

# Comments of the Independent Regulatory Review Commission



## Pennsylvania Public Utility Commission Regulation #57-283 (IRRC #2915)

### Marketing and Sales Practices for the Retail Residential Energy Market

January 20, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the October 22, 2011 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Public Utility Commission (PUC) to respond to all comments received from us or any other source.

#### 1. Implementation procedures.

This proposed rulemaking establishes standards and practices for marketing and sales activities of electric generation suppliers (EGSs) and natural gas suppliers (NGSs) (collectively referred to as “suppliers”) to ensure the fairness and integrity of the competitive residential energy market. According to the PUC, it is needed to address complaints about the marketing and sales practices used by suppliers and their agents. The PUC has cited numerous sections of the Public Utility Code as its statutory authority for the rulemaking.

Pennsylvania’s Office of Attorney General administers two statutes that regulate subject matter covered by certain sections of this rulemaking: telemarketing and door-to-door sales. The statutes are the Pennsylvania Telemarketer Registration Act (73 P.S. §§ 2241 - 2249) and the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1 – 201-9.2). In the Preamble to the final-form regulation, we ask the PUC to explain how it will administer and enforce this rulemaking when it identifies or becomes aware of activities that violate the rulemaking and the statutes noted above.

#### 2. Section 111.2. Definitions. – Consistency with statute; Clarity.

##### *Terms that should be defined*

There are several terms or phrases used throughout the regulation that are not defined. We believe that the clarity of the regulation would be improved if definitions were provided for the following terms and phrases: marketing; public event; transaction; transaction document; verification; and verification process.

## *Agent*

Paragraph (1) of this definition states the following: “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.” The Preamble notes that agents that provide marketing and/or sales services to more than one supplier would fall under this definition. Commentators are concerned that the stated intent of the PUC in the Preamble is not reflected in the definition of this term. We believe that clarity could be improved by amending the definition to more accurately reflect the PUC’s intent.

In addition, the PUC should review this definition to make sure it covers all persons who could act as agents, such as subcontractors and the potential for an agent to hire employees or delegate activities to employees.

## *Disclosure statement*

This definition requires a written disclosure between a customer and a supplier to satisfy the conditions set forth in the definition of “consumer contract” in Section 3 of the Plain Language Consumer Contract Act (73 P.S. § 2203). Section 4(b)(7) of the Plain Language Consumer Contract Act (73 P.S. § 2204(b)(7)) provides an exclusion for “contracts subject to examination or other supervision by the Pennsylvania Public Utility Commission or by the Federal Energy Regulatory Commission.” Are contracts between suppliers and a customer subject to examination or other supervision by the PUC? If so, we question whether the reference to “consumer contract” is appropriate.

## *Door-to-door sales*

This term is defined as “A solicitation or sales method whereby an agent proceeds randomly or selectively from residence to residence without prior specific appointment.” We are concerned that the inclusion of the phrase “without prior specific appointment” could negate all of the protections afforded customers by this regulation. If an agent has an appointment with a resident, would that agent have to abide by this regulation? We ask the PUC to clarify this definition to ensure that all customers benefit from the safeguards this regulation is intended to provide.

### **3. Section 111.3. Supplier liability for its agent. – Implementation procedures; Clarity.**

#### *State and Federal laws and regulations*

Subsection (a) requires compliance with “Federal, State and municipal laws.” Similar phrases are used elsewhere in the regulation. The regulation does not specify which state laws, federal laws or federal regulations apply. We have a question and a suggestion. First, is this rulemaking consistent with all of these laws, regulations and ordinances?

Second, to encourage compliance, we recommend that the rulemaking include specific references to local ordinances, state laws, federal laws or federal regulations in Subsections 111.3(a), 111.3(c), 111.9(b) and 111.10(a).

#### *Clarity of implementation procedures*

We have three concerns with this section. First, under Subsection (b), suppliers are “...responsible for fraudulent, deceptive or other unlawful marketing **or billing acts** performed by its agent.” (Emphasis added.) However, this regulation pertains to sales and marketing activities of agents. Why does this section include a reference to billing activities performed by an agent? What kind of billing activities would an agent perform?

