

November 19, 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:

Attached, please find the Joint Answer to RESA's Petition for Reconsideration and/or Clarification of the Commission's October 24, 2012 Final Rulemaking Order, filed today on behalf of the Pennsylvania Coalition Against Domestic Violence (PCADV) and the Pennsylvania Utility Law Project (PULP).

Parties to this proceeding have been served in accordance with the Certificate of Service, which is also attached.

Sincerely,



Elizabeth R. Marx, Esq.

Enclosures

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**JOINT ANSWER OF THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE
AND THE PENNSYLVANIA UTILITY LAW PROJECT TO THE RETAIL ENERGY SUPPLY
ASSOCIATION'S PETITION FOR RECONSIDERATION AND/OR CLARIFICATION**

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Date: November 19, 2012

The Pennsylvania Coalition Against Domestic Violence (PCADV) and the Pennsylvania Utility Law Project (PULP) file this joint Answer pursuant to 52 Pa. Code § 5.572(e) in response to the petition filed by the Retail Energy Supply Association (RESA) for reconsideration and/or clarification of the Commission's October 24, 2012, final rulemaking order in the above-captioned proceeding.

PCADV and PULP submit that RESA has failed to meet its burden to establish that reconsideration or clarification of the Commission's final rulemaking is necessary and respectfully requests that RESA's Petition be denied. RESA argues that clarification is needed in two specific areas, the definition of agent and the background check requirement for those involved in door-to-door activities. In neither area does RESA do anything more than reiterate arguments that it has previously raised or had an opportunity to raise. Regarding its assertion that the final rulemaking contravenes current federal and state law, RESA misstates the law and fails to apprise the Commission of contrary jurisprudence on the issue, specifically holdings of the United States District Courts of the Middle District of Pennsylvania and the Third Circuit. PCADV and PULP respond to RESA's Petition in corresponding numbered paragraphs below.

I. RESA's Petition for Reconsideration Alleges Insufficient Basis for Reconsideration

1. Admitted.
2. Admitted.
3. Denied. PCADV and PULP assert that RESA's Petition is not "narrowly limited to those [issues] that require further clarification," and should be denied. RESA has had ample time to set forth its arguments prior to the issuance of the Commission's final order and, indeed, it has. On December 21, 2011, RESA submitted comments to the PUC and had an additional opportunity to file reply comments, but did not do so. Reconsideration is proper only when a party pleads "newly discovered evidence, alleges errors of law, or a change in circumstances." (RESA Petition at 3); *see also* *Duick v. Pa. Gas & Water Co.*, 56 Pa.

PUC 553 at 8-12 (Dec. 17, 1982). RESA has failed to allege any new evidence, errors in the law or changes of circumstance.

With respect to the definition of agent, RESA's Petition fails to present new evidence, allege an error of law, or set forth a change in circumstances. Rather, RESA's Petition reiterates the same arguments it set forth in the initial proceedings. Thus, PCADV and PULP assert that RESA's arguments regarding the definition of agent are not properly before this Commission and should be denied. (*See paras. 6-26.*)

PCADV and PULP acknowledge that the Commission uses the phrases "door-to-door sales and marketing" and "door-to-door marketing or sales" interchangeably throughout the final regulations. We, however, disagree that the use of these phrases interchangeably causes confusion. Even if clarification were necessary, RESA's proposed resolution is inconsistent with the intent and purpose of the regulations and repeats the same arguments that RESA previously raised. (*See paras. 27-34 & 40.*)

Finally, RESA's request to eliminate background requirements for existing employees and agents is based on a clearly erroneous legal assertion. RESA fails to cite any provision of the law that contradicts the Commission's Final Order with respect to the legal requirements for background checks. Moreover, RESA fails to explain how the minimal requirements would impose an undue burden on suppliers. (*See paras. 35-40.*)

4. Admitted in part, denied in part. PCADV and PULP agree with RESA in its conclusion that the Commission's definition of "agent" applies to "everyone who communicates prices or distributes marketing materials." However, RESA fails to point out the additional qualifying language in the definition of agent that limits its application to those acting "on behalf of the supplier." This essential

component of the definition undermines RESA's arguments that the definition lacks clarity. (*See* para. 7.)

