Energy Choice Matters

August 30, 2010

Dominion Retail, Springfield Township File Complaint Against Duke Energy Retail Sales

Dominion Retail, Inc. and the Board of Trustees of Springfield Township, Hamilton County, Ohio filed a complaint at the Public Utilities Commission of Ohio against Duke Energy Retail Sales, LLC alleging that a Duke Energy Retail Sales (DERS) marketing letter sent to Springfield Township customers was "deceptive and misleading," as it provided an incorrect rate for a period of the Township's opt-out electric aggregation program, which is supplied by Dominion Retail (10-1249-EL-CSS).

In early 2009, Springfield Township issued an RFP for generation service for the aggregation. Dominion Retail was the successful bidder, and subsequently entered into an agreement with Springfield Township to supply retail electric service to the aggregation customers at a fixed rate of 6.88 cents per kWh for a term ending with the January 2011 customer bills. Springfield Township is located in the Duke Energy Ohio service area.

On April 20, 2010, Springfield Township, by and through its broker, Independent Energy Consultants, Inc., issued an RFP soliciting bids for electric supply service for the aggregation for 2011. The RFP, plus a follow-up reminder, was distributed to a number of potential suppliers, including Duke Energy Retail Sales and Dominion Retail. The complainants alleged that Duke Energy Retail Sales vice president Paul Smith acknowledged that Duke Energy Retail Sales received the RFP during a telephone discussion with IEC president Mark Burns on April 26, 2010.

"Further, upon information and belief, DERS carefully monitors governmental aggregation activity

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ICC Staff Proposes New Language for Electric Rescission Period, Clarity Still Lacking

Illinois Commerce Commission Staff have proposed several modifications to its earlier recommendations regarding the electric rescission period as contained in the Part 412 Rulemaking on electric consumer protection (09-0592), but BlueStar Energy Services opposed consideration of Staff's changes as they came in the briefing stage of the proceeding, as BlueStar called the changes an impermissible attempt to expand the record to which parties have no ability to respond.

Briefs from interested parties were filed Friday, and, as briefs, mostly build on the established record in the case as extensively reported by *Matters* in prior issues (see 6/24/10, 4/23/10, 3/8/10, 3/5/10 & 12/4/09). As such, *Matters* will not repeat general arguments concerning a three versus 10-day rescission period, starting the rescission period on the contract date versus utility processing of the enrollment, the termination fee waiver period, termination fee caps, door-to-door marketing, and other issues.

However, Staff offered modifications to its prior recommended language in its brief, informing parties in an email early last week of its intent to do so and providing the language to parties. The modifications related exclusively to the rescission period, which, as BlueStar noted, is, "the most hotly contested issue in this proceeding."

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Briefly:

ResCom Energy Seeks Ohio Electric License

ResCom Energy LLC applied for an Ohio electric supplier license to serve residential and commercial customers in all service areas. ResCom has about 41,000 customers in Connecticut, 80% of which are residential. The remainder are primarily small commercial. Since ResCom's inception on January 4, 2010 through July 31, 2010, ResCom has scheduled and delivered to customers 162,331,590 kWh, with a weekday daily load flow of approximately 2,000,000 kWh. ResCom will use direct solicitation, internet marketing, and mailings to contact and enroll potential customers.

Energy Hawk Services Seeks Texas Aggregation License

Start-up Energy Hawk Services LLC applied for a Texas electric aggregator certificate to serve residential, commercial, and industrial customers.

FERC Sets Date for Demand Response Compensation Technical Conference

FERC has set a date of September 13 for its technical conference on certain issues related to the potential payment of full LMP to demand response in organized markets (RM10-17, see Matters, 8/3/10).

TNMP Rate Request Includes Higher Monthly Customer Charge for Mass Market Customers

Texas-New Mexico Power has proposed modifying its Residential and Secondary < 5 kW rate structures to recover 50% of the total revenue requirements through a fixed monthly customer charge that covers all customer costs, metering costs, and a portion of distribution costs, as part of a rate case filed with the PUCT (38480).

The proposed change reflects that the majority of TNMP's utility costs are fixed, with little variance in cost with changes in usage, TNMP said in testimony.

