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May 20, 2020

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Supplier Door-to-Door and In-Person Marketing Moratorium Proclamation of Disaster  
Emergency-COVID-19; Docket No. M-2020-3019254

Dear Secretary Chiavetta:

On behalf of NRG Energy, Inc. ("NRG"), enclosed for electronic filing please find a Petition for Partial Rescission of March 16, 2020 Emergency Order issued in the above-captioned matter. Also, please note that NRG is respectfully requesting expedited relief in the form of a Secretarial Letter issued by June 1, 2020 with regard to its Petition. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

*/s/ Karen O. Moury*  
Karen O. Moury

KOM/lww  
Enclosure

cc: Cert. of Service w/enc.

**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of NRG Energy, Inc.'s Petition for Partial Rescission of March 16, 2020 Emergency Order upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

**Via Electronic Mail**

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Dated: May 20, 2020

*/s/ Karen O. Moury*

Karen O. Moury, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Supplier Door-to-Door and In-Person :  
Marketing Moratorium Proclamation : Docket No. M-2020-3019254  
of Disaster Emergency-COVID-19 :

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**PETITION OF NRG ENERGY, INC. FOR PARTIAL RESCISSION OF MARCH 16,  
2020 EMERGENCY ORDER ESTABLISHING MORATORIUM ON IN-PERSON  
SALES AND MARKETING OF COMPETITIVE ENERGY SUPPLY SERVICES**

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**AND**

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**PETITION OF NRG ENERGY, INC. FOR EXPEDITED RELIEF**

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Pursuant to Section 703(g) of the Public Utility Code, 66 Pa. C.S. § 703(g), and Section 5.41 of the regulations of the Pennsylvania Public Utility Commission (“Commission”), 52 Pa. Code § 5.41, and on behalf of its wholly-owned subsidiaries who are Commission-licensed electric generation suppliers and licensed natural gas suppliers (collectively, “energy suppliers”), NRG Energy, Inc. (“NRG”) files this Petition for Partial Rescission of the Commission’s March 16, 2020 Emergency Order (“Emergency Order”), requesting action by June 1, 2020. NRG also hereby requests Expedited Relief. In support of this Petition, NRG states as follows:

**I. SUMMARY OF RELIEF SOUGHT**

1. Through an *ex parte* Emergency Order, which was signed on March 16, 2020 and ratified on March 26, 2020, the Commission established a moratorium on door-to-door, public event and in person sales and marketing of competitive energy supply services in Pennsylvania.

2. By this Petition, NRG seeks immediate relief only from the portion of the Emergency Order that bans in person sales and marketing at retail businesses that are open or opened as a result of orders and directives subsequently issued by Governor Wolf and/or the

Secretary of Health in counties in the “yellow” phase, “green” phase or which are otherwise permitted to be open under future directives.<sup>1</sup>

3. Energy suppliers who opt to resume these in person sales and marketing practices must comply, of course, with: (i) all orders, guidance and other directives issued by the Governor’s Office and the Secretary of Health; (ii) the safety protocols that apply to their retail channel partners and employees; and (iii) any other applicable Commission regulations, including the marketing and sales practices regulations.

4. Additionally, suppliers engaging in such sales and marketing activity undertaken at a retail establishment should be required to follow best practices that include the following:

- Steps to ensure sales agent and customer safety, such as temperature checks, use of face masks, use of disposable stylus pens, hand sanitizer and disinfectant wipes;
- Steps to maintain six-foot social distancing requirements, including training and designations of such space; and
- Use of a “contactless” enrollment process.

5. NRG respectfully urges the Commission to act as swiftly and efficiently as it did in issuing the Emergency Order so that NRG’s subsidiaries may resume in person sales and market activities in the designated retail locations by June 1, 2020 to offer attractive and innovative energy supply alternatives to Pennsylvania customers.

## **II. BACKGROUND OF EX PARTE EMERGENCY ORDER**

6. On March 6, 2020, Governor Tom Wolf issued a Proclamation of Disaster Emergency, pursuant to subsection 7301(c) of the Emergency Management Services Code

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<sup>1</sup> NRG anticipates, however, that the Commission will promptly act on its own, as necessary, to rescind the portion of the Emergency Order that prohibits sales and marketing activities at public events once they are permitted to be held in Pennsylvania either during the green phase or pursuant to other directives issued by Governor Wolf and/or the Secretary of Health.

