

PENNSYLVANIA ENERGY MARKETERS COALITION

December 21, 2011

Rosemary Chiavetta
Secretary, Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Dear Secretary Chiavetta:

Please find enclosed the Comments of the Pennsylvania Energy Marketers Coalition ("PEMC"), in response to the Pennsylvania Public Utility Commission's Proposed Rulemaking Order on marketing and sales practices for the retail residential energy market (Docket No. L-2010-2208332).

Please do not hesitate to contact me with any questions or concerns regarding our Comments.

Sincerely,



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Enclosures

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Proposed Rulemaking on Marketing and Sales)
Practices for the Retail Residential Energy Market) Docket No. L-2010-2208332

COMMENTS OF THE PENNSYLVANIA ENERGY MARKETERS COALITION

INTRODUCTION

Pursuant to Docket No. L-2010-2208332, the Pennsylvania Public Utility Commission (“PUC,” or “Commission”) seeks comments on a Proposed Rulemaking Order on marketing and sales practices for the retail residential energy market (“Proposed Rulemaking”), which is based on the interim guidelines issued by the Commission on November 5, 2010.¹ The interim guidelines were developed during 2010 through the ongoing dialogue and discussion emanating from a series of collaborative meetings conducted by the Office of Competitive Market Oversight (“OCMO”) and as part of two primary industry working groups – The Committee Handling Activities for Retail Growth in Electricity (“CHARGE”), and Stakeholders Exploring Avenues to Remove Competitive Hurdles (“SEARCH”).

The Pennsylvania Energy Marketers Coalition (“PEMC”)², appreciates the opportunity to comment on these proposed regulations and the value they will bring in assuring the protection of consumer rights while creating a more competitive marketplace.

Under the guidance and leadership of Commission Staff, these proposed regulations were developed in close collaboration with a broad stakeholder group consisting of utilities, suppliers, the Office of Consumer Advocate, and others. Active participation in face-to-face meetings and bi-weekly conference calls between December 2009 and June 2010 allowed for significant opportunity to comment, discuss, and debate this subject matter. The resulting set of regulations, included in the

¹ See Docket No. M-2010-2185981.

² For purposes of this filing, the PEMC consists of Agway Energy Services, LLC (“Agway”), Energy Plus Holdings LLC (“Energy Plus”), Gateway Energy Services Corporation (“Gateway”), Interstate Gas Supply, Inc. (“IGS”), Pennsylvania Gas & Electric (“PAG&E”), and Vectren Retail, LLC (“Vectren”). PEMC members supply electricity, natural gas, and various other energy services to residential and commercial customers across a large number of utility markets throughout several states. PEMC works collaboratively on non-competitive, regulatory issues to advance competitive markets and consumer choice.

above-referenced Proposed Rulemaking, seek to “ensure the fairness and integrity of the competitive residential energy market.”³ We believe these regulations promote that goal.

As active participants in competitive electricity and/or natural gas markets throughout the United States, PEMC has a strong interest in the consistent development and formation of a robust and vibrant marketplace in Pennsylvania. For this reason, we made sure to be intimately involved in the process that led to the development of these regulations. On balance, we believe the Commission Staff has done an exceptional job of addressing the issue of consumer protection related to competitive energy sales and marketing, while at the same time allowing participants in the competitive marketplace enough latitude to develop their own unique business models. In particular, PEMC is very sensitive to the Commission’s concerns regarding door-to-door marketing (“D2D”), and has made an emphatic commitment – both as individual companies, for those members who use this sales channel, and also as a coalition – to advocate the most responsible D2D practices in the industry regardless of any regulatory requirement to do so.

Therefore, we support and applaud the development of this Proposed Rulemaking, and urge the Commission to adopt these regulations as expeditiously as possible, subject to the modifications and clarifications as appropriately identified within these Comments.

We appreciate that these regulations are intended to apply consistently to the marketing and sales of both electricity and natural gas. PEMC advocated for this uniform application and believes that a common set of regulations for both electricity and natural gas will be best for the marketplace and consumers.

While we support the majority of provisions outlined in the proposed regulations, PEMC offers the following Comments for consideration by the Commission to help assure consistent application of these regulations to the industry as a whole.

³ Proposed Rulemaking Order, § 111.1, p.1.

DEFINITION OF "AGENT" FAIR; SHOULD NOT BE EXPANDED

§ 111.2 defines "door-to-door sales" as "[a] solicitation or sales method whereby an agent proceeds randomly or selectively from residence to residence without prior specific appointment." We would recommend making this clearer to indicate door-to-door sales refers only to residence-only locations, not to the commercial component of dwellings which include both a residence and commercial space (for example, a dentist whose practice is located at home).