Second, a commentator has questioned how alleged acts of misconduct will be investigated and determined to be factual before a supplier is held responsible. We believe that including the procedures or a cross-reference to the procedures used to investigate the alleged misconduct would improve the clarity and assist with the implementation of the regulation.

Finally, Subsection (c)(2) allows the PUC to impose fines “for fraudulent acts, violation of Commission regulations and orders.” Are the suppliers the only parties that could be subject to fines, or could agents also be fined? Could fines also be imposed for “deceptive or other unlawful marketing” acts referenced in Subsection (b)?

#### **4. Section 111.4. Agent qualifications and standards; criminal background investigations. – Protection of the public health, safety and welfare; Implementation procedures; Need; Clarity.**

##### *Exercise good judgment*

Subsection (a) requires a supplier to “exercise good judgment” in developing standards and qualifications for individuals it chooses to hire as its agents. This phrase is vague and does not establish a binding norm. It should either be deleted or amended to state what the PUC considers to be “good judgment.”

##### *Criminal background checks*

Subsection (b) pertains to background checks and requires a supplier to conduct criminal background investigations to “determine if the individual presents a probable threat to the health and safety of the public.” We have four concerns. First, commentators have expressed concern with the clarity of this phrase and have noted that the standard established by this phrase and the inclusion of the word “probable” differs from the standard found in the PUC’s Interim Guidelines that uses the word “possible.” We are also concerned with the clarity of this phrase and question why the standard was changed. We recommend that the final-form regulation be amended to clarify what is meant by the phrase noted above. We also request an explanation of why the PUC believes the regulatory standard of “probable” compared to “possible” is adequate to protect the public health, safety and welfare.

Second, once this proposed rulemaking is published as final regulation, will suppliers have to perform a second background investigation on agents that have already been hired? In the Preamble to the final-form regulation, we ask the PUC to explain how it will transition from administering interim guidelines to administering the regulation.

Although background checks are required before an individual is hired to perform door-to-door sales, the regulation is silent on whether agents must report any pending criminal charges or criminal convictions after they are hired. To protect the public, health safety and welfare, we ask the PUC to consider adding a provision that requires agents to report this type of information.

Third, a commentator has suggested that the regulation be amended to clarify that other parties can conduct the required background checks on behalf of the supplier. If that is the intent of the PUC, then we recommend the final-form regulation be amended accordingly.

Finally, a commentator states a typical background check may not be adequate because it will not provide information such as protection from abuse orders. The PUC should explain how the evaluation of a potential agent's background in the final-form regulation adequately protects the public health, safety and welfare.

#### *Supplier contracts with an independent contractor or vendor*

Under Subsection (c), suppliers must confirm that their independent contractors and vendors have performed criminal background checks on their "employees and agents." Why was the term "employees" included in this subsection? Is it the PUC's intent to require criminal background checks for all of an independent contractor or vendor's employees? If so, what purpose does this serve? We have a similar concern with the use of the word "employee" in § 111.5(d), related to agent training.

### **5. Section 111.5. Agent training. – Protection of the public health, safety and welfare; Implementation procedures; Clarity.**

#### *Telemarketer Registration Act*

While Paragraph (a)(1) requires training in state and federal laws, should this provision also reference Pennsylvania's Telemarketer Registration Act since it directly relates to agents and Section 111.10?

#### *Responsible and ethical sales practices*

Paragraph (a)(2) requires training in "responsible and ethical sales practices." This phrase could be interpreted in different ways. We are unable to evaluate this provision because the specific practices are not in the regulation. The PUC should either include in the regulation the specific training required relating to responsible and ethical sales practices, or add a citation to the practices the training must include.

In addition, the regulation is not clear regarding the bounds of actions an agent may take when doing door-to-door sales. For example, is it appropriate for the agent to ask to enter the dwelling, or should the agent only enter the dwelling upon the invitation of the customer? We ask the PUC to consider this question not only in the context of agent training, but also whether specific “responsible and ethical sales practices” for agents are needed directly in the regulation.

### *Terms and definitions*

Paragraph (a)(10) requires training in terms and definitions. This provision is broad. We suggest adding a cross-reference to the minimum terms and definitions the training must include.

