BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for Competitive Retail Natural Gas Service Contained in Chapters 4901:1-27 Through 4901:1-34 of the Ohio Administrative Code.	)))))	Case No. 12-925-GA-ORD

REPLY COMMENTS
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

In this important case, the Public Utilities Commission of Ohio ("PUCO" or "Commission") is reviewing the rules that govern the practices used by Competitive Retail Natural Gas Suppliers ("CRNGS" or "Marketers") when they sell the commodity of natural gas to Ohio consumers. The PUCO has a duty under R.C. 119.032 to review the rules contained in Ohio Admin. Code Chapters 4901:1-27 through 4901:1-34. The PUCO reviews these rules every five years to determine whether to continue the rules without change, amend the rules, or rescind the rules.[1]

This case is significant for residential customers because the CRNGS rules govern the certification process for Marketers and government aggregators and define the necessary consumer protections that help ensure Ohioans are not subjected to unfair, misleading, deceptive, or unconscionable acts or practices related to the marketing, enrollment processes and the administration of competitive contracts by CRNG providers.[2] This case is also significant for residential customers to the extent that several of the proposed changes in the CRNGS rules are

[1] See R.C. 119.032(C).

[2] See Ohio Admin. Code 4901:1-29-02 (A)(1)-(3).

intended to more closely align the CRNGS consumer protections with the Competitive Retail Electric Service ("CRES") rule consumer protections promulgated in Ohio Admin. Code 4901:1-24.[3] More uniformity in the marketing, enrollment, and contract administration rules can help facilitate better public education efforts oriented at explaining retail natural gas choices to consumers and lead to improved quality of service.

By Entry issued on July 2, 2012, the Commission scheduled a workshop to be held at its offices on August 6, 2012, to elicit feedback on any proposed revisions to the rules that the PUCO Staff may have and to permit stakeholders to propose their own revisions to the rules for the Staff's consideration. On November 7, 2012, the Commission ordered that all interested persons file Initial Comments on the proposed rules by January 7, 2013, and Reply Comments by February 6, 2013. In addition, the Commission requested comments concerning Attachment A to the Entry that poses a number of questions concerning other potential changes in rules.

The Office of the Ohio Consumers' Counsel ("OCC") filed Initial Comments on January 7, 2013. Other parties filing Initial Comments were: Ohio Partners for Affordable Energy ("OPAE"), Duke Energy Retail Sales, LLC ("Duke Retail"); Duke Energy Ohio ("Duke"); Dominion Retail, Inc. ("Dominion Retail"); Ohio Gas Marketers Group and The Retail Energy Suppliers Association ("OGMG/RESA"); The East Oho Gas Company d/b/a Dominion East Ohio ("Dominion") and Vectren Energy Delivery of Ohio ("Vectren"); Northeast Ohio Public Energy Council ("NOPEC"); Interstate Gas Supply ("IGS"); Border Energy Gas Services ("Border"); Hess corporation ("Hess"); Columbia Gas of Ohio, Inc. ("Columbia"); and Eagle

[3] *In the Matter of the Commission's Review of its Rules for Competitive Retail Natural Gas Services Contained in Chapters 4901:1-27 Through 4901:1-34 of the Ohio Administrative Code*, Case No. 12-925-GA-ORD, Entry at 4 (November 7, 2012).

Energy, LLC ("Eagle"). OCC files these Reply Comments to the Initial comments filed by these other parties on behalf of all residential natural gas consumers in Ohio.

II. REPLY COMMENTS TO QUESTIONS LISTED ON ATTACHMENT A

In its Entry initiating this proceeding, the Commission noted that there may be ambiguity in Chapter 4901:1-29, O.A.C. relative to distinguishing the activities of consultants and brokers.[4] More specifically, the Commission stated that it would be appropriate to further explore this and other issues in this case. The Commission listed eight issues/questions in Attachment A that warranted some discussion.[5]

A. Are Competitive Retail Natural Gas Service Providers Who Conduct Sales Through Agents That Are Compensated Primarily Or Exclusively On A Commission Basis, Incentivizing These Agents To Take Unfair Advantage Of Potential Customers Through Deceptive Sales Practices? Would Sales Agents Be Less Incentivized If They Were Employees Of The Seller And/Or Provided With Some Level Of Base Salary?

The answers to the PUCO's questions are "yes" and "yes."

Dominion Retail commented that the Commission should not overstep its authority by dictating terms by which a supplier compensates employees or outside agents, or requires marketing efforts be conducted by only employees of the supplier.[6] OGMG/RESA assert that CRNG suppliers must evaluate the most cost effective ways of acquiring customers and commission-based incentives can be an important part of motivating a sales team.[7] Dominion

[4] Entry at Attachment A page 1 of 2, (November 7, 2012) citing *In the Matter of the Complaint of Buckeye Energy Brokers, Inc., v. Palmer Energy Company*, Case No. 10-693-GE-CSS.

[5] Please note that OCC is not responding to question Nos. 6 and 7.

[6] Dominion Retail Initial Comments at 3 (January 7, 2013).

[7] OGMG/RESA Initial Comments at 3 (January 7, 2013).

and Vectren commented that there is more incentive for agents to take advantage of potential customers when the compensation is exclusively based on commissions.[8]

OCC reiterates that CRNGS sales agents who are compensated primarily or exclusively on a commission basis are incentivized to take advantage of potential customers through deceptive sales practices.[9] Sales-based compensation incentives should not be structured in a manner that can contradict the policies in the state to prevent false, misleading, deceptive or unconscionable sales practices.[10] OCC believes that sales agents that are compensated primarily or exclusively on a commission basis have more incentive to engage in deceptive sales practices because a majority of, or all of their salary is based on the results of signing up customers. The pressure to earn greater compensation can lead to greater temptation to engage in sales practices that are deceptive and unfair in order to get customers to sign up to take service.

To the extent that such commission-based compensation is combined with door-to-door solicitation, the potential violation of rules is compounded. As noted in the Initial Comments by Eagle, the problems and concerns associated with door-to door solicitations far outweigh any benefits.[11]

To the extent that Dominion Retail is concerned that the PUCO not overstep its authority, the PUC does have the discretion and authority to approve certification applications and applications for renewal of certificates. If a CRGNS relies on agents who are compensated primarily or exclusively on a commission basis, and that leads to instances of deceptive sales practices, then the PUCO does have the authority to consider that compensation policy as part of

[8] Dominion and Vectren Initial Comments at 11 (January 7, 2013).

[9] OCC Initial Comments at 3 (January 7, 2013).

[10] R.C. 4929.22.

[11] Eagle Initial Comments at 3 (January 7, 2013).

its certificate approval or renewal process. Finally the PUCO also does have the authority necessary to enforce the rules set forth in Ohio Admin. Code 4901:1-29.

In Initial Comments OCC recommended that CRNGS must be held responsible for the actions of their sales personnel regardless if the solicitors are employees or agents of the CRNGS provider or government aggregator.[12] OPAE noted that the PUCO should ensure that its certification review process keeps pace with the surge in supplier activities in other states and carefully review background and qualification.[13] OCC supports OPAE's comments. OCC also recommended that Applicants for certification as CRNGS or government aggregators disclose more information about sales practices in other jurisdictions related to customer complaints, notices of probable non-compliance, and slamming.[14] This additional information is necessary to enable both customers and the Commission to best evaluate the performance and behavior of Marketers.

