

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

MidAmerican Energy Company,)	
Nicor Energy, L.L.C.,)	
AES New Energy, Inc., and the)	
National Energy Marketers Association)	
)	Docket No. 02-0290
Request for Expedited Rulemaking)	
Regarding Telephonic and Internet)	
Enrollment Procedures Consistent with)	
§ 2EE of the Consumer Fraud and)	
Deceptive Business Practices Act)	

COMMENTS OF
MIDAMERICAN ENERGY COMPANY, NICOR ENERGY, L.L.C.,
AES NEW ENERGY, INC., AND THE
NATIONAL ENERGY MARKETERS ASSOCIATION

Pursuant to the Hearing Examiner’s schedule, as agreed to by the parties at the May 13, 2002 Status Hearing, MidAmerican Energy Company, Nicor Energy, L.L.C., AES New Energy, Inc., and the National Energy Marketers Association, hereinafter “Marketers,” under 83 Ill. Admin. Code §200.210, respectfully submit these Initial Comments for consideration by the Illinois Commerce Commission (“Commission”), concerning the request for rulemaking with regard to telephonic and Internet enrollment procedures, pursuant to the Illinois Public Utilities Act, 220 ILCS 5/1-101, *et. seq.* (“the Act”), as an alternative form and manner of the Letter of Agency (LOA), consistent with 815 ILCS 505/2EE of the Consumer Fraud and Deceptive Business Practices Act (“Fraud Act”). Specifically, Marketers seek to implement telephonic and Internet enrollment procedures utilizing electronic signatures and electronic records to satisfy the requirement of verifiable authorization or consent of the customer as required by law.

I. BENEFITS TO COMPETITION

The proposed rules directly affect how retail electric suppliers (RES) are permitted to enroll customers under the Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILCS 5/16-101 et seq. (“Choice Act”). These alternative enrollment rules allow Marketers to enroll customers in a cost-effective manner, and thereby assist in the development of a robust competitive market, while continuing to ensure that the interest of the customer is protected.

Marketers assert that the adoption of the attached telephonic and Internet enrollment rules will lower customer acquisition costs, allow for the provision of additional value-added products and services, reduce barriers to entry into the Illinois marketplace and provide the foundation for a true, competitive energy market in Illinois. Continued utilization of a physical or “wet” signature requirement increases Marketer costs which, in turn, discourages market entry. The requirement of a wet signature is also a discriminatory one, since incumbent utilities are permitted to accept applications for service by telephone and, for some utilities, by Internet [See 83 Ill. Admin. Code § 280.50(d)] (Added at 6 Ill. Reg. 13723, effective November 8, 1982; amended at 18 Ill. Reg. 17974, effective December 15, 1994). This disparate treatment among energy providers is one of many market-design policies that this Commission should correct.

In sum, approval of these rules provides the following benefits to competition:

1. Lowers customer acquisition costs;
2. Increases opportunities for new market participants;
3. Lowers the cost of service to the ultimate consumer; and
4. Levels the playing field by eliminating regulatory barriers that permit continued market dominance by the incumbent utility.

II. COMMISSION AUTHORITY TO APPROVE FORM AND MANNER OF LETTER OF AGENCY

A. Need to Remove Regulatory Barriers:

The Commission is vested with the authority by the Choice Act to approve the form and manner of the verifiable authorization from the customer, provided that form and manner is consistent with § 2EE of the Fraud Act [220 ILCS 5/16-115A, (effective Dec. 16, 1997)]. Even more basic than the Commission's authority with respect to customer switching procedures is its responsibility to "act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." [220 ILCS 5/16-101A(d)] The process of removing gratuitous barriers to competition generally falls into two categories; the first is the removal of departmental policies that impede competition, and the second, is the removal of a barrier created by regulation or tariff. In the second category, the Commission, pursuant to its statutory authority, may amend regulations or tariffs. The simple fact that a policy, regulation or tariff currently exists should not signify that it cannot be challenged or modified, if it is found to obstruct the advancement of a competitive electricity market in Illinois. The existing "wet" signature procedures utilized by market participants became the standard practice in Illinois prior to the enactment of the Illinois Electronic Commerce and Security Act (5 ILCS 175 1-101 *et seq.*, "ECSA") and the federal Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign), and prior to current technological advances. It is critical that regulation keep pace with the current business environment, or the result will be a stagnant market.

