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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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Rulemaking Re: Marketing and Sales)
Practices for the Retail Residential Energy Market) Docket No. L-2010-2208332

Comments of the
National Energy Marketers Association

The National Energy Marketers Association (NEM)¹ hereby submits its comments on the Commission's Proposed Rulemaking Order on marketing and sales practices of electric generation suppliers (EGSs) and natural gas suppliers (NGSs) [hereinafter "Proposed Order"]. The Proposed Order includes proposed regulations based on Interim Guidelines for Marketing and Sales Practices for Electric Generation and Natural Gas Suppliers that were adopted by the Commission in November 2010. The proposed regulations differ from the Interim Guidelines in some respects. NEM's comments will be focused on the areas in which the proposed regulations would represent new or revised marketing standards from those contained in the Interim Guidelines.

The Interim Guidelines have been in place for over a year. NEM members believe that the Interim Guidelines have been an invaluable tool in providing clear "rules of the road" to competitive suppliers to coincide with the expiration of electric utility rate caps and the corresponding widespread availability of energy choice options to mass market consumers.

¹ 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.

It is in the best interest of competitive suppliers to provide consumers with a positive shopping experience, through all methods of valid enrollment and with a variety of energy product offerings. The Interim Guidelines have promoted this goal. Accordingly, NEM supports the proposed regulations as based on the Interim Guidelines, subject to the suggested modifications and clarifications set forth below.

I. Section 111.2. Definitions

The proposed regulations include a Definitions Section whereas the Interim Guidelines did not include a Definitions Section. In particular, the Definitions Section includes the term “agent,” for which the proposed regulations in subsequent sections set forth a significant amount of requirements and responsibilities. As proposed by the Commission, the term “agent” would be defined as,

A person who conducts marketing or sales activities, or both, on behalf of a single licensed supplier. The term includes an employee, a representative, an independent contractor or a vendor. For natural gas suppliers, the term “agent” also includes “marketing services consultant” or “nontraditional marketer” as those terms are defined at 52 Pa. Code § 62.101 (relating to definitions).

In delineating what constitutes a supplier’s “agent” in the marketplace, there are two main factors that are determinative in NEM’s view. These are the exclusivity of the relationship and the terms of the contractual relationship between the supplier and the entity. The Commission’s proposed definition of “agent,” by using the phrase “on behalf of a single licensed supplier” has incorporated the concept of exclusivity. NEM believes it would aid in the application of this definition if the concept of the contractual relationship between the parties were also incorporated. This permits the stakeholders the certainty of a clear,

bright line rule. While compensation may be a factor to look at, in NEM's view compensation of an entity may not be directly determinative of agency and should not be incorporated in a definition of "agent." For example, a third party that represents a customer in the role of consultant or otherwise, or that requests a price quote from an energy supplier on behalf of a customer, should not be considered an agent of a supplier within the context of this definition, without regard to whether or not such third party receives a fee from such energy supplier.

The Commission proposes that agents that provide marketing and/or sales support services to more than one supplier (i.e., in different service territories/separate divisions of the company) are to be included in the definition of "agent" and required to follow the regulations. NEM believes this is a reasonable recognition of current practices in the marketplace. However, NEM believes it is important to clarify under these circumstances that a particular supplier should only be liable for the marketing and sales activities that were undertaken on that supplier's specific behalf. We believe this concept should also be incorporated in the definition of "agent."

Therefore, NEM suggests the definition be modified as follows:

A person who, **at any point in time**, conducts marketing or sales activities, or both, **pursuant to a contractual agreement with the supplier**, on behalf of **and in the interest of** a single licensed supplier. The term includes an employee, a representative, an independent contractor or a vendor. For natural gas suppliers, the term "agent" also includes "marketing services consultant" or "nontraditional marketer" as those terms are defined at 52 Pa. Code § 62.101 (relating to definitions). (additions indicated in bold text).

NEM also requests that the Commission clarify that affinity groups, and individuals acting on behalf of affinity groups, such as fraternal organizations, churches, rotary clubs and the like, that endorse a competitive supplier should not be deemed an "agent" under the proposed regulations. These groups are not directly affiliated with the competitive supplier. These groups exist independently outside of the energy markets, and the application of the marketing standards to these entities would be outside of the scope of "marketing and sales activities" that the standards are intended to regulate. To the extent that consumers encounter issues with the underlying marketer offering, any associated marketer misconduct would be actionable under that marketer's license. NEM suggests that the definition of "agent" include the following subparagraph,

Groups or organizations not directly affiliated with electricity or natural gas suppliers, brokers, or agents that choose to endorse a particular energy supplier for its members, employees, or customers, are not considered an agent of a supplier within the context of this definition.

II. Section 111.4. Agent Qualifications and Standards; Criminal Background Investigations

NEM agrees with the purpose and intent of proposed Section 111.4 to require competitive suppliers to set internal standards and qualifications for agent hiring and to appropriately screen those individuals, particularly those that will be in the field engaged in door-to-door marketing and sales activities. NEM requests clarification for the purpose of ensuring that supplier standards will be in compliance with the Commission's requirements. In particular, we request clarification of the language "probable threat to the health and safety of the public" set forth in Section 111.4(b) as it pertains to the screening of door-to-door marketing and sales agents. To be compliant, NEM suggests that the supplier's agent

hiring standards should comport with federal and state statutory employment guidelines and the supplier's screening of door-to-door marketing and sales agents should be for convictions that are related to and would impact the individual's ability to responsibly engage in these types of sales.

