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
In the Matter of the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Chapters 4901:1-21 and 4901:1-24 of the Ohio Administrative Code.	)))))	Case No. 12-1924-EL-ORD

OHIO PARTNERS FOR AFFORDABLE ENERGY'S COMMENTS

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OHIO PARTNERS FOR AFFORDABLE ENERGY'S COMMENTS

I. INTRODUCTION

Ohio Partners for Affordable Energy ("OPAE") herein submits to the Public Utilities Commission of Ohio ("Commission") these comments in the matters of the Commission's review of its administrative code rules for competitive retail natural gas service and competitive retail electric service.

OPAE's comments reflect the assistance of Barbara R. Alexander, Consumer Affairs Consultant. Ms. Alexander's expertise in this area is a reflection of over 30 years of professional experience in consumer protection policies and programs, both with respect to consumer credit transactions, public utility regulatory policies, and regulation of retail competitive markets. From 1978-1983 she was the Superintendent of the Maine Bureau of Consumer Credit Protection, responsible for the supervision and enforcement of the Truth in Lending, Debt Collection, and Fair Credit Reporting Acts

over Maine licensed financial and commercial lenders. From 1986-1996 she was the Director of the Consumer Assistance Division of the Maine Public Utilities Commission, responsible for handling customer complaints and participating in formal regulatory proceedings on consumer protection policies, customer service, and low income assistance programs applicable to regulated telecommunications, electric, and natural gas utilities. Since 1996, Ms. Alexander has appeared in over 15 state jurisdictions in the U.S. and Canada on consumer protection, customer service, and low income policies and programs related to the development of retail competitive markets. At the onset of the development of the retail energy markets she prepared a guide to the development of consumer protection programs and policies applicable to retail energy suppliers that was published by the U. S. Department of Energy.[1] Ms. Alexander has represented national consumer organizations, such as AARP, and state public advocates in the development of retail market regulations, including licensing, customer disclosures, contract term regulation, and enforcement policies applicable to retail natural gas and electric suppliers. In addition, she has appeared as an expert witness on behalf of advocates and regulatory commission staff in the investigation of specific supplier marketing and customer service conduct in Illinois (Just Energy, formerly U.S. Savings Corp.[2]) and Delaware (Horizon Power & Light[3]), as well as pending and

[1] Alexander, Barbara, Retail Electric Competition: A Blueprint for Consumer Protection, U.S. Department of Energy, Office of Energy and Renewable Energy, Washington, D.C., October, 1998.
[2] Illinois Commerce Commission, Docket No. 08-0175.
[3] Delaware Public Service Commission, PSC Docket 10-2.

recently completed reforms of retail market regulations in Delaware[4] and Pennsylvania.[5]

The Commission initiated these two proceedings to review its current retail electric and natural gas regulations applicable to Competitive Retail Electric Suppliers (CRES) and Competitive Retail Natural Gas Suppliers (CRNGS). These regulations govern the Commission's certification or licensing process for suppliers, as well as supplier conduct and interactions, including disclosures, with retail customers. OPAE's comments reflect a review of the current regulations; the proposed changes as reflected in the Staff proposed changes to these regulations; and, the transcript of the workshop held on August 6, 2012. OPAE also sought and received complaint statistics and recent complaint files from the Commission's Service Monitoring and Enforcement Division; however, our comments do not reflect any detailed analysis of this information due to the time constraints posed by this schedule. OPAE's Reply Comments will include more detailed information derived from these complaint statistics as appropriate. These comments primarily focus on the experiences of residential customers in Ohio and other states in which these same and similar suppliers are active, but note that non-mercantile commercial customers are often in need of and should receive consumer protections similar to those identified in these comments.[6]

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[4] Delaware Public Service Commission, In The Matter Of Adoption Of Rules And Regulations To Implement The Provisions Of 26 Del. C. Ch.10 Relating To The Creation Of A Competitive Market For Retail Electric Supply Service, PSC Regulation Docket No. 40.

[5] Pennsylvania Public Utility Commission, Rulemaking RE: Marketing and Sales Practices for the Retail Residential Energy Markets, Docket No. L-2010-2208332.

[6] OPAE's membership includes sixty large and small community-based nonprofit organizations providing anti-poverty, housing, and economic development services. Our experience, after some fourteen years of providing information on the workings of

The comments are organized based on the proposition that the natural gas and electric regulations should be identical for the most part and offer the same level of consumer protections for natural gas and electric service from suppliers. There is no reason why the proposed regulations should be organized differently or contain different provisions in this regard. One of the key reforms OPAE recommends is that the regulations be revised and re-ordered to achieve this approach. The existing and proposed regulations treat similar conduct by gas and electric suppliers differently. There are significant differences in the level of consumer protections that do not appear to reflect any difference in the nature of the transaction. The use of a combined regulatory structure and similar consumer protections will enhance the ability of the Commission and other agencies and organizations in consumer education and outreach initiatives. In addition, the use of a similar organizational format and the use of similar content in required licensing, consumer disclosures, contract terms, and customer remedies for both electric and natural gas supplier services will benefit suppliers who may be active in both markets.

These comments initially focus on recommendations for best practices that should govern the reforms and revisions to both natural gas and electric regulations. The comments then address the key provisions and policies reflected in both the existing natural gas and electric retail supplier regulations that should be reformed and improved. Language is included from existing regulations in other states that may provide appropriate models for necessary changes in several significant provisions.

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competitive markets to our members, is that these and other non-mercantile commercial customers are no more 'sophisticated' in navigating competitive energy markets than residential customers.

Though not directly addressed in these regulations, regulators should be mindful of the value of a standard service offer, which utilizes the competitive market and takes advantage of the power of bulk purchasing in a manner comparable to government aggregations, cannot be overstated and should be available on an opt-in basis for residential and small commercial customers. This type of service complements the consumer protections that are the underlying focus of the regulations being reviewed in these dockets. A standard service offer ensures a significant level of self-regulation in competitive markets by establishing a benchmark by which all providers can measure themselves.

Ensuring that the value of the competitive market is available to customers struggling to survive in a difficult economy can be accomplished through an approach that combines a declining clock auction bidding process and an opt-in pool. Participation in the pool can be conditioned on income below a certain threshold, with the eligibility certified by the existing network that determines eligibility for the Home Energy Assistance Program (HEAP) and the Percentage of Income Payment Plan (PIPP). Given that over 40% of American Electric Power's customers have incomes under 200% of the federal poverty line and more than 30% of customers of most other utilities currently have incomes below the same level (though less than 25% of this total receive services through assistance programs and most are working at least one job if not more), it only makes sense to utilize market forces to set the lowest possible price by eliminating the impact of expensive marketing costs and minimizing the potential impact on the most vulnerable customers of the marketing practices these rules seek to prohibit. A $10 annual income certification fee to participate in such a pool, coupled

with rates set through a competitive auction, is the best option for insuring that the lowest income customers receive the energy service most tailored to their needs: service at the lowest possible price.

II. BEST PRACTICES FOR REGULATION OF ELECTRIC AND NATURAL GAS SUPPLIER SERVICES TO RESIDENTIAL CUSTOMERS: AN OVERVIEW

The regulation of the retail sale of natural gas and electric service to residential and small commercial customers by a state public utility commission, particularly the review and revision of those regulations that have been in place for five or more years, should reflect the Commission's experiences in the implementation of its current regulations; an analysis of customer complaints concerning supplier interactions and contract terms; experiences that have occurred in other states with similar market structures; and, a review of classic consumer protection policies and programs at the state and federal levels that regulate competitive markets other than energy. The existing Ohio retail energy market regulations compare fairly well with those adopted at the onset of retail energy competition in other states. However, much has been learned in the last five years and there has been a significant increase in the number of suppliers active in the residential and small commercial market, an increased variety in supplier offers, increased residential customer migration to suppliers, as well as some important state investigations and enforcement of applicable regulations. It is appropriate to consider carefully these experiences when crafting necessary reforms to the Commission's existing rules. While the current regulations may have responded reasonably well to supplier activity and customer experiences over the past five years, they have not kept pace with the need for additional reforms and the closing of loopholes that have contributed to customer complaints and led to formal investigations and actions by state commissions.