"For TNMP, REP, and end use customer alike, TNMP's proposed restructuring will provide more predictability and stability in TDU charges ... For REP and end use customer alike, TNMP submits that this structure will provide greater transparency in the TDU component of the retail bill, potentially enhancing retail price competition," TNMP said.

TNMP also said that moving more costs into the flat customer charge will offer end use customers some protection against bill increases due to extreme weather.

The existing monthly Residential customer charge would increase from $1.40 per month to $19.93 under an equalized rate of return (ROR) allocation and $18.72 under TNMP's Alternate allocation method. Similarly, the Secondary < 5 kW customer charge would increase from $2.50 per month to $9.46 under equalized ROR, and $11.36 under the Alternate scenario.

TNMP said that a typical residential customer using 1,200 kWh per month will see a monthly total increase of approximately $9.86 per month under an equalized ROR revenue allocation scenario, with TNMP's total charges on such a residential bill increasing from $37.87 at today's rates to $47.73. The monthly increase would be approximately $7.38 under the Alternate scenario.

TNMP has also proposed a Storm Hardening Cost Recovery Factor (SHCRF) whose rate would become effective on January 1 of each year to coincide with the implementation date of the energy efficiency cost recovery factor (EECRF). "Tying the effective dates of the EECRF and SHCRF will help provide rate certainty and provide sufficient time for retail electric providers to implement the rates," TNMP said.

Rider SHCRF would initially be as follows:

Residential	$1.14 Per ESI ID
Secondary (≤ 5 kW)	$0.39 Per ESI ID
Secondary (> 5 kW)	$0.21 Per Billing kW
Primary	$0.19 Per Billing kW

TNMP is not opposed to including the amounts recovered through the storm recovery rider in base rates if the PUCT prefers.

Additionally, TNMP proposed changes to its demand ratchet for both Secondary Service > 5 kW and Primary customers to eliminate the ratchet's current exclusion of municipal pumping customers.

TNMP also proposed to reduce all discretionary fee charges that will be impacted by the deployment of advanced meters expected to begin in late 2010.

TNMP did not propose a Distribution Cost Recovery Factor in its filing, noting that the Commission has said that the proper venue for the issue is the generic rulemaking in Project No. 38928. However, TNMP stated that it fully supports adoption of a proposed interim Distribution Cost of Service adjustment mechanism, and would expect to apply to implement an appropriate tariff provision at the appropriate first interval.

PUCT Staff Revised PPA Proposal Includes Compliance Deadlines

An updated proposal for adoption submitted by PUCT Staff concerning REPs' obligations under the Prompt Payment Act would set deadlines for compliance with new notice provisions (37981).

As under the earlier proposal (Only in Matters, 8/13/10) REPs and aggregators would be required to provide written notice to all non-residential customers that the Prompt Payment Act applies to eligible government entities. The Prompt Payment Act sets extended payment periods and other billing rules applicable to eligible government entities.

Staff's revised proposal further states that the required notice shall be completed within six months of the effective date of the rule for existing non-residential customers. Within three months of the rule's effective date, the required notice shall be provided to a new customer at or before the time that the terms of service are provided to the customer.

An aggregator's or REP's failure to provide the notice would not give rise to any independent claim under the PPA, nor does the notice initiate or terminate any party's rights or obligations under the PPA.

The updated draft maintains prior language that if a REP does not provide notice of the Prompt Payment Act's provisions to a non-residential customer, that fact can be considered in a billing complaint brought by a government entity under the Prompt Payment Act. Similarly, if a government entity, after being provided notice, does not inform the REP that the entity is eligible for the provisions of the Prompt Payment Act, that failure may also be considered in any billing complaint.

Industrials Allege Proposed MISO Concessions to Duke Ohio Violated Order 719

Eight industrial consumer groups, including the Electricity Consumers Resource Council, sent a letter to Midwest ISO Chairman Paul Feldman alleging that MISO violated FERC Order 719 governing the responsiveness of RTOs due to MISO's, "offer of substantial concessions to Duke [Energy] Ohio in an attempt to establish incentives for its continued membership in Midwest ISO."

