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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

Docket No. L-2011-2266832

COMMENTS OF
THE RETAIL ENERGY SUPPLY ASSOCIATION

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Dated: June 13, 2012

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I. INTRODUCTION

By Order entered January 13, 2012, in the above-captioned matter, the Pennsylvania Public Utility Commission ("Commission") sought comment on proposed regulations that would remove the exemption from licensing for marketing services consultants and nontraditional marketers. The Retail Energy Supply Association ("RESA")¹ is a broad and diverse group of retail energy suppliers who share the common belief that competitive retail energy markets deliver a more efficient and favorable outcome for customers than a traditional monopoly regulated utility structure. RESA strives to provide input to this Commission and to work with stakeholders to continue to grow competitive retail natural gas and competitive options for residential, commercial and industrial customers.

RESA thanks the Commission for this opportunity to submit input by Comments and believes RESA's suggested modifications or revisions will promote natural gas competition in Pennsylvania.

In sum, RESA's revisions and modifications suggest the continuation of the exemption for marketing services consultants and nontraditional marketers who are in essence working for a single Natural Gas Supplier ("NGS").² The NGS responsibility for such marketers and

¹ RESA is a non-profit trade association made up of a broad range of companies that are involved in wholesale generation of electricity and the competitive supply of natural gas to residential, commercial and industrial customers. RESA and its members are actively involved in the development of retail and wholesale competition in natural gas and electricity markets in various states throughout the country, including Pennsylvania. RESA's members include: Champion Energy Services, LLC; ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus; Reliant; Stream Gas & Electric, Ltd.; TransCanda Power Marketing Ltd. and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² RESA's Comments in Rulemaking Re: Marketing and Sales for the Retail Residential Energy Market, Docket No. 2010-2208332 (filed Dec. 21, 2011), at 2 (advocating for the clarification of the definition of "agent" to clarify that the term only includes those entities acting on behalf of a single licensed NGS).

consultants and reporting obligations will remain the same as under the status quo. Furthermore, for nontraditional marketers who receive compensation for essentially functioning as a conduit or referral agent for an NGS, the status quo's exemption, NGS responsibility, and reporting requirements should continue. RESA believes that competition will be promoted by not having such nontraditional marketers, including but not limited to civic organizations, businesses who may post brochures or flyers from an NGS, fraternal organizations or educational institutions, be subject to licensure and all regulatory requirements that follow, such as bonds, reporting and other requirements. In short, RESA believes that licensure of such nontraditional marketers, in particular, will have a chilling effect upon their participation and dissemination of information on behalf of an NGS and creates a barrier to these types of sales channels. Thus, the best balance of market and regulatory interests is to not have them licensed and to continue to have the NGS responsible for sales practices and all necessary reporting. Additionally, if "referring" nontraditional marketers are required to be licensed, the Commission will take on an excessive administrative burden to rule on potentially hundreds (or more) licensing applications and to provide regulatory oversight over these licensed entities on an ongoing basis.

RESA submits that its recommendation to exempt from licensing certain marketing service consultants and nontraditional marketers to conduct natural gas-related sales and marketing activities for a single NGS is consistent with the Commission's December 10, 2009 Secretarial Letter notification to Electric Generation Suppliers at Pa. PUC Docket No. M-2009-2082042 (copy attached as **Appendix "A"**). Moreover, the recognition and licensure treatment for "Aggregators" and "Brokers or Marketers" is consistent with the Electric Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2803.

Regarding reporting under Section 62.110(a)(3), RESA submits that reporting of non-licensed marketers or consultants by an NGS for a firm, partnership, organization, institution, or business should be required of the NGS itself, which will hold the comprehensive sales data, as opposed to individual employees or members of the nontraditional entity which may not actually track sales data in its role.

If, however, a marketing services consultant or nontraditional marketer functions as an “Aggregator” or a “Broker or Marketer”, RESA supports the Commission requiring these entities to be licensed and to be responsible for their own marketing practices,. The terms “Aggregators” and “Broker or Marketer” do not presently appear in the Commission’s definitions at 52 Pa. Code §62.101 and RESA offers definitions in its Comments for those terms which are similar to the terms contained at 66 Pa.C.S. § 2803 for comparable entities on the electric competition side.

