

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

**Illinois Commerce Commission** )  
**On Its Own Motion** )  
 )  
**Notice of Inquiry regarding retail** )  
**electric market issues** )

**14-NOI-01**

**JOINT VERIFIED REPLY COMMENTS OF  
THE COALITION OF ENERGY SUPPLIERS AND  
THE NATIONAL ENERGY MARKETERS ASSOCIATION**

The Coalition of Energy Suppliers ("CES")<sup>1</sup> and the National Energy Marketers Association ("NEM")<sup>2</sup> respectfully submit the following Joint Reply Comments in response to the Initial Comments submitted by stakeholders on November 6, 2014, in response to the questions asked by the Illinois Commerce Commission ("Commission") in the instant Notice of Inquiry regarding the residential retail electric market.

**I.**

**INTRODUCTION**

The Initial Comments highlight the success of the Illinois competitive electricity market and the relative lack of significant problems requiring "solutions" in the form of additional

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<sup>1</sup> CES is an ad hoc coalition of retail electric suppliers ("RESs") that participate in competitive energy markets in Illinois and throughout the United States.

<sup>2</sup> 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.

regulatory requirements and obligations. (*See* CES/NEM Initial Comments at 1-3; ICEA Initial Comments at 1-3; RESA Initial Comments at 1-5.) The Initial Comments also point to existing law and regulations that provide the regulatory tools, where needed, to address potential problems, bad actors, or allegations of improper marketing techniques or RES misconduct. (*See id.*)

Significantly, no party has demonstrated that there are significant problems with the way in which the retail electric market is functioning in Illinois. While one party -- CUB -- asserts that problems exist, CUB does so only through an unspecific introductory statement that just refers generically to "CUB's contact with consumers and complaints from its consumer hotline," without any specifics about the number, frequency, time period, customer type, or subject-matter of the alleged contacts and complaints. (CUB Initial Comments at 1.) CES/NEM does not doubt that CUB has had *some* contacts with some number of the millions of electric customers in Illinois regarding customer interactions and potential complaints relating both to service provided by utilities and by RESs. However, the lack of specific information about those interactions leaves a highly incomplete basis upon which to propose extensive new regulatory requirements -- particularly that would apply to RESs but not the utilities.

Moreover, the Commission currently has sufficient enforcement authority to investigate alleged RES misconduct and to require changes to a RES's compliance measures and/or penalties, as appropriate. In this regard, the public interest has been and will continue to be well-served by the current consumer protection and marketing standards.

Accordingly, at this time, it seems that there is no legitimate basis upon which to consider modifying any existing rules or requirements applicable to RESs under Illinois law, or the addition of new or different regulatory obligations. The Initial Comments of the stakeholders

show that the majority of the stakeholders believe that the existing laws and regulations provide an adequate basis upon which the Commission can provide oversight and enforcement of the retail electric market.

The Commission, its Staff, RESs, CUB, and other interested parties devoted hundreds of hours toward the development of well-considered and robust Part 412 consumer protection rules and marketing standards for the retail electric marketplace in ICC Docket No. 09-0592. The marketing standards in Part 412 that resulted from ICC Docket No. 09-0592 have been in place for a relatively short period of time, and there is no evidence to support changing the regulations at this time. (*See* ICC Docket No. 09-0592, Dec. 5, 2012 Order.) RESs have conformed their operations in compliance with these regulations. Given the millions of consumers that have switched to competitive suppliers and the number of customer contacts associated with those high shopping participation levels, the number of complaints received appears to be exceedingly low. Indeed, by this measure, the consumer protection and marketing regulations have been very successful in guiding the actions of marketplace participants. Clearly delineated, rational behavioral standards are a strong deterrent of potential supplier misconduct.

These Reply Comments address particular stakeholder recommendations received in the Initial Comments for which additional commentary is necessary and constructive and will inform discussions going forward. Lack of a Reply Comment to any stakeholder recommendation should not be construed as our agreement therewith.

## II.

### **REPLY OF CES/NEM TO THE STAKEHOLDERS' RESPONSES TO QUESTIONS REGARDING VARIABLE RATE OFFERS**

#### **ICC Question 1: What type of disclosure requirements do you believe are necessary for variable rate offers to ensure consumers understand that the rate fluctuates?**

While it is important to provide consumers with adequate disclosures about the nature of the products they are purchasing, the existing statutory and regulatory provisions already require adequate disclosures about variable rate products. (*See* CES/NEM Initial Comments at 1-4.)

