



National Energy Marketers Association

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL TRADE COMMISSION

Telemarketing Sales Rule; Proposed Rule) FTC File No. R411001

COMMENTS
OF THE
NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM) hereby submits comments on the proposed changes to the Commission's Telemarketing Sales Rule (TSR) pursuant to the January 30, 2002, Federal Register Notice.¹ For the reasons set forth herein, NEM urges that the national Do-Not-Call registry provisions set forth in the Notice of Proposed Rulemaking (NOPR) not be applied to the competitive energy market and that the matter of energy consumer enrollment should be a matter of state and local jurisdiction. NEM urges that the Commission conform its authorization and related recordkeeping requirements to the "Uniform Business Practices for Retail Energy Markets." NEM also urges that the proposed prohibition from providing third parties with customer billing information not be construed to bar utilities from providing competitive energy suppliers, and the telemarketers acting on their behalf, with access to customer lists.

NEM is a national non-profit trade association representing a regionally diverse cross-section of wholesale and retail marketers of energy and financial products, services, information and technologies throughout the United States, Canada and the U.K. NEM's membership includes: small regional marketers, large international wholesale and retail

¹ 67 Fed. Reg. 4491 (2002).

energy suppliers, billing and metering firms, Internet energy providers and trading platforms, energy-related software developers, risk managers, energy brokerage firms and financial institutions, information technology providers as well as suppliers of advanced metering and distributed generation technology.

This regionally diverse, broad-based coalition of energy and technology firms has come together under the NEM auspices to forge consensus and to help eliminate 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 and electricity 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.
- 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; and

I. A National Do-Not-Call Registry May Not Adequately Protect Consumer Interests

By the terms of the NOPR, customers will have three options to utilize to restrict telemarketing calls: 1) use the Commission's proposed national do-not-call (DNC) registry to eliminate all telemarketing calls; 2) use the Commission's proposed national DNC registry but agree to accept calls from specific sellers that have "express verifiable

authorization;" or 3) block company-specific calls as provided under the current rules.² NEM submits that the national DNC registry approach may not accomplish its intended purposes for the reasons set forth below.

A. The Enrollment of Energy Consumers Should Be a Matter of State and Local Jurisdiction

Telemarketing of competitive energy products, services, information and technologies provides a cost effective way to enroll new customers. NEM submits that the issue of do-not-call registries is best dealt with at the local and state level. State Public Service Commissions and state legislatures have recognized the value of telephonic enrollment to foster the growth of the competitive market,³ and are also acutely aware of the consumer protection and slamming issues posed by this method of customer enrollment. If consumers have complaints pertaining to telemarketer contacts, their first point of contact will be their State Public Utility Commission, and the State Commission will be in the best position to handle the complaint on an expeditious and fair basis. Furthermore, the

² Proposed Section 310.4(b)(1)(iii) of the TSR specifically provides that:

It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

...
(iii) Initiating any outbound telephone call to a person when that person previously has:
(A) stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or the charitable organization on whose behalf a charitable contribution is being requested; or
(B) placed his or her name and/or telephone number on a do-not-call registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls, unless the seller or charitable organization has obtained the express verifiable authorization of such person to place calls to that person. Such authorizations shall be deemed verifiable if either of the following means are employed:

(1) Express written authorization by the consumer or donor which clearly evidences his or her authorization that calls made by or on behalf of a specific seller or charitable organization may be placed to the consumer or donor, and which shall include the telephone number to which the calls may be placed and the signature of the consumer or donor; or

(2) Express oral authorization which is recorded and which clearly evidences the authorization of the consumer or donor that calls made by or on behalf of a specific seller or charitable organization may be placed to the consumer or donor; provided, however, that the recorded oral authorization shall only be deemed effective when the telemarketer receiving such authorization is able to verify that the authorization is being made from the telephone number to which the consumer or donor, as the case may be, is authorizing access.