RESA also submits that the Commission should consider modified or lesser bonding requirements for Aggregators or a Broker or Marketer so as to ensure that bonding or security requirements do not create a barrier to such entities participating in the market.

II. COMMENTS ON PROPOSED REVISIONS TO SECTIONS 62.101, 102(d) AND (e) AND 62.110(a)(3)

A. Section 62.101. Definitions.

The Commission’s January 13, 2012 Order proposes to delete the definitions of “marketing service consultant” and “nontraditional marketer.” Because of the revisions RESA proposes to Section 62.102 *infra*, the existing definitions of marketing services consultant and nontraditional marketers should remain in the regulations. However, the following definitions should be added so there is symmetry and continuity between the treatment of licensed entities on the electric side with the natural gas licensure regime. By implementing this definitional

symmetry, the Commission will provide much needed transparency. Specifically, the definition for “Aggregator” should be added and RESA suggests the following:

Aggregator – an entity that purchases natural gas and takes title to it as an intermediary for sale to retail customers.

This definition tracks that for electric competition. *See* 66 Pa.C.S. §2803.

RESA also suggests that a definition be added for “broker or marketer,” and suggests the following:

Broker or Marketer – an entity not exempt from licensure under Section 62.102(d) or (e) that acts as an intermediary that does more than simply refer a potential customer to an NGS such as, but not limited to, arranging for the sale of natural gas to the customer, evaluates NGS offers, issues requests for proposals for service to the customer, schedules natural gas supplies, or payment of natural gas supplies, notwithstanding that the entity may not take title to the natural gas.

This definition is consistent with the definition on the electric side at 66 Pa.C.S. §28034

“Broker or Marketer.”

B. Subsections 62.102(d) and (e).

RESA believes that the following revisions to these sections will more closely align natural gas licensure treatment with licensure treatment of analogous entities that do the same or similar functions on the electric competition side.

Specifically, RESA believes the status quo with some modifications should continue with respect to marketing services consultants and nontraditional marketers who are compensated and authorized by a single license NGS to conduct natural gas-related marketing and sales activities as an employee, agent, independent contractor, representative, or vendor. As RESA explained in another Commission rulemaking docket which is still pending, the definition of “agent” should be clarified to only include a person conducting marketing and sales activities on behalf of a single licensed NGS. Thus, to the extent that a 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 (as the NGS would be directly responsible for its agent’s activities and for reporting requirements under Section 62.110(a)(3).

In contrast, for those marketing services consultants or nontraditional marketers who function as an “Aggregator”³ or a “Broker or Marketer”⁴ providing or arranging for natural gas service to be supplied to an end-user, including but not limited to collection of payment, scheduling of natural gas supplies, or payment of natural gas supplies, RESA supports a change in the Commission’s regulations to require that these entities be licensed with the Commission. Since these entities are not agents of a NGS, but yet, directly arrange for a customer’s natural gas supply services, natural gas aggregators and broker/marketers should go through a licensing process and have their marketing activities directly regulated by the Commission. Otherwise, there will be a significant “blind spot” in the Commission’s regulatory oversight of all of entities that have direct interaction for the arrangement of supply with retail customers in the competitive market place.⁵

If the Commission adopts RESA’s proposed changes and requires aggregators and broker/marketers to be licensed as described herein, RESA provides that NGSs should not be responsible for marketing practices of these separately licensed aggregators and broker/marketers. Nor should NGSs be required to report their involvement with these entities in their annual reports except as to underlying customer data as discussed below. While aggregators and broker/marketers should be separately licensed, RESA is in favor of less burdensome licensing requirements. More specifically, aggregators and broker/marketers should

³ See RESA’s definition for this term in the preceding section.

⁴ See RESA’s definition for this term in the preceding section.

