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March 20, 2017

Ms. Brinda Westbrook-Sedgwick
Commission Secretary
Public Service Commission
of the District of Columbia
1325 G Street, NW
Eighth Floor
Washington, DC 20005
Via email: psc-commissionsecretary@dc.gov

**RE: Formal Case No. 1130 and Rulemaking 46-2015-01-E -
Comments of the National Energy Marketers Association**

Dear Secretary Westbrook-Sedgwick:

The National Energy Marketers Association (NEM) submits for filing the Comments of the National Energy Marketers Association in the above-referenced proceedings.

Thank you for your assistance.

Respectfully submitted,

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

Craig G. Goodman
President, NEM

Cc: Service List

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA**

In the Matter of)	
The Investigation into the)	
Public Service Commission’s Rules)	Rulemaking 46-2015-01-E
Governing the Licensure and Bonding)	
Of Electric Suppliers in the)	
District of Columbia)	

In the Matter of)	
The Investigation into)	
Modernizing the Energy Delivery System)	Formal Case No. 1130
For Increased Sustainability)	

**COMMENTS OF THE
NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Energy Marketers Association (NEM)¹ hereby submits comments pursuant to the Commission’s Notice of Second Proposed Rulemaking [hereinafter “second NOPR”] published in the February 17, 2017, D.C. Register, on the adoption of a new Chapter 46 of Title 15 of the District Code of Municipal Regulations which would establish rules pertaining to the licensure and bonding of electricity suppliers in the District of Columbia. A previous NOPR on these rules was issued by the Commission in February 6, 2015 [hereinafter “initial NOPR”].² NEM filed comments in response to the initial NOPR.³

¹ The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM’s membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting and power line technologies.

² The initial NOPR was issued in Formal Case 945 and RM 46-2015-01-E.

³ NEM’s Comments dated March 9, 2015, are incorporated by reference herein.

The Commission's current requirements for electric supplier licensing and bonding were established in Formal Case 945 in Order No. 11796 and Order No. 11862, respectively. The second NOPR proposes to incorporate many of the current existing licensing and bonding requirements into the regulations as well as incorporate new provisions. NEM offered recommended changes to the proposals in the initial NOPR, some of which are incorporated into this second NOPR. NEM appreciates the Commission's consideration of its previously filed comments. With the instant comments, NEM offers recommendations and requests clarification of certain proposals in order to facilitate supplier compliance, to better calibrate the regulatory reporting requirements with supplier business processes, and to ensure consumer protection.

NEM's comments on the second NOPR on licensing and bonding regulations are ordered in conformance with the proposed section numbering and are set forth below:

1) 4602.11 Solicitation of Customers – One-Time Notice

Proposed Section 4602.11 would require licensees to provide a one-time notice to the Commission "as soon as" they begin "soliciting or marketing to customers" in the District. The notification shall include a copy of the supplier's proposed marketing materials. The Commission has also proposed that a supplier's failure to provide it with the one-time notice prior to marketing or soliciting would constitute just cause for Commission action against a supplier in Proposed Section 4608.2(v).

NEM notes that the proposed language on the one-time notice of solicitation customers in the second NOPR has been changed and improved from the language in the first NOPR. The initial proposed language would have required electric suppliers to provide the Commission with ten days advance notice before starting to solicit customers. In NEM's comments on the initial

NOPR we explained that the ten day advance notice requirement would be problematic because it would unnecessarily interfere with suppliers ability to rapidly respond to changing market conditions and offer products when optimal market conditions are present. We also noted that in the neighboring jurisdiction of Pennsylvania, the PUC adopted a requirement that it be notified the “morning of” when a supplier begins soliciting customers.⁴ The difference between ten days advance notification and notice provided “as soon as” soliciting begins is that the ten day advance notice period will unnecessarily inject delay into supplier sales campaigns. NEM appreciates and supports the modification the Commission has made to the language in this section of the second NOPR that would require the notice “as soon as” the supplier begins soliciting customers. This should achieve the intended goal of accomplishing notification to the Commission of supplier activity without sacrificing supplier flexibility to rapidly respond to changing market conditions to offer consumers beneficial products.