³ See, e.g. Massachusetts General Laws c.164 § 1F; New Jersey Permanent Statutes C.48:3-86; Ohio Administrative Code, 4901:1-21-06, Rules for Competitive Retail Electric Service; Illinois Commerce Commission Docket Nos. 00-0620 and 00-0621, Order, issued July 5, 2001, page 72.

states impose significant penalties and fines for non-compliance with telemarketing rules in excess of federal penalties.⁴

The competitive energy market is in an early stage of development. Most energy marketers' are focused on customers within a single state or in many cases a single utility service territory. However, NEM submits that the use of a national do-not-call registry could impose significant burdens on the nascent competitive energy industry. Customer contacts in this nascent market rarely constitute interstate commerce within this Commission's jurisdiction. Consequently, existing state laws and regulations governing energy telemarketing are the most important line of defense for ensuring consumer protection.

B. Energy Marketers Contact with Customers Serves a Valuable Public Educational Purpose

State Public Service Commissions together with utilities, marketers and consumer groups typically develop and conduct a comprehensive public information campaign that precedes the opening of a local energy market. The campaign alerts consumers to the myriad of competitive choices they will be eligible to elect. Consequently, consumers are often times expecting energy marketers calls and rely on the information and explanation of how their energy costs will be affected. Accordingly, the calls placed by energy marketers serve a dual purpose. The call serves an educational purpose in addition to the sales component of the call. If energy marketers calls to consumers were to be restricted, this important means to reach consumers and explain energy offerings would be lost. Consumers would be deprived of the opportunity to review the benefits of switching. Accordingly, fewer consumers will fully understand the competitive opportunities they may avail themselves of and customer switching will be deterred. As a result, fewer customers will enjoy the benefits of reduced energy prices and innovative product offerings.

C. A National DNC Registry Will Overburden Interstate Commerce

NEM is concerned that any increase in consumer protection yielded by a national DNC registry could be far outweighed by the burden to interstate commerce that would be

⁴ See e.g. Press Release of New York Lieutenant Governor Donohue, "Thirteen Companies Settle Alleged Violations of New York's "Do Not Call" Telemarketing Law - Companies to Pay \$217,500 in Settlements," dated March 8, 2002, available at http://www.state.ny.us/governor/lrgov/press99/march8_02.htm.

imposed. Telemarketing of competitive energy options is an important source of consumer outreach. It is difficult enough at the present time to overcome customer inertia to remain with a regulated utility rather than select a competitive supplier. At this stage of competitive energy market development, when customers are aware of the ability to switch to a competitive supplier but competitive suppliers have not attained the status of household names, allowing consumers to expressly authorize specific companies to contact them despite their enrollment on the national DNC list is an almost meaningless exemption. Energy suppliers are forming into new entities almost daily, making it virtually impossible to expressly authorize these entities to call national DNC registry participants. Therefore, a significant portion of the population will have to be excluded from competitive energy marketers and telemarketers potential sales base. Due to other state-imposed restrictions on customer enrollment methods, such as the lack of recognition of the validity of electronic signatures, it will be difficult for marketers to reach customers in a meaningful, time and cost effective way. The national DNC registry could cause a severe negative impact on the growth of the competitive energy market and indirectly to the cost of energy itself.

D. The Commission Should Implement Uniform, National Electronic Signature Rules

Migration of customers from utilities to competitive suppliers is significantly hampered in some states by wet signature requirements. NEM is encouraged that some state 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.⁵ If this Commission decides to adopt the national DNC registry approach, it will in effect be taking away the telephonic enrollment option. Consequently, the Commission should ensure that there are other cost-effective means of customer contact. NEM urge the Commission to exercise its authority to promulgate uniform, national rules to implement the federal Electronic Signatures in Global and National Commerce Act.⁶ 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

⁵ Id.

⁶ 15 U.S.C. § 7001.

signatures would allow competitive energy marketers and the telemarketers acting on their behalf to enroll customers in a timely and cost-effective manner.

E. The National DNC Registry Will Impose Significant Compliance Costs on the Competitive Energy Industry

The exact costs of compliance associated with a national DNC registry are unclear because the manner in which the information will be maintained by the Commission and provided to telemarketers is not stated. However, the use of a national DNC registry will at a minimum require extensive monitoring and checking to ensure that consumers on the list are not contacted. Energy marketing companies and the telemarketers acting on their behalf will have to cross-check the national registry for each state and multiple utility service territories within each state. It is not clear how this can be accomplished in an efficient manner. The method of updating the list to reflect that consumers have moved and changed phone numbers as well as the effect of a consumer move on the consumer's status and eligibility to receive calls is also unclear. The use of a national DNC registry will impose a costly and unnecessary burden on competitive energy marketers and energy markets that are already operating on thin margins. As the number of states adopting retail choice expands, the costs of compliance with the national DNC registry requirements will increase. NEM submits that the current company-specific approach to blocking telemarketing calls is sufficient to protect consumer privacy without unnecessarily hindering the development of competitive energy markets.