Moreover, RESA's arguments on this issue are simply a restatement of their arguments in the proceedings leading up to the Commission's Final Order. In comments filed December 21, 2011, RESA fully explained its position on which entities should or should not be included in the definition of agent. And, as noted above, RESA was given an opportunity to file reply comments after reading the comments of other interested parties, but did not exercise this opportunity. Thus, RESA's request for reconsideration on this point does not meet the standard for reconsideration in that it does not raise any new evidence, allege an error of law, or note a change in circumstances. (*See* para. 7.)

5. Denied. PCADV and PULP assert that the phrases "door-to-door sales and marketing" and "door-to-door marketing or sales" in section 111.4(b) and 111.4(b)(2) are used interchangeably throughout the regulations and, so long as the activities are modified by "door-to-door," confusion is not created. Further, RESA's suggested revisions go beyond simple clarification. Instead, RESA suggests a solution that would eviscerate the scope of the background checks required by the Commission in its Final Order and, therefore, must be denied. (*See* paras. 28-31.)

Finally, RESA's claim that criminal background checks for current employees and agents are "inconsistent with state and federal law" is itself inconsistent with the law. Neither state nor federal law prohibits background checks for current employees and agents. Clear case law from the Middle District and the Third Circuit confirm this fact. *See Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429 (U.S. Dist. Ct. 2004), *affirmed by* 135 Fed. Appx. 499 (3d Cir. 2005). Thus, RESA's Petition fails to allege an error of law and, thus, is not properly raised for reconsideration and/or clarification and should be denied. (*See* paras. 37-40.)

II. The Commission's Definition of Agent Complies with the Principles and Law of Agency.

6. Admitted.
7. Admitted in part, denied in part. In comments filed December 20, 2012, PCADV argued that the Commission's originally proposed definition of agent was not sufficiently broad to incorporate "second-level sub-contractors, employees, vendors, or representatives." And, indeed, PCADV argued that an expansion of the definition was necessary to ensure that subcontractors would be subject to the Chapter 52 confidentiality provisions. However, PCADV did not suggest any specific language, and the Commission specifically expressed in its Final Order that its decision on the term agent was unrelated to PCADV's confidentiality provisions. (Final Order at 12.)

The language that the Commission ultimately adopted to define agent was born from compromise and included components of the arguments asserted by consumer agencies (PCADV, the Office of Consumer Advocate (OCA), and AARP), the Independent Regulatory Review Commission (IRRC), and energy advocates (RESA, the Pennsylvania Energy Marketers Coalition, and the National Energy Marketers Association). (Final Order at 11-12.)

8. Admitted in part, denied in part. PCADV and PULP deny RESA's assertion that clarification is needed.
9. Denied. The additional requirements placed on suppliers to monitor the marketing activities of their agents do not place an undue burden on suppliers, nor do they create "unreasonable confusion and uncertainty." RESA is clearly not confused about how it can comply with the new regulations. In paragraph 8, RESA listed the requirements that it foresees for suppliers. Moreover, the Commission specifically invited suppliers to come forward and seek guidance

with respect to any uncertainty about the application of the Final Order to a novel marketing structure. (Final Order at 12-13.)

As explained in paragraph 7, the Commission has already weighed RESA's concerns and, in particular, the Commission addressed RESA's concerns with unique marketing structures, such as affinity groups and multi-level marketing. After weighing the various arguments, the Commission settled on a definition of agent that best met the competing needs of suppliers and consumers.

