



National Energy Marketers Association

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL TRADE COMMISSION

Comments Regarding Ecompetition)

COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association hereby submits comments pursuant to the Commission's Notice of Opportunity for Comment in the July 24, 2002, Federal Register on possible anti-competitive efforts to restrict competition on the Internet.

NEM is a national, non-profit trade association representing wholesale and retail marketers of energy, telecom and financial-related products, services, information and related technologies throughout the United States, Canada and the U.K. NEM's Membership includes wholesale and retail suppliers of electricity and natural gas, independent power producers, suppliers of distributed generation, energy brokers, power traders, and electronic trading exchanges, advanced metering and load management firms, billing and information technology providers, credit, risk management and financial services firms, software developers, clean coal technology firms as well as energy-related telecom, broadband and internet companies.

This regionally diverse, broad-based coalition of energy, financial services and technology firms has come together under NEM's auspices to forge consensus and to

help resolve as many issues as possible that would delay competition. NEM members urge lawmakers and regulators to implement:

- Laws and regulations that open markets for natural gas, electricity and related products, services, information and technology in a competitively neutral fashion;
- Rates, tariffs, taxes and operating procedures that unbundle competitive services from monopoly services and encourage true competition on the basis of price, quality of service and provision of value-added services;
- Competitively neutral standards of conduct that protect all market participants;
- Accounting and disclosure standards to promote the proper valuation of energy assets, equity securities and forward energy contracts, including derivatives; and
- Policies that encourage investments in new technologies, including the integration of energy, telecommunications and Internet services to lower the cost of energy and related services.

NEM asserts that the Internet will likely become a significant, perhaps dominant vehicle to aggregate the supply and demand for energy as well as to facilitate the delivery of energy-related products, services and information. The Internet can lower operating costs, facilitate a wide array of value-added products and services, lower barriers to entry and provide an ideal platform for true price competition. By comparison, requiring wet signatures for enrollment of energy customers increases costs for suppliers to acquire customers, resulting in higher costs to consumers and a reduction in competitive options. Accordingly, NEM strongly supports Internet-based enrollment of energy consumers.

I. The Commission Should Adopt Rules to Implement the Federal Electronic Signatures in Global and National Commerce Act

As noted in NEM's comments on the Commission's proposed revisions to the telemarketing sales rule in Docket R411001, the migration of customers from utilities to competitive suppliers is significantly hampered in some states by wet signature

requirements. NEM is encouraged that some legislatures and Public Service Commissions have adopted telephonic and internet enrollment laws and rules to allow energy marketers to acquire customers on a more cost effective basis.¹ If this Commission decides in Docket R411001 to adopt the national do-not-call registry approach, contrary to the recommendations of NEM, it will in effect be taking away the telephonic enrollment option to competitive energy suppliers.² NEM strongly urges this Commission not to apply national do-not-call registry provisions to the competitive energy industry.³ Consequently, the Commission should ensure that there are other cost-effective means of customer contact. NEM urges the Commission to exercise its authority to promulgate uniform, national rules to implement the federal Electronic Signatures in Global and National Commerce Act.⁴ The current piecemeal approach of state adoption of electronic signature laws and regulations is contrary to the federal statute and is slowing the growth of the competitive energy market. Uniform, national rules on the use of electronic signatures would allow competitive energy marketers and the telemarketers acting on their behalf to enroll customers in a timely and cost-effective manner.

¹ See, e.g. New Jersey Permanent Statutes C.48.3-86; Ohio Administrative Code, 4901:1-21-06, Rules for Competitive Retail Electric Service.

² NEM recommended in its comments in Docket R411001 that energy consumer enrollment should be a matter of state and local jurisdiction. Entrusting the monitoring and enforcement of energy telemarketing with state Public Service Commissions will be appropriate until the country has implemented national uniform rules, including electronic signature rules, that permit the aggregation of large groups of customers across the country. NEM also urges that competitive suppliers use of customer lists continue to be permitted. NEM is also concerned that the transaction authorization and recordkeeping requirements of the TCPA Rule imposes duplicative and costly burdens on energy consumers as well as competitive suppliers and recommends that the energy industry UBP be followed for customer enrollment transactions.

³ Permitting an exemption for the competitive energy industry would be consistent with the exemption provided under the FTC Act for banks, credit unions, savings and loans, and common carriers. 15 U.S.C. § 45(a)(2).

