

<h1>Regulatory Analysis Form</h1> <p>(Completed by Promulgating Agency)</p> <p>(All Comments submitted on this regulation will appear on IRRC's website)</p>		<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p> <div style="border: 2px solid black; padding: 5px; text-align: center;"> <p>RECEIVED</p> <p>MAR 12 2014</p> <p>INDEPENDENT REGULATORY REVIEW COMMISSION</p> </div>
(1) Agency: Pennsylvania Public Utility Commission		<p>IRRC Number: 2938</p>
(2) Agency Number: L-2011-02266832 Identification Number: 57-288		
(3) PA Code Cite: 52 Pa. Code § 62.101, § 62.102 and §62.110		
(4) Short Title: Licensing Requirements for Natural Gas Suppliers		
(5) Agency Contacts (List Telephone Number and Email Address): Primary Contact: David E. Screven, 717-787-2126, dscreven@pa.gov ; Colin W. Scott, 717-783-5949, colin.scott@pa.gov Secondary Contact: James Shurskis, 717-787-8763, jshurskis@pa.gov ; Sherri DelBiondo, 717-772-4597, sdelbiondo@pa.gov		
(6) Type of Rulemaking (check applicable box): <input type="checkbox"/> Proposed Regulation <input checked="" type="checkbox"/> Final Regulation <input type="checkbox"/> Final Omitted Regulation		<input type="checkbox"/> Emergency Certification Regulation; <input type="checkbox"/> Certification by the Governor <input type="checkbox"/> Certification by the Attorney General
(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less) <p>The purpose of the final-form regulation is to amend the licensing requirements for NGSs. Specifically, the rulemaking was instituted to determine: (1) whether the exemption from NGS licensing of “marketing services consultants” and “nontraditional marketers” should be discontinued; and (2) whether <u>all</u> natural gas aggregators, marketers and brokers should be required to be licensed as NGSs. The Final Rulemaking Order provides that: (1) all “aggregators” and “brokers” must be licensed; (2) “nonselling marketers” under contract to a single NGS in Pennsylvania are exempt from licensure; (3) “nonselling marketers” under contract to two or more NGS firms in Pennsylvania are required to be licensed; and (4) the licensing exemption continues for “nontraditional marketers.”</p>		
(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation. <p>The statutory authority for the proposed revisions to the NGS licensing regulations may be found in the following sections of the Public Utility Code: 66 Pa.C.S. § 501 (relating to [the PUC's] general powers); § 504 (relating to reports by public utilities); § 1501 (relating to character of service and facilities); § 1504 (relating to standards of service and facilities); § 2202 (relating to definitions); § 2204(a) (relating to implementation; commencement of customer choice); and § 2208 (relating to requirements for natural gas suppliers).</p>		

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

The NGS licensing regulations are mandated by state law at 66 Pa. C.S. § 2204(a) (relating to implementation; commencement of customer choice) to implement natural gas choice. The instant rulemaking, which (1) eliminates the term “marketing services consultant,” (2) modifies the definition of a “nontraditional marketer,” (3) adds designations for “aggregators,” “brokers,” and “nonselling marketers,” and (4) revises the licensing exemption accordingly, was initiated at the discretion of the PUC.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The compelling public interest furthered by the proposed revision to existing regulations is the licensing of all entities who are required to be licensed as “natural gas suppliers” pursuant to 66 Pa. C.S. § 2208(a) (relating to requirements for natural gas suppliers; license requirements). The term “natural gas supplier” is broadly defined at 66 Pa.C.S. § 2202 (relating to definitions), and as previously construed by the PUC, has not included certain entities, like “aggregators” and “brokers,” that were involved in the sale or the arrangement of the sale of natural gas to retail customers under 66 Pa.C.S. § 2202 (relating to the definition of “natural gas supply services).

The persons who may benefit from the proposed revision are NGSs who must compete for customers with previously unlicensed entities involved in selling natural gas supply services. NGDCs may benefit as they will be able to identify and establish applicable security requirements for all entities that sell natural gas supply services in their service territories. Retail natural gas customers may benefit by being protected from marketing and sales solicitations by previously unlicensed *de facto* NGSs.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

These proposed regulations do not contain any provisions that are more stringent than federal standards.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

The changes to the Commission's regulations are not significant enough to warrant comparison with other states. The license application fee is *de minimus*. The regulatory changes should have no impact on Pennsylvania's ability to compete with other states.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No, the changes only affect the licensing requirements for entities engaged in the business of natural gas supplier in the Commonwealth. No other regulations of the Commission or other state agencies will be affected.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

An opportunity for public input in the form of written comments was provided following the Commission's issuance of its Proposed Rulemaking Order and its Advanced Notice of Final Rulemaking Order. The following entities filed comments to our proposed rulemaking: IRRC, National Energy Marketers Association (NEMA), Washington Gas Energy Services, Inc. (WGES), Spark Energy Gas, LP, Retail Energy Supply Association (RESA) and the Pennsylvania Energy Marketers Coalition (PEMC). Also, several entities filed comments to our ANOFR including: RESA, NEMA, the Pennsylvania Independent Oil and Gas Association (PIOGA), the OCA, and PEMC.

The Final Rulemaking Order and Annex A were served on all jurisdictional natural gas distribution companies, natural gas suppliers, the Office of Consumer Advocate, the Office of Small Business Advocate and all other parties that filed comments at Docket No. L-2008-2069114, Natural Gas Distribution Companies and the Promotion of Competitive Retail Markets.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

Entities previously exempted from NGS licensing as “marketing services consultants” may be affected by these proposed revisions. The Commission’s amended regulations establish clear procedures and processes regarding the entities that must be licensed. “Aggregators” and “brokers” of natural gas supply, as well as marketers engaged in the sale or arrangement of the sale of natural gas to retail gas customers, will be required to obtain NGS licenses and to submit annual reports to the Commission pursuant to 52 Pa. Code § 62.110. Several “aggregators” and “brokers” may be considered small businesses.

At this time, the Commission approximates that it will see between fifty and one hundred new applicants for licensure in the next couple years, most of them being small businesses. This estimate is derived from the Commission’s experience in licensing brokers and marketers on the electric side, but also accounts for the fact that there are fewer residential natural gas customers than electric customers. There are roughly 4.9 million Electric Generation Supplier (EGS) residential customers in Pennsylvania versus only 2.7 million NGS residential customers. However, because entities on the natural gas side have not been regulated previously, being treated until now as “marketing services consultants” as the term was defined in the Commission’s regulations at 52 Pa. Code § 62.101 (relating to definitions), our prediction is admittedly an educated approximation.

The one-time application fee for licensure as an NGS, while likely being passed on to customers, will be *de minimus*. The cost of mandatory newspaper notices prior to an entity’s submission of its application may vary depending on the service territories of the company. Therefore, the cost of these newspaper notices may be *de minimus* (under \$1000), but could potentially rise as high as \$3000. In either event, newspaper notices are not a preventative cost and have not impeded 223 brokers and marketers on the electric side from receiving licenses.

(16) List the persons, groups or entities, including small businesses, which will be required to comply with the regulation. Approximate the number that will be required to comply.

As stated directly above, pursuant to the amended regulations all entities engaged in the sale or arrangement of the sale of natural gas to retail customers in Pennsylvania will be required to obtain a license. There is no way to predict a finite number of entities that will be required to comply with this regulation because these entities were not previously regulated or required to make their activities known to the Commission. However, most entities required to receive NGS licenses will be small businesses.

As 2014 began, 148 entities had received NGS licenses -- 128 suppliers and 22 “aggregators” or “brokers.” In 2012, sixteen companies applied for licenses, five being aggregators or brokers as those terms are defined in the Commission’s Final Rulemaking Order. In 2013, the Commission received 38 applications for licensure, 22 being aggregators or brokers. This rise in applications in 2013 came as the result of several entities becoming aware of the Commission’s directive via our Final Rulemaking Order.

The Commission anticipates an uptick in applications once the amended regulations become effective as more entities work to comply. Commission staff estimates that between 50 and 100 new applicants will come forward in the next couple years to be licensed under the amended regulations. Once again, this estimate comes from the Commission's experience in licensing similar entities on the electric side, but also accounts for the fact that there are fewer residential natural gas customers than electric customers in Pennsylvania.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

This analysis cannot yet be completed as the entities that may be affected are unknown. Until these entities come forward for licensure, the financial, economic and social impact can scarcely be predicted. The benefits coming from these final-form regulations include that licensure of "aggregator" and "broker" entities involved in the sale or arrangement of sale of natural gas to retail customers will follow the mandate in Section 2202 of the Public Utility Code. Additionally, by requiring non-exclusive, nonselling marketers to obtain NGS licenses, the Commission is better able to identify a party against whom suit may be brought if a customer files a complaint or in the event of waste, fraud, or abuse.

As stated above, while the fee for licensure might be passed on to consumers, this is a one-time fee per entity and the cost will be *de minimus*. The larger financial impact that has the potential to surface involves mandatory newspaper notices that must be posted in these companies' service territories. Depending on these territories, newspaper notices may amount to more than a *de minimus* cost (\$1000) and could be as high as \$3000. However, similar costs on the electric utility side have not deterred 223 brokers and marketers from obtaining EGS licenses.

The amended regulations more accurately capture Section 2202 of the Public Utility Code and provide uniformity for all entities involved in the sale or arrangement of sale of natural gas so that rules for these entities do not vary arbitrarily. Costs to apply for NGS licenses are not preventative for small businesses to obtain NGS licenses.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The number of entities that may be affected by this revision to the NGS licensing regulations is unknown, but predicted by Commission staff to be between 50 and 100 new entities. The costs and savings associated with this revision are difficult to estimate. However, the benefits of the final regulations include uniformity for all entities involved in the sale or arrangement of sale of natural gas, pursuant to 66 Pa. C.S. § 2202. Also, requiring licensure of all "aggregators" and "brokers" will increase the Commission's awareness of these entities' activities in the natural gas market and will ensure that these entities may be held accountable for their interactions with retail consumers.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The costs of this proposed revision on the regulated community cannot be estimated because the number of previously exempted “marketing services consultants” that may need to obtain NGS licenses is not known. In general, costs that could be incurred by a previously exempt entity to obtain a NGS license could include costs: (1) to prepare and submit an NGS license application; and (2) to post and maintain security to be licensed to operate in each NGDC’s service territory. Costs could also be increased for those NGSs who have in the past hired or partnered with these previously unlicensed entities to provide sales and marketing support.

Savings to the regulated community also cannot be estimated because the number of previously exempt entities is not known.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Local governments will not be affected by the proposed revision of PUC regulations on NGS licensing, and are not expected to incur costs or realize any savings.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

The PUC, the branch of state government that processes NGS license applications and oversees the activities of NGS licensees, will be affected by the proposed revisions to the regulation. The revisions will eliminate the exemption from regulation for “marketing services consultants,” thereby increasing the number of NGS applications that must be processed. The current \$350 NGS license application fee, 52 Pa. Code § 1.43 (a), covers only administration costs related to the application’s filing. The fee does not cover the PUC’s costs for reviewing and approving the NGS license application.

Additionally, the PUC exercises continuing oversight over NGS licensees and may incur increased operational costs as previously exempt entities are granted licenses. Currently NGSs do not pay assessments under 66 Pa. C.S. § 510 (relating to assessment for regulatory expense upon public utilities) so the cost of the PUC’s continuing oversight of licensed NGSs is borne by NGDCs and the customers.