If the Commission does decide to utilize a national DNC registry, NEM strongly urges that the costs of implementing and maintaining the registry not be imposed on U.S. supplies. The national registry costs would have to be passed on in the form of higher prices to consumers. This will make competitive energy options less attractive, hinder customer switching and negatively impact the growth of the competitive energy market. It will also render telemarketing a higher-cost option for aggregating energy demand.

II. Transaction Authorization and Related Recordkeeping Requirements Should Not be Unduly Burdensome

Section 310.5 of the existing TSR requires any seller or telemarketer to keep records related to their telemarketing activities for a period of 24 months of: 1) all substantially different advertising, brochures, telemarketing scripts, and promotional materials; 2)

names and last known addresses of recipients of prizes awarded of \$25 or more in value as well as the prize awarded; 3) customer names and last known addresses, goods or services purchases and the date on which they were provided or shipped and the amount the customer paid; 4) names, last known home addresses, telephone numbers, and job titles of all current and former employees directly involved in telephone sales or solicitations; and 5) all verifiable authorizations required under the Rule.

Express verifiable authorization is proposed to be required for the submission of billing information for payment, "when the method of payment used to collect payment does not impose a limitation on the customer's or donor's liability for unauthorized charges nor provide for dispute resolution procedures pursuant to, or comparable to those available under, the Fair Credit Billing Act and the Truth in Lending Act, as amended"⁷ This is meant to expand the coverage of this TSR Section from only demand drafts, to encompass forms of payment such as debit cards, electronic payment systems, and the use of utility company billing and collection systems to bill and collect for telemarketing purchases.

Proposed Section 310.2 (n) of the TSR defines express verifiable authorization as, "the informed, explicit consent of a consumer or donor, which is capable of substantiation." Authorization is to be deemed verifiable pursuant to one of the following methods:

- (i) Express written authorization by the customer or donor, which includes the customer's or donor's signature; or
- (ii) Express oral authorization which is recorded and made available upon request to the customer or donor, and the customer's or donor's bank, credit card company or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods and services that are the subject of the sales offer and the customer's or donor's receipt of all of the following information:
 - (A) The number of debits, charges or payments;
 - (B) The date of the debit(s), charge(s), or payment(s);
 - (C) The amount of the debit(s), charge(s), or payment(s);
 - (D) The customer's or donor's name;
 - (E) The customer's or donor's specific billing information, including the name of the account and the account number, that will be used to collect payment for the goods or services that are the subject of the sales offer;

⁷ Proposed Section 310.3(a)(3) of the TSR.

- (F) A telephone number for customer or donor inquiry that is answered during normal business hours; and
- (G) The date of the customer's or donor's oral authorization;⁸

The major proposed modification to this Section is the insertion of Section 310.3(a)(3)(ii)(E) and the requirement that a customer receive specific billing information, including the account number and name, which will be used for payment.

A diverse group of utilities, energy suppliers, regulators, vendors, consumer advocates and trade organizations participated in the development of the "Uniform Business Practices for Retail Energy Markets"⁹ (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. Section IV of the UBP pertains to Customer Enrollment and Switching, and NEM urges that the provisions of Chapter IV be reflected in the TSR.

On the subject of telephonic enrollment, Section IV(1) of the UBP provides that:

Suppliers may telephonically enroll all Customers under the following conditions:

A. While engaged in a telephone conversation with the potential Customer, the Supplier must audio record or third-party verify (via either a live operator or interactive voice response [IVR]) the following information in order to substantiate the Customer Enrollment:

- 1.** A statement that the telephonic Enrollment conversation between the Customer and the Supplier is being recorded.
- 2.** A statement from the Customer acknowledging the date of the call.
- 3.** A statement from the Customer agreeing to enroll with the Supplier.
- 4.** A statement from the Customer acknowledging:
 - a.** the Customer's name;

⁸ Proposed Sections 310.3(a)(3)(i) and (ii) of the TSR.

