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November 8, 2012

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Rulemaking Re: Marketing and Sales Practices for the Retail Residential Energy Market,
Docket No. L-2010-2208332

Dear Secretary Chiavetta:

On behalf of the Retail Energy Supply Association ("RESA") enclosed please find its Petition for Reconsideration and/or Clarification of the Commission's October 24, 2012 Final Rulemaking Order which has been filed electronically.

Sincerely,



Deanne M. O'Dell

DMO/lww
Enclosure

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rulemaking Re: Marketing and Sales Practices : Docket Nos. L-2010-2208332
for the Retail Residential Energy Market :
:

**RETAIL ENERGY SUPPLY ASSOCIATION – PA ELECTRIC CAUCUS
PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE
COMMISSION’S OCTOBER 24, 2012 FINAL RULEMAKING ORDER**

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**PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE
COMMISSION’S OCTOBER 24, 2012 FINAL RULEMAKING ORDER**

Pursuant to Section 703(g) of the Public Utility Code,¹ and Section 5.572 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations,² the PA Electric Caucus of the Retail Energy Supply Association (“RESA”)³ submits this Petition for Reconsideration and/or Clarification of the Final Rulemaking Order entered October 24, 2012 and as corrected by the Errata Notice entered on October 25, 2012, in the above-captioned proceeding (collectively, the “*Final Rulemaking Order*”). The scope of this Petition is limited to seeking clarification regarding two sections of the Commission’s regulations.

First, clarifying language should be added to the definition of “agent” set forth in Section 111.2 to make clear that the term applies to persons who: (a) are authorized to contractually bind the supplier; and, (b) are compensated by the supplier for the referral, enrollment or servicing of a customer. This clarification is necessary because the Commission’s expanded definition of the term “agent” is so broad that everyone who communicates prices or distributes marketing materials can come within its purview, and applying these regulations and related requirements (background checks, training, uniforms, identification, etc.) upon these people is impractical and unnecessary. Furthermore, the Commission discussed its intention to apply a compensation

¹ 66 Pa. C.S. §703(g).

² 52 Pa. Code §5.572.

³ RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA. These comments are also limited to the regulations as they are applied to electric generation suppliers.

requirement to determine when the requirements of the regulation are to be applied but did not include this in the actual definition in Section 111.2. To be valid and enforceable, the compensation requirement must be made a part of the definition of “agent.” These clarifications are important to lessen the confusion about the applicability of the Commission’s requirements.

RESA’s second request for clarification is related to Section 111.4(b). Specifically RESA requests that it be clarified to: (1) make clear that the requirements regarding criminal background checks only apply to “door-to-door sales;” and, (2) remove the requirements for existing “employees and agents,” as such requirements are inconsistent with state and federal laws related to the use of criminal history records. Although the Commission has focused on requiring “agents” who engage in “door-to-door sales” to undergo criminal background checks, the use of the terms “door-to-door sales and marketing” and “door-to-door marketing or sales” in the new language can be read to mean that background checks are required for any form of “sales and marketing” activities on behalf of a supplier. In addition, the Commission’s new requirement that criminal background checks be obtained for current employees and agents within 90 days is in conflict with relevant state and federal laws that only permit suppliers to use the information in criminal history records for pre-employment/relationship decisions and, therefore, the new language should be removed.

RESA submits that each of these requested clarifications meet the standard for granting a petition for reconsideration and each clarification is important to enable suppliers to reasonably implement the requirements of the regulations for the benefit of all consumers. In support of this Petition, RESA states as follows:

I. BACKGROUND AND BASIS FOR RECONSIDERATION

1. The *Final Rulemaking Order* sets forth regulations which detail prohibited and required practices for the “sales and marketing” of electricity by electric generation suppliers

(“EGSs” or “suppliers”) to the retail residential energy market. The regulations are the result of a process that began in late 2009 and these regulations are intended to replace the Interim Guidelines that are currently in effect.⁴ RESA members understand the critical importance that substantive, practical, fair and workable consumer protection and marketing practices play in creating a robust and sustainable competitive market that provides value-added products and services to customers. As such, RESA – as an organization and through its individual members – has been an active participant in this process and appreciates the Commission’s efforts in this regard.

2. Requests for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under the Public Utility Code to rescind or amend a prior order in whole or in part.⁵ Parties cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them. What the Commission expects in petitions for reconsideration are new and novel arguments, not previously heard or considerations which appear to have been overlooked by the Commission. Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.

3. The scope of this Petition is limited to seeking clarification regarding two sections of the Commission’s regulations. RESA is not asking the Commission to reverse its decision on all issues that were decided against RESA’s advocacy in the case. Rather, the issues identified here are narrowly limited to those that require further clarification to provide clarity to suppliers

⁴ *Interim guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Supplier*, Docket No. M-2010-2185981, Final Order entered November 5, 2010, Annex A.