### *Record keeping*

Subsection (b) requires a supplier to document the training of an agent and to maintain a record of the training. How long must the record of training be kept? A time-frame associated with this record-keeping requirement should be included in the final-form regulation.

### *Monitoring*

Subsection (e) requires a supplier to monitor a “representative sample” of telephonic and door-to-door marketing and sales calls. We have two concerns. First, the term “representative sample” is vague. A more precise standard should be included in the final regulation.

Second, we question how monitoring of door-to-door sales calls can be accomplished in a manner that ensures the agent is meeting the requirements of this regulation. A telephonic marketing and sales call could be monitored by the supplier without the knowledge of the agent. This would allow the supplier to make an accurate evaluation of the call. However, we are concerned that the sales presentation made by a door-to-door sales agent could differ when that agent is accompanied by another employee of the supplier. In the Preamble to the final-form regulation, we ask the PUC to explain how a supplier is expected to monitor door-to-door sales and how that monitoring will adequately protect the public health, safety and welfare.

## **6. Section 111.6. Agent compensation; discipline. – Implementation procedures; Need; Clarity.**

### *Compensation*

Commentators are concerned with Subsection (a) because they believe it may interfere with their business decisions. They contend that compensation structures should be left to their discretion. The PUC should explain the need for this subsection.

### *Internal agent discipline practices and procedures*

Subsection (b) states the following:

In developing internal agent discipline practices and procedures, a supplier shall 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.

We have three concerns. First, would this provision apply to independent contractors and vendors of suppliers, or would those entities have to develop their own internal discipline practices and procedures? Second, we recommend that this subsection include a cross-reference to the PUC's policies regarding unauthorized transfers. Third, the phrase "long-standing zero-tolerance" and the last sentence of the subsection are both non-regulatory in nature and should be deleted.

**7. Section 111.7. Customer authorization to transfer account; transaction; verification; documentation. – Implementation procedures; Clarity.**

*Authorization*

Subsection (a) requires a supplier to establish a transaction process to authorize the transfer of a customer's account to the supplier. We have three concerns. First, Subsection (a)(1) states that the process "may" include three specific actions. The use of the word "may" implies that a supplier has the option to use one of the three actions to authorize the transfer. If it is the PUC's intent to require suppliers to use one of the three actions in Paragraphs (i), (ii) and (iii) of Subsection (a)(1), then "may include" should be replaced with "shall include one of." If the PUC intends to allow suppliers to use other processes, the regulation should be amended to clarify this intent.

Second, Subsections (a)(1)(ii) and (iii) include a reference to a "program." What does this term mean?

Third, Subsection (a)(2) requires the document used to complete the transaction to identify the agent who completed the transaction. However, the documents referenced in Subsection (a)(2)(iii) and (iv) could be completed without the assistance of an agent. It is unclear how the requirements of these provisions will be implemented. We recommend these provisions be clarified in the final-form regulation.

*Verification*

Subsection (b) requires a supplier to establish a process to verify transactions that involve an agent. Subsection (b)(3) requires the supplier to inform the customer of the three-business-day right of rescission at the end of the verification process. Section 201-7 of Pennsylvania's *Unfair Trade Practices and Consumer Protection Law*, 73 P.S. § 201-7, provides specific standards for cancellation notices for door-to-door sales in Pennsylvania. We note that Section 111.10 (a) of this rulemaking requires agent compliance with "consumer protection" laws for telemarketing practices, but Section 111.7 does not contain a similar requirement or specifically direct

suppliers to provide the form of cancellation notice required by the *Unfair Trade Practices and Consumer Protection Law*. We believe the regulated community would benefit if a specific reference to 73 P.S. § 201-7 was included in the final regulation.

**8. Section 111.8. Agent identification; misrepresentation. – Protection of the public health, safety and welfare; Implementation procedures; Clarity.**

*Display of identification badge*

Subsection (a)(3) requires the agent’s identification number to be displayed on the identification badge in a “reasonably sized font.” We have three concerns. First, must a supplier assign an identification number to each of its agents? If so, where can that requirement be found? The same concerns apply to business cards in Subsection 111.9(d)(2).