As the number of the previously exempted entities is unknown, and the number of these entities who will file a license application is also unknown, the total additional costs to state government cannot be estimated. For this same reason, savings from this revision cannot be estimated.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

No additional legal, accounting or consulting procedures should be required for the implementation of the proposed revisions to the regulation. The proposed revisions, *inter alia*, eliminate an exemption from NGS licensing requirements for “marketing services consultants.” It is anticipated that other actions may need to be taken, like the revision of the NGS license application form and the reallocation of staff time to process applications. To view the current NGS license application, see http://www.puc.pa.gov/general/onlineforms/pdf/NGS_License_App_Package.pdf

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated
Local Government	N/A	N/A	N/A	N/A	N/A	N/A
State Government	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated
Total Savings	N/A	N/A	N/A	N/A	N/A	N/A
COSTS:						
Regulated Community	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated
Local Government	N/A	N/A	N/A	N/A	N/A	N/A
State Government	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated
Total Costs	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated	Cannot be estimated
REVENUE LOSSES:						
Regulated Community	N/A	N/A	N/A	N/A	N/A	N/A
Local Government	N/A	N/A	N/A	N/A	N/A	N/A
State Government	N/A	N/A	N/A	N/A	N/A	N/A
Total Revenue Losses	N/A	N/A	N/A	N/A	N/A	N/A

(17a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
Program costs cannot be estimated*				

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

The proposed revision of the NGS licensing regulations will have no singular effect on the identified small businesses.

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

N/A

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

The proposed revision of the NGS licensing regulations will have no singular effect on the identified groups or persons.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

In its Proposed Rulemaking Order, the Commission recommended eliminating the licensing exemption for all entities which would have required all marketing services consultants and nontraditional marketers to obtain a license. Deleting the exemption would have burdened more entities and would have required much more regulatory oversight by Commission staff. The Commission's resolution to continue using a licensing exemption for certain marketing entities lessens that burden while still requiring "aggregators" and "brokers," entities engaged in the sale or the arrangement of sale of natural gas to retail customers, to be licensed in accordance with the Public Utility Code.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

No regulatory flexibility analysis was conducted because the final-form regulations do not produce a material cost increase. The licensing application fee is *de minimus* and nonselling marketers are not required to furnish a bond in order to obtain a license from the Commission.

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performing standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

N/A

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

N/A

(29) Include a schedule for review of the regulation including:

- | | |
|---|------------------------------|
| A. The date by which the agency must receive public comments: | N/A |
| B. The date or dates on which public meetings or hearings will be held: | As needed |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | 1 st quarter 2014 |
| D. The expected effective date of the final-form regulation: | Upon publication |

E. The date by which compliance with the final-form regulation will be required:

Upon publication

F. The date by which required permits, licenses or other approvals must be obtained:

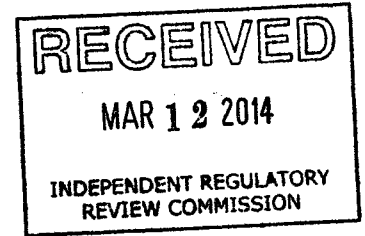
Upon publication or
pursuant to subsequent
Commission directive

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

When finalized, the effectiveness of the revised regulation will be continually reviewed by the PUC's monitoring of the number of complaints filed by consumers, and by concerns raised by competing NGSs and NGDCs about possible marketing or sales activities by entities acting as *de facto* NGSs that should be licensed. Also, Section 62.110 (regarding reporting requirements) will provide information to allow the Commission to monitor the nonselling marketers under contract to each NGS and to make sure any nonselling marketer working with more than one NGS in Pennsylvania is properly licensed.

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU**

(Pursuant to Commonwealth Documents Law)



DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General.

BY _____
(DEPUTY ATTORNEY GENERAL)

DATE OF APPROVAL

☐ Check if applicable
Copy not approved. Objections attached

Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

Pennsylvania Public Utility Commission
(AGENCY)

DOCUMENT/FISCAL NOTE NO. L-2011-2266832/57-288

DATE OF ADOPTION August 15, 2013

BY Rosemary Chiavetta
Rosemary Chiavetta

TITLE Secy
(SECRETARY)

Copy below is hereby approved as to form and legality. Executive or independent Agencies.

BY Bohdan R. Pankiw

Bohdan R. Pankiw
Chief Counsel

8-15-2013
DATE OF APPROVAL

☐ Check if applicable. No Attorney General approval or objection within 30 days after submission.

L-2011-2266832/57-288
Final Rulemaking
Licensing Requirements for Natural
Gas Suppliers
52 Pa Code, Chapter 62

The Pennsylvania Public Utility Commission on August 15, 2013, adopted a final rulemaking order which reviews the Commission's existing regulations outlining the licensing requirements for natural gas suppliers; specifically whether the exemption from NGS licensing of marketing services consultants and nontraditional marketers should be discontinued and whether all natural gas aggregators, marketers and brokers should be required to be licensed as NGSs in order to offer natural gas supply services to retail customers. The contact persons are David Screven, Law Bureau, 717 787-2126, Colin Scott, Law Bureau, 717 783-5949 and Brent W. Killian, Bureau of Technical Utility Services, 717 783-0350.

EXECUTIVE SUMMARY

L-2011-2266832/57-288

Final Rulemaking Re Licensing Requirements for Natural Gas Suppliers 52 Pa. Code §§ 62.101-62.102, 62.110

By order entered January 13, 2012, the Pennsylvania Public Utility Commission (Commission) initiated a proposed rulemaking to review the exemption from licensing for “marketing services consultants” and “non-traditional marketers” in its natural gas supply (NGS) licensing regulations at 52 Pa. Code § 62.102 (relating to scope of licensure). The Commission’s existing regulations hold a licensed NGS responsible for violations of the law, or for any fraudulent, deceptive or other unlawful marketing or billing acts committed by the marketing services consultant or nontraditional marketer that the NGS hires or with whom it partners.

Following the receipt of comments to its Proposed Rulemaking Order, the Commission suggested further amendments to the NGS licensing regulations in an Advance Notice of Final Rulemaking Order, entered February 28, 2013. The Commission recommended adding the terms “aggregator,” “broker,” and “nonselling marketer,” and incorporated a revised definition of “nontraditional marketer.” Ultimately, for purposes of its final rulemaking, the Commission decided to advance proffered definitions of these terms while choosing to eliminate the “marketing services consultant” designation. Additionally, the Commission clarified the definition of “marketing,” and modified the exemption from licensing requirements set forth in its existing regulations at Section 62.102(a).

By order entered August 15, 2013, the Commission set forth final-form regulations regarding NGS licensing requirements. Pursuant to its Final Rulemaking Order, the Commission determined that (1) all “aggregators” and “brokers” must be licensed for their involvement in the sale or arrangement of the sale of natural gas to

retail customers; (2) “nonselling marketers” under contract to a single NGS in Pennsylvania are exempt from licensure; (3) “nonselling marketers” under contract to two or more NGS firms in Pennsylvania are required to be licensed; and (4) the licensing exemption continues for “nontraditional marketers.”

The PUC contact persons are David E. Screven, 717-787-2126 (legal), Colin W. Scott, 717-783-5949 (legal), and Brent W. Killian, 717-783-0350 (technical).

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held August 15, 2013

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
Wayne E. Gardner
James H. Cawley
Pamela A. Witmer, Statement

Licensing Requirements for Natural Gas Suppliers
Regulations at 52 Pa. Code § 62.101 – § 62.102

L-2011-2266832

FINAL RULEMAKING ORDER

BY THE COMMISSION:

By Order entered February 28, 2013, the Pennsylvania Public Commission (Commission) issued an Advanced Notice of Final Rulemaking (ANOFr) to amend our natural gas supplier (NGS or supplier) licensing regulations at 52 Pa. Code § 62.101(relating to definitions) and § 62.102 (relating to scope of licensure). Specifically, this rulemaking was initiated to address whether or not to maintain the exemptions from the licensing requirement for marketing services consultants and nontraditional marketers. Comments were filed by various interested parties. The Commission has reviewed those comments, as well as all comments filed to its Proposed Rulemaking Order entered January 13, 2012, and issues this Final Rulemaking.

Background

On June 22, 1999, Governor Thomas J. Ridge signed into law the Natural Gas Choice and Competition Act, effective July 1, 1999, 66 Pa. C.S. §§ 2201-2212 (Act).

Pursuant to the Act, beginning on November 1, 1999, retail customers were given the ability to choose an NGS to provide them with natural gas supply services.¹

Section 2208(a) of the Act requires that no entity can engage in the business of an NGS unless it holds a license issued by the Commission. 66 Pa. C.S. § 2208(a). The term NGS is defined, in part, as:

An entity other than a natural gas distribution company, but including natural gas distribution company marketing affiliates, which provides natural gas supply services to retail gas customers utilizing the jurisdictional facilities of a natural gas distribution company.

66 Pa. C.S. § 2202. Further, the term “natural gas supply services” is defined, in part, as “the sale or arrangement of the sale of natural gas to retail gas customers,” 66 Pa. C.S. § 2202.

On June 24, 1999, following the passage of the Act, the Commission issued a Tentative Order establishing a draft licensing application for the interim licensing of NGSs. On July 15, 1999, the Commission issued a Final Order at Docket No. M-00991248F0002 that adopted the interim licensing procedures and license application for NGSs. The Final Order required all suppliers of retail natural gas supply services to obtain an NGS license, other than natural gas local distribution companies providing service within their certificated service territories and municipal utilities providing service within their corporate or municipal limits.

Subsequently, in 2000, the Commission adopted a Proposed Rulemaking Order that revised its interim licensing procedures and promulgated proposed regulations governing the licensing requirements for NGSs. *See* 52 Pa. Code §§ 62.101 – 114. *See*

¹ Section 2202 of the Act, 66 Pa. C.S. § 2202, defines natural “gas supply services” as including (1) the sale or arrangement of the sale of natural gas to retail customers; and (2) services that may be unbundled by the Commission under section 2203(3) of the Act (relating to standards for restructuring of the natural gas utility industry) and excluding distribution service.

Licensing Requirement for Natural Gas Suppliers, Proposed Rulemaking Order, Docket No. L-00000150, 30 *Pa.B.* 3073 (June 17, 2000). The Commission stated that its initial interpretation of the Act had been that every entity that engages in an activity listed as that undertaken by a natural gas supplier must be licensed. However, the Commission's proposed rulemaking acknowledged that some activities may be undertaken by entities that will not have any direct physical or financial responsibility for the procurement of the customer's natural gas. Accordingly, in the proposed regulations the Commission decided to exempt from licensing two types of entities that worked as brokers or agents for NGSs and retail customers. The proposed regulation used the terms "marketing services consultant" and "nontraditional marketer" for these agents and brokers.

In the final NGS licensing regulations, the Commission defined the term "marketing services consultant" as follows:

A commercial entity, such as a telemarketing firm or auction-type website, or energy consultant, that under contract to a licensee² or a retail customer, may act as an agent to market natural gas supply services to retail gas customers for the licensee or may act as an agent to recommend the acceptance of offers to provide service to retail customers. A marketing services consultant:

- (i) does not collect natural gas supply costs directly from retail customers;
- (ii) is not responsible for the scheduling of natural gas supplies;
- (iii) is not responsible for the payment of the costs of the natural gas to suppliers, producers, or NGDCs.

