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July 31, 2014

The Honorable Kristi Izzo
Secretary
State of New Jersey
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Trenton, NJ 08625-0350
Via email: board.secretary@bpu.state.nj.us

Re: Docket Nos. EX14060579 and EX14060610

Dear Secretary Izzo:

The National Energy Marketers Association (NEM)¹ hereby submits comments pursuant to the June 24, 2014, Notice consumer protection provisions applicable to Third Party Suppliers (TPSs). As per the Notice, the comments are being sought on an array of consumer protection-related issues including current consumer protection rule provisions, consumer education about energy choice, rule enforcement and consumer rights under federal and state laws. NEM and its members share the Board'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**² in January 2013 to provide a common basis for doing business in the energy marketplace. The

¹ 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/ACF74.pdf>

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.
- 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 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 TPSs that incorporate consumer disclosure requirements as their linchpin should be the goal of this regulatory review process.

While recognizing the negative consequences experienced by consumers during this winter, we urge the Board not to make drastic regulatory changes premised on the aberrant market conditions of winter 2014. The Board has already adopted comprehensive Energy Competition Standards that have served the retail market participants for many years. To be clear, extreme weather conditions, increased demand for natural gas, and infrastructure constraints combined to

increase the wholesale price of electricity this winter.³ The contributing factors to the price spikes in the wholesale electric market were beyond the control of competitive retail suppliers and the increases were of such magnitude that they were impossible for retailers to foresee or hedge against. Third party suppliers in turn had to pay these higher wholesale electricity prices, which price increases were reflected in the retail prices paid by consumers for variable rate products. NEM members proactively worked with their customers to mitigate the impacts of winter 2014, through increased consumer communications, price reductions and rebates, and alternative price offerings. TPSs are exceedingly concerned with ensuring that their customers are satisfied, in order to engender goodwill and earn repeat business.

I. Best Practices for Serving Consumers that Have Emerged from the Winter 2014 Market Conditions

The Board's comprehensive Energy Competition Standards have formed the cornerstone of the retail market in New Jersey and have been subject to continual refinements and improvements over the years through the Board's readoption process as all of the stakeholders have gained more experience with the rules and their impact on consumers and TPSs' ability to best serve the marketplace. What has become clear subsequent to events of winter 2014 is that there are certain targeted improvements to the existing rules that could prevent or ameliorate the negative consequences experienced by certain consumers. Commissions in other neighboring states have undertaken reviews similar to that which the Board has initiated in the instant case to examine the events of winter 2014 and what steps should be taken in response. Through these reviews, a number of additional best practices have emerged to address the consumer dissatisfaction that was experienced and to prevent it from occurring in the future. These best practices involve: 1)

³ See NEM Media Brief, Winter 2014: Impact on the Energy Marketplace, available at:

accelerating the consumer switching process; 2) utilization of a one-page contract summary of contract terms, modeled on the Schumer Box used in the credit card industry; 3) requiring adequate disclosure of contract pricing terms without being overly prescriptive about pricing constructs or terminology; and 4) education initiatives.

A. Accelerated Switching

Consumers have historically been confused and dissatisfied by the delay in the switching process when they shop for energy, which is currently twenty days. The conditions of this winter have served to highlight the importance of effectuating timely customer switching to the supplier of their choice. An accelerated switching process will positively enhance the consumer energy shopping experience in general. However, under the conditions that were experienced this winter, it will specifically aid consumers faced with increasing variable rates to switch to a different supplier (competitive or regulated) that can offer them a more desirable product on a more expeditious basis so they do not continue to incur charges at the higher rate. The Pennsylvania Public Utility Commission recently adopted an accelerated switching timeline of three business days for electric choice customers, premised on the need to provide consumers with a faster timeframe within which they can avail themselves of more competitive rates, particularly under market conditions such as those that were just experienced.⁴ The

http://www.energymarketers.com/Documents/NEM_Winter_of_2014_MEDIA_BRIEF_Final.pdf

⁴Pennsylvania PUC Docket L-2014-2409383, Order, issued April 3, 2014. The Pennsylvania PUC reasoned that accelerating the switching process will, “allow customers to more quickly and easily switch electric suppliers, which will allow customers to more fully realize the benefits of a fully functioning retail market through quicker and easier access to a more favorable retail rate. These changes will also allow customers to avoid being trapped on unfavorable and volatile rate plans as many were this past winter. Furthermore, these changes will advance competition in the retail market as EGSs will need to respond more quickly to customer concerns or risk losing them to more agile competitors.” (Order at 34).

Commissions in New York⁵ and Maryland⁶ are studying the benefits of accelerating the customer switching process as well. NEM urges the Board to adopt an accelerated switching process that is line with the five business day process adopted and/or actively being considered by neighboring jurisdictions for implementation by this winter.

