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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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COMMENTS OF  
THE RETAIL ENERGY SUPPLY ASSOCIATION

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### **Attachment A: RESA's Suggested Changes To Proposed Interim Guidelines**

## **I. INTRODUCTION**

By Proposed Rulemaking Order entered on February 14, 2011, the Commission sought comment on proposed regulations intended to establish standards and practices for marketing and sales practices for the retail residential energy market based on the currently effective Interim Guidelines. The Retail Energy Supply Association (“RESA”)<sup>1</sup> is a broad and diverse group of retail energy suppliers who share the common vision that competitive retail energy markets deliver a more efficient, customer-oriented outcome than a regulated utility structure and are devoted to working with all stakeholders to promote vibrant and sustainable competitive retail energy markets for residential, commercial and industrial consumers.

In the context of this proceeding, RESA members understand the critical importance that substantive, practical, fair and workable consumer protection and marketing practices play in creating a robust and sustainable competitive market that provides value-added products and services to customers. Accordingly, RESA appreciate this opportunity to provide additional input and suggestions on these important proposed regulations.

## **II. COMMENTS ON THE PROPOSED INTERIM GUIDELINES**

### **A. Section 111.2 Definitions**

RESA recommends that the proposed definition of “agent” and “sales” be revised and that the Commission add definitions for “transaction” and “verification.” As all of these terms

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<sup>1</sup> RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

are used in the regulation, clarity about their meaning in relation to these regulations is appropriate.

**1. Definition of Agent and Regulated Activities**

The purpose of the Commission's proposed regulations is to set forth the rules governing the sales and marketing activities of entities performing these functions on behalf of licensed suppliers and to ensure that suppliers take all necessary actions to ensure these activities are performed in accordance with the regulations. To accomplish this purpose, the regulations need to define the entities over which the licensed suppliers will be responsible and the activities of these entities which fall within the scope of the regulations. These concepts are embodied in the terms "agent" and "sales and marketing."

**a. Definition of Agent**

The Commission's proposed definition for "agent" is a reasonable starting point but additional clarification is warranted. At the outset, the definition should be clarified to make clear that the person conducting the marketing or sales activities on behalf of a single licensed supplier is compensated by that supplier to perform the activities. The purpose of this addition is to be clear that the supplier is responsible for the actions of entities that are or should be under the direct control of the supplier. The requirement that the entity be compensated by the supplier to conduct the entities establishes this clear relationship.

Also integral to establishing the direct relationship between the supplier and the agent is the requirement that the sales and marketing activities be performed on behalf of a single licensed supplier as already proposed by the Commission in this definition. Establishing this singular relationship is important in consideration of the various ways in which suppliers may choose to advertise their products and the relationships the supplier may establish with entities that are not "agents" as contemplated in this regulation. For example, suppliers may engage in

affinity partnerships which link complementary brands so it can develop them into lasting partnerships and strategic alliances. More specifically the supplier's partner, i.e. the affinity group, seeks to add value to its existing customers, members or donors by promoting products and services they do not currently sell while the supplier, i.e. the product supplier, seeks to acquire new customers by using the strength of the affinity group's relationship with its audience. Such affinity partnerships can be with community organizations, trade associations, and/or retail outlets. When the affinity group advertises the product of the supplier and directs members of its audience to the supplier, the affinity group is not acting as an agent in the context of this definition. Such relationships are similar to a supplier advertising with a local newspaper. The supplier purchases an advertisement and the newspaper distributes the advertisement to its readers directing the readers to the supplier. This relationship, however, does not convert the newspaper or its employees, into agents for the suppliers. RESA recommends additional language for the definition of agent to ensure that these types of relationships are excluded.

In addition to partnerships and advertising activities, RESA does not interpret the Commission's definition of agent to include those entities who may be working on behalf of a consumer as an energy consultant. These entities may aggregate a pool of customers or work for one customer but solicit a number of suppliers to make an offer to provide service for the customers. In this scenario, the energy consultant is not within the direct control of a single licensed supplier and, therefore, the supplier who is ultimately chosen to provide the service to the consumer should not be held responsible for the activities of the energy consultant. RESA supports this outcome.

However, the Commission's proposal to reference the natural gas licensing regulations to further define "agent" for purposes of this regulation is unnecessary and confusing as the

meaning of “marketing services consultant” and “nontraditional marketer” includes, at least in part, some of the types of entities that the first part of the Commission’s proposed definition appears to exclude, i.e. energy consultants to consumers (who are included within the definition of marketing services consultant) and affinity partnerships (who are included within the definition of nontraditional marketer). For the reasons discussed above, RESA does not support including these types of independent entities as agents for which suppliers will be responsible in the context of these regulations.

Additionally, the proposed cross-referenced definitions are contained in the Commission’s natural gas supplier licensing regulations and are intended to provide an exemption from the licensing requirements for natural gas suppliers. The Commission is in the process of initiating a rulemaking to specifically amend these sections of its current regulations and, therefore, any reference to those regulatory definitions may be outdated by the time that process is completed.<sup>2</sup>

Finally, to the extent this reference may be viewed as creating different definitions for agents used by electricity suppliers and the agents used by gas suppliers for purposes of these regulations such differences are unwarranted. Any entity – without regard to whether it is licensed or not or whether it is an agent of a gas or electricity supplier – which falls within the definition of agent and performing the activities covered by the regulations will be required to comply with these regulations.<sup>3</sup>

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<sup>2</sup> See Licensing Requirements for Natural Gas Suppliers, Docket No. L-2011-2266832, Motion of Commissioner Pamela A. Witmer adopted October 14, 2011.