CUB has proposed that, "Variable rate offers should be required to include a disclosure that includes a 'band' within which their supply rate will be for the length of the contract." (CUB Initial Comments at 2). CUB posits that this "band" will "inform customers about the variable nature of the contract." (*Id.*). CES/NEM oppose the requirement for a variable rate "band" as proposed by CUB, both because it would be counterproductive for consumers and because the Commission does not have legal authority to impose such a requirement. Further, the existing regulations already provide substantial consumer protections.

The CUB proposal would require the RES to hedge its "variable" rate so that it does not vary outside of the artificial band – effectively converting the variable product into a fixed product. Imposing pricing regulations such as a "band" would impose upward pricing pressure on RESs to anticipate future market price increases and increase the need for RES hedging to avoid unanticipated price increases. The increased hedging increases RES costs, thereby increasing the costs of making variable products available in the marketplace, and artificially and unnecessarily increasing prices to consumers.

Moreover, the Public Utilities Act ("Act") does not give the Commission the authority to micro-manage the competitive electric market in such a manner. However, the Commission's

Part 412 regulations, together with sections of the Act and the Illinois Consumer Fraud and Deceptive Business Practices Act, do provide extensive disclosure requirements and provide the Commission with authority to enforce those requirements. (*See* 83 Ill. Admin. Code 412.110(d); 220 ILCS 5/16-115A(e); 815 ILCS 505/2EE.) Adding additional requirements -- particularly requirements that would send false price signals -- would not be appropriate and would be anti-competitive.

**ICC Question 2: Should the Commission adopt a requirement that the supplier provide the customer with a formula or method by which the variable rate is determined?**

In its Initial Comments, CUB supported the institution of a requirement that RESs provide customers with a formula or method by which a variable rate is determined. (*See* CUB Initial Comments at 2.) However, as the Initial Comments of CES/NEM and other parties explained, Section 412.110(d) of the Commission's regulations already requires that a sales contract for a variable rate product include "an explanation of how the variable charges are determined." (83 Ill. Admin. Code 412.110(d); *see* CES/NEM Initial Comments at 2-5; RESA Initial Comments at 3-7; ICEA Initial Comments at 2, 10.) Moreover, there is a balance to be struck: if consumers are to be provided with meaningful disclosures, those disclosures cannot be so granular in detail as to be confusing for consumers to understand. In complying with the current requirement to explain how variable charges are determined, RESs already make reference to PJM market pricing and other variables.

Requiring RESs to disclose formulas for designing rates is equivalent to providing their competitors with highly confidential and proprietary competitive pricing strategies and business strategies. (*See* CES/NEM Initial Comments at 4; ICEA Initial Comments at 10.) At the same time, doing so would likely be of little or no use to consumers. As RESA points out, ComEd's

Rider PE explanation of its variable charges runs to 21 pages of highly technical information. (See RESA Initial Comments at 7.) Notwithstanding that utility tariffs are inscrutable and difficult for even energy professionals to understand, imposing similar tariff-like filing regimes on the competitive marketplace is inappropriate and would restrict innovation and responsiveness to consumer needs, undermining the very market innovations that RESs specialize in providing.

**ICC Question 3: Should the Commission adopt a requirement that a residential variable rate has to be tied to a publicly available index/benchmark?**

There is broad and clear opposition to this potential requirement. (See CES/NEM Initial Comments at 5-6; RESA Initial Comments at 7; ICEA Initial Comments at 11-12.) CUB (the only party not opposing the requirement) even conceded that it likely would not actually help customers, noting that "a technical index or benchmark may lack understandability for consumers." (CUB Initial Comments at 3.) CUB simply states that it would "not be harmful." (*Id.*) But, imposing requirements that would make contracts less understandable definitely would be harmful to the development of the competitive market. RESs voluntarily will make variable rate offers tied to an index available to consumers in response to consumer need and appetite for such products, but *requiring* suppliers to do so would be in excess of Commission authority and would unnecessarily restrict suppliers from making other innovative variable rate structure products available to consumers. (See CES/NEM Initial Comments at 5-6; RESA Initial Comments at 4-5, 7; ICEA Initial Comments at 11-12.)

Contrary to CUB's suggestion, tying variable rates to an index would not avoid the underlying wholesale electric and natural gas market conditions that caused the aberrant price increases in the winter of 2014. (See CUB Initial Comments at 3.) This suggestion was

anticipated and rebutted by CES/NEM, ICEA, and RESA in their Initial Comments. (*See* CES/NEM Initial Comments at 5-6; ICEA Initial Comments at 11-12; RESA Initial Comments at 4-5.)

