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Office of Competitive Market Oversight  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
Harrisburg, PA 17120  
Via Email: [RA-OCMO@pa.gov](mailto:RA-OCMO@pa.gov)

**Re: Informal Comments on Chapter 111 Residential Supplier Marketing Regulations**

Dear Office of Competitive Market Oversight:

The National Energy Marketers Association (NEM)<sup>1</sup> hereby submits informal comments on the Commission's Chapter 111 Supplier Residential Marketing Regulations as requested during the January 27, 2020, CHARGE livestream event and in related email communications. In addition, NEM requests the opportunity to discuss its informal comments with OCMO via conference call. Informal comments were requested on the following: telemarketing rules; updating sales verification procedures to accommodate new technologies; renewable energy product marketing rules; rules for direct mail and in-person marketing; potential guidance regarding residential brokering; and a potential reporting requirement for supplier marketing a price "significantly higher" than the utility Price to Compare.

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<sup>1</sup> 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.

NEM and its members are committed to ethically and responsibly serving residential consumers in the Commonwealth. NEM and its members have adopted a “Consumer Bill of Rights”<sup>2</sup> as well as “National Marketing Standards of Conduct”<sup>3</sup> that delineate proper business practices for doing business in the retail energy marketplace. These resources form the basis for a positive consumer-supplier relationship and inform the comments submitted herein. NEM participated in the process that resulted in the initial adoption of Interim Guidelines for Marketing and Sales Practices for Electric Generation and Natural Gas Suppliers and the subsequent adoption of the Residential Supplier Marketing Regulations. NEM appreciates the opportunity presented by OCMO to engage in an informal dialogue about potential revisions and updates to these rules.

The issues identified for comment and NEM’s responses are set forth below:

**A. Telemarketing rules – see 52 Pa. Code § 111.10; including a possible reporting requirement for telemarketing analogous to the reporting requirement for door-to-door marketing at 52 Pa. Code § 111.14, and potential limitations on caller ID spoofing and robocalls.**

Regarding the proposal to adopt a telemarketing reporting requirement analogous to the door-to-door reporting requirement, NEM understands that providing notice to the Commission and utilities of supplier telemarketing activities can be a way to assuage consumer concern when the Commission and/or the utilities receive consumer inquiries as to whether the telemarketing calls are legitimate. That being said, any telemarketing reporting requirement should be narrowly tailored to achieving that objective in order to avoid placing unnecessarily burdensome costs and compliance requirements on suppliers.

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<sup>2</sup> Available at: [https://www.energymarketers.com/Documents/Consumer\\_Bill\\_of\\_Rightsfinal\\_formatted.pdf](https://www.energymarketers.com/Documents/Consumer_Bill_of_Rightsfinal_formatted.pdf)

<sup>3</sup> Available at: [https://www.energymarketers.com/Documents/Formated\\_Marketing\\_Standardsfinal.pdf](https://www.energymarketers.com/Documents/Formated_Marketing_Standardsfinal.pdf)

The door-to-door notice requirements in Section 111.14 appropriately address a number of issues that would also need to be addressed in a telemarketing reporting requirement. For instance, the timeframe for the notification to the Commission and a utility of door-to-door activity “no later than the morning of the day” the activity begins. This timeframe maximizes a supplier’s ability to respond to dynamic market conditions and make responsive product offerings available in the marketplace, whereas requiring more advanced notice of telemarketing would impede supplier flexibility to respond to changing market conditions. The door-to-door reporting requirements appropriately limit the information the supplier is required to share with the utility to “general, nonproprietary information” about the sales and marketing activity. A corresponding limitation should apply to a telemarketing reporting requirement. Finally, the door-to-door reporting requirements also include restrictions on utility communications should the utility receive a consumer inquiry related to supplier sales and marketing activity such that the utility “may provide information about its own price and terms but shall refer the customer to the supplier for questions about the supplier’s prices and terms.” A corresponding restriction on utility communications should be incorporated into a telemarketing notice requirement. Moreover, a utility should have an obligation to respond to supplier questions regarding potential suspected utility representative misconduct related to responses to these types of customer inquiries.