<sup>3</sup> If the Commission is inclined to maintain the reference, then RESA recommends that the last sentence of the definition read: "For natural gas suppliers, the term “agent” also includes a “marketing services consultant” or “nontraditional marketer” as those terms are defined at 52 Pa. Code § 62.101 (relating to definitions) that conducts marketing or sales activities, or both, on

For all these reasons, RESA recommends that the definition of agent be revised as follows:

*Agent* - A person who is compensated to conduct 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. The term does not include any employee of an independent organization, such as a media outlet, trade organization or retailer, which facilitates access to a supplier. ~~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).~~

**b. Definition of Sales and Marketing**

The "activities" identified by the Commission as falling within the scope of these regulations are "marketing" and "sales" activities. However, the proposed regulations only include a definition for "sales." RESA recommends that the definition be recast as the definition for "Sales and Marketing" as that encompasses the activities that the Commission is intending to regulate. Marketing involves making an actual offer to the customer that the customer can accept. Sales involves the process of assisting the customer in accepting the offer. Both of these terms are intertwined and including the definition for both clarifies the activities that are covered by these regulations.

**2. Definition of processes involved in enrolling a customer**

After the customer has chosen to accept an offer extended as a result of the sales and marketing of the agent, the next step in the process is to confirm the customer's intent. The proposed regulations split this into two distinct processes. The first is the process by which the customer authorizes the transfer of his or her account to the supplier. This process is set forth in proposed Section 111.7(a). The second is the process by which the customer's intent is

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behalf of a single licensed supplier." Such a revision would ensure that term "agent" is uniform in its application to electricity suppliers and natural gas suppliers.

validated. This process is set forth in proposed Section 111.7(b). However, the Commission does not include any definitions for these two distinct processes. Adding definitions for these processes will provide more context and clarity to the regulations. For this reason, RESA recommends that the Commission add the following two definitions:

Transaction – A process by which a customer authorizes the transfer of his or her account to the supplier.

Verification – A process by which a customer validates his or her intent to enter into a contract and receive service from a supplier and is separate from marketing or sales. In the context of this chapter, the term is limited to those transactions initiated by agents and does not include those transactions that are completed by the customer upon his or her own initiation.

The exclusion in the definition of verification is consistent with the Commission determination to except the verification process from transactions completed without the involvement of an agent.<sup>4</sup> The wording is intended to ensure that a supplier's customer service representative assisting the customer initiated change is not considered an "agent" in the context of these regulations. This is because the customer service representative is not engaging in the sales and marketing activities of these regulations but rather assisting the customer.

**B. Section 111.3 Supplier Liability for its Agent.**

RESA recommends that subsection (c) be clarified as follows:

(c) If, consistent with due process, the Commission finds that a supplier's agent has committed for fraudulent acts, violations of Commission regulations and orders, or for violations of any state and federal laws within the Commission's jurisdiction and that the supplier should be held liable for such violations, then the Commission may suspend or revoke a supplier's license, and may impose fines as appropriate after consideration of the factors and standards set forth in 52 Pa. Code § 69.1201. committed by the supplier's agent.

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<sup>4</sup> Proposed Rulemaking Order at 8.



The revision clarifies that this section is addressing the activities governed by these regulations – i.e. the actions of a supplier’s agent in sales and marketing. Additionally, the revisions clarify that the violations for which a supplier may be held liable involve those within the Commission’s jurisdiction to adjudicate.

Finally, the revision to the last sentence is intended to permit the Commission flexibility, based on the specific facts of an alleged violation, to craft an appropriate remedy. This is important since potential violations could involve varying degrees of behavior from a systematic intent to violate the regulations to one rogue agent who is swiftly and immediately corrected. In addition, appropriate consideration regarding penalties should be given when a supplier can demonstrate that it has a reasonable plan in place to ensure compliance with the regulations and that the agent was properly trained in accordance with the plan. By assuring suppliers such facts will be taken into consideration, consistent with 52 Pa. Code § 69.1201, the Commission will be appropriately focusing on preventing problems. Absent unusual circumstances, imposing a punitive penalty on a supplier who can demonstrate that it has taken all reasonable measures but was unable to ultimately control the actions of the agent serves no preventative value. Thus, the regulations should make clear that depending on the facts involved and the record developed, the Commission maintains flexibility to impose appropriate sanctions and/or penalties as deemed necessary in each specific situation.

**C. Section 111.4. Agent qualifications and standards; criminal background investigations.**

Subsection (b) is intended to ensure that a criminal background investigation is conducted to determine whether an individual presents a probable threat to the health and safety of the public. RESA does not oppose the requirement that criminal background investigations be conducted or that the supplier may be held liable if one is not conducted. However, as written,

the proposed regulation could be interpreted to mean that only the supplier itself can conduct the investigation even though there are numerous independent vendors who may perform this function. As the intent of the regulation is to make the supplier responsible for conducting the investigation rather than requiring that the supplier perform the investigation, RESA requests that the subsection be revised as follows:

(b) Prior to hiring an individual who will be performing door-to-door marketing and sales activities, a supplier shall ensure that a conduct criminal background investigations has been conducted to determine if the individual presents a probable threat to the health and safety of the public.

**D. Section 111.6. Agent Compensation; Discipline.**

In this section, the Commission proposes to add a new requirement prohibiting suppliers from designing agent compensation programs that encourage or reward behavior in violation of the regulations. While the Commission urged all suppliers to evaluate their agent compensation programs during the development of the Interim Guidelines, the Commission declined to make it a specific requirement in the Interim Guidelines.<sup>5</sup>

The genesis of the concern is that agents compensated through commissions are more likely to engage in sales and marketing behavior in violation of the regulations than salaried agents. While RESA does not share this viewpoint, the regulation as proposed is too narrow in that the determination of whether a supplier has violated it depends on the actions of the agent to violate the regulations. Viewed in this context, any time any agent violates the regulations, a supplier's compensation arrangement with the agent could be viewed as violating this section because the agent is compensated by the supplier. This puts the supplier in an impossible situation. Instead of requiring a supplier to try to determine in advance what may or may not be

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<sup>5</sup> See Final Interim Guidelines Order at 33.

a problematic compensation arrangement and then holding the supplier in violation of this section anytime an agent violates the regulations, RESA recommends that this section be revised as follows to achieve the result that is intended – i.e. that the supplier does not deliberately create an arrangement with an agent that incents the agent to violate the Commission’s regulations:

(a) A supplier shall not deliberately design its agent compensation program structure ensure that it does not in a manner where its relationship with the agent to promote, encourages or rewards behavior which that runs counter to the practices established in these regulations and to the general obligation of fair dealing and good faith that a supplier should exercise when interacting with customers.

