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February 8, 2010

James H. Cawley, Chairman
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

Re: Request for Opinion regarding the Telemarketer Registration Act and the
Electricity Generation Customer Choice and Competition Act

Dear Chairman Cawley:

On behalf of the Public Utility Commission ("PUC"), you have requested my opinion regarding the applicability of the Telemarketer Registration Act ("Telemarketer Act"), 73 P.S. §§2241-2249, to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act ("Competition Act"), 66 Pa. C.S. §§2801-2815.

As a threshold matter under Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. §732-204(a)(1), we must establish that the PUC's request for legal advice concerns "a matter or issue arising in connection with the exercise of the official powers or the performance of the official duties of the [PUC]."

The Competition Act requires electric utilities "to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly to consumers," 66 Pa. C.S. §2802(14). The Act directs the PUC, by regulation, to require electricity providers to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of electricity services. 66 Pa. C.S. §2807(d)(2). PUC regulations require providers to notify consumers that information is available upon request, 52 Pa. Code §54.6(h), and prohibit providers from releasing customer information to third parties without customer consent. 52 Pa. Code §54.8.

Telephone communication is among the means by which electricity providers may seek to discharge their obligation under the Competition Act and regulations to inform customers of choices regarding the purchase of electricity. Section 3(b) of the Telemarketer Act, 73 P.S. §2243(b), prohibits telemarketers from communicating with consumers by telephone in connection with the purchase of consumer goods or services "unless the telemarketer or the telemarketing business which employs the telemarketer is registered with the Office of Attorney General" and otherwise circumscribes telemarketer activities.

This interplay between the communication requirements of the Competition Act and the communication restrictions of the Telemarketer Act provides ample basis for concluding that the applicability of the Telemarketer Act to electric generation suppliers is an issue “arising in connection with” the PUC’s powers and duties. Accordingly, we proceed to address the questions presented in your opinion request.

1. Is electric generation supply a “consumer good or service” as defined in the Telemarketer Act?

Section 2 of the Telemarketer Act, 73 P.S. §2242, defines “consumer goods and services” as “real or personal property or services used for personal, family or household purposes.” Electricity is used in countless aspects and activities of daily life; thus electric generation supply is plainly a “service used for personal, family and household purposes” and therefore a “consumer service” within the meaning of the Act.

2. Is an electric generation supplier excluded from the definition of “telemarketer” in the Telemarketer Act? If so, what is the scope of the exclusion under the Act, does it extend to an agent of a supplier, and does it matter that the source of customer information used for telephone solicitation by a supplier or its agent is an electric distribution company?

Section 2 of the Telemarketer Act, 73 P.S. §2242, defines “telemarketer” as follows:

Any person or business which, in connection with telemarketing, initiates or receives telephone calls to or from a consumer in this Commonwealth, or when the person or business acting in connection with telemarketing is located within this Commonwealth when such calls are initiated or received. *For purposes of registration under section 3(a), “telemarketer” does not include any of the following...*

(5) A person or business engaged in a business or occupation which is licensed by, certificated by or registered with a Federal or Commonwealth agency while acting within the scope of the business for which licensure, certification or registration is required.

(Emphasis added).

Under this definition, electric generation suppliers engaged in telemarketing are telemarketers for all purposes of the Act except the requirement of Section 3(a), 73 P.S. §2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC under the Competition Act, 66 Pa. C.S. §2809(a). Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with suppliers, are not excluded from the definition of “telemarketer” and

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therefore must register. It is immaterial to the definition or the exclusion that the source of customer information used for telephone solicitation by suppliers or their agents is an electric distribution company.

3. Is customer consent to the release of information given to an electric distribution company to enable competitive solicitations “an express request” to receive telephone solicitations from electric generation suppliers or their agents within the meaning of the Telemarketer Act?

Section 2 of the Telemarketer Act, 73 P.S. §2242, excludes from the definition of a “telephone solicitation call” a call to a residential or wireless consumer “(1) in response to an express request of the residential or wireless consumer.” You explain that customers of electric distribution companies may indicate to the company their general consent to the release of information about them to enable competitive solicitations by electric generation suppliers and that such consent may be given by an “opt-in” process in which the customer affirmatively agrees to the release of information or an “opt-out” process in which the customer does not object to (opt-out of) the release of information.

Regardless of process, customer consent to the release of customer information by an electric distribution company to enable competitive solicitations by electric generation suppliers does not constitute “an express request” to receive telephone solicitation calls. The “do-not-call list” defined in section 2 of the Telemarketer Act, 73 P.S. §2242, protects consumers from unwanted telephone solicitation calls. See sections 5-9, 73 P.S. §§2245-2249. The protection of the do-not-call list is defeated if general consent to the release of information given by a consumer to one individual or business operates as general consent to receive telephone solicitations from any number of other individuals or businesses.

4. Is an electric generation supplier using customer information supplied by an electric distribution company for telephone solicitations shielded from liability under the “error” provision of the Telemarketer Act?

Section 5(a) of the Telemarketer Act, 73 P.S. §2245(a), shields a telemarketer who has complied with the four requirements (i)-(iv) of the provision from liability for a telephone solicitation call to a consumer who has previously indicated that he or she does not wish to receive such calls. It is immaterial to this “error” provision of the Act that an electric generation supplier or its agent uses customer information supplied by an electric distribution company in making telephone solicitation calls.

In summary, it is my opinion, and you are so advised, that electric generation suppliers are subject to all the requirements of the Telemarketer Act, as detailed herein, except the requirement that they register with this Office.

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Finally, you are advised that, in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. §732-204(a)(1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Tom Corbett". The signature is fluid and cursive, with a large initial "T" and a stylized "C".

TOM CORBETT
Attorney General