2) 4602.11 Solicitation of Customers – Photo Identification

Proposed Section 4602.11 also would require that, “each sales representatives [sic], and marketing agent or representative conducting door to door solicitations shall be required to present a company photo identification to customers as part of the solicitation process.” Suppliers would be required to “maintain a record of the identity” of the sales representatives, marketing agents or representatives, “including the company photo identification.” NEM requests clarification of this proposal.

At the outset, NEM notes that the initial NOPR language could have potentially been construed to mean that suppliers file photo identifications of representatives with the Commission, rather

⁴ 52 Pa. Code Section 111.14(a).

than a requirement that representatives present photo identifications to customers as part of the sales process. NEM's initial comments requested clarification of that point because the provision of photo identification of representatives to consumers is clearly consistent with the goal of protecting consumers, while an administrative photo identification filing with the Commission requirement does not appear to be reasonably related to such a consumer protection goal. The revised language in the second NOPR appears to incorporate this concern.

However, NEM requests further clarification of the wording so that suppliers can ensure that they understand the compliance obligation associated with this provision. First, the construction of the phrase, ““each sales representatives [sic], and marketing agent or representative conducting door to door solicitations,”” should be revised to avoid a potentially expansive meaning through the use of the word “or.” As presently worded, the language could be construed to mean that a photo identification is required not only for door to door sales, but also for sales representatives and marketing agents in other contexts. Rewording the phrase such that it applies to, “door to door sales representatives and agents,” would avoid that result. Moreover, the purpose of providing photo identification to customers is only relevant in the door to door context, when such identification could, in fact, be physically displayed and presented.

NEM also requests clarification of the photo identification recordkeeping requirement. Specifically, does the Commission intend for the supplier to maintain a copy of the picture of the person used for the identification or should the supplier scan and retain a copy of the entire photo identification? NEM also requests clarification of how long the photo identification records should be maintained by the supplier. NEM suggests that supplier maintenance of the photo identification record for a period of six months after a representative or agent has been employed or marketing on the supplier's behalf is a reasonable timeframe.

3) 4602.12 Electronic Solicitation

Proposed Section 4602.12 would require suppliers that contract electronically with customers to, "provide the Commission with the electronic accessibility necessary to monitor the Licensee's compliance" with the DCMR Consumer Bill of Rights provisions on electronic enrollment and website posting of information on services and rates. NEM submits that the phrase "electronic accessibility necessary" is a vague and open-ended term and that the extent of the associated supplier compliance obligation is therefore rendered unclear. If the Commission has a concern related to a supplier's electronic enrollment of a customer, the Commission can request the supplier to provide its electronic file of the transaction. If that is what is intended by that phrase, NEM requests that the language be changed to reflect this understanding. The Commission is also able to access the supplier's electronic enrollment information on the supplier's website, without any special provision, just as any potential customer would be able to perform.

4) 4602.13 Serving Customers - Notice

Proposed Section 4602.13 would require a licensee to notify the Commission of the date when it will begin to serve customers. Such requirement is stated separate and in addition to the requirement in proposed Section 4602.11 that a supplier provide a one-time notice of its intent to begin marketing to customers in the District. From a practical perspective, NEM notes that a supplier will have a generalized idea of the date when it will begin to serve customers, but the utility switching process determines the actual date upon which service will begin. Moreover, it is unclear what additional useful information will be obtained by requiring the one-time notice of marketing as well as the separate notice that a supplier is commencing service to customers.

5) 4602.13 Serving Customers -Training

Proposed Section 4602.13 would require suppliers to attest to the Commission that their sales and marketing and regulatory personnel have read the relevant provisions of Chapters 3 and 46 of Title 15 DCMR before soliciting customers. With respect to a supplier using an independent contractor or vendor to perform marketing or sales activities on its behalf, the supplier “shall confirm” that all of the sales and marketing personnel of the contractor or vendor have read the relevant provisions of the Commission's regulations before soliciting customers.

As an initial matter, NEM notes that it requested clarification of the initial NOPR language as it pertained to suppliers that utilize third party providers to provide sales and marketing services. NEM recommended that in such circumstance the extent of the supplier’s obligation should be to ensure that the third party provider utilized a supplier-approved training program. If a supplier becomes aware of circumstances that indicate that the training is ineffective, then it becomes incumbent upon the supplier to work with the third party provider to revise the training. NEM suggested that the Pennsylvania PUC’s regulations present a reasonable approach to this issue by requiring that, “When a supplier contracts with an independent contractor or vendor to perform marketing or sales activities on the supplier’s behalf, the supplier shall confirm that the contractor or vendor has provided supplier-approved training to agents and independent contractors.”⁵ NEM supports the Commission’s inclusion of this approach in the second NOPR.