Given the concern that seems to underlie the PUCO's question, the Commission should consider requiring Marketers to make customers whose contracts are up for automatic renewal aware of their lowest priced fixed or variable contracts (as posted on the PUCO's Apple to Apple Website). Providing this current data will help customers make more informed decisions.

Moreover, CRNGS who misrepresent offers in one state are probably inclined to misrepresent offers in another state where they operate. OCC recommends that, if any CRNGS are performing false, misleading, or unconscionable sales practices in other states, the Commission should consider that information as part of its certification process.

[12] See OCC Reply Comments below at 13-15.

[13] OPAE Initial Comments at 11 (January 7, 2013).

[14] See OCC Reply Comments below at 13-15.

B. Should Aggregation Incentives, Such As Financial Contributions To The Community, Be Disclosed In These Opt-Out Notices Or Is Media Coverage Of Aggregation Incentives Adequate?

The answers to the PUCO's questions are "yes" (for disclosure) and "no" (for reliance solely on media coverage).

Dominion Retail asserted there is no legitimate purpose to be served by requiring government aggregators to disclose inducements the community has received for selecting a particular CRNGS.[15] OGMG/RESA assert that financial contributions to communities should not be disclosed in opt-out notices. NOPEC claims that media and other marketing coverage are adequate to inform customers about the community incentives.[16] Columbia supports the incentives being disclosed in opt-out notices to promote transparency and public education.[17]

OCC continues to assert that a critical component of Ohio law is the requirement that an aggregator prominently disclose rates, charges, and other terms and conditions related to the enrollment of customers.[18] As a general matter, openness and transparency in government are best served by requirements for disclosure of any information that could impact governmental decisions. As such, any incentive being provided to the community by a Marketer is an important piece of information that customers should be made aware of so that they can make a decision based on all available information.

Moreover, requiring customers to rely on the media to provide information is not a reasonable approach because there may or may not be coverage of these types of issues throughout Ohio. For example, while a large urban newspaper may devote coverage and

[15] Dominion Retail Initial Comments at 3 (January 7, 2013).

[16] NOPEC Initial Comments at 7 (January 7, 2013).

[17] Columbia Initial Comments at 2 (January 7, 2013).

[18] R.C. 4929.26(D).

resources to informing their subscribers about these issues, smaller weekly rural newspapers may not. All customers throughout Ohio who are eligible to participate in Choice, regardless of where they live -- should be afforded the same level of reasonable and consistent protection. Moreover, relying on the media may not be sufficient because the media may not even know of the incentives.

The Commission should require transparency in the disclosure of the rates and the terms and conditions for service to individual customers and for incentives, if any, provided to the community.

C. Should The Commission's Rules Regulate The Availability Of Certain Lengths And Types Of Contracts For Certain Customer Classes? Should The Commission's Rules Require A Supplier To Disclose All Inducements To Contract?

The answers to the PUCO's questions are "yes" and "yes."

Dominion Retail agreed that the rules should require that all inducements offered to customers to contract with a Marketer should be disclosed.[19] OCC agrees with Dominion Retail and reiterates that the Commission's rules should require CRNGS to disclose all inducements to enter into a contract. Such a requirement would provide potential customers with additional information that could be helpful to enabling customers to make decisions based on all possible available information. A full disclosure requirement is also consistent with the objectives of openness and transparency.

Also the Commission's rules should either ban or significantly limit the use of evergreen CRNGS contracts with residential customers. "Evergreen" contracts are ones where the contact

[19] Dominion Retail Initial Comments at 4 (January 7, 2013).

is automatically renewed for periods of time, based on a customers' failure to act. Evergreen contracts can renew themselves for indefinite periods of time.

While these contracts may be effective for CRNGS, the potential harm for customers can be significant. The Commission must protect the public interest to the extent that some customers who are in evergreen contracts may be unaware of the changes in the market since first signing a contract. For example, there may have been significant changes in the price they were paying for natural gas compared with the utility-sponsored standard option rates.

OCC recommended in Initial Comments that CRNGS be required to demonstrate that contracts with residential customers provide timely adequate, accurate, and understandable pricing and terms and conditions of service as required by Ohio law.[20] The Commission should initiate a requirement where CRNGS be required to provide a written notice to customers if the rate they are being charged by a CRNGS exceeds the Utility standard offer rate for two consecutive months. Due to the potential for customers to remain in contracts long after they actually made a decision regarding their natural gas provider -- because of the roll-over effect of evergreen contract provisions, the PUCO should eliminate or severely restrict the use of evergreen contracts.

D. Should The Rule Also Require The Sales Pitch Segment Of The Call To Also Be Recorded? Should The Rules Be Clarified To Require Greater Customer Protections?

The answers to the PUCO's questions are "yes" and "yes."

OGMG/RESA assert that capturing the call from the beginning would require rearranging equipment and that, "the only use of the recording that leads up to the verification would be to

[20] R.C 4929.22(A)(1).

attack the verification.[21] Rather than viewed as attacking the verification, the use of a recording that leads up to the verification can be important in making sure that a customer fully understood the terms and conditions of an offer and that the customers did not agree to terms based on unfair, misleading, deceptive, or unconscionable acts or practices as required by Ohio Admin. Code 4901:1-29-02 (A)(1)-(3).

Dominion Retail claims the recording of the entire phone conversation is consistent with its current practice.[22] Thus it does not appear that such a requirement is beyond the capabilities of CRNGS.

Recording of the entire phone conversation would be helpful to help ensure that CRNGS products and services are being marketed to the public with the level of integrity required by Ohio law and the Commission's rules. Contrary to the OGMG/RESA's assertion that the recording would be used to attack verifications, if customers are being provided false or misleading marketing of CRNGS products, the recording would be useful to help eradicate such practices.

E. Are There Best Practices From Other States That Should Be Incorporated In The Rules To Facilitate This Promotion? Other State Commissions Post Supplier Complaint Data On Their Web Sites Identifying The Numbers And Types Of Consumer Complaints Received By The Commission's Call Center. If Normalized, Should Complaint Data Be Added To The Apples To Apples Chart?

The answers to the PUCO's questions are "yes" and "yes."

Dominion Retail opposes the posting of complaint data on the Apples to Apples Chart because a complaint may just be a misunderstanding.[23] OGMG/RESA claims that customer

[21] OGMG/RESA Initial Comments at 7 (January 7, 2013).

[22] Dominion Retail Initial Comments at 5 (January 7, 2013).

[23] Id.

complaints can be subjective and may just be inquiries to the Commission.[24] On the other hand, Columbia supports complaint data being added to the Apples to Apples comparison chart so that customers are fully informed before they make a decision.[25]

To the extent that a complaint is merely a misunderstanding, then that clarifying information should also be made available to the PUCO. The key point is that a customer complaint indicates possible customer concern and the PUCO should be made aware of all such customer concerns.

OCC advocates for the adoption of 'best practices" from other states being incorporated into Ohio's rules governing CRNGS. Incorporating best practices enables Ohio to benefit from the experiences of other states. As a result of the increase in marketing activities in other states, The National Association of State Utility Consumer Advocates "NASUCA"), of which OCC is a member, recently passed Resolution No 2012-04 Urging the Adoption of State Laws and Regulations Regulating Competitive Energy Supply Markets: Including Measures Designed to Promote Honesty and Clarity In Marketing and to Give Consumers a Reasonable Ability to Select a Competing Provider.[26]

OCC also supports making complaint information available on the PUCO Apples-to-Apples chart. The complaint information should also be made available to OCC and to others that are assisting the public in comparing retail offers for natural gas.