Most importantly, these comments reflect the essential nature of electricity and natural gas service for residential customers. The lack of affordable electricity and

natural gas for home heating, refrigeration, and cooling is not the equivalent of the retail market for most other consumer goods and services and the lack of essential energy services have dire consequences for the health and safety of residential customers.[7] A customer who enters in a retail contract with a supplier that ends up costing much more than other competitive offers (or a standard service offer) because the customer was not sufficiently knowledgeable about the pricing structure being offered or the supplier misled the customer with fine print that alters what appears to be a good deal on the "front page" of the contract has not merely suffered economic loss. The customer's household experiences threats to its health and safety as a result of paying unconscionable rates, particularly when the family includes those who are elderly, young, disabled, or medically frail. This concern is heightened by the ability of the supplier to use the trusted local utility to bill and collect for the contract services and fees. This puts the utility in the position of enforcing unreasonable rates by threatening and disconnecting families for nonpayment of unregulated supplier charges.

Low income and poor customers are particularly vulnerable to excessive prices. It is well documented that many families face the choice between heating and eating. Several recent electric cases have included reduced rates for participants in the electric PIPP and a declining clock auction sets prices in three of the four major gas utilities for those same customers. These approaches ensure participants in PIPP pay reasonable rates. However the vast majority of low-income Ohioans are not served through PIPP, nor do most of these families receive benefits under the Home Energy Assistance

[7] See, e.g., Snyder, Lynne Page, PhD, MPH, National Energy Assistance Directors' Association, Baker, Christopher A. AARP Public Policy Institute, Affordable Home Energy and Health: Making the Connections, AARP (June 2010).

Program (HEAP). Households which struggle to make ends meet need one thing: the lowest rates available. It is crucial that the Commission take proactive steps to make sure that suppliers that take advantage of vulnerable households to market and sell a product that results in customers being unable to afford essential electricity and natural gas service are prevented from doing so and conduct is policed to prevent such results.

The following key areas require reforms and the development of improved consumer protections in the Ohio regulations.

A. Licensing/Certification. The intent of the certification process should be to ensure that the supplier has the necessary managerial, financial, and technical expertise to allow it to market to residential customers and enforce its contract terms. However, the purpose of this process is not only to require the supplier to check off certain boxes, file required forms, and submit a modest security or retainer. It is vital that the Commission act as a gatekeeper to prevent suppliers that have a history of investigations and adverse activities in other states from operating in Ohio. While most commissions are reluctant to prevent suppliers from entering the competitive market, fearing these actions will be viewed as adverse to the creation of a retail market, the fact remains that the certification and licensing process must be viewed with a serious intent to prevent "bad actors" or those without sufficient resources and expertise from entering the Ohio retail market. The failure to undertake this duty in a proactive manner risks serious harm to consumers and the potential that the Commission will need to undertake expensive and time consuming activities to remove the offending supplier from the market and make consumers whole, a result that unfortunately

rarely occurs without economic loss to consumers. Many marketers operate with very small Ohio staffs, as noted below. The economic impact of these companies is negligible compared to the financial losses to Ohio residents and the negative impact on our local economy when excessive earnings resulting from unconscionable contracts flow to out-of-state corporations that are not investing in Ohio. As a result, the Commission should ensure that its certification review process keeps pace with the surge in supplier activities in other states and carefully reviews the background and qualifications of not only the corporate entity that has applied, but the background and experiences of key directors and managers of other retail market entities in other states. OPAE's following recommendations include specific reforms to the existing regulations in this regard to implement this important policy.

B. **Disclosures**. In a competitive market the role of disclosures is the crucial substitute for regulation of prices and terms of service. This hallmark of consumer protection regulation has been recognized in state and federal consumer credit transactions (e.g., Truth in Lending Act), and in numerous retail consumer sales transactions (e.g., the sale of used cars, personal insurance). The same criteria that led to those typical disclosure laws and regulations are applicable to the retail sale of electricity and natural gas supply. Energy suppliers are in the business of making a sale to earn a profit and are motivated to maximize that profit. Residential and small commercial customers who are used to standard utility prices and terms and conditions that cannot be changed

on a whim are ill equipped to understand and compare the many pricing and contract term options offered by the suppliers; this describes the position of the vast majority of Ohio utility customers, a great many of whom have chosen not to choose, preferring to be served at prices approved by the Commission or set through a competitive auction process where aggregated consumer loads provide customers leverage in the marketplace. While the cents per therm or the cents per kWh may be the focal point of most educational activity (such as the Commission's "apples to apples" price comparison charts) and a key element of the supplier's marketing materials, there are other key components relating to the price and other terms and conditions that can and do have a significant impact on the customer's bill and the cost of energy services. The Commission's regulations should reflect the need for disclosures that reflect all fixed, variable, and recurring charges in a uniform manner that allows for reasonable comparisons and educational messages. Further, other contract terms must be highlighted, such as non-recurring fees (deposits, late fees, early termination fees) in a manner that allows the prospective customer to compare the essential contract terms among suppliers. This type of regulatory tool is particularly important for supervision of door-to-door sales and telemarketing sales of energy supply because the customer is naturally incented to rely on the salesperson's statements about the contract terms as opposed to the written contract terms that may contain fine print and that the salesperson may deliberately fail to orally disclose. There is a potential for adverse impact given the disparity between the written contract terms and the oral representations and sales messages when a

transaction is conducted in person or over the phone. It must be emphasized that the typical customer's reliance on what is said in person far outweighs any written disclosures or written terms of service in motivation of a sales transaction, a phenomenon that marketers rely upon in using these sales channels.

C. Regulation of Contract Terms. While typically not widely understood, the regulation and potential prohibition of certain contract terms and marketer conduct is an essential tool for the regulation of a competitive market. For example, the Truth in Lending Act (and many similar state consumer credit protection laws), Fair Credit Reporting Act, and the Fair Debt Collection Practices Act all prohibit certain conduct and contract terms that are viewed as unconscionable or unfair, even if accompanied by disclosure. This type of regulation is particularly important for the retail energy market due to the significant need for affordable energy services and the implications for health and safety if these services are not available at a reasonable price and reasonable terms. The state's retail regulation of energy markets confronts the need for this approach when dealing with the regulation of variable rate contract terms, contract renewal policies, early termination fees, and other terms that may tilt the bargain so far into the supplier's favor that they should be deemed unreasonable and prohibited. Another area in which such regulation is typical is the oversight of door-to-door and telemarketing activities by suppliers, an area in which several states have taken remedial action that should be emulated by this Commission.