52 Pa. Code § 62.101 (footnote added).

Additionally, in the regulations the Commission defined "nontraditional marketer" as follows:

A community-based organization, civic, fraternal or business association, or common interest group that works with a licensed supplier as an agent to market natural gas supply services to its members or constituents. A

² "Licensee" is defined as "a person or entity that has obtained a license to provide natural gas supply services to retail customers." See also 52 Pa. Code § 62.101 (relating to definitions).

nontraditional marketer: (i) conducts its transactions through a licensed NGS; (ii) does not collect revenue directly from retail customers; (iii) does not require its members or constituents to obtain its natural gas service through the nontraditional marketer or a specific licensed NGS; (iv) is not responsible for the scheduling of natural gas supplies; [and] (v) is not responsible for the payment of the costs of the natural gas to its suppliers or producers.”

52 Pa. Code § 62.101.

In Section 62.102 of the regulations, relating to scope of licensure, the Commission created licensing exemptions for marketing services consultants and nontraditional marketers.

(d) A nontraditional marketer is not required to obtain a license. The licensed NGS shall be responsible for violations of 66 Pa. C.S. (relating to the Public Utility Code), and applicable regulations of this title, orders and directives committed by the nontraditional marketer and fraudulent, deceptive or other unlawful marketing or billing acts committed by the nontraditional marketer.

(e) A marketing services consultant is not required to obtain a license. The licensed NGS shall be responsible for violations of 66 Pa. C.S. and applicable regulations of this title, orders and directives committed by the marketing services consultant and fraudulent, deceptive or other unlawful marketing or billing acts committed by the marketing services consultant.

62 Pa. Code § 62.102(d)-(e).

The Commission recommended these two exemptions in its June 2000 Proposed Rulemaking Order. Some commenters supported the exemptions and others, including the Independent Regulatory Review Commission (IRRC), opposed them. In the final rulemaking the Commission determined that marketing services consultants and nontraditional marketers were not engaged in the *sale or arranging* of natural gas supply services to retail consumers. Thus, they fell outside of the definition of an NGS set forth in Section 2202 of the Act. Furthermore, rather than require these entities to obtain a license themselves, the regulations emphasized that the licensed NGSs were responsible

for any violations of the statute, regulations or orders or for any fraudulent, deceptive or other unlawful marketing or billing acts committed by the marketing services consultant or nontraditional marketer. *See* 52 Pa. Code § 62.102 (relating to scope of licensure). *See also* 52 Pa. Code § 62.110(a)(3) (NGSs must identify nontraditional marketers and marketing services consultants who are currently or will be acting as agents for the licensee in the upcoming year).

The proposed regulations were finalized by the Commission in July 2001 in *Licensing Requirements for Natural Gas Suppliers, Final Rulemaking Order*, Docket No. L-00000150, 31 *Pa. B.* 3943 (July 21, 2001).

On September 28, 2010, Alphabuyer LLC (Alphabuyer) filed a license application to operate as a broker/marketer engaged in the business of supplying natural gas services in the service territory of various NGDCs within the Commonwealth of Pennsylvania. The term broker/marketer is synonymous with marketing services consultant. The application was filed pursuant to section 2208 of the Natural Gas Choice and Competition Act (Act) and Title 52 of the Pennsylvania Code, Chapter 62, Subchapter D. In conjunction with the approval of that application, the Commission noted that during the past ten years, a number of entities similar to Alphabuyer,³ despite the existence of an exemption from the requirement to obtain a license, nonetheless applied for an NGS license in order to supply natural gas services to retail customers.⁴

Due to the non-compulsory nature of licensing entities like Alphabuyer and the amount of direct interaction these entities have with retail customers, the Commission

³ Under this model, the entity falls within the definition of “marketing services consultant” if it: (1) does not collect natural gas supply costs directly from retail customers; (2) is not responsible for the scheduling of natural gas supplies; and (3) will not be responsible for the payment of costs to NGSs, producers or NGDCs.

⁴ The Commission’s practice has been to issue NGS licenses to such entities upon demonstration that they meet the financial and technical requirements of NGS licensure and also comply with, and be governed by, the applicable provisions of the Public Utility Code and Commission regulations.

determined it was time to conduct a review of its regulations outlining the licensing requirements for natural gas suppliers. Therefore, on January 13, 2012, the Commission initiated the instant rulemaking proceeding to determine (1) if its current NGS licensing regulations conform with the plain language of the Natural Gas Choice and Competition Act⁵ and reflect the current business plans of NGSs appearing before it; and (2) whether continuing these licensing exemptions is in the public interest. Furthermore, the Commission requested comments on whether it was appropriate to remove responsibility from a licensed NGS for violations of the Public Utility Code, and applicable Commission regulations, orders and directives and for fraudulent, deceptive or other unlawful marketing or billing acts committed by a marketing service consultant or a nontraditional marketer.

Accordingly, in its Proposed Rulemaking Order, the Commission suggested the following revisions to its NGS licensing regulations at 52 Pa. Code 62.101-62.110: (1) deletion of the “marketing service consultant” and “nontraditional marketer” definitions; (2) the deletion of the exemptions set forth in Subsections 62.102 (d) and (e) of the regulations and (3) the deletion of Subsection 62.110 (a)(3) that requires a licensee to report the names and addresses of nontraditional marketers and marketing services consultants who are acting or will be acting as agents for the licensee in the upcoming year.

The Commission received comments to its proposed revisions.⁶ Based upon these comments, the Commission suggested further amendments to the NGS licensing regulations to add the definitions aggregator, broker, and nonselling marketer and to incorporate a revised definition of nontraditional marketer. It also modified the exemption from licensing requirements set forth in the existing regulations and added

⁵ Natural Gas Choice and Competition Act, effective July 1, 1999, 66 Pa. C.S. §§ 2201-2212 (Act).

⁶ Comments to the proposed rulemaking were filed by the IRRC, National Energy Marketers Association (NEMA), Washington Gas Energy Services, Inc. (WGES), Spark Energy Gas, LP, Retail Energy Supply Association (RESA) and the Pennsylvania Energy Marketers Coalition (PEMC).

clarifying language at Section 62.102(a) and to the definition of marketing. The Commission issued its further revisions to the proposed regulations as an Advanced Notice of Final Rulemaking (ANOFR), entered February 28, 2013, and invited additional comments.

Comments to the ANOFR were filed by the Retail Energy Supply Association (RESA), National Energy Marketers Association (NEMA), the Pennsylvania Independent Oil and Gas Association (PIOGA), the Office of Consumer Advocate (OCA), and the Pennsylvania Energy Marketers Coalition (PEMC).

Comments to the Proposed Rulemaking Order

IRRC's Comments

In its comments, IRRC stated that the Commission did not provide convincing supporting information as to the need to amend the regulations regarding licensing of NGSs. *IRRC Comments at 2.* IRRC commented that the Commission's Regulatory Analysis Form (RAF) did not provide substantive information to estimate the direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector, and did not identify the types of persons, businesses and organizations which would be affected by the regulation. IRRC further stated that the Commission should explain its interpretation of its statutory authority in deciding which entities must be licensed, which entities do not need to be licensed and provide an explanation of how the final-form regulation meets the requirement of the Act. *Id.* IRRC recommended that the Commission withdraw this proposed regulation and conduct an investigation with stakeholders to determine who is using the current exemption, what the cost impact is to them and how to best regulate the competitive marketplace. *Id.* In the alternative, IRRC recommended that the Commission publish an advanced notice of final rulemaking that allows interested parties the opportunity to review the revised regulatory language before submittal of a final-form regulation. *Id.*

NEMA's Comments

NEMA stated that a wholesale deletion of the “marketing services consultant” definition and its exemption from licensing is not necessary for those consultants that only make sales to consumers on behalf of licensed suppliers. *NEMA Comments at 7.* NEMA stated, however, that “energy consultants,” who purport to hold themselves out as either agents of or representatives of *consumers* and which have been included as a subset within the definition of ‘marketing services consultants’ by the Commission, may not have sufficient safeguards in place within the current regulations to protect consumers and the public interest. *NEMA Comments at 9-12.*

NEMA stated that there has been a proliferation of ‘energy consultants’ in the competitive marketplace that interject themselves between the consumer and the NGS in order to “arrange for the sale of natural gas” for the consumer. *Id.* NEMA explained that these energy consultants may have a direct contract with the consumer to perform this service on the consumer’s behalf. In the alternative, the energy consultant may not have a contract with the consumer, but will gather bids from multiple suppliers for the consumer and receive its compensation through the NGS’s bill. In this latter scenario, the energy consultant has an agreement in place with the winning NGS for the NGS to act as its billing service provider and the NGS is under a contractual obligation to remit compensation or commission directly to the energy consultant.

NEMA stated that an NGS should not be responsible for the energy consultant’s conduct because it is operating as the agent of the consumer and not the supplier. *NEMA Comments at 12.* NEMA stated that the Commission should look to whom the entity owes its fidelity or whether they are acting for their own account rather than a specific supplier or a purchaser or group of purchasers. NEMA asserted that in the absence of a contractual relationship with the NGS, the NGS should not be responsible for the entity’s conduct. *Id.*

NEMA stated that it supports the exemption from licensing of entities operating exclusively for a supplier in a utility service territory and the licensing of brokers who are not beholden to anyone unless they have an exclusive contract with one supplier. *NEMA Comments at 15*. NEMA asserted that refining the current exemption by excluding ‘energy consultants’ from the “marketing services consultant” definition may be a good first step in an ongoing process of monitoring the performance of entities in the natural gas market. Conversely, NEMA stated that the Commission should retain the exemption from the licensing requirements for nontraditional marketers. NEMA asserted that the nontraditional marketer is not involved in the financial transaction between the licensed supplier and the customer and is not holding itself out as representing the NGS, it is merely communicating to its members that there is an offer that they may avail themselves of from the NGS.

Furthermore, NEMA stated that prior to the Commission making a determination as to whether gas aggregators, brokers or marketers need to be licensed, that the Commission should engage in a rulemaking process to develop definitions and a common understanding of these terms as they apply to the retail gas market. *Id.* NEMA noted that legislature did not set forth definitions for the terms “aggregator,” “broker,” and “marketer” in the Act or any corresponding licensing requirement for any such specifically identified entities. NEMA asserted that the licensing requirement in the Act mentions only “natural gas suppliers.”

WGES’s Comments

In its comments, WGES stated that it agreed with NEMA that the Commission should consider refining the expansive definition of “marketing services consultant” to exclude “energy consultants” that “arrange for the sale of natural gas for a consumer.” *WGES Comments at 1*. WGES explained that under this scenario, the main contractual relationship exists between the energy consultant and the customer.

WGES further stated that NGSs generally do not exercise any control over the actions of energy consultants. *WGES Comments at 2*. Nevertheless, despite this lack of control or contractual relationship, under the current regulations, NGSs may be held responsible for the actions of the energy consultant. WGES stated that the Commission should revise its regulations to assign appropriate responsibility to energy consultants for their actions, rather than assigning responsibility to NGSs. *WGES Comments at 3*.

Spark Energy's Comments

Spark Energy stated that NGS firms and marketing entities should not be grouped together when identifying licensing requirements. *Spark Energy Comments at 2*. Rather, Spark Energy stated that the Commission should implement a less-stringent certification procedure for marketing entities. *Id.* Spark Energy explained that the newly-implemented certification process will allow the Commission to focus on whether the marketing entity possesses appropriate core marketing proficiencies. Additionally, Spark Energy stated that certification should enhance, but not replace, oversight of the entity by the licensed NGS for fraudulent, deceptive or unlawful practices. *Spark Energy Comments at 3*. Lastly, Spark Energy stated that if the definitions for “marketers” and “brokers” were adopted for gas purposes, it would be difficult to distinguish them from the existing marketing services consultant and nontraditional marketers operating today in the competitive retail market. Accordingly, Spark Energy stated that the Commission should refrain from adopting the more generic “marketer” and “broker” terms. *Spark Energy Comments at 5-6*.

