

**BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DRM 16-853

RULEMAKING

**New Hampshire Code of Administrative Rules
Chapter Puc 2000, Competitive Electric Power Supplier and Aggregator Rules**

**COMMENTS OF THE
NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Energy Marketers Association (NEM)¹ hereby submits these Comments pursuant to the Order of Notice issued December 27, 2016, in the above-referenced proceeding regarding the Commission's proposed revisions to the regulations applicable to competitive electric power suppliers (CEPS) and electric load aggregators in the New Hampshire Code of Administrative Rules, Chapter Puc 2000. At the outset, NEM notes its support for the delineation of a clear set of rational behavioral standards for market participants, with clearly delineated consequences for non-compliance. Toward that end, NEM has adopted a Consumer Bill of Rights² and National Marketing Standards of Conduct³ that set forth ethical business practices to form a common basis for doing business in the energy marketplace. The business practices delineated in NEM's National Standards are focused on ensuring the adequacy of disclosures and accuracy of

¹ 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.

² Available at: http://www.energymarketers.com/Documents/Consumer_Bill_of_Rightsfinal_formatted.pdf

³ Available at: https://www.energymarketers.com/images_fp_logos/National_Marketing_Code_of_Conduct.pdf

information provided to consumers in the energy shopping process and include, but are not limited to, the following:

- Suppliers shall not engage in false, misleading or deceptive conduct in dealings with consumers.
- Suppliers shall not make false, misleading or deceptive statements or representations in dealings with consumers. Consumers have the right to honest, accurate, and clear communications relating to energy marketing and sales activities. These communications include but are not limited to print, radio or television advertisements, mail, email, website claims, social media, telephone solicitations and person-to-person contacts.
- Suppliers shall provide accurate information to consumers about the products and services being offered. Suppliers shall provide the necessary documents and information that are required to be provided to the consumer under applicable law.
- A Supplier's agreement with a customer shall set forth all material terms.
- A Supplier's agreement with a customer shall be clear, plain and in a language that is understandable to the consumer.

NEM's comments herein are informed by the business practices set forth in these documents.

NEM strongly supports the goal of promoting consumer understanding, transparency and consumer confidence in retail energy markets. NEM is concerned that certain proposed revisions to the regulations would restrict supplier product offerings, impose unnecessarily stringent disclosure requirements and effectively eliminate the availability of a valuable sales channel. Promoting increased consumer understanding, transparency and consumer confidence can be achieved without sacrificing competitive suppliers' ability to offer product innovation and differentiation. NEM comments are made in support of these goals.

NEM's Comments are organized in accordance with the proposed sections of the regulations.

Proposed Puc 2004.03(a), (b), (c) and (g) Price Posting Requirements

The proposed rules in this section pertain to CEPS posting of price offerings on a Commission shopping comparison website as well as on individual supplier websites. In proposed Puc 2004.03(a) reference is made to “standard pricing policies, charges and key terms,” but no such reference is made with respect to individual supplier websites. As a general matter, NEM notes that other jurisdictions that have implemented shopping comparison websites have similarly utilized posting of “generally available offers” from suppliers. By placing the emphasis on posting “generally available offers,” it promotes the goal of providing consumers with pricing transparency while also retaining a necessary level of flexibility for electric suppliers to be able to respond to dynamically changing market conditions. In other words, overly proscriptive price reporting requirements have the negative consequence of limiting suppliers’ ability to offer innovative services and rates in the market. The purpose of online posting and transparency should be to inform the public of actual purchase prices that are reasonably recent and updated.

Likewise, electric suppliers should only be required to post current, generally available offers to their own websites. An electric supplier may also make customized, negotiated rate offerings available to eligible consumers. In the case of these customized, negotiated rate offerings, it would be impracticable for a supplier to be required to post all of these products. For products of this nature, the supplier should be permitted to post language online to the effect that the consumer “should contact the supplier for a quote.” In addition, the consumer should be encouraged to contact the supplier should it have any questions about its services and rates inasmuch as the supplier can then efficiently clarify and explain any areas of potential confusion.