10. Denied. (*See* para. 9.)
11. Admitted. However, it is important to note that the crucial modifying language in the Commission's definition of agent is "*on behalf of a licensed supplier or suppliers*" and "*on behalf of the supplier,*" and does not turn solely on the definition of "marketing," "sales," or "sales and marketing" as RESA's Petition implies. (*See* para. 14.)
12. Admitted. (*See* paras. 11 and 14.)
13. Admitted. (*See* paras. 11 and 14.)
14. Denied. RESA claims that there is a need for additional clarifying factors to avoid the absurd result of having educational materials by independent agencies fall within the supplier's responsibilities. However, the Commission's inclusion of the phrases "*on behalf of a licensed supplier or suppliers*" and "*on behalf of the supplier*" is sufficient to limit the definition's scope to only those instances where an individual or entity conducts or conducted sales and marketing activities with the consent and authorization of the supplier.

To draw from RESA's examples, neither the OCA's nor the Commission's website are created "on behalf of" the suppliers. In fact, these examples expressly

provide that they do not advocate for one supplier over another. Theoretically, even if an independent agency were to distribute marketing materials to promote a select supplier on their own accord, it would not be “on behalf of the supplier” unless the marketer acted with the supplier’s consent. This is a basic legal tenant of agency. The Restatement of Law (Second) Agency defines agency as:

[T]he fiduciary relation which results from the manifestation by one person to another that the other shall act *on his behalf* and subject to his control, and consent by the other so to act.

Restatement of the Law (Second) Agency § 1. An agency relationship may be actual (express or implied) or apparent; however, the key to both an actual or apparent agency relationship is the need for mutual consent and agreement that one party will act *on the other’s behalf*. *Id.* §§ 1 (Agency) & 7 (Authority). Thus, RESA’s Petition makes a critical error in its failure to account for the Commission’s inclusion of the important modifying phrase “on behalf of,” which definitively limits the scope of the definition in accordance with the very basic tenants of agency law.

PCADV and PULP recognize that some market participants may still have some confusion over the applicability of this section. But, as explained above, the Commission has clearly defined its expectations and has invited any market participant that is confused about the regulations’ applicability to come forward for additional guidance. (*See* paras. 8-13.)

15. Denied. Brokers, marketers and aggregators would not fall within the Commission’s definition of agent without some additional agreement with the supplier for the intermediary to act *on their behalf*. (*See* para. 14.)
16. Denied. Inclusion of the phrase “on behalf of” is sufficient to limit the scope of agency to only those relationships that were consensually created between the supplier and the individual or entity. (*See* para. 14.) PCADV and PULP assert that

individuals or entities that attend events and provide information *on behalf of* the supplier correctly fall within the scope of the regulation.

17. Denied. (*See* para. 14.) As RESA correctly acknowledges, the law of agency in the Commonwealth recognizes both express and implied authority. (RESA Petition at 11.) And, as RESA points out, authorization of the agent is required to bind the principle in both implied and express agency relationships. *Id.* The Commission recognized and addressed this tenant of the law in its definition of agent by including the phrase “on behalf of.” (*See* para. 14.)
18. Denied. RESA claims that the regulations err by “impos[ing] liability on suppliers for the acts of persons who do not and cannot bind the supplier.” They elaborate by explaining that a vendor at public events “does not have the authority to contractually bind the supplier of the power to enter into a contractual relationship with the consumer.” (RESA Petition at 11.)

RESA’s argument conflates the law of agency and the law of contracts. The term “bind” has a different meaning in the context of an agency relationship than it does in the context of a contractual relationship. In terms of agency law, an agent can bind a supplier by acting in a manner that could impose liability on that supplier in either tort or contract. Even if a marketer is not given authority to bind the supplier in a *contractual* relationship between the supplier and a consumer, it may still be acting as an agent of the supplier if the supplier authorized the marketer to promote and/or provide details about the goods and services the supplier offers. (Or, in other words, has authorized an individual or entity to act *on its behalf*.) *See also* Restatement of the Law (Second) Agency § 7 (authority).

The Commission’s inclusion of the phrase “on behalf of” is in line with the principles of agency law, as it is sufficiently broad to include the multiple ways in which an agent might “bind” a supplier. RESA’s Petition, however, seeks to shift

the definition from one based on agency principles to one based on contract principles. Such a shift would significantly narrow the scope of agency that the Commission intended. (*See* Final Order at 12 & 18.)