B. Supplier Contract Summary

In order to enhance consumer understanding of retail energy products, and to improve the quality and clarity of supplier disclosures that are being made to consumers, the Board may wish to consider the development of a standard TPS contract summary. The TPS contract summary would appear as a one-page document at the beginning of the customer's agreement. The TPS contract summary would serve as a disclosure format for terms of service that highlight the important relevant terms to the consumer. The TPS contract summary would be constructed so as to be phrased using plain language to the extent feasible to aid consumer understanding. For example, the New York Public Service Commission adopted an approach that requires the inclusion of this "Schumer Box"-style disclosure for retail energy choice contracts, which they call a Customer Disclosure Statement.⁷ Likewise, the Pennsylvania PUC also recently required

⁵ See New York Public Service Commission Cases 12-M-0476 et. al. Staff Proposal Regarding Accelerated Switching of Commodity Providers for All Customer Classes advocating accelerating the switching process to five business days.

⁶ Maryland Public Service Commission, PC35.

⁷ See NYPS Case 98-M-1343, Uniform Business Practices, Section 5, Attachment 4. The Sample Customer Disclosure Statement adopted by the NYPS includes the following elements:

- 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

competitive suppliers to make use of a one-page disclosure statement, which they call a Contract Summary.⁸ Utilizing a one-page contract summary provides 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 the unique competitive elements of supplier pricing and terms of service are not standardized or restricted.

⁸ Pennsylvania PUC Docket L-2014-2409385, Final Omitted Rulemaking Order, adopted April 3, 2014 pages 25-27 and Attachment A. “EGSs are required to include those terms, as listed above, which are applicable to the contract being summarized. If a certain category of information is not applicable, the EGS may remove it from the template for that contract summary.” The Supplier Contract Summary template adopted is as follows:

Electric Generation Supplier Contract Summary

Electric Generation Supplier Information	<i>Name, telephone number, website, etc. Plain language statement that EGS is responsible for generation charges.</i>
Price Structure	<i>Fixed or variable. If variable, based on what? If variable, how often is the rate expected to vary? If variable, give any applicable ranges/ceilings. If no ranges/ceilings, a plain language statement indicating this fact. If variable, describe when the customer will receive notification of price changes in relation to time of month, final monthly meter read, billing cycle or when the price takes effect.</i>
Generation/Supply Price	<i>\$/kWh or ¢/kWh. If variable rate, the first billing cycle’s rate. Any introductory rate with length of term.</i>
Statement Regarding Savings	<i>Plain language that the supply price may not always provide savings to the customer</i>
Deposit Requirements	<i>Any deposit requirements necessary for a customer and any terms associated with that deposit, in plain language.</i>
Incentives	<i>Any bonuses, discounts, cashback, etc. offers and any associated terms, in plain language.</i>
Contract Start Date	<i>Plain language regarding start of EGS service (meter reads/billing cycles/etc.)</i>
Contract Term/Length	<i>In months, billing cycles, etc.</i>
Cancellation/Early Termination Fees	<i>Yes or no. If yes, describe the amount of the fee and how to avoid that fee, if possible.</i>
Renewal Terms	<i>Treatment of customer at end of contract. Timing of notices. No cancellation/early termination fees. In plain language.</i>
Electric Distribution Company Information	<i>Name, telephone number, website, etc. Plain language statement that EDC is responsible for distribution charges, as well as any emergencies/outages/etc.</i>

C. Contract Pricing Constructs and Terminology

Consumers deserve adequate disclosures about, and should be educated regarding, the type, duration, pricing and other terms of their contracts with competitive suppliers. In that regard, in order to enhance consumer understanding, it is important to establish and follow common terminology for energy products. In particular, it should comport with common consumer understanding and usage. If terms are used in a manner that is not consistent with general consumer knowledge, this will only lead to the terms becoming confusing and misleading. Consumers purchase fixed and variable rate products across other industries. They should be able to reference their experience purchasing these other products, rather than being misled by artificial regulatory restrictions on product terms and pricing that effectively redenominate a variable rate into a fixed rate or vice versa.

It would be helpful to establish a common industry terminology of relevant products. A month-to-month variable rate product utilizes a price that changes once per month and typically does not include a termination fee. A variable rate product utilizes a price that can fluctuate over time, in accordance with the terms included in the contract. An indexed rate product will utilize a price that can change based on an underlying pricing formula that makes use of an index. A fixed rate product will utilize the same set price for a set period of time as described in the contract. A contract may also utilize a combination of these price features, for example, it may begin as a fixed price and then convert to a variable price at a predetermined point in time.