RESA’s proposed revisions to subsection (b) are intended to clarify that suppliers shall educate agent about the Commission’s slamming policy. RESA also recommends that the last sentence of subsection (b) be deleted as repetitive and unnecessary. The purpose of the regulations is to set forth the obligations of suppliers with respect to their agents and, therefore, language informing the supplier that it must “consider the legal consequences” of failing to comply with these requirements is unnecessary. RESA’s recommended revisions to subsection (b) are as follows:

(b) In developing internal agent discipline practices and procedures, a supplier shall educate agents about ~~incorporate~~ the Commission’s long-standing zero-tolerance policy regarding the unauthorized transfer of customer accounts and the violation of other consumer protections. ~~A supplier shall consider the legal consequences faced by a supplier that fails to properly train and supervise its agents.~~

**E. Section 111.7. Customer Authorization To Transfer Account; Transaction; Verification; Documentation.**

RESA recommends that subsection (c) be revised consistent with current Guideline D-5 which enables an on-site agent to immediately address any problem with the enrollment so long as the customer consents. The Commission’s newly proposed section has the potential to create a significant amount of time lag between the customer’s expression of desire to enroll and the

actual enrollment because any errors with the enrollment could only be addressed by the supplier via telephone, email or letter. Such delay is unnecessary when an customer is enrolled with an on-site agent who could very quickly and easily address any technical errors or problems with the enrollment process. To address this, RESA recommends the following revisions to subsection (c):

(c) When a supplier is informed that a transaction could not be verified, the supplier shall contact the customer by telephone, email or by letter, and explain that the transaction could not be verified. If the agent is still available to assist the customer, the supplier may ask if the customer would like to have the agent return to address the problem. The agent may return to the customer's premises to offer assistance to correct the problem so that the transaction can be re-submitted to the verification process only if the customer responds in the affirmative.

**F. Section 111.8. Agent Identification; Misrepresentation.**

RESA recommends that an additional subsection (f) be added to address the situation of a non-affiliated supplier acquiring the rights to use a local distribution company's name and/or logo. The revisions are intended to assure that any such use includes the appropriate disclosures to state that the non-affiliated company is not the utility and to provide the full legal name of the entity providing services under the similar logo. RESA's recommended new subsection (f) is as follows:

(f) Any company, regardless of affiliation, using a similar name as the distribution company must provide appropriate disclosures regarding the nature of the relationship which would include at least (i) disclosure that the non-affiliated company is not the distribution utility and not affiliated with the distribution utility; and, (ii) disclosure of the full legal name of the entity providing services under the similar logo.

**G. Section 111.9. Door-to-Door Sales.**

**1. Subsection (a)(1)**

Subsection (a)(1) limits the hours during which door-to-door sales may occur. RESA recognizes that the Commission has increased, by one hour, the time period in which door-to-door sales may occur during the summer months. *See* Guideline J-1. As many suppliers advocated in the stakeholder process, the hours for door-to-door sales should be established as 9:00 A.M. to 9:00 P.M. year round. By requiring winter sales to end at 7:00 P.M., the Commission's proposed time frame eliminates sales to the majority of households during the winter months since residents often do not arrive home from work until 6:00 P.M. While RESA is sensitive to the concerns raised by other stakeholders regarding this issue, the implementation of these regulations which establish clear rules about the behavior of agents and the liability of a supplier is more than sufficient to address the concerns attempting to be addressed by shortening the end time for door-to-door marketing. Thus, RESA recommends that subsection (a)(1) be revised as follows:

- 1) A supplier shall limit door-to-door marketing or sales activities to the hours between 9 a.m. and 7 ½ p.m. during the 6 months beginning October 1 and ending March 31, and between 9 a.m. and 8 p.m. during the months beginning April 1 and ending September 30. When a local ordinance has stricter limitations, a supplier shall comply with the local ordinance.

**2. Subsection (e) insufficient English language skills**

RESA recommends that proposed subsection (e) be revised to enable an agent to rely on the assistance of another member of the customer's household who is fluent in the language spoken by the customer and the agent. Such flexibility recognizes that other household members are often relied upon to assist those who are not fluent in English with any number of issues involved in their day-to-day life. As such, permitting an agent to similarly rely on these household members is reasonable.

Consistent with this, the Commission's current Guideline M-1 permits the use of translation services and language identification cards while proposed subsection (c) limits their use only for purposes of identifying the language spoken by the potential customer. No explanation for the new limitation is provided but RESA recommends that it be revised to permit an agent flexibility in his or her interaction with the customer. RESA recommends the following changes to this subsection:

(e) When a customer's English language skills are insufficient to allow the customer to understand and respond to the information being conveyed by the agent, or when the customer or a third party informs the agent of this circumstance, the agent shall find another agent who is fluent in the customer's language to continue the sales or marketing activity. If another person present in the household is fluent in both languages and offers to assist, then the agent may proceed. If, however, the agent cannot find another agent and no other person present in the household offers to help with translation, the agent shall terminate contact with the customer. The agent shall be permitted to use translation services, electronic language translation devices and language identification cards ~~only to identify the language spoken by the potential customer.~~

### 3. Subsection (f) providing disclosure statement

RESA recommends that Subsection (f)(3) be clarified to recognize that an on-site agent may give the customer a copy of the disclosure statement prior to the verification process if the customer agrees to accept it in that manner. Recognizing this is important in determining when the time period starts for a customer's right to rescind the contract as the time period begins upon the customer's receipt of the disclosure statement. Including this also streamlines the enrollment process to more quickly effectuate the customer's intent to switch suppliers.

RESA recommends that subsection (f)(4) replace the word "cancel" with "rescind" consistent with the fact that a customer has a three business day right of "rescission" in addition to any specific contractual rights he or she may have to "cancel" the contract at any time.