D. Customer Education. The Commission's "apples to apples" price comparison materials represent a commitment of considerable resources to promote these price comparison charts to community organizations and their members. The prominent placement of this information on the Commission's website is also beneficial. However, this information is typically presented to customers as "how to save money" on your electric or gas bill, suggesting that entering the retail competitive market through a bilateral contract with a supplier will lower customer bills. Unfortunately, this result is not always accurate for a number of reasons:

1. Some suppliers emphasize the fixed cents per kWh or cents per therm price but fail to also conspicuously point out that the contract calls for a fixed monthly fee in addition to the kWh or per therm rate or the supplier's contract calls for other non-recurring charges or fees that are imposed for activities that customers normally do not experience with regulated utility service. As a result, the actual monthly price for supply service is higher than the multiplication of the kWhs or therms by the advertised fixed price. To focus customer education on the fixed or initial price per kWh or per therm is misleading, and the Commission should move away from this sort of practice by assuring that any price comparisons made by customers are comparing the totality of charges to which customers are subject.
2. Some suppliers price their product with a "teaser" rate that is in effect for several months, followed by a methodology to establish a price for the remaining contract term that may charge more than a standard service offer or other competitive offer which eschews such gimmickry.

3. Variable rate contracts may rely on a methodology that changes prices in a way that is private to the supplier and that causes higher prices during the contract term compared to a standard service offer.
4. Once a supplier has a customer, the supplier may include a contract term that allows automatic renewal so that silence from the customer when new terms are presented is treated as acceptance. Again, the supplier's renewal price may be higher than the current standard service offer or other current competitive options, a comparison that is not evident on the customer's bill.
5. Some suppliers offer attributes for their products, such as "peace of mind" for long term fixed rate or variable rate prices, or "green" power, that result in prices higher than the standard service offer.

The actual results in several publicly available studies confirm these concerns and should give pause to the Commission's promotion of customer participation in the retail energy markets as a means to save on electric and natural gas bills. For example, the Citizens Utility Board in Illinois has tracked actual natural gas supplier offers to residential customers over the term of the specific plans and compared those results to default natural gas supply service provided by Illinois natural gas utilities. Based on an analysis of how natural gas supplier plans have actually impacted customer bills since 2003, 94% of the supplier plans have resulted in higher prices for residential customers compared to default service. The average customer loss is $1,202.00.[8] This trend has been evident for many years and for almost all suppliers. In New York, the Public Utility Law Center obtained data from Niagara Mohawk (a National Grid affiliate in upstate

[8] See CUB's Gas Market Monitor, available at: http://www.citizensutilityboard.org/GasMarketMonitor.php

New York) that documented that between August 2010 and July 2012, 84 % of the electric bills and 92 % of the gas bills of those who switched to alternative suppliers were higher than the bills of those who decided to keep getting their supply from National Grid. And those statistics translated into huge disparities in consumer bills. For instance, the data showed that over that 24-month period, those with higher bills paid nearly $500 more for electricity and $260 for natural gas.[9] A similar study of PPL Electric low income customers served by electric suppliers in Pennsylvania resulted in the same unfortunate finding—over 70% were paying more than the PPL Electric default service price at the time of the evaluation.[10] Clearly, customer education concerning shopping and entering the retail market must include more than the notion that "savings" are likely to result.

In Ohio, data submitted by OPAE in two recent natural gas dockets clearly demonstrates that the bulk of competitive natural gas supplier offers are higher in price than standard service and standard choice offers. See: *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, OPAE Exhibit 1, Direct Testimony of Stacia Harper (October 4, 2012) at 14 and Exhibit SH-3; *In the Matter of the Joint Motion to Modify the*

[9] Direct Testimony of William Yates on behalf of the Public Utility Law Project of New York, Inc., before the New York Public Service Commission, Proceeding for Niagara Mohawk Power Co. for natural gas and electric rates, Case No. 12-G-0202 and Case No. 12-E-0201 (August 31, 2012).

[10] Direct Testimony of Stephen Krone, on behalf of Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania, before the Pennsylvania Public Utility Commission, Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the period of June 1, 2013 through May 31, 2015, Docket No. P-2012-2302074 (July 20, 2012). According to the information provided by PPL in discovery, more than 73% of its low income customers enrolled in PPL's low income benefit program who were currently being served by an Electric Supplier were being charged a higher price than PPL's price to compare.

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, OPAE Exhibit 2A at SH-3, Direct Testimony of Stacia Harper (November 30, 2012). Data provided by Columbia Gas of Ohio makes clear that customers purchasing commodity natural gas from unregulated suppliers have paid over $861 million since the advent of CHOICE.[11] In the most recent six months for which data is available, customers served by marketers have paid $37 million more than the standard choice offer, and that figure does not include any winter heating months.[12]

Consumers in our capitalistic, deregulated system have been conditioned to believe that competition produces lower prices. However, Ohio legislators and regulators have carefully parsed the statutory language and interpretations to avoid the notion that competition would lead to lower prices, despite the emphasis on 'savings' that underscore the Commissions 'apples to apples' comparison charts and the educational messages provided by the Commission. Early in natural gas choice programs, competition focused on price and was clearly superior in many ways to the traditional regulatory pricing mechanisms. However, over time, the elimination of older "take and pay" contracts and reforms to the wholesale market resulted in reduced standard service offer rates below what most competitive suppliers could afford to offer individual customers, particularly taking into account the "margin" and the marketing costs that suppliers must include in their prices to stay in business. Buying in bulk generally produces a lower price than bilateral retail contracts between individual consumers and suppliers. Currently, the retail electricity market resembles the early

[11] Case No. 12-2637-GA-EXM, OPAE Ex. 2A at Exhibit SH-7.
[12] Id.

days of natural gas choice. A combination of events – a recession and excess capacity – has allowed some suppliers to offer prices below standard service offer rates. This environment will not exist forever; suppliers who cannot compete will go out of business resulting in less choice and more market power for the remaining suppliers. It is important for the Commission's regulations and its regulatory oversight to take into account the potential for change and the reality that customers cannot be promised "savings" by entering the competitive market. There will be winners and losers from competition, and customers must be made aware of that fact through effective education efforts, not something that 'sugar-coats' the realities of the marketplace.

In order to ensure the promise of competition provides for the opportunity to secure reasonable rates for consumers, supplier behaviors and contract terms that lead to unfair and unreasonably high prices should be prohibited. It is also critical that the Commission's educational and outreach programs take on a new degree of sophistication in alerting customers to supplier behaviors that lead to higher prices and educating customers to look for and consider such actions in their shopping decisions. The key to customer shopping is not merely to focus on the price, at least not the one price that is the current focus of the "apples to apples" charts, but should also emphasize that customer evaluation of supplier options should be more sophisticated and that poor choices result in higher prices.

E. Customer Complaints; Enforcement.

The existing regulations in this area reflect most recommended best practices. However, the Commission should initiate several reforms and additional actions in this regard to accommodate and respond to the rising level of retail market activities

targeted to residential and small commercial customers. OPAE recommends that the Commission publish a complaint index for all active marketers on at least a quarterly basis;[13] take more proactive steps to initiate formal investigations; and, undertake enforcement and compliance actions against suppliers with above average complaint ratios where those complaints indicate a "red flag" that suggests violation of the regulations or unfair and deceptive conduct that should be further investigated and prohibited. The Commission should also allow for public comments on customers' experiences with individual suppliers to be published on the Commission's website, much in the way that consumer feedback is made available through services such as "Angie's List®". The current regulations, even if not changed, will require a significant level of staff and enforcement resources to enable the Commission to properly supervise the compliance with its regulations and take affirmative enforcement action where appropriate. These costs should be recovered from the marketers themselves, a recognition that adequate enforcement is a cost of doing business in Ohio.