CES/NEM have no objection to additional consumer education on the existence and availability of index-based variable rate offers on PlugInIllinois. However, a *requirement* for index-based rates would be anti-competitive and would not provide a benefit to customers.

**ICC Question 4: Should the Commission adopt additional notice requirements for variable rate changes?**

CUB suggested that RESs be required to notify customers "of the rate for their following month's supply either on each monthly bill or in a print or electronic communication, prior to the month the charges will be [sic] begin to be incurred under the new rate." (CUB Initial Comments at 3). ICEA appears to support this approach for variable non-index product rates, subject to certain caveats. (*See* ICEA Initial Comments at 12.) CES/NEM join RESA in opposing such requirements. (*See* CES/NEM Initial Comments at 6; RESA Initial Comments at 7.)

A requirement that consumers be provided with "insurance" of this type against variable rates will increase the prices consumers pay. Requiring RESs to give advance notice of a price change for a variable rate product on the prior month's bill would, in effect, mandate that RESs provide something akin to a new two-month product. That is, if RESs are required to provide advance notice of a price change, RESs will have to price in advance, which in turn will require additional hedging, and consumers will have to cover the costs associated with those hedges. As previously noted, the Commission lacks authority to dictate RES price offerings. Additionally,

to the extent that consumers seek protections from monthly variable rate price increases, they can enter into contracts that allow them to terminate without an early termination fee.

**ICC Question 5: Should the Commission require suppliers to set and disclose a maximum rate for each residential variable rate offer?**

CUB suggests that the maximum rate charged by suppliers would be the upper limit of the rate band that they propose suppliers be limited to in variable rate product offerings. (*See* CUB Initial Comments at 3.) For the reasons set forth in the CES/NEM Initial Comments and as further explained in the response to Question 1 in these Reply Comments, CES/NEM opposes CUB's suggestion that a rate band requirement be instituted for variable rate offers or that such band function as a maximum rate for such offers. (*See* CES/NEM Initial Comments at 3-7. *See also* RESA Initial Comments at 7-8; ICEA Initial Comments at 14.)

**ICC Question 6: Should sales of variable rate offers be prohibited from implying future savings unless the basis for such implied savings is provided?**

Please see CES/NEM's answer to this question in its Initial Comments. (CES/NEM Initial Comments at 7-8.) CES/NEM also note that in responding to this question, CUB makes the important point -- which CES/NEM and other parties have also repeatedly made -- that existing statutory and regulatory provisions already provide an enforcement mechanism for addressing problems that may arise in this area. (*See* CUB Initial Comments at 3-4.)

**ICC Question 7: Should the Commission require suppliers to provide its customers with readily available access to rates, including historical rates and current rates, as well as imminent changes to the rates?**

Please see CES/NEM's answer to this question in its Initial Comments. (CES/NEM Initial Comments at 8-9.) CES/NEM also note that there is a broad recognition in the Initial Comments that historical rate information does not predict future rate information, is of limited utility, and may create customer confusion. (*See id.*; RESA Initial Comments at 8; ICEA Initial Comments at 14-17; CUB Initial Comments at 4.)

**III.**

**REPLY OF CES/NEM TO THE STAKEHOLDERS' RESPONSES TO QUESTIONS REGARDING RENEWABLE OR "GREEN" ENERGY OFFERS**

Additional regulation in this area at this time is unwarranted and may stifle competitive offerings and innovation, to the detriment of Illinois consumers. Please see the CES/NEM Initial Comments regarding this sub-set of questions. (*See* CES/NEM Initial Comments at 9-11.)

**IV.**

**REPLY OF CES/NEM TO THE STAKEHOLDERS' RESPONSES TO QUESTIONS REGARDING DEFINITIONS OF FIXED AND VARIABLE RATES**

While it is important that there be adequate consumer disclosures regarding the type, duration, pricing, and other terms of their contracts with suppliers, there has not been a showing that the current legally mandated disclosure mechanisms are inadequate. Please see the CES/NEM Initial Comments regarding this sub-set of questions. (*See* CES/NEM Initial Comments at 11-13.) A Commission-imposed definition of "fixed" or "variable" rates is unwarranted and, like trying to define "green" offerings, may stifle competitive offerings and innovation, to the detriment of Illinois consumers.

