

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Licensing Requirements for Natural Gas Suppliers)
Regulations at 52 Pa. Code § 62.101-§62.102) Docket No. L-2011-2266832**

**Comments of the
National Energy Marketers Association**

The National Energy Marketers Association (NEM)¹ hereby submits its comments on the Commission’s Advanced Notice of Final Rulemaking dated February 28, 2013, on licensing requirements for natural gas suppliers (NGSs) [hereinafter “ANOFR”]. The Commission opened this review in January 2012 to determine, "(1) whether the exemption from licensing for marketing services consultants and nontraditional marketers should be discontinued; and (2) whether all natural gas aggregators, marketers and brokers should be required to be licensed as NGSs in order to offer natural gas supply services to retail customers.” (ANOFR at 12). Upon reviewing comments received from NEM and other stakeholders on its initial January 2012 proposal, the Commission issued the instant ANOFR. As explained in NEM’s previously filed comments, we support the exemption from licensing of entities operating exclusively for a supplier in a single utility service territory. NGSs should be responsible for the actions of third parties with whom they have entered into contractual relationships that act exclusively in the NGS’s interest in a single

¹ The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting and power line technologies. This document reflects the views of the National Energy Marketers Association and does not necessarily reflect the views of any specific member..

utility service territory. In the absence of that contractual relationship with the NGS, then the NGS should not be responsible for the entity's conduct. NEM suggested in its initial comments that the Commission should examine whether the exemption from licensing for energy consultants continued to be warranted and consistent with the public interest. NEM also supported the exemption from licensing of non-traditional marketers.

The ANOFR incorporates many of the concepts recommended by NEM, including exempting entities with exclusive contractual relationships with NGSs from licensing as well as continuing the exemption from licensing for non-traditional marketers. In the ANOFR, the Commission is now proposing a uniform licensing process for aggregators, brokers and non-exclusive, non-selling marketers. In response, NEM suggests that the licensure process for different entities in the retail marketplace should be tailored to the activities they perform and the relative technical fitness and financial expertise required to perform their different roles. Additionally, NEM is recommending clarification of the definitions in the proposed regulations for the terms "broker," "energy consultant" and "non-selling marketer" to more accurately express the roles and functions of these entities in the marketplace.

I. Proposed Regulatory Changes in the ANOFR

The recently issued ANOFR now proposes the following changes to the licensing requirements and regulations:

- The term "aggregator" is proposed to be added to the regulations defined as, "an entity, licensed by the Commission, that purchases natural gas and takes title to it as an intermediary for sale to retail customers." (Proposed § 62.101 Definitions).

- The term “broker” is proposed to be added to the regulations defined as, “an entity, licensed by the Commission, that acts as an agent or intermediary in the sale and purchase of natural gas but does not take title to natural gas supply.” (Proposed § 62.101 Definitions). One of the entities this term is intended to encompass is energy consultants. (ANOFR at 14).
- The term "marketing services consultant" would be removed from the regulations and the new term, "non-selling marketer," would be included. “Non-selling marketer” would be defined as, “A commercial entity, such as a telemarketing firm, door-to-door company or auction-type website, that provides marketing services to retail customers for a licensed NGS's natural gas supply services.” (Proposed § 62.101 Definitions).
- A revised definition of the term “non-traditional marketer” would be included in the regulations as follows, “A community-based organization, civic, fraternal or business association, or common interest group that works with a licensed NGS as an agent to market natural gas service to its members or constituents. The nontraditional marketer may not require its members or constituents to obtain its natural gas service through a specific licensed NGS and may not be compensated by the licensed NGS if members or constituents enroll with a licensed NGS.” (Proposed § 62.101 Definitions).
- The newly defined “aggregators” and “brokers” are proposed to be licensed (Proposed § 62.102(a)) as well as a “non-selling marketer” that is under contract to more than one licensed NGS or which has a contract with an end-user retail natural gas customer. (Proposed § 62.102(e)).
- “Non-traditional marketers” would not be required to be licensed (Proposed § 62.102(d)), and non-selling marketers under contract to only one licensed NGS “may”² not be required to be licensed. (Proposed § 62.102(f)). NGSs would be responsible for the actions of nontraditional marketers and non-selling marketers with whom they have an exclusive relationship. (Proposed §§ 62.102(d) and (f)).

