

COMMONWEALTH OF PENNSYLVANIA



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November 19, 2012

Rosemary Chiavetta  
Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Enclosed please find the Office of Consumer Advocate's Answer to the Petition of the Retail Energy Supply Association for Reconsideration and/or Clarification of the Commission's October 24, 2012 Final Rulemaking Order, in the above-referenced proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Respectfully Submitted,

A handwritten signature in black ink that reads "Barrett C. Sheridan".

Barrett C. Sheridan  
Assistant Consumer Advocate  
PA Attorney I.D. # 61138

Enclosures

cc: Certificate of Service  
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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**ANSWER OF  
THE OFFICE OF CONSUMER ADVOCATE  
TO THE PETITION OF THE  
RETAIL ENERGY SUPPLY ASSOCIATION  
FOR RECONSIDERATION AND/OR CLARIFICATION  
OF THE COMMISSION'S OCTOBER 24, 2012  
FINAL RULEMAKING ORDER**

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**I. INTRODUCTION**

On October 24, 2012, the Pennsylvania Public Utility Commission (Commission or PUC) entered its Corrected Final Rulemaking Order, establishing regulations governing activities by and on behalf of electric generation suppliers (EGSs) and natural gas suppliers (NGS). (Final Rulemaking Order). The Commission's Final Rulemaking Order considered the comments of interested parties, the Office of Attorney General (OAG), and the Independent Regulatory Review Commission (IRRC). The Retail Energy Supply Association (RESA) had filed comments during the rulemaking process.

By Petition filed November 8, 2012, RESA requests that the Commission reconsider its Final Rulemaking Order and adopt specific modifications to the regulatory language adopted by the Order. RESA proposes that the definition of "agent" in Section 111.2 be modified to narrow the scope to include only persons who are authorized to contractually bind

the supplier and are compensated by the supplier for the referral, enrollment or servicing of a customer. Petition ¶¶ 25, 26. RESA also requests that the Commission modify the language of Section 111.4(b) in two ways. First, RESA proposes that the Commission modify Section 111.4(b) so that the background check requirement applies only to persons that the supplier permits to engage in door-to-door sales. *Id.* ¶¶ 27-34, 40. Second, RESA asks the Commission to delete language from Section 111.4(b) which pertains to background checks for existing employees and agents of the supplier to avoid conflict with the Pennsylvania Criminal History Record Information Act (CHRIA)<sup>1</sup> and Federal Fair Credit Reporting Act (FCRA).<sup>2</sup> RESA states that these language changes are clarifications needed to avoid confusion, conflicts with other laws, and undue burden to suppliers.

The OCA files this Answer in opposition to RESA's request for reconsideration and/or clarification. The Commission's Final Rulemaking Order builds on the Interim Guidelines, as developed through consultation between the Commission's Office of Competitive Market Oversight (OCMO) and stakeholders.<sup>3</sup> The Commission adopted the Section 111.2 definition of "agent" based on consideration of the differing positions of the OCA/AARP, PCADV, RESA and others. Similarly, the Commission adopted the provisions of Section 111.4 requiring background checks based on consideration of parties' comments as well as comments from the Office of Attorney General (OAG) reviewing the legality of the proposed regulations.<sup>4</sup>

The Final Rulemaking Order establishes safeguards "to protect public safety and the consumers participating in the market" as well as "to protect the integrity of the entire

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<sup>1</sup> RESA cites to 18 Pa.C.S. §§ 9101 to 9183. Petition ¶ 37, fn. 34, 35, 36, 37.

<sup>2</sup> RESA cites to "15 U.S.C. §§ 1681(b)(3), 1681m(a), 1681s(a)" as well as other subparts of Section "1681(b)". Petition ¶¶ 37, 38, fn. 37, 38, 39, 40. The OCA notes that the numbering of the FCRA is unusual. Based on the text and structure of the FCRA, RESA appears to refer to Section 1681b(b) in support of certain arguments, not Section 1681(b).

<sup>3</sup> Final Rulemaking Order at 1-2.

<sup>4</sup> Final Rulemaking Order at 4, 23-25.

competitive market.”<sup>5</sup> RESA’s Petition asks the Commission to alter that balance in several significant ways. RESA has not established that reconsideration and/or clarification is appropriate and in the public interest. Accordingly, the Commission should deny the relief sought by RESA.

## II. ANSWER

### A. Standard of Review

RESA requests reconsideration and/or clarification based on Section 703(g) of the Public Utility Code and Section 5.572 of the Commission’s regulations.<sup>6</sup> Petition at 1. The Commission articulated its standards for granting reconsideration following the entry of a final order in Duick v. Pennsylvania Gas and Water Co. as follows:

A Petition 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 this code to rescind or amend a prior order in whole or in part.