**H. Section 111.10. Telemarketing.**

Subsections (a)(1) and (2) define when suppliers and agents are required to register with the *Telemarketer Registration Act*. The *Telemarketer Registration Act* is within the jurisdiction of the Attorney General and subject to interpretation and change by the Attorney General. Instead of attempting to set forth specific current requirements that are overseen by another regulatory agency in these regulations, RESA recommends that (a)(1) and (2) be consolidated and the burden of ensuring compliance with these non-Commission requirements be left with the suppliers and their agents.

Subsection (c) sets forth the specific information an agent must provide a customer. RESA recommends that this subsection be clarified to recognize that a supplier may provide the customer with a copy of the written disclosure in the manner discussed during the transaction. Additionally, as the flow of conversation cannot be specifically controlled, RESA recommends that the specific requirement that the agent inform the customer “at the end of the telephone contact” about the right of rescission be deleted.

**I. Section 111.11. Receipt of Disclosure Statement and Right to Rescind Transaction.**

RESA recommends removal of the phrase “and is not submitted to the verification process” from subsection (a). The language is not necessary if RESA’s proposed definition for verification is adopted and is consistent with the exclusion from the verification process for non-agent transactions set forth in Section 111.7(b).

RESA also recommends that the last sentence in paragraph (b) become a new paragraph (c). The right of rescission is effective upon a customer’s receipt of a disclosure statement. There are a number of ways a customer may receive the disclosure statement. Consistent with RESA’s recommendation for Section 111.9(f)(3), an agent may give the customer a copy of the

disclosure statement prior to the enrollment process. Or, as addressed in RESA's proposed new paragraphs (e) and (f) discussed below, a customer may receive a disclosure statement on-line or via electronic mail. Since there are a number of ways that a customer may receive the disclosure statement, the second sentence addressing the right of rescission should be separated from the first sentence involving just one specific way a customer may receive the disclosure statement.

RESA also recommends the addition of two new subsections to address when a customer is deemed to have received the disclosure statement when the statement is provided on-line or via electronic mail. Adding these two paragraphs recognizes some of the more "timely" ways a customer can receive his or her disclosure notice. The two additional paragraphs RESA recommends adding here are the following:

(e) There shall be a rebuttal presumption that a customer who enrolls on-line and is presented with the disclosure statement as part of the enrollment process has received the disclosure statement when the customer affirmatively acknowledges the terms of the disclosure statement.

(f) There shall be a rebuttal presumption that a customer who agrees to receive a disclosure statement by electronic mail receives the disclosure statement on the day it is sent to the customer-provided email address.

**J. Section 111.12. Consumer Protection.**

In subsection (c), the Commission references its regulations dealing with rescission periods but prefaces the reference as the "cooling off period." The right of rescission and the federal cooling off period are two separate issues. Proposed subsection (b) addresses the cooling off period and subsection (c) appears to be referencing the rescission period. Therefore, RESA recommends the following clarification:

(c) A supplier and its agents shall comply with the 3 business day right of rescission ~~cooling off period~~ requirement at § 54.5 (d) that applies to EGSs and § 62.75 (d) that applies to NGSs. The rescission period may run concurrently with the federal three-day cooling off period.



**K. Section 111.13. Customer Complaints.**

Subsection (d) requires a supplier to provide contact information to the Commission staff to address consumer inquiries and resolve complaints. RESA recommends that an additional sentence be added to this subsection to recognize that the Commission staff, per standard procedures, will encourage callers to first attempt to resolve the matter with the companies involved if they have not done so already. This is consistent with current Guideline P-1.

RESA's recommended language is below:

(d) A supplier shall provide a single contact and a list of designated escalation contacts for the Commission staff to access to address consumer inquiries and resolve complaints. Commission staff will encourage consumers to first attempt to resolve the matter with the companies involved if they have not done so already.

**L. Section 111.14. Notification Regarding Marketing or Sales Activity.**

**1. Advance Notice to the Commission**

In subsection (a), the Commission proposes to require a supplier to notify the Commission's Bureau of Consumer Services prior to engaging in an activity that the supplier anticipates may generate phone call and inquires to the Commission. No penalties for failure the failure of a supplier to notify the Commission about any such activity are included in the Interim Guidelines. In fact, the Commission made clear that "the intent of the notification is simply to prepare the Commission's call center for possible calls about door-to-door marketing and sales campaigns" and that "the determination of the need to notify BCS. . . resides totally with the supplier."<sup>6</sup> For these reasons, suppliers did not raise any serious objections to this provision in the Interim Guidelines.

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<sup>6</sup> Final Interim Guidelines Order at 44.

RESA is concerned, however, about the consequences of including mandatory language – “the supplier shall notify” – in a regulation whereby a supplier can be fined or otherwise penalized if it fails to notify the Commission about a campaign that results in phone calls and inquiries to the Commission. Suppliers engage in a wide variety of marketing campaigns that evolve and change over time and suppliers cannot anticipate with certainty each time one of these changes will result in calls or inquires to the Commission. Unfortunately, the language as drafted, does not allow any flexibility for a situation where the supplier did not anticipate that a campaign would result in calls to the Commission but it did. For this reason, RESA recommends that the language of subsection (a) be modified as follows:

(a) When a supplier engages in marketing or sales activity that the supplier anticipates may generate a significant number of phone calls and inquiries to the Commission, the supplier ~~should~~ notify the Bureau of Consumer Services no later than the morning of the day that the activity will commence. The notification shall include general, non-proprietary information about the activity, the period involved, and a general description of the geographical area. A supplier is expected to use reasonable judgment in determining whether or not advance information should be provided.

The proposed revision balances the Commission’s desire for information with the ability of the supplier to reasonably anticipate when such advance notice may be reasonable necessary. To this end, the revision requires a supplier to use reasonable judgment and to provide advance notice if it can reasonably anticipate that a future campaign may result in a significant number of phone calls and inquiries to the Commission.

## **2. Advance notice to the local distribution company**

The current Interim Guidelines provide that when a supplier chooses to provide advance notice to the Commission about an upcoming sales and marketing campaign that the supplier “should” also provide advance notice to the local distribution company. *See* Guideline K-1. The Commission proposes to make the disclosure of this information mandatory in subsection (b) of

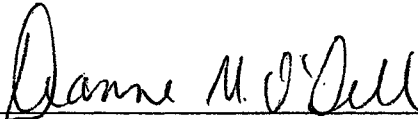
this section by changing the “should” to a “shall” but does not offer any reason for the proposed change. RESA does not support this change.

