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**RE: Draft Proposed Revisions to 940 C.M.R. 19.00 – Retail Marketing and Sale of Electricity**

Dear Mr. Forster and Ms. Anderson:

The National Energy Marketers Association (NEM)<sup>1</sup> hereby respectfully submits these letter comments in response to the email Request for Informal Stakeholder Feedback Regarding Proposed Revisions to 940 CMR 19.00 dated December 22, 2016. NEM and its members share the AGO's commitment to ensuring that consumers receive adequate disclosures about the terms of the products they purchase in the competitive retail energy marketplace.

Toward that end, NEM and its members adopted **National Marketing Standards of Conduct**<sup>2</sup> in January 2013 to provide 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 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.

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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 members are serving and intend to serve all classes of electric and natural gas consumers in the service territories of the New York utilities.

<sup>2</sup> Available at: [https://www.energymarketers.com/images\\_fp\\_logos/National\\_Marketing\\_Code\\_of\\_Conduct.pdf](https://www.energymarketers.com/images_fp_logos/National_Marketing_Code_of_Conduct.pdf)

- 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 its National Standards. NEM's National Standards evince our commitment to ensuring consumers receive adequate disclosures as participants in the competitive energy marketplace. Indeed, the delineation of clear behavioral standards for competitive suppliers that incorporate reasonable consumer disclosure requirements as their linchpin should be the goal of this review process.

NEM strongly supports the goal of promoting consumer understanding, transparency and consumer confidence in retail energy markets. NEM is concerned that the proposals to restrict supplier product offerings and impose unnecessarily stringent disclosure requirements are not the means to achieve consumer empowerment. Promoting increased consumer understanding, transparency and consumer confidence can be achieved without sacrificing competitive suppliers' ability to offer product innovation and differentiation. Indeed, one of the hallmarks of a competitive marketplace is the existence of increasingly diverse product offerings to consumers.

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

### **Proposed Section 19.03 Definitions – Voluntary Demand**

The proposed definition of Voluntary Demand would incorporate a requirement that suppliers selling and marketing renewable energy be limited to promoting these products as “green” or “renewable” only if they are “in excess of the retail seller of electricity’s obligations under the Renewable Portfolio Standard or similar requirements in other jurisdictions.” NEM is concerned about this proposal because, in general, it would lead to inaccurate representations by restricting a supplier from noting that its product has a “green” component when it has, in fact, complied with the RPS. More specifically, this definition would appear to lead to an incongruous result with that being implemented by the Department of Public Utilities in DPU 14-140.<sup>3</sup>

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<sup>3</sup> DPU 14-140-E, Order issued October 26, 2016, Attachment A, Energy Switch Massachusetts Website Rules, Section III.I.

## **Proposed Section 19.04 Misrepresentations Prohibited, Section 9**

NEM recommends that the language and requirements regarding renewable energy product disclosure requirements be adopted in consistent fashion with that being considered in DPU 14-140 in order to promote supplier compliance and consumer understanding.

## **Proposed Section 19.05 Disclosures Required**

In this proposed Section, the current requirement of Section 19.05 to provide consumers with a written disclosure statement would be expanded to a, “three page or less standalone document in at least twelve point type.” NEM notes that these type of disclosure statements, sometimes referred to as a “Schumer Box,” are increasingly being adopted in retail choice jurisdictions.<sup>4</sup> The point of the disclosure statement is to communicate to consumers in a clear and succinct manner the material terms of the product for which they are contracting. Accordingly, in other jurisdictions the Schumer Box disclosure statements are generally limited to one-page in length and are constructed in a chart format for easy reference. The one-page disclosure sheets adopted by Commissions elsewhere provide for standard disclosures to be made in a highly visible place on the contract, that is easy for the consumer to see and understand, but do not standardize or restrict the unique competitive elements of supplier pricing and terms of service. NEM submits that requiring lengthy disclosure statements, in addition to the contract itself, may run counter to the purpose of providing consumers with a succinctly-stated, plainly-worded summary of the material terms of the products that they wish to contract with the supplier to buy. NEM also notes that this issue has been extensively considered in DPU 14-140. As such, we recommend consistency in the rules being considered here in order to promote supplier compliance.