A review of the Commission's website over the last two years fails to reveal any formal enforcement actions or announcements by the Commission concerning enforcement of its current regulations against electric or natural gas suppliers. There is no public information on complaint trends, formal or informal investigations, or other indicia of actions taken to enforce the current regulations. There is also no public comment on the website to allow individual consumers to comment on supplier's behaviors and prices. However, various other state commissions have initiated formal

[13] The Illinois Commerce Commission publishes supplier complaint scorecards. See, Retail Electric Suppliers Complaint Summary, April 2012 to September 2012, http://www.pluginillinois.org/ComplaintGrid.aspx

actions involving retail electric and natural gas suppliers, many of whom operate in Ohio. It is reasonable to conclude that the Commission has not actively supervised or responded to customer complaints or evidence of violations and/or market abuse since it is highly unlikely that such conduct has not occurred during this time period. The Commission's rules should proactively provide for consumer input about the conduct of marketers in Ohio.

III. RECOMMENDATIONS FOR REFORMS TO PROPOSED NATURAL GAS AND ELECTRIC RETAIL MARKET REGULATIONS

A. Certification and Licensing

The Commission should require both electric and natural gas suppliers who seek to engage in contracts with residential customers in Ohio to file a sufficient security or bond actionable by the Commission. Neither the existing nor proposed electric and natural gas regulations require that applicants file a bond or demonstrate other actionable security available to the Commission.[14] The current regulations rely on electric and natural gas distribution utilities to require suppliers to file security to ensure that the utility and its customers do not suffer additional costs for electricity or natural gas service if a supplier fails to meet its obligations. Such an approach does not protect consumers who are owed funds by a supplier that declares bankruptcy or suddenly exits the market for whatever reason. Several states (such as Pennsylvania[15] and Maine) require such security from suppliers and have used the proceeds from such

[14] See, Sec. 4901:1-24-14, where Electric suppliers must meet only the security requirements of the distribution utility. The same is true for Gas suppliers in Sec. 4901:1-27-14.
[15] 52 Pa. Code. Section 54.40.

security for consumers who are owed funds for security deposits or other funds held by the supplier when the supplier exits the market. This bond or fund would also be available to the Commission to recompense customers for unlawful conduct by the supplier as part of enforcement remedies, similar to the fund made available to Delaware customers at the conclusion of the investigation of Horizon Power & Light[16] and marketing and customer service conduct in Illinois (Just Energy, formerly U.S. Savings Corp.[17]). OPAE also recommends language such as that in effect in Maine as part of its licensing regulations for electric suppliers:

Excerpt from Maine PUC, Chapter 305:

Sec. 2 (B) Application Requirements for Competitive Providers

1. **Evidence of Financial Capability**

a. **Financial Disclosures**

An applicant shall include its most recent financial disclosures. If the applicant does not make financial disclosures, it shall include the most recent financial disclosures of its corporate parent.

b. **Customer Deposits**

An applicant shall include additional documentation necessary to demonstrate financial capability sufficient to refund deposits to retail customers in the case of bankruptcy or nonperformance or for any other reason. This provision is not applicable if the applicant will not hold customer deposits.

[16] Delaware Public Service Commission, PSC Docket 10-2.
[17] Illinois Commerce Commission, Docket No. 08-0175.

2. **Evidence of Technical Capability**

a. **Industry Experience**

An applicant shall include a description of the industry experience of the applicant, the corporate parent of the applicant or individuals that will be responsible for the provision of service in Maine. For purposes of this provision, industry experience includes involvement with retail or wholesale electricity or natural gas markets in the United States or Canada.

b. **Generation Service**

An applicant that will provide generation in the ISO-NE control area shall document that it is either a participant in the ISO-NE electricity market or will conduct transactions through a contractual arrangement with an entity that is a participant in the ISO-NE electricity market. An applicant that will provide generation service in northern Maine shall document that it is either a participant in the market administered by NMISA or will conduct transactions through a contractual arrangement with an entity that is a participant in the market administered by the NMISA.

c. **Interconnection**

If applicable, applications shall include a demonstration of the ability of the applicant to enter into binding interconnection arrangements with transmission and distribution utilities.

3. **Financial Security**

a. **Applicability**

The financial security requirements of this paragraph apply only to applicants that seek a license to provide generation service to residential and small non-residential customers. The requirements of this paragraph do not apply to standard offer service.

b. **Requirements**

An applicant must submit financial security that complies with this paragraph prior to the issuance of a license. The

applicant must maintain financial security that complies with this paragraph as long as it is licensed to provide generation service to residential and small non-residential customers and must submit replacement security at least seven days prior to the expiration or cancellation of a previously submitted financial security instrument. Upon termination of a license to provide generation service to residential and small non-residential customers, the financial security instrument shall remain in force until the Commission determines that all obligations of the competitive electricity provider have been satisfied.

c. **Security Amount**

The initial security amount shall be $100,000. The Commission may grant modifications of this amount commensurate with the nature and scope of the business the licensee anticipates conducting in Maine upon submission of information in support of the modification. A request for modification of the initial security amount may be made in conjunction with the filing of the license application. The required security amount will change each year and shall equal 10 percent of the licensee's annual revenues from sales of generation services to residential and small non-residential customers in Maine over the prior calendar year. Annual revenues for purposes of this provision do not include revenues from standard offer service.

d. **Use of Security Amounts**

Upon a finding that a licensee has violated a statute or regulation regarding the provision of service to residential or small non-residential customers, the Commission may direct that amounts from the financial security be distributed as follows:

(i) to customers for a refund of security deposits or advanced payments paid to the competitive electricity provider;

(ii) to customers for restitution of amounts paid in error or unlawfully obtained; or

(iii) to the Commission for payment of administrative penalties or any other sanction ordered by the Commission pursuant to section 3 of this Chapter or

other statutes or rules applicable to competitive electricity providers.

e. **Type of Security**

An applicant may satisfy the financial security requirements of this paragraph through an irrevocable letter of credit or cash perfected as security. Financial security documents must be in a form and contain language that is acceptable to the Commission.

(i) **Letter of Credit**. An irrevocable letter of credit must unconditionally obligate the issuing financial institution to honor drafts drawn on such letters for the purpose of paying the obligations of the competitive electricity provider pursuant to Maine law and regulations and must specify that the issuing financial institution will notify the Commission 30 days in advance of the expiration or cancellation of the letter of credit. The letter of credit must include the following language: that the letter of credit binds the issuing financial institution to pay one or more drafts drawn by the Commission as long as the draft does not exceed the total amount of the letter of credit; and that any draft presented by the Commission will be honored by the issuer upon presentation. The letter of credit must be issued by a financial institution with a minimum corporate credit rating of “BBB+” by Standard & Poor’s or Fitch or “Baa1” by Moody’s Investors Service, or an equivalent short term credit rating by one of these agencies, If, at any time, the corporate debt rating of an issuing financial institution drops below the above specified levels, the competitive electricity provider shall notify the Commission’s Director of Technical Analysis in writing and provide replacement security that satisfies the requirements of this Chapter.

(ii) **Cash**. To satisfy the security requirement of this paragraph, cash must be perfected as a security interest. Cash and applicable interest shall be returned to the competitive electricity provider after all obligations are satisfied.

f. **Other Liability**

Liability of competitive electricity providers for violation of law, Commission orders or Commission rules is not limited by the security requirements of this section.

4. **Disclosure of Enforcement Proceedings and Customer Complaints**

a. **Applicability**

This paragraph applies to actions against the applicant and associated entities of the applicant. For purposes of this provision, an associated entity is any entity for which the applicant is a control person; any control person of the applicant; any entity under common control with the applicant; or any entity for which a control person of the applicant served as a control person at the time of the conduct that was the basis for the action. A control person is any person who serves as an officer or director of, or who exercises similar authority over, an entity or who possesses, directly or indirectly, voting power over 10% or more of the voting securities of the entity.

b. **Enforcement Proceedings**

An applicant must disclose all civil court or regulatory enforcement proceedings or criminal prosecutions commenced against it or an associated entity within the last six years prior to the date of the license application or currently pending that relate to or arise out of the sale of electricity, the sale of natural gas, the provision of utility services, business fraud, or unfair or deceptive sales practices.

c. **Customer Complaints**

An applicant must disclosure the number of customer complaints related to the retail sale of electricity or natural gas filed against it at regulatory bodies other than the Commission within the last 12 months prior to the date of the license application.