⁵ See Motion of Commissioner Witmer, Docket No. 2011-2266832, at 2-3 (dated Oct. 14, 2011).

have reduced bonding or security requirements. Broker/Marketers are typically not taking title to supply and, therefore, do not impose the same level of market risk associated with default on obligations to serve. Further, unnecessarily imposing the same financial requirements of an NGS on Brokers/Marketers could potentially put some entities out of business in Pennsylvania. Bonding or security could create a barrier to such entities participating in the market. Additionally, the Commission should not require aggregators and broker/marketers 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. Furthermore, these reports are likely to contain duplicate sales and load data as that of the aggregators and broker/marketers.

Notwithstanding RESA's position on aggregator and broker/marketer licensing, RESA believes that a continued licensing exemption should be extended to nontraditional marketers, such as employees or members of an independent organization, community-based organization, educational institution, media outlet, retailer, civic, fraternal or civic group or association, who for compensation from an NGS have a limited and passive role of recommending, referring or providing contact information to or from an NGS, and they should not be required to be licensed. As described above, if the Commission required these referring entities to be licensed, the Commission would chill their participation in the market place, could potentially block a subset of shopping customers from information on retail competition, and would subject the Commission to a flood of licensing applications. The NGS should continue to be responsible for them as under the status quo, and should continue to do reporting with certain modifications.

RESA offers the following revisions to 62.102: a revised subsection (d), new subsections (e), and (f), and former subsection (e) is modified as new subsection (g):

- (d) Marketing Services Consultants and Nontraditional Marketers compensated and authorized by a single licensed NGS to conduct natural gas-related marketing and sales activities as an employee, agent, independent contractor, representative, or vendor are not required to be licensed. 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 such marketing services consultant or nontraditional marketer, and fraudulent, deceptive or other unlawful marketing or billing acts committed by such marketing services consultant or nontraditional marketer.
- (e) Nontraditional marketers, such as employees or members of an independent organization, community-based organization, educational institution, media outlet, retailer, civic, fraternal or civic group or association, who for compensation from an NGS have the limited and passive role of recommending, referring or providing contact information to or from an NGS, are not required to be licensed. 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 such nontraditional marketers and fraudulent, deceptive or other unlawful marketing or billing acts committed by such nontraditional marketer.
- (f) Unless qualified for an exemption under subsections (d) and (e) above, a marketing services consultant or nontraditional marketer who functions as an "Aggregator" or arranges for the natural gas supply services as a "Broker or Marketer" providing or arranging for the natural gas service to be supplied to an end-user, including but not limited to collection and payment, scheduling of natural gas supplies, or payment of natural gas supplies, must be licensed. The NGS shall not be responsible for the actions of such Aggregator, Broker or Marketer, nor shall the NGS be responsible for reporting for them.

C. Subsection 62.110(a)(3).

Consistent with the foregoing revisions and reasons in support thereof, RESA submits that Section 62.110 (Reporting requirements). Subsection (a)(3) should be revised to read as follows:

- (3) The names and addresses of nontraditional marketers and marketing service consultants who are not subject to licensure pursuant to Section 62.102(d) and (e) in the upcoming year. For reporting marketers and consultants operating as a firm, partnership, organization, institution or business, its name and address and number of employees engaged in natural gas marketing and sales activities in Pennsylvania shall be sufficient.

III. CONCLUSION

Attached as "**Appendix B**" hereto is the Commission's existing regulations in pertinent part for Sections 62.101, 62.102 and 62.110, showing the revisions respectfully requested by RESA.

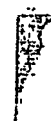
RESA appreciates and thanks the Commission for the opportunity to submit comments regarding these matters and will be available to provide input regarding the evolution of these regulations.

Respectfully submitted,



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PENNSYLVANIA PUBLIC UTILITY COMMISSION
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IN REPLY PLEASE
REFER TO OUR FILE

December 10, 2009

To: Electric Generation Suppliers

Docket No.: M-2009-2082042

The Commission, through the Office of Competitive Market Oversight, has become aware of an issue that has been raised in the context of some applications filed by electric generation suppliers, which has the potential to hinder development of a competitive market, particularly in the PPL Electric Utilities service territory where rate caps are expiring at the end of this month.