In this regard, we agree with the court in the Pennsylvania Railroad Company case, wherein it was stated that:

Parties...cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them...what we expect to see raised 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.*<sup>7</sup>

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<sup>5</sup> Final Rulemaking Order at 6, see also Annex A, Section 111.1.

<sup>6</sup> 66 Pa.C.S. § 703(g); 52 Pa.Code § 5.572.

<sup>7</sup> Duick v. Pennsylvania Gas and Water Co., 56 Pa. P.U.C. 553, 559 (1985) (Duick), (quoting Pennsylvania R.R. Co. v. Pa. PUC, 118 Pa. Super. 380, 179 A. 850 (1935)). (Emphasis added).

As set forth below, RESA's Petition does not meet the Quick standard for grant of reconsideration or clarification.

B. RESA's Proposed Modification of the Section 111.2 Definition of "Agent" Should Be Denied

In Annex A to the Final Rulemaking Order, the Commission set forth the final modifications to the definition of "agent":

*Agent—*

~~—(i) 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.~~<sup>8</sup>

RESA finds fault with this definition arguing that it is overbroad and fails to track basic principles of agency law. Petition ¶¶ 8-19. Although the Commission expressly includes persons "not directly contracted by the supplier" within the scope of the definition of "agent," RESA asks the Commission to revise the definition to include only those persons authorized by the supplier to contractually bind the supplier and have received compensation from the supplier for certain tasks. RESA asks the Commission to reconsider the definition and replace the last sentence with RESA's alternative language, as a clarification:

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

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<sup>8</sup> Final Rulemaking Order, Annex A at 1-2.

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.

Petition ¶ 25.<sup>9</sup>

RESA has not met the standards of Duick such that the Commission should consider adoption of RESA's proposed modified definition of "agent." Whether to define "agent" narrowly or broadly was a critical and contested issue in response to the Proposed Rulemaking Order. The Commission acknowledged RESA's recommendation "that the definition be changed to make clear that the person conducting the marketing/sales for a single supplier is compensated by that supplier and therefore the supplier is responsible for that agent's actions."<sup>10</sup> The Commission also noted the position of the National Energy Marketers Association (NEM) as opposing RESA's position regarding compensation.<sup>11</sup>

After considering these positions, the Commission expressly concluded that the definition of "agent" in these regulations should include persons who may be engaged in marketing and sales on behalf of more than one supplier and include subcontractors and other representatives "not directly contracted by the supplier" who are providing sales and marketing services on behalf of the supplier."<sup>12</sup>

RESA has not raised new and novel arguments, where the Commission expressly chose to adopt a definition of "agent" which does not turn on direct contractual links between the supplier and the agent, or the receipt of compensation by the agent as RESA proposes.

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<sup>9</sup> RESA's recitation of the definition adopted by the Commission includes "single" as part of the first sentence. Petition ¶¶ 6, 11. The OCA submits that RESA's quotation is incorrect. As set forth in Annex A to the Final Rulemaking Order, the Commission modified the first sentence to delete "single" as follows: "A person who conducts marketing or sales activities, or both, on behalf of a ~~single~~ licensed supplier OR SUPPLIERS." Final Rulemaking Order, Annex A at 1-2.

<sup>10</sup> Final Rulemaking Order at 10.

<sup>11</sup> Id.

<sup>12</sup> Id. at 11-12.

As set forth in Section 111.1, the purpose of Chapter 111 is “to establish standards and practices for marketing and sales activities for EGSs and NGSs and their agents to ensure the fairness and the integrity of the competitive residential energy market.”<sup>13</sup> Section 111.1 also requires that “EGSs, NGSs, and their agents shall comply with these standards and practices when engaged in sales and marketing activities involving residential customers.”<sup>14</sup> The regulations crafted by the Commission are directed at protecting consumers where marketing and sales activities by suppliers and their agents may directly impact the continuity and affordability of the consumer’s electric and natural gas utility service. The OCA submits that the Commission’s final regulations provide sufficient notice to suppliers that they must conform with Chapter 111 in this context, even if the regulations would vary from general principles of agency law.

The OCA submits that the Commission should deny RESA’s request for reconsideration and clarification.

C. RESA Has Not Met The Standard For Reconsideration Or Clarification Of The Important Background Check Requirements Of Section 111.4.

According to RESA, Section 111.4 is too broad in scope and requires suppliers to conduct background checks of current employees in violation of the CHRIA and FCRA. Petition ¶¶ 27-40. RESA proposes revisions to Section 111.4(b) so that background checks would be required only for agents who conduct door-to-door sales. Id. ¶ 40. RESA proposes that Section 111.4(b) also be modified to delete the requirement that suppliers obtain a background check for existing employees within 90 days of the effective date of the regulation. Id.

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<sup>13</sup> Final Rulemaking Order, Annex A at 1.