19. Denied. (*See* paras. 17-18.)

20. Denied. As explained above, the Commission's definition is clear. Inclusion of the modifier "on behalf of" eliminates any remaining uncertainty. There is no need for the Commission to enumerate every potential marketing relationship in the regulations. For the same reasons stated above, an affinity group would not fit within the Commission's definition of agent because affinity groups are not acting on behalf of the supplier. Rather, affinity groups act in tandem with the supplier and not on behalf of the supplier; thus, the supplier would not be responsible for the actions of the affinity groups.

Moreover, the Commission has specifically addressed its intended treatment of "affinity groups" in its Final Order and has invited any supplier who is confused about the regulations' applicability to come forward and request clarification on a case-by-case basis. Thus, there should not be any lingering confusion on this issue.

21. Denied. (*See* para. 20.)

22. Denied. RESA correctly restates the law of statutory interpretation and its application to regulation. However, its conclusion that the Commission's regulation lacks clarity because it fails to specify that compensation is required is unsound. The Commission was purposeful in its decision not to include compensation as a component for the definition of agency. (Final Order at 12; *see* para. 18.)

23. Denied. The Commission correctly based the definition of agency on whether the sales and marketing were conducted on behalf of the supplier, as it is in line with the basic tenants of agency law. (*See* paras. 18 & 22.)
24. Denied. The Commission did not create a separate test or exception for affinity groups. Rather, it reserved its administrative authority to determine the applicability of the regulation in varied circumstances. Further, the Commission extended the opportunity for suppliers to seek further guidance should confusion arise. As explained at length in the preceding paragraphs, the definition of agent is unambiguous and clearly comports with the principles of agency law.
25. Denied. RESA's proposed language would eviscerate the Commission's Final Order in that it would exclude most marketing activities from the Commission's purview, thereby defeating the intent and purpose of these regulations.
26. Denied. As explained above in paragraphs 14, 17, and 18, whether a marketer can contractually bind the supplier is irrelevant to whether a marketer is granted authority to act on behalf of the supplier in other ways, such as marketing and sales.

III. The Door-to-Door Marketing Provisions Fully Comply with the Law, and RESA Fails to Raise an Issue Ripe for Reconsideration.

27. Admitted.
28. Admitted in part, denied in part. PCADV and PULP agree with RESA in so far as it states that suppliers are not required to conduct a background check for all agents. This, we assert, is clear in the current language of the regulation. PCADV and PULP recognize that the regulations use the phrases "door-to-door sales and marketing" and "door-to-door marketing or sales" interchangeably but do not

agree that these phrases cause confusion. Additionally, RESA's proposed resolution inappropriately narrows the scope of this provision and, thus, undermines the purpose of the regulation. (*See* RESA Petition at 23.) PCADV and PULP suggest that the Commission deny RESA's suggested revisions. (*See* paras. 30-33 & 40.)

Moreover, the Commission's Final Order with respect to background checks of current employees/agents is consistent with federal and state law. RESA's Petition only cites limited provisions of the two applicable laws and fails to examine other relevant portions that, in fact, confirm the appropriateness of the Commission's Final Order. RESA's request to strike this component of the background check requirement should be denied. (*See* paras. 34-40.)

29. Admitted.
30. Denied. RESA's assertion that "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) is erroneous. The term "door-to-door" clearly modifies both "sales and marketing activities" in section 111.4(b) and "marketing or sales" in section 111.4(b)(2). RESA's explanation of the same phrase from the tentative order in paragraph 29 is illustrative: " 'door-to-door' [is used] to describe the type of 'marketing and sales activities' for which the supplier would be required to conduct criminal background investigations." (RESA Petition at 17.) Just because the phrase "door-to-door sales" is included in the definition section does not mean that the Commission is barred from using "door-to-door" to modify the defined phrase "sales and marketing."