As characterized by the industrials, MISO offered the following to Duke Energy Ohio, in a May letter from MISO CEO John Bear, to convince it to remain a MISO member:

- Allowing Duke's CD and CCD units [units jointly owned with other utilities] to move into PJM's capacity market and dispatch to allow Duke Ohio to achieve more favorable terms relating to load switching, duration, and price, to the detriment of consumers
- Transferring load forecasting from load serving entities to the local balancing authority in retail choice states
- Imposing additional costs relating to the value of capacity on load serving entities. Midwest ISO proposed to accomplish this in retail choice states by either a capacity auction conducted by the Midwest ISO or by using a capacity price determined in the PJM auction, with duration and other features matching the PJM outcome
- Adding a 36-month capacity reporting requirement to add duration to the capacity obligation of load serving entities

"In effect, Midwest ISO staff proposed a redesign of the Midwest ISO market to satisfy the parochial demands of one transmission owner for higher capacity pricing for its generation assets, such as that available in PJM, to the detriment of consumer interests," industrials said.

"As a matter of substance, the incentives had the purpose of enhancing the revenue streams of one transmission owner to the potential detriment of consumers, whose circumstances apparently were not viewed as significant by Midwest ISO's management," the industrials said.

"The ISOs/RTOs are supposed to be 'independent' grid operators, not beholden to transmission owners or other stakeholder groups just to retain their membership ... Midwest ISO's conduct did not exhibit fairness in balancing diverse interests. Midwest ISO's positions suggest that it is dominated by transmission owners and does not equitably consider the interests of consumers or other stakeholder categories," industrials added.

Industrial groups signing the letter were the American Forest & Paper Association, the American Chemistry Council, the Association of Businesses Advocating Tariff Equity, ELCON, the Illinois Industrial Energy Consumers, the Industrial Energy Consumers of America, the Wisconsin Industrial Energy Group, and the Wisconsin Paper Council.

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within the Duke service territory. Thus, although DERS did not respond to the RFP, there is no question that DERS was well aware that the current agreement with Dominion Retail for generation supply to the Springfield Township electric aggregation ended with the January 2011 bills and that Springfield Township was seeking a new rate for the aggregation for 2011," Dominion Retail and Springfield Township alleged.

At the May 11, 2010 public meeting of the Springfield Township Board of Trustees, Dominion Retail was selected as the supplier to the aggregation for the term commencing with the February 2011 bills and ending with the January 2012 bills for a fixed price of 5.70 cents per kWh.

In early July 2010, Springfield Township began to receive calls from township residents indicating confusion regarding a marketing letter they had recently received from Duke Energy Retail Sales which claimed savings over the aggregation program. Complainants are not aware of the exact date of the mailing of the letter, but alleged it occurred after the public filing of the Springfield Township opt-out notice in PUCO Case No. 05-1476-EL-GAG on June 21, 2010.

A copy of one letter sent by Duke Energy Retail Sales to a potential customer states:

"Springfield Township has approved a governmental aggregation program that currently charges a fixed price of 6.88¢/kWh for electricity. With continued downward movement in the electricity market, Duke Energy Retail, a local hometown electric provider, can offer you an even lower fixed rate of 6.39¢/kWh. This translates to a 7% savings off the current price. Your savings is off the 'Supplier Energy Charge' found on page two of your Duke Energy Ohio bill each month through December 2011."

The letter also informs the customer of its, "opportunity to save approximately $100 on your electric bill between now and December 2011."

A footnote in smaller print states, "Estimated savings based upon your historic usage and the current pricing structure of your aggregation program which is 6.88¢/kWh through December 2011."

"Although, as a matter of simple mathematics, 6.39 cents is approximately 7% less than 6.88 cents, the 2011 Dominion Retail aggregation fixed rate of 5.70 cents is some 11% lower than the 6.39 cents per kWh fixed rate that DERS asked customers to lock into through the end of 2011," Dominion Retail and Springfield Township said.

"Further, notwithstanding that DERS knew, or should have known, that customers would actually pay significantly more through December 2011 under the DERS rate than under the new aggregation rate, DERS, in a prominently displayed, bolded box in the upper right-hand comer of the letter styled 'YOUR ESTIMATED SAVINGS,' shows an estimate of the dollar amount of savings the customer would purportedly realize by enrolling with DERS," complainants alleged. The complainants further alleged that the savings estimate provided in the letter was based on an aggregation rate of 6.88 cents throughout 2011, rather than the 5.70 cents rate that will actually apply starting with bills issued in February 2011.

