

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

<b>Illinois Commerce Commission</b>	)	
<b>On Its Own Motion</b>	)	<b>Docket No. 09-0592</b>
	)	
<b>Adoption of 83 Ill. Adm. Code 412 and</b>	)	
<b>Amendment of 83 Ill. Adm. Code 453.</b>	)	

**COMMENTS**  
**OF THE**  
**NATIONAL ENERGY MARKETERS ASSOCIATION**

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The National Energy Marketers Association (NEM)<sup>1</sup> hereby respectfully submits its Comments on the First Notice Order issued in the above-referenced proceeding pursuant to its publication in the August 12, 2011, Illinois Register. In its Comments, NEM will address the following issues:

- 1) seasonally adjusted door-to-door solicitation hours would strike an appropriate balance between allowing marketing activities during reasonable hours and respecting consumer privacy and protection concerns;
- 2) the concept of a utility-maintained Do Not Market List has not been fully vetted and should not be included in the proposed rules;

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<sup>1</sup> The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting and power line technologies.

This document reflects the views of the National Energy Marketers Association and does not necessarily reflect the views of any specific member of the Association. NEM notes that there may be individual member(s) that have different views on the issues herein.

- 3) regulations pertaining to the use of a utility name or logo should focus on the entity's use of proper disclosures of its relationship to the utility;
- 4) residential and small commercial consumers should be provided a three day contract rescission period that runs from the date of the consumer's signing the contract, or, alternatively, the consumer's receipt of the contract;
- 5) early termination fees should not be capped at \$50, or, at a minimum, the proposed rule should be clarified that the fee limitation applies only to residential consumers and not commercial and industrial consumers; and
- 6) the proposed regulations should not include an additional ten day period after receipt of the first bill to terminate a contract without a termination fee.

**I. Proposed Section 412.120(k) - Door to door solicitation hours**

NEM is concerned that restricting door-to-door activity from 10:00AM to 6:00PM in the evening as set forth in Proposed Section 412.120(k) would significantly restrict the effectiveness of this sales channel as many working families may not be at home during these hours. NEM requests that the Commission consider that door-to-door sales is an important sales channel for RESs that also serves a consumer education function. Moreover, with the attendant telemarketing do not call restrictions, RESs are already constrained in the manner in which they may contact consumers. That having been said, NEM is also mindful of the consumer protection and privacy concerns that arise in connection with door-to-door sales.

In its recent proceeding to adopt Marketing and Sales Guidelines for competitive suppliers, the Pennsylvania Public Utility Commission ultimately decided to, "permit door-to-door sales activity to take place between the hours of 9:00 am and 8:00 pm during the six months between

April 1 and September 30, while keeping the hours of 9:00 am and 7:00 pm during the six months between October 1 and March 31. This additional hour for six months during the spring and summer months will allow more marketing without compromising the safety and privacy concerns expressed by many of the parties.” (Pennsylvania PUC Docket No. M-2010-2185981, Final Order, issued November 4, 2010, at pages 40-41).

We believe that the seasonally adjusted hours adopted by the Pennsylvania PUC are a generally reasonable timeframe within which to contact consumers and increase the likelihood that consumers will in fact be home. This approach also recognizes and balances consumer protection concerns. NEM suggests that the Commission consider such an approach. We do also recognize that certain localities have taken a stricter approach in their ordinances to door-to-door sales and will conform to those requirements as applicable. Accordingly, NEM recommends the following revisions to Proposed Section 412.120(k) (suggested revisions are shown in strikethrough and bold):

“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.**”

## II. Proposed Section 412.170(d) and 412.10 – Do Not Market List

NEM is concerned about the inclusion of the concept of a utility-maintained Do Not Market List in the proposed rules. In general, NEM believes that there are a number of important issues associated with allowing such lists that have not yet been fully vetted and considered by the stakeholders. First among these issues is the appropriateness of instituting the utility (the

incumbent and dominant provider) as the keeper of the list in a competitive marketplace. Related to this are the rules for how the utility may inform consumers in a competitively neutral fashion about the existence of the list, what constitutes consent for the consumer to be on the list, how long will a consumer be kept on the list, and the implementation and on-going costs to the utility of maintaining the list. NEM is concerned that the Do Not Market list, in concert with state and federal telemarketing sales restrictions, and the door-to-door solicitation requirements being considered in the instant rulemaking, could drastically limit the availability of effective sales channels without first having made a requisite finding that such a restriction is necessary to protect consumers. All of these are important considerations, the resolution of which could affect the on-going development of the marketplace, and should be addressed before this provision is included in the proposed rules.