## **Proposed Section 19.06 Unfair or Deceptive Acts or Practices Unique to Variable Rates and Electricity Supply Agreements Automatically Renewed Into Variable Rates**

Proposed Section 19.06(1) would restrict competitive suppliers to only offer variable rates to residential and small commercial customers that are “calculable” variable rates. As defined in the proposal a variable rate is “calculable,”

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<sup>4</sup> See, e.g., NYPSC Case 98-M-1343, Uniform Business Practices, Section 5, Attachment 4. The Sample Customer Disclosure Statement approved by the NYPSC includes the following fields:

Price  
Fixed or Variable and, if variable, how the price is determined  
Length of the agreement and end date  
Process customer may use to rescind the agreement without penalty  
Amount of Early Termination Fee and method of calculation  
Amount of Late Payment Fee and method of calculation  
Provisions for renewal of the agreement  
Conditions under which savings to the customer are guaranteed

See also Pennsylvania PUC Docket L-2014-2409385, Final Omitted Rulemaking Order, adopted April 3, 2014 pages 25-27 and Attachment A; NJBPU Docket No. EX14060579, Order, dated September 30, 2014; MDPSC Docket COMAR 20.53.07.08(B) and 20.59.07.08(B).

only if each and every rate (in terms of cents per unit of electricity sold) charged over the course of the stated term of the electricity supply agreement, and the times during which the customer will take service under such rates is either:

- (a) disclosed in the electricity supply agreement or
- (b) can be calculated through a mathematical calculation that is
  - i. set forth in the electricity supply agreement and fully disclosed to the consumer; and
  - ii. capable of being executed using only publicly available information published by third parties, mathematical constants disclosed in the electricity supply agreement, or some combination thereof.

NEM suggests that 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. In general, if the contract for the variable priced 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. Requiring competitive suppliers to disclose formulas for designing rates 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. Rules should properly focus on marketing standards and conduct and should not impermissibly extend into the setting of competitive rates and pricing. The discipline of competitive market forces ensures that supplier rates are just and reasonable.

Proposed Section 19.06(2) would require suppliers offering “calculable” variable rates to residential and small commercial customers to provide those customers with, “a chart that compares the fixed basic service rate charged by the customer’s distribution company in each of the previous twelve (12) months and the rate that the customer would have been charged per kWh in each of those months if the customer’s supply rate in those months had been calculated pursuant to the mathematical calculation set forth in the offered electricity supply agreement.” NEM recommends that this chart proposal not be adopted for a number of reasons. In general, the purpose of price posting and transparency should be to inform the public of actual purchase prices that are reasonably recent and updated. The DPU has implemented the Energy Switch Massachusetts website for this purpose. In addition, a chart comparing the utility basic service rate for commodity with a competitive supplier rate that may include value-added services; or consumer benefits such as rebates, reward cards or loyalty programs; or offers premium renewable products; would artificially understate the benefit of the competitive offering and cause consumers to misapprehend the full value of the competitive offering.

With respect to the provision of historical supplier rates on the chart under proposed Section 19.06(2), NEM submits that this information is highly sensitive and confidential information that suppliers should not be required to publish. Additionally, historical rates are not an indicator of future performance and could be a source of consumer confusion. Moreover, the supplier may not have offered that rate during the prior twelve month period because of business judgment,

market conditions and the like, and so requiring the supplier to prepare such an analysis on a chart would be inaccurate.

Notwithstanding the foregoing, Proposed Section 19.06(2) is also problematic because it does not make clear at what point in time the supplier is supposed to provide the chart to the customer. This should be clarified to permit proper supplier compliance.

Finally, proposed Section 19.06(2)(e) is a “catchall” provision for determining the format in which the chart is to be provided to the customer, dependent on the form of the solicitation. NEM submits that for the sake of clarity and to enhance supplier compliance, this should be determined by the method under which the customer is finally enrolled (door-to-door, electronic, or telemarketing).

### **Proposed Section 19.07 Unfair or Deceptive Acts or Practices Unique to Fixed Rates**

Proposed Section 19.07 sets forth a series of restrictions on the manner in which fixed rate products can be marketed to residential and small commercial customers. NEM submits that these restrictions are problematic for a number of reasons. The limits on supplier communications would have the unintended negative consequence of imposing artificial constraints on meaningful conversations and exchanges with customers. The delineation of the one-off scenarios and exceptions in the case of customer-requested information will create supplier uncertainty, potential compliance problems and be difficult to enforce.

### **Proposed Section 19.08 Unfair or Deceptive Acts or Practice Regarding the Environmental Benefits of Electricity Supply Services**

This proposed Section pertains to the marketing of “renewable” or “green” energy. NEM’s primary concern with this Section relates to the fact that DPU 14-140 is currently examining these issues. NEM suggests that to promote and ensure supplier compliance, that the ultimate outcome of that proceeding should be coordinated with the requirements adopted by the AGO. For instance, Proposed Section 19.08(2)(b) would require up-front specification, “at the time of the marketing presentation,” of renewable attributes. This disclosure requirement would be costly to comply with and ultimately result in the limitation of the ability of suppliers to offer compliant renewable products. Additionally, Proposed Section 19.08(3) would limit a supplier to promoting products as “green” or “renewable” only if the “retail seller of electricity retires renewable energy certificates and/or carbon offsets in excess of those that it is already required to purchase and retire under the Commonwealth’s Renewable Portfolio Standard.” NEM is concerned about this proposal because it would lead to inaccurate representations to restrict a supplier from noting that its product has a “green” or “renewable” component when it has, in fact, complied with the RPS. This marketing restriction would also appear to lead to an inconsistent result with that being implemented in DPU 14-140.