As discussed above, RESA is concerned about the regulatory consequences of not accurately anticipating that a particular campaign would result in phone calls and inquiries to the Commission and providing advance notice to the utility. Further, RESA believes that customer inquiries to the local distribution company about a supplier should be directed to the supplier as the local distribution company is not the appropriate entity to discuss a supplier’s offer. RESA acknowledges that the Commission’s concern here is about ensuring that customers – who may contact the utility with questions about a supplier’s marketing – receive appropriate information. However, creating a regulatory mandate that suppliers provide the utility advance notice of a marketing campaign unreasonably burdens suppliers with the risk of being penalized for not providing advance notice even if the supplier could not have anticipated that a particular marketing campaign would result in inquiries to the Commission. In fact, the Commission specifically rejected such a mandate in developing the Interim Guidelines reasoning that is Interim Guidelines struck a “reasonable” balance among all the concerns raised. There is no reason to depart from this prior resolution and, on the contrary, creating regulatory mandates that can result in penalties to the suppliers because they misjudged the outcome of a marketing campaign is not reasonable. For these reasons, RESA recommends that subsection (b) replace “shall” with “should” consistent with the current Interim Guidelines.

**III. CONCLUSION**

RESA appreciates this opportunity to provide its viewpoint regarding this important proceeding and looks forward to continuing to assist the Commission with this very important process.

Respectfully submitted,



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## ATTACHMENT A

### RESA's Suggested Changes To Commission's Proposed Regulations Included as Appendix A of Proposed Rulemaking Order entered February 14, 2011 at Docket Number L-2010-2208332

#### TITLE 52 PUBLIC UTILITIES PART I. PUBLIC UTILITY COMMISSION Subpart F. COMPETITIVE MARKETS

#### CHAPTER 111. MARKETING AND SALES PRACTICES FOR THE RETAIL RESIDENTIAL ENERGY MARKET

##### § 111.1. General.

The purpose of this chapter is to establish standards and practices for marketing and sales activities for electric generation suppliers and natural gas suppliers and their agents, in order to ensure the fairness and the integrity of the competitive residential energy market. Electric generation suppliers and natural gas suppliers and their agents shall comply with these standards and practices when engaged in sales and marketing activities involving residential customers. When these standards and practices do not address a specific situation or problem, the supplier shall exercise good judgment and use reasonable care in interacting with customers, prospective customers and members of the public.

##### § 111.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

*Agent* - A person who is compensated to 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. The term does not include any employee of an independent organization, such as a media outlet, trade organization or retailer, which facilitates access to a supplier. For natural gas suppliers, the term "agent" also includes "marketing services consultant" or "nontraditional marketer" as these terms are defined at 52 Pa. Code § 62.101 (relating to definitions).

*Commission* - Public Utility Commission.

*Disclosure statement* - A written disclosure of the terms of service between a supplier and a customer that satisfies the definition of "consumer contract" in section 3 of the Plain Language Consumer Contract Act (73 P. S. § 2203) containing information as required in, and developed consistent with 52 Pa. Code § 54.5 (relating to disclosure statement for residential and small business customers) for electric generation service and § 62.75 (relating to disclosure statement for residential and small business customers) for natural gas supply service.

*Distribution company* - An electric distribution company or a natural gas distribution company.

*Door-to-door sales*- A solicitation or sales method whereby an agent proceeds randomly or selectively from residence to residence without prior specific appointment.

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*EDC - Electric distribution company* – As defined in 66 Pa.C.S. § 2803 (relating to definitions).

*EGS - Electric generation supplier* — As defined in 66 Pa.C.S. § 2803.

*Electric generation service* – Electricity and related services.

*Energy service* – Electric generation service or natural gas supply service.

*Marketing services consultant* – As defined in 52 Pa. Code § 62.101.

*Natural gas supply services* – As defined in 66 Pa.C.S. § 2202 (relating to definitions).

*NGDC - Natural gas distribution company* — As defined in 66 Pa.C.S. § 2202.

*NGS - Natural gas supplier* — As defined in 66 Pa.C.S. § 2202.

*Sales and Marketing* – The extension of an offer to provide services or products communicated orally, electronically or in writing to a prospective customer.

*Supplier* – An electric generation supplier or a natural gas supplier.

*Telemarketing* – An activity, plan, program or campaign using one or more telephones that is conducted to induce customers to purchase goods or services. See 73 P.S. § 2242 (relating to definitions).

*Transaction*-A process by which a customer authorizes the transfer of his or her account to the supplier.

*Verification* – A process by which a customer validates his or her intent to enter into a contract and receive service from a supplier and is separate from marketing or sales. In the context of this chapter, the term is limited to those transactions initiated by agents and does not include those transactions that are completed by the customer upon his or her own initiation.

## ATTACHMENT A

### § 111.3. Supplier liability for its agent.

- (a) A supplier may use an agent to conduct marketing or sales activities in accordance with federal, state and municipal law, and applicable Commission rules, regulations and orders.
- (b) In accordance with § 54.43(f) (relating to standards of conduct and disclosure for licensees) for an EGS, and § 62.114(e) (relating to standards of conduct and disclosure for licensees) for a NGS, a supplier is responsible for fraudulent, deceptive or other unlawful marketing or billing acts performed by its agent.
- (c) If, consistent with due process, the Commission finds that a supplier's agent has committed for fraudulent acts, violations of Commission regulations and orders, or for violations of any state and federal laws within the Commission's jurisdiction and that the supplier should be held liable for such violations, then the Commission may suspend or revoke a supplier's license, and may impose fines as appropriate after consideration of the factors and standards set forth in 52 Pa. Code § 69.1201. committed by the supplier's agent.

