



3333 K Street, NW, Suite 110
Washington, D.C. 20007
Tel: 202-333-3288
Fax: 202-333-3266

February 14, 2003

The Honorable Robert Spada
Senate Building
Room #143, First Floor
Columbus, OH 43215

Re: S.B. 0028 - Institution of a Do-Not-Call Registry

Dear Senator Spada:

I am writing to express NEM's concerns about recently introduced legislation that would institute a do-not-call (DNC) registry in the State of Ohio. The National Energy Marketers Association (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.

S.B. 0028 would implement a DNC registry for the State of Ohio. NEM is aware of the popularity of DNC lists as a means of providing consumer protection, i.e., limiting the receipt of unwanted calls particularly during certain hours of the day. However, NEM urges that any DNC legislation be narrowly tailored to achieving the goal of consumer protection while still permitting telephonic enrollment to be a viable and cost-effective means of reaching consumers.

As an initial matter, NEM notes that the Public Utilities Commission of Ohio has adopted rules implementing electric restructuring and gas deregulation laws that include provisions on the telephonic enrollment of gas and electric customers.¹ These rules set forth detailed disclosure requirements as well as call recording requirements that obviate the need to apply the DNC legislation to the energy sector.

NEM has a number of concerns about restricting the use of customer contact services to sell energy products, services, information and technologies in general. NEM also has concerns about specific provisions of the bill. These are set forth more fully below. For instance, NEM urges you to consider the educational value of energy marketing calls for consumers. NEM also urges you to consider the cost impacts of the legislation on competitive energy suppliers and the resultant impact on energy supply prices for consumers. The costs of compliance with this legislation, beyond merely the collection of the user fee, must be fully considered and accounted for. NEM offers a number of proposed revisions to decrease the compliance costs associated with the DNC legislation and to increase the usefulness of the registry.

I. Customer Contact Services Serve a Valuable Educational Purpose for Energy Marketers and Potential Customers

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 unnecessarily restricted, this important means to reach consumers and explain energy offerings would be lost. Consumers would be deprived of the opportunity to review the

¹ See Ohio Administrative Code Sections 4901:1-21-06(C)(2) and 4901:1-29-06(E).

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.

The use of customer contact services to sell 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.

II. The Proposed DNC Registry Will Impose Significant Compliance Costs on Energy Marketers

The use of a DNC registry will at a minimum require extensive monitoring and checking to ensure that consumers on the list are not contacted. As a result, the use of a DNC registry will impose a costly and unnecessary burden on competitive energy marketers and energy markets that are already operating on thin margins.

NEM urges you to consider the full cost impacts of implementing and maintaining the DNC registry and how those costs will be imposed on U.S. energy supplies. The 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 customer contact services a higher-cost option for aggregating energy demand.

NEM is particularly concerned about the failure to include a specified fee for obtaining a copy of the registry. Proposed Section 4719.29(B) provides that,

The registry developed, operated, and maintained under division (B) of section 4719.28 of the Revised Code shall be made available to any person upon request pursuant to procedures prescribed by rules adopted pursuant to section 4719.32 of the Revised Code, which procedures shall require payment of a reasonable distribution fee, specified in the rules, in order to obtain a copy of or access to the registry. The rules also shall provide that a residential telephone service subscriber who requests to have its residential telephone number or numbers included on the registry shall pay no fee or charge for any such listing and that the telephone number shall remain on the registry until removed by request of the subscriber.

The proposed language does not define what amount constitutes a "reasonable distribution fee." NEM would suggest that in order to encourage compliance to the fullest extent the fee should not exceed \$500 annually. Setting the fee at this level will increase the ability of small entities to use customer contact services and to fully comply with the DNC law.

III. The Exemptions Provided in the Proposed Legislation Are of Little Value to the Developing Energy Market

The definition of "telephone solicitation" under proposed Code section 4719.25(E) of S.B. 0028 is "a communication to a person that is initiated by or on behalf of a telephone solicitor or a representative and either represents a price, quality, or availability of goods or services or is used to induce the person to purchase goods or services, including, but not limited to, inducement through the offering of a gift, award, or prize."

"Unsolicited telephone solicitations" to persons on the DNC list are prohibited. A call will not be considered "unsolicited" under proposed Code section 4719.25(G) if,

- (1) It is made in response to an express written or verbal request by the called party.
- (2) It is made in connection with an established business relationship with the called party, unless the called party has communicated a desire to no longer receive a telephone solicitation from the telephone solicitor or its representative or from the entity on whose behalf the solicitation is made.

NEM submits that the exceptions to the definition of "unsolicited" 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 potential sales base. As such, it will be difficult for marketers to reach customers in a meaningful, time and cost effective way. The DNC registry could cause a severe negative impact on the growth of the competitive energy market and indirectly to the cost of energy itself.

IV. Ohio DNC Legislation Should Be Implemented on a Uniform Basis with Federal Rules

Ohio's do-not-call legislation should be implemented in a uniform manner with the FTC's do-not-call rule to the extent possible. If Ohio adopts different standards and requirements for compliance than the federal rule, it will be imposing a new and significantly burdensome layer of compliance costs on energy marketers.

For instance, proposed Code section 4719.26 (D) would require that,

- Within the first sixty seconds of a telephone call that is a telephone solicitation and before requesting any financial information or conveying to the party answering the call any substantive information about a prize,

good, or service, no telephone solicitor or representative shall fail to do all of the following:

- (1) State the telephone solicitor's or representative's true name and the name of the entity on whose behalf the solicitation is being made;
- (2) State that the purpose of the call is to effect a sale;
- (3) Identify any good or service being sold;

By contrast, the FTC's new telemarketing sales rule requires such information to be disclosed but not within the first 60 seconds of a call. The FTC rule provides that,

It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

- (1) The identity of the seller;
- (2) That the purpose of the call is to sell goods or services;
- (3) The nature of the goods or services; and
- (4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning.²

NEM recommends that the proposed time limit on the required disclosures be removed from the Ohio legislation to avoid creating disparate federal and state standards. This is particularly appropriate since the information would be conveyed under the federal rule; it simply would not be required within the first 60 seconds.

Additionally, a notable omission from the Ohio legislation that is included in the FTC rule is the creation of a safe harbor for violations of the DNC requirements under certain circumstances. A seller or telemarketer is provided a safe harbor under the FTC rule if as part of its "routine business practice:"

- (i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);
- (ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);
- (iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of

² FTC Telemarketing Sales Rule Section 310.4(d).

telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§ 310.4(b)(3)(iii) or 410.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors or enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.³

NEM submits that it is imperative that the Ohio legislation have a safe harbor provision for compliance as the FTC rule has included. Such a safe harbor will encourage good compliance practices and also recognize that some degree of human error in complying with the terms of a new Ohio law is unavoidable.

V. 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 DNC legislation as presently written could have such an effect, and will not yield an appreciable increase in consumer protection. Accordingly, NEM urges that DNC legislation be narrowly tailored to accomplish the desired consumer protection goals while still permitting energy marketers to utilize this means of consumer contact on a cost-effective basis. NEM also urges that the Ohio legislation conform with the disclosure requirements and safe harbor provision set forth in the FTC's new Telemarketing Sales Rule.

Sincerely,

Craig G. Goodman, Esq.
President
National Energy Marketers Association

³ FTC Telemarketing Sales Rule Section 310.4(b)(3).