(“Emergency Code”), 35 Pa. C.S. § 7301(c), proclaiming the existence of a disaster emergency throughout the Commonwealth for a period of up to ninety days.<sup>2</sup> This same statutory section limits the initial declaration to a period of ninety days, but permits the Governor to renew the declaration at his/her discretion. It is widely expected that the Governor will continue the Proclamation past its current expiration date of June 4, 2020.

7. A Proclamation of Disaster Emergency is not a disaster response, but rather it is a declaration that grants powers to the Governor during its period of effectiveness. As noted below, the Governor has exercised those powers by limiting personal interactions, including those prescribed by the Commission’s *ex parte* Emergency Order.

8. In issuing an *ex parte* Emergency Order on March 16, 2020 and ratifying the same on March 26, 2020, the Commission relied on this Proclamation of Disaster Emergency to establish a moratorium on the door-to-door, public event and in person sales and marketing of competitive energy supply services in Pennsylvania. By the terms of the Emergency Order, this prohibition will now continue unabated “during the pendency of the Proclamation of Disaster Emergency, or unless otherwise directed by the Commission.”<sup>3</sup>

9. The Commission issued the *ex parte* Emergency Order under its regulations at 52 Pa. Code § 3.1 et seq. which requires “a clear and present danger to life or property or which is uncontested and requires action.” The southeastern portion of the Commonwealth was already in a state of virtual lock down at the time pursuant to a “stay at home” order issued by the Governor. As no petition was filed seeking such relief, as contemplated at 52 Pa. Code § 3.2 prior to issuance of the *ex parte* Emergency Order, the Commission took action *sua sponte* with

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<sup>2</sup> On March 11, 2020, the World Health Organization declared COVID-19 – the coronavirus – a pandemic.

<sup>3</sup> Emergency Order at 2.

no prior notice to the public, including the affected energy suppliers. Notably, the Commission took no similar measures or imposed any restriction whatsoever on any of the other industries that it regulates, including those that are person-to-person intensive such as taxicabs and transportation network companies.

### **III. SUBSEQUENT EVENTS**

10. Since the date of the Commission’s *ex parte* Emergency Order, management of the COVID-19 pandemic by the Commonwealth has continued to evolve, addressing and resolving many of the concerns expressed in the Emergency Order.

11. Three days after issuing the Emergency Order, on March 19, 2020, Governor Wolf ordered all non-life-sustaining businesses to close across the Commonwealth to help stop the spread of the virus. The administration provided guidance, refined parameters, and designed an exemption process that could allow some businesses to remain open under strict guidance from the State. On April 1, 2020, the Governor issued a statewide Stay-at-Home Order.

12. As of several weeks ago, the Governor’s Office and the Department of Health have begun employing a regional and industry-specific approach to reopening non-life-sustaining businesses under the Governor’s Plan to Reopen Pennsylvania,<sup>4</sup> although the Proclamation of Disaster Emergency remains in effect.

13. Guidance issued by the Department of Health on May 4, 2020 permits “all business,” except those in certain excluded categories (such as indoor fitness and entertainment), to conduct in-person operations in various counties designated to be in the “yellow phase” on and after May 8, 2020, a listing of counties which is expanding as the Governor loosens restrictions across the Commonwealth.

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<sup>4</sup> <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>.

14. The Guidance details the myriad of procedures that reopened businesses, including in person retail enterprises, must follow. These include limitation on entry, social distancing, masking, cleaning high touch surfaces and shielding, as well as employee wellness.<sup>5</sup>

#### **IV. EFFECT ON NRG AND ITS RETAIL PARTNERS**

15. NRG operates several wholly-owned subsidiaries that are licensed by the Commission to provide competitive energy supply services in Pennsylvania. A frequently used channel for the sale and marketing of competitive energy supply services by NRG's subsidiaries includes kiosks and shops that operate within retail businesses with which they partner. The Commission has long expressed support for this in-person sales and marketing channel because it gives consumers an opportunity to speak with the energy suppliers' representatives in a public location.<sup>6</sup>

16. The Emergency Order's very broad moratorium immediately and adversely affected NRG's subsidiaries that were extensively conducting sales and marketing activities at retail locations, many of which remained open as essential businesses. Given Pennsylvania's recent and ongoing movement toward reopening businesses consistent with the Governor's Guidance, no valid justification exists for subjecting energy suppliers to restrictions that are not applicable to other businesses.