The retail electric market in Illinois is experiencing significant growth in consumer shopping and supplier participation. Now is the time to look for ways to meaningfully educate consumers on a low cost basis of the opportunities available to them, not to unnecessarily restrict otherwise appropriate consumer contacts. In this vein, it is NEM's suggestion that the best course of action is for the utilities to maintain and disseminate a customer list to competitive suppliers in which consumers participate on an opt-out basis. Opting out of the customer list would serve the same purpose as the Do Not Market list but is more consistent with the goals of the legislature and this Commission to encourage meaningful consumer choice.

### **III. Proposed Section 412.190 - Affiliate Name and Logo Use**

In the First Notice Order pertaining to Proposed Section 412.190 on affiliate name and logo use the Commission expressed concern that parties proposed language may suffer from a lack of

clarity and modified Section 412.190 from previous proposals. NEM is concerned that Proposed Section 412.190 continues to be unclear as to what entities it is intended to be made applicable. NEM submits as a general proposition that if a utility name is used by an entity, affiliated or otherwise, that the entity must make proper disclosures with respect to its relationship with the utility. In other words, the focus of the regulations should be on proper disclosure regardless of the entity's affiliation.

NEM believes as a long-standing principle that a utility should not speak on behalf of its unregulated affiliate or give the appearance that it is speaking on behalf of its unregulated affiliate. In addition, 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 the affiliation. Furthermore, the Uniform Disclosure Statement requirements set forth in Proposed Section 412.110(l) would require every RES to state that 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) would additionally require the disclosure of, "The legal name of the RES and the name under which the RES will market its products, if different." As such, the proposed regulations would require disclosure of the nature of a RES's relationship to the electric utility. In NEM's view, proper disclosure of an entity's relationship with a utility is the appropriate focus of the regulations to promote consumer understanding and protection.

With these principles and proposed regulatory requirements in mind, NEM requests that the Commission clarify the intention and wording of Section 412.190.

#### **IV. Proposed Section 412.210 and 412.110(k) – Rescission of Sales Contract**

Proposed Section 412.210 provides that residential and small commercial customers would have the right to rescind a contract within 10 calendar days after the electric utility processes the enrollment request. This requirement is also set forth in the Uniform Disclosure Statement requirements at Section 412.110(k). NEM continues to recommend that consumers should be provided with a three day right of rescission that runs from the date of the consumer's signing of the contract. The Commission may alternatively consider providing the consumer with a three day right of rescission that runs from the date of the consumer's receipt of the contract, which would effectively extend the period in most cases. The First Notice Order does not acknowledge that current Illinois statute and administrative laws expressly provide for a three-day rescission period. (See 83 Ill. Adm. Code 453.40(a)(4) and Section 2EE of the Consumer Fraud and Deceptive Business Practices Act). Importantly, NEM notes that the recent Order issued in Docket 09-0460 pertaining to the Ameren UCB/POR settlement in Docket 08-0619 required Ameren to reform its tariff to provide residential consumers with a three business day right of rescission of internet enrollments, consistent with Section 453.40(a)(4) of the Commission's existing regulations. (Order, Docket 09-0460, dated April 12, 2011, at page 7). The Commission did so after expressly recognizing the instant rulemaking.

NEM is cognizant of concerns that consumers be provided with adequate time within which to decide to rescind a contract. NEM submits that providing consumers with a three day right of rescission satisfies that concern. In that vein, NEM notes that the New York Public Service Commission adopted a three-day rescission period as follows, "The ESCO shall provide residential customers the right to cancel a sales agreement within three business days after its

receipt (cancellation period).” (New York Public Service Commission, Case 98-M-1343, Uniform Business Practices, Section 5.B.2). By comparison, the proposed ten day rescission period significantly increases marketer business risk as they procure supplies in a dynamic market to serve a customer that has nearly two weeks to change its mind. In the end, this increased risk will be reflected in a higher energy price for consumers, making choice options less economic.