Additionally, the phrases "door-to-door marketing and sales activities," "door-to-door marketing or sales activities," and "door-to-door sales or marketing activities" are used interchangeably in section 111.9. (relating to door-to-door sales). In section 111.9, the commission sets forth limitations on the conduct of

suppliers vis-à-vis activities, be those “sales” or “marketing,” that involve a door-to-door approach. While the section is titled “door-to-door sales,” the section interchanges the phrases within its sub-sections. For instance, the phrase “door-to-door marketing and sales activities” is used in subsections (a) and (h), while the phrase “door-to-door marketing or sales activities” is used in subsection (a)(1), and the phrase “door-to-door sales or marketing activities” is used in subsection (c) and (d).

RESA does not suggest that the language found in section 111.9 creates confusion and requires clarification; therefore, their claim that the language in section 111.4 needs clarification is inconsistent at best.

31. Denied. PCADV and PULP assert that the Commission’s intent was for the undefined singular term “door-to-door” to modify the defined phrase “sales and marketing.” (See para. 30.)

RESA asserts that it “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.” But the Commission did not expressly opine on whether the restrictions on door-to-door activities applied to both marketing and sales – or, as RESA suggests, only to sales. The Commission’s use, however, of the interchangeable phrases “door-to-door sales or marketing” and “door-to-door marketing and sales” and “door-to-door marketing or sales” found in section 111.9 regarding “door-to-door sales” clearly establishes the Commission’s intent to cover all activities, whether they are sales activities or marketing activities that are conducted door-to-door.

By asking the Commission to revise section 111.4 to apply only to door-to-door sales, RESA is not asking the Commission to clarify its Final Order. Rather, RESA

simply repeats arguments previously made before the Commission to limit application to door-to-door sales rather than any door-to-door activity including marketing. Therefore, RESA fails to meet the requirements for the Commission to grant reconsideration.

32. Denied. Requiring a criminal history record for every person engaged in sales and marketing activities door-to-door does not pose an undue burden on suppliers. But this is beside the point, which is that the Commission has already fully considered whether the burden on suppliers would be undue and, after carefully weighing those considerations, determined that requiring background checks for all door-to-door activities – both sales and marketing – is in the public’s best interest. (Final Order at 23-25.)
33. Denied. The Commission has already limited the application of the background check requirement to those individuals involved in door-to-door activities.
34. Denied. (*See* para. 33.)
35. Denied. Background requirements are not new to this proceeding. The inclusion of background checks has been on the table since the start of this proceeding. RESA was given ample opportunity to comment on the requirements and, indeed, it exercised this opportunity and voiced its concerns. On its face RESA’s Petition appears to raise an error of law, which may be considered on reconsideration. RESA’s assertion, however, that the Federal Fair Credit Reporting Act (FCRA) and the Pennsylvania Criminal History Record Information Act (CHRIA) prohibit criminal record checks for current employees is patently false. FCRA and CHRIA are discussed in detail below in paragraph 37.
36. Denied. RESA’s Petition overstates the requirements in section 111.4(b). Suppliers are only required to ensure that background checks have been conducted for any agent engaged in sales and marketing wherein the agent

approaches the consumer door-to-door. With regard to all other types of agents, the Commission only requires suppliers to “develop standards and qualifications for individuals it chooses to hire as its agents” and prohibits suppliers from hiring agents who fail to meet those standards. As the Commission explained in its Final Order, it believes this regulatory scheme strikes an appropriate balance between the public interest in preventing criminals from conducting sales and marketing door-to-door while preserving the ability of suppliers to employ whomever they wish to perform other duties.

37. Admitted in part, denied in part. Neither CHRIA nor FCRA bar the use of criminal history records to justify post-employment decisions. And clear precedent from the United States Court of Appeals for the Third Circuit indicates that employers are allowed to use criminal records of current employees in this manner.