5. **Evidence of Ability to Satisfy Portfolio Requirement**

An applicant must submit evidence of its ability to satisfy the eligible resource portfolio requirement under 35-A M.R.S.A. § 3210, consistent with the provisions of the Commission's portfolio requirement rules, Chapter 311. This provision is not applicable to aggregator and broker license applications.

6. **Disclosure of Affiliates**

An applicant must disclose the names and addresses of all affiliated interests engaged in the retail sale of electricity in the United States or Canada. An applicant may submit a copy of its most recent corporate annual report in compliance with this provision if the annual report contains the required information. At the request of the Commission, the applicant shall submit further information on the corporate structure of the applicant's parent corporation.

7. **Tax Registration**

An applicant must submit evidence that the applicant is registered with the State Tax Assessor as a seller of tangible personal property pursuant to Title 36, section 1754-B, together with a statement that the applicant agrees to be responsible for the collection and remission of taxes in accordance with Title 36, Part 3 on all taxable sales of electricity made by the applicant to consumers located in Maine.

8. **Applicant Information**. An applicant must provide the following information:

   a. Legal name and name(s) under which the applicant will do business in Maine;

   b. Business street and mailing address;

   c. Location and agent for service of process in Maine;

   d. Location, if any, of any office available to the general public or Maine customers of the applicant;

   e. Contact person, address and telephone number for regulatory matters;

f. Contact person, address and telephone number for consumer issues and complaints;

g. A generic list of the products and services that will be marketed in Maine, the customer class(es) that will be served (residential and small non-residential, medium non-residential, or large non-residential), and the transmission and distribution utility service territories in which the applicant will do business.

h. A list of all jurisdictions in which the applicant or any affiliated interest of the applicant is engaged or has been engaged within the prior 6 years in the sale of generation services or broker or aggregator services;

i. A list of all jurisdictions in which the applicant or any affiliated interest of the applicant has applied for a license or has otherwise sought the authority to engage in the sale of generation service or broker or aggregator services, and the disposition of the application;

j. Whether the applicant or affiliated interest of the applicant has filed for bankruptcy within the past six years.

k. A copy of the documents which demonstrate the type of organization of the applicant (sole proprietor, corporation, partnership, association, or other business form) and a copy of its by-laws;

l. The state(s) in which the applicant is incorporated or otherwise registered or licensed to do business and a copy of its registration or license number, where applicable;

m. A copy of any FERC approval as a Power Marketer or date and docket number of the application to FERC, if applicable; and

n. The name, address and title of each officer and director, partner, or other similar officer.

9. **Other Information**

Applicants may be required to provide other information that the Commission determines is useful or necessary in the review of a license application.

C. **Licensing Conditions**

By obtaining a license, competitive electricity providers agree:

1. To comply with all Maine laws and regulations applicable to competitive electricity providers;

2. To provide updated information to the Commission if there are substantial changes in circumstances from those documented in the license application process within six months of those changes;

3. To use reasonable efforts not to conduct business with any entity acting as a competitive electricity provider in Maine without a license from the Commission. For purposes of this provision, a review of the Commission's webpage to determine if an entity is licensed constitutes a reasonable effort.

4. Submit to the jurisdiction of the courts of the State of Maine and the Maine Public Utilities Commission; and

5. That all contracts for generation, broker or aggregator service to residential or small non-residential customers will be interpreted according to Maine law and maintained in Maine courts or before Maine administrative agencies.

OPAE also recommends, as reflected in the Maine regulation, that the Commission seek information on prior enforcement actions and civil and criminal actions applicable not only to the entity that is applying for the certification, but also to the ***individuals*** associated with the corporate entity that is applying for a certificate in Ohio. The current regulations only require applicants to file background information on the "applicant" and not the individuals who operate the corporate entity.[18] The regulations should seek such information for members of the board of directors and executive officers of the applicant. There is substantial evidence that a supplier who experiences enforcement actions in one state may then create another corporate entity to apply for certification in another state, using one or more of the same corporate

[18] Sec. 4901:1-27-05 (Gas) and Sec. 4901:1-24-14 (Electric).

officials that were subject to enforcement actions elsewhere. Even more important, the proposed regulations require suppliers to conduct a criminal background check on employees, but fail to then prohibit a supplier from employing individuals with a felony or misdemeanor conviction that is related to the employment or duties of the individual.[19] This loophole should be closed.

OPAE also recommends that the regulations seek more detailed information from applicants with respect to their "managerial" qualifications. The proposed regulations do not contain any specific guidance on this point and it is crucial to the evaluation of an applicant's oversight of employees and agents in their marketing and sales activities with residential customers. These provisions should include documentation that the applicant has a sufficient internal management oversight and a management structure designed to ensure compliance with Ohio's consumer protection regulations and supervise the supplier's employees and agents to detect violations and take proactive steps to prevent such violations from occurring. While it is well understood that a supplier is responsible for the conduct of its agents (as well as its employees), a supplier that relies almost entirely on agents who are compensated based on successful sales has the incentive to ignore proper training and management oversight of these "independent sales agents" and respond to individual complaints without resolving underlying violations as long as the resulting sales mean profits to the supplier. For example, an investigation of U.S. Savings Corporation in Illinois (now called Just Energy) revealed that the Ontario-based ownership of this door-to-door marketer of both electricity and natural gas service relied on one management person employed by Just

[19] Sec. 4901:1-29.03 (B) [Gas] and Sec. 4901:1-21.05 (D) [Electric].

Energy in Illinois to supervise the work of hundreds of individual sales agents, and even the training for these sales agents was done by a third party contractor without any direct employment or managerial relationship to Just Energy and its Canadian owners. Such a management structure was and is a recipe for disaster that should be prevented at the certification stage. As part of the regulatory reforms recently adopted in Pennsylvania (which are described in more detail later in these comments), the Pennsylvania PUC is requiring applicants to document their training and supervision of employees and agents with regard to compliance with marketing and consumer protection regulations.

The Commission should also require suppliers to submit their standard terms and conditions for residential contracts as part of their licensing application. While such standardized contract terms need not be "approved" as part of the certification review, these provisions should be reviewed as part of the certification application and certificate holders should be required to routinely provide the Staff with such documents as they change in the normal course of business.

Certifications should be granted for a specific term[20] and suppliers should be required to submit a renewal application that updates all previously provided information concerning formal investigations and enforcement actions in other states, customer complaint activity in Ohio, and an updated review of the supplier's terms and conditions. The renewal should be an affirmative review of the supplier's conduct in Ohio and elsewhere and not merely an automatic renewal that is allowed to occur without

[20] It is not clear from the regulations whether all gas and electric supplier certificates are granted for two years or other terms. Furthermore, the renewal process appears to allow an applicant to assume a license renewal if not acted upon within 30 days [4901:1-24.10) [Electric] and 4901:1-27-10 [Gas], a policy that should not be continued.

affirmative Commission approval. This renewal process is an important factor in the overall enforcement scheme and should be utilized as such rather than merely an automated process that relies on submitting updated forms and fees.

Natural gas supplier applicants should not be permitted to submit a notarized affidavit in lieu of required documentation as part of the certification process.[21] This provision does not exist in the electric certification regulations. Furthermore, the nature of the affidavits that must be filed by a Gas applicant differs from those required of an Electric applicant, a difference that does not appear justified.