RESA's Comments

RESA stated the Commission should retain the current “marketing services consultant” and “nontraditional marketer” definitions in the regulations. *RESA Comments at 2*. However, RESA also stated that the Commission should incorporate the “aggregator,” “broker” and “marketer” definitions so there is symmetry and continuity between the treatment of licensed entities on the electric side with the entities subject to

the natural gas licensure regime. *RESA Comments at 3-4*. RESA stated that the exemption from licensure should continue for those marketing services consultants and nontraditional marketers that are compensated and conducting marketing and sales activities on behalf of a single licensed NGS. *RESA Comments at 4*. To the extent that the marketing services consultant or nontraditional marketer works solely for a single NGS, it would be deemed an “agent” of the NGS and, therefore, would not be required to be separately licensed with the Commission. *RESA Comments at 4-5*.

RESA further stated that those marketing services consultants or nontraditional marketers who function as aggregators or a broker/marketer by providing or arranging for natural gas service to be supplied to an end-user, including but not limited to collection of payment, schedule of natural gas supplies, or payment of natural gas supplies should be required to be licensed with the Commission. *RESA Comments at 5*. RESA stated that while these entities are not “agents” of an NGS, they directly arrange for a customer’s natural gas supply services; therefore, these natural gas aggregators and broker/marketers should go through the licensing process and have their marketing activities directly regulated by the Commission. *Id.*

However, RESA asserted that it is in favor of less burdensome licensing requirements for these entities in the form of reduced bonding or security requirements. *Id.* Furthermore, RESA asserted that these entities should not be required to submit annual reports given that NGSs already have an obligation to submit annual reports and are parties that are best positioned to provide the required data to the Commission due to their familiarity with the process for confidential filings. *RESA Comments at 6*.

PEMC’s Comments

PEMC stated that there does not appear to be a discernible or identifiable reason for the Commission to revise the current regulations. *PEMC Comments at 4*. Additionally, PEMC stated that as an unintended consequence, the Commission’s

proposed revisions would dramatically expand the number of license applications it must review and suppliers it must monitor. *Id.* Accordingly, PEMC stated that it opposes the elimination of the exemption from licensing requirements for marketing services consultants and nontraditional marketers.

PEMC offered two alternatives to the Commission. First, PEMC stated that when agents who are legitimate representatives of a single supplier are found to be in violation of Commission regulations, the NGS should be held accountable as if the agent was its own employee. *PEMC Comments at 5.* Secondly, PEMC stated that to address accountability issues that can arise when an agent simultaneously represents more than one NGS, the Commission could choose to define such agents as “natural gas supply brokers.” *Id.* PEMC further stated that the Commission could then either require entities that meet this definition to apply for a standard NGS license or establish a new, separate natural gas broker license tantamount to the “broker” definition under the EGS licensing regulations. *Id.*

Discussion of comments to the Proposed Rulemaking Order

In response to IRRCs comments that the Commission did not provide convincing supporting information as to the need to amend its existing regulations regarding licensure of NGSs, the Commission published an advanced notice of final rulemaking to allow the public and standing committees the opportunity to review the revised regulatory language before submittal of a final form regulation. The Commission’s statutory authority to decide which entities must be licensed comes from 66 Pa. C.S. §§ 2202 (regarding definitions for the terms “Natural Gas Supplier” and “natural gas supply services”); and § 2208(a) (stating that no entity shall engage in the business of a natural gas supplier unless it holds a license issued by the commission). Also, the Commission acknowledges IRRC’s comments regarding the deficiencies of its RAF submitted with the Proposed Rulemaking. The Commission will supplement its RAF to address the

direct and indirect costs that will result from changes to our regulation and will identify the various types of persons, businesses and organizations that may be affected.

In establishing the original NGS licensing regulations, the Commission adopted definitions for both “marketing services consultant” and “nontraditional marketer” as a means to distinguish certain activities that would fall outside of the definition of “natural gas supply services” set forth in Section 2202 of the Act. Thus, when the Commission defined these two entities, it clearly determined that there was a distinction between the rendering and sale of the physical natural gas commodity versus the provision of marketing and sales support activities. The Commission supported the exemptions because “those [marketing] entities ... act[ed], not on behalf of licensees, but on behalf of retail customers as energy consultants.” April 19, 2001 Order at 10.

However, upon its subsequent experience of monitoring the activities and interactions of entities acting or operating as “marketing services consultants” in the gas retail market, the Commission believes these entities appear to provide functions that are the same or similar to those performed by “aggregators” and “brokers” operating on the electric competition side, whom are required to be obtain a license. Therefore, the Commission determined that it was appropriate to revisit the definitions of those entities operating within the competitive retail gas market.

We acknowledged that the Act did not create subcategories of natural gas suppliers as were created for electric generation suppliers in the Electric Competition Customer Choice and Competition Act. *See* 66 Pa. C.S §2803 (definitions of aggregator, market aggregator, broker, marketer and electric generation supplier). However, we determined that entities that act as aggregators and brokers do fall under the definition of NGS as they are in engaged in the “arrangement of the sale of natural gas to retail gas customers.” 66 Pa. C.S. § 2202. The fact that these entities may take no title to the natural gas is irrelevant in this determination.

Therefore, the Commission deleted the term “marketing services consultant” set forth in the initial licensing regulations as its definition was ambiguous and the activities of these entities had become synonymous with the activities of “aggregators” and “brokers” on the electric competition side. The Commission determined that the activities of “aggregators and “brokers” on the natural gas side should be regulated under the Natural Gas Choice and Competition Act. In response to IRRC’s comment about the Commission’s authority to decide which entities must be licensed, the Commission added definitions for “aggregators” and “brokers” involved in the sale, arrangement and purchase of natural gas to retail customers to the final-form regulation. See 66 Pa. C.S. § 2202. Additionally, the Commission amended its definition of a “nontraditional marketer” to ensure these entities engage only in the marketing of an NGS’s natural gas service to its members or constituents. However, the Commission also decided to add the term “nonselling marketer” to identify entities engaged only in marketing natural gas services to retail customers on behalf of a NGS. These “nonselling marketers” are not required to obtain a license unless they are under contract to more than one NGS. The Commission believes this provides sufficient consumer protection, but will not infringe on the competitive market.

Thus, for the purpose of the amendments to our regulation at 52 Pa. Code §§ 62.101-62.102, the definitions of “aggregators” and “brokers” in this final-form rulemaking refer to entities engaged in “the sale or arrangement of the sale of natural gas to retail gas customers” under 66 Pa. C.S. § 2202. Entities engaged solely in the marketing of natural gas to retail customers do not provide natural gas supply services as defined in Section 2202 of the Public Utility Code.

In response to IRRC’s comment about proving a threat to the public interest, comments received from the regulated community are instructive. The natural gas marketplace has seen a proliferation of “energy consultants” that interject themselves between the consumers and NGSs. These consultants currently operate as “marketing

services consultants” and are outside the scope of our licensing requirements. However, “energy consultants” arrange for the sale of natural gas for the consumer and act as either agents or representatives of consumers. Presently, “energy consultants” may have a direct contract with the consumers, but they also may gather bids from multiple suppliers for the consumer and receive compensation through the NGS’s bill. Thus, safeguards need to be in place to protect consumers and to ensure that “energy consultants” disclose their fees and are accountable for their analysis of a customer’s natural gas needs. “Energy consultant” activities fall within the definition of “broker.” Therefore, entities that provide energy consultation services for customers should be required to obtain a license from the Commission regardless of whether or not they take title to the natural gas.

Further, the Commission noted RESA’s comments stating that there should be some form of symmetry and continuity between our governance of the licensed entities performing electric supply services on the electric side with entities operating within the natural gas licensure regime, especially when they appear to be undertaking the same or similar functions. Accordingly, we revised Section 62.101 of our regulations by deleting the definition of “marketing services consultant” and incorporating the definitions for “aggregator” and “broker” set forth in the our EGS licensing regulations at 52 Pa. Code § 54.31.

PEMC commented that the Commission’s proposed revision to eliminate the current exemptions would dramatically expand the number of applicants the Commission must review and suppliers it must monitor. Additionally, Spark Energy commented that the existing definitions of marketing service consultant and nontraditional marketer were useful in describing which marketing entities would be subject to the Commission licensing requirements. Moreover, Spark Energy asserted that licensed NGSs and entities that perform only marketing duties should not be grouped together when identifying licensing requirements.

In its ANOFR, the Commission identified the primary focus of this rulemaking as whether entities essentially acting as aggregators, brokers or entities solely providing marketing services in the natural gas retail marketplace should be licensed under the Act. In order to bring clarity to the natural gas retail marketplace regarding the entities that must be licensed, as we stated above, we proposed the deletion of the current “marketing services consultant” definition and incorporated the terms “aggregator,” “broker” and “nonselling marketer” into the final-form regulation.

Our rationale for the licensure of natural gas “aggregators” and natural gas “brokers” has been fully discussed above. A “nonselling marketer” is an entity whose activities are limited to providing only marketing support services on behalf of one or more NGS firms. We noted the comments of RESA and NEMA that a “marketer” that operates under an exclusive contract with a single licensed NGS supplier to conduct natural gas-related marketing activities in its service territory should not be required to be separately licensed by the Commission. We agreed with the commenters that the line of accountability back to a single NGS is clear where there is a direct relationship and the NGS will be directly responsible for the marketer’s activities and for reporting requirements under Section 62.110. Accordingly, we incorporated this concept into the ANOFR by stating that a “nonselling marketer” under contract to a single NGS will not be required to obtain a license. Conversely, a nonselling marketer that interacts directly with an end-user customer or simultaneously represents more than one licensed NGS should be required to obtain a license so that if an action is brought by a customer or the Commission for violations of the Code, applicable regulations, Commission orders or other consumer protection safeguards, the appropriate party is clearly identifiable.

As to “nontraditional marketers,” we reinstated a modified definition for this term and exempted these entities from a licensing requirement. Nontraditional marketers are community-based organizations, civic, fraternal or other groups with a common interest that work with a licensed NGS to endorse that NGS’ natural gas supply service to its

members. The members are not required to purchase the services from the endorsed NGS and, if the offer is accepted, the contract is between the member and the NGS. Under these circumstances, we believed it reasonable to not require a license for this type of activity.

Based upon our further consideration of these issues, the Commission proposed that an exemption from licensing for entities providing “marketing” support services either (a) on behalf of the members of a civic or other community-based organization or (b) on behalf of a single NGS should remain intact. Thus, in contradiction to PEMC’s assertion, the Commission has retained some form of the previous exemption from licensing set forth in the existing regulations in the revised final-form regulation.

Spark Energy was also concerned that entities that perform only marketing duties but fall outside of the licensing exemption category, should not have to pay a license application fee. However, we noted that marketers/brokers and aggregators providing electric generation supply services have been required to pay a *de minimus* application fee that we are now requiring marketing entities on the natural gas side to pay. Such a *de minimus* fee has not had a negative impact, or chilling effect, on entities seeking to provide electric generation supply services and, therefore, is not expected to have a negative effect on entities seeking to participate in the natural gas retail market in order to conduct marketing support services.