⁵ *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553 (1982).

about the Commission's expectation regarding marketing and sales activities to ensure that these requirements can be appropriately incorporated into the suppliers' business practices consistent with the intent of the Commission. As explained further below, reconsideration of these limited issues is appropriate and, therefore, RESA respectfully requests that the Commission grant this Petition.

4. The request for clarification regarding the Commission's definition of "agent" results from the Commission's decision to add new language that – without clarification – could mean that everyone who communicates prices or distributes marketing materials would be considered an "agent" within these regulations. As "agents," suppliers would be required to ensure that these persons comply with the related requirements (background checks, training, uniforms, identification, etc.) set forth in the regulations. Additionally, in the text of the *Final Rulemaking Order* the Commission created a compensation exception whereby an "agent" would not be required to comply with the requirements of the regulations. The Commission recognized that "there may be scenarios where the applicability of these definitions and regulations may not always be clear" but stated that its expansion of the term was intended to "lessen the chance of confusion."⁶ However, as explained further below in Section II.A, the practical application of the Commission's expanded definition of "agent" without further clarifying language will have significant consequences on those who the Commission never intended to be governed by the regulations as well as the suppliers who will be required to expend resources and time managing their compliance. For these reasons, RESA submits that its request for clarification of Section 111.2 meets the standards for reconsideration and should be granted.

⁶ *Final Rulemaking Order* at 12.

5. The request for clarification regarding the criminal background checks in Section 111.4 is likewise appropriate and should be granted. As explained below in Section II.B, the Commission’s chosen terminology to identify what activities require suppliers to obtain criminal background checks can be read to apply to any agent engaging in any type of “sales and marketing,” not just “door-to-door.” While this has not been the Commission’s intent throughout this process, the failure of the newly revised regulation to utilize the defined term “door-to-door sales” creates this confusion and should be clarified. Similarly, the Commission’s new requirement that suppliers obtain criminal background checks for current employees and agents is a requirement that has not been the subject of public discussion prior to the release of this new language which, as explained below, is inconsistent with state and federal law. Therefore, RESA submits that its request for clarification of Section 111.4 meets the standard for reconsideration and should be granted.

II. REQUESTS FOR RECONSIDERATION AND CLARIFICATION

A. The Definition of “Agent” In Section 111.2 Should Be Clarified To Ensure That It Is Only Applicable To Persons Who Are Authorized To Contractually Bind The Supplier And Are Compensated By The Supplier For The Enrollment Of A Customer

6. The Commission added the below language to its previously proposed definition of “agent” in Section 111.2:

Agent— A person who conducts marketing or sales activities, or both, on behalf of a single licensed supplier OR SUPPLIERS. The term includes an employee, a representative, an independent contractor or a vendor. IT ALSO INCLUDES SUBCONTRACTORS, EMPLOYEES, VENDORS AND REPRESENTATIVES NOT DIRECTLY CONTRACTED BY THE SUPPLIER WHO CONDUCT MARKETING OR SALES ACTIVITIES ON BEHALF OF THE SUPPLIER.

7. The new last sentence was proposed by the Pennsylvania Coalition Against Domestic Violence (“PCADV”) so as to be sure that those employees who are hired by

marketing firms or other vendors on behalf of the supplier, but are not working directly for the supplier, comply with the Commission's confidentiality requirements set forth in 52 Pa. Code §§ 54.8, 54.43(d).⁷ The Commission stated that it accepted this proposed sentence based on the belief that it would "provide a more comprehensive description of the individuals covered by the definition and lessen the chance of confusion."⁸

8. The additional language added to the definition of "agent" by the Commission expands the types of persons that could fall within the scope of the regulations. Clarification on this point is extremely important because the regulations impose significant requirements on suppliers regarding "agents." For example, a supplier is responsible for fraudulent, deceptive or other unlawful marketing or billing acts performed by its "agent." Section 111.3(b), (c). A supplier is required to develop standards and qualifications for individuals it chooses to hire as its "agents," and may not hire a person that fails to meet its standards. Section 111.4(a). An "agent" must be trained by a supplier. Section 111.5(a), (d). An "agent" must be subject to internal discipline for violations of the Commission's regulations. Section 111.6. A supplier must document all customer authorizations when an "agent" is involved. Section 111.7(a). A supplier shall establish a process to verify a transaction that involved an "agent." Section 111.7(b), (c). A supplier shall issue an identification badge to "agents" who conduct door-to-door activities or appear at public events. Section 111.8. An "agent" conducting "door-to-door sales" must comply with the Commission's regulations. Section 111.9. An "agent" conducting telemarketing comply with the Commission's regulations. Section 111.10. An "agent" must comply with consumer protections. Section 111.12.