"Plainly, not only would this customer not experience a $100 savings over the course of

the DERS contract by enrolling with DERS, but, in fact, the customer would actually pay some $60 more for generation service than the customer would have paid as a participant in the aggregation program. Thus, the DERS marketing letter is not only deceptive and misleading, but the deliberate misrepresentation of the purported 'savings' constitutes an unconscionable marketing practice," Dominion Retail and Springfield Township alleged.

Duke Energy Retail Sales' Paul Smith was quoted in the *Cincinnati Enquirer* in July as stating, "We didn't intentionally misrepresent the township's offer. We weren't aware of their new deal."

However, the complainants said that the 2011 aggregation price was public information as early as May 11, 2010, and alleged that Duke Energy Retail Sales acknowledged receipt of the new Township RFP for 2011 supplies.

"DERS clearly knew the current aggregation rate, and surely knew, or should have known, that the current 6.88 cents per kWh rate would expire with the January 2011 bills. Thus, there was absolutely no basis for using the 6.88 cents rate in calculating the estimated savings through the end of 2011," Dominion Retail and Springfield Township alleged.

"Moreover, notwithstanding that a copy of the opt-out notice was docketed with the Commission on June 21, 2010, even if one were to believe that DERS was not aware of the 2011 price, at minimum, DERS had an obligation to investigate the rate that would be charged to participants in the aggregation program during 2011 to avoid misleading prospective customers," complainants said.

Complainants said that Rule 4901:1-21-05(C), OAC, provides that "(n)o CRES [competitive retail electric service] provider may engage in marketing, solicitation, or sales acts, or practices which are unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a CRES," and goes on to enumerate various acts or practices that are considered to be unfair, misleading, deceptive, or unconscionable per se. Subparagraph (C)(8)(a) of the rule specifically identifies advertising or marketing offers that "(c)laim that a specific price advantage, savings, or guarantee exists if it does not" as such a practice, complainants said.

Aside from the contents of the letter, complainants also objected to the mailing of such a marketing letter during the period in which aggregation opt-out notices were mailed. Opt-out notices were mailed on or about July 1. The timing of the Duke Energy Retail Sales letter made the letter, "susceptible to an interpretation that DERS was the supplier to the aggregation," complainants alleged.

Complainants said that Springfield Township received over 100 phone calls in early July 2010 as a result of the Duke Energy Retail Sales marketing letter. "The Springfield Township employee that fielded these calls reports that approximately 25 percent of the callers interpreted the letter to mean that DERS was the supplier to the aggregation. The fact that over a quarter of the callers were under this mistaken impression clearly suggests that the letter was, at best, confusing, if not misleading, in this regard," complainants contended.

"The letter's failure to clearly explain DERS's status as a marketer constitutes a separate violation of Rule 4901:1-21-05(C)(8)(a), OAC, prohibition against misleading acts or practices," complainants alleged.

Dominion Retail and Springfield Township are seeking, among other relief, the following:

- That all contracts between DERS and Springfield Township residents entered into as a result of the offer contained in the DERS marketing letter that is the subject of the complaint should be rescinded and that such customers remain eligible to participate in the Springfield Township aggregation program notwithstanding the expiration of the opt-out period;
- That DERS should cooperate in all respects with Duke Energy Ohio and Dominion Retail to insure the orderly return of such customers to the aggregation program at the earliest possible date, and that, in no event, should DERS impose an early termination fee upon any such customer;
- That DERS should be required, at its sole expense, to send a notice, in a form prescribed by the Commission, to all customers that received the marketing letter explaining the Commission's decision in this case and advising any customers that entered

into contracts with DERS as a result of said letter of the steps that must be taken to participate in the Springfield Township aggregation;

- That DERS should be liable for, and should pay, the maximum civil forfeiture permitted by law;
- That the certification of DERS should be suspended insofar as it relates to DERS's authority to provide service to customers that entered into contracts with DERS as a result of the marketing letter that is the subject of this complaint and reinstated only after DERS has fully complied with the directives contained in the Commission's order;
- That, for a period of two years from the date of the Commission's order, DERS should not disseminate any offers, marketing letters, or other forms of solicitation without prior review and approval by the Commission Staff.