Comments to the Advanced Notice of Final Rulemaking Order

RESA's Comments

In general, RESA supports the revisions recommended in the Commission's ANOFR. As an example, RESA agrees with the Commission that the licensing exemption for nontraditional marketers should be retained. However, RESA contends that the licensing exemption applicable to nonselling marketers who work for a single NGS should be clarified to state that the exemption attaches to marketers who work for no more than a single NGS in a given service territory. RESA suggests that a nonselling marketer who works for a single NGS that is licensed to provide service in a specific service territory should be permitted to work for another NGS that is licensed to provide service in a completely separate service territory without first obtaining a license. RESA believes that its proposed revision provides for necessary consumer protections while also supporting and promoting natural gas competition in Pennsylvania.

NEMA's Comments

NEMA, like RESA above, supports the exemption from licensing of nonselling marketers operating exclusively for one NGS in a single utility service territory. NEMA states that an NGS should be responsible for the actions of third parties with whom they have entered into contractual relationships and who act exclusively in the NGS's interest in a single utility service territory. NEMA identifies that the Commission's suggested language in its ANOFR at Section 62.102(f) state that, "a nonselling marketer under contract to only one licensed NGS *may* not be required to obtain a license." (Emphasis added). However, the text of the Commission's ANOFR order concluded that a nonselling marketer *will not* be required to obtain a license. (Emphasis added). NEMA requests that the language in Section 62.102(f) be modified to reflect the Commission's finding in the ANOFR order.

NEMA also recommends that licensing or registration requirements placed on aggregators, brokers and non-exclusive, nonselling marketers be imposed only after a showing of demonstrable need to safeguard the public has been made. In its comments, NEMA contends that if the Commission advances a uniform licensing requirement for aggregators, brokers and non-exclusive, nonselling marketers, then the licensure process for different entities in the retail marketplace should be tailored to the activities they perform and the relative financial fitness and technical expertise that are required to perform their different roles. For example, NEMA suggests that license or registration applications for nonselling marketers might require information relevant to the entity's ability to perform sales and marketing support services as opposed to the retail sale of the natural gas commodity, which is how the current licensing application is framed. Moreover, NEMA recommends information the Commission might consider collecting from these different entities including: (1) a list of officers and key management personnel; (2) contact information including the entity's principal place of business as well as a local service agent; (3) an entity's express agreement to abide by relevant Commission rules and regulations; (4) the demonstration of the requisite technical and operational experience to conduct its business; and (5) a listing of other states in which the entity currently does business.

Additionally, NEMA shares concern that the Commission should consider a form of minimal registration of individuals engaged in sales and marketing activities to residential consumers, other than NGS employees, exclusive agents, brokers and Multi-Level Marketing representatives. NEMA states that this could be as straightforward as requiring these individuals to file their names and contact information with the Commission to produce an identification number that would be presented to residential consumers during direct sales or marketing activities.

NEMA recommends that the Commission's suggested definition of the term "broker" that was added in its ANOFR be revised to reflect common industry usage by

clarifying that the broker is acting “on behalf of” NGSs when it is performing its service. Also, NEMA once again suggests a definition for “energy consultants” that act on behalf of consumers in the marketplace because these consultants may have direct contact with the consumer to arrange for the sale of natural gas on the consumer’s behalf. One particular concern raised by NEMA to the treatment of “energy consultants” is the disclosure of their fee to consumers.

Furthermore, NEMA contends that the title “nonselling marketer” may not correctly identify the types of activities that such entities undertake and could be better expressed in a manner more consistent with industry usage and understanding. NEMA suggests that these entities instead be denominated as “marketing services providers” or “sales channel partners.” Finally, NEMA supports the exemption from licensing of nontraditional marketers.

PIOGA’s Comments

In its comments, PIOGA echoes the general thrust of the comments of NEMA. Specifically, PIOGA supports (1) NEMA’s suggested definition of “energy consultant;” (2) NEMA’s suggested change of the term “nonselling marketer” to “marketing services provider;” (3) NEMA’s suggested revision to the term “broker;” and (4) the correction of the language in proposed Section 62.102(f) to implement the Commission’s finding in the ANOFR that nonselling marketers operating exclusively for one NGS need not be licensed. However, in contrast to NEMA’s recommendations, PIOGA suggests that nonselling marketers with an exclusive marketing relationship to an NGS that operates in more than one utility service area should be licensed. PIOGA contends that this situation is present in western PA where gas utility service territories overlap.

OCA’s Comments

The OCA submitted comments in support of the Commission’s proposed modifications to its licensing requirements for NGSs. The OCA cited the significance of

the proposed changes as “broker/marketers” have taken up an increasingly significant role in the retail gas market. Also, the OCA supported the Commission’s determination to not require a license for nontraditional marketers because the members of these groups are not required to purchase the services from any partnering NGS.

PEMC’s Comments

PEMC, in its comments, supports the Commission’s decision to incorporate the definitions of “broker” and “aggregator” from the electric supplier licensing regulations into the natural gas regulations. Additionally, PEMC favors the Commission’s decision to leave intact the licensing exemption for “nonselling marketers” that provide marketing and sales support services on behalf of only one NGS because the alternative would result in significant costs for NGSs who rely on services from a range of partner firms to sell and deliver natural gas to retail consumers. PEMC recognizes that requiring licensing for nonselling marketers that work with multiple NGSs ensures a single entity can be held responsible for any violations of consumer protection or sales and marketing rules. Finally, PEMC supports the Commission’s choice to continue the licensing exemption for nontraditional marketers which work on behalf of the members of a civic or other community-based organization.

Discussion of the comments to the Advanced Notice of Final Rulemaking

As stated in the Commission’s ANOFR, entered February 28, 2013, at Docket No. L-2011-2266832, the focus of this rulemaking is to review: (1) whether the exemption from licensing for marketing services consultants and nontraditional marketers should be discontinued; and (2) whether all natural gas aggregators, marketers and brokers should be required to be licensed as NGSs in order to offer natural gas supply services to retail consumers.

RESA and NEMA, in their respective comments, request that the licensing exemption applicable to nonselling marketers working for a single NGS and set forth in the Commission's ANOFR should be clarified to state that the exemption applies to nonselling marketers who work for only one NGS in a single utility service territory. In part, this request was in response to the Commission's ANOFR wherein we noted comments that a "marketer" operating under an exclusive contract with a single licensed NGS to conduct natural gas-related marketing and sales activities *in its service territory* should not be required to be separately licensed by the Commission. (Emphasis added.) See ANOFR p. 15. The Commission agreed with commenters that when a nonselling marketer's line of accountability back to a single NGS is clear, meaning that a direct relationship exists and the NGS is directly responsible for the marketer's activities and for its reporting requirements under Section 62.110, a nonselling marketer under contract to a single NGS will not be required to obtain a license.

However, the Commission will not expand its licensing exemption at this time. First, the Commission recognizes that there are places in the Commonwealth, especially in western PA, where gas utility service territories overlap. To the extent that the proposals by RESA and NEMA would expand the licensing exemption for a "nonselling marketer" with an exclusive marketing relationship with only one NGS to an exemption that applies to a "nonselling marketer" that contracts with an NGS that operates in more than one utility service territory, no direct relationship or responsibility may be inferred in the event of abuse. Secondly, in forwarding administrative and regulatory efficiency, the rule proffered in the Commission's ANOFR is enforceable as both NGDCs and NGSs continue to expand the territories they service as natural gas competition continues to grow. Finally, the Commission believes that consumer protections are further enhanced by requiring "nonselling marketers" working for more than one NGS to be licensed, even when the NGSs operate in separate service territories.

The Commission will grant NEMA's request to have the language in the proffered revision of 62.102(f) modified to reflect the Commission's finding in its ANOFR. Thus, the language will state that a nonselling marketer is not required to obtain a license unless it is under contract to more than one licensed NGS.

In response to NEMA's recommendation that licensing or registration requirements be imposed on aggregators, brokers and non-exclusive, nonselling marketers only after a showing of demonstrable need to safeguard the public has been made, the Commission declines to delay in regulating these entities. First, the Act mandates that aggregators and brokers, because they are involved in the sale or the arrangement of the sale of natural gas to retail customers, must be licensed. We believe that entities interacting with retail consumers should have the appropriate regulatory oversight in the first instance, not after a violation or harm to the public has already occurred. Secondly, with respect to non-exclusive, nonselling marketers, we have determined it is the relationships with multiple NGSs that require these entities to obtain a license. The Commission seeks to ensure that a party against whom an action may be brought is clearly identifiable where waste, fraud and abuse occurs. Neither a delay in regulating these entities nor a light-handed approach to licensing or registration adequately safeguards the public.

NEMA also comments that if the Commission moves forward with its proposal to uniformly license aggregators, brokers and non-exclusive, nonselling marketers, then the licensure process should be tailored to the activities these entities perform and the relative financial fitness and technical expertise required in completing their different tasks. We agree with this suggestion in part. We note that pursuant Section 2208 of the Act and Section 62.111 of our regulations, which identify the licensing requirements for entities that sell or arrange for the sale of natural gas to retail gas customers, potential licensees have to pay an application fee and furnish a bond or other security. Based upon the activities that nonselling marketers perform, we will not establish a bonding requirement

for non-selling marketers, as they do not provide natural gas supply service as defined in section 2202 of the Act. We do not believe that it is necessary for entities that provide only marketing services in the natural gas retail marketplace to furnish a bond in order to obtain a license from the Commission. The only cost that would potentially apply to nonselling marketers is the *de minimus* license application fee.

In its comments, NEMA requests that the Commission consider a form of minimal registration of individuals engaged in marketing activities to residential consumers. The Commission's suggested definition of a nonselling marketer currently refers only to a commercial entity, but makes no mention of an individual engaged in similar activities. Therefore, the Commission will take this opportunity to expand its definition of nonselling marketers to include individuals engaged in marketing activities to residential consumers. If these individuals are under contract to more than one NGS, like their commercial entity counterparts, they will be required to obtain a license. While it is true that licensing these individuals will entail some cost for the license application fee, we note that the amounts are *de minimus* and are not expected to have a negative impact on the natural gas supply market. Moreover, in the Commission's judgment, the cost associated with obtaining a license are outweighed by the benefit to the public of ensuring that these marketing activities are performed by credible and responsible entities.

Additionally, for the purpose of clarification, the Commission will further amend its definition of "nonselling marketer" to state that an individual or commercial entity must be under contract to a licensed NGS to provide marketing services to retail customers for natural gas supply services. Moreover, in its ANOFR, the Commission added language to Section 62.102(e) stating "or which has a contract with an end-user retail natural gas customer." This clause will not be retained in the Commission's Final Rulemaking because there is no foreseeable circumstance in which a marketer would work on behalf of a retail consumer rather than an NGS.

Finally, NEMA comments that the title “nonselling marketer” may not correctly identify the types of activities that such entities undertake. Instead, NEMA suggests these entities be called either “marketing services providers” or “sales channel partners.” The Commission chooses not to adopt either of these titles which NEMA believes will better reflect industry usage and understanding. Neither suggestion properly encompasses that the key to an individual or commercial entity receiving the licensing exemption is that a marketer solely offers marketing services on behalf of the NGS and does not offer to “arrange for the sale of” natural gas supply services to retail consumers. While marketers may hand-out and introduce an NGS’s services to the consumer, the consumer must contact the NGS directly to be provided with service or enter into a separate contractual relationship with a broker or an aggregator. Therefore, the Commission believes that the term “nonselling marketer” most accurately describes and covers the intent of the definition.

The Commission will also retain its amended definition of the term “nontraditional marketer” as proffered in its ANOFR and the exemption from licensing for these entities. The comments received to the Commission’s ANOFR supported the continuation of this exemption.