NEM also questions the propriety of hinging the rescission period on the date the utility processes the enrollment request, rather than when the consumer signs the contract, or alternatively, is in receipt of the contract. From a practical perspective, both the consumer and the supplier will not have advance knowledge of when enrollment processing occurs. Causing the supplier and its prospective customer to be dependent on utility back office operations as a trigger to the operation of a contract is inappropriate in a competitive marketplace as it interjects the utility into a competitive transaction. In addition, it is highly unlikely that the average consumer will understand the utility enrollment request processing procedure nor should they be expected to do so.

Clearly, the rescission period provides the residential consumer with a valuable opportunity to review documents, other offers and even discuss other products with their incumbent competitive supplier. However, in order for this period to provide the maximum possible value to the consumer, it is important that any incumbent competitive supplier receive notice at the same time as the consumer that a pending new enrollment (or, in the case of the incumbent competitive supplier, a drop) is occurring. This provides the consumer with an additional opportunity to test

the new product against other products in the market and a chance for the incumbent competitive supplier to provide the consumer with a more competitive offer.

Therefore, NEM recommends that Proposed Section 412.210 be modified as follows (proposed changes indicated in bold and strikethrough):

The customer has the ability to rescind the contract with the RES before the RES submits the enrollment request to the electric utility. Within one business day after processing a valid electronic enrollment request from the RES, the electric utility shall notify the customer in writing, **and contemporaneously provide electronic notification to the incumbent RES**, of the scheduled enrollment and provide **to the customer** the name of the RES that will be providing power and energy service. The written enrollment notice from the electric utility shall state the last day to make a request rescinding the enrollment, and provide contact information for the RES. A residential customer wishing to rescind the pending enrollment with the RES will not incur any early termination fees if the customer contacts either the electric utility or the RES within **three days of the consumer's signing the contract**~~10 calendar days after the electric utility processes the enrollment request~~. A small commercial retail customer wishing to rescind the pending enrollment with the RES will not incur any early termination fees if the customer contacts the RES within **three days of the consumer's signing the contract**~~10 calendar days after the electric utility processes the enrollment request~~. If the ~~third~~**third**~~10th~~ calendar day falls on a non-business day, the rescission period will be extended through the next business day. In the event the residential customer provides notice of rescission to the electric utility, the electric utility shall notify the RES.

NEM likewise recommends that Proposed Section 412.110(k) be modified as follows (Proposed changes indicated in bold and strikethrough):

A statement that the customer may rescind the contract and the pending enrollment, within **three days of the consumer's signing the contract**~~10 calendar days after the electric utility processes the enrollment request~~, by contacting the RES. Residential customers may rescind the contract and the pending enrollment by contacting either the RES or the electric utility. The statement shall provide both toll-free phone numbers;

## **V. Proposed Section 412.230 – Early Termination of Sales Contract**

Proposed Section 412.230 would institute a \$50 cap on early termination fees regardless of the term length of a RES contract. This restriction is mirrored in Proposed Section 412.110(f). NEM opposes the \$50 cap on early termination fees. The Commission's justification for instituting the cap as stated in the First Notice Order is primarily laws that are applicable to natural gas suppliers. (First Notice Order at 26) (220 ILCS 5/19-115(g) and 815 ILCS 505/2DDD(e)(1)). Tellingly, the legislature did not apply these laws to electric suppliers. As a matter of statutory construction and interpretation, the Commission should not extend the application of these laws to entities that the legislature did not expressly include within their scope.