Regarding caller ID spoofing and robocalls, the regulations already reference a requirement for supplier and agent compliance with the federal Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C.A. §§ 6101-6108) and 16 CFR Part 310 (relating to telemarketing sales rule). The Commission may wish to consider expanding the references in the regulations to include supplier and agent compliance with applicable provisions of the Pennsylvania Telemarketer Registration Act (73 P.S. §§ 2241-2249). Act 73 of 2019 amended the

Pennsylvania Telemarketer Registration Act to adopt restrictions on caller ID blocking and also adopt detailed robocall requirements. The Commission may also wish to expand references in the regulations to include supplier and agent compliance with applicable provisions of the federal Truth in Caller ID Act (47 U.S.C. § 227(e)) and FCC implementing regulations that prohibit the transmission of inaccurate or misleading caller identification information (47 CFR § 64.1604).<sup>4</sup>

**B. Updating the sales verification procedures at 52 Pa. Code § 111.7 to accommodate new and evolving technologies.**

NEM strongly supports Commission efforts to update sales verification procedures to accommodate suppliers use of new and evolving technologies. Section 111.7 delineates the supplier verification process. Importantly, the regulations do not require a verification to be completed by a third party, although a supplier may utilize one. The operative requirements in the rules are: the verification process be separate from the transaction process; the sales agent leaves the premises during the verification unless the consumer consents to the agent remaining on the premises; the consumer is informed of the three day right of rescission; and the supplier retains a verification record that can be provided to the Commission upon request. The Commission has approved the use of a tablet device as being in conformance with the existing transaction verification requirement, finding that compliance hinged on the supplier's verification record of the items enumerated in Section 111.7(b), not the technology or the device used.<sup>5</sup> It may, however, aid in supplier compliance and facilitate more widespread use of smart devices if the regulations specifically addressed an electronic verification process. Indeed, the use of smart devices in the verification process provides a number of significant benefits, which

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<sup>4</sup> 47 CFR § 64.1604 provides that “No person or entity in the United States shall, with the intent to defraud, cause harm, or wrongfully obtain anything of value, knowingly cause, directly or indirectly, any caller identification service to transmit or display misleading or inaccurate caller identification information.”

<sup>5</sup> See, e.g., Docket No. P-2015-2464976, Opinion and Order, issued April 23, 2015.

the Commission has previously recognized.<sup>6</sup> These benefits include the GPS tracking capabilities to increase accountability and oversight of agents, a decrease in supplier costs, improving supplier compliance, improving the consumer experience, and providing near real-time documentation to the customer of what they agreed to (and the corresponding ability to act within the three day rescission window, if needed).

### **C. Quality control and oversight of marketing vendors – see 52 Pa. Code § 111.5.**

With respect to suppliers' quality control and oversight of marketing vendors, the current rules require that a "supplier shall confirm that the contractor or vendor has provided supplier-approved training to agents and independent contractors." (52 Pa. Code 111.5). Suppliers are also "responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives." (52 Pa. Code § 111.3, 52 Pa. Code § 54.43(f), 52 Pa. Code § 62.114(e)). When a supplier contracts with an independent contractor or vendor to perform door-to-door activities, the supplier is required to confirm that the contractor or vendor has performed criminal background investigations of an agent. (52 Pa. Code § 111.4(c)).

A Secretarial Letter was issued on April 3, 2019, regarding Guidance on Chapter 111 Residential Supplier Marketing Regulations.<sup>7</sup> The Secretarial Letter advised suppliers that they should "have *quality control and monitoring programs* in place to ensure that telemarketing activities are being conducted in accordance with state and federal telemarketing laws, the Commission's regulations and the supplier's standards. This is especially important if the supplier is using a

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<sup>6</sup> Id. at 10-11.

<sup>7</sup> Docket L-2010-2208332, Guidance on Chapter 111 Residential Supplier Marketing Regulations, issued April 3, 2019.

contractor or vendor to perform marketing services.”<sup>8</sup> (emphasis added). NEM requests clarification of what “quality control and monitoring programs” are meant to entail in excess of the existing rule requirements for supplier oversight of agents.

**D. Updating rules and guidance on the marketing of renewable energy products – see 52 Pa. Code § 54.6 and 52 Pa. Code § 75.68.**

NEM requests further detail on the nature of the anticipated changes to the rules and guidance on the marketing of renewable energy products in order to provide substantive and responsive comment.

**E. Rules for direct mail marketing and in person marketing.**

Regarding direct mail marketing, NEM notes that the existing regulations do not include a separate section expressly directed toward delineating compliant direct mail marketing practices. However, the April 2019 Secretarial Letter to suppliers addressed direct mail, noting that direct mail should conform to product disclosure requirements, i.e., claims should not be false, misleading or deceptive, in Section 111.12. In addition, the Secretarial Letter noted that the standards of conduct for electric and natural gas (52 Pa. Code 54.43 and 52 Pa. Code 62.114) “require that suppliers use plain language and common terms in communications with consumers and that when new terms are used, the terms shall be defined again using plain language.”