B. Consumer Disclosures by Suppliers

The disclosure of contract price and material contract terms is an important consumer protection for any competitive market and particularly for the retail sale of gas and electric service to residential and small commercial customers. The proposed Ohio regulations reflect useful improvements, but lack necessary details and important clarifications, in part due to the lack of specificity in some of the proposed disclosure language. As a result of OPAE's preliminary review of customer complaints in Ohio and many other states, we recommend the following additional policies.

The Commission should require suppliers to disclose their price in a uniform manner as part of their marketing materials and terms of service documents. This recommendation is not intended to regulate the pricing method that suppliers choose to use or regulate their underlying pricing decisions. Rather, the recommendation would require that a true "apples to apples" comparison of prices be enabled by requiring

[21] Sec. 4901:1-27-05 (C) (3) [Gas].

suppliers to include all fixed and recurring charges, such as minimum monthly charges or other unavoidable fees, in the cents per therm or cents per kWh price that is presented to customers and listed in the "apples to apples" charts.[22]

This proposal is quite similar to the requirement under the Truth in Lending Act that creditors disclose the Annual Percentage Rate (APR) for all credit transactions in a uniform and "regulated" manner to allow customer comparisons of interest rates. The interest rate on the note or mortgage document does not necessarily tell the whole story if the creditor charges upfront fees or "points" that have the impact of raising the actual impact of the interest charges. As a result, all creditors must calculate their advertised and disclosed interest rate pursuant to regulations that define what is and what is not included in the APR.

The same approach should be applicable to energy prices that may appear to be fixed and lower than the standard service offer (or lower when compared to other suppliers) but in fact result in higher prices due to a minimum monthly charge or other fee that is disguised or not otherwise included in the cents per kWh or cents per therm that is prominently advertised or orally presented to customers at the point of sale. A separate disclosure of such fees does not solve this concern.

[22] This recommendation does not apply to other non-recurring fees, such as an early termination fee or late fee. However, if a supplier charges a fee for services that the Commission determines should not be allowed outside of the stated price, such as a fee for filing a complaint, accessing the calling center, or seeking prior billing information in a dispute, these fees should also be included in the uniform pricing disclosure methodology OPAE recommends. Such fees as those described here have routinely been charged by Texas retail electricity providers who are not currently required to include such fees in basic service prices, a trend that should not be allowed in Ohio.

The way in which such charges can be included is to require suppliers that seek to include such charges in their customer contracts to calculate and disclose the effective energy price based on common usage levels for residential customers, for example, 500 kWh, 1,000 kWh, and 1,500 kWh. The effect of the cents per kWh and the monthly fee will result in a higher kWh charge than the advertised rate and be clearly visible to customers in this manner. For example, if the supplier is offering to charge 8 cents per kWh but also includes a $10 monthly fee that is included in the fine print of the contract, the actual disclosure should be as follows:

- 500 kWh X $.08 + $10.00 = $50. The actual kWh rate is $50 / 500 kWh or $.10/kWh.
- 1,000 kWh X $.08 + $10.00 = $90.00. The actual kWh rate is $90 / 1,000 kWh or $.09/kWh.
- 1,500 kWh X $.08 + $10.00 = $130.00. The actual kWh rate is $130 / 1,500 kWh or $.087/kWh.

This example shows the well-known phenomenon that fixed monthly charges have a larger impact on lower customer usage profiles compared to higher customer usage profiles. Nonetheless, if suppliers are going to be able to charge fixed monthly fees in addition to the “nominal” energy charge, the above required disclosure will be a valuable and needed shopping tool and will have benefits in particular for lower usage customers when comparing prices.

The disclosures required for variable rate energy contracts are among the most vexing issues facing state regulators. The proposed regulations for both Gas and Electric suppliers contain language that is potentially confusing and not clear on this point because the language offers suppliers optional variable rate contract terms

depending on whether or not a termination fee is charged.[23] The lack of a termination fee alone is not a distinction that is sufficient to allow a supplier to impose a variable rate term that is not clearly identified as publicly available and external to the supplier's manipulation.

OPAE's concern is that the customer may be informed that the price will vary, but the disclosures concerning the manner or range within which the price will vary is often obscure or deliberately hidden in fine print. Some of these variable rate disclosures are incomprehensible and allow the supplier to make changes in the customer's rates without any reference to a published or external index that is not in the control of the supplier. For example, Cincinnati Bell Energy is listed in the Duke Energy "apples to apples" chart as offering a variable month-to-month price at $0.06150 per kWh. The terms and conditions available on this supplier's website states, "[u]nder CBE's variable price plan, your price may fluctuate from month to month based on wholesale market conditions applicable to the Distribution Company's service territory."[24] This "disclosure" is not specific and does not even state what aspect of the "wholesale market" might be used to change the customer's price. Nor is there any minimum or

[23] Sec. 4901:1-21-05 (A) (2) requires Electric suppliers to disclose the "clear and understandable explanation of the factors" that cause a variable rate to change. Both the fixed and variable rate disclosures must inform the customer of "contingencies or conditions precedent" that will result in a contract rate change. The meaning of these terms about "contingencies or conditions precedent" is not clear. The Electric Supplier contract disclosure language in 4901:1-21-12 contains additional language that, with respect to variable rate offers, must identify "a clear and understandable formula, based on publicly available indices or data" or "a clear and understandable explanation of the factors that will cause the price to vary, including any related indices and how often the price can change." The former option allows a termination fee. That latter option does not allow the supplier to charge a termination fee. Sec. 4901:1-29-05 contains similar, but not exactly the same, language for Gas suppliers.

[24] www.cincinnatibellenergy.com

maximum price change identified as controlling this variability in price. Energy Plus also offers a variable rate to Duke Energy customers. Its website states, "[i]n a variable-rate model, your supply rate is based on a variety of factors including our costs to purchase energy, applicable taxes, fees, charges, costs, expenses and margins and can change each month. As with many variable supply rate products, the supply rate may be different, including higher, than the supply rate charged by your local utility company. Because you can cancel at any time without a cancellation fee, you can evaluate your plan each month to determine whether it's working for you."[25] Again, there is no specific information disclosed concerning the basis for changes to the variable rate other than supplier discretion and the manipulation of the rate to assure "expenses and margin (another word for "profit")."

While OPAE makes recommendations below concerning regulation of the substantive contract pricing terms, at a minimum, we recommend that variable rate contract disclosures inform the customer of an example of how the price of their contract would have changed in the past 12-24 months if the contract had been in place with the methodology included in the supplier's contract. Obviously, there should not be any promise that historical changes in the index or methodology will guarantee future price changes, but at least the customer will understand the nature of the variability to which he or she has agreed and see the range of change in price that has occurred in the recent past. Such a disclosure is required, for example, for variable rate mortgages under the Truth in Lending Act.[26]

[25] http://www.energypluscompany.com/residential/faqs.php

[26] Truth in Lending Act, 15 U.S.C. §1601, et seq. and its implementing Regulation Z, 12 C.F.R. Section 226. For example, for variable rate credit applications and solicitations,

Many states have confronted a burgeoning number of complaints concerning door-to-door marketing and telemarketing of natural gas and electricity services by suppliers. These marketing channels result in a one-on-one interaction with the customer at a private home and carry a long history of abuses.[27] There are several reasons why door-to-door and telemarketing gives rise to the potential for abusive and deceptive marketing. First, the salesperson is typically not an employee of the supplier, but an independent agent compensated based on a successful sale and so has the natural incentive to use strong sales techniques to achieve this objective. Second, the customer is marketed with oral statements and information that may and, based on experience, often is contradicted by the large and small print of the actual agreement. These oral representations are not recorded, but customers rely on those statements and often view the verification statements as a formality. While the written agreement may not promise savings, the oral representations and statements by the salesperson may be designed to imply or promise such a result. Third, the customer is typically not as knowledgeable about competitive energy markets, the role of the utility and its Price

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creditors must disclose the fact that the rate may vary and state how the rate will be determined, including identifying the index or formula and any margin or spread added to the index or formula. For introductory "teaser" rates that are temporary, the creditor must also disclose the annual percentage rate that will apply after the introductory rate expires. Special rules also govern the accuracy and currency of disclosed rates. See, e.g., 12 C.F.R. 226.5a(b)(1). Variable rate mortgages must disclose how the interest rate would change based on the prior 15-year history of the index used to trigger rate changes.

