



National Energy Marketers Association

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Rules and Regulations Implementing the) **CG Docket No. 02-278**
Telephone Consumer Protection Act of 1991)

COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association ("NEM") files these comments in the above-referenced proceeding pursuant to the "Notice of Proposed Rulemaking and Memorandum Opinion and Order" adopted September 12, 2002, in the above-referenced proceeding. For the reasons set forth herein, NEM urges that the Commission reaffirm its prior decision in Docket 92-90 and reject the implementation of a national Do-Not-Call (DNC) registry. NEM submits that a national DNC should 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.¹

The National Energy Marketers Association (NEM) is a national, non-profit trade association

¹ NEM has also submitted comments on the Federal Trade Commission's proposed rulemaking on a national do-not-call list. See Comments of the National Energy Marketers Association, FTC File No. R411001, dated March 28, 2002, Telemarketing Sales Rule; Proposed Rule and Comments of the National Energy Marketers Association, dated June 26, 2002, FTC File No. R411001, Telemarketing Rulemaking - User Fee. NEM asserted that the national Do-Not-Call registry provisions set forth in the FTC's 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 urged that the Commission conform its authorization and related recordkeeping requirements to the "Uniform Business Practices for Retail Energy Markets." NEM also urged that the proposed prohibition from providing third

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.

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.

I. The Commission's Previous Findings that Required Rejection of a National DNC Registry Remain Equally Valid Today

FCC was granted the statutory authority to, "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase."² In a prior proceeding, the Commission rejected the national do-not-call list approach³ finding that it, "would be costly, difficult to maintain in an accurate form, and might jeopardize the security of telemarketer proprietary information and the privacy of telephone subscribers who paid to have unpublished or unlisted numbers."⁴ The Commission also reasoned that, "frequent updates would be required, regional telemarketers would be forced to purchase a national database, costs might be passed on to consumers, and the information compiled would present problems in protecting consumer privacy. The Commission noted that, because nearly one-fifth of all telephone numbers change each year, any such database would require frequent updates to remain accurate."⁵

FCC issued this rulemaking to receive comment, "on whether the Commission should revisit its determination not to adopt a national do-not-call list."⁶ FCC indicated it was interested in comments pertaining to, "any disadvantages to consumers or any other parties to establishing a national do-not-call list including whether the concerns noted by the Commission in declining to adopt a national do-not-call list in 1992 remain persuasive today."⁷ As discussed more fully below, NEM submits that the concerns previously recognized by the Commission remain equally

² 47 U.S.C. 227(c).

³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) [hereinafter TCPA Order].

² NOPR at para. 5 citing TCPA Order, 7 FCC Rcd at 8758-61, paras. 11-15.

⁵ NOPR at page. 51 citing TCPA Order at para. 12 and para. 14.

⁶ NOPR Para. 49.

⁷ NOPR Para. 52.

valid today and still justify rejection of the national do-not-call list approach, particularly with respect to competitive energy markets.

II. 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,⁸ 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 Public Utility Commission will be in the best position to handle the complaint on an expeditious and fair basis. Furthermore, the states impose significant penalties and fines for non-compliance with telemarketing rules in excess of federal penalties.⁹

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

⁸ 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.

⁹ 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.

defense for ensuring consumer protection.

III. 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 of which they may avail themselves, and customer switching will be deterred. As a result, fewer customers will enjoy the benefits of reduced energy prices and/or innovative product offerings.

IV. 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 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.

The definition of "telephone solicitation" for which the Commission may require the

establishment of a national DNC registry is, "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."¹⁰ The statute specifically excludes from the definition of "telephone solicitation," "a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization."¹¹ NEM submits that the exceptions to the definition of telephone solicitation are almost meaningless exemptions 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.

It is therefore highly unlikely that potential customers will have supplied prior express invitation or permission for an energy marketer to contact them. It is even less likely that an energy marketer will have an established business relationship with the potential customer. 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.

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

¹⁰ 47 U.S.C. § 227(a)(3).

¹¹ 47 U.S.C. § 227(a)(3).

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. suppliers. 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.

VI. A National DNC Registry Will Have a Disproportionate Impact on Small Businesses

NEM submits that a national DNC registry will have a disproportionate and unnecessary impact on small entities as that term is defined in the Administrative Procedure Act¹² and the Small Business Act.¹³ In considering the utilization of a national DNC registry, the Commission is also required to use a fee schedule or price structure that does, "not place an unreasonable financial burden on small businesses."¹⁴

Not only are energy marketers small entities, energy marketers operate on small margins, which means that a national DNC registry will have a disproportionately adverse impact on marketers subject to such a new regulatory requirement. A national DNC registry will impose significant one-time implementation costs for design, development, storage and hardware on energy marketers. In addition, a national DNC registry will impose significant and unnecessary ongoing record-keeping, storage and compliance costs that will place these small entities at a competitive disadvantage and/or render them unable to effectively compete in a deregulated energy market. NEM submits that in order to minimize the impacts on small entities such as energy marketers, the Commission should not apply a national DNC to the competitive energy market and that the matter of energy consumer enrollment should be a matter of state and local jurisdiction.

VII. Conclusion

At this stage in the development of competitive energy markets, it is imperative that

¹² 5 U.S.C. § 601 (6).

¹³ 15 U.S.C. § 632 (a).

¹⁴ 47 U.S.C. § 227(c)(4)

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 a national DNC registry could have such an effect, and will not yield an appreciable increase in consumer protection. Accordingly, NEM urges 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 is appropriate.

Respectfully submitted,

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