III. Section 111.5. Agent Training

The agent training requirement in the Interim Guidelines is proposed to be expanded in Section 111.5(d) of the proposed regulations to include a supplier's obligation to ensure that its vendors and independent contractors have provided the same training to their employees, agents or independent contractors. NEM agrees with the requirements set forth in the proposed guidelines that would require supplier agents to have reasonable knowledge of the supplier's products as well as what constitutes acceptable conduct in the marketplace. NEM does not oppose the extension of the training requirement to vendors or independent contractors. We would however suggest a modification to the wording of Section 111.5(d) to make clear the supplier's responsibility with respect to that training. If a supplier wishes to engage a third party vendor or independent contractor, the supplier should incorporate a training program as a qualification of hiring a vendor. Thereafter, if the supplier becomes aware of circumstances that indicate that the training is ineffective, then it becomes incumbent upon the supplier to work with the vendor to revise the training. To be clear, the extent of the supplier's obligation is to ensure that the vendor or independent contractor utilized the training program. As such, NEM would suggest the following wording change to Section 111.5(d):

When a supplier contracts with an independent contractor or vendor to perform marketing or sales activities on the supplier's behalf, the supplier

shall confirm that the contractor or vendor has provided **supplier-approved** training to employees, agents and independent contractors in accordance with this section. (additions indicated in bold).

IV. Section 111.6. Agent Compensation; Discipline

NEM recommends that the reliance on the rules to incent proper conduct by agents should be the focus of the proposed regulations. In our view, strictly proscribed compensation rules should not be relied upon to affect proper conduct. The matter of appropriate and optimal agent compensation structures should be a matter within the purview of the supplier. The proposed regulations provide many bases upon which to police agent conduct. While agent compensation may be a factor to consider as to whether a supplier is in compliance with the rules, compensation requirements per se should not be a chief focus of the proposed rules.

V. Section 111.8. Agent Identification; Misrepresentation

In Section 111.8(a) of the proposed regulations, the Commission has included the requirement that, "A supplier shall issue an identification badge to agents who conduct door-to-door activities or appear at public events." NEM agrees with the Commission about the value of requiring identification badges for agents. NEM requests clarification of the term "public events" as used in this Section. We suggest that a "public event" be defined as one that is intended to facilitate sales and marketing activities and potentially result in consumer enrollment as otherwise defined in the rules. So, for example, energy choice expos at shopping malls such as the events this Commission has organized would be considered "public events." However, a supplier's rallying event of its agents or a supplier's sponsorship of a sporting event would be distinguishable and not considered

“public events” for which an agent identification badge is required. That being said, NEM suggests that Section 111.8(a) be modified as follows, “A supplier shall issue an identification badge to agents who conduct door-to-door activities or appear at public events, **which are held for the purpose of inviting members of the public to potentially enroll in an energy choice program.**” (additions in indicated in bold).

VI. Section 111.9. Door-to-Door Sales

NEM suggests only a minor point of clarification with respect to proposed Section 111.9. Proposed Section 111.9 (f)(3) would require, after the completion of a transaction, that the agent state to the customer that a copy of the disclosure statement will be sent after the transaction is verified. NEM wishes to clarify that in the case that the customer was provided with a copy of the disclosure statement at the time the contract was signed, that this Section not be construed to require a duplicate copy of the disclosure statement be provided again after verification of the transaction. This clarification can be accomplished by adding language to Section 111.9(f)(3) as follows: “State that the supplier shall send a copy of the disclosure statement about the service to the customer after the transaction has been verified, **if the disclosure statement has not been previously provided.**”

VII. Section 111.10. Telemarketing

Proposed Section 111.10(b) would require, “an agent who contacts customers by telephone shall provide the agent’s first name” in addition to the name of the supplier and the agent’s identification number, upon customer request. NEM notes that suppliers may have their agents utilize a fictitious name in this situation for valid security reasons. That being the case, NEM requests that the Commission confirm that when a supplier’s agents use a

fictional first name process to protect the agents' identity, that this should be deemed to be in compliance with this Section of the proposed regulations.

VIII. Section 111.14. Notification Regarding Marketing or Sales Activity

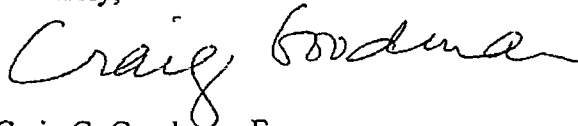
This Section of the proposed regulations differs from the Interim Guidelines in that it would require a supplier to provide the utility with general, non-proprietary information about sales or marketing activity that the supplier anticipates may generate phone calls and inquiries. The Interim Guidelines did not require the supplier to make such notification to the utility. NEM urges the Commission to continue to utilize the approach taken in the Interim Guidelines, which would reserve the decision to share such information with the utility to the supplier's business discretion. NEM believes this represents the most appropriate approach given that the utilities still perform the merchant function in the marketplace and as such are direct competitors of competitive suppliers. It is for this reason that suppliers are reluctant to share this information with utilities even though the proposed regulations would seek to limit its use to the utility informing its customer service representatives to allow them to respond to customer inquiries. If the supplier anticipates its marketing or sales activity will generate calls or inquiries, it is required to notify the Commission. NEM submits that this is the appropriate avenue for sharing of this information.

Conclusion

NEM appreciates this opportunity to comment on the Commission's proposed regulations on retail marketing standards. The proposed regulations will be an important tool in

informing responsible supplier conduct and ensuring that consumers are protected in the retail energy marketplace.

Sincerely,



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