⁴ 15 U.S.C. § 7001.

II. The Energy Industry Agreed to the Use of Internet Enrollment in its Uniform Business Practices Document

A diverse group of utilities, energy suppliers, regulators, vendors, consumers advocates and trade organizations participated in the development of the "Uniform Business Practices for Retail Energy Markets"⁵ (UBP) document. The primary goal of the UBP is to provide regulators and the industry with a set of "road tested" business practices based on the experience of competitive retail energy markets that should be used as guidelines to establish effective, low cost retail energy choice programs. The document presents a set of recommended business principles and practices to guide the interaction of various market participants where choice of a retail energy supplier is being made available. Chapter IV of the UBP pertains to Customer Enrollment and Switching, and Section C.8 provides that:

The Supplier must obtain Customer authorization to Switch via any one or more of the following methods, subject to verification requirements outlined in Section IV.E:

- a.** written authorization bearing a Customer's signature (original document signed or a fax copy of signed document) in accordance with Exhibit 3 – Written Enrollment;
- b.** telephone authorization in accordance with Exhibit 1 - Telephonic Enrollment;
- c.** electronic authorization in accordance with Exhibit 2 – Internet Enrollment; or
- d.** any additional methods deemed reasonable by the Applicable Regulatory Authority. Once a Supplier has enrolled (contracted with) its Customer, it effectuates the Switch by submitting a Switch Request with the Registration agent, following the business practices described below.

⁵ Uniform Business Practices for the Retail Energy Market, November 2001; for information visit www/ubpnet.org, sponsored by the Edison Electric Institute (EEI), the National Energy Marketers Association (NEM), the Coalition for Uniform Business Rules (CUBR), and the Electric Power Supply Association (EPSA).

The participants in the UBP process developed a detailed internet enrollment procedure to ensure adequate consumer protection measures would be implemented.⁶ Despite the recognition in the energy industry of the efficacy of the internet enrollment option, as

⁶ Chapter IV, Exhibit 2 of the UBP provides that:

A. Suppliers may enroll any Customer by means of the Internet provided that the terms and conditions of the agreement are publicly posted and accessible to the user. These terms and conditions must comply with all applicable legal requirements.

B. The rules to facilitate Internet Enrollment are outlined herein.

1. The means of all electronic Enrollment, renewal, re-negotiation and cancellation information transfer between the Customer and Supplier must be by an encrypted transaction using Secure Socket Layer or a similar encryption standard to ensure privacy of Customer information.

2. Any electronic agreement containing a Supplier's terms and conditions should be identified by a version number in order to ensure the ability to verify the particular agreement to which the Customer assents.

3. The Internet Enrollment procedure should prompt the Customer to print or save the terms and conditions to which the Customer assents and provide an option to have written terms and conditions sent by regular mail.

4. Upon request by the Customer, the Supplier should make available throughout the duration of the agreement, a copy of the terms and conditions of the agreement version number to which the Customer assents. The Supplier must provide to the Customer a toll-free telephone number, Internet means, or an electronic mail (e-mail) address for the Customer to request this information throughout the duration of the agreement.

5. The Internet Enrollment procedure should require the Customer to include, at a minimum, their name, service address, e-mail address, Utility account number and other unique identifier as required for Switch validation under Section IV.F to effectuate a sign-up, and to "accept" or "not accept" the terms and conditions by checking the appropriate box, which should be displayed as part of the terms and conditions. Such acceptance or rejection by the Customer will be retained, in a retrievable format, by the Supplier.

6. The Internet procedure should incorporate a Customer cancellation period that automatically provides the ending date of that jurisdiction's mandatory rescission period substantially in the form that follows: "IF YOU WISH TO CANCEL THIS AGREEMENT, YOU MUST DO SO BEFORE 12:00 a.m. (local time) on _____"

7. The Supplier must provide a mechanism by which the Customer's acceptance or rejection of the terms and conditions are recorded by time and date.

8. After the Customer checks the appropriate box relative to the acceptance of the terms and conditions, the Internet Enrollment process should disclose conspicuously that the Customer has been enrolled.

9. The Supplier should provide confirmation notice to the Customer, by e-mail at the specified e-mail address or by regular mail at the address specified by the Customer.

10. The Supplier should provide to the Customer a toll-free telephone number, an Internet means, and/or an e-mail address for the Customer to cancel the agreement within three (3) days from the date on which the Customer is enrolled by means of the Internet. If the agreement is canceled, the Supplier will provide the Customer with a cancellation number.