The Commission opines that the expansion of the licensing obligation to these entities, “will entail a minimal cost for both the license application fee and bonding,” and that, “the amounts are de minimus and have not had a negative impact on the electric generation supply market.” (ANOFR at 14).

² With respect to exclusive, non-selling marketers, the proposed regulations at Section 62.102(f) use the discretionary term of “may” not be required to obtain a license. In comparison, the text of ANOFR affirmatively states that a license “will not” be required. (ANOFR at 15). See further discussion at pages 9-10 infra.

II. The Licensure Process for Different Entities in the Marketplace Should be Tailored to the Activities, Technical Fitness and Financial Expertise Required to Perform Their Different Respective Roles

As NEM recommended in its comments on the Commission's initial proposal and as incorporated by the Commission into the proposed regulations in the ANOFR with respect to the exemption from licensing requirements for exclusive "non-selling marketers," when an NGS has entered into a contract with a third party entity to act on its exclusive behalf in a single utility service territory, there is no need for separate licensing. However, where no such exclusive contractual relationship exists, and/or where the scope of the relationship and a related contract is limited to an NGS's activity as a billing agent on behalf of the entity, the NGS should not be responsible for the third party entity's conduct. NEM agrees with the Commission proposal not to require licensing of non-traditional marketers.

The Commission is proposing to require licensing of aggregators, brokers and non-exclusive, non-selling marketers. NEM supports the most efficient means of regulation, when needed, that has a low cost to consumers and yields a higher benefit to the public interest. With this in mind NEM recommends that any licensing or registration requirement be imposed only after a showing of demonstrable need to safeguard the public interest has been made. If such a need is demonstrated, NEM suggests that the Commission consider a light-handed approach to licensing or registration, particularly in the event the Commission decides to use a "one-size fits all" approach as appears to currently be contemplated. In NEM's view, any new licensure or registration process should reflect the roles of the different entities in the marketplace and be commensurate with the requisite technical and financial expertise that is required to perform that particular entity's function in the marketplace. If such a process is more than a registration

process it should be narrowly tailored to an entity's respective role in the marketplace to avoid unnecessarily interfering with and constraining commerce as well as restricting market entry by otherwise qualified businesses.

NEM recommends that the Commission allow the stakeholders the opportunity for additional comment on what the licensure process for the different entities should entail. For instance, with respect to licensing of non-selling marketers, an applicable licensing or registration application may require information relevant to the entity's ability to perform sales and marketing support services as opposed to the retail sale of the natural gas commodity,³ which is how the current licensing application is framed. NEM submits that any new license or registration requirement that the Commission determines is needed to serve a demonstrable public interest should be directed at collecting information that helps both the Commission and the Industry to trace patterns of misconduct and improve accountability.

With this in mind, the following information may be worth the Commission's consideration should it decide to license entities who are not exclusive to a single NGS in a given utility service territory: (1) a list of officers and key management personnel; (2) contact information including the entity's principal place of business as well as a local service agent; (3) the entity's express agreement to abide by relevant Commission rules and regulations when it conducts business in the Commonwealth; (4) the demonstration of the requisite technical and operational experience to conduct its business, including how

³ The NGSs rendering of the physical natural gas commodity, including activities such as scheduling, is a different competency and entails a different type of technical sophistication and financial wherewithal to perform than the marketing and sales support function.

long the business has been in existence; and (5) a listing of other states in which the entity currently does business.

Additionally, the Commission may wish to consider, either now or in a future rulemaking, whether some form of minimal registration of individuals engaged in sales and marketing activities to residential consumers, other than NGS employees, exclusive agents, brokers and Multi-Level Marketing representatives is necessary to serve the public interest. Such