Additionally, with respect to the Commission’s regulation at 52 Pa. Code § 62.110(a)(3) (regarding reporting requirements and requiring a licensed NGS to file the names and addresses of nontraditional marketers and marketing services consultants acting as agents for the licensee), our Proposed Rulemaking Order suggested the deletion of this requirement. Logically, removing this requirement followed our recommendation, at the time, to delete the definitions of “nontraditional marketers” and “marketing services consultants” and to eliminate licensing exemptions entirely. However, as our ANOFR and now our Final Rulemaking Order reflect, a revised definition of “nontraditional marketers” and a new designation, “nonselling marketers,” make certain marketing entities exempt from licensing. Thus, our Final Rulemaking Order will

reinstate an amended Section 62.110(a)(3) to account for these entities and that will require licensed NGSs to file the names and addresses of their agents as part of their annual reports to the Commission.

Both NEMA and PIOGA commented that a separate definition of “energy consultant” should be included in the Commission’s revised regulations to complement the advanced definition of “broker.” These “energy consultants” work on behalf of *consumers* as intermediaries between the consumer and an NGS for the sale and purchase of natural gas. While we acknowledge the latitude that is available to the Commission to separately delineate a definition of “energy consultant,” entities that provide energy consultation services for consumers under our final form regulations will already be required to obtain a license from the Commission because their activities fall within the definition of “broker.” Implicit in our definition of the term “broker” is the understanding that an entity acting as an agent or intermediary in the sale and purchase of natural gas, *whether working on behalf of the retail consumer or the NGS*, must be licensed. As Section 62.102(a) of our regulations state, in pertinent part, “an NGS, including an aggregator or a broker, may not ... offer to provide, or provide natural gas supply services to retail consumers until it is granted a license by the Commission.” Therefore, we decline to construct a separate definition for “brokers” working on behalf of consumers and reaffirm that all entities that act as agents or intermediaries in the sale and purchase of natural gas must be licensed.

In reaching the conclusion directly above, the Commission also rejects NEMA’s recommendation to revise the suggested definition of the term “broker.” In its comments, NEMA requests that the definition of “broker” read as follows:

Broker -- An entity, licensed by the Commission, that acts **on behalf of more than one NGS** as an agent or intermediary in the sale and purchase of natural gas but does not take title to natural gas supply. (Additions in bold).

This proffered addition would provide an exemption for licensure for entities providing brokering services for only one NGS and does not truly delineate the Commission's intent regarding the licensing of brokers. Currently, our regulations require that an NGS obtain a license before offering to provide or before providing natural gas supply services to retail consumers. See 52 Pa. Code § 62.102(a). This steadfast rule has been applied to all entities that provide natural gas supply services irrespective of whether the entity acts on behalf of more than one NGS. If an entity is not solely engaged in marketing services to retail consumers on behalf of a licensed NGS, but also in the provision of natural gas supply services, that entity must obtain a license.

CONCLUSION

This order sets forth final-form regulations concerning NGS licensing that eliminate the definition of marketing service consultants and modify the exemption from licensing requirements set forth in the current regulations. Consistent with our authority and obligations under the Act, particularly, Chapter 22 of the Public Utility Code, 66 Pa. C.S. §§ 2201-12, the Commission is establishing rules and regulations that will bring the benefits of natural gas competition and customer choice to retail consumers. The purpose of the regulations is to eliminate barriers to supplier entry and participation in the marketplace. Accordingly, under sections 501 and 1501 of the Public Utility Code (66 Pa. C.S. §§ 501 and 1501); sections 201 and 202 of the act of July 31, 1968 (P. L. 769 No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P. S. § 732.204(b)); section 745.5 of the Regulatory Review Act (71 P. S. § 745.5); and section 612 of The Administrative Code of 1929 (71 P. S. § 232), and the regulations promulgated thereunder at 4 Pa. Code §§ 7.231--7.235, we find that the regulations for establishing a licensing requirements for NGSs as set forth in Annex A should be approved; **THEREFORE,**

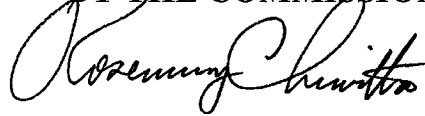
IT IS ORDERED:

1. That the Secretary shall serve a copy of this Order and Annex A on all jurisdictional natural gas distribution companies, natural gas suppliers, the Office of Consumer Advocate, the Office of Small Business Advocate and all other parties that filed comments at Docket No. L-2008-2069114, Natural Gas Distribution Companies and the Promotion of Competitive Retail Markets.
2. That the Secretary shall certify this order and Annex A and deposit them with the Legislative Bureau for publication in the *Pennsylvania Bulletin*.
3. That the Secretary shall submit this order and Annex A to the Office of Attorney General for approval as to legality.
4. That the Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.
5. That the Secretary shall submit this order and Annex A for review by the designated standing committees of both houses of the General Assembly, and for review and approval by the Independent Regulatory Review Commission.
6. That the final regulations become effective upon publication in the *Pennsylvania Bulletin*.
7. That the Office of Competitive Market Oversight shall electronically send a copy of this Order and Annex A on all persons on the contact list for the Stakeholders Exploring Avenues to Remove Competitive Hurdles (SEARCH).

8. That a copy of this Order and Annex A shall be posted on the Commission's website at the Office of Competitive Market Oversight's web page.

9. That the contact persons for this Final Rulemaking are David E. Screven, Assistant Counsel, (717) 787-2126 (legal), Colin W. Scott, Assistant Counsel, (717)-783-5949 (legal) and Brent Killian, Bureau of Technical Utility Services, (717) 783-0350 (technical). Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Review Assistant, Law Bureau, (717) 772-4597.

BY THE COMMISSION

A handwritten signature in cursive script, appearing to read "Rosemary Chiavetta", written over the printed name.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 15, 2013

ORDER ENTERED: August 15, 2013

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

**Licensing Requirements
for Natural Gas Suppliers**

Public Meeting: August 15, 2013
Agenda No. 2266832-LAW
Docket No. L-2011-2266832

STATEMENT OF
COMMISSIONER PAMELA A. WITMER

Before the Commission today is the Final Rulemaking Order concerning revisions to the Commission's requirements for Natural Gas Supplier (NGS) licensing that, among other things, removes the exemption for marketing services consultants, establishes new definitions and clarifies the NGS licensing requirements for "aggregators" and "brokers." These changes better reflect the statute as well as current business standards and practices. Importantly, these changes also provide better symmetry and continuity between the treatment of licensed entities on the electric side with entities subject to our NGS licensing requirements, both of which are providing the same service to the competitive market.

As I stated in October 2011 when the Commission first initiated this rulemaking process, "I believe it is necessary for the Commission to periodically review both the Public Utility Code and our regulations to ensure that their purpose is being properly effectuated." I continue to believe that it is appropriate to periodically review statutory requirements, regulations, and policy statements to ensure that all are in synch, are being properly effectuated and reflect current standards.

I want to commend the good work of staff as well as the thoughtful comments received that resulted in today's Final Rulemaking Order. This rulemaking recognizes the important role aggregators and brokers have come to play in the natural gas competitive retail market and provides more clarity to the natural gas industry and more transparency to consumers regarding what is expected of these entities. Furthermore, using similar terminology across the electric and natural gas industries will reduce customer confusion and will allow companies that supply or sell both commodities to more easily market their products across the Commonwealth.

I remain steadfast in my belief that a functioning natural gas competitive retail market represents an economic opportunity and that this Commission should continue to actively explore ways to remove barriers to retail natural gas competition. I look forward to working with all interested parties going forward to further strengthen the state of natural gas competition in Pennsylvania.

DATE: August 15, 2013

PAMELA A. WITMER
COMMISSIONER

FRANK CALIVA III
PA ENERGY MARKETERS
COALITION
STRATEGIC COMMUNICATIONS
1012 14TH ST NW SUITE 1106
WASHINGTON DC 20005

MICHAEL GRUIN ESQ
STEVENS & LEE
17 N SECOND ST
16TH FLOOR
HARRISBURG PA 17101

HARRY KINGERSKI
SPARK ENERGY GAS LP
2105 CITYWEST BLVD
SUITE 100
HOUSTON TX 77042-2836

THOMAS J SNISCAK ESQ
HAWKE MCKEON & SNISCAK LLP
100 NORTH TENTH STREET
HARRISBURG PA 17101

CRAIG G GOODMAN PRES
NATIONAL ENERGY
MARKETERS ASSN
3333 K ST NW SUITE 110
WASHINGTON DC 20007

KEVIN MOODY ESQ
PIOGA
212 LOCUST STREET
SUITE 300
HARRISBURG PA 1710-1510

ARON J BEATTY
OFFICE OF CONS ADVOCATE
555 WALNUT STREET
5TH FLOOR FORUM PLACE
HARRISBURG PA 17101-1923

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held November 14, 2013

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
James H. Cawley
Pamela A. Witmer
Gladys M. Brown

Petition for Reconsideration of the Commission's
Rulemaking regarding Licensing Requirements for
Natural Gas Suppliers Regulations at 52 Pa. Code §
62.101 – § 62.102

L-2011-2266832

ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition is a Petition for Clarification and/or Reconsideration (Petition) filed by Washington Gas Energy Services (Washington Gas) on August 30, 2013, in the above-captioned proceeding. The Petition refers to the Commission's Final Rulemaking Order that was issued on August 15, 2013 (*August 15th Final Rulemaking Order*), which set forth final form regulations regarding the scope of the licensure of Natural Gas Suppliers. No Response to the Petition has been filed. For the reasons set forth herein, we will grant the Petition and will modify the *August 15th Final Rulemaking Order* by revising the definition of nontraditional marketers set forth in our final regulations.

Background

On June 22, 1999, Governor Thomas J. Ridge signed into law the Natural Gas Choice and Competition Act, effective July 1, 1999, 66 Pa. C.S. §§ 2201-2212 (Act). Pursuant to the Act, beginning on November 1, 1999, retail customers were given the ability to choose a Natural Gas Supplier (NGS) to provide them with natural gas supply services.

Section 2208(a) of the Act requires that no entity can engage in the business of an NGS unless it holds a license issued by the Commission. 66 Pa. C.S. § 2208(a). The term NGS is defined, in part, as:

An entity other than a natural gas distribution company, but including natural gas distribution company marketing affiliates, which provides natural gas supply services to retail gas customers utilizing the jurisdictional facilities of a natural gas distribution company.

66 Pa. C.S. § 2202. Further, the term “natural gas supply services” is defined, in part, as “the sale or arrangement of the sale of natural gas to retail gas customers,” 66 Pa. C.S. § 2202.¹

On June 24, 1999, following the passage of the Act, the Commission issued a Tentative Order establishing a draft licensing application for the interim licensing of NGSs. On July 15, 1999, the Commission issued a Final Order, at Docket No. M-00991248F0002, that adopted the interim licensing procedures and license application for NGSs. The Final Order required all suppliers of retail natural gas supply services to obtain an NGS license except those natural gas local distribution companies providing

¹ Specifically, Section 2202 of the Act, 66 Pa. C.S. § 2202, defines natural “gas supply services” as including (1) the sale or arrangement of the sale of natural gas to retail customers; and (2) services that may be unbundled by the Commission under section 2203(3) of the Act (relating to standards for restructuring of the natural gas utility industry) and excluding distribution service.

service within their certificated service territories and municipal utilities providing service within their corporate or municipal limits.