We would recommend more clarity to the definition of "sales" at § 111.2. For example, does "The extension of an offer to provide services or products communicated orally, electronically or in writing to a customer," include customer referrals?

We also note that § 111.2 defines an agent as "[a] person who conducts marketing or sales activities, or both, on behalf of a single licensed supplier. According to this definition, 'agent' includes an employee, a representative, an independent contractor, or a vendor. For natural gas suppliers, the term 'agent' also includes 'marketing services consultant' or 'nontraditional marketer' as defined at § 62.101 (relating to definitions)."⁴ PEMC would recommend that "person" in this definition be further defined to delineate between a legal person (a corporation) and a natural person. Otherwise, we believe that this definition of an agent is accurate and fair. PEMC's primary concern is to make sure that a clear distinction is made between an 'agent' and a group or organization that exists outside of the electric and natural gas industry (for example, a church or fraternal group) which has no direct affiliation with a supplier. Such a group or organization may choose to recommend or endorse a supplier to its members, employees, or customers and such reference should not result in the group or organization being considered an agent of the supplier under the above definition. To address this concern, PEMC recommends a new sub-paragraph (iii) be added to the definition of agent which states "Groups or organizations not directly affiliated with electricity or natural gas suppliers, brokers, or agents which choose to endorse a particular energy supplier for its members, employees, or customers, are not considered an agent of a supplier within the context of this definition."

⁴ Proposed Rulemaking Order, § 111.2, p.1.

SUPPLIER LIABILITY FOR ITS AGENT

§ 111.3 sub-paragraph (b) states that “a supplier is responsible for fraudulent, deceptive or other unlawful marketing or billing acts performed by its agent.” We strongly support the concept that suppliers should be held to account for the actions of its agents over whom suppliers bear responsibility. In order to ensure that this accountability process is even-handed, we recommend a procedure by which alleged acts are investigated and determined to be factual before a supplier is held responsible.

CRIMINAL BACKGROUND CHECKS ARE IMPORTANT

PEMC believes that the supplier and its representatives have an important obligation as stated in § 111.4 to develop standards and qualification for individuals the supplier chooses to hire as its agents. This includes, “criminal background investigations to determine if the individual presents a probable threat to the health and safety of the public...[including] checking the sex offender registry commonly referred to as the “Megan’s Law” registry maintained by the Pennsylvania State Police.”⁵. We take very seriously our responsibility to ensure our representatives adhere to high standards of ethical conduct.

We also believe that independent contractors or vendors which perform door-to-door activities should also be required to conduct criminal background investigations on their representatives as outlined in § 114 sub-paragraph (c). To this end, we will work diligently to ensure these third-party contractors have performed the prerequisite background checks along with taking other quality assurance steps to protect the public. We commit to working closely with the Bureau of Consumer Services to provide the safest environment possible for consumers while implementing this provision of the regulation in as practical a manner as possible.

⁵ Proposed Rulemaking Order, § 111.4, p.3.

ENCOURAGE EFFECTIVE SUPPLIER COMPENSATION PROGRAMS

§ 111.6, sub-paragraph (a) says that “[a] supplier shall design its agent compensation program to ensure that it does not promote, encourage or reward behavior than [sic] runs counter to the practices established in these regulations and to the general obligation of fair dealing and good faith that a supplier should exercise when interacting with customers.”⁶

As responsible suppliers, we are committed to developing long-term, mutually beneficial relationships with our customers. Effectively-designed compensation programs which reward the initiation of such relationships are critical in this regard. While we appreciate the intent behind this rule, PEMC is concerned that if the Commission seeks to enforce this provision strictly, Commission Staff will be faced with a significant burden to evaluate every supplier compensation program for its employees, agents, and contractors. Moreover, we are concerned that assessment of supplier compensation practices may be an overreach into the legitimate and proprietary business practices of suppliers.

We do understand the intent, however. Therefore, we recommend inserting the phrase, “be encouraged to” between “shall” and “design” in the first sentence of § 111.6 sub-paragraph (a). This will convey the Commission’s sentiment of how effective compensation programs should be designed while guarding against overly prescriptive or intrusive regulation.

In subparagraph (b), while the PEMC strongly opposes slamming, and our member EGSs hold themselves to the highest standards of integrity and transparency in their business dealings, we are concerned that the language might result in severe consequences for an EGS if a customer or agent makes an honest mistake. For example, an EGS must take a customer at his or her word if the customer affirms that he or she is the primary accountholder with decision-making authority. If this is later determined to be false, we recommend that the PUC incorporate some procedure by which EGSs can inform the PUC of any material facts in a particular situation before the EGS faces legal

⁶ Proposed Rulemaking Order, § 111.6, sub-paragraph (a). An apparent grammatical error is present.

consequences. This way, true errors and honest mistakes can be separated from clear cases of slamming (which should be punished to the fullest extent of the law).