The Secretarial Letter also cautioned suppliers to avoid the following practices<sup>9</sup>:

- Failing to prominently identify the Supplier that sent the communication.
- Using references to the distribution utility improperly, including using the utility name in a manner that could suggest that the communication is from or sent on behalf of the utility.

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<sup>8</sup> Id. at 4.

<sup>9</sup> Id. at 7.

- Failing to properly identify the purpose of the communication. We further advise against statements like “rate discount/refund/rebate notice,” “utility rate increase notice,” etc., without a more complete explanation of the purpose of the solicitation.

Should the Commission adopt a separate rule Section pertaining to direct mail marketing, the three practices identified in the Secretarial Letter as to be avoided are reasonable requirements. The regulations could also be modified to reference supplier compliance with applicable provisions of the Pennsylvania Unfair Trade Practices & Consumer Protection Law (73 P.S. §§ 201-1 – 201-9.2) and the Federal Trade Commission Act (15 U.S.C §§ 41-58) which allows the FTC to protect against unfair or deceptive acts affecting commerce.

Regarding in person marketing, NEM notes that the existing regulations also do not include a separate section expressly directed toward delineating compliant in person marketing practices. NEM construes in person marketing to encompass marketing at mall kiosks, fairs, events and other public venues (and to exclude door-to-door marketing). Any additional rule requirements applied to these sales should be tailored to the public nature of the marketing. In other words, the consumer in a public venue always has the ability to walk away from a sale and so the heightened need for consumer protection in the door-to-door sales context does not apply. The requirements for door-to-door sales set forth in Section 111.9(b) through (f) are an appropriate foundation for developing corresponding in person marketing regulations.

**F. Any need for guidance regarding residential brokering (such as disclosing how and who compensates the broker for their services; and the broker disclosing any affiliations with other suppliers, etc.).**

NEM requests clarification as to what is deemed “residential brokering” for these purposes. If residential brokering is intended to refer to online websites that include offers from select

suppliers, then NEM agrees that guidance would be useful. In particular, guidance pertaining to the disclosure of the brokering website's relationships with specific suppliers as well as disclosure that the website is not affiliated with or representing the Commission and its PAPowerSwitch and PAGasSwitch sites, as applicable, would be useful and aid consumers in evaluating these websites.

**G. Possible reporting requirement regarding EGS marketing a price that is significantly higher than the current utility PTC. Including: what would be the triggering price level (such as a percent of the PTC, i.e. 150%, etc.), possible exceptions (i.e. renewable products), applicable customer classes (residential only, or also small commercial, etc.).**

NEM submits that, in general, any comparison of the EGS marketing price and the current utility PTC is invalid. In addition to an EGS marketing price often featuring supplementary renewable attributes and/or a term fixed price completely unrelated to the current PTC, there is a significant and ongoing problem with the PTC that must be addressed.

The regulations address the computation of the PTC.<sup>10</sup> Yet, a whole series of “generation related” costs have yet to be unbundled from utility delivery rates. The PTC excludes a significant range of ancillary costs incurred by a utility in the provision of supply service. It is inarguable that the utility incurs operating and other costs that can be directly or indirectly attributed to the provision of supply service. Yet, all these costs are charged to customers in the utility delivery service rate contrary to the principles of cost allocation detailed in NARUC's Cost Accounting Manual.

NEM suggests that if the Commission wants to evaluate supplier pricing for “outliers” it already has the means to do so through the PAPowerSwitch website. Supplier price data is currently

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<sup>10</sup> See 52 Pa. Code § 69.1808 and 52 Pa. Code § 62.223.

available to the Commission on the back end of the website. In this regard, the Commission may wish to reform PAPowerSwitch so that it is more sophisticated on the data entry side.

Moreover, an EGS price reporting requirement raises a host of issues and complexities. For example, what event would trigger the reporting requirement and when? If a reporting requirement were adopted, the supplier price should be reviewed in the context of market conditions that existed at the time the contract was executed, not after the fact. It is unclear how a reporting requirement could be constructed that makes up for the mismatch in timing between the utility PTC and supplier product offerings. It is also unclear how a reporting requirement could be constructed to accurately account for value-added product attributes, product bundling and green products.

## **Conclusion**

NEM appreciates the opportunity to offer informal comments on potential revisions and updates to the Commission's Chapter 111 Residential Supplier Marketing Regulations. We look forward to future opportunities for discussion of these issues.

Respectfully submitted,

*s/William Kinneary*

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