Subsequently, in 2000, the Commission adopted a *Proposed Rulemaking Order* that revised its interim licensing procedures and promulgated proposed regulations governing the licensing requirements for NGSs. *See* 52 Pa. Code §§ 62.101 – 114. *See Licensing Requirement for Natural Gas Suppliers*, Proposed Rulemaking Order, Docket No. L-00000150, 30 *Pa.B.* 3073 (June 17, 2000). The Commission stated that its initial interpretation of the Act had been that every entity that engages in an activity listed as that undertaken by a natural gas supplier must be licensed. However, the Commission’s proposed rulemaking acknowledged that some activities may be undertaken by entities that will not have any direct physical or financial responsibility on the procurement of the customer’s natural gas. Accordingly, in the proposed regulations, the Commission decided to exempt from licensing two types of entities that worked as brokers or agents for NGSs and retail customers: marketing services consultant and nontraditional marketer. The proposed regulation set forth definitions of the terms “marketing services consultant” and “nontraditional marketer” and established an exemption from licensing for these entities. *See* 52 Pa. Code §§ 62.101, 62.102(d)-(e).

The Commission issued its June 2000 Proposed Rulemaking Order and corresponding proposed regulations for public comment. Some commenters supported the exemptions and others, including the Independent Regulatory Review Commission (IRRC), opposed them. In the subsequent Final Rulemaking Order, the Commission determined that marketing services consultants and nontraditional marketers were not engaged in the *sale or arranging* of natural gas supply services to retail consumers. Thus, the Commission concluded that these two entities fell outside of the definition of an NGS set forth in Section 2202 of the Act.

Furthermore, rather than require these entities to obtain a license themselves, the regulations emphasized that the licensed NGSs would be responsible for any violations of the statute, regulations or orders or for any fraudulent, deceptive or other unlawful marketing or billing acts committed by a marketing services consultant or nontraditional marketer. *See* 52 Pa. Code § 62.102 (relating to scope of licensure). *See also* 52 Pa. Code § 62.110(a)(3) (NGSs must identify nontraditional marketers and marketing services consultants who are currently or will be acting as agents for the licensee in the upcoming year).

The regulations were finalized by the Commission in July 2001 in *Licensing Requirements for Natural Gas Suppliers, Final Rulemaking Order*, Docket No. L-00000150, 31 *Pa. B.* 3943 (July 21, 2001).

By Order entered January 13, 2012, the Commission initiated a rulemaking to review the scope of the NGS licensing regulations at 52 Pa. Code § 62.101 (relating to definitions) and § 62.102 (relating to scope of licensure). The Commission initiated the instant rulemaking proceeding to determine (1) if its current NGS licensing regulations conform with the plain language of the Act and reflect the current business plans of NGSs appearing before it; and (2) whether continuing certain licensing exemptions was in the public interest. Specifically, the rulemaking was initiated to address whether or not to maintain the exemptions from the licensing requirement for marketing services consultants and nontraditional marketers. Furthermore, the Commission requested comments on whether it was appropriate to remove responsibility from a licensed NGS for violations of the Public Utility Code, and applicable Commission regulations, orders and directives and for fraudulent, deceptive or other unlawful marketing or billing acts committed by a marketing service consultant or a nontraditional marketer.

In the *Proposed Rulemaking Order*, the Commission suggested the following revisions to its NGS licensing regulations at 52 Pa. Code 62.101-62.110: (1) deletion of the “marketing service consultant” and “nontraditional marketer” definitions; (2) the deletion of the exemptions set forth in Subsections 62.102 (d) and (e) of the regulations and (3) the deletion of Subsection 62.110 (a)(3) that requires a licensee to report the names and addresses of nontraditional marketers and marketing services consultants who are acting or will be acting as agents for the licensee in the upcoming year.

Comments to the proposed revisions were filed by Washington Gas, IRRC, National Energy Marketers Association (NEMA), Spark Energy Gas, LP, Retail Energy Supply Association (RESA) and the Pennsylvania Energy Marketers Coalition (PEMC). Based upon these comments, the Commission suggested further amendments to the NGS licensing regulations to add the definitions “aggregator,” “broker,” and “nonselling marketer” and to incorporate a revised definition of “nontraditional marketer.” The Commission issued its further revisions to the proposed regulations as an Advanced Notice of Final Rulemaking (ANOFR), entered February 28, 2013, and invited additional comments.

Specifically, the ANOFR proposed to continue the exemption from licensure for nontraditional marketers, but proposed the following new definition of nontraditional marketers:

NONTRADITIONAL MARKETER—A COMMUNITY-BASED ORGANIZATION, CIVIC, FRATERNAL OR BUSINESS ASSOCIATION, OR COMMON INTEREST GROUP THAT WORKS WITH A LICENSED NGS AS AN AGENT TO MARKET NATURAL GAS SERVICE TO ITS MEMBERS OR CONSTITUENTS. THE NONTRADITIONAL MARKETER MAY NOT REQUIRE ITS MEMBERS OR CONSTITUENTS TO OBTAIN ITS NATURAL GAS SERVICE THROUGH A

**SPECIFIC LICENSED NGS AND MAY NOT BE COMPENSATED BY THE
LICENSED NGS IF MEMBERS OR CONSTITUENTS ENROLL WITH THE
LICENSED NGS.** (Emphasis added).

Comments to the ANOFR were filed by the RESA, NEMA, PEMC, the Pennsylvania Independent Oil and Gas Association (PIOGA), and the Office of Consumer Advocate (OCA). While these parties raised concerns related to various aspects of the proposed rulemaking order, which we then addressed in the final rulemaking order, none of the parties expressed opposition to the Commission's proposed new definition of "Nontraditional marketer," and all seemed to agree that it was reasonable to exempt nontraditional marketers from the licensing requirement. However, no party specifically addressed the "no-compensation" limitation in the new definition. Accordingly, in the Final Rulemaking Order issued August 15, 2013, the Commission approved the proposed new definition of Nontraditional Marketer that was included in the ANOPR (with minor format changes).

Washington Gas filed the instant petition seeking clarification on one aspect of the Commission's new definition of "Nontraditional Marketer," namely, the portion of the definition that addresses the payment of compensation to Nontraditional Marketers. No responses to the instant petition were filed.

Discussion

The Public Utility Code (Code) establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. § 703(f) and § 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must also be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of

a final decision. The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 1982 Pa. PUC Lexis 4, *12-13 (1982):

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that: “[p]arties . . . , cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them . . .” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Furthermore, the Commission has held that a Petition for Clarification must meet the same standard as a Petition for Reconsideration.

See Petition of PECO Energy Company for Approval of its Revised POR Program, Docket No. P-2009-2143607 (Opinion and Order issued August 10, 2010).

In considering this Petition, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). Any argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

Since we did not have the benefit of any comments regarding the “no compensation” limitation in the proposed rulemaking order and because Washington Gas has raised some legitimate concerns, these are new and novel arguments and, accordingly, we shall exercise our discretion to reconsider our prior determination on this issue.

In its petition, Washington Gas states that the in the final form regulation, the exemption from the licensing requirement for a nontraditional marketer is limited only to

those community-based civic, fraternal or business associations that receive no compensation from NGSs. As currently written, the new definition of Nontraditional Marketer set forth in the final form regulation states that “A Nontraditional Marketer.....MAY NOT BE COMPENSATED BY THE LICENSED NGS IF MEMBERS OR CONSTITUENTS ENROLL WITH THE LICENSED NGS.”

Washington Gas notes that the current regulation at 52 Pa. Code §62.102 exempt nontraditional marketers from the requirement of obtaining a license because the Commission had determined that nontraditional marketers fall outside of the Act’s definition of NGS since they are not engaged in the sale or arranging of natural gas supply to retail customers. Accordingly, the existing regulation permits the use of Community-based Civic, Fraternal or Business Associations to market natural gas services in the Commonwealth. Washington Gas asserts that such arrangements are not unusual, and have proven to be an effective method of expanding energy choice to residential and small business customers.

Washington Gas asserts that it agrees with the Commission that civic and community organizations should not be required to obtain a license in order to market natural gas services to their members. It also asserts, however, that there is no valid reason why the existence of a compensation arrangement between a nontraditional marketer and an NGS should change this conclusion. Washington Gas notes that the existing regulations at 52 Pa. Code §§ 62.101-102 do not include any limitation that would preclude nontraditional marketers from receiving compensation from NGSs. Conversely, the current regulations clearly do not prohibit the receipt of compensation from an NGS.

Washington Gas asserts that limitation in the new definition of nontraditional marketer could be interpreted to mean that Nontraditional Marketers are *not necessarily*

compensated by the NGS, or that Nontraditional Marketers *may or may not be* compensated by the NGS. But the Commission should clarify that this language does not mean that Nontraditional Marketers must not be compensated by the NGS.

Washington Gas states that requiring community and civic organizations to obtain an NGS license in order to receive compensation from their NGS partners will have a chilling effect on these arrangements, as most organizations would have no interest in taking the steps necessary to obtain a license and remain compliant with the rules and regulations that go along with being an NGS, as RESA discussed in its comments to the ANOPR, at p. 6.

Furthermore, Washington Gas asserts that the August 15th Final Rulemaking Order does not discuss why such a strict limitation is imposed or the rationale behind its imposition. Accordingly, Washington Gas states that since there is no discussion of the “no-compensation” limitation for nontraditional marketers in the Final Rulemaking Order, this issue appears to have been overlooked and its Petition for Clarification/Reconsideration should be granted to fully address this issue.

Alternatively, Washington Gas requests that instead of clarifying its intent regarding the new definition of Nontraditional Marketer, the Commission should revise the new definition to exclude the language which states that the Nontraditional Marketer “MAY NOT BE COMPENSATED BY THE LICENSED NGS IF MEMBERS OR CONSTITUENTS ENROLL WITH THE LICENSED NGS.” Washington Gas asserts that removing the limiting language would be consistent with the current regulation and would reflect the current business practices of NGSs in the Commonwealth.

Upon our review and consideration of the Washington Gas’ petition, we agree that the definition of Nontraditional Marketer set forth in our prior order should be amended.

First of all, the Commission notes that the current regulation, which has been in place since 2001, contains no such limitation on a nontraditional marketer receiving compensation from an NGS, and there was no evidence in the record presented to suggest that there is a need for such a limitation. The Commission acknowledges that no objection has been made by any of the commenters regarding prohibiting a Nontraditional Marketers from receiving some form of compensation from the NGS based on the enrollment of the organization's members.

Furthermore, the receipt of a fee does not bring the Nontraditional Marketer within the Act's definition of "Natural Gas Supplier," because the Nontraditional Marketer will still not be engaged in the sale or arranging of natural gas supply service to retail customers. In situations where a Nontraditional Marketer receives compensation from the NGS, customers still contract directly with the NGS for supply, and the NGS is still responsible for any violations of the statute, regulations, and orders for acts committed by the Nontraditional Marketer.