Proposed Puc 2004.03(b), (c), (d), (e) and (f) Variable Price Product Disclosures and Restrictions

Proposed Puc 2004.03(b)-(f) sets forth a series of proposals regarding the expression of variable price products by suppliers. NEM is concerned that these proposals are unnecessarily restrictive of the competitive retail marketplace. Indeed, the proposals more closely resemble regulated utility tariff rate filings. The proposals are also in excess of the provisions of SB170, effective July 20, 2015.

NEM and its members strongly support the provision of adequate disclosures to consumers to ensure that transactions are undertaken in an informed and consensual manner. There is a balance to be struck in providing consumers with meaningful disclosures, but that are not so granular in detail as to be confusing for consumers to understand. Rather than the approach set forth in Puc 2004.03(b), if the terms of service for the variable price product includes wording to the effect that it is a market-based product that is subject to change and not subject to a ceiling, that disclosure should be sufficient.

Puc 2004.03(b)(3) would require disclosure of the “variable pricing structure including each applicable component used in determining the variable price and the frequency of variation.” Requiring competitive suppliers to disclose formulas for designing rates, as is proposed by this language, is equivalent to providing their competitors with highly confidential and proprietary competitive pricing strategies and business strategies. Notwithstanding that utility tariffs are inscrutable and difficult for even energy professionals to understand; imposing similar tariff-like filing regimes on the competitive marketplace is inappropriate and would restrict innovation and responsiveness to consumer needs as well as undermine the very market innovations that competitive suppliers specialize in providing. Relatedly, Puc 2004.03(b)(5) would require a

graphical display of the variable prices required in Puc 2004.03(b)(3). In addition to the foregoing reasons explained by NEM for not adopting this proposal, NEM notes that supplier production of such a graphical display would be operationally difficult.

Suppliers would be required to provide customers with twelve months of historical variable pricing information under Puc 2004.03(b)(4). With respect to the provision of historical rates, NEM submits that this information is highly sensitive and confidential information that suppliers should not be required to post on a public website. Additionally, historical rates are not an indicator of future performance and could be a source of consumer confusion. Finally, the supplier may not have offered that rate during the prior twelve month period because of business judgment, market conditions or other reasons, and so requiring the supplier to prepare such an analysis would be inaccurate.

Puc 2004.03(b)(6) would require the supplier website and terms and conditions include a statement of the, “maximum and minimum monthly price, stated separately, that a similarly situated retail customer in New Hampshire would have paid over the preceding 12 month period.” NEM reiterates its concerns with Puc 2004.03(b)(4) as applied to this historical price disclosure requirement. It also unclear how to interpret the term, “similarly situated retail customer.”

Puc 2004.03(c) would establish a requirement for posting the applicable variable price per kWh no less than five calendar days in advance of the effective date. This would be coupled with the requirement to provide customers thirty days advance notice of, “any increase in a variable price projected to increase by 10 percent or more or one cent per kilowatt-hour, whichever is less,” included in Puc 2004.03(d). Puc 2004.03(e) requires the supplier notice to “confirm” the availability of the actual price on the supplier website at least five days in advance of the effective

date of a price increase. Requiring thirty days advance notice of a rate increase for a product that by its nature varies with the market is impracticable to comply with and unnecessary, particularly since customers can terminate month-to-month variable contracts without an early termination fee. Essentially it requires the supplier to hedge its “variable” rate so that it does not vary – effectively converting the variable product into a fixed product. The increased hedging increases supplier costs, thereby increasing the costs of making variable products available in the marketplace and artificially and unnecessarily increasing prices to consumers.