[27] Several marketers in other states have specialized in door-to-door sales to residential customers and have been the subject of investigation, fines, and license revocation, e.g., Georgia, Pennsylvania, Michigan, New Jersey, and Ohio. The history of the door-to-door sales technique is replete with consumer fraud and unfair sales techniques. See, International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 112 S.Ct.2701, 2722, 120 L.Ed.2d 541 (1992) (Kennedy, J., concurring).

to Compare, and is often misled, either deliberately or not, that the person at the door has some “official” status, either from the utility or a government agency. Furthermore, customers are sometimes informed that they “must” choose or that their “window” to make a decision is closing, implying or deliberately misleading the customer into thinking that the utility’s role in supplying power supply is temporary or about to end. Finally, door-to-door marketers often target lower income, elderly, non-English speaking, or disabled or frail individuals as a result of the neighborhoods that are targeted for this type of marketing and/or the fact that these are the folks who are home during the hours typical for door-to-door marketing activities.

The proposed Natural Gas regulations -- 4901:1-29-05, Marketing and Solicitation -- attempt to address this issue in part by prohibiting “knowingly taking advantage of a customer’s inability to reasonably protect their interests because of physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement.” While the intent of this proposal is laudable, this type of “protection” is very difficult to identify and enforce. How would the Commission prove that the customer’s “ignorance” or “disability” led to the sale in question or that the supplier relied on such customer specific attributes in making the sale? This type of language would have to rely on customer complaints and investigations of underlying medical or physical conditions that many individuals would object to disclosing in such a public fashion. In addition, this provision does not appear in the proposed Electric regulations, another example of the lack of consistency between the two rulemaking packages.

It appears that the existing Natural Gas regulations require the customer of a door-to-door sale to sign an "acknowledgement form."[28] (Again, this provision is not reflected in the proposed Electric rules.) It is not clear how or whether this additional disclosure and form has operated or impacted customer complaints or activities of door-to-door marketers in Ohio. Experience indicates that signing another preprinted form is not a substitute for affirmative regulations. OPAE does not believe that such an approach is a reasonable substitute for more affirmative regulation of the door-to-door and telemarketing sales activities that are reflected in the Pennsylvania PUC regulations, as discussed below.

Because of the heightened potential for consumer abuse and deceptive conduct by marketers relying on door-to-door marketing and telemarketing sales channels, it is necessary to adopt a stricter oversight for these activities. This oversight should reflect both additional disclosures and specific regulatory constraints relating to these sales techniques. The proposed regulations recognize the need for additional regulatory oversight, but OPAE recommends that, at a minimum, the Commission adopt the newly approved regulations from Pennsylvania.[29] These regulations require additional certification requirements as well as enhanced consumer protections. Specifically, we recommend the following additions and clarifications for the Ohio regulations:

- Suppliers should be required to develop and implement standards and qualifications for employees and agents engaged to interact with retail customers, and document

[28] Sec. 4901:1-29-06, customer Enrollment and Consent, subsection (C) (6). In general, OPAE supports the proposed language that would govern the disclosures and the means by which third party verification of customer consent must be obtained in the proposed regulations.
[29] Pennsylvania PUC, Final Order, Docket No. L-2010-2208332 (October 27, 2012).

that it has procedures in place to prevent the hiring or engagement of individuals that do not meet these standards;

- A supplier should be explicitly prohibited from hiring or allowing any agent to represent it unless it has conducted a criminal background check on the individual obtained from the appropriate Ohio authorities and any other state in which the individual has resided in the last 12 months. Suppliers should be required to conduct such background checks on existing employees or agents within six months of the effective date of the regulations. This background check should include, but not be limited, to any sex offender database maintained by the State.
- Suppliers should be explicitly prohibited from retaining, hiring or engaging any employee or agent who was convicted of a felony or misdemeanor when the conviction reflects adversely on the person's suitability for such employment.
- A supplier shall ensure the training of its agents on the following subjects:
    (1) State and Federal laws and regulations that govern marketing, telemarketing, consumer protection and door-to-door sales, including consumer protection laws and regulations authorized by Chapter 1345, O.R.C.
    (2) Responsible and ethical sales practices as described in these regulations.
    (3) The supplier's products and services.
    (4) The supplier's rates, rate structures and payment options.
    (5) The customer's right to rescind and cancel contracts.
    (6) The applicability of an early termination fee for contract cancellation when the supplier has one.

(7) The necessity of adhering to the script and knowledge of the contents of the script if one is used.

(8) The proper completion of transaction documents.

(9) The supplier's disclosure statement.

(10) Terms and definitions related to energy supply, transmission and distribution service.

(11) Information about how customers may contact the supplier to obtain information about billing, disputes and complaints.

(12) The confidentiality and protection of customer information and the regulations relating to standards of conduct and disclosure for licensees and relating to standards of conduct and disclosure for licensees.

- Suppliers should be required to document the training of an agent and maintain a record of the training for 3 years from the date the training was completed.
- Suppliers should be required to make training materials and training records available to the Commission upon request, as well as evidence that the training materials and records have resulted in reasonable management oversight to implement the training requirements.
- Suppliers should be required to monitor a representative sample of telephonic and door-to-door marketing and sales calls to: (1) Evaluate the supplier's training program; (2) Ensure that agents are providing accurate and complete information, complying with applicable rules and regulations and providing courteous service to customers.

- Suppliers should be required to develop and implement a disciplinary program to ensure compliance with their training programs and these regulations and document that such disciplinary program has been implemented to prevent violations and internal management failures.

- Suppliers must issue an identification badge to employees or agents that interact with consumers in door-to-door sales or public events. The badge must:
    (1) Accurately identify the supplier, its trade name and logo.
    (2) Display the agent's photograph.
    (3) Display the agent's full name .
    (4) Be prominently displayed.
    (5) Display a customer-service phone number for the supplier.
- A Supplier should be required to affirmatively identify the name of the Supplier that he represents and affirmatively state that he is not working for and is independent of the customer's local distribution company or other supplier. This requirement shall be fulfilled by both an oral statement by the agent and by written material provided by the agent.
- When conducting door-to door activities or appearing at a public event, an agent should be prohibited from wearing apparel or accessories or carry equipment that contains branding elements, including a logo, suggests a relationship that does not exist with any distribution utility, government agency or another supplier.
- A supplier should not be able to use the name, bills, marketing materials or consumer education materials of another supplier, distribution utility, or government agency in a way that suggests a relationship that does not exist.
- A supplier or supplier agent may not say or suggest to a customer that utility customers are required to choose a competitive energy supplier.
- Door-to-door sales should comply with local ordinances regarding door-to-door marketing and sales activities.