VERIFICATION PROCESS SHOULD INCLUDE A "SAFE HARBOR" PROVISION

§ 117.7, sub-paragraphs (b)(2)(i) and (b)(2)(ii) state that a sales transaction verification process shall be initiated only when customer and sales agent are separated from one another. The premise behind requiring this physical separation is to ensure that the pending customer enrollment is informed and consensual without any undue pressure or coaching from the sales and marketing agent. We agree with this intent and believe that the Commission should maintain its zero-tolerance policy towards slamming and all other infractions of consumer protection.

However, PEMC offers that a customer may have additional and legitimate questions of the sales agent during the verification process which cannot be answered by the verification agent. In such instances, a customer may in fact prefer that the sales agent remain in the customer's presence or home during the verification as a potential resource to ensure an informed decision. It should be the customer's choice. PEMC would therefore suggest that the following three modifications be made to this Section to help ensure consumer protection while recognizing the practical implementation of this Proposed Rulemaking.

First, we suggest that a specific question or questions be posed to customers by verification agents that is also recorded and affords proof of no undue influence and coaching (e.g., "Is the sales agent present in your immediate vicinity? Are you aware of your right to not have the sales agent present during this verification process, unless you wish for the agent to be present? Can you verify that you are entering into this sales agreement voluntarily without any undue influence or pressure by the sales agent?"). A reply of "yes" or "no" would be required, with "no" being an automatic termination of the verification process without any interaction allowed between the verification agent and sales agent.

Second, there should be a "safe harbor" provision in the regulations whereby marketers can adopt an internal policy pursuant to which the sales agent provides the clear option to the customer

to physically separate themselves from the agent's vicinity during the verification process. If the customer chooses to leave the public location following the sale, or requests the agent to leave the customer's home, the sales agent would be required to comply immediately. This "safe harbor" provision would create a rebuttable presumption that the customer enrollment is voluntary and consensual.

Finally, there should be a requirement that sales agents are not to have any interaction with verification agents once the verification process begins. In other words, once the verification starts, it is the customer who controls the conversation, including whether or not the customer would like to be separated from the sales agent during the verification.

REQUIRED VERIFICATION DOCUMENTS NEED TO ACCOUNT FOR AUTOMATED PROCESSES

§ 117.7 sub-paragraph (b)(5) states the verification record shall include the transaction documents and the following information: (i) the date that the transaction was completed; (ii) the name or identification number of the agent that completed transaction; (iii) the date of the verification; (iv) the name or identification number of the individual that conducted the verification; (v) the results of the verification; and (vi) the date that the disclosure statement was provided to the customer and the method by which it was provided.

A complete and accurate verification record should provide peace of mind to customers and certainty to competitive suppliers and the regulator. We would suggest, however, that some pieces of information in the proposed rule will be difficult to collect and will not necessarily strengthen the verification process. For some suppliers, the verification process is automated, so there is no individual with a name or identification number to record, even though the entire process is recorded and archived. To address this concern, we would suggest the addition of a new provision, § 111.7 (5)(vii), that states "Suppliers which use automated sales verification systems shall maintain recordings of individual verification calls for a time period equivalent to six billing cycles in a system capable of retrieving that record by customer name and account number."

Further, typically these pieces of information are located in different electronic files and databases. While the EGS can produce such a complete record as needed or required by the PUC, it would be a significant expense and technical challenge to keep this information in a single record for all customers. We recommend that EGSs be allowed to maintain this information in separate databases, as long as they are able to produce a complete verification record as needed or required.

DOOR-TO-DOOR TIMEFRAMES MAY BE TOO RESTRICTIVE

During the collaborative sessions, there was debate surrounding the appropriate time which should be designated as the end point for Door-to-Door (D2D) sales activities when local ordinances are silent or less restrictive on this issue. The proposed regulations have designated the hours of operation for D2D marketing and sales activity from 9 a.m. and 7:00 p.m. beginning October 1 and ending March 31, and between 9 a.m. and 8 p.m. during the months beginning April 1 and ending September 30.

PEMC observes that daily work schedules and family commitments are such that a 7 p.m. or 8 p.m. cessation may be too early in that a restriction on sales activity at this hour might preclude a significant group of potential customers from having an opportunity to engage in discussion with sales representatives. Thus, the PEMC suggests that the hour by which sales solicitation activity must cease be extended to 9 p.m. local time, unless a more restrictive local ordinance exists.

Further, § 111.9 subparagraph (e) restricts the use of translation services by an agent. PEMC proposes that at the customer's discretion and with the customer's affirmative consent, a friend, family member, or neighbor could act as a translator on behalf of the customer.