NEM also notes that proposed Section 19.08(5), related to endorsements and certifications, appears to be premised on the FTC's Green Guides.<sup>5</sup> NEM suggests that it would enhance supplier compliance to change the language of this Section to a direct reference to the relevant provisions of the FTC's Green Guides.

### **Proposed Section 19.10 Automatic Renewal**

In proposed Section 19.10(2), a supplier would be required to provide a renewal notice to a customer that is, "postmarked no earlier than three months before and no later than one month before the customer's election is due." NEM requests that the language with respect to when, "the customer's election is due" be clarified. As currently stated, it is unclear what the triggering date for sending the notice should be construed as for compliance purposes. One possible revision could be to restate the phrase to, "the effective date of the change in the account."

In proposed Section 19.10(3), it would require that for a fixed rate agreement that renews on to a variable rate, that the supplier should provide the customer with the disclosures in proposed Section 19.06 and those disclosures should be made, "at the time that it made its marketing presentation to the customer for the original fixed rate electricity supply agreement." NEM opposes the requirement for suppliers to make the proposed Section 19.06 disclosures for the reasons set forth above in its comments. NEM also notes, with respect to the variable rate chart that would be required under Section 19.06, that the provision of such information at the time of contracting would be particularly unmeaningful. This is because, in the case of some fixed rate contracts, the fixed rate can apply for prolonged periods, sometimes as long as 36 months. The provision of the variable rate chart at the time of contracting would only provide stale information under those circumstances.

A customer's "substantial hardship" would be construed to be a valid excuse for not responding to a renewal notice under Proposed Section 19.10(4) and would require a supplier to be liable for compensation to that customer "for any losses that occurred when his or her electricity supply agreement was renewed without that customer's affirmative consent" under Proposed Section 19.10(5). As a general matter, NEM notes that in a competitive marketplace, suppliers have an incentive to retain customers and build goodwill and to respond to customer problems implicated by this Section. NEM is concerned that this proposed Section requires a supplier to engage in a highly subjective inquiry with unclear boundaries and to then be subject to potential enforcement for non-compliance. This creates a significant risk for suppliers. If this proposed Section is implemented, there should be a maximum time period during which a customer could raise the "substantial hardship" provision. We suggest this should extend thirty to sixty days tolling from the date on which the automatic renewal takes place.

### **Proposed Section 19.11 Unauthorized Switching is Prohibited**

Proposed Section 19.11 would prohibit a supplier from, "replac[ing] or arrang[ing] to replace a consumer's current provider or electricity services with its own service or with the service of any

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<sup>5</sup> FTC Guides for the Use of Environmental Marketing Claims ("FTC Green Guides"), 16CFR Part 260, available at [https://www.ftc.gov/sites/default/files/documents/federal\\_register\\_notices/guides-use-environmental-marketing-claims-green-guides/greenguidesfrn.pdf](https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-use-environmental-marketing-claims-green-guides/greenguidesfrn.pdf)

other retail seller of electricity, without the consumer's express affirmative consent." NEM strongly opposes unauthorized customer switching. NEM is concerned however that the proposed language could be construed as contradictory to the DPU's Order on reporting requirements and rules for customer assignments in DPU 14-140-D.<sup>6</sup> NEM requests that this language be clarified to avoid that result.

### **Proposed Section 19.13 Bait and Switch Prohibited**

NEM strongly opposes the practice of "bait and switch" as would be prohibited in proposed Section 19.13. NEM notes however that there may be instances of inadvertent human error when a consumer is charged a price that is different from that which the supplier agreed to provide. NEM recommends that the supplier be provided a reasonable cure period, upon being made aware that the error took place.

### **Proposed Section 19.15 Effect of Third Party Verification Call on Unfair or Deceptive Acts or Practices**

Proposed Section 19.15 states that third party verification calls do not "cure or mitigate" unfair or deceptive acts or practices. Rather than include this provision, it may be advisable to include language to the effect that suppliers should respond to reasonable requests for records to verify the validity of a disputed transaction.

### **Conclusion**

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

Respectfully submitted,



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<sup>6</sup> DPU 14-140-D, Order issued September 16, 2016.