<sup>14</sup> Id.

Section 111.4(b) states “A supplier may not permit a person to conduct door-to-door sales and marketing activities until it has obtained and reviewed a criminal record...”<sup>15</sup> Section 111.4(b)(2) then uses the phrase “door-to-door marketing and sales,” where “sales” and “marketing” are reversed in order. RESA proposes that the Commission clarify that the background check requirements of Section 111.4 does not apply to agents engaged in “sales and marketing” other than door-to-door sales and modify Section 111.4(b) accordingly. The OCA submits that RESA’s proposed clarification is in conflict with the Final Rulemaking Order. The Commission specifically focused the background check requirements on “agents,” noting that the Commission was adopting a definition of agents which would include “employees, representatives, contractors, subcontractors and vendors, *who perform sales and marketing activities...*”<sup>16</sup> The OCA submits that if the Commission finds that clarification is needed, then the Commission could modify Section 111.4(b) and (b)(2) to state “door-to-door sales and sales and marketing” so that both the specific and broader defined terms are used in Section 111.4(b).

RESA’s other proposed modifications to Section 111.4 are based on RESA’s newly raised concerns that CHRIA and the FCRA restrict the ability of employers to request records from the Pennsylvania State Police and/or credit bureaus and then use that information to take action adverse to the agent, including existing employees. Petition ¶¶ 5, 27, 28, 35-40. The OCA submits that RESA’s arguments do not support a grant of reconsideration or clarification.

The Commission notes that the OAG “reviewed the proposed regulations for form and legality” and submitted comments to the Commission regarding the legal parameters concerning the conduct and use of background checks.<sup>17</sup> The Final Rulemaking Order notes that the OAG counseled as to how the Commission should revise the provisions of Section 111.4(b)

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<sup>15</sup> Final Rulemaking Order, Annex A at 4.

<sup>16</sup> Final Rulemaking Order at 24 (emphasis added).

<sup>17</sup> *Id.* at 4, 23-25.

so that the language concerning background checks and the possible use of such information by the supplier “would more closely track [CHRIA] and would make the regulation less vulnerable to a court challenge.”<sup>18</sup> The Commission also noted that “OAG suggested that the regulation be revised to make clear that the requirements [of Section 111.4(b)] apply equally to both new and existing employees.”<sup>19</sup> The Final Rulemaking Order states that the Commission “accepted OAG’s suggested changes and [has] revised this section accordingly.” The OCA submits that RESA has not presented any colorable argument that the provisions of Section 111.4 are in conflict with CHRIA such that reconsideration is warranted. The Commission gave express consideration to the comments and recommendations of the OAG on this issue.

RESA suggests that the background check requirements may conflict with federal law governing the use of consumer credit reports by employers. According to RESA, the FCRA only allows employers to request consumer credit reports, which may include criminal history, in connection with applications for employment. Petition ¶¶ 35, 37. RESA proposes that the Commission modify Section 111.4(b) based on the premise that a suppliers request for a consumer credit report may lead to “adverse action” against the existing employees and so the background check requirement for existing employees should be dropped. *Id.* ¶ 36.

The OCA submits that RESA has not set forth sufficient grounds for grant of reconsideration and adoption of RESA’s revised Section 111.4(b) language. As the Commission notes, from the development of the Interim Guidelines through the Final Rulemaking Order, “agent background checks have been extensively discussed and considered.”<sup>20</sup> The question of how to conduct background checks in compliance with the FCRA could have been raised much earlier than through a Petition for Reconsideration, where the FCRA is not a new law. Nor does

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<sup>18</sup> *Id.* at 24.

<sup>19</sup> *Id.*

<sup>20</sup> Final Rulemaking Order at 23.

the Final Rulemaking Order require suppliers to request consumer credit reports which are subject to the FCRA. Instead, Section 111.4(b) requires suppliers to check with the Pennsylvania State Police's criminal history records and the Megan's Law registry. Otherwise, Section 111.4(b) is silent as to the other possible sources of information which suppliers might access to meet the obligation to check the criminal history records in other states of persons, agents, or prospective hires. The OCA submits that there is no conflict between Section 111.4(b) and the FCRA, contrary to RESA's Petition, such that the Commission should grant reconsideration. The Commission included language in Section 111.4(b) to require criminal background checks of existing supplier employees and agents based on the recommendation of the OAG. RESA's proposed deletion of this provision should be rejected.

### III. CONCLUSION

WHEREFORE, the Office of Consumer Advocate respectfully requests that the Commission deny RESA's Petition for Reconsideration and/or Clarification.

Respectfully Submitted,



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Dated: November 19, 2012

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CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Answer to the Petition of the Retail Energy Supply Association for Reconsideration and/or Clarification of the Commission's October 24, 2012 Final Rulemaking Order, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 19th day of November 2012.

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