Second, what is considered a “reasonably sized font?” How will suppliers and agents know if they are meeting this standard? We recommend that a more precise standard be included in the final-form regulation.

Finally, Subsection (a)(4) requires the identification badge to “be visible at all times.” We question how an agent can satisfy this requirement. Would requiring the identification badge to be “prominently displayed” be an acceptable standard that could be met by the agent while still protecting the public health, safety and welfare? The same concern applies to Subsection 111.9(c).

*Similarity to local distribution company*

Subsection (c) prohibits an agent from wearing apparel or accessories and carrying equipment that contains branding elements “deceptively similar to that of the local Pennsylvania distribution company.” We have two concerns. First, the word “deceptively” is unclear and should be deleted from the final-form regulation. Second, the PUC should consider replacing the phrase “Pennsylvania distribution company” with the phrase “any EDC or NGDC.” We believe using the suggested phrase would provide greater clarity and would be more consistent with other PUC statutes and regulations. If the PUC adopts this suggestion, a similar change should be made to Subsection (d) and the phrase “distribution company.”

**9. Section 111.9. Door-to-door sales. – Consistency with statute; Protection of the public health safety and welfare; Implementation procedure; Need; Reasonableness.**

*Informed choices*

Under 66 Pa.C.S.A. § 2206(c), relating to natural gas competition, the PUC has the statutory directive to:

... by order or regulation, establish requirements that **each natural gas distribution company and natural gas supplier provide adequate, accurate customer information to enable retail gas customers to make informed**

**choices** regarding the purchase of **all natural gas services** offered by that provider. Information shall be provided to retail gas customers in an **understandable format** that enables retail gas customers to compare prices and services on a uniform basis. (Emphasis added.)

Similar requirements relating to the electric industry are specified in 66 Pa. C.S.A. § 2807(d)(2). Some commentators questioned whether door-to-door sales will provide the customer with the information needed to make an informed choice. The commentators state that there is good information on the internet that can be verified. They also state that information provided by mailings can be reviewed and telemarketing can be monitored. Commentators question how door-to-door sales can be adequately monitored.

We believe the commentators make valid points. How does the PUC ensure that a door-to-door agent provided the customer with the information required by statute for the customer to make an informed choice? The PUC should explain how the final-form regulation will ensure that customers, when solicited by door-to-door agents, will receive “adequate, reliable customer information,” “in an understandable format” to enable customers to make informed choices, consistent with the statute.

#### *Safety concerns*

The regulation establishes requirements that include compliance with local ordinances, notification of local officials, identification badges, immediate identification of the agent, and a requirement that an agent must immediately leave when requested to do so. However, some commentators believe door-to-door sales present a threat to customer safety, particularly if the agent asks to be invited into the customer’s home. We ask the PUC to thoroughly explain its consideration and resolution of these comments that raise safety concerns with door-to-door sales. The PUC should explain how the final-form regulation will adequately protect the public health, safety and welfare.

#### *Hours*

Paragraph (a)(1) limits the hours that door-to-door marketing or sales activities can occur. Some commentators argue for fewer hours, whereas others argue for more hours. The PUC should explain how it chose the hours specified in the final-form regulation and why those hours represent the most reasonable hours for both the customer and the agents.

#### *Notification in advance*

Paragraph (a)(2) requires a supplier to notify local municipal officials “in advance of its schedule.” We have two concerns. First, notification “in advance” does not impose a specific time requirement. Second, the provision does not require notice if the schedule changes. We recommend amending Paragraph (a)(2) to specify a timeframe for the advance notice and also notification if the schedule changes.



## *Language skills*

Subsection (e) states:

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 the agent cannot find another agent to help with translation, the agent shall terminate contact with the customer. The agent shall use translation services, electronic language translation devices and language identification cards only to identify the language spoken by the potential customer.