### § 111.4. Agent qualifications and standards; criminal background investigations.

- (a) A supplier shall exercise good judgment in developing standards and qualifications for individuals it chooses to hire as its agents, and may not hire an individual that fails to meet its standards.
- (b) Prior to hiring an individual who will be performing door-to-door marketing and sales activities, a supplier shall ensure that a criminal background investigations has been conducted to determine if the individual presents a probable threat to the health and safety of the public.
  - 2) The criminal background investigation shall include checking the sex offender registry commonly referred to as the "Megan's Law" registry maintained by the Pennsylvania State Police.
  - 3) There shall be a presumption that a person whose name is listed on the "Megan's Law" registry presents a threat to the health and safety of the public.
- (c) When a supplier contracts with an independent contractor or vendor to perform door-to-door activities, the supplier shall confirm that the contractor or vendor has performed criminal background investigations on its employees and agents in accordance with this section and with the standards set by the supplier.

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### § 111.5. Agent training.

- (a) A supplier shall ensure the training of its agents on the following subjects:
- 4) Pennsylvania and federal laws and regulations that govern marketing, telemarketing, consumer protection and door-to-door sales, including consumer protection regulations in Chapter 54 (relating to electric generation customer choice) and Chapter 62 (relating to natural gas supply customer choice), and with applicable provisions of Chapter 56 (relating to standards and billing practices for residential utility service), Chapter 57 (relating to electric service) and Chapter 59 (relating to gas service) of Title 52 (relating to public utilities) of the Pennsylvania Code.
  - 5) Responsible and ethical sales practices.
  - 6) The supplier's products and services.
  - 7) The supplier's rates, rate structures and payment options.
  - 8) The customer's right to rescind and cancel contracts.
  - 9) The applicability of an early termination fee for contract cancellation when the supplier has one.
  - 10) The necessity of adhering to the script and knowledge of the contents of the script if one is used.
  - 11) The proper completion of transaction documents.
  - 12) The supplier's disclosure statement.
  - 13) Terms and definitions related to energy supply, transmission and distribution service.
  - 14) Information about how customers may contact the supplier to obtain information about billing, disputes, and complaints.
- (b) A supplier shall document the training of an agent and shall maintain a record of the training.
- (c) A supplier shall make training materials and training records available to the Commission upon request. A supplier is not required to submit training materials and programs for advance Commission review and approval.
- (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 training to employees, agents and independent contractors in accordance with this section.



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- (e) The supplier shall monitor a representative sample of telephonic and door-to-door marketing and sales calls to evaluate the supplier's training program, and to ensure that agents are providing accurate and complete information, complying with applicable rules and regulations, and providing courteous service to customers.

### § 111.6. Agent compensation; discipline.

- (a) A supplier shall not deliberately design its agent compensation program structure ensure that it does not in a manner where its relationship with the agent to ~~promotes, encourages or rewards behavior which that runs counter to the practices established in these regulations and to the general obligation of fair dealing and good faith that a supplier should exercise when interacting with customers.~~
- (b) In developing internal agent discipline practices and procedures, a supplier shall educate agents about incorporate the Commission's long-standing zero-tolerance policy regarding the unauthorized transfer of customer accounts and the violation of other consumer protections. A supplier shall consider the legal consequences faced by a supplier that fails to properly train and supervise its agents.

### § 111.7. Customer authorization to transfer account; transaction; verification; documentation.

- (a) A supplier shall establish a transaction process for a customer to authorize the transfer of his or her account to the supplier.
- 1) The process may include the following:
- i. The formation of a written or oral contract where a customer knowingly authorizes the transfer of his or her account to a supplier.
  - ii. The enrollment of a customer in a program where a customer knowingly authorizes, orally or in writing, the transfer of his or her account to a supplier.
  - iii. The subscription of a customer to a program where a customer knowingly authorizes, orally or in writing, the transfer of his or her account to a supplier.
- 2) A document used to complete a transaction shall include a means to identify the agent who completed the transaction and a notation indicating whether the transaction was the result of:
- i. A door-to-door call or other in-person contact with an agent.
  - ii. A telephone contact with an agent.
  - iii. A written document completed and mailed to a supplier by a customer outside the presence of, or without interaction with, an agent.

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- iv. An electronic document completed and uploaded to a supplier's website or electronically mailed to a supplier by a customer outside the presence of, or without interaction with, an agent.
- 3) A supplier shall provide a copy of documentation used in a customer transaction to the Commission upon request.
- (b) A supplier shall establish a process to verify a transaction that involved an agent. The process shall confirm that the customer authorized the transfer of his or her account to the supplier. This subsection shall not apply to a transaction that was completed solely by the customer as set forth in subsection (a)(2)(iii-iv).
- 1) A supplier may use a third party to verify transactions.
  - 2) The verification process shall be separate from the transaction process, and shall be initiated only after the transaction has been finalized.
    - i. When verifying a transaction that resulted from an agent's in-person contact with a customer in a public location, the verification process shall be initiated only after the customer leaves the vicinity of the agent.
    - ii. When verifying a transaction that resulted from an agent's contact with a customer at the customer's residence, the verification process shall be initiated only after the agent has physically exited the customer's residence.
  - 3) A customer shall be informed of the 3 business day right of rescission of the transaction pursuant to § 54.5(d) and § 62.75 (d) at the end of the verification process contact.
  - 4) A supplier shall maintain a record of a verification in a system that is capable of retrieving the record by customer name and by customer account number for a period of time equivalent to at least six billing cycles to enable compliance with § 57.177 (relating to customer dispute procedures) for an EGS and § 59.97 (relating to customer dispute procedures) for a NGS.
  - 5) The verification record shall include the transaction documents and the following information:
    - i. The date that the transaction was completed.
    - ii. The name or identification number of the agent that completed the transaction.
    - iii. The date of the verification.
    - iv. The name or identification number of the individual that conducted the verification.

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- v. The results of the verification.
  - vi. The date that the disclosure statement was provided to the customer and the method by which it was provided.
- 6) A supplier shall provide copies of verification records to the Commission upon request.
- (c) When a supplier is informed that a transaction could not be verified, the supplier shall contact the customer by telephone, email or by letter, and explain that the transaction could not be verified. If the agent is still available to assist the customer, the supplier may ask if the customer would like to have the agent return to address the problem. The agent may return to the customer's premises to offer assistance to correct the problem so that the transaction can be re-submitted to the verification process only if the customer responds in the affirmative.