⁷ *Final Rulemaking Order* at 9.

⁸ *Final Rulemaking Order* at 12.

9. Given the significant requirements placed on suppliers regarding “agents,” clarity regarding what persons are intended to fall within the scope of the Commission’s definition and regulatory requirements is crucially important. While RESA recognizes the Commission’s acknowledgement that “there may be scenarios where the applicability of these definitions and regulations may not always be clear,” RESA submits that without additional clarification as requested herein, the newly added sentence creates unreasonable confusion and uncertainty which may lead to negative consequences in the market place. Therefore, clarification on this issue is necessary and in the public interest.

10. As explained further below, RESA is particularly concerned that the new language can be applied to a wide range of people who are clearly not the type of “agents” that the Commission intends to address in these regulations. Since applicability of the various requirements set forth in the various regulations is dependent on whether or not a person is an “agent,” the open-ended language added by the Commission will complicate the ability of suppliers to understand what is required of them and how to comply. In addition, RESA is concerned that the new language fails to incorporate the “compensation” test exception regarding an agent’s compliance with the regulations that the Commission explained in the text of the *Final Rulemaking Order*. Not including this exception in the text of the regulations will create confusion going forward about the Commission’s intention in this regard again complicating the ability of suppliers to understand what is required of them and how to comply. For these reasons, RESA submits that clarification of the definition of “agent” is warranted and RESA requests that the Commission clarify the language as explained further below.

1. The newly expanded definition of “agent” should be clarified to make clear that agents must be authorized by the supplier to contractually bind the supplier

11. Pursuant to the regulations, the only factor to be considered in determining whether a person is an “agent” is whether the person is conducting, or has conducted, “marketing or sales activities, or both, on behalf of a single licensed supplier or suppliers.”⁹ Importantly, the Commission’s definition of “agent” makes clear that those engaging in either “marketing” or “sales” activities can fall within the scope of being an “agent.” The Commission’s currently existing regulations define “marketing” as follows:

Marketing - the publication, dissemination or distribution of informational and advertising materials regarding the EGS’s services and products to the public by print, broadcast, electronic media, direct mail or by telecommunication.¹⁰

12. In these new regulations, the Commission chose to include the meaning of the term “marketing” in the definition of “sales” and to utilize the currently existing definition of “offer to provide service” in 52 Pa. Code § 54.31 (with the exception of adding a reference to “electronically”):

Sales AND MARKETING – The extension of an offer to provide services or products communicated orally, electronically or in writing to a customer.

13. Although the term “extension of an offer” is not defined in the Commission’s regulations, it can reasonably be interpreted as communicating advertised prices or distributing marketing materials.¹¹

⁹ *Final Rulemaking Order*, at Annex A (§ 111.2, relating to definitions) (emphasis added).

¹⁰ *See* 52 Pa. Code § 54.31 (definitions, electric).

¹¹ *See* 52 Pa. Code § 54.7 (marketing/sales activities, electric).

14. Therefore, any person engaging in “marketing” or “sales and marketing” fall within the meaning of “agent” as defined in the Commission’s regulations and the scope of persons that could fall within the definition of “agent” is extremely broad. For example, without any additional clarifying factors, the term “agent” can be read as including independent organizations, such as a media outlet, trade organizations or retailers, because these entities are communicating advertised prices or distributing marketing materials on behalf of a supplier. Likewise, through the Commission’s website (www.PAPowerSwitch.com), Commission Staff communicates electronically the offers of multiple suppliers to provide services or products to the public and would arguably fit within the definition of “agent.” Similarly, through its Consumer Shopping Guides,¹² the staff of Office of Consumer Advocate communicates, electronically and in writing, the offers of multiple suppliers to provide services or products to the public and could arguably fit within the definition of “agent.” Clearly, the Commission did not intend to include persons performing these activities within the definition of “agent” but, without further clarifying language added to the definition of “agent” in Section 111.2, these persons are within the scope.

15. Further, the newly added language to the term “agent” can be read to also include brokers, marketers and aggregators which are licensed by the Commission and act as intermediaries in the sale and purchase of electric energy.¹³ Suppliers who ultimately procure the power for end users may receive customers through these intermediaries in a variety of ways. Since these intermediaries are separately licensed entities, they have their own obligations to comply with the Commission’s regulations. Therefore, it is not necessary to hold both the

¹² <http://www.oca.state.pa.us/Default.htm>

¹³ See 52 Pa. Code § 54.2 (definitions, electric); 52 Pa. Code § 54.31 (definitions, electric).

intermediary and the supplier that provides the power responsible for compliance with these regulations. Where an intermediary is utilized and that intermediary has its own license from the Commission, then that intermediary should be the party responsible for ensuring compliance with these regulations. Clarifying this point within the definition of “agent” will make clear which entity is responsible for what activities to avoid duplicative efforts and confusion in the marketplace.