To the extent that Ohio Marketer complaint data can be provided to customers on either the PUCO website and in other fact sheets, Ohio customers would then be provided with additional information upon which to make a decision regarding a Choice contract with a

[24] OGMG/RESA Initial Comments at 9-10 (January 7, 2013).

[25] Columbia Initial Comments at 3 (January 7, 2013).

[26] See attached NASUCA Resolution (Attachment 1).

CRNGS. Even though a Marketer may be in compliance with "the letter" of the Commission's rules, customers may find complaint information helpful to discern marketing and enrollment patterns that are contrary to the customer's values and beliefs.

F. Are Additional Rules Necessary To Protect Customers As Local Distribution Companies Begin To Exit The Merchant Function?

The answer to the PUCO's questions is yes.

First, this question characterizes natural gas utilities as beginning to exit the merchant function. But there has been no PUCO ruling allowing an exit from the merchant function for residential customers. And it can be plainly seen in the PUCO's Apples-to-Apples information that the Utility standard offer that would be eliminated in an exit is typically providing the best price to consumers.

Indeed, the settlements in two recent cases involving natural gas utilities and do not specify an end to the residential standard offer.[27] (An exit from the merchant function would mean that the natural gas utilities would no longer offer a standard offer option for customers to purchase their natural gas.) To date, the standard offer option has served Ohio consumers well over the years by providing them what has generally been the lowest cost-option for natural gas. The benefit of a standard offer option for Ohioans can be seen in a recent widely reported news story that, based on 15 years of information obtained from an Ohio natural gas utility, customers who chose to purchase their natural gas from alternative suppliers paid $885 million more than

[27] *In the Matter of the Joint Motion to Modify the June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM,* Case No. 12-1842-GA-EXM, Joint Motion to Modify Order Granting Exemption at Joint Exhibit 1, Stipulation and Recommendation (June 15, 2012); and *In the Matter of the Joint Motion to Modify the December 2, 2009 Opinion and Order and the September 7, 2011 Second Opinion and Order in Case No. 08-1344-GA-EXM,* Case No. 12-2637-GA-EXM, Amended Joint Motion To Modify Order Granting Exemption (November 27, 2012).

what those customers would have paid had they purchased their natural gas from the public utility's standard offer.[28]

As detailed in OCC's Application for Rehearing in Case No. 11-5590-GA-ORD, additional rules are necessary in a proceeding where elimination of the customers' option for a standard offer is being considered. In such a proceeding, due process protection is vital, to ensure that the PUCO hears evidence from all sides before it makes a decision on such an important matter for Ohioans.

Any Exit the Merchant Function rules should address these areas of concern to ensure that, for example, customers have due process rights including ample notice of local public hearings, a full evidentiary hearing and reasonable opportunity to submit Briefs and Reply Briefs.

III. REPLY COMMENTS ON 4901:1-27

The PUCO Staff proposed changes to Ohio Admin. Code 4901:1-27-05, which sets forth the requirements for a CRNGS certification application. More specifically, Ohio Admin. Code 4901:1-27-05(B)(1)(f) requires applicants to disclose whether its participation in a Choice program has ever been terminated, if a certification has been revoked or suspended, if the applicant has been in default for failure to deliver, any past legal rulings against the applicant, and any pending legal actions.

OGMG/RESA contend that clarification is necessary to exclude those situations involving hot-line style calls, workers compensation claims, tax disputes, etc.[29] OGMG/RESA

[28] See Columbus Dispatch, "Ohioans burned by gas choice," by Dan Gearino at A-1 and A-9 (Sunday November 11, 2012).

[29] OGMG/RESA Initial Comments at 11 (January 7, 2013).

argue that the disclosure should be limited to legal actions or past rulings related to the applicant's technical, managerial, and financial abilities.[30] OGMG/RESA recommend that the Commission clarify that an applicant need not include in the statements information related to any calls, inquiries, or resolutions from calls to the Commission hotline.[31]

The PUCO should not make the clarification sought by the Marketers. Information about the concerns and experiences of other Ohio customers can be helpful and should be provided. There is no reason to believe that hot-line style calls, workers compensation claims, tax disputes, etc. may not impact an applicant's technical, managerial or financial abilities. Also, there is much to be learned from applicants concerning their Choice-related interactions with consumers in other jurisdictions. OCC previously explained in Initial Comments that applicants should be required to disclose notices of probable non-compliance that were provided by other state public utility commissions ("PUCs"), summaries of complaints filed with PUCs in other jurisdictions, and instances of slamming.[32] To this end, OCC recommended a new rule in Initial Comments that would explicitly require disclosure of all of this information.[33]

In addition, OCC asserts that applicants for CRNGS certification should not have the latitude to unilaterally determine if the reason why they were terminated from participation in a Choice program was related to technical, financial, or managerial abilities. Technical, financial or managerial abilities are application requirements, but the Commission needs information regarding violation of rules and laws (e.g. marketing malpractices) which cannot be demonstrated through "technical, financial, or managerial abilities in order to properly evaluate

[30] Id.

[31] Id.

[32] OCC Initial Comments at 9-11 (January 7, 2013).

[33]Id.

an application. These subjects should not be interpreted to limit the provision of information, in certification cases, regarding customer service.

The Commission has the expertise to evaluate applications and to determine whether or not an applicant is fit to be a certified CRNGS in Ohio. Certainly, more information is preferable to less information when it comes to evaluating a Marketers fitness to provide service to Ohio customers.

IV. COMMENTS ON 4901:1-29

4901:1-29-01 - Definitions.

OGMG/RESA commented concerning the need to establish separate definitions for "direct enrollment" and "door-to-door solicitations."[34] According to this recommendation, door-to-door solicitations would be defined as a face-to-face solicitation of a customer initiated by a CRNGS or governmental aggregator at the home or place of business of the customer through canvassing without an appointment and/or previous personal relationship.[35] Direct enrollment would be defined as the face-to-face enrollment of a customer initiated by a CRNGS or governmental aggregator at a place other than the supplier's place of business when such solicitation is made by previous arrangement or when the consumer solicited is previously known to the seller.[36]

OCC recommends that the Commission reject this proposal by OGMG/RESA because the definition is subjective and could be used to more narrowly define the responsibilities and liability of CRNGS involved in the direct (i.e. the face-to-face marketing, solicitation and

[34] OGMG/RESA Initial Comments at 16-17 (January 7, 2013).

[35] Id.

[36] Id.

enrollment) of customers. Regardless of where this face- to-face interaction occurs or if the customer supposedly knows the seller, the consumer protections that ban false, misleading, or unconscionable sales practices must be in effect.

Because there is a face-to-face contact with the public, critical requirements such as the criminal background check, the disclosure requirements, and the verification by a third-party verification are essential in the evaluation of CRNGS application for certification. OCC supports the current definition for direct solicitation with very minor modifications to ensure there the issues associated with direct solicitations are addressed.

To further enhance the definition of direct solicitation, OCC recommends that the words "or enrollment" be inserted after the word "solicitation." This proposed change helps clarify that the solicitation and enrollment are separate processes. In other words, an enrollment need not occur for a CRNGS to be found engaging in conduct that involves providing false or misleading information to the public or to conduct unconscionable sales practices.