Finally, no Commission policy, regulation or legal precedent exists that prohibits the use of telephonic and Internet enrollment. To the contrary, the Commission recently approved both enrollment methods in the gas choice pilot programs of Nicor Gas, Peoples Gas and North Shore Gas. [*Northern Illinois Gas Company d/b/a Nicor Gas Company*, Docket Nos. 00-0620/0621,

214 P.U.R. 4th 43 (July 5, 2001); *The Peoples Gas, Light and Coke Company*, Docket No. 01-0470, “Order” (March 5, 2002); and *North Shore Gas Company*, Docket No. 01-469, “Order” (March 5, 2002)] There is no justification to distinguish between the means of selecting a competitive provider of natural gas or electric service. To the contrary, the Commission properly recognized the value of telephonic enrollment to the competitive gas market. The same rationale is applicable in the instant case. Marketers request that the Commission act to remove this substantial regulatory barrier and approve these proposed rules as a form and manner of verifiable authorization consistent with § 2EE of the Fraud Act.

B. Rules Provide Adequate Consumer Protections:

The Illinois General Assembly adopted, within the Public Utilities Act at §16-101A, “Legislative Findings” that “All consumers must benefit in an equitable and timely fashion from the lower costs for electricity that result from retail and wholesale competition and receive sufficient information to make informed choices among suppliers and services” (Public Utilities Act §101A). This rulemaking is an opportunity for the Commission to consider and adopt rules in a statewide and uniform manner that provide for specific enrollment processes and disclosure requirements. Uniform rules provide more certainty and a greater level of consumer protection than if each utility is permitted its own tariff language and its own interpretation of such language. All parties, including consumers, would benefit from the Commission’s guidance and interpretation of its own singular set of rules.

The proposed rules are consistent with the intent of the Fraud Act. As the Government and Consumer Parties’ Initial Brief in the ComEd delivery services proceeding stated, “In simple terms, the purpose of the Fraud Act is to prevent deception, misrepresentation or concealment. In terms of § 2EE, this translates into requiring that the LOA disclose the specific information describing to what the subscriber is agreeing, and regarding the subscriber itself. [815 ILCS

505/2EE(5)].” “Allowing a subscriber to attest this by secure electronic signature, in addition to a “wet” signature, is not “clearly inconsistent with the manifest intent” of the General Assembly nor “repugnant to the context” of the Fraud Act.” (5 ILCS 175/5-120), see also (815 ILCS 505/1 et seq.) “Where qualified security procedure is met, allowing an electronic signature is not inconsistent with the Fraud Act; rather it is in harmony with the disclosure and validation purposes of § 2EE.” (Initial Brief of the Government and Consumer Parties, Docket No. 01-0423, at 95). As such, it would be appropriate for the Commission to approve the attached rules as a proper form and manner of obtaining verifiable authorization from the customer, consistent with § 2EE.

The consumer protection measures proposed in the rules are described below. The Letter of Agency must contain clear and unambiguous language that confirms:

- The subscriber’s billing name and address;
- The subscriber’s decision to change its electric service provider from the current provider to a prospective provider;
- The terms, conditions and nature of the service to be provided to the subscriber must be clearly and conspicuously disclosed, in writing, and an electric service provider must directly establish the rates for the service contracted for by the subscriber; and
- That the subscriber understands that any electric service provider selection the subscriber chooses may involve a charge to the subscriber for changing the subscriber’s electric service provider.