17. NRG's subsidiaries have existing partnerships with retail establishments in Pennsylvania that have invited or are in discussions with the suppliers to return to their stores to market competitive retail energy services to customers visiting those retail establishments. NRG

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<sup>5</sup> <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200504-COVID-19-Business-Guidance.pdf>

<sup>6</sup> See, e.g., *Natural Gas Distribution Company Customer Account Number Access Mechanism for Natural Gas Suppliers*, Docket No. M-2015-2458991 (Order entered July 8, 2015), at 19-20.

seeks to have the same ability as any retailer in Pennsylvania to restart its own marketing in these channels.

18. Under the Governor’s Plan to Reopen Pennsylvania, NRG is permitted to reopen its in-store retail marketing and sales operations under the expressed safeguards.<sup>7</sup> It intends to do so initially in the counties that have been place on “yellow” status and subsequently in counties that move to “green” status, as well as pursuant to any future directives issued by the Governor and/or the Secretary of Health. However, this is not possible unless and until the Commission modifies its *ex parte* Emergency Order.

19. Through a partial rescission of the Emergency Order by the Commission, NRG would be placed on equal footing with other retailers operating businesses in Pennsylvania.

## **V. APPLICABLE LEGAL STANDARDS**

20. Under the Commission’s regulations, petitions for relief “must be in writing, state clearly and concisely the interest of the petitioner in the subject matter, the facts and law relied upon, and the relief sought.” 52 Pa. Code § 5.41(a).

21. Section 703(g) authorizes the Commission at any time “after notice and after opportunity to be heard...rescind or amend any order made by it.” 66 Pa.C.S. § 703(g).

22. Pursuant to its statutory authority to regulate competitive energy markets, the Commission has promulgated the marketing and sales practices regulations that are published in Chapter 111, 52 Pa. Code §§ 111.1-111.14.

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<sup>7</sup> Under the phased reopening, the yellow phase requires telework to continue where feasible and obligates businesses with in-person operations to follow the business and building safety orders. Conducting in-person sales within retail establishments, which is NRG’s primary sales channel, cannot be done through a “telework” mode. Rather, this sales channel inherently involves in-person operations, and as such, NRG must follow the business and building safety orders.



23. As noted, the Commission’s Emergency Order is based upon the March 6, 2020 Proclamation of Disaster Emergency issued by Governor Wolf. While very broad, the Governor’s powers are not unrestrained. The Constitution of the Commonwealth of Pennsylvania states that “No power of suspending laws shall be exercised unless by the Legislature or by its authority.” Pa. Const., Art. I, § 12. The Governor of Pennsylvania assumes his emergency management powers under specific provisions of the Emergency Code, 35 Pa. C.S. §§ 7301-7304. Section 7301(f) of the Emergency Code provides, in part, that the Governor may: “Suspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.” 35 Pa. C.S. § 7301(f)(1). In the Proclamation regarding COVID-19 issued on March 6, 2020, the Governor stated that he suspended “the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with this emergency. Proclamation of Disaster Emergency, 50 Pa. B. 1644 (March 21, 2020).

24. Thus, the Governor’s Proclamation gave the Commission authority to revise regulatory statutes and regulations to the extent necessary to deal with the grave health issues caused by the pandemic – but only if otherwise applicable regulatory provisions would “prevent or hinder” the Commonwealth’s ability to cope effectively with the COVID-19 emergency. With the orders gradually permitting retail establishments to reopen in a number of locations in

Pennsylvania, the full extent of the Commission’s Emergency Order is no longer necessary or justified.<sup>8</sup>

25. While NRG understands and appreciates the circumstances of the alarming and little understood threat of the novel coronavirus at the time the Emergency Order was executed in mid-March, and did not challenge it at that time under the Commission’s regulations governing the issuance of emergency relief,<sup>9</sup> the circumstances have changed, warranting a partial rescission of the Emergency Order to stay abreast of the Guidance being issued and implemented by the Governor’s Office.

## **VI. RELIEF SOUGHT**

26. For the reasons set forth herein, NRG respectfully requests that that the Commission rescind the portion of its Emergency Order that bans in person sales and marketing in retail businesses that are opened as a result of Governor Wolf earmarking the counties in which they are located as being in the “yellow” or “green” phase, or otherwise permitting them to operate through future directives. To be clear, NRG is not asking the Commission to rescind the portion of the Emergency Order that impose moratoriums on door-to-door sales and marketing practices.<sup>10</sup>

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<sup>8</sup> In issuing the *ex parte* Emergency Order, the Commission also relied upon Section 1501 of the Public Utility Code, which requires every public utility to “furnish and maintain adequate, efficient, safe and reasonable services and facilities.” 66 Pa. C.S. § 1501. As the definition of public utility expressly excludes electric generation suppliers exempt for very limited purposes, which do not appear to be applicable here, it is arguable that this provision does not support issuance of the Emergency Order. *See* 66 Pa. C.S. §§ 101, 2809, 2810; *Delmarva Power & Light Co v. PUC*, 582 Pa. 338, 870 A.2d 901 (Pa. 2005).