OCC also reiterates an earlier recommendation that a definition for "agents" be included in the rules.[37] Without a definition, a CRNGS may be inclined to view these agents as "independent contractors," and therefore attempt to absolve themselves of any liability associated with the action of the agents in enrolling customers for CRNGS service. A definition for "agents" would help prevent a CRNGS from potentially using "independent contractors" in an attempt to circumvent PUCO review, and to distance itself from the actions of the "independent contractor." The PUCO should act to ensure that such a loophole does not exist.

[37] OCC Initial Comments at 11 (January 7, 2013).

Moreover, the National Energy Marketers Association ("NEMA") recently issued National Marketing Standards of Conduct and a Customer Bill of Rights.[38] The Press Release announcing that action specifically stated that "Suppliers shall be responsible for the conduct of their agents."[39] OCC agrees with NEMA that Marketers should be responsible for conduct of their agents.

4901:1-29-03 - General Provisions.

Ohio Adm. Code 4901:1-29-03(C) prohibits CRNGS or government aggregators from causing or arranging for the disconnection of service, or to employ the threat of such actions, or as a consequence of contract termination, customer non-payment, or for any other reason. However, OGMG/RESA commented that this provision does not apply when the CRNGS is using a purchase of supplier receivables program.[40] In this regard, OGMG/RESA suggest that if a CRNGS participates in the purchase of receivable program, then the CRNGS should be permitted to cause or arrange for disconnection of a customer's service or to be able to make such threats.[41]

But the OGMG/RESA suggestion is contrary to the statutory provisions concerning the minimum service requirements for competitive services.[42] Pursuant to R.C. 4929.22(D), the Commission is required to establish minimum service requirements consistent with policies and procedures in R.C. 4933.121, R.C. 4933.122, and Commission rules. These laws and rules concern the disconnection of electric service by a gas company and not CRNGS or governmental

[38] See, www.enrgymarketers.com/documents/nem_natl_mktg_stds_release.pdf.

[39] Id., See also Attached Press Release (Attachment 2).

[40] OGMG/RESA Initial Comments at 18 (January 7, 2013).

[41] Id.

[42] R.C. 4928.10(D).

aggregators. The OGMG/RESA recommendation to expand the authority of CRNGS providers to cause, arrange, or threaten for disconnection of distribution service should be rejected because the inherent protection built into R.C. 4933.121, R.C. 4933.122, and Commission rules, do not apply to CRNGS. Therefore customers would not have the same level of protection against threatened disconnection by a CRNGS as they have when threatened disconnection by an LDC.

4901:1-29-05 - Marketing and Solicitation.

4901:1-29-05(C)(5).

Duke Retail expressed concern regarding the sufficiency of Ohio Admin. Code 4901:1-29-05(C)(5) in precluding CRNGS from leading customers to believe that they are soliciting on behalf of an Ohio LDC when no such relationship exists.[43] Duke Retail suggests that the current rules are not stringent enough, and should require CRNGS to affirmatively state that there is no such relationship.[44] OCC agrees.

The issues associated with CRNGS representing that they are affiliated with a utility are not uncommon.[45] Ensuring that the consumers are protected against unreasonable sales practices such as CRNGS providers misrepresenting their affiliation with an LDC is in the public interest.[46] Accordingly, OCC supports Duke Retail's recommendation to strengthen the separation between the Utility and its affiliate.

Duke Energy discussed the need for specific hours during which door-to-door solicitations can occur in jurisdictions where local laws and ordinances do not specify the hours

[43] Duke Energy Retail Sales Initial Comments at 7 (January 7, 2013).

[44] Id.

[45] OCC Initial Comments at 6 (January 7, 2013).

[46] R.C. 4929.02; Ohio Admin. Code 4901:1-29-02(A)(1)-(3).

in which solicitations can occur.[47] Duke Energy recommends that a rule be added that prohibits door-to-door marketing after dusk. Duke Energy also suggests that door-to-door marketing should not occur before 9:00 a.m., or after 9:00 p.m. local.[48] OCC suggests that 9:00 a.m. is too early for marketing to begin considering many family members work at night and may be awakened by door to door marketers.

In addition, 9:00 p.m. is well after dusk in the winter months, and it is not in the public interest for CRNGS to be soliciting customers in the dark when customers may not be able to see the identification of the CRNGS representative or sales agent. OCC recommends the adoption of the Duke Energy proposal for specific times during which door to door solicitations may occur in jurisdictions where there is no such ordinance. OCC recommends that Ohio Admin. Code 4901:1-29-05(C)(5); be modified so that "morning hours" should be changed to 10:00 a.m. and the evening hour be specified as "dusk" to account for seasonal differences.

4901:1-29-05(C)(8).

The PUCO Staff proposed an amendment to Ohio Admin. Code 4901:1-29-05(C)(8) that an unfair, misleading, deceptive, or unconscionable acts or practices would include a CRNGS or government aggregator engaging in direct solicitation of a customer without complying with all applicable ordinances and laws of the customer's jurisdiction. OGMG/RESA oppose the Staff's proposed change asserting that the Commission lacks the expertise in "municipal law; let alone what the case law may be in the particular area"[49] to know when and if violations have occurred. OGMG/RESA's opposition is perplexing as it seems to overlook the fact that the responsibility is

[47] Duke Energy Ohio Initial Comments at 1 (January 7, 2013).

[48] Id.

[49] OGMG/RESA Initial Comments at 21-22 (January 7, 2013).

on the CRNGS provider and governmental aggregators to know the local laws, rules, and ordinances applicable to their marketing practices.

And contrary to the OGMG/ RESA's assertion that the Commission is not in a position to judge the violation of an ordinance,[50] the Commission has a public duty pursuant to the certification of CRNGS and governmental aggregators to protect customers from unfair, deceptive, or unconscionable acts or practices.[51] Accordingly, OCC supports the proposed Staff recommendation and urges the Commission to reject the OGMG/RESA proposal.

4901:1-29-05(C)(1) - (C)(11).

OGMG/RESA proposed the removal of four items from the list of marketing acts and practices that are defined by Ohio Admin. Code 4901:1-29-05(C) as being unfair, misleading, deceptive, or unconscionable.[52] These items include: 1) failing to provide a telephone number and address for customers to request more detailed information; 2) not adhering to current standards regarding the do-not-call list; 3) not engaging in telemarketing before 9:00 a.m. or after 9:00 p.m.; and 4) not complying with local laws and ordinances while performing door to door solicitations.[53]

The Commission should reject the OGMG/RESA proposal because of the potential harm to consumers. Customers should have readily available phone numbers and addresses for obtaining more detailed information and to have questions answered by CRNGS or governmental aggregators who are providing advertising and marketing materials to consumers. In addition, customers have a right to privacy in their own homes and a right to not be bothered

[50] Id.

[51] R.C. 4929.22(A).

[52] OGMG/RESA Initial Comments at 25-26 (January 7, 2013).

[53] Id.

with unwanted telemarketing calls at all hours, and for the assurance for safety knowing that CRNGS door-to-door solicitors are adhering local laws and ordinances concerning these practices. The Commission should reject the OGMG/RESA recommendation and ensure that the CRNGS and government aggregators comply with Ohio Admin. Code 4901:1-29-05(C)(1) through (C)(11).

4901:1-29-06 - Customer Enrollments and Consent.