By enrolling with a supplier for a variable price product, the customer is on notice that the rates are subject to change due to market forces, and therefore rate changes are not unforeseen. Products with a variable rate component need to be adequately disclosed to the customer upfront at the time of contracting. However, subsequent notice requirements must be tailored to the actual variable nature of the product. Otherwise, suppliers will not be able to offer variable rate products. Consumers are not well-served by a market that is overly reliant solely on fixed rate products, or variable rate products. As market conditions change, different products offer different value to consumers. Moreover, if notice requirements effectively eliminate variable rate offers to consumers, it is foreseeable that at some point consumers will be dissatisfied by fixed rates that lock them into a price when market conditions cycle downward. In other words, to best protect consumers, the Commission should focus on the adequacy of consumer disclosures at the initial time of contracting about the nature of the product and the terms and conditions. Overly burdensome on-going notice requirements that are not appropriately tailored to the nature of the product, variable or fixed or otherwise, will not serve consumers well because it will distort and diminish the competitive offerings that are available to them.

The notice requirement will have a negative distortionary impact on the market. It will pervert supplier pricing. This is because the notice requirements will impose upward pricing pressure on suppliers to anticipate future market price increases and increase the need for supplier hedging to avoid unanticipated price increases. Moreover, suppliers will factor these increased unnecessary costs into their pricing in order to avoid costly notice requirements.

The requirement for advance notice of price changes for variable price products is additionally problematic because the supplier cannot forecast the market changes that would be required to provide advance notice. Rather the supplier waits until the market changes occur and the supplier incurs the cost to serve the consumers, and then uses those inputs to determine any price change to the consumer. Requiring suppliers to give advance notice of a price change for a variable price product would, in effect, cause the creation of something akin to a new two month, fixed product. This is because if the supplier is required to provide advance notice of a price change, the supplier must price in advance, which in turn requires more hedging. This increases the costs and risks of providing the product. In current practice, the supplier's price to the customer is not a projection. It is the actual cost the supplier incurred to serve the customer over the past billing cycle. As such, it is impossible to inform the consumer of the price ahead of time. In addition, after the supplier were to give the customer notice of the price, the customer would be free to leave the next day without an early termination fee, thereby compounding the supplier's risk.

Requiring that consumers be provided with "insurance" of this type against variable prices will ultimately increase the prices consumers end up paying or eliminating the availability of these products overall.

Puc 2004.03(f) would require that residential and small commercial customers receive notice, between 45 and 60 days prior to the effective date, “of any change in the terms or structure of a variable price.” NEM suggests that this language be reworded such that notice be provided to the customer of a, “**material** change in the terms or structure of a variable price.”

Proposed Puc 2004.03(g) and (h) Fixed Price Product Disclosures and Restrictions

Regarding fixed price products, Proposed Puc 2004.03(g)(2) and (g)(3) would require suppliers to post on their websites and include in their terms of service the “average monthly price” for service to residential and small commercial customers assuming different usage levels. NEM is concerned that the presentation of “average monthly price” information will have the unintended consequence of sending misleading information to the consumer. In other words, average monthly pricing will not reflect the individual customer’s actual experience. The presentation of average monthly prices, that are not representative of actual supplier product offerings, will be providing false information to consumers that they may rely upon to draw false conclusions about the relative value of competitive offerings. And, the actual fixed price to be charged to the customer will be disclosed to the customer up front at the time of contracting.

Proposed Puc 2004.03(g)(4) would require the term of fixed price contracts on supplier websites and terms of service be expressed in months or the “effective ending meter read month.” NEM suggests that suppliers should only be required to provide an approximate ending meter read month. This is because the beginning and end dates of a contract are generally dependent upon the utility switching process. The supplier itself cannot say with certainty when the utility will effectuate the customer switch. As such, the supplier may be able to offer an approximation of the contract end month, but should not be required to include a specific end month.

Proposed Puc 2004.03(h) pertains to fixed price contracts that include charges based on demand and would require the terms of service to include, “the average price per kW of demand, or other billing determinants for demand charges, if other than a fixed rate per kW.” NEM submits that this requirement may be impracticable to comply with because a supplier would not know the pricing information until after the demand event occurs.