ICEA proposed in its initial comments that definitions of a "fixed price product," "variable non-index product," "index product," and "time of use product" be adopted. (ICEA Initial Comments at 5-9). Under ICEA's proposal, for a product to be deemed "fixed," the price must remain unchanged for at least three months and a variable non-index product would describe a product whose price changes more frequently than every three months, and for which the price is not formulaically tied to an index. (*See id.*) An "index rate" product would describe a product whose price changes more frequently than every three months, and for which the price is formulaically tied to an index. (*See id.*)

ICEA's proposal would mandate that the industry use a completely arbitrary time construct of three months to delineate between a "fixed" and "variable" rate offering. There has been no demonstrated need for such a requirement, and it likely would lead to increased consumer confusion. Consumers purchase fixed and variable rate products across other industries and have a general understanding of what those terms mean. Injecting the artificial regulatory construct of a three-month timeframe to define fixed versus variable rate offerings simply will not comport with common consumer understanding and usage, thereby making the terms confusing and misleading to consumers.

## V.

### **REPLY OF CES/NEM TO THE STAKEHOLDERS' RESPONSES TO QUESTIONS REGARDING PRICE-TO-COMPARE**

There is a general consensus that accurate "price-to-compare" information can be useful to consumers and should be a goal for improving the performance of the Illinois competitive market. (*See* CES/NEM Initial Comments at 14; RESA Initial Comments at 11; ICEA Initial Comments at 21; CUB Initial Comments at 6-7.)

However, the current approach to the "price-to-compare" is confusing and potentially misleading for consumers. For further discussion, please see the CES/NEM Initial Comments regarding this sub-set of questions. (*See* CES/NEM Initial Comments at 14-15. *See also* RESA Initial Comments at 11.)

## VI.

### **REPLY OF CES/NEM TO THE STAKEHOLDERS' RESPONSES TO QUESTIONS REGARDING CONSUMER EDUCATION**

Efforts to improve and expand consumer education are appropriate. However, the Commission should avoid the temptation to impose additional obligations on RESs "in the name of" consumer education when the market is already working well and there is no evidence of a problem in need of a solution.

There is important agreement regarding both placing the supplier logo on the utility-consolidated bill and holding periodic workshops to discuss competitive market-related issues. (*See* CES/NEM Initial Comments at 17-18; RESA Initial Comments at 13-14; ICEA Initial Comments at 24-26.) Likewise, there is similar agreement that RESs should not be mandatorily required to post their offers on the PlugInIllinois website. (*See* CES/NEM Initial Comments at 18; RESA Initial Comments at 14; ICEA Initial Comments at 26-27.)

For further discussion, please see the CES/NEM Initial Comments regarding this sub-set of questions. (*See* CES/NEM Initial Comments at 16-18.)

## VII.

### **REPLY OF CES/NEM TO THE STAKEHOLDERS' RESPONSES TO QUESTIONS REGARDING CANCELLATION AND RESCISSION**

CES/NEM continue to advocate the positions taken on this sub-set of questions as discussed in their Initial Comments. (See CES/NEM Initial Comments at 19.) As explained in the CES/NEM Initial Comments, utility smart metering capabilities should allow for more accelerated customer switching and the provision of information to customers, RESs, and utilities more quickly than is currently generally the case. Likewise, smart metering capabilities should permit the shortening of rescission periods for smart meter customers to the extent that the rescission periods were dependent upon and constructed in view of legacy metering constraints.

Consumers have historically been confused by the delay in the switching process when they shop for energy. Indeed, consumers are used to instantaneous switches of service in many other industries, including phone service, and the disparity in switching times for energy shopping is a source of dissatisfaction. An accelerated switching process will enhance the consumer energy shopping experience in general, and will specifically aid consumers faced with increasing variable rates to switch to a different supplier (competitive or regulated) that can offer them a more desirable product on a more expeditious basis, so they do not continue to incur charges at the higher rate. The Pennsylvania Public Utility Commission recently adopted an accelerated switching timeline of three business days for electric choice customers, premised on the need to provide consumers with a faster timeframe within which they can avail themselves of more competitive rates, particularly under market conditions such as those that were just

experienced.<sup>3</sup> Smart metering capabilities should permit off-cycle switching to more expeditiously accommodate a consumer's choice of supplier.