⁹ Uniform Business Practices for the Retail Energy Market, November 2000; 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").

- b.** the Customer's service address; and
- c.** the Customer's Utility account number and secondary validation element, as described in Section IV.F.

(Note: any IVR system used for this purpose should clearly identify a path for the Customer to follow to talk with a live operator)

- 5.** The Supplier may request additional information from the Customer to verify the Customer's identity.

B. For Customers who have not previously reviewed the terms and conditions of the offer, the Supplier should provide the terms and conditions as described in Section IV.C.6. If the consumer protection laws provide for a period for reconsideration during which the Customer can rescind the Enrollment, then the terms and conditions should include a toll-free telephone number for the Customer to exercise such rescission and specify the time frame for doing so.

Like the TSR, the UBP provides that suppliers should retain proof of verification of a customer's switching authorization for at least two years.¹⁰

NEM is concerned that the TSR requirements to be followed to obtain express verifiable authorization appear to reverse the burden of the requirements of the UBP thereby doubling the procedures and recordkeeping required of competitive suppliers and telemarketers to switch a customer from utility service to a competitive supplier. Section 310.3(a)(3) requires that a customer receive information of the transaction as part of oral authorization. Section IV(1)(A) of the UBP requires that a customer provide information in a statement acknowledging the date, their agreement to enroll, name, service address, utility account number and a secondary validation element.¹¹ Accordingly, for an energy supplier or telemarketer to telephonically enroll a customer it would appear that both the customer and the energy supplier/telemarketer would have to make duplicative statements confirming the transaction rather than simply allowing a customer to make a statement. Since the information at issue is dictated by the customer, it is incumbent upon the competitive supplier or telemarketer to follow the customer's instruction. Once the customer's statement is taped, that statement should be sufficient to control the parties understanding. The Commission stated that "[g]iven the apparent prevalence of taping,

¹⁰ UBP at Section IV(E).

the Commission believes that any additional burden on telemarketers will be minimal."¹² As demonstrated by NEM, this duplication of required information will entail the use of more tapes for recording, more storage facilities, and increased expense. Therefore, NEM requests that the Commission conform Section 310.3(a)(3) to the UBP to make clear that only a customer is required to make statements acknowledging the terms of the agreement.

III. The Prohibition of Receipt of Consumer Billing Information By Third Parties Should Not Apply to the Competitive Energy Industry

The Commission proposes to modify Section 310.4(a)(5) pertaining to abusive telemarketing acts or practices to include the prohibition of the receipt of consumer billing information by a third party for telemarketing purposes. The proposed definition of billing information is, "any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card."¹³ The proposed prohibition is as follows:

Receiving from any person other than the consumer or donor for use in telemarketing any consumer's or donor's billing information, or disclosing any consumer's or donor's billing information to any person for use in telemarketing; provided, however, this paragraph does not apply to the transfer of a consumer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction in which the consumer or donor has disclosed his or her billing information and has authorized the use of such billing information to process such payment for goods or services or a charitable contribution.

NEM is very concerned about the effect this prohibition could potentially have on the development of competitive energy markets. In at least two states, Public Service Commissions have endorsed the use of customer lists provided by utility companies to competitive suppliers for the purpose of enrolling new customers. The Public Utility Commission of Ohio adopted this measure as a part of a Pro Forma Certified Supplier

¹¹ Section IV(F) lists the following secondary validation elements:

1. Five-digit zip code of service address; or
2. First four (4) characters of the Customer or company name on the account, e.g., Henderson or Wal-Mart; or
3. Other field as determined by the Applicable Regulatory Authority.

¹² NOPR at page 44.

¹³ Telemarketing Sales Rule, Section 310.2(c), NOPR page 134.