NEM does recommend that the proposed Section state with greater specificity the provisions of Chapter 3 of Title 15 DCMR that a supplier’s sales and marketing and regulatory personnel must read. Chapter 3 includes a number of sections that do not pertain to competitive electric

⁵ 52 Pa. Code Section 111.5(d).

suppliers, but rather describe utility service obligations or pertain to telecommunications service providers. In order to ensure supplier compliance, it would be helpful if the specific sections of Chapter 3 that must be consulted would be enumerated.

6) 4602.16 Required Notices Upon Default

Proposed Section 4602.16 would require in the case of supplier default, that a supplier, "shall immediately notify its customers of its default by electronic mail, if possible, or by telephonic communication followed by written notice and send written notice by electronic mail to the electric company and Commission notifying them of its default." NEM suggests that this provision be changed such that a supplier would be required to provide notice to its customers using the preferred method that each customer has selected to receive notifications.

Indeed, in some cases, the supplier may not have the customer's email address to provide a notice. Additionally, telephonic notification to customers poses potential supplier liability issues. Specifically, to the extent that the proposed rule contemplates automated calling to accomplish telephonic notice, it may implicate FCC rules promulgated under the Telephone Consumer Protection Act (TCPA)⁶ that prohibit calls to wireless numbers using autodialers without a customer's "prior express written consent."⁷ Supplier contracts may not include a provision providing such consent for these purposes. As such, those suppliers would be

⁶ 47 U.S.C. §227; *see also* FCC Declaratory Ruling, CG Docket No. 02-278, released August 4, 2016.

⁷ See 47 CFR § 64.1200(a) Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the *prior express consent of the called party*) using an automatic telephone dialing system or an artificial or prerecorded voice;

.....
(iii) *To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.*

effectively prohibited from using autodialers to notify customers, or face violating the TCPA subject to significant penalties.

7) 4603.1 Electricity Supplier Education Workshop

Proposed Section 4603.1 would require a supplier to certify on an annual basis that its regulatory contact or compliance personnel has completed the Commission's Electricity Supplier Education Workshop, “or is otherwise knowledgeable with respect to the Commission’s Electricity Supplier rules.” NEM noted its support in its comments filed on the initial NOPR for the Commission’s supplier education workshop as a valuable tool for communicating and informing the supplier community about applicable regulatory compliance requirements. It should also allow suppliers and the Commission to establish new lines of communication that permit the proactive identification of potential market issues. NEM continues to support this provision. NEM suggests that the Commission consider that these workshops be available not only for in-person participation but also be available for suppliers to participate via the internet. The supplier community is located in cities across the country. Some small suppliers may have constrained staff resources. Providing a web-based workshop option will facilitate robust supplier participation. In addition, the webinar and related materials could be made available on the Commission website for on-going supplier reference.

NEM does request clarification related to the last phrase in this proposed section that would allow the compliance obligation to be satisfied if a supplier’s regulatory contact or compliance personnel, “is otherwise knowledgeable with respect to the Commission’s Electricity Supplier rules.” It is unclear what a supplier’s regulatory contact or compliance personnel would be

required to do to satisfy this provision. It is also unclear what a supplier would be required to report to demonstrate compliance therewith.

8) 4606.1 Privacy Protection Policy

Under Proposed Section 4606.1 suppliers must submit to the Commission a copy of their Privacy Protection Policy intended to, “protect against the unauthorized disclosure or use of customer information about a Customer or a Customer's use of electricity.” The Privacy Protection Policy must demonstrate how the supplier is in compliance with 15 DCMR § 308 and § 309. The Privacy Protection Policy would be required to be included in the supplier’s annual filing under Proposed Section 4607.2. The Commission has also proposed that the failure to provide it with the Privacy Protection Policy would constitute just cause for Commission action against a supplier under Proposed Section 4608.2(u).

