint into inquiries, general concerns, specific complaints, or additional classifications, it would be too misleading to simply list the number of informal complaints. It also argued that listing the number of complaints could provide consumers with a false picture of a RES's performance without taking into account the actual number of customers the RES serves. Dominion stated the remedy would be to direct the ORMD to initiate an industry collaborative workshop to evaluate the best methods for collecting data in the most informative manner for the consumer while protecting the RESs confidential data. As such, Dominion proposed the following revisions to Section 412.320 (c) (3).

Section 412.320 (c) (3)

Disclosure of RESs' level of customer complaints. The Commission shall, on at least a quarterly basis, prepare a summary of all formal and informal complaints received by it and publish such summary on its web site. The summary shall be in an easy-to-read and user friendly format that provides sufficient information to reflect RES performance without revealing confidential business information, the details of which will be addressed in workshops supervised by the Commission's Office of Market Retail Development.

Commission Analysis & Conclusion:

The Commission notes the position offered by ICEA and will revise Section 412.320 (a) as stated above to bring this section in line with well-established Federal and State law. We will not adopt the revision proposed by Dominion and will not change Section 412.320 (c) (3) herein.

III. Proposed Revisions to Part 453.

A. Section 453.20 Criteria by Which to Judge the Validity of an Electronic Signature

RESA

RESA stated that although Section 453.20 (b) was appeared to be designed to protect the consumer, it found this section to be onerous and no longer necessary considering the pending adoption of the enrollment protections offered to the consumer in Part 412 of this rulemaking. RESA argued Section 453.20 (b) would cause the consumer to have to provide additional information to the RES that is not required under other marketing channels. RESA also maintained the consumer would also have to have additional communications with the RES to establish what security method the customer will use. RESA believed these additional communications would place the consumer at a disadvantage and act as a deterrent to the consumer using online enrollment.

RESA argued the Commission's goal should be encourage competitively neutral marketing channels. RESA maintained that since the online enrollment regulations in Section 453.20 (b) are duplicative, they should be eliminated.

Commission Analysis & Conclusion:

The Commission will not eliminate Section 453.20 or any provisions in Part 453 that were not subject to the amendments originally presented in the First Notice Order.

IV. Findings and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction over the subject matter herein;

(2) the recitals of fact set forth in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;

(3) the proposed rule at 83 Ill. Adm. Code 412, as reflected in the attached Appendix A, and the proposed amendment to 83 Ill. Adm. Code 453, as reflected in the attached Appendix B, should be submitted to the Joint Committee on Administrative Rules to begin the second notice period.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed rule at 83 Ill. Adm. Code 412, as reflected in the attached Appendix A, and the

proposed amendment to 83 Ill. Adm. Code 453, as reflected in the attached Appendix B, should be submitted to the Joint Committee on Administrative Rules of the Illinois General Assembly, pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this order is not final and is not subject to the Administrative Review Law.

By Order of the Commission this 22nd day of November, 2011.

(SIGNED) DOUGLAS P. SCOTT

Chairman