<sup>9</sup> 52 Pa. Code § 3.4.

<sup>10</sup> NRG does not engage in door-to-door marketing sales and practices and is aware that public events are still banned in Pennsylvania. However, as noted earlier, NRG anticipates that when public events are permitted to be held in Pennsylvania, the Commission will ensure that the Emergency Order is no longer prohibiting competitive energy suppliers from engaging in sales and marketing activities at such events.

27. Further, NRG recommends that the Commission require energy suppliers who opt to resume in person sales and marketing practices to comply with: (i) all orders, guidance and other directives issued by the Governor's Office and the Secretary of Health; (ii) the safety protocols that apply to their retail channel partners and employees; and (iii) the Commission's regulations, including its marketing and sales practices regulations. 52 Pa. Code §§ 111.1-111.14

28. Additionally, NRG recommends that suppliers engaging in such sales and marketing activities undertaken at a retail establishment be required to follow best practices that include the following:

- Steps to ensure sales agent and customer safety, such as temperature checks, use of face masks, use of disposable stylus pens, hand sanitizer and disinfectant wipes;
- Steps to maintain six-foot social distancing requirements, including training and designations of such space; and
- Use of a "contactless" enrollment process.

29. In addition to the foregoing, NRG would welcome the opportunity to submit to the Commission's staff, on a confidential basis, the detailed steps that it plans to take to protect agents and consumers if this Petition is granted. Alternatively, the Commission could order any energy supplier who elects to resume sales and marketing practices in designated retail locations to submit a notification to the Office of Competitive Market Oversight of its intent to do so along with a description of the specific steps it intends to follow to ensure the protection of its agents and the public.

## VII. EXPEDITED CONSIDERATION

30. The Commission should act as swiftly and efficiently as it did when issuing the *ex parte* Emergency Order that immediately and adversely affected the operation of competitive energy supply businesses by NRG's subsidiaries.

31. As NRG's subsidiaries have already been denied the opportunity to utilize a significant sales and marketing channel for over 60 days, the Commission should take measures designed to get them back in business by June 1, 2020.

32. Moreover, NRG's subsidiaries are currently being denied the opportunity to this channel in counties that have been earmarked as "yellow." No justification exists for delaying these sales and marketing activities beyond June 1, 2020.

33. Since the Commission did not solicit input prior to issuance of the Emergency Order, NRG does not believe that any comments need to be sought in connection with this Petition, particularly given the changed circumstances described above. Although Section 703(g) requires notice and opportunity to be heard prior to rescission or amendment of an order, it contemplates such due process being afforded to "parties" in a proceeding,<sup>11</sup> of which there are none here. Also, the Commission can rely on the additional powers stemming from the Proclamation of Disaster Emergency to waive any such requirements and undo the restrictions in a similar *ex parte* manner that it imposed them.

34. Nonetheless, if the Commission desire additional input, it could establish a shortened response period to this Petition, with responses due by May 27, 2020, and then promptly act via Secretarial Letter to partially lift the bans in the Emergency Order.

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<sup>11</sup> 66 Pa. C.S. § 703(g).

## VIII. SERVICE OF PETITION

35. Consistent with the Commission's regulations regarding the service of petitions, NRG is electronically serving this Petition on the Bureau of Investigation and Enforcement, the Office of Consumer Advocate and the Office of Small Business Advocate.<sup>12</sup>

36. NRG is also electronically serving the Petition on the Office of Competitive Market Oversight ("OCMO") and requesting that the Petition be disseminated to the electronic mail list that is widely used by OCMO for many such similar purposes.

## IX. CONCLUSION

WHEREFORE, NRG Energy, Inc. respectfully requests that the Commission grant its Petition, partially rescind the Emergency Order consistent with the foregoing and take any other action deemed to be in the public interest.

Respectfully submitted,

*/s/ Karen O. Moury*

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Dated: May 20, 2020

Counsel for NRG Energy, Inc.

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<sup>12</sup> 52 Pa. Code § 5.41(b).

**VERIFICATION**

I, Leah Gibbons, am the Director of Regulatory Affairs for NRG Energy, Inc., and I hereby state that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to sworn falsification to authorities).



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Leah Gibbons, Director Regulatory Affairs  
NRG Energy, Inc.

Dated: May 20, 2020