Tariff.¹⁴ Section VII of the Pro Forma Tariff sets forth a process for suppliers to request customer information lists from utilities, and customers can choose to opt-out of inclusion on the list. Customer information lists are to include the following information for each customer:

- i) End-use Customer name
- ii) Service Address
- iii) Service City
- iv) Service State and Zip Code
- v) Mailing Address
- vi) Mailing City
- vii) Mailing State and Zip Code
- viii) Rate Schedule under which service is rendered, including class and sub-class (if applicable)
- ix) Rider (if applicable)
- x) Load Profile Reference Category
- xi) Meter Type (will provide information that is readily available)
- xii) Interval Meter data indicator (will provide information that is readily available)
- xiii) Budget Bill/PIPP indicator
- xiv) Meter Read Cycle
- xv) Most recent twelve (12) months of historical consumption data (actual energy usage plus demand, if available)¹⁵

More recently, the Massachusetts Department of Telecommunications and Energy (DTE) required electric utilities to provide names, addresses and rate classes of default service customers to requesting competitive suppliers.¹⁶ In response to lackluster participation in retail electric competition in the state, DTE adopted the measure to, "improve the ability of suppliers to offer their services to default service customers."¹⁷ DTE subsequently decided that the customer lists should also include historic usage information,¹⁸ service and mailing addresses, contact persons, and customer meter read cycle,¹⁹ and should also include standard offer service customers.²⁰ Suppliers are required to use the information

¹⁴ Case 00-813-EL-EDI, In the Matter of Establishment of Electronic Data Exchange Standards and Uniform Business Practices for the Electric Utility Industry, Finding and Order, issued July 19, 2000, at page 18.

¹⁵ Pro Forma Certified Supplier Tariff, Section VII(A).

¹⁶ DTE 01-54, Investigation by the Department of Telecommunications and Energy on its own Motion into Competitive Market Initiatives, Order Opening Investigation into Competitive Market Initiatives, issued June 29, 2001, at page 6 [hereinafter "DTE Order"].

¹⁷ DTE Order at page 5.

¹⁸ DTE 01-54-A, Investigation by the Department of Telecommunications and Energy on its own Motion into Competitive Market Initiatives, Order, issued October 15, 2001, at page 11[hereinafter DTE Order II].

¹⁹ DTE Order II at page 18.

²⁰ DTE Order II at page 22.

only for the marketing of electricity-related services defined as, "any activities associated with a customer's electricity consumption."²¹ Customers participate on an opt-out basis.²²

NEM submits that providing competitive suppliers access to the information on customer lists is an important means of fostering the growth of competitive energy markets. These lists provide competitive suppliers with valuable information for formulation of offerings to potential customers. The use of these customer lists also allows telemarketers to narrowly tailor the calls made to only those customers in a particular utility service territory that receive a particular type of service. The customer lists provide an efficient means to ensure that calls are not placed to customers that do not reside in the relevant service area or do not receive the type of service, electric or gas, the telemarketer is calling about. Accordingly, use of customer lists significantly reduces levels of customer confusion and limits the population of customers contacted.

If the use of customer lists were to be prohibited at this stage of market development, it could have deleterious effects on competitive entry, competitive offerings and future growth of these nascent markets. NEM urges that the proposed prohibition of providing billing information to third parties not be construed to include the practice of utilities providing customer lists to competitive suppliers. In the event the Commission determines this activity could fall within the proposed prohibition, NEM urges that the Commission provide a specific exemption to competitive suppliers, and/or the telemarketers acting on their behalf, that receive and use these customer lists in the interest of fostering the growth of competitive energy markets.

III. Conclusion

At this stage in the development of competitive energy markets, it is imperative that unnecessarily restrictive measures do not increase the cost of U.S. energy supplies, impede consumers' ability to understand their energy choices or to exercise choice. NEM is concerned that the national DNC registry and possible prohibition of utilities providing competitive suppliers access to customer lists could have such an effect, and yet these prohibitions will not yield an appreciable increase in consumer protection. Accordingly, NEM urges that energy consumer enrollment should be a matter of state and local

²¹ DTE Order II at page 23.

²² DTE Order II at page 11.

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 this Rule imposes duplicative and costly burdens on energy consumers as well as competitive energy supplies and recommends that the energy industry UBP be followed for customer enrollment transactions.

Sincerely,

Craig G. Goodman, Esq.
President,
National Energy Marketers Association
3333 K Street, NW, Suite 425
Washington, DC 20007
Tel: (202) 333-3288
Fax: (202) 333-3266
Email: cgoodman@energymarketers.com
Website-www.energymarketers.com

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