Dominion Retail serves 60,000 electric customers located within the service territory of Duke Energy Ohio.

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Staff first offered a revised definition of "rescind," with the revised definition meaning, "the cancellation of a contract with a RES [retail electric supplier] and/or pending customer enrollment to a RES, without the incurrence of an early termination fee." The new language, Staff said, clarifies that the execution of rescission relieves the customer from any early termination fee.

Additionally, the old language only defined rescission as the cancellation of an enrollment. The new definition provides it may be either the cancellation of a contract and/or enrollment.

Furthermore, Staff proposes to modify the Uniform Disclosure Statement to add a statement that the customer may rescind the contract, by contacting the RES, before the RES submits the enrollment request to the electric utility, and clarifies another section of the Uniform Disclosure Statement to provide that the customer may rescind both the contract and the pending enrollment within ten calendar days after the electric utility processes the enrollment request.

More substantively, Staff would modify the Uniform Disclosure Statement to state that a customer may rescind the contract within ten calendar days after the electric utility processes the enrollment request by contacting the RES, and that residential customers only may rescind the contract and the pending enrollment by contacting either the RES or the electric utility.

Small commercial customers would not have the ability to rescind a contract or enrollment by contacting the utility.

"Given the utilities' expressed difficulty and/or costliness of monitoring and tracking small commercial customers with annual usage below 15,000 kWh in real-time, Staff foresees confusion and frustration among commercial customers if they contact the utility to rescind a contract with a RES. Because the electric utility will not inform the customer whether or not the customer is a small commercial customer, the customer will not find out whether there are early termination fees associated with the cancellation of the contract. For this reason, Staff recommends that the rule specify that only residential customers may contact the electric utility to rescind a contract and pending enrollment request. Small commercial customers should contact the RES to rescind a contract and pending enrollment request," Staff said.

These changes necessitated changes in Section 412.210, Rescission of Sales Contract, Staff added. Several modifications merely affirm what Staff recommended with respect to the rights and abilities as provided in the Uniform Disclosure Statement discussed above.

Additionally, however, Staff recommended new language relating to the written enrollment notice sent by the electric utility to the customer, informing the customer of the pending switch to a new supplier.

"While Staff is not proposing to codify the actual wording of such written enrollment notices, Staff sees some benefit in specifying the special circumstances for non-residential customers. Given that the utility will not automatically send a separate enrollment notice to small commercial customers that is different from the enrollment notice to other non-residential customers, Staff recommends that the letter to the customer group that includes

small commercial customers contain a statement that customers with annual usage above 15,000 kWh may incur early termination fees even if they make a request to rescind the pending enrollment and RES contract within ten calendar days after the utility processes the enrollment request. In addition, the same written enrollment notice should state that the customer shall contact the RES if the customer is unsure about the annual electric usage. This additional clarity removes the need for Staff's previously offered alternative of requiring the RES to send a separate written enrollment notice to small commercial customers,"

Staff's recommended language is:

"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 of the scheduled enrollment and provide 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 for making a request to rescind the enrollment, and provide contact information for the RES. The written enrollment notice from the electric utility to non-residential customers shall state that non-residential customers with annual usage above 15,000 kWh may incur early termination fees and that customers shall contact the RES if they are unsure about their annual electric usage. If a residential customer wishes to rescind its the pending enrollment with the supplier RES, the customer will not incur any early termination fees if the customer contacts either the electric utility or the RES within ten calendar days after the electric utility processes the enrollment request. If a small commercial customer wishes to rescind the pending enrollment with the RES, the customer will not incur any early termination fees if the customer contacts the RES within ten calendar days after the electric utility processes the enrollment request. If the tenth 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 such rescission to the electric utility, the electric utility shall notify the RES."

Addressing Staff's new proposal as emailed to parties early last week, BlueStar argued, "[e]ven a cursory review of the new Proposed Rules shows inconsistencies among proposed revisions and included provisions regarding large commercial and industrial customer classes, which have no business being addressed in this mass market rulemaking proceeding."