In NEM’s comments on the initial NOPR we noted our shared concern with the Commission of the need to maintain the privacy of consumer information. However, as stated in our initial comments and reiterated here, NEM submits that this provision does not provide sufficient detail to suppliers as to the extent of this regulatory requirement and what suppliers would need to do in order to be deemed to be in compliance. NEM continues to request that the Commission clarify what a “Privacy Protection Policy” is meant to entail.

For instance, this may have been intended as a straightforward verification that the four subsections of 15 DCMR § 308 have been followed. NEM notes that 15 DCMR § 309 has not been adopted as a final regulation. Alternatively, suppliers have internal policies on privacy protection. Suppliers also may include language in the terms and conditions of their customer contracts pertaining to customer information privacy, describing the information that the supplier

will receive from the utility attendant with the transaction and how that information will be used. It is unclear the extent of the information that the Commission was seeking in Proposed Section 4606.1. Since non-compliance with this requirement would be a sanctionable action under Proposed Section 4608.2(u), it is important that suppliers have a clear understanding of this reporting obligation.

9) 4607.1(a) Updated to an Approved Application

Under Proposed Section 4607.1(a), if a supplier changes any of its marketing materials, it must provide those new materials to the Commission as soon as those materials are to be used to solicit customers. NEM reiterates the concerns it expressed with this provision in the initial NOPR regarding this proposed language. The language appears to create an on-going obligation for suppliers to provide any and all of their marketing materials as they change over time. Supplier marketing materials change to reflect market conditions, price and product changes, new marketing strategies and other reasons. Sometimes the change in the marketing materials may be more administrative than substantive in nature. Requiring suppliers to submit all of their marketing materials would be burdensome to comply with and would also generate so many filings that it may be administratively infeasible for Commission Staff to review all of the materials.

NEM recommends that the proposal be modified such that suppliers be required to file a representative sample of their marketing materials, as reflective of general industry practice. Of course, if Commission Staff has a question about specific supplier marketing materials, the supplier will make the marketing materials available upon request.

10) 4607.2 Annual Reporting Requirements

Under Proposed Section 4607.2, the annual supplier reporting requirement would be expanded beyond the current requirement to review and update information as needed, to an expansive list of required document filings. NEM submits that the annual supplier reporting process should follow a streamlined approach. Duplicative filing of information that was previously submitted by a supplier and has not changed should be avoided. The repetitive filing of unchanged information is unnecessarily burdensome for suppliers and does not meaningfully contribute to Commission oversight.

11) 4608.2 Grounds for Commission Action

Proposed Section 4608.2 delineates the circumstances constituting “just cause” for Commission action regarding a supplier. The second NOPR incorporates a number of the existing grounds provided for under prior Commission Order, modifies certain language and also adds new grounds for Commission action. In particular, proposed Section 4608.2(u) would make a supplier’s failure to provide its Privacy Protection Policy to the Commission, as required under Proposed Sections 4606.1 and 4607.2, a basis for Commission action. In addition, proposed Section 4608.2(v) would make a supplier’s failure to provide a one-time initial notice of marketing or soliciting District customers a basis for Commission action. NEM incorporates its comments set forth above in response to those specific proposals in response to the inclusion of these filings as grounds for Commission action.

12) 4699 Definitions

The Proposed Definitions Section of the regulations includes modifications to the terms “electricity supplier” and “electric company” as well as the inclusion of new definitions of terms

including “nontraditional marketers.” As the Commission endeavors to facilitate the modernization of the electric grid and to encourage the availability of innovative distributed energy resources to consumers, NEM suggests that it is important to bear in mind the relative regulatory requirements and consumer protection standards that competitive electric suppliers are required to adhere to and to ensure the competitively neutral application of such standards to both competitive electric suppliers as well as new distributed energy resource providers. Both distributed energy resource providers and competitive electric suppliers are providing energy products and services to the consumer’s home. Subjecting competitive electric suppliers to a greater regulatory compliance and reporting burden to offer such products would be unjustified.

Conclusion

NEM appreciates this opportunity to offer its comments on the Commission’s second NOPR on proposed licensing and bonding regulations.

Respectfully submitted,

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

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Dated: March 20, 2017.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March 2017 that a copy of the foregoing Comments of the National Energy Marketers Association was served via email on the parties on the official service list in Formal Case No. 1130.

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

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