### § 111.8. Agent identification; misrepresentation.

- (a) A supplier shall issue an identification badge to agents who conduct door-to-door activities or appear at public events. The badge shall accurately identify the supplier, its trade name and logo, and shall display the agent's photograph, and his or her full name and identification number in reasonably sized font. The badge shall be visible at all times.
- (b) Upon first contact with a potential customer, an agent shall identify the supplier that he or she represents. The agent shall state that he or she is not working for, and is independent of the customer's local distribution company or other supplier. This requirement shall be fulfilled either by an oral statement by the agent, or by written material provided by the agent.
- (c) When conducting door-to door activities or appearing at a public event, an agent may not wear apparel or accessories, or carry equipment that contains branding elements, including a logo, that are deceptively similar to that of the local Pennsylvania distribution company.
- (d) A supplier may not use the name, bills, marketing materials or consumer education materials of another supplier, distribution company, or government agency in a way that suggests a relationship that does not exist.
- (e) An agent of a supplier that is an affiliate of a distribution company shall comply with the rules regarding affiliate marketing at § 54.122 (relating to the code of conduct) for an EGS and at § 62.142 (relating to the standards of conduct) for a NGS.

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- (f) Any company, regardless of affiliation, using a similar name as the distribution company must provide appropriate disclosures regarding the nature of the relationship which would include at least (i) disclosure that the non-affiliated company is not the utility and not affiliated with the utility; and, (ii) disclosure of the full legal name of the entity providing services under the similar logo.

### § 111.9. Door-to-Door Sales.

- (a) A supplier and its agents shall comply with local ordinances regarding door-to-door marketing and sales activities.
- 1) A supplier shall limit door-to-door marketing or sales activities to the hours between 9 a.m. and 7 <sup>2</sup> p.m. ~~during the 6 months beginning October 1 and ending March 31, and between 9 a.m. and 8 p.m. during the months beginning April 1 and ending September 30.~~ When a local ordinance has stricter limitations, a supplier shall comply with the local ordinance.
  - 2) As a courtesy, a supplier shall notify the local municipal officials in advance of its schedule and the locations in which it intends to conduct door-to-door marketing and sales activities.
- (b) A supplier and its agents shall comply with Pennsylvania and federal laws and regulations that govern marketing, consumer protection and door-to-door sales including consumer protection regulations in Chapter 54 and Chapter 62, and applicable provisions of Chapter 56, Chapter 57 and Chapter 59.
- (c) When conducting door-to-door sales or marketing activities, an agent shall display his or her identification badge issued by the supplier. The identification shall be visible at all times.
- (d) When engaging in door-to-door sales or marketing activities, an agent shall comply with the following:
- 1) After greeting the potential customer, the agent shall immediately identify himself or herself by name, the supplier he or she represents and the reason for the visit. The agent shall state that he or she is not working for, and is independent of the local distribution company or another supplier.
  - 2) The agent shall offer a business card or other material that lists the agent's name, identification number and title, and the supplier's name and contact information, including telephone number. This information does not need to be pre-printed on the material, but if the information is handwritten, it shall be hand-printed and legible.

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- (e) When a customer's English language skills are insufficient to allow the customer to understand and respond to the information being conveyed by the agent, or when the customer or a third party informs the agent of this circumstance, the agent shall find another agent who is fluent in the customer's language to continue the sales or marketing activity. If another person present in the household is fluent in both languages and offers to assist, then the agent may proceed. If, however, the agent cannot find another agent and no other person present in the household offers to help with translation, the agent shall terminate contact with the customer. The agent shall be permitted to use translation services, electronic language translation devices and language identification cards only to identify the language spoken by the potential customer.
- (f) When an agent completes a transaction with a customer, the agent shall:
- 1) Provide a copy of each document that the customer signed or initialed relating to the transaction. A copy of these documents shall be provided to the customer before the agent leaves the customer's residence. If requested by the customer, a copy of the materials used by the agent during the call shall be provided to the customer as soon as practical.
  - 2) Explain the supplier's verification process to the customer, and that the verification process may not be initiated until after the agent has left the customer's residence.
  - 3) State that the supplier shall provide send a copy of the disclosure statement about the service to the customer after the transaction has been verified. The agent may give the customer a copy of the disclosure statement prior to the verification process if the customer agrees to accept it in that manner.
  - 4) State that the customer may rescind cancel the transaction within 3 business days after receiving the disclosure statement.
- (g) An agent shall immediately leave a residence when requested to do so by a customer or the owner or an occupant of the premises.
- (h) A supplier shall comply with an individual's request to be exempted from door-to-door marketing and sales contacts, and shall annotate its existing marketing or sales databases consistent with this request.

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### § 111.10. Telemarketing.

- (a) A supplier and its agents shall comply with Pennsylvania and federal laws and regulations that govern marketing, consumer protection and telemarketing sales including consumer protection regulations in Chapter 54 and Chapter 62, and applicable provisions of Chapter 56, Chapter 57 and Chapter 59.
- 1) A supplier and its agents shall comply with all applicable requirements of that is licensed by the Commission and engages in telemarketing is not required to register as a telemarketer pursuant to 73 P.S. § 2243 (a) (relating to registration requirement), but shall comply with other provisions of the Telemarketer Registration Act, 73 P.S. § 2241 - § 2249.
  - 2) ~~An agent that contracts with a supplier to conduct telemarketing and sales activities on behalf of the supplier shall register as a telemarketer, and shall comply with the Telemarketer Registration Act.~~
  - 2) A supplier and its agents shall comply with the federal "Do Not Call" law. *Telemarketing and Consumer Fraud and Abuse Prevention Act*, 15 U.S.C §§ 6101, *et seq.* and *Telemarketing Sales Rule*, 16 CFR Part 310.
  - 3) Customer consent to the release of customer information by the distribution company to the supplier to enable competitive solicitations does not constitute an express intent to receive telephone solicitation calls. *See* 73 P.S. § 2245 (relating to unlawful acts and penalties). *See also* definition of "do not call list" at 73 P. S. § 2242 (relating to definitions).
- (b) An agent who contacts customers by telephone shall provide the agent's first name and shall state the name of the supplier on whose behalf the call is being made. The agent shall provide his or her identification number upon request by the customer.
- (c) When an agent completes a transaction with a customer, the agent shall explain the supplier's verification process to the customer and shall state that the supplier will ~~send~~ provide, in the manner discussed during the transaction, a copy of the disclosure statement and other material about the service to the customer after the transaction has been verified. ~~At the end of the telephone contact, t~~The agent shall state that the customer may rescind the transaction within 3 business days after receiving the disclosure statement.