- Door-to-door sales should only occur during the hours between 9 a.m. and 7 p.m. during the 6 months beginning October 1 and ending March 31, and to the hours between 9 a.m. and 8 p.m. during the months beginning April 1 and ending September 30. When a local ordinance has stricter limitations, a supplier shall comply with the local ordinance.
- With regard specifically to door-to-door sales or telemarketing marketing activities, an agent should be required to comply with the following:

  (1) After greeting the customer, the agent shall immediately identify himself by name, the supplier the agent represents and the reason for the visit. The agent shall state that he is not working for and is independent of the local distribution company or another supplier.

  (2) The agent shall offer a business card or other material that lists the agent's name, identification number and title and the supplier's name and contact information, including telephone number. This information does not need to be preprinted on the material. When the information is handwritten, it shall be printed and legible.
- When a customer's language skills are insufficient to allow the customer to understand and respond to the information being conveyed by the agent, or when the customer or a third party informs the agent of this circumstance, the agent shall terminate contact with the customer.
- When an agent completes a transaction with a customer, the agent shall:

  (1) Provide a copy of each document that the customer signed or initialed relating to the transaction. A copy of these documents shall be provided to the customer before the agent leaves the customer's residence. If requested by the customer, a copy of the materials used by the agent during the call shall be provided to the customer as soon as practical.

  (2) Explain the supplier's verification process to the customer.

(3) State that the supplier shall send a copy of the disclosure statement about the service to the customer after the transaction has been verified if the disclosure statement has not been previously provided.

(4) State that the customer may rescind the transaction within seven business days after receiving the disclosure statement.

- An agent shall immediately leave a residence when requested to do so by a customer or the owner or an occupant of the premises or if the customer expresses no interest in what the agent is attempting to sell.
- A supplier shall comply with an individual's request to be exempted from door-to-door marketing and sales contacts and annotate its existing marketing or sales databases consistent with this request within 2 business days of the individual's request.

C. Prohibited Conduct and Terms of Service

This section addresses two key provisions of both the Gas and Electric regulations that should be improved: (1) variable rate contract terms; (2) renewal and change of terms in existing contracts.

Variable rate contracts should be required to identify the specific index, formula, or methodology that is external to the supplier's own manipulation or discretion to govern their terms. As such, the option in the proposed regulations that would appear to allow a Supplier to avoid this requirement by not charging a termination fee should not be adopted. It is unreasonable and unfair for residential customers to be exposed to a monthly change in price for essential electricity or natural gas service based on an unidentified or unknown methodology. Whatever the methodology, index, or formula used by the supplier, it should be publicly available and external to the supplier's ability to manipulate or interpret the index, formula, or methodology. This reform, coupled with

the proposed disclosure requirement that the customer be presented with how that index, formula, or methodology has changed the underlying electricity or natural gas price in the past 12-24 months, will allow customers to make a rational and informed decision about whether a variable rate contract is appropriate for their needs.[30]

It should be recognized that in Ohio monthly variable rates based on an identified external index independent of a supplier's manipulation (such as the NYMEX) generally have provided lower priced options for customers, both on a monthly basis and over the long-term, in the recent past. A monthly variable rate with a cap is also a useful and valuable option for customers, providing the security of a maximum rate while permitting the rate to follow a well-known and published market index rate. Our comments are not intended to prohibit such rate options. However, our proposals would require additional disclosures and a prohibition on allowing suppliers to offer a variable rate that is not based on a published index or formula.

The proposed regulations contain a range of options for suppliers to change contract terms and renew existing contracts.[31] Similar to the variable rate disclosures, many of the options are related to whether or not a termination fee is charged or the amount of the termination fee. These rules are confusing and would be difficult to transmit to customers in a reasonable manner as part of any educational effort.

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[30]In order to accommodate variable rates based on indexes, utility tariffs and/or the timing established by utilities by which a marketer must submit prices should permit suppliers to post rates after the monthly close of markets where price for deliveries in the following month is established. Pricing that offers a percentage off of a standard offer like Ohio's standard choice offer ("SCO") or a monthly close price with an adder must be permitted under utility tariffs by ensuring such rates can be filed after the index prices are determined and published. This is not possible for variable rates based on day-ahead electrical markets, but should be available for most index-based pricing.

[31] Sec. 4901:1-21-06 (E) and 21-11 [Electric] and Sec. 4901:1-29-06(K) and 29-10 [Gas].

Furthermore, OPAE does not recommend that the sole distinction as to whether a supplier can treat customer silence as acceptance of renewal or a change in contract terms should rely on the early termination fee. The key consumer protection issue is how or whether a supplier can interpret a customer's silence as agreement to changed terms or a renewal of an expiring contract. In general, the regulations should lean toward ensuring that affirmative customer consent is required to make a "material" change in terms of an existing contract, whether or not the original contract contained a term that allows such changes without customer consent. The term "material" should be defined at a minimum as a change in the pricing terms. First, it is unreasonable to allow suppliers to change the terms of an existing contract when that term affects the customer's price or fees and charges without affirmative customer consent. Second, when a supplier's contract has reached the end of its stated term, the regulations should require the supplier to obtain a customer's affirmative consent to a renewal of any contract that also seeks to change the original price or related fees and charges.

Renewal of an existing contract should be allowed to occur without affirmative customer consent only if the underlying terms and price do not change or if the renewal is limited to a month-to-month contract with the original terms and no termination fee. A supplier should not be able to change a fixed price contract into a variable price contract nor alter the fixed rate without obtaining affirmative customer consent.

The basis for these proposals with regard to renewal and change of contract terms is that customers who leave the utility and agree to be served by a supplier have agreed to a certain "bargain" and have affirmatively provided evidence of such agreement in the verification process. The supplier should not be able to interpret this

initial agreement to allow the supplier to change the basis of this bargain without also assuring affirmative customer consent. An agreement to become a customer is not an agreement to allow the supplier to make changes that are material to the bargain based on customer silence.

D. Customer Education and Enforcement Remedies

The Commission's proposal for enforcement of these regulations, particularly the "Conditional Rescission" language, is important and reasonable.[32] However, the language that would allow the Commission to "conditionally rescind" a certification appears overly restrictive and would appear to require the Commission to make one or more "findings," a term that suggests a fairly lengthy adjudicatory process. Rather, OPAE recommends that the Commission should be able to issue an order that "conditionally rescinds" a certificate based on grounds similar to those used for a "temporary injunction;" that is, the Commission has sufficient evidence (presumably gathered by the Staff and presented to the Commission) which would allow a reasonable person to conclude that a violation of these regulations has occurred or is likely to occur and that harm to consumers has or will result if the conduct is allowed to continue. Under such an approach, the Commission should be able to halt marketing and sales activities by a supplier while the more formal and lengthy adjudicatory process is allowed to continue.

In addition, as previously recommended in the introductory comments herein, OPAE recommends that the Commission require its Staff to publish customer complaint

[32] Sec. 4901:1-24-13 [Electric] and Sec. 4901:1-27-13 [Gas].

reports that identify specific marketers and the types of complaints that have been filed by customers. These reports, along with customer comments on certified suppliers, should be posted on the Commission's website.

IV. CONCLUSION

Ohio has adopted policies designed to substitute market forces for regulation of utility rates for generation and commodity supply service. For these policies to be successful, and to ensure that consumers are able to strike reasonable bargains and marketers are required to fulfill those agreements, this Commission must ensure that competition is fair. Fairness includes effective oversight of certification and licensing; marketing practices; contract terms and conditions; and, provisions to ensure the most vulnerable customers receive the lowest possible price produced by competitive market forces. We urge the Commission to adopt the recommendations contained within and look forward to working cooperatively to ensure the effective education of the public and compliance with the regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served electronically on these persons on this 7th day of January 2013.

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Summary: Comments electronically filed by Colleen L Mooney on behalf of Ohio Partners for Affordable Energy