16. One of the key problems with the Commission’s broad definition of “agent” is that it arguably requires suppliers to be responsible for the acts of an “agent” who lacks any authority – either direct (express) or indirect (implicit) – to contractually bind the supplier by accepting responses to offers made by the supplier or otherwise. Not every employee, representative, independent contractor, vendor or subcontractor of a supplier who conducts “sales and marketing” activities is authorized to contractually bind the supplier (regardless of whether or not they are “directly contracted by the supplier.”) The Commission appears to recognize this distinction in its requirements related to “public events.” A “public event” is an “event in a public location which may facilitate sales and marketing activities or may result in a customer enrollment transaction.”¹⁴ That term is clearly focused on those who have the authority to contractually bind the supplier by extending offers to provide services or products and by accepting responses to those offers. But, certain people at “public events” may be merely communicating advertised prices or distributing marketing materials. Including those people within the definition of “agents” is unreasonable when any consumer receiving the prices or materials must contact an actual “agent” of the supplier to authorize their switch to the supplier.

¹⁴ *Final Rulemaking Order*, at Annex A (§ 111.2 relating to definitions) (emphasis added).

17. This far-reaching impact of the Commission's regulations in its newly revised definition of "agent" is not consistent with the law of agency in Pennsylvania. In Pennsylvania, an agent is entitled to act under implicit, as well as express, authority.¹⁵ Thus, a principal is liable for the acts of its agent committed in the scope of its employment whether or not the principal authorized the acts, and a principal is also liable in damages because of the criminal acts of his agent where such acts are within the scope of the agent's employment.¹⁶ Implied authority, under Pennsylvania law, is "authority to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority."¹⁷ Based on this, authorization of the agent to bind the principal is a key requirement of the law of agency in Pennsylvania.

18. The Commission's regulations, however, go beyond this because they impose liability on suppliers (in the form of ensuring their compliance with the Commission's regulations) for the acts of persons who do not and cannot bind the supplier. In other words, when a vendor at a public event provides a flyer to an interested consumer and that consumer has to follow-up directly with the supplier, that vendor does not have the authority to bind the supplier to enter into a contractual relationship with the consumer. Likewise, the licensed intermediary aggregator or broker does not have the authority to contractually bind the supplier of the power to enter into a contractual relationship with the consumer.

¹⁵ See *Bolus v. United Penn Bank*, 525 A.2d 1215, 1221 (Pa. Super. 1987)

¹⁶ *Pennsylvania National Mutual Casualty Insurance Co. v. Insurance Commission of Pennsylvania*, 551 A.2d 368 (Pa. Cmwlth. 1998); appeal denied, 559 A.2d 41 (Pa. 1988). *Commonwealth v. Junkin*, 32 A. 617 (Pa 1895) ("Ordinarily, a principal is not held criminally responsible for the acts of his servant or agent, unless he in some way participates in, countenances or approves the criminal act of the agent; nor can a principal be held criminally liable for the act of his agent in opposition to his will and against his orders.").

¹⁷ *Bolus*, 525 A.2d at 1221.

19. To be consistent with Pennsylvania law regarding agency relationships, the definition of “agents” needs to clarify that only those persons who are authorized to contractually bind the supplier (regardless of whether or not they are “directly contracted by the supplier”) should fall within the definition of “agent” in Section 111.2. Those persons who are not authorized to contractually bind the supplier should fall outside the definition of “agent” in Section 111.2. RESA’s recommended language to address this issue is set forth below in Section II.A.3.

2. The Commission’s clarification regarding compensation requirements for agents should be included in the definition of “agent”

20. Compounding the confusion created by the Commission’s additional sentence to the definition of “agent” is the explanation in the *Final Rulemaking Order* wherein the Commission stated that it is choosing to clarify its intent regarding how “affinity groups” fall within the definition of “agent” through the discussion section in lieu of incorporating the clarification in the final regulations.¹⁸

21. In its explanation, the Commission appears to conclude that “affinity groups” would be included within the scope of the expanded definition but that such “agents” should be excluded from the training, criminal background check, and the other requirements in the regulations as long as they are not compensated by the supplier.¹⁹ The Commission correctly recognized that it is impractical and unnecessary to have every person who satisfies the expanded definition of “agent” satisfy the training, criminal background check, and the other requirements set forth in the new regulations. RESA supports this result but is concerned that not including

¹⁸ *Final Rulemaking Order* at 12.

¹⁹ *Final Rulemaking Order* at 12.

clarifying language in the text of the actual regulations to codify the compensation exception will have negative consequences in the marketplace.