NEM urges the Board to avoid rule changes that would have the unintended consequence of significantly increasing the costs and risks associated with making variable price products available in the marketplace, to the long-term detriment of consumers. Restricting product offerings that

provide value harms consumers by limiting their access to options that they suit their individual preferences and budgets. At times, a variable rate product will offer savings from the default rate. The variable rate product by its nature adjusts with the market conditions. At other times, a fixed rate product will be priced below market conditions, although the predominant value of such products is to offer long term price certainty. The solution is ensuring that consumers receive adequate disclosures to ensure they understand the nature of the product they are contracting with the TPS to provide to them. Artificial regulatory restrictions on product pricing and terms, however, will only prevent consumers from availing themselves of products that could otherwise offer savings and value as market conditions change.

Included on the issues list issued by the Board for comment was the concept of, “how the price for gas or electricity is determined.” There is a balance to be struck in providing consumers with meaningful disclosures about product pricing, but that are not so granular in detail as to be confusing for consumers to understand. In general, if the contract for a 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. Many TPSs already make reference to PJM market pricing and other variables in contracts. However, requiring TPSs 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 to the lightly regulated competitive marketplace is inappropriate and would restrict innovation and responsiveness to consumer needs as well as undermine the very market innovations that EGSs specialize in providing.

D. Consumer Education

Competitive suppliers provide consumers with energy shopping information at many points of contact and in many formats, and welcome the opportunity to engage with potential and current consumers about questions they may have. This is fundamental to forming a long-term relationship with a satisfied customer. To be clear though, consumers rely on and trust the Board as a source of objective energy choice information. A robust consumer shopping website is an excellent education tool. The Pennsylvania PUC's PAPowerSwitch⁹ website is highly regarded by suppliers and consumers alike. The Pennsylvania PUC has also promoted consumer shopping through appearances at local events and fairs and press releases. They also required the utilities to make a number of informational mailings to consumers about the availability of energy choice. In specific response to the events of winter 2014, the Pennsylvania PUC created informational videos on its website to further educate consumers about fixed and variable rate energy products and switching suppliers. It also issued press releases urging consumers to check their contracts to ensure they understood the terms and to shop for alternative competitive deals when appropriate.

Another form of education the Board may wish to consider is a forum for supplier education. The Board Staff's periodic stakeholder calls on EDI have been helpful in providing a forum to discuss retail energy issues, but these calls are generally centered on EDI-related matters. NEM suggests that the Board may want to convene a Staff-led forum for suppliers and prospective suppliers to review the licensing process, the Energy Competition Standards, any significant pending legislative and/or regulatory changes, and other compliance matters. The Pennsylvania PUC's Office of Competitive Market Oversight has convened such supplier forums when the

Commission has adopted significant rule changes, and it was an excellent resource for ensuring suppliers fully understood the Board's requirements.

II. Recent Rule Changes Addressed by the Board in its Regulatory Review Process

NEM has participated in the Board and Staff's on-going review of its Energy Competition Standards, including its recent readoption of rules in 2012 and adoption of certain new rules in 2013. As a result of the most recent rule readoption and promulgation processes, the Board adopted a number of rule modifications, certain of which improved suppliers' ability to serve consumers. These issues have been identified by the Board in the Notice for comments in the instant proceeding as well. These issues include provision of a seven day right of rescission to consumers, allowing TPSs to audio verify telephonic enrollments through either an in-house process or independent third party, and provision of the customer contract in differing formats to reflect different modes of customer solicitation and enabling technologies.

A. Seven Day Right of Rescission

The Board recently decided to modify Section 14:4-7.6(b)4 to provide a consumer with a seven calendar day right of contract rescission, instead of the previous fourteen calendar day provision. The fourteen-day rescission period significantly increased marketer business risk as they were required to procure supplies in a dynamic market to serve a consumer that had two weeks to change its mind. Fourteen days was also longer than the rescission period provided in neighboring jurisdictions. NEM submits that consumers are adequately protected by the seven day rescission period and no increase to the length of time in the rescission period is warranted.

⁹ [http:// www.papowerswitch.com](http://www.papowerswitch.com)

B. In-House and Independent Audio Verification of Customer Switch

In the previous rule readoption process, the Board modified Section 14:4-2.3(c)2 to allow audio verification of a customer switch to be performed by a competitive supplier or by an independent third party. The mandated independent third party verification requirement to verify the telephonic enrollment unnecessarily imposed an additional expense in the choice process that ultimately increased the cost of rendering energy service to consumers. Some suppliers may want to utilize a third party and some may perform this function more effectively in-house and both should be permitted to do so consistent with their business model. Again, this was a reasonable rule change that should not be revisited.