A question has arisen as to whether entities or individuals under contract with electric generation suppliers (EGSs) must be licensed by the Commission in order to provide marketing services, such as telemarketing, direct mail, newsletters, brochures or door-to-door activities. Due to uncertainty on the part of some EGSs as to the potential licensing requirements for entities or individuals with whom they have contracted to provide these services, and their resulting reluctance to proceed with marketing activities in PPL's service area, the Commission is providing this clarification.

The Electricity Generation Customer Choice and Competition Act (Act) requires EGSs, including brokers, marketers and aggregators, to obtain a license from the Commission to sell electricity or related services to retail customers in Pennsylvania. 66 Pa. Code §2803. The Commission's regulations further provide that an EGS may not engage in marketing prior to being licensed. 52 Pa. Code §54.32.

Since the Act went into effect, EGSs have frequently relied upon independent third parties to market their services especially to residential and small business consumers. These marketing services providers have solicited customers to purchase electricity from the EGS with whom they are under contract. While numerous Chief Counsel opinion letters have been provided over the past 12 years indicating that entities providing such services need not be licensed, many active EGSs are not aware of those opinions; and in those instances, the Commission itself was not asked to clarify these matters.

Similar questions have been clearly addressed by the Commission for the natural gas industry. Specifically, the Commission has expressly exempted from licensing those entities that provide marketing and sales support services to licensed natural gas suppliers (NGSs) under a contract. 52 Pa. Code §62.101. Just as the Commission would not require an NGS's own employees to be individually licensed to perform such functions, independent third parties providing marketing services on behalf of the NGS have not been required to obtain a license.

As long as third parties entities are working directly for an EGS, as an employee or independent contractor, and their activities are limited to providing marketing and sales support services, they are not engaged in the sale of electricity or related services to consumers. As marketing services providers, these entities need not be licensed by the Commission under the

Appendix A

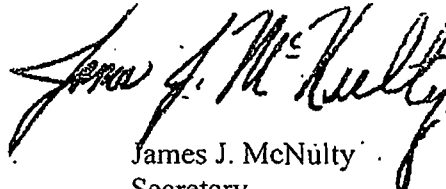
Act. Before these entities would become involved in arranging for electric service to be provided to end users, including the collection or payment of supply costs, they would be required to obtain a license. Going forward, as necessary, the Commission will not hesitate to further clarify activities requiring a license.

EGSs are reminded of their responsibility for any fraudulent, deceptive or other unlawful marketing or billing acts performed by their employees, agents or representatives. *See* 52 Pa. Code §54.43. For instance, if an independent marketing services provider under contract with the EGS misrepresents an offer to a consumer or uses deceptive practices to attract the customer to the EGS, the Commission will hold the EGS responsible. Such actions of the third party marketing services provider could result in the imposition of civil penalties on EGSs, including fines, license suspension or license revocation.

The Commission is aware that the business model of using independent contractors for marketing and sales support has caused customer service concerns in some states. Through OCMO, the Commission will be closely monitoring the issue in Pennsylvania and will evaluate this business model by November 30, 2010 to determine if steps are necessary to restrict or prohibit this practice.

Any questions about this letter should be directed to the Office of Competitive Market Oversight by email at ra-OCMO@state.pa.us or by calling the Director of Operations at 717-783-5331.

Very truly yours, .



James J. McNulty
Secretary

cc: Office of Competitive Market Oversight

APPENDIX B

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62.101. Definitions.

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

Act—The Natural Gas Choice and Competition Act (66 Pa.C.S. § § 2201—2212).

Aggregator – an entity that purchases natural gas and takes title to it as an intermediary for sale to retail customers.

Applicant—A person or entity seeking to obtain a license to supply retail natural gas supply services to retail customers.