4901:1-29-06(B).

Ohio Admin. Code 4901:1-29-06 governs the procedures for CRNGS and government aggregators to enroll customers and the coordination process with the LDC. Duke Retail addressed an issue concerning the high monthly charges that customers pay for natural gas service to the Utility using the straight fixed variable ("SFV") rate design and the impact on CRNGS.[54] Duke Retail notes that customers are disconnecting service in the summer when there is little or no summertime need for natural gas and reconnecting again in the fall when natural gas is needed for heating.[55]

Duke Retail recommends that if customers reconnect service at the same address in the fall, the customer should automatically revert to the pre-existing contract with the CRNGS provider.[56] The OCC opposes the Duke Retail recommendation for a customer to be automatically reassigned to the same CRNGS because the termination of service would also have the effect of terminating the CRGNS contract. The customer should revert to the standard option with the opportunity to select the same or a different Marketer, if the customer so decides to do so at that time.

[54] Duke Retail Initial Comments at 7-8 (January 7, 2013).

[55] Id.

[56] Id.

4901:1-29-06(C).

The Staff proposed significant improvements in paragraph (C)(6) involving the door-to-door solicitation and enrollment procedures by requiring third-party verification ("TPV" or "Verification") on all enrollments performed through door-to-door solicitations.

Under the proposed rule the Verification must be conducted in accordance with Ohio Adm. Code 4901:1-29-06(C)(6)(b)(i)-(v).[57] Border recommended that, as an alternative to the TPV, a sales associate could initiate a video recording of the customer affirming the decision to switch to a CRNGS.[58] OGMG/RESA commented that if the TPV is being used, customers should not have to be provided a copy of the acknowledgement form that lists the questions included in the TPV.

There are privacy concerns with Border's recommendation that customers be videotaped (or have their property videotaped). Being asked to affirm an enrollment in a videotape can be intimidating. To the extent that CRNGS would retain such videos, privacy concerns also arise. OCC recommends that customers should affirm the decision to switch suppliers in a TPV process without being in the presence of the door-to-door Marketer who initiated the enrollment. Regarding the OGMG/RESA proposal, the acknowledgement form is a good checklist that should be used to help ensure sales representatives are disclosing the requirements in the Commission rules. OCC supports the continued use of the acknowledgement form along with the TPV.

[57] Id.

[58] Border Initial Comments at 1 (January 7, 2013).

Border also commented concerning the requirement that the TPV confirm that the sales agent has left the property.[59] OGMG/RESA filed similar comments on this topic.[60] The proposed rule prohibits a sales agent from returning to a customer's property before, during, or after the TPV process. But OGMG/RESA claim that there are legitimate reasons for the sales agent to return to the property -- for instance, to answer additional questions customers may have.[61]

However, the potential for coercion or intimidation increases if a sales agent is permitted to return to the property to try to get the customer to enroll for a second time. One potential reason a TPV would not result in a verified enrollment could be because in the process of verifying the information the sales agent provided the customer, the customer realized there were factual errors and no longer felt comfortable switching, or the customer may simply decide not to enroll. Allowing sales agents a second opportunity to coerce a customer enrollment is not in the public interest. The Commission should reject the Border and OGMG/RESA proposal.

OGMG/RESA also suggested that a new provision be added concerning door-to-door solicitations that CRNGS must have sales representatives trained in a manner established by the CRNGS and overseen by an employee of the CRNGS.[62] However, OGMG/RESA propose that liability for trained door-to-door agents should be limited just to the door-to-door agents who work exclusively for the CRNGS provider.[63] Such a provision would have the effect of creating a loophole to protect and separate a CRNGS from agents acting on their behalf.

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[59] Id.

[60] OGMG/RESA Initial Comments at 27-28 (January 7, 2013).

[61] Id.

[62] OGMG/RESA Initial Comments at 29 (January 7, 2013).

[63] Id.

While OCC supports CRNGS having a well-trained and well supervised sales force, the liability of the CRNGS should extend to all sales agents who are working on behalf of the CRNGS and not just those who are employed exclusively for the CRNGS. Otherwise, an unscrupulous CRNGS might try to absolve themselves from responsibility for agents who are initiating false, misleading, and unconscionable sales practices, by claiming the agents are not exclusively working for the CRNGS.

OGMG/RESA also commented concerning the Staff's proposed rule Ohio Admin. Code 4901:1-29-06(C)(6)(e) that requires door-to-door solicitors to leave the premise when asked to do so.[64] OGMG/RESA recommends that customers must "expressly" request that the agent leave the premises before an agent actually be required to leave.[65] The Commission should adopt the PUCO Staff's proposed rule as drafted, and should reject any change in the rule that can be interpreted to not require sales agents to leave a property **immediately** upon request.

4901:1-29-06(K).

The PUCO Staff proposed a new rule, Ohio Admin. Code 4901:1-29-06(K), that requires customer consent to material changes in existing contracts. OGMG/RESA object to this new proposed rule because they claim it will result in negative consequences for customers that outweigh any benefits.[66] OGMG/RESA suggests that if the Commission does not reject the proposed rule as they recommend, the language should specifically be amended to exclude

[64] OGMG/RESA Initial Comments at 29 (January 29, 2013).

[65] Id.

[66] Id. at 30.

contract renewals.[67] Finally, OGMG/RESA commented that customers are assumed to have read and understand the terms of their contracts.[68]

The issue of the understandability of CRNGS contracts, including automatic renewal provisions, was raised by OCC in the Initial Comments.[69] OCC recommended that CRNGS be required to demonstrate the adequacy and understandability of the contracts.[70] Given that Ohioans have spent more than $885 million more for natural gas than if customers had remained with the Utility's standard offer, there are clear reasons for concern about the understandability of these contracts.[71] Requiring customer consent for material changes in contracts, including renewals, helps ensure that consumers actually make an informed decision and have access to reasonably priced natural gas service as required by statute.[72]

The Commission should reject the OGMG/RESA recommendation to eliminate the Staff's proposed Ohio Admin. Code 4901:1-29-06(E). The Commission should adopt the OCC's recommendation concerning verifying the adequacy and understandability of contracts for residential consumers.[73]

4901:1-29-09 - Customer Information.

4901:1-29-09(A).

Ohio Admin. Code 4901:1-29-09 (A)(1) prohibits CRNGS or government aggregators from disclosing a customer account number or any information for any purpose other than the for

[67] Id.

[68] Id.

[69] OCC Initial Comments at 19-21 (January 7, 2013).

[70] Id.

[71] See Columbus Dispatch, "Ohioans burned by gas choice," by Dan Gearino at A-1 and A-9 (Sunday November 11, 2012).

[72] R.C. 4929.02(A)(1).

[73] Id.

the operation, maintenance, assignment, and transfer of a customer's account. In addition, the rule prohibits the disclosure of a customer's social security number for any purpose other than to provide a credit check without explicit customer consent. OGMG/RESA commented that the rule should not prohibit CRNGS who have a business relationship with a customer from offering other products and services provided by CRNGS or its agents, vendors, and affiliates.[74] The Rule does not preclude a Marketer who has a business relationship with a customer from offering other products or services that the Marketer, its agents, vendors or affiliates might offer. However, the Rule merely precludes use of the customer's social security number which was only obtained to provide natural gas commodity service.