Early termination fees allow RESs to control their costs to serve consumers by managing their risk, and when early termination fees are adequately disclosed to consumers up-front, they serve a valid and important role in the marketplace. A blanket \$50 cap on early termination fees regardless of the length of a contract or the nature of the service, whether it be residential or commercial, will seriously impinge upon RESs ability to offer long term fixed price products in the market. If the Commission determines nonetheless to utilize a cap on early termination fees, at a minimum it should consider instituting the cap in tiers such that the amount of the early termination fee would be allowed to be reasonably increased commensurate with longer term contracts and the increased costs and risks associated with offering those contracts.

NEM urges the Commission to consider the harm to the nascent retail market of significantly limiting the availability of a diverse array of products and services just when mass market consumer offerings are beginning to be made possible through the efforts of the Commission and

other stakeholders through the availability of utility POR programs amongst other measures. As NEM has maintained throughout its participation in this proceeding, the proper focus of this issue should be ensuring that the consumer receives adequate disclosure of the terms of the contract, including the early termination fee. RESs should be subject to strict consequences for failure to make required disclosures. This approach focuses on letting the RES offer energy products at the most competitive price to the consumer and likewise protects the consumer by requiring disclosure of contract terms, like an early termination fee, if applicable.

In addition, if despite the foregoing, the Commission incorporates an early termination fee limitation in the rules, they should be clarified such that the fee limitations are only made applicable to service to residential consumers. Commercial consumers enter into contracts on a very regular basis and have an increased level of sophistication and understanding that vitiates the need for this type of measure to be applied to them. Restrictions on termination fees for commercial consumers will dramatically limit the individual bilateral negotiations that could occur for this class of customer.

It is for the same reasons that NEM opposes the provision of an additional ten day window after the consumer's receipt of its first bill to terminate a contract without the application of an early termination fee. This proposal compounds the risk to RESs that NEM discussed above associated with the \$50 cap, by extending the window for a consumer to cancel its contract for a prolonged period that could run three months on average. This includes an eighteen to forty eight day enrollment window, a thirty day consumption period, five day period to bill, and fourteen day (ten business days) rescission period. As such, the proposal is very much a de facto determination that fixed price products are not a priority for RESs to make available to

consumers. NEM urges the Commission to avoid this result, particularly at this juncture in market development.

NEM offers the following revisions to Proposed Section 412.230 consistent with the foregoing recommendations (proposed changes in bold and strikethrough):

Any contract between an 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, ~~provided that any early termination fee or penalty shall not exceed \$50 total regardless of whether the contract is a multiyear contract. Any contract containing an early termination fee shall provide the customer the opportunity to contact the RES to terminate the contract 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 customer relying on this provision to avoid an early termination fee shall be precluded from relying upon this provision for 12 months following the date the customer terminated his or her sales contract. The contract shall disclose the opportunity and provide a toll free phone number that the customer may call in order to terminate the contract. This requirement does not relieve the customer of obligations to pay for services rendered under the contract until service is terminated.~~

NEM also recommends that Proposed Section 412.110(f) be modified as follows:

The presence or absence of early termination fees or penalties and applicable amounts or the formula pursuant to which they are calculated, ~~and shall not exceed \$50;~~

**VI. Conclusion**

For the reasons discussed herein, NEM respectfully requests that the Commission modify the First Notice Order and proposed regulations in accordance with the arguments set forth herein.

Respectfully submitted,

THE NATIONAL ENERGY MARKETERS  
ASSOCIATION  
s/Craig G. Goodman

By \_\_\_\_\_

Craig G. Goodman, Esq.  
President  
National Energy Marketers Association  
3333 K Street, NW, Suite 110  
Washington, DC 20007  
Telephone: (202) 333-3288  
Fax: (202) 333-3266  
E-Mail: [cgoodman@energymarketers.com](mailto:cgoodman@energymarketers.com)

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## **CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the Brief on Exceptions of the National Energy Marketers Association upon the service list for Docket No. 09-0592 by email on September 26, 2011.

S/ Craig G. Goodman

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Craig G. Goodman, Esq.  
President  
National Energy Marketers Association  
3333 K Street, NW, Suite 110  
Washington, DC 20007  
Telephone: (202) 333-3288  
Fax: (202) 333-3266  
E-Mail: [cgoodman@energymarketers.com](mailto:cgoodman@energymarketers.com)