The telephonic enrollment rules provide for a definite script, following the above required content of information, to be provided to the customer during the recorded verification of authorization to switch. As the proposed rules indicate, the verification call by an independent third party is the second step in the solicitation process; much like the faxing or direct mailing of a written LOA is currently the second step in the solicitation process. During the verification call, Marketers employ a question and acknowledgement process to confirm that the customer understands the term and conditions of service, and confirm that the customer is authorizing the

Marketer to switch customer's electric service providers. The digital recording of the verification call accomplishes two things: (1) it clearly provides authentication of the customer's desire to switch (more difficult to falsify a voice recording than to falsify a signature from an unauthorized agent acting to switch the customer's service provider); and (2) it allows the customer sufficient time, between the initial solicitation and the independent third-party verification, to ensure that the customer is making an informed decision.

Consumer protection does not end with the digital recording of the voice information and preservation of that record. The promulgated rules provide that Marketers will furnish the customer with a copy of the written terms and conditions for the customer's record. If the customer feels that the written terms and conditions are in any way different than those agreed to on the phone, the customer may initiate a complaint and may challenge the enrollment, as do customers who currently challenge the service provided under "wet" signature contracts. The customer and the regulatory agency that assists in the dispute resolution may receive for review a copy of the digital recording and the corresponding contract. If the entity is unable to receive the digital recording through electronic means, a transcription and a recording will be provided by an independent third party. These rules in no way compromise the customer's access to information, and provide as many safeguards as does obtaining the customer's written signature.

Consumer protection, under the Internet enrollment rules, acts in much the same way as those outlined above and as assumed is afforded by "wet" signatures. The LOA disclosures are clearly provided on Marketers' website. The customer provides a customer-specific identification key to authorize the switch of its electric service provider. The customer identification key is the method used to authenticate the customer's authority to switch suppliers. Also, as described above, the same disclosures required under §2EE of the Fraud Act are provided to the customer in a downloadable and printable format. A dispute in enrollment is

resolved in much the same manner as that provided under both the proposed telephonic enrollment and as if the customer has physically signed the LOA.

III. DIGITAL RECORDING OF VOICE INFORMATION IS AN ELECTRONIC RECORD UNDER THE ILLINOIS ELECTRONIC COMMERCE AND SECURITY ACT

The Illinois General Assembly enacted the Electronic Commerce and Security Act (ECSA) on July 1, 1999, which provides for the use of “secure electronic signatures” as described in § 10-110, in lieu of “wet” signatures. The ECSA also outlines security measures and procedures to validate such “secure electronic signatures,” in order to prevent unfair and deceptive acts or practices in the competitive marketplace. The federal Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) went into effect on June 30, 2000, and provides that:

“If a law that was enacted prior to this chapter expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).” [15 USC § 7001(c)(2)(B)]

This provision, as read in relation to the consumer disclosure requirements of the LOA in § 2EE of the Fraud Act, would permit that an electronic record be used to authorize a customer switch, as long as the electronic record provides verification of the disclosure requirements stated in § 2EE of the Fraud Act.

Under the proposed rules, the customer’s intent to adopt a RES service contract, and to be bound by it, is evidenced by their verbal acceptance and acknowledgement of authorization to switch electric service providers under telephonic enrollment procedures, and by the customer’s provision of a customer-specific identification key, under the Internet enrollment procedures, both of which are electronic records under the ECSA and E-Sign. The provision of the Illinois

ECSA pertaining to “electronic records” may supercede E-Sign, because it provides a broader definition of the term.

The definition of an electronic record under the ECSA is as follows: “Electronic Record” means a record generated, communicated, received or stored by electronic means for use in an information system or for transmission from one information system to another. “Electronic” under the ECSA includes electrical, digital, magnetic, optical, electromagnetic, or any other form of technology that entails capabilities similar to these technologies (5 ILCS 175/5-105). E-Sign defines an “Electronic Record” as, “a contract or other record created, generated, sent, communicated, received, or stored by electronic means,” and defines “Electronic” as, “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” [15 U.S.C. 7006(2) and (4)].

Technology is continually evolving, and several mechanisms exist to manage the delivery of voice information recorded or preserved in digital form through information systems. The proposed rules simply outline the consumer protections by utilizing a cost-effective business tool, and in no way defines or limits the use of any technology currently available, or that may become available.

The Electronic Telephonic Enrollment Procedure conforms to the ECSA in the following ways: (a) the electronic signature is the ECSA security procedure of answer back or acknowledgement and identifying words that are recorded and stored by digital, electronic means for use in an information system (5 ILCS 175/5-105); and (b) the electronic record clearly shows that the LOA disclosure requirements are met and that the customer is acknowledging their understanding of the offer.

WHEREFORE, Marketers respectfully request that the Illinois Commerce Commission approve the Request for Rulemaking filed by MidAmerican Energy Company, Nicor Energy, L.L.C., AES New Energy, Inc., and the National Energy Marketers Association, to establish operating rules for telephonic and Internet enrollment procedures consistent with § 2EE of the Consumer Fraud and Deceptive Business Practices Act. With the opening of the Illinois residential market on May 1, 2002, the facilitation of business processes provided by the implementation of telephonic and Internet enrollment could provide advantages to both the method and cost of service. Currently, although the market is open, Illinois residential customers have no competitive options available to them, which is a direct result of both market conditions and the regulatory framework that has not developed regulations that foster a competitive market. The Electric Service Customer Choice and Rate Relief Law of 1997 supports Commission action that encourages customer choice and Marketer competition. Its purpose is to develop processes that establish a competitive energy market. Without support for business processes that allows Marketers to do business at a reasonable cost, consumers will find less than optimal access to alternative energy providers. The procedures outlined above, if approved, will take significant steps toward the accomplishment of that goal.

Respectfully submitted,

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TELEPHONIC ENROLLMENT RULES

1. Definitions
 - a. “*Retail Electric Supplier (RES)*” shall mean either: (i) an Alternative Retail Electric Supplier (ARES) certified by the ICC pursuant to Section 16-115 of the Public Utilities Act (220 ILCS 5/16-115), meeting all obligations of ARES pursuant to Section 16-115A of the Public Utilities Act (220 ILCS 5/16-115A), and authorized to provide electric power and energy supply services in an LDC’s service territory; or (ii) an Illinois electric utility as defined in Section 16-102 of the Public Utilities Act (220 ILCS 5/16-102) meeting all obligations provided in Section 16-115A and 16-116 of the Public Utilities Act (220 ILCS 5/16-115A, 220 ILCS 5/16-116), other than the LDC.
 - b. “*Retail Customer (Customer)*” shall have the same meaning as that stated in Section 16-102 of the Public Utilities Act.
 - c. “*Independent Third Party*” shall mean (i) any third party not owned, managed, controlled, or directed by the RES or the RES’s marketing agent; (ii) who does not have any financial incentive to verify provider change orders; and (iii) who operates in a location physically separate from the RES or the RES’s marketing agent.
 - d. “*Telephonic Enrollment*” means any electronic recording of a Customer’s authorization to change electric service providers, which satisfies the disclosure requirements of the Letter of Agency prescribed in 815 ILCS 505/2EE.
 - e. “*Telephone Solicitation*” shall mean any communication through the use of a telephone by live operators for soliciting the sale of goods or services and as defined in the Telephone Solicitations Act (815 ILCS 413/1).
2. Telephone Solicitations and Telephonic Enrollments
 - a. All telephone solicitations for competitive electric service shall be made pursuant to state and federal law.
 - b. For all telephonic enrollments, a RES shall maintain a date and time stamped audio recording, verifying, at a minimum, the following:
 - i. Identity of the RES and purpose of call;
 - ii. Statement and the Customer’s acknowledgment that the call is being recorded;
 - iii. Question and the Customer’s acknowledgement that they are the customer of record at the local LDC or otherwise authorized to switch providers;
 - iv. Question and the Customer’s acknowledgement that they wish to enroll with RES for competitive electric service;

EXHIBIT A

- v. Statement and the Customer's acceptance of each of the principal terms and conditions for the service that will be provided including, but not limited to:
 - (a) Service(s) to be provided;
 - (b) Price for each service being provided;
 - (c) Contract term;
 - (d) Any fees for cancellation prior to contract termination date;
 - (e) Any material limitations, conditions, or exclusions;
 - (f) Any fees or costs to the Customer;
 - (g) If applicable, whether a credit check and/or deposit will be required, including amount of deposit; and
 - (h) Identity of party who will bill for the RES provider's service(s).
 - vi. Statement and the Customer's acknowledgment that the RES will provide a written contract that details the terms and conditions that were summarized in the telephonic enrollment,
 - vii. For residential Customers a verbal statement and the Customer's acknowledgement that the Customer has 3 business days from the Telephonic Enrollment to rescind the contract without penalty and be placed in its original condition prior to the sale,
 - viii. Statement and the Customer's acknowledgement of the RES's Toll-free number or local number for customer service questions or inquiries.
 - ix. Request and the Customer's provision of the Customer's LDC account and meter numbers, if applicable;
 - x. Request and the Customer's provision of the Customer mailing and service addresses.
- c. Following Telephonic Enrollment, the RES shall:
- i. Provide to the Customer a written contract that details the terms and conditions summarized in the Telephone Enrollment;
 - ii. Retain the audio recording of the Telephonic Enrollment for a period of no less than two years.
 - iii. Provide a copy of a transcription of the audio recording and a copy of the audio recording to the ICC or its Staff and the Customer's LDC upon request, within a reasonable time.
- d. All telephonic enrollments, as described above, shall be conducted by an independent Third Party, and such third party shall not market any of the RES's services by providing additional information.

INTERNET ENROLLMENT RULES

1. Definitions

- a. “*Retail Electric Supplier (RES)*” shall mean either: (i) an Alternative Retail Electric Supplier (ARES) certified by the ICC pursuant to Section 16-115 of the Public Utilities Act (220 ILCS 5/16-115), meeting all obligations of ARES pursuant to Section 16-115A of the Public Utilities Act (220 ILCS 5/16-115A), and authorized to provide electric power and energy supply services in an LDC’s service territory; or (ii) an Illinois electric utility as defined in Section 16-102 of the Public Utilities Act (220 ILCS 5/16-102) meeting all obligations provided in Section 16-115A and 16-116 of the Public Utilities Act (220 ILCS 5/16-115A, 220 ILCS 5/16-116), other than the LDC.
- b. “*Retail Customer (Customer)*” shall have the same meaning as that stated in Section 16-102 of the Public Utilities Act.
- c. “*Internet Enrollment*” means any electronic record of a Customer’s authorization to change electric service providers, which satisfies the disclosure requirements of the Letter of Agency prescribed in 815 ILCS 505/2EE.

2. Internet Enrollments

- a. For all Internet Enrollments, authorization to switch electric service providers shall be obtained by encrypted customer input on a provider’s Internet website.
- b. The Internet Enrollment website shall at a minimum provide:
 - xi. A copy of the RES provider’s customer contract, including all the terms and conditions of services being provided, which include;
 - (a) Price for each service being provided;
 - (b) Contract term;
 - (c) Any fees for cancellation prior to contract termination date;
 - (d) Any material limitations, conditions, or exclusions;
 - (e) Any fees or costs to the Customer;
 - (f) If applicable, whether a credit check and/or deposit will be required, including amount of deposit; and
 - (g) Identity of party who will bill for the RES provider’s service(s).

EXHIBIT B

- xii. A conspicuous statement, within the body of the electronic version of the contract that residential customers may cancel the enrollment within 3 business days of the Internet Enrollment.
 - xiii. A prompt for the customer to print or save a copy of the contract.
 - xiv. Any electronic version of the contract shall be identified by a version number, in order to ensure the ability to verify the particular contract to which the customer assents;
- c. Following the Internet Enrollment, the RES shall:
- i. Retain the Internet Enrollment for a period of no less than two years.
 - ii. Provide a copy of the Internet Enrollment information to the ICC or its Staff and the Customer's LDC upon request.