## VIII.

### **REPLY OF CES/NEM TO ICEA'S "ONE-STAR SUPPLIER" RECOMMENDATION**

ICEA included in its initial comments a proposal, not in response to any specific Commission question, regarding the RES Complaint Scorecard. (*See* ICEA Initial Comments at 29-32.) ICEA suggested that the Commission consider whether it automatically should initiate action against any RES which has a "one star" rating on the PlugInIllinois RES Complaint Scorecard for a period of six consecutive months. (*See id.*) Under the proposal, the Commission process would begin as a remedial action plan, but apparently could escalate to suspension or revocation of a RES's license.

This proposal is concerning on a number of grounds. The Commission obviously already is empowered to use its enforcement authority against bad actors, and should do so with appropriate vigor; the actions of a few bad actors can tarnish the image of the industry overall. However, using the PlugInIllinois RES Complaint Scorecard as the basis for Commission action does not afford a RES with due process and a fair opportunity to be apprised of the underlying incidents and inquiries forming the basis of the one star rating.

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<sup>3</sup> *See* Pennsylvania PUC Docket L-2014-2409383, Order, issued April 3, 2014. The Pennsylvania PUC reasoned that accelerating the switching process will, "allow customers to more quickly and easily switch electric suppliers, which will allow customers to more fully realize the benefits of a fully functioning retail market through quicker and easier access to a more favorable retail rate. These changes will also allow customers to avoid being trapped on unfavorable and volatile rate plans as many were this past winter. Furthermore, these changes will advance competition in the retail market as EGSs will need to respond more quickly to customer concerns or risk losing them to more agile competitors." (Order at 34).

Indeed, as ICEA concedes, the RES Complaint Scorecard includes inquiries, such as simple consumer questions, in the complaint count. (*See id.* at 30.) There could be any number of reasons why a RES had an uptick in inquiries that should not properly form the basis of a Commission enforcement action. Compounding this problem, if the Commission were to take action based on a RES's one star rating, this would likely be reportable to other jurisdictions in which the RES was licensed, potentially leading to an investigation in those other jurisdictions, all on the potential basis of simple consumer inquiries and not bona fide complaints.

Again, the Commission should exercise its existing authority to pursue investigations and enforcement actions against any RES that, in fact, is engaging in violations of marketing standards. However, those actions should be subject to proper supplier notice and an opportunity to cure before harsher penalties are assessed.

## **IX.**

### **CONCLUSION**

CES/NEM appreciate the opportunity to submit these Reply Comments, and look forward to a continued productive stakeholder process to examine these issues.

Respectfully submitted,

**THE COALITION OF ENERGY  
SUPPLIERS**

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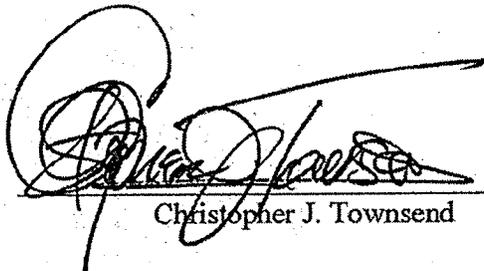
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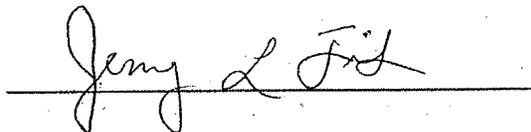
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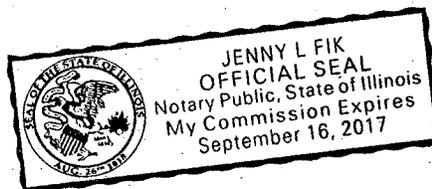
VERIFICATION

Christopher J. Townsend, being first duly sworn, on oath deposes and says that he is one of the attorneys for the Coalition of Energy Suppliers, that he has read the foregoing Joint Verified Reply Comments of the Coalition of Energy Suppliers and the National Energy Marketers Association, that he knows of the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

  
Christopher J. Townsend

Subscribed and sworn to me  
this 3rd day of December 2014.





**VERIFICATION**

Stacey L. Rantala, being first duly sworn, on oath deposes and says that she is the Executive Director, Regulatory Services of the National Energy Marketers Association, that she has read the foregoing Joint Verified Reply Comments of the Coalition of Energy Suppliers and the National Energy Marketers Association, that she knows of the contents thereof, and that the same is true to the best of her knowledge, information, and belief.

  
\_\_\_\_\_  
Stacey L. Rantala

Subscribed and sworn to me  
this 3rd day of December 2014.

  
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Washington, DC



**PHILOMINA GOMES**  
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My Commission Expires June 30, 2019