Finally, § 111.9 subparagraph (f)(3) states that following the completion of a D2D sale, the EGS is responsible for sending a copy of the disclosure statement to the customer. While this makes sense for telephone transactions, the PEMC would recommend that if the agent provides the customer a copy of the disclosure statement at the customer's residence at the time of the transaction, this should be sufficient.

MUNICIPAL OFFICIALS NOTIFICATION REQUIREMENT REDUNDANT

§ 111.9. (2) requires that the supplier notify local municipal officials in advance of its schedule with the locations where it intends to conduct marketing and sales activities.

When a supplier seeks and is granted a license from the appropriate licensing authority for a particular municipality or jurisdiction, the supplier is in effect publicly stating its intent to conduct marketing and sales activities in that jurisdiction. Continual additional notifications of sales and marketing activities seem duplicative. In large unincorporated areas, it may be quite difficult to identify the "local municipal officials" that would be required under this section. In short, we believe that the requirement to obey all local licensing requirements should satisfy the need to notify municipal officials, thus making this requirement unnecessary.

TELEMARKETING

§ 111.10 sub-paragraph (b) requires the agent to provide the agent's first name when conducting a telemarketing call. Many suppliers who utilize the telemarketing channel for sales often assign fictitious names to their sales agents in order to protect their identity. PEMC recommends that this paragraph be modified to allow the use of a fictitious name as long as the fictitious name assigned to an agent is unique to that agent and can be traced back to the individual actually making the sales call.

CUSTOMER COMPLAINTS

§ 111.13 subparagraph (b) addresses the suppliers' requirements to implement an internal process for responding to and resolving customer inquiries, disputes and complaints. The last sentence in that paragraph states "A supplier shall retain the record for a time period equivalent to six billing cycles in a system capable of retrieving that record by customer name and account number." PEMC respectfully suggests that this sentence be modified to allow for the retrieval of the record be accommodated by "customer name, account number or any other effective means in order to obtain access to the information."

**PROVIDING UTILITIES GENERAL INFORMATION ABOUT MARKETING ACTIVITIES IS
GOOD BUSINESS PRACTICE**

§ 111.14 sub-paragraph (b) refers to the information that a supplier is required to provide the local distribution company regarding sales and market activities. PEMC strongly believes that the development of a highly-functioning competitive marketplace requires ongoing dialogue with the Commission (through the Bureau of Consumer Services) and distribution utilities. We believe our conduct throughout the CHARGE and SEARCH process, as well as through individual company activity, supports that commitment to dialogue and cooperation.

However, we believe that suppliers should be *encouraged* – not mandated – to provide information to distribution utilities regarding marketing efforts in a given territory. At this juncture in the development of a competitive marketplace, and notwithstanding the utilities’ Code of Conduct delineated in 52 Pa. Code § 54.122 and § 62.142, utilities continue to be in the role of true competitor with alternative suppliers. Therefore, providing detailed information regarding a supplier’s marketing plans (including specific geography) could put the supplier and the utility at risk for divulging private information that is competitively sensitive.

We do, however, believe that it is in our best interest to help utility customer service representatives understand who we are and what we do. This should not include details about specific offers, duration of sales activities, prices, or other terms and conditions of sales. As stated on numerous occasions during the CHARGE and SEARCH collaborative meetings, ongoing dialogue with utilities is of critical importance for all parties – but it should not be mandated to include specific offers or notifications on the morning of a program launch.

Therefore, we believe the language in Sub-Paragraph (b) of §111.14 should be revised as follows: “A supplier **shall be encouraged** to provide the local distribution company...” We believe this accomplishes the intended goal, and that successful suppliers will be in regular contact with utilities, regardless of the requirements contained in the Rulemaking.

Finally, with regard to paragraph 2 of this Section, PEMC again emphasizes that utilities also have an important responsibility to refer any and all questions regarding competitive supplier offers back to the supplier for clarification. At no time should utility customer service representatives offer opinions about the nature or effect of any supplier's offers or marketing and sales efforts nor encourage or discourage customers from choosing service by any supplier.

CONCLUSION

PEMC believes that the development of this Proposed Rulemaking is a very important step in the continuing development of the competitive natural gas and electricity marketplace in the Commonwealth of Pennsylvania. More than any other component of energy choice, it is critical that these regulations are approached with a continued commitment to empowering consumers so that they have the ability to take control of their energy purchases with products that they believe best fit their individual needs. If implemented properly with a strong commitment by all parties, consumers will have access to more choices for natural gas and electricity supply – and more control over their energy future.

We recognize that more work remains to be done on this topic and others related to competition, and we pledge to the Commission our continued support to help with these efforts.

December 21, 2011

Respectfully submitted,

PENNSYLVANIA ENERGY MARKETERS COALITION



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CC: PEMC Distribution List (below)

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