Proposed Puc 2004.03(i) Disclosure of Real Time or Time of Use Rate Information

It is proposed in Puc 2004.03(i) that in the case of time of use or real time rates that suppliers provide a disclosure of “all applicable billing determinants” and twelve-month historic average pricing information at different usage levels to residential and small commercial customers. This proposal is problematic for a number of reasons. It would require suppliers to provide competitively sensitive pricing information. It would also require suppliers to provide historic average price information that is not an indicator of future market conditions and misleading as applied to any individual customer. In total, the information would do more to overwhelm and confuse consumers than to inform them.

Proposed Puc 2004.11(e) - Door to Door Marketing Prohibition

Proposed Puc 2004.11(e) would effectively prohibit door-to-door marketing to residential customers. The proposal would allow for a narrow exception in the case of a potential customer’s request made at least 24 hours in advance that would not effectively be put in practice. NEM submits that there is no evidence to support the adoption of such a draconian restriction on this marketing channel. NEM notes that with the existence of do not call lists, the avenues available for suppliers to effectively reach consumers - in terms of message, content and cost - has been dramatically limited. Door-to-door sales remains a viable and

effective method for contacting residential customers. In fact, these types of in-person contacts are an excellent venue for consumers to become educated about product offerings. Moreover, a supplier representative upon being requested to leave the premises, should be required to promptly and courteously leave the premises.

An approach utilized elsewhere is to establish and adopt reasonable time restrictions during which door-to-door marketing is permitted.⁴ In addition, there may also be applicable local ordinances pertaining to permissible hours for door-to-door marketing with which suppliers must comply. NEM suggests that 9:00AM and 9:00PM is a generally reasonable timeframe within which to allow door-to-door marketing to residential customers.

Proposed Puc 2005.01 Enforcement Provisions and Procedures

A procedure for addressing supplier violations and associated potential fines is proposed in Puc 2005.01. Of particular note, Puc 2005.01(c) provides that, “[w]ithin 10 business days following the date of issuance of the NOV [Notice of Violation],” the supplier shall decide to either sign a consent agreement or request a Commission hearing or the supplier will be deemed to have agreed with the findings in the NOV. NEM suggests that the time period be expanded beyond ten business days to at least twenty business days in order to ensure a supplier is provided requisite due process. After the NOV is issued, the supplier will need time to thoroughly investigate and respond to the allegations. Ten business days is an insufficient amount of time for a supplier to meaningfully evaluate potential claims and determine the appropriate corrective action.

⁴ See, e.g. 52 Pa. Code § 111.9.

Request to Add NEM to the Service List

NEM respectfully requests that it be added to the service list of the instant proceeding.

Correspondence in this matter should be directed to:

Craig G. Goodman, Esq.
President
National Energy Marketers Association
3333 K Street, NW, Suite 110
Washington, DC 20007
Tel: (202) 333-3288
Email: cgoodman@energymarketers.com

Stacey Rantala
Director, Regulatory Services
National Energy Marketers Association
3333 K Street, NW, Suite 110
Washington, DC 20007
Tel: (202) 333-3288
Email: srantala@energymarketers.com

Conclusion

NEM appreciates this opportunity to offer comments on the proposed regulations and looks forward to future opportunities to participate in the rulemaking process.

Sincerely,



Craig G. Goodman, Esq.
President
Stacey L. Rantala
Director, Regulatory Services
National Energy Marketers Association
3333 K Street, NW, Suite 110
Washington, DC 20007
Tel: (202) 333-3288
Email: cgoodman@energymarketers.com;
srantala@energymarketers.com
Website-www.energymarketers.com

Dated: January 26, 2017.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has on this 26th day of January, 2017, been sent via electronic mail to the service list in Docket 16-853.

A handwritten signature in blue ink, appearing to read "Craig Goodman", with a long horizontal flourish extending to the right.

Craig G. Goodman, Esq.
President
National Energy Marketers Association
3333 K Street, NW, Suite 110
Washington, DC 20007
Tel: (202) 333-3288
Email: cgoodman@energymarketers.com
Website-www.energymarketers.com