C. In the event of any dispute involving an Internet Enrollment, the Supplier must provide either a date and time stamped copy of the Customer's acceptance of the terms and conditions or on-line access to the same to verify Customer Enrollment to the Applicable Regulatory Authority within five (5) business days of any such request.

evidenced by the UBP, implementation of internet enrollment rules in the various states is a slow process.

III. Restrictions on Internet Enrollment

A number of states have laws and implementing regulations that restrict energy supplier enrollment of customers. Such states may restrict customer enrollment methods to only wet signatures or wet signatures and telephonic enrollment with independent third party verification. These restrictions were imposed as consumer protection measures - to prevent customer slamming. However, these onerous and costly requirements are proving detrimental to the development of retail energy markets.

For instance, in Illinois the Consumer Fraud and Deceptive Business Practices Act provides that, "[a]n electric service provider shall not submit or execute a change in a subscriber's selection of a provider of electric service except as follows: The new electric service provider has obtained the customer's written authorization . . . (emphasis added)" 815 ILCS 505/2EE. Similarly, Massachusetts law provides that,

(a)(i) Each customer choosing a generation company or its affiliate, subsidiary, or parent company, or a supplier or aggregator shall be required to affirmatively choose such entity. It shall be unlawful for a generation company, supplier or aggregator to provide power or other services to such a customer without first obtaining said affirmative choice from the customer.

(ii) For the purposes of this section, the term "affirmative choice" shall mean the signing of a letter of authorization, third party verification, or the completion of a toll-free call made by the customer to an independent third party operating in a location physically separate from the telemarketing representative who has obtained the customer's initial oral authorization to change to a new electricity service provider. G.L. c.164 § 1F(7).

In both of these states, NEM and other energy marketers have argued that the federal Electronic Signatures in Global and National Commerce Act provides that electronic

records and signatures satisfy rules of law requiring information to be "written" or "in writing." Despite the clear wording of the federal statute, neither the Illinois Commerce Commission nor the Massachusetts Department of Telecommunications and Energy (DTE) made direct findings that the federal law required recognition of electronic signatures. Instead, the Massachusetts DTE found there was, "no necessary conflict between Federal and state law," and directed the investigation of the technical processes and consumer protections necessary to implement electronic signatures.⁷ The Massachusetts DTE only recently approved electronic customer authorizations guidelines.⁸

In Illinois, the Illinois Commerce Commission did not address the effect of the federal law but "direct[ed] the parties to begin the workshop process with the understanding that they should arrive at a process to implement electronic signatures."⁹ A proceeding to examine internet enrollment procedures is still under way.¹⁰

NEM submits that this piecemeal and protracted approach to recognizing the validity of electronic signatures and permitting internet enrollment of energy consumers as provided under federal law is detrimental to the development of the competitive retail energy market. Accordingly, NEM submits that it is in the best interests of energy consumers that this Commission promulgate uniform, federal rules governing the usage of electronic signatures.

⁷ D.T.E. 01-54-A, Investigation by the Department of Telecommunications and Energy on its own Motion into Competitive Market Initiatives, issued October 15, 2001, at page 35.

⁸ D.T.E. 01-54-B, Investigation by the Department of Telecommunications and Energy on its own Motion into Competitive Market Initiatives, issued July 30, 2002, at page 23-28.

⁹ Docket 01-0423, Interim Order, issued April 1, 2002, at page 148.

¹⁰ Docket 02-0290, Request for Expedited Rulemaking Regarding Telephonic and Internet Enrollment Procedures Consistent with § 2EE of the Consumer Fraud and Deceptive Business Practices Act.

IV. Conclusion

Internet enrollment of energy consumers can and will be a key means for competitive energy suppliers to aggregate demand on a cost-effective basis. The piecemeal and protracted approach that some state Public Service Commissions have taken to examining the issue of internet enrollment in view of the federal Electronic Signatures in Global and National Commerce Act seriously hinders the ability of competitive energy suppliers to reach and serve potential customers. As a result, NEM urges this Commission to promulgate uniform rules to implement the federal electronic signature law to provide much-needed certainty and clarity to the competitive energy industry.

Sincerely,

A handwritten signature in blue ink, appearing to read "Craig Goodman", with a long horizontal flourish extending to the right.

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