A CRNGS should not be able to disclose the customer's utility account number, social security number or other identifying information for offering other products and services by the CRNGS or affiliates without explicit consent from the customer. Utility customer account numbers and social security numbers were provided to the CRNGS for the specific purpose of obtaining natural gas supply. Allowing the proliferation of this information to be used for other marketing purposes can result in significant harm for customers. This ill-advised recommendation by OGMG/RESA should be rejected.

4901:1-29-09(B) and (C).

IGS proposes amendments concerning proposed Ohio Admin. Code 4901:1-29-09(B) and (C).[75] IGS proposes that CRNGS be provided with the utility account numbers by the Utility and not customers as part of the enrollment process as contemplated in the rules.[76] IGS proposes that the Utilities include this information with the eligible customer list that is provided to all

[74] OGMG/RESA Initial Comments at 32 (January 7, 2013).

[75] IGS Initial Comments at 6 (January 7, 2013).

[76] Id.

CRNGS by the Utilities.[77] IGS claims that account number access simply enhances the customer experience and makes competitive products and services more accessible to consumers.[78]

Although CRNGS would like to obtain access to the customer's Utility account numbers, the potential negative consequences or harm for customers could be devastating. The use of the Utility account number as part of the enrollment verification process is a highly effective way to help prevent slamming. "Slamming" is defined as the unethical process of changing a customer's supplier without customer consent. Since the Utility account number is a unique identifying piece of information common between the Utility and customer, the disclosure of the account number by the customer as part of the enrollment helps validate that the customer is actually engaged in the enrollment.

IGS acknowledges that a "nefarious supplier" could use the account numbers to enroll customers without obtaining consent.[79] However, IGS also notes that a supplier who performs slamming could risk being fined forfeitures and the revocation of their certification.[80] While the fact that enforcement mechanisms that can be used after-the-fact against nefarious Marketers can be appreciated, the PUCO should support the development and use of appropriate consumer protections and practices that prevent customers from being harmed by slamming in the first place. It is better for the Commission to enforce rules that prevent problems rather than having to deal with the fallout from rules being violated -- in this case the consequences of slamming.

OGMG/RESA recommended that the Commission initiate a new rule that enables enrollments to occur with the social security number, customer account number, customer birth

[77] Id.

[78] Id.

[79] IGS Initial Comments at 4 (January 7, 2013).

[80] Id.

dates, or driver's license number.[81] Eagle Energy commented that a provision should be added to the rules to prohibit CRNGS providers from requesting social security numbers.[82] OCC supports Eagle Energy's recommended ban on the requests for social security numbers as an essential way to protect customer privacy.

In addition, enrollments using customer birth dates and/or driver's license numbers lack the inherent protections that are afforded by the utility account number which is on the gas bill. OCC reasons that copies of recent gas bills are likely to be information that customers would have close by when they are making **an informed** choice for a CRNG supplier.

R.C. 4929.22(D)(3) imposes a legislated prohibition against switching or authorizing the switching of a customer's supplier of natural gas service without the prior consent of the customer using appropriate confirmation practices. OCC is strongly opposed to the unethical practice of slamming and contends that the public interest is served when consumer protections prevent this practice.

Unlike the IGS proposal that in essence supports the Commission taking action **afte**r slamming takes place, the OCC seeks to prevent slamming from occurring in the first place. The current process of requiring the use of account numbers to authorize changing suppliers has been in place for many years and OCC is aware of few instances of slamming. Therefore, the use of the account numbers as the unique identifier that is needed to demonstrate the customer's authorization for changing suppliers appears to be effective. The Commission should reject the IGS proposal to have the utilities provide account numbers and should continue the practice of having customers provide the account number during the enrollment process.

[81] OGMG/RESA Initial Comments at 34 (January 7, 2013).

[82] Eagle Energy Initial Comments at 11 (January 7, 2013).

4901:1-29-09(C)(5).

Ohio Admin. Code 4901:1-29-09(C)(5) requires the Utilities to disclose to customers, at least four times per year, their right to object to the Utilities sharing with CRNGS the customers' personal identifying information (about themselves and their natural gas account). This consumer right is commonly referred to as the "opt-off" list. Dominion and Vectren commented that the disclosure should only be provided twice a year because the benefits do not match the costs.[83] OGMG/RESA commented that the information should be conveyed to customers in a way that is more supportive of the competitive market.[84]

However, the legislated intent of this notice is for each Utility to provide clear and frequent notice to customers of their right to object to having their customer information provided to CRNGS.[85] Therefore, the Commission should reject the OGMG/RESA proposal to encourage customers to participate in Choice because the intent of the notice is to clearly inform customers about their right to object to having their customer information disclosed to CRNGS. The intent of the Rule is not to encourage or to push customers to Choice, but instead to make sure that customers have all of the information necessary to make an informed decision regarding Choice. Customers should retain the right to not have their customer information distributed to Marketers and to select the standard option instead of Choice. In addition, OCC notes that the legislature requires the notice to be sent "frequently." OCC does not believe that there is sufficient basis to reduce the number of notices from the current four times a year to half that number as recommended by Dominion and Vectren. That recommendation should be rejected.

[83] Dominion and Vectren Initial Comments at 8-9 (January 7, 2013).

[84] OGMG/RESA Initial Comments at 33 (January 7, 2013).

[85] R.C. 4929.22(F).

4901:1-29-10 - Contract Administration and Renewals.

The PUCO Staff proposed Ohio Admin. Code 4901:1-29-10(G) to include requirements for contract renewals. The requirements for disclosure depend upon the term of the contract renewal, if there are material changes in the contract terms and conditions, and the amount of any early termination charges. In Initial Comments, OCC raised questions concerning the adequacy and understandability of the CRNGS contracts that are being used with residential consumers.[86]

While not readdressing those comments here, OCC is concerned if the renewal contracts result in customers paying more for the commodity of natural gas than they would pay under the standard offer. The Commission should continue to require customer consent for material changes in contracts as addressed earlier in these comments. The Commission should also establish a provision in the rules alerting customers that are paying a higher variable monthly rate compared to the alternative standard option, that a lower cost option is available. OCC suggests that if for any two consecutive months a customers is charged a monthly variable CRNGS rate that exceeds the standard option rate, then the CRNGS be required to notify customers in-writing that the lower cost standard option is available.

4901:1-29-11 - Contract Disclosure.

OGMG/RESA commented that Ohio Admin. Code 4901:1-29-11(J)(1) should be amended to specify that not all products are priced based on the cost per Ccf or Mcf.[87] To the extent that CRNGS are not offering products that are priced on a per Ccf for Mcf basis, the Commission must ensure that customers have some mechanism do be able to determine the comparability of prices. OCC also reiterates its concern with the adequacy and understandability

[86] OCC Initial Comments at 19-21 (January 7, 2013).

[87] OGMG/RESA Initial Comments at 35 (January 7, 2013).

of the terms and conditions of these contracts.[88] The PUCO Staff proposal to removal the text "in clear and understandable language" in (J) should not be adopted by the Commission because the end result would potentially be more customer confusion and not less.

4901:1-29-12 - Customer Billing and Payments.

Ohio Admin. Code 4901:1-29-12(B)(1) – (15) enumerates the requirements for billing and payments rendered by or on behalf of a CRNGS or government aggregator. OGMG/RESA recommended the deletion of the OCC toll free number in (B)(12) because OCC no longer operates a call center.[89] The PUCO should once again reject this recommendation.