Broker or Marketer – an entity not exempt from licensure under Section 62.102(d) or (e) that acts as an intermediary that does more than simply refer a potential customer to an NGS such as, but not limited to, arranging for the sale of natural gas to the customer, evaluates NGS offers, issues requests for proposals for service to the customer, schedules natural gas supplies, or payment of natural gas supplies, notwithstanding that the entity may not take title to the natural gas.

City natural gas distribution operation—A collection of real and personal assets used for distributing natural gas to retail gas customers owned by a city or a municipal authority, nonprofit corporation or public corporation formed under section 2212(m) of the act (relating to city natural gas distribution operations).

License—A license granted to an NGS under this subchapter.

Licensee—A person or entity that has obtained a license to provide natural gas supply services to retail customers.

Marketing—The publication, dissemination or distribution of informational and advertising materials regarding the NGS's 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.

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(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.

NGDC—Natural gas distribution company—As defined in section 2202 of the act (relating to definitions).

NGS—Natural gas supplier—As defined in section 2202 of the act.

Natural gas supply services—As defined in section 2202 of the act.

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.

Offer to provide service—The extension of an offer to provide services or products communicated orally or in writing to a customer.

Retail gas customer—As defined in section 2202 of the act.

Supplier of last resort—A supplier approved by the Commission under section 2207(a) of the act (relating to obligation to serve) to provide natural gas supply services to customers who contracted for natural gas that was not delivered, or who did not select an alternative NGS, or who are not eligible to obtain competitive natural gas supply, or who return to the supplier of last resort after having obtained competitive natural gas supply.

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§ 62.102. Scope of licensure.

(a) An NGS 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.

(b) An NGDC acting within its certified service territory as a supplier of last resort is not required to obtain a license.

(c) The owners/operators of a building or facility that manage the internal distribution system supplying a building or facility and supply natural gas and other related services to occupants of the building or the facility where the owners/operators, and not the occupants, are the direct purchasers of the natural gas supply services are not required to obtain a license.

~~(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) Marketing Services Consultants and Nontraditional Marketers compensated and authorized by a single licensed NGS to conduct natural gas-related marketing and sales activities as an employee, agent, independent contractor, representative, or vendor are not required to be licensed. 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 such marketing services consultant and nontraditional marketer, and fraudulent, deceptive or other unlawful marketing or billing acts committed by the marketing services consultant or nontraditional marketer.

(e) Nontraditional marketers, such as employees or members of an independent organization, community-based organization, educational institution, media outlet, retailer, civic, fraternal or civic group or association, who for compensation from an NGS have the limited and passive role of recommending, referring or providing contact information to or from an NGS, are not required to be licensed. 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 such nontraditional marketers and fraudulent, deceptive or other unlawful marketing or billing acts committed by such nontraditional marketer.

(f) Unless qualified for an exemption under subsections (d) and (e) above, a marketing services consultant or nontraditional marketer who functions as an "Aggregator" or arranges for the natural gas supply services as a "Broker or Marketer" providing or arranging for the natural gas service to be supplied to an end-user, including but not limited to collection and payment,

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scheduling of natural gas supplies, or payment of natural gas supplies, must be licensed. The NGS shall not be responsible for the actions of such Aggregator, Broker or Marketer, nor shall the NGS be responsible for reporting for them.

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§ 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:

(1) The total amount of gross receipts from the sales of natural gas supply services for the preceding calendar year.

(2) The total amount of natural gas sold during the preceding calendar year.

~~(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 marketing service consultants who are not subject to licensure pursuant to Section 62.102(d) and (e) in the upcoming year. For reporting marketers and consultants operating as a firm, partnership, organization, institution or business, its name and address and number of employees engaged in natural gas marketing and sales activities in Pennsylvania shall be sufficient.

(b) A licensee shall be required to meet periodic reporting requirements issued by the Commission to fulfill the Commission's duty under the act pertaining to reliability and to inform the Governor and General Assembly of the progress to a fully competitive natural gas market.

(c) The information requested in this section will be made available for public review upon request to the Commission subject to any rulings on confidentiality made by the Commission.

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