22. The rules of statutory construction and interpretation,²⁰ which also apply to regulations, state that the object of all interpretation is to ascertain and effectuate the intention of relevant agency.²¹ Under the Statutory Construction Act, when the words of the regulation are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.²² In this case, the words of the newly revised regulation are clear in that they do not mention or even suggest that compensation by the supplier may be considered as a factor in determining whether (or not) a person is an “agent” under the definition in Section 111.2.

23. The failure to include the “compensation” requirement in the actual regulation will lead to confusion, and disparate burdens, in the industry. Because the “compensation” requirement does not exist in the regulation itself, it appears to exist as a matter of policy – which is not binding on the Commission.²³ Future entrants to the market will attempt to ascertain the regulations of the Commission by reviewing the regulations themselves. They may or may not review the rulemaking order(s) related to regulations and may or may not discover the relaxed policy of the Commission towards uncompensated “agents.” Entrants who adhere strictly to regulation will face higher burdens than members of the industry who follow the relaxed policy.

²⁰ Statutory Construction Act, 1 Pa. C.S. §§ 1501, *et seq.*

²¹ *See, e.g., Energy Conservation Council of Pa. v. PUC*, 995 A.2d 465, 483 (Pa. Cmwlth 2010).

²² 1 Pa. C.S. § 1921(b).

²³ A policy statement is not a regulation, is not enforceable and has no binding effect on the agency, or on anyone else. *See, e.g., Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977).

24. While RESA does recognize and agree with the Commission's observation in the *Final Rulemaking Order* "that there are many different marketing structures currently in operation. . .[and] there may be scenarios where the applicability of these regulations may not always be clear,"²⁴ RESA does not agree that the way to address this is by creating an exception or other test in the text of the rulemaking order which is not translated into the final regulations. Rather, RESA recommends that, to be valid and enforceable, the compensation requirement must be made a part of the definition of "agent" in Section 111.2. RESA's recommended language to address this issue is set forth below in Section II.A.3.

3. Suggested language for clarifying the definition of "agent"

25. To appropriately narrow the scope of the term "agent" consistent with the discussion above in Sections II.A.1 and II.A.2, RESA requests that the Commission include language to its newly revised definition of "agent" to clarify that the term "agent" is only applicable to persons who: (a) are authorized to contractually bind the supplier; and, (b) are compensated by the supplier for the referral, enrollment or servicing of a customer. The language proposed by RESA is set forth in the underlined section below and is taken from the Connecticut Department of Public Utility Control ("DPUC") Guidelines which was referenced by the Commission in the *Final Rulemaking Order*:²⁵

²⁴ *Final Rulemaking Order* at 13.

²⁵ Final Rulemaking Order at 9, n2, citing, *DPUC Review of the Current Status of the Competitive Supplier and Aggregator Market in Connecticut and Marketing Practices and Conduct of Participants in that Market*, Docket No. 10-06-24, Decision (Mar. 16, 2011).

Agent— A person who conducts marketing or sales activities, or both, on behalf of a single licensed supplier or suppliers. The term includes an employee, a representative, an independent contractor or a vendor. It also includes subcontractors, employees, vendors and representatives not directly Contracted by the supplier who conduct marketing or sales activities on behalf of the supplier. Provided, however, that for purposes of this definition, an “agent” must be (a) authorized by a supplier to contractually bind the supplier to an offer to provide services or products; and, (b) have received compensation, in any form, from the supplier for the referral, enrollment or servicing of customers on behalf of the supplier.

26. The requirement that both of these clauses be met to be considered an “agent” is important. While those with authority to bind the supplier are likely to also be compensated by the supplier, there are situations where a person may receive some type of “compensation” from a supplier but lacks any authority to contractually bind the supplier. For example, the supplier may offer its existing customer some type of price break if the customer refers others to enroll for service. While the existing customer may arguably be receiving “compensation,” the existing customer has no authority to contractually bind the company. Treating this existing customer as an “agent” and requiring the supplier to ensure that the customer complies with the requirements of these regulations is unreasonable and can be avoided by adopting RESA’s proposed language clarification.

B. Section 111.4(B) Should Be Clarified: (1) To Ensure That Criminal Background Checks Are Only Required For Agents Engaged In “Door-To-Door Sales;” And, (2) To Be Consistent With State And Federal Laws Related To The Use Of Criminal History Records For Current Employees And Agents

27. The Commission revised the language of Section 111.4(b) as follows:²⁶

²⁶ *Final Rulemaking Order*, at Annex A (§ 111.4(b) relating to criminal background investigations).