In Case Number 11-4910-AU-ORD, the PUCO addressed this issue, after OCC no longer operated a call center. The PUCO found that, while R.C. 4911.021 specifies OCC shall not operate a telephone call center for consumer complaints, the statute does not "prohibit OCC from serving as a resource for residential consumers."[90] In fact, the Commission acknowledged that there are provisions throughout Title 49 of the Ohio Revised Code that mandate that OCC contact information be on residential bills.[91] The PUCO asserted that a state entity, such as OCC, "should be available to provide customer assistance."[92] OCC is available to provide this assistance as the PUCO noted -- contrary to OGMG/RESA's assertions. For example, OCC provides educational material to customers upon request.

The OGMG/RESA recommendation to remove the OCC toll-free number from CRNGS or governmental aggregator bills should be rejected.

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[88] Id. at 19-21 (January 7, 2013).

[89] OGMG/RESA Initial Comments at 36 (January 7, 2013).

[90] *In the Matter of the Amendment of Certain Rules of the Ohio Administrative Code to Implement Section 4911.021, Revised Code*, Case No. 11-4910-AU-ORD, Finding and Order, at ¶ 9 (November 29, 2011).

[91] Id.

[92] Id.

V. CONCLUSION

OCC appreciates the opportunity to provide these reply comments regarding the proposed changes to Ohio Admin. Code Chapters 4901:1-27 through 4901:1-34. The Commission's adoption of OCC's recommendations in these comments will provide necessary consumer protections by deterring unfair, misleading, deceptive, or unconscionable acts or practices related to the CRNGS interactions with customers. And these recommendations also serve the interest of those CRNGS who are compliant with Ohio law and rule, by deterring non-compliant conduct from any CRNGS that would unfairly compete by enrolling customers in violation of PUCO standards.

Additionally, the Commission's adoption of OCC's reply comments -- concerning the general questions asked in the PUCO's Attachment A -- will result in better consumer protections and less potential for Ohioans to be subjected to deceptive and misleading marketing practices that may be occurring in other jurisdictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was served via electronic service upon the parties this 6th day of February 2013.

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NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

RESOLUTION 2012-04

URGING THE ADOPTION OF STATE LAWS AND REGULATIONS REGULATING COMPETITIVE ENERGY SUPPLY MARKETS, INCLUDING MEASURES DESIGNED TO PROMOTE HONESTY AND CLARITY IN MARKETING AND TO GIVE CONSUMERS A REASONABLE ABILITY TO SELECT A COMPETING PROVIDER

Whereas, the markets for electricity and natural gas have been open to retail competition in numerous states for nearly two decades; and

Whereas, there are differing procedures among the states by which competitive retail energy providers may be authorized to conduct business, differing business models by which the providers conduct business, and almost as many approaches to marketing as providers; and

Whereas, frequent, even daily, commercial messaging by such providers often presents consumers with bewildering claims and options; and

Whereas, compounding the problem, there have been documented complaints of marketing representations that are false and misleading, including representations of affiliation with a public utility and representations regarding the savings a consumer can expect if the consumer switches providers;[1] and

Whereas, the false and misleading representations have been delivered both door-to-door and by telephone; and

Whereas, in consequence of these difficulties, consumers are frequently surprised to learn that their provider contracts do not match expectations or are not well-suited to their needs; and

Whereas, retail energy providers have control over, and are responsible for, the content, manner and methods of marketing, whether in house or by their contracted third-party marketing agents; and

Whereas, on the front end, consumers need an ability to compare competitive offers meaningfully and directly, price to price, and desired feature to desired feature; and

Whereas, the ability of consumers to escape unexpected and unwanted terms and conditions is frequently undercut by expensive early termination fees, which are anticompetitive and even antithetical to the concept of a competitive market;[2] and

Whereas, on the back end, consumers need an ability to switch to a competing provider, without undue constraints from unreasonable early termination fees, if and when they determine a competing offering is superior or better suited to their needs; and

Whereas, the receipt of electricity supply or natural gas supply is not a luxury but a necessity of life; and

Whereas, households of modest means must optimize the spending power of their limited incomes; and

Whereas, consumers are entitled to honest, transparent and accurate marketing in matters concerning vital and essential services, including electricity and natural gas supply; and

Whereas, such honest, transparent and accurate marketing enhances customer confidence in the competitive markets and benefits all concerned, including the providers; and

Whereas, retail energy marketers would benefit from a common set of guidelines for conducting marketing efforts to consumers;

***Now, therefore, be it resolved*, that state legislatures and state public utility commissions should develop and adopt laws and regulations regulating competitive energy supply markets, including measures designed to promote honesty and clarity in marketing and measures designed to give consumers a reasonable ability to select a competing provider.**

Be it further resolved, that such laws and regulations should incorporate the following specific consumer protections:

(1) Retail energy marketers should be required to make honest and accurate marketing presentations; deceptive and misleading statements should be prohibited.[3]

(2) Retail energy providers should be required to disclose the price of energy supply, *i.e.*, cents per Kwh for electricity or dollars per Dth/CCF for natural gas, before a consumer signs or verbally agrees to a contract for energy supply.

(3) Regulators should require uniform disclosure of prices and terms by retail energy providers and should make the information available on their websites and by other means in order to permit consumers to compare and make informed selections of products and services offered in the supply markets.

(4) Before consumers are asked to sign a contract or verbally agree to enroll with a new provider, retail energy providers should be required to give consumers written information that clearly and conspicuously discloses, in plain language, the prices, terms and conditions of the products and services being offered and sold.

(5) Before consumers are asked to sign a contract or verbally agree to enroll with a new provider, retail energy providers should be required to disclose specifically what, if any, fees and charges apply, such as application fees, customer charges, administrative charges, taxes or early termination fees.

(6) Retail energy providers should be required to confirm that the person authorizing the switch of an account holder's energy supply to a new competitive retail energy provider is in fact the account holder; unauthorized switches should be prohibited.[4]

(7) Under well-established principles of the law governing principal and agent, retail energy providers should be held accountable for the misrepresentations, misleading scripting and other rogue actions of their marketing agents.

(8) Statutory and regulatory requirements should be enforced through the assessment of significant civil monetary penalties, and through escalating penalties including suspension and revocation of authority to do business when patterns of consumer protection violations occur.[5]

(9) Provider contracts should be subject to a "cooling off" period of a number of days, not fewer than three, during which the consumer can rescind the contract without incurring any obligations under it.[6]

(10) Early termination fees should be clearly disclosed in advance of signing a contract and separately agreed to in writing.[7]

(11) Early termination fees should be limited in amount,[8] as, for example, to the maximum $50 allowed under Illinois law for alternative gas suppliers;[9]

(12) Early termination fees should include grace period exceptions, extending until thirty (30) days after receipt of the first bill, under which a surprised or dissatisfied consumer can terminate the contract without incurring any such fee.[10]

(13) All solicitation materials and presentations should be required to include a conspicuous statement that the consumer will be able to terminate the contract during the grace period without being assessed an early termination fee.

(14) Retail energy providers should be permitted to market energy supply as "green," "renewable" or "environmentally friendly" only if the energy supply being marketed includes purchases entirely separate, apart from, and in excess of, those required to meet any state renewable portfolio standard requirements applicable to retail energy providers.