We see an overall need to address the circumstance where the agent and customer cannot communicate because 66 Pa.C.S.A. §§ 2206(c) and 2807(d)(2) require information to be in an understandable format. However, after it is established the agent and customer cannot communicate, we question the need, reasonableness and effectiveness of continued contact. For example, how can the agent, who already does not speak the customer's language, sufficiently identify that language to the point of finding another agent who does? Also, while the regulation restricts the use of "translation services, electronic language translation devices and language identification cards," we question the need, reasonableness and effectiveness of the agent continuing contact to identify the customer's language in this manner. These actions appear to be excessive and impractical, particularly when there are other methods for a customer to be aware of and participate in customer choice. Therefore, we recommend that, once it is established the agent and customer cannot communicate effectively enough to present information in an understandable format, the regulation should require the agent to terminate contact. Alternatively, the PUC should justify the need for and reasonableness of these continued measures.

We have two further concerns with this provision as proposed. First, the regulation restricts the initial conversation to English and addresses the "customer's English language skills." We question whether a supplier, who is familiar with a demographic area, should be allowed to initiate conversations in a language other than English that is prevalent in that area. We recommend deleting the word "English" so there is flexibility in what language is used first.

Second, as the regulation is written, if the customer's English language skills are insufficient, "the agent **shall** find another agent who is fluent in the customer's language to continue the sales or marketing activity." Emphasis added. We question why the word "shall" is used, thus requiring the agent to find another agent fluent in the customer's language.

*"Rescind"*

To be consistent with Section 111.11, we suggest replacing the word "cancel" with the word "rescind" in Paragraph (f)(4).

*Immediately leave a residence*

Under Subsection (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.” We support this provision but question whether it is too narrow. For example, if a customer says they are not interested, under the regulation, the agent would not have to leave the premises. We suggest the provision be broadened to require the agent to leave the premises if requested to do so by the customer or if the customer expresses no interest in the product being sold.

*Annotate its existing marketing or sales database*

Subsection (h) requires a supplier to annotate its existing databases but does not specify when. We recommend adding language to state within what time frame this action must occur.

**10. Section 111.10. Telemarketing. – Statutory authority; Consistency with statute; Reasonableness; Clarity.**

*Telemarketer Registration Act*

A commentator observes that the Telemarketer Registration Act is within the jurisdiction of the Attorney General and subject to interpretation and change by the Attorney General. Paragraphs (a)(1), (2) and (4) place in PUC regulation requirements under the Telemarketer Registration Act. Has the PUC established a Memorandum of Understanding with the Attorney General? The PUC should explain how it will enforce or consider a violation of Paragraphs (a)(1), (2) and (4), and include in the regulation what enforcement actions it may take pursuant to these provisions.

*Timing of agent identification*

A commentator observes that Paragraph 111.9(d)(1) requires door-to-door agents to identify themselves immediately after greeting the customer, but Section 111.10(b) relating to telemarketing does not state when the identification must take place. We recommend adding to Subsection (b) the same or similar requirement for agent identification as Paragraph 111.9(d)(1). In addition, Paragraph 111.9(d)(1) requires the door-to-door salesperson to “state he is not working for and is independent of the local distribution company or another supplier.” Why isn’t this included in Subsection (b)?

**11. Section 111.11. Receipt of disclosure statement and right to rescind transaction. – Reasonableness.**

Subsection 111.12(c) cross-references 52 Pa. Code §§ 54.5(d) and 62.75(d) which address disclosure statements. Why weren’t these cross-references included in Section 111.11? Subsection (c) addresses receipt of a disclosure statement by mail. Should the regulation provide similar requirements for electronic delivery of disclosure statements?

**12. Section 111.12. Consumer protection. – Protection of the public welfare.**

A commentator suggests adding “Interim Guideline M(2)” to this section and provides a quotation of the guideline which shows protections against suppliers engaging activities including misleading conduct, false representations, etc. Why did the PUC not include these protections in this section?

**13. Section 111.14. Notification regarding marketing or sales activity. – Clarity.**

Subsection (a) requires a supplier conducting marketing or sales activities “that the supplier anticipates may generate phone calls and inquiries to the Commission [PUC]” to notify the PUC’s Bureau of Consumer Services. We find this requirement to be unclear and subjective and question how it could be enforced. How could a supplier demonstrate that it did or did not “anticipate” certain activities? The PUC should review this provision and clarify its intent.