~~(b) Prior to hiring an individual who will be performing door-to-door marketing and sales activities, a supplier shall conduct criminal background investigations to determine if the individual presents a probable threat to the health and safety of the public.~~ A SUPPLIER MAY NOT PERMIT A PERSON TO CONDUCT DOOR-TO-DOOR SALES AND MARKETING ACTIVITIES UNTIL IT HAS OBTAINED AND REVIEWED A CRIMINAL HISTORY RECORD FROM THE PENNSYLVANIA STATE POLICE AND FROM EVERY OTHER STATE IN WHICH THE PERSON RESIDED FOR THE LAST 12 MONTHS. FOR A CURRENT EMPLOYEE OR AGENT WHO CONDUCTS SALES AND MARKETING ACTIVITIES, A SUPPLIER MUST OBTAIN A CRIMINAL HISTORY RECORD NOT LATER THAN 90 DAYS AFTER THE EFFECTIVE DATE OF THIS REGULATION.

(1) The criminal background investigation shall include checking the sex offender registry commonly referred to as the “Megan’s Law” registry maintained by the Pennsylvania State Police.

~~(2) There shall be a presumption that a person whose name is listed on the “Megan’s Law” registry presents a threat to the health and safety of the public.~~ A SUPPLIER MAY NOT HIRE A PERSON AS AN EMPLOYEE OR AN AGENT FOR DOOR-TO-DOOR MARKETING OR SALES WHO WAS CONVICTED OF A FELONY OR MISDEMEANOR WHERE THE CONVICTION REFLECTS ADVERSELY ON THE PERSON’S SUITABILITY FOR SUCH EMPLOYMENT.

28. RESA requests that the Commission clarify that the newly added language in Section 111(b) is not intended to create a new obligation on suppliers to ensure that all “agents” – regardless of whether or not they engage in door-to-door marketing – undergo a criminal background check and to remove the newly added language which creates new requirements regarding criminal history records of existing employees and agents that are inconsistent with state and federal laws and would impose significant costs and burdens on suppliers.

1. References to “marketing” in Section 111.4(b) should be deleted to clarify that criminal background checks are required only for “agents” engaged in “door-to-door sales”

29. Throughout this rulemaking process, the requirement that suppliers obtain and review a criminal history record for their agents has been limited to those agents engaging in door-to-door sales. The currently effective Interim Guideline B limits background checks to “all

door-to-door marketing agents and sales agents.”²⁷ Likewise, the language for Section 111.4(b) in the tentative rulemaking order used the term “door-to-door” to describe the type of “marketing and sales activities” for which the supplier would be required to conduct criminal background investigations.²⁸

30. Despite this, the new revisions to Section 111.4(b) can be read as encompassing “agents” who are engaged in any “sales and marketing” activities (other than door-to-door sales). This is because Section 111.2 includes a narrower definition for the term “door-to-door sales” but a broader definition for the term “sales and marketing” activities:

- a. Door-to-door sales - A solicitation or sales method whereby an agent proceeds randomly or selectively from residence to residence ~~without prior specific appointment.~~²⁹
- b. Sales AND MARKETING -extension of an offer to provide services or products communicated orally, electronically or in writing to a customer.³⁰

31. Rather than using the defined term “door-to-door sales,” the new language in Section 111.4(b) uses the undefined terms “door-to-door sales and marketing activities” and “door-to-door marketing or sales.” The lack of reference to the defined term (“door-to-door sales”) could result in an interpretation of Section 111.4(b) that goes beyond door-to-door sales. In addition, the new language of Section 111.4 directs checks for any current “agent” who conducts “sales and marketing” activities within 90 days after the effective date of the regulation. The reference to the broader term (“sales and marketing”) again could result in an interpretation

²⁷ *Interim guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Supplier*, Docket No. M-2010-2185981, Final Order entered November 5, 2010, Annex A at Guideline B.1.

²⁸ *Rulemaking Re: Marketing and Sales Practices for the Retail Residential Energy Market*, PUC Docket No. L-2010-2208332, Tentative Opinion and Order (entered February 14, 2011), at 5.

²⁹ Final Rulemaking Order, at Annex A (§ 111.2, relating to definitions).

³⁰ Final Rulemaking Order, at Annex A (§ 111.2, relating to definitions).

of Section 111.4(b) that goes beyond door-to-door sales. RESA does not support such a broad interpretation and, based on the history of this regulation as well as the Commission's discussion of it in the *Final Rulemaking Order*, does not believe it is the Commission's intent to expand this requirement beyond door-to-door sales. Therefore, RESA recommends that the Commission maintain the references to "door-to-door sales" only and delete the term "marketing."

32. However, to the extent further explanation on this point is necessary, not every supplier in the Commonwealth is engaged in "door-to-door" sales, but every supplier is engaged in "sales and marketing" activities (e.g., the extension of offers of services or products). Requiring a criminal history record for every person engaged in any form of "sales and marketing" activities would impose undue costs and compliance obligations on suppliers.