(15) Marketing activities should be consistent with other applicable state and federal laws and regulations.[11]

Be it further revolved, that NASUCA authorizes its Executive Committee to develop specific guidelines for retail energy marketing to consumers and to take appropriate actions consistent with the terms of this resolution. The Executive Committee shall advise the membership of any proposed action prior to taking such action, if possible. In any event, the Executive Committee shall notify the membership of any action taken pursuant to the resolution.

Submitted by Consumer Protection Committee

Approved June 25, 2012
Charleston, South Carolina

Abstention: Indiana

[1]See Illinois Commerce Commission Docket No. 08-0175, *Citizens Utility Board, Citizens Action/Illinois, AARP v. Illinois Energy Savings Corp., d/b/a US Energy Savings Corp – Complaint as to marketing practices in Chicago, IL*, Order dated April 13, 2010; Maryland Public Service Commission Case No. 9253, *In the Matter of the Complaint of the Staff of the Public Service Commission Against North American Power and Gas, LLC*, Order Nos. 83785 dated Jan. 14, 2011 and 84096 dated June 9, 2011; Ohio Public Utilities Commission Case No. 02-1828-GA-CRS, *In the Matter of the Application of Commerce Energy, Inc. d/b/a Just Energy for Certification as a Competitive Retail Natural Gas Provider*, Order dated Nov. 22, 2010; see also Ohio Consumers' Counsel, Press Release, "OCC files complaint against IGS marketing tactics" (Oct. 21, 2010).

[2]See Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services, 24 F.C.C.R. 6185 ¶ 185 (FCC 2009) ("[t]he practice of assessing [early termination fees] . . . represents a barrier to consumers' ability to switch service providers"). In a recent court decision similarly involving the assessment of early termination fees in conjunction with contracts for cellphone service, the fees did not appear to be "based on the amount of any actual or estimated loss" but instead to have been assessed "from a competitive standpoint," with a purpose "to control churn" and "prevent customers from leaving." *Cellphone Fee Termination Cases*, 122 Cal.Rptr.3d 726, 745 (Cal. App. 2011).

[3]See Code of Mass. Regs. 19.94 (making it an unfair or deceptive act or practice for a retail seller of electricity to make any material misrepresentation to the public or to any consumer, either directly or through any type or marketing or agreement, or through the use of any misleading symbol or representation, which the seller knows or should know has the capacity or tendency to deceive or mislead a reasonable consumer, or that has the effect of deceiving or misleading a reasonable consumer, in any material respect, including, among others, representations related to: (a) the quality, environmental or other characteristics, or source of any product or service being offered for sale; (b) the business relationship between any retail seller of electricity and any distribution company; (e) the distribution price, the generation price or the total delivered price of electricity or the price of any related electricity products or services; or (h) the amount of money to be saved by a consumer, expressed in any manner, if a consumer chooses one retail seller of electricity over any other seller). See also Md. Code Ann., Commercial Law 13-301.

[4]See 815 Ill. Comp. Stats. Ann. 505/2DDD(d); Md. Code Ann., Public Utilities 7-705; Mich. Comp. Laws Ann. 460.9(2).

[5]See Mich. Comp. Laws Ann. 460.9(9)(a) (authorizing fine for first offense not less than $20,000 nor more than $30,000 and fine for second or subsequent offense not less than $30,000 nor more than $50,000, or, if second or subsequent offense was knowingly in violation of requirements, not more than $70,000; each violation is separate offense).

[6]See 16 C.F.R. § 429.1.

[7]See Annual Report and Analysis of Competitive Market Conditions with respect to Mobile Wireless including Commercial Mobile Services, 25 F.C.C.R. 11407 ¶ 236 (FCC 2010) ("it is essential that consumers fully understand what they are signing up for – both in the short term and over the life of the contract – when they accept a service plan with an early termination fee").

[8]In 2009, when Verizon doubled its early termination fee for certain devices from $175 to $350, the action prompted an inquiry from the Federal Communications Commission. 24 F.C.C.R. 14320 (FCC 2009). See also Annual Report and Analysis of Competitive Market Conditions with respect to Mobile Wireless including Commercial Mobile Services, 25 F.C.C.R. 11407 ¶ 236 (FCC 2010) ("early termination fees are substantial (and in some cases are increasing) and have an important impact on consumers' ability to switch providers").

[9]220 Ill. Comp. Stats. Ann. 5/19-115(g)(5)(A) ("any early termination fee or penalty shall not exceed $50 total, regardless of whether or not the agreement is a multiyear agreement"); 815 Ill. Comp. Stats. Ann. 505/2DDD(e) (same).

[10]See *Pacific Bell Wireless, LLC v. Public Utilities Commission*, 44 Cal.Rptr.3d 733 (Cal. App. 2006) (policy of charging customers an early termination fee to cancel a wireless telephone service contract without permitting any type of grace period was an unjust and unreasonable practice, particularly when company admitted the best way for customers to decide whether company's service would work for them was to try the service for some period of time"). See also Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services, 24 F.C.C.R. 6185 ¶ 185 (FCC 2009) ("Other provider practices also affect consumers' ability to switch service providers. Mobile telephone service providers generally allow new customers to cancel their service for any reason without incurring the early termination fee within a grace period – typically thirty days – of signing the agreement").

[11]See Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. Sec 6101 *et seq.*; Telemarketing Sales Rule, 16 C.F.R. Part 310.

National Energy Marketers Association

News Release
FOR IMMEDIATE RELEASE
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NEM Adopts National Marketing Standards of Conduct

Energy Marketers Compete for the Opportunity to Serve Consumers

Washington, DC – The National Energy Marketers Association (NEM) is pleased to announce that it adopted National Marketing Standards of Conduct at its recent Winter Executive Committee Meeting. The National Marketing Standards of Conduct builds upon the work of NEM to develop and adopt a Consumer Bill of Rights in 2010 and a Network Marketing Code of Conduct in 2011. State Public Utility Commissions have initiated inquiries to implement or revise existing standards for marketing to consumers in the retail energy marketplace. NEM's National Marketing Standards of Conduct were adopted to reflect its members' commitment to consumer protection and augment the important work of the state PUCs. "NEM members are honored to serve consumers and to endorse and implement these National Marketing Standards of Conduct, as well as ethical business practices that protect the consuming public," said Craig Goodman, President of NEM.

NEM's National Marketing Standards of Conduct sets forth business practices to form a common basis for doing business in the energy marketplace:

- Suppliers shall not engage in false, misleading or deceptive conduct or make false, misleading or deceptive statements or representations in dealings with consumers;
- Suppliers shall be responsible for the conduct of their agents;
- Suppliers shall utilize methods appropriate to the size and type of consumer when engaged in door-to-door, telephonic, electronic and network sales and marketing;
- Consumers will be provided with accurate information about products and services they are being offered:
- A supplier's agreement with a consumer shall include all material terms and be clear, plain and in a language understandable to the consumer;
- A consumer shall not be enrolled for competitive energy service unless s/he has expressed his/her consent to the Supplier to do so.

The full texts of NEM's National Marketing Standards of Conduct, Network Marketing Code of Conduct and Consumer Bill of Rights are available on the NEM Website. NEM is a national, non-profit trade association representing wholesale and retail marketers of natural gas, electricity, as well as energy and financial related products, services, information and advanced technologies throughout the United States, Canada and the European Union. **You may contact NEM's Washington, DC headquarters at (202) 333-3288 or its Web site at www.energymarketers.com.**

Summary: Comments Reply Comments of the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Serio, Joseph P.