As RESA correctly recites, employers may use information in an employment applicant’s criminal history to decide whether or not to hire that applicant, and CHRIA proscribes the process in which an employer may deny an application based on that information. 18 Pa. C.S. § 9125(a). However, the Act is silent as to when and how an employer can use the criminal records of existing employees. It does not bar such a use. Nor does CHRIA bar an employer from accessing the criminal history of its current employees. 18 Pa. C.S. § 9121(b).

Moreover, RESA correctly indicates that FCRA authorizes the use of consumer reports (including criminal records) in connection with an employee’s application for employment. 15 U.S.C. § 1681b(b)(2)(C). But this is by no means the only manner in which employers may use an employee’s or agent’s criminal record. Section 1681b(2)(A) provides:

A person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, *unless—*

- (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a [criminal record] may be procured for employment purposes; and
- (ii) the consumer has authorized in writing ... the procurement of the report by that person.

Id. (emphasis added). The term “employment purposes” is defined as “a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or **retention as an employee.**” 15 U.S.C. § 1681a(h) (emphasis added).

Thus, as FCRA clearly states, suppliers may obtain a current employee’s or agent’s criminal history for the purpose of determining whether they are suitable to conduct door-to-door sales and marketing. The only requirement on the supplier is to provide notice and obtain consent prior to conducting the background check on current employees or agents. *See Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429 (U.S. Dist. Ct. 2004), *affirmed by* 135 Fed. Appx. 499 (3d Cir. 2005).

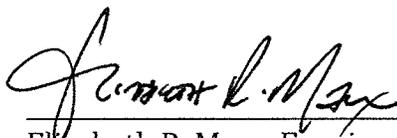
Kelchner v. Sycamore Manor Health Center, a decision from the Middle District of Pennsylvania that was affirmed by the United States District Court for the Third Circuit, definitively confirmed – pursuant to FCRA – that employers can obtain an employee’s or agent’s criminal record. As the case highlighted, the purpose of FCRA was not to prohibit access to an employee’s or agent’s consumer records, but rather to “inform consumers more thoroughly of their rights.” *Id.* at 434. The court went on to explain, “an employer may *require* that an employee authorize procurement of consumer reports,” subject to the employer’s compliance with the notice requirements in the Act. *Id.* at 435 (emphasis added).

38. Denied. The Commission has already considered whether background requirements would impose an undue burden on suppliers and, after carefully considering input from consumer advocates, industry participants, and governmental bodies, determined that the public interest in background checks for door-to-door agents outweighed the burden on suppliers. FCRA's notice requirements are minimal and pose little inconvenience to suppliers. As explained in *Kelchner*, "it is well within an employer's rights under the FCRA to require its employees to sign a blanket authorization to procure consumer reports." *Id.* at 434. Asking suppliers to send out a memo to each of their employees notifying them of the background check requirements cannot be characterized as a significant burden that would warrant reconsideration.
39. Denied. As explained above in paragraphs 37 and 38, CHRIA and FCRA do not prohibit employers from obtaining criminal histories of existing employees. Moreover, FCRA requires only minimal effort on the part of suppliers. Thus, PCADV and PULP urge the Commission to deny RESA's request to remove a portion of the background check requirements.
40. Denied. RESA's requests are unsupported by the law and seek to eviscerate the careful balance of interests that the Commission sought to establish in its Final Order. For the reasons set forth in paragraphs 37-39, PCADV and PULP urge the Commission to deny RESA's Petition and reject any requested revisions.

CONCLUSION

RESA's Petition fails to raise new issues for the Commission to consider but simply seeks to repeat arguments that were previously considered and definitively decided in the Commission's Final Order. Thus, PCADV and PULP strongly urge the Commission to deny RESA's Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Answer to RESA's Petition for Reconsideration and/or Clarification upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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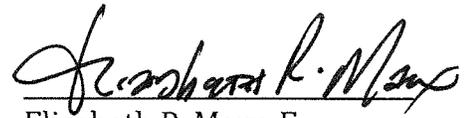
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A handwritten signature in black ink, appearing to read "Elizabeth R. Marx". The signature is fluid and cursive, with a horizontal line drawn across the middle of the name.

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Date: November 19, 2012