33. Given the Commission's expressed concerns with "door-to-door sales," the background check requirement is properly limited to agents who are at a consumer's residence. Persons engaged in telemarketing or other methods of "sales and marketing" should not be subject to the background check requirement.

34. Therefore, RESA requests that the Commission clarify that Section 111.4(b) only mandates that suppliers obtain a criminal history record from the Pennsylvania State Police (and other applicable jurisdictions) for "agents" who are engaged in "door-to-door sales." RESA's recommended language to address this issue is set forth below in Section 0.

2. Section 111.4(b) should be revised to be consistent with state and federal laws related to the use of criminal history records for current agents

35. Newly added language to Section 111.4(b) directs that, for a current "employee or agent who conducts sales and marketing activities, a supplier must obtain a criminal history

record not later than 90 days after the effective date of the regulation.”³¹ According to the *Final Rulemaking Order*, the language was added based on concerns expressed by the Pennsylvania Office of Attorney General (“OGC”) to Commission staff that “the regulation be revised to make clear that the requirements apply equally to both new and existing employees.”³² While the use of background checks for prospective door-to-door agents had been well discussed throughout the proceedings related to these regulations – in both stakeholder meetings and through formal comments – the inclusion of current employees in this section of regulation appears to be something new and based on input and feedback solely from the OGC. As explained further below, the Federal Fair Credit Reporting Act (“FCRA”) and the Pennsylvania Criminal History Record Information Act (“CHRIA”) do not authorize the use of information in a criminal history record information file as a basis for decisions made after employment or entering into a business relationship and requiring suppliers to perform background checks on current employees triggers federal requirements under the FCRA that would create significant new burdens on suppliers that have not been formally considered with the input of the impacted stakeholders in this proceeding. Therefore, RESA submits that its request for clarification on this issue is appropriate.

36. Regarding how a supplier is expected to utilize the information obtained in a criminal history record file, the newly added language appears to: (1) require that suppliers should end employment or other business relationships with any and all current “agents” who have been convicted of a felony or misdemeanor where the conviction reflects adversely on the person’s suitability for such employment; and, (2) to create a blanket rule prohibiting suppliers

³¹ *Final Rulemaking Order*, at Annex A (§ 111.4(b), relating to relating to criminal background investigations)(emphasis added).

³² *Final Rulemaking Order* at 24.

from continuing to employ or have a business relationship with current “agents” who have been convicted of a felony or misdemeanor where the conviction reflects adversely on the person’s suitability for such employment. This is based on the fact that the regulations require criminal history records only once for current “agents” (i.e., within 90 days). Current or prospective “agents” are not required by Section 111.4(b) to report any pending criminal charges or undergo subsequent criminal history record reviews.³³

37. The problem with this, however, is that neither the CHRIA or FCRA authorize the use of information in a criminal history record file to justify decisions made after employment or entering into a business relationship. The Pennsylvania State Police maintains criminal history record information in accordance with Pennsylvania’s CHRIA.³⁴ CHRIA provides, in part, that employers may use information in an employment applicant’s criminal history record information file for the purpose of deciding whether or not to hire the applicant.³⁵ It further provides that: (1) felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant’s suitability for employment in the position for which he has applied; and, (2) the employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information.³⁶ Similarly the FCRA only authorizes the use of a “consumer report” (which may include a criminal history report) in connection with the consumer’s application for employment. 15 USC § 1681b(b)(2)(C). Therefore, because the newly added language appears to be creating a blanket

³³ Cf. 52 Pa. Code § 29.505(b) (frequency of record check, motor carriers).

³⁴ 18 Pa. C.S. §§ 9101 to 9183.

³⁵ 18 Pa. C.S. § 9125(a) (emphasis added).

³⁶ 18 Pa. C.S. §§ 9125(b), (c).

rule prohibiting suppliers from continuing to employ or have a business relationship with current “agents” who have been convicted of a felony or misdemeanor where the conviction reflects adversely on the person’s suitability for such employment, the new regulation appears to be requiring a use of the criminal information history report for existing agents that is beyond the scope of permissible uses under both state and federal law. Violations of Pennsylvania’s Criminal History Record Information Act may result in administrative discipline, injunctive relief, actual damages, attorney’s fees, costs of litigation, and punitive damages and similar relief is available for violations of the FCRA.³⁷ Since this concern arises because of the Commission’s new language imposing obligations regarding current employees or agents, removal of that one sentence from the regulations would address these concerns.