### § 111.11. Receipt of disclosure statement and right to rescind transaction.

- (a) When a transaction is completed by a customer without the presence of, or interaction with an agent ~~and is not submitted to the verification process,~~ a supplier shall provide the customer with a copy of its disclosure statement as soon as it is practical. A customer shall have the right to rescind the transaction within 3 business days after receiving the disclosure statement.

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- (b) After a transaction that involved an agent has been completed and verified, a supplier shall provide the customer with a copy of its disclosure statement.
- (c) [new paragraph] A customer shall have the right to rescind the transaction within 3 business days after receiving the disclosure statement.
- (d) ~~(e)~~ There shall be a rebuttable presumption that a disclosure statement correctly addressed to a customer with sufficient first class postage attached shall be received by the customer 3 days after it has been properly deposited in the United States mail.
- (e) There shall be a rebuttal presumption that a customer who enrolls on-line and is presented with the disclosure statement as part of the enrollment process has received the disclosure statement when the customer affirmatively acknowledges the terms of the disclosure statement.
- (f) There shall be a rebuttal presumption that a customer who agrees to receive a disclosure statement by electronic mail receives the disclosure statement on the day it is sent to the customer-provided email address.

### § 111.12. Consumer protection.

- (a) A supplier and its agents shall not discriminate in the provision of electric generation and natural gas as to availability and terms of service to a customer based on race, color, religion, national origin, sex, marital status, age, receipt of public assistance income, and exercise of rights under the Consumer Credit Protection Act (15 U.S.C. §§ 1601 - 1693c) and 12 CFR Part 202 (relating to equal credit opportunity). This requirement is consistent with § 54.43(e) (relating to standards of conduct and disclosure for licensees) for EGSs and § 62.114 (e) (relating to standards of conduct and disclosure for licensees) for NGSs.
- (b) A supplier and its agents that engage in door-to-door marketing or sales shall comply with the federal cooling off period requirements. *See Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations*, 16 CFR Part 429.
- (c) A supplier and its agents shall comply with the 3 business day right of rescission ~~cooling-off period~~ requirement at § 54.5 (d) that applies to EGSs and § 62.75 (d) that applies to NGSs. The rescission period may run concurrently with the federal three-day cooling off period.

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### § 111.13. Customer complaints.

- (a) A supplier shall investigate customer inquiries, disputes and complaints concerning marketing or sales practices. The supplier shall cooperate with the Commission and other government agencies that are investigating complaints about marketing or sales practices prohibited by state and federal law, and with local law enforcement officials that are investigating complaints about violations of local municipal law.
- (b) A supplier shall implement an internal process for responding to, and resolving customer inquiries, disputes and complaints. The process shall document as a record the customer inquiry, dispute or complaint, subsequent communications between the supplier and the customer, and the resolution of the inquiry, dispute or complaint. A supplier shall retain the record for a time period equivalent to six billing cycles in a system capable of retrieving that record by customer name and account number.
- (c) The internal process shall comply with the applicable dispute regulations including:
  - 1) 52 Pa. Code § 56.141. Dispute procedures.
  - 2) 52 Pa. Code § 56.151. General rule.
  - 3) 52 Pa. Code § 56.152. Contents of the utility company report.
  - 4) 52 Pa. Code § 54.9. Complaint handling process.
  - 5) 52 Pa. Code § 62.79. Complaint handling process.
  - 6) 52 Pa. Code § 57.177. Customer dispute procedures.
  - 7) 52 Pa. Code § 59.97. Customer dispute procedures.
- (d) A supplier shall provide a single contact and a list of designated escalation contacts for the Commission staff to access to address consumer inquiries and resolve complaints. Commission staff will encourage consumers to first attempt to resolve the matter with the companies involved if they have not done so already.



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### § 111.14. Notification regarding marketing or sales activity.

- (a) When a supplier engages in marketing or sales activity that the supplier anticipates may generate a significant number of phone calls and inquiries to the Commission, the supplier should notify the Bureau of Consumer Services no later than the morning of the day that the activity will commence. The notification shall include general, non-proprietary information about the activity, the period involved, and a general description of the geographical area. A supplier is expected to use reasonable judgment in determining whether or not advance information should be provided.
- (b) A supplier should provide the local distribution company with general, non-proprietary information about the marketing or sales activity that caused the supplier to provide notice to the Commission in accordance with subsection (a). The supplier shall provide this general information to the distribution company no later than the morning of the day that the marketing or sales activities commence. The distribution company shall use this information only for acquainting its customer service representatives with marketing or sales activity occurring in its service territory so that they may knowledgably address customer inquiries. Consistent with § 54.122 for an EDC and § 62.142 for a NGDC, a distribution company may not use the information for other purposes.
- (c) In responding to a customer inquiry about price and service, a distribution company may provide information about its own price and terms, but shall refer the customer to the supplier for questions about the supplier's prices and terms.

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December 21, 2011

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

On behalf of the Retail Energy Supply Association ("RESA") enclosed is the original of its  
Comments along with the electronic filing confirmation page with regard to the above-referenced  
matter.

Sincerely yours,



Deanne M. O'Dell, Esq.

DMO/lww  
Enclosure

cc: [pburket@pa.gov](mailto:pburket@pa.gov), w/enc.  
[dmumford@pa.gov](mailto:dmumford@pa.gov), w/enc.  
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