Associated with the audio verification requirement, the Board also decided that the entire marketing portion of the call must be taped, including for customer-initiated calls. NEM previously filed comments in opposition to that requirement, noting that the requirement to tape all calls and then retain these voluminous records would be extremely expensive. NEM recommended then, and continues to recommend now, that the supplier's recordation of the verification portion of the call should be sufficient, and this practice is commonly utilized in other jurisdictions as sufficient to ensure the consumer is protected. Allowing suppliers to perform the audio verification of the enrollment in house in addition to third party providers does not change the validity of this methodology in verifying the consumer's intent to switch providers. But, requiring suppliers to tape the entire marketing call for all sales calls (in-bound and outbound) significantly undermines the cost effectiveness of telephonic enrollment as a means to acquire customers. Moreover, when a customer initiates a call to the TPS, the consumer protection concerns associated with switching are reduced because the consumer on its own has started the shopping process and as a result of that is contacting the TPS to make its

choice. As such, the level of processes needed to verify the switch that results from a customer-initiated call should logically be less stringent.

C. Provision of the Contract to the Consumer

The Board also recently modified Section 14:4-7.6(a) to require TPSs to provide consumers on or before the date the supplier submits a change order to the utility, and within one business day of when a customer authorizes a renewal, with a copy of the contract electronically, by regular mail, or by hand delivery, depending on the manner of the enrollment. NEM agrees with the Board on the importance of providing consumers with a copy of the terms and conditions that they have agreed to in order to promote fully informed consumer shopping. We also continue to support allowing TPSs with the ability to utilize different means, i.e., electronic copy, mail copy or in-person delivery, to provide consumers with a contract to reflect the different modalities through which TPSs are making offers available in the marketplace and the different ways in which consumers are shopping for energy today and varying consumer preferences.

NEM submits that proposals to restrict TPSs to providing customers only with written contracts is potentially violative of federal and state E-Sign laws that recognize the validity and enforceability of electronic signatures and electronic records (including electronic contracts). Both the federal and state E-Sign Acts were implemented to facilitate commerce by recognizing the increasing importance of electronic transactions in so many facets of personal and business dealings. Under both laws, an electronic record is as valid as a record formed by other means. A written contract requirement undermines the important goal of the E-Sign laws and would impose a costly and unnecessary burden on the marketplace.

III. Current Regulations and Board Enforcement

The Board requested comment on the, “adequacy of current regulations and enforcement authority of executive agencies.” NEM submits that clarity as to the measure by which one’s conduct will be judged, as well as the facts that may constitute actionable misconduct versus innocent mistake or clerical error is extremely important to a well-functioning market. Additionally, confidence that the enforcement of the Board’s rules will be fair, consistent, and prudently applied defines the true costs and risks of doing business in the State of New Jersey. Clear, consistent and prudently applied compliance and enforcement procedures, protocols and processes are an effective incentive for desired conduct and a deterrent for fairly defined misconduct. To this end, TPS oversight should entail a reasonable, prudent and understandable system of and process for warnings, corrective actions, restitution standards and/or penalties, if and when appropriate. Toward this end, NEM recommends a two-part approach:

- 1) **Delineation of a uniform set of behavioral standards for marketplace actors with clear consequences for violations.** The Board has already accomplished this through adoption of its comprehensive Energy Competition Standards; and
- 2) **Effective enforcement of behavioral standards as a strong deterrent against potential marketplace misconduct.** NEM and its members encourage the Board to adopt a zero tolerance policy for fraud and the adoption of reasonable and prudent standards for enforcement of non-fraudulent conduct that the Board finds objectionable in the competitive marketplace.

To the extent that fraudulent conduct is ongoing in the New Jersey market or any market, NEM unequivocally supports and extends all of its resources to this and any Board to take immediate and corrective enforcement actions to prevent fraudulent or otherwise illegal conduct from occurring or reoccurring. NEM, like the Board, has zero tolerance for fraudulent, illegal or unethical conduct in the marketplace and strongly supports Board efforts to weed out bad actors.

IV. Application of the Rules for Service to Small Commercial Customers

NEM requests that the Board and its Staff through this regulatory review process provide the stakeholders with clarification as to the scope of application of consumer protection rules to small commercial customers, of particular importance, including the adoption of a definition of what constitutes a “small commercial customer.” Appropriate application of consumer protection rules for TPS service to residential customers entails different considerations than for TPS service to small commercial customers. Small commercial customers have a greater degree of business sophistication, and application of an expansive set of consumer protection measures for these customers is unwarranted and costly to implement and comply with. Moreover, application of expansive consumer protection requirements to small commercial customers would significantly restrict competitive suppliers’ ability to make innovative offerings available to these customers.

Conclusion

NEM appreciates this opportunity to provide comment on the Board's review of its Energy Competition Standards and possible changes to consumer protection rules. We look forward to participating in this process going forward.

Respectfully submitted,

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