38. Even if, however, the Commission’s newly added language requiring suppliers to obtain a criminal history record for current employees and agents could be implemented, RESA submits that the Commission overlooked the fact that this requirement would impose significant costs and burdens on suppliers because of federal requirements contained in FCRA. FCRA requires the employer to get a person’s permission, usually in writing, before seeking a background screening company for a criminal history report.³⁸ If an employer might use information from a credit or other background report to take an “adverse action” (e.g., to deny an application for employment or to terminate employment), the employer must give the person a copy of the report and a document called “A Summary of Your Rights Under the Fair Credit Reporting Act.” before taking that action.³⁹ Finally, FCRA requires that if the employer takes an

³⁷ See 18 Pa. C.S. §§ 9181, 9183; See 15 U.S.C. §§ 1681(b)(3), 1681m(a), 1681s(a); 15 U.S.C. § 53(b).

³⁸ 15 U.S.C. § 1681(b)(2).

³⁹ 15 U.S.C. § 1681(b)(3).

adverse action against a person based on information in a report, the employer must provide notice to the person.⁴⁰ Implementing systems to comply with these requirements would be a costly and burdensome undertaking for suppliers which – even if suppliers were to do so – could not likely be completed within the 90 day timeframe established in the regulations.

39. In sum, neither CHRIA and FCRA authorize the use of criminal history records of current employees in the manner the Commission appears to be directing with its newly added language to Section 111.4(b). Moreover, even if such use were permitted, complying with FCRA requirements would be costly and burdensome. Therefore, to be consistent with the state and federal laws related to the use of criminal history records, RESA requests that the Commission remove the newly added language requiring suppliers to obtain a criminal history record for current employees and agents. RESA's recommended language to address this issue is set forth below in Section 0.

⁴⁰ 15 U.S.C. § 1681m.

3. Suggested language to address the use of criminal history records for new and existing agents

40. To address the issues discussed above in Sections II.B.1 and II.B.2, RESA

requests that the Commission revise the newly added language set forth in the *Final Rulemaking Order* for Section 111.4(b) as follows.

(b) A SUPPLIER MAY NOT PERMIT A PERSON TO CONDUCT DOOR-TO-DOOR SALES ~~AND MARKETING ACTIVITIES~~ UNTIL IT HAS OBTAINED AND REVIEWED A CRIMINAL HISTORY RECORD FROM THE PENNSYLVANIA STATE POLICE AND FROM EVERY OTHER STATE IN WHICH THE PERSON RESIDED FOR THE LAST 12 MONTHS. ~~FOR AN CURRENT EMPLOYEE OR AGENT WHO CONDUCTS DOOR-TO-DOOR SALES AND MARKETING ACTIVITIES, A SUPPLIER MUST OBTAIN A CRIMINAL HISTORY RECORD NOT LATER THAN 90 DAYS AFTER THE EFFECTIVE DATE OF THIS REGULATION.~~

(1) The criminal background investigation shall include checking the sex offender registry commonly referred to as the “Megan’s Law” registry maintained by the Pennsylvania State Police.

(2) A SUPPLIER MAY NOT HIRE ~~A PERSON AS AN EMPLOYEE OR AN AGENT FOR DOOR-TO-DOOR MARKETING OR SALES~~ WHO WAS CONVICTED OF A FELONY OR MISDEMEANOR WHERE THE CONVICTION REFLECTS ADVERSELY ON THE PERSON’S SUITABILITY FOR SUCH EMPLOYMENT.⁴¹

III. CONCLUSION

In conclusion, RESA asks the Commission: (1) to add language to its definition of “agent” to clarify that it is only applicable to persons who are authorized to contractually bind the supplier or are compensated by the supplier for the enrollment of a customer; and, (2) to revise its new language regarding criminal background checks to clarify that the requirement are only required for “agents” engaged in “door-to-door sales” and to remove the requirement that criminal background checks for current agents can be used by suppliers to end employment or

⁴¹ RESA suggests that the phrase “a person as an employee or” be deleted as superfluous since this section already uses the defined term of “agent.”

other business relationships with current “agents” because such a requirement is not consistent with the state and federal laws related to the use of criminal history records.

WHEREFORE, the Retail Energy Supply Association – Electric Caucus respectfully requests that the Commission grant this Petition for Reconsideration and/or Clarification and issue an order consistent with the recommendations set forth herein.

Respectfully submitted,



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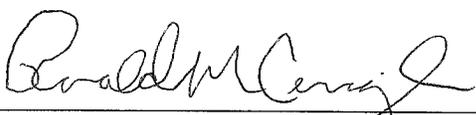
Date: November 8, 2012

Attorneys for Retail Energy Supply Association –
Electric Caucus

VERIFICATION

I, Ronald M. Cerniglia, hereby state that I am Pennsylvania State Chairman of the PA Electric Caucus of the Retail Energy Supply Association and am authorized to make this verification on its behalf, and that the facts above set forth in the attached Petition are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 11/8/12



Ronald M. Cerniglia