In the final form regulation in the present docket, the Commission acknowledged that it is reasonable not to require Community-based Civic, Fraternal or Business Associations to obtain an NGS license, on the condition that the organization's members are not required to purchase the services from the endorsed NGS and if the offer is accepted the contract is between the member and the NGS. Accordingly, since no rationale was presented for adding a new limitation to the Nontraditional Marketer definition that would have the effect of requiring licensure for Nontraditional Marketers that receive a fee from an NGS based on members who enroll with the NGS, the Commission will revise the new definition of nontraditional marketer in the final form regulation by deleting this limitation; **THEREFORE,**

IT IS ORDERED:

1. That the Commission hereby grants the Petition for Clarification and/or Reconsideration (Petition) filed by Washington Gas Energy Services.
2. That the Commission hereby revises the Annex to its August 15, 2013 Final Rulemaking Order (August 15th Final Rulemaking Order) in the above-captioned proceeding by modifying the definition of nontraditional marketer set forth in 52 Pa. Code § 62.101 to read as follows:

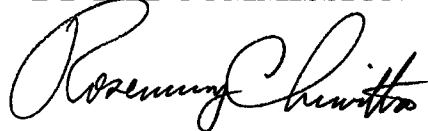
NONTRADITIONAL MARKETER—A COMMUNITY-BASED ORGANIZATION, CIVIC, FRATERNAL OR BUSINESS ASSOCIATION, OR COMMON INTEREST GROUP THAT WORKS WITH A LICENSED NGS AS AN AGENT TO MARKET NATURAL GAS SERVICE TO ITS MEMBERS OR CONSTITUENTS. A NONTRADITIONAL MARKETER MAY NOT REQUIRE ITS MEMBERS OR CONSTITUENTS TO OBTAIN ITS NATURAL GAS SERVICE THROUGH A SPECIFIC LICENSED NGS.
3. That the Secretary's Bureau shall serve a copy of the instant Order granting reconsideration of the August 15th Final Rulemaking Order on all jurisdictional natural gas distribution companies, natural gas suppliers, the Office of Consumer Advocate, the Office of Small Business Advocate and all other parties that filed comments at Docket No. L-2008-2069114, Natural Gas Distribution Companies and the Promotion of Competitive Retail Markets.
4. That the Secretary's Bureau shall submit the August 15th Final Rulemaking Order, the instant Order and the revised Annex A to the Governor's Budget Office for review of fiscal impact and the Office of Attorney General for approval as to legality.
5. That the Secretary's Bureau shall submit the August 15th Final Rulemaking Order, the instant Order and the revised Annex A for review by the designated standing committees of both houses of the General Assembly, and for review and approval by the Independent Regulatory Review Commission.

6. That the Secretary's Bureau shall certify the August 15th Final Rulemaking Order, the instant Order and the revised Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

7. That the final regulations become effective upon publication in the *Pennsylvania Bulletin*.

8. That a copy of the instant Order and the revised Annex A shall be posted on the Commission's website at the Office of Competitive Market Oversight's web page.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta", written in a cursive style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: November 14, 2013

ORDER ENTERED: November 14, 2013

ANNEX A
TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
SUBPART C. FIXED SERVICE UTILITIES
CHAPTER 62. NATURAL GAS SUPPLY CUSTOMER CHOICE
Subchapter D. LICENSING REQUIREMENTS FOR NATURAL GAS
SUPPLIERS

§ 62.101. Definitions.

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

* * * * *

AGGREGATOR—AN ENTITY, LICENSED BY THE COMMISSION, THAT PURCHASES NATURAL GAS AND TAKES TITLE TO IT AS AN INTERMEDIARY FOR SALE TO RETAIL CUSTOMERS.

* * * * *

BROKER —AN ENTITY, LICENSED BY THE COMMISSION, THAT ACTS AS AN AGENT OR INTERMEDIARY IN THE SALE AND PURCHASE OF NATURAL GAS BUT DOES NOT TAKE TITLE TO NATURAL GAS SUPPLY.

* * * * *

Marketing—The publication, dissemination or distribution of informational and advertising materials regarding the LICENSED NGS's NATURAL GAS SUPPLY services and products to the public by personal contact, print, broadcast, electronic media, direct mail or by telecommunication.

[Marketing services consultant—A commercial entity, such as a telemarketing firm or auction-type website, or energy consultant, that under contract to a licensee or a

retail customer, may act as an agent to market natural gas supply services to retail gas customers for the licensee or may act as an agent to recommend the acceptance of offers to provide service to retail customers. A marketing services consultant:

- (i) Does not collect natural gas supply costs directly from retail customers.**
- (ii) Is not responsible for the scheduling of natural gas supplies.**
- (iii) Is not responsible for the payment of the costs of the natural gas to suppliers, producers, or NGDCs.]**

* * * * *

***NONSELLING MARKETER*—AN INDIVIDUAL OR COMMERCIAL ENTITY, SUCH AS A TELEMARKETING FIRM, DOOR-TO-DOOR SALESMAN OR COMPANY, OR AUCTION-TYPE WEBSITE, UNDER CONTRACT TO A LICENSED NGS, THAT PROVIDES MARKETING SERVICES TO RETAIL CUSTOMERS FOR NATURAL GAS SUPPLY SERVICES.**

***[Nontraditional marketer*—A community-based organization, civic, fraternal or business association, or common interest group that works with a licensed supplier as an agent to market natural gas supply services to its members or constituents. A nontraditional marketer:**

- (i) Conducts its transactions through a licensed NGS.**
- (ii) Does not collect revenues directly from retail customers.**
- (iii) Does not require its members or constituents to obtain its natural gas service through the nontraditional marketer or a specific licensed NGS.**
- (iv) Is not responsible for the scheduling of natural gas supplies.**

(v) Is not responsible for the payment of the costs of the natural gas to its suppliers or producers.]

NONTRADITIONAL MARKETER—A COMMUNITY-BASED ORGANIZATION, CIVIC, FRATERNAL OR BUSINESS ASSOCIATION, OR COMMON INTEREST GROUP THAT WORKS WITH A LICENSED NGS AS AN AGENT TO MARKET NATURAL GAS SERVICE TO ITS MEMBERS OR CONSTITUENTS. A NONTRADITIONAL MARKETER MAY NOT REQUIRE ITS MEMBERS OR CONSTITUENTS TO OBTAIN ITS NATURAL GAS SERVICE THROUGH A SPECIFIC LICENSED NGS.

* * * * *

§ 62.102. Scope of licensure.

(a) An NGS, INCLUDING AN AGGREGATOR OR A BROKER, may not engage in marketing, or may not offer to provide, or provide natural gas supply services to retail customers until it is granted a license by the Commission.

* * * * *

[(d) A nontraditional marketer is not required to obtain a license. The licensed NGS shall be responsible for violations of 66 Pa.C.S. (relating to the Public Utility Code), and applicable regulations of this title, orders and directives committed by the nontraditional marketer and fraudulent, deceptive or other unlawful marketing or billing acts committed by the nontraditional marketer.

(e) A marketing services consultant is not required to obtain a license. The licensed NGS shall be responsible for violations of 66 Pa.C.S. and applicable regulations of this title, orders and directives committed by the marketing services consultant and fraudulent, deceptive or other unlawful marketing or billing acts committed by the marketing services consultant.]

(D) A NONTRADITIONAL MARKETER IS NOT REQUIRED TO OBTAIN A LICENSE. THE LICENSED NGS SHALL BE RESPONSIBLE FOR VIOLATIONS OF 66 PA.C.S. (RELATING TO THE PUBLIC UTILITY CODE), AND APPLICABLE REGULATIONS OF THIS TITLE, ORDERS AND DIRECTIVES COMMITTED BY THE NONTRADITIONAL MARKETER AND FRAUDULENT, DECEPTIVE OR OTHER UNLAWFUL MARKETING OR BILLING ACTS COMMITTED BY THE NONTRADITIONAL MARKETER.

(E) A NONSELLING MARKETER UNDER CONTRACT TO MORE THAN ONE LICENSED NGS SHALL BE REQUIRED TO OBTAIN A LICENSE.

(F) A NONSELLING MARKETER UNDER CONTRACT TO ONLY ONE LICENSED NGS IS NOT REQUIRED TO OBTAIN A LICENSE. THE LICENSED NGS SHALL BE RESPONSIBLE FOR VIOLATIONS OF 66 PA. C.S. AND APPLICABLE REGULATIONS OF THIS TITLE, ORDERS AND DIRECTIVES COMMITTED BY THE NONSELLING MARKETER AND FRAUDULENT, DECEPTIVE OR OTHER UNLAWFUL MARKETING OR BILLING ACTS COMMITTED BY THE NONSELLING MARKETER.

§ 62.110. Reporting requirements.

(a) A licensee shall file an annual report on or before April 30 of each year, for the previous calendar year. The annual report shall contain the following information:

* * * * *

[(3) The names and addresses of nontraditional marketers and marketing services consultants who are currently or will be acting as agents for the licensee in the upcoming year.]

(3) THE NAMES AND ADDRESSES OF NONTRADITIONAL MARKETERS
AND NONSELLING MARKETERS WHO ARE CURRENTLY OR WILL BE
ACTING AS AGENTS FOR THE LICENSEE IN THE UPCOMING YEAR.

* * * * *



COMMONWEALTH OF PENNSYLVANIA
PUBLIC UTILITY COMMISSION
400 NORTH STREET
HARRISBURG, PA 17120

ROBERT F. POWELSON
CHAIRMAN

March 12, 2014

The Honorable John F. Mizner
Chairman
Independent Regulatory Review Commission
14th Floor, Harristown II
333 Market Street
Harrisburg, PA 17101

Re: L-2011-2266832/57-288, Final Rulemaking Re Licensing
Requirements for Natural Gas Suppliers
52 Pa. Code, Chapter 62

Dear Chairman Mizner:

Enclosed please find one (1) copy of the regulatory documents concerning the above-captioned rulemaking. Under Section 745.5(a) of the Regulatory Review Act, the Act of June 30, 1989 (P.L. 73, No. 19) (71 P.S. §§745.1-745.15) the Commission, on April 3, 2012, submitted a copy of the Notice of Proposed Rulemaking to the Senate Committee on Consumer Protection and Professional Licensure, the House Consumer Affairs Committee and the Independent Regulatory Review Commission (IRRC). This notice was published at 42 *Pa.B.* 2034 on April 14, 2012. The Commission also provided the Committees and IRRC with copies of all comments received in compliance with Section 745.5(b.1).

In preparing this final form rulemaking, the Commission has considered all comments received from the Committees, IRRC and the public.

Sincerely,

Robert F. Powelson

Enclosures

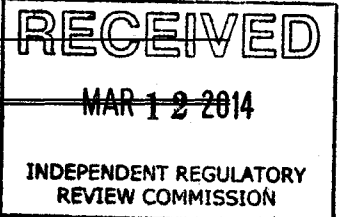
pc: The Honorable Robert M. Tomlinson
The Honorable Lisa Boscola
The Honorable Robert Godshall
The Honorable Peter J. Daley, II
Legislative Affairs Director Perry
Chief Counsel Pankiw
Assistant Counsel Screven and Scott
Mr. Killian
Regulatory Coordinator DelBiondo

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT
TO THE REGULATORY REVIEW ACT

ID Number: L-2011-2266832/57-288

Subject: Final Rulemaking Re Licensing Requirements for
Natural Gas Suppliers

Pennsylvania Public Utility Commission



TYPE OF REGULATION

- ☐ Proposed Regulation
- ☐ Final Regulation with Notice of Proposed Rulemaking Omitted.
- ☒ Final Regulation
- ☐ 120-day Emergency Certification of the Attorney General
- ☐ 120-day Emergency Certification of the Governor

FILING OF REPORT

<u>Date</u>	<u>Signature</u>	<u>Designation</u>
3/12/14	S. Suggs	HOUSE COMMITTEE (Godshall) Consumer Affairs
3/12/14	Mary M. Walmer	SENATE COMMITTEE (Tomlinson) Consumer Protection and Professional Licensure
3/12/14	K. Cooper	Independent Regulatory Review Commission
		Attorney General
		Legislative Reference Bureau