Although not addressed specifically by BlueStar in its brief, the most confusing aspect of the new Staff proposal is the enrollment letter sent out to non-residential customers.

Although Staff's language states that the enrollment notification letter shall state, "the last day for making a request to rescind **the enrollment**" [emphasis added], Staff's explanatory comments, along with its definition for "rescind" which includes cancellation of the contract or enrollment, show Staff's intent is that the notification letter is to inform customers of their ability to rescind both the enrollment and contract, with the caveat that customers above 15,000 kWh may face an early termination penalty for doing so.

However, the very definition of "rescind" proposed by Staff is inconsistent with this caveat, as to "rescind" explicitly means the cancellation of an enrollment/contract without the incurrence of an early termination fee. Although much of the rule is only applicable to customers with annual consumption of 15,000 kWh or less, the rescind definition appears in the broader definitions section of the rule (and not a definitions section applicable only to a subpart), and would presumably apply to all cases of rescission.

Even if the rule's definition of "rescind" was limited to those sections of the rule applicable to customers with annual consumption of 15,000 kWh or less, the problem remains, because Staff's discussion of the enrollment letter, which addresses the letter sent to all non-residential customers, falls under a section of the rule applicable only to mass market customers and thus would invoke the Staff definition of rescind.

Here again is the Staff language for Section 412.210:

"The written enrollment notice from the electric utility shall state the last day for making a request to rescind the enrollment, and provide

contact information for the RES. The written enrollment notice from the electric utility to non-residential customers shall state that non-residential customers with annual usage above 15,000 kWh may incur early termination fees and that customers shall contact the RES if they are unsure about their annual electric usage."

If one were to simply replace the word "rescind" with the definition provided in Staff's language (removing the definition's text related to the contract and just leaving in the enrollment), the following results (inserted definition highlighted, language made duplicative by the inserted definition indicated by strikethrough):

"The written enrollment notice from the electric utility shall state the last day for making a request to ~~rescind~~ [effect a] cancellation of a pending customer enrollment to a RES, without the incurrence of an early termination fee ~~the enrollment~~, and provide contact information for the RES. The written enrollment notice from the electric utility to non-residential customers shall state that non-residential customers with annual usage above 15,000 kWh may incur early termination fees and that customers shall contact the RES if they are unsure about their annual electric usage."

Staff's language essentially states the letter shall inform all non-residential customers of the last possible date to "rescind" the enrollment, which, by definition means cancellation without early termination fee. Staff's language then immediately provides that customers with annual usage above 15,000 kWh may incur early termination fees for doing so. The inconsistency of such language is apparent.

It is unclear why Staff did not simply recommend that the non-residential enrollment letter inform customers that only those at or below 15,000 kWh may "rescind" their enrollment, while informing larger customers that they may "cancel" or "stop" their enrollment subject to any potential early termination fees in their contracts. This may partially be due to the insistence in using the term "rescind," a term deeply associated with specific contractual law, to describe the mechanical process of cancelling or withdrawing an EDI enrollment transaction, which has generated much of the controversy around the rescission language in the rulemaking.

Ironically, Staff itself notes what should be a clear distinction between cancelling a contract and a pending enrollment; however, Staff's language never reflects this distinction due to its very definition of rescind. In addressing Staff's belief that the Ameren tariffs (which currently grant a 10-day rescission period to larger customers) should conform to the rule, Staff states:

"Staff would point out again the distinction between rescinding a pending enrollment request and rescinding a contract with a RES. In the context of this proposed rule, it is clear that 'rescinding' means the absence of early termination fees and it is also clear that this ten-calendar day rescission period only applies to residential and small commercial customers (as defined herein)."

However, since the enrollment letter to all non-residential customers will inform them of their ability to "rescind," under a section of the rule to which Staff's definition of rescind applies, it is anything but clear what rescission means, and to whom it applies.

As noted, BlueStar objected to Staff's latest revisions since they were introduced in a brief. "Proper procedures require that proposals be submitted using Verified Statements and subject to reply (and even surreply, as is the case with this proceeding) comments, while briefs are used to summarize the record ... BlueStar is also very concerned with the precedent this will set if Staff's approach were accepted. Staff has essentially attempted to expand the record, allowing briefs to be used to introduce new testimony and granting themselves an additional round of comments in which to make new Proposed Rule revisions without substantiation ... while denying all other parties a [chance] for a meaningful and well-developed response. This is even more troublesome given that 'rescission,' the most debated issue in this proceeding, is the subject of Staff's revised Proposed Rules," BlueStar said.

"BlueStar also objects because the revised Proposed Rules attached to Staff's brief will go before the Commission without the benefit of a full record whereby parties can provide responses. BlueStar believes that providing an email to the parties four days before the deadline for the submission of briefs and

proposed orders is an abuse of Staff's role in this rulemaking proceeding, especially since reply briefs were not contemplated or submitted in this proceeding," BlueStar added.

"Finally, BlueStar is concerned since comments and proposals from Staff carry great weight with the Commission but the absence of these revised proposals from the record at this point in time allows disagreeing parties no ability to address them in briefs or proposed orders," BlueStar said.

Other Issues

Staff maintains that an extended no-cancellation-fee period should be imposed for a period up to 10 business days after the date of the customer's bill. As previously reported, in response to objections from suppliers, Staff proposed limiting a customer's use of this provision to one no-fee cancellation in a 12 month period. While suppliers characterized such a limitation as difficult if not impossible to enforce, Staff offered that it, "does not deny that the enforcement of the proposed limitation will require some collaboration among the suppliers offering service to residential and small commercial customers."

"However, if the Commission adopts Staff's recommendation, Staff does not view it as impossible for the supplier community to create a mechanism that would allow the participating suppliers to reasonably enforce such a limitation," Staff said.

The Retail Energy Supply Association said that while the limit of one waiver per 12 months may address one problem (customers continually switching to the cheapest provider every month with no cancellation fee), it opens up a new problem.

Specifically, the one-time waiver will discourage "first mover" suppliers in the mass market, because first movers will have to include a risk premium in fixed pricing to account for the customer's ability to switch without penalty for an extended period. However, another supplier, entering the market after this first mover, could target customers who have already migrated and offer them a price with no risk premium, because the customer would exhaust their one-time termination fee waiver in choosing this new supplier. Once the new supplier enrolls these customers, the supplier could be assured that customers would have to pay a termination fee in order to choose a new supplier, and could thus offer lower pricing which does not include a migration risk premium since such risk is covered in the termination fee.

As more fully explained by RESA:

"RES One makes a market launch announcement, becoming one of the first RESs to market to mass market customers in Illinois. Despite concerns over the lack of ability to collect damages as a result of early terminations, RES One offers a fixed-rate term product, incorporating a cost premium that represents this risk. On the heels of this announcement and marketing activity, RES Two announces its own market launch and offerings, which include a fixed-rate term offer as well. However, RES Two has no such risk premium, as it has a specific marketing campaign not to encourage customers to switch away from the utility to the RES, but for customers to switch from RES One, to a new lower-cost supplier, RES Two. RES Two's marketing efforts specifically remind customers if they have signed up with RES One, they can still cancel without penalty ten days after receipt of their first bill. Although RES Two is engaging in perhaps a distasteful practice, it is operating within the parameters of the rule, and essentially avoiding the associated risks and costs with the early termination waiver provision by narrowly focusing on customers that would have already exercised or be willing to exercise their 'one-time only (within a 12-month period)' early termination fee waiver, prior to enrolling with RES Two," RESA said.

New Parties

Several parties recently granted intervenor status offered briefs on the record as it stands.

Among them, the National Energy Marketers Association supported shortening the proposed rescission period to three days, and basing it upon the signing of the contract and not the utility's processing of an enrollment. NEM also opposed Staff's proposed termination fee waiver period, and the caps on termination fees offered by the Citizens Utility Board.

However, Interstate Gas Supply, which filed a late intervention on Friday which has not yet been ruled upon, supported Staff's proposed

termination fee waiver period which would extend up to 10 business days after the date of the first bill. The waiver period, "would provide the customer the vehicle in which to evaluate other products and services their new supplier may be offering, with the notion that the customer could in fact switch to a different product that may be more suitable," IGS said.

IGS also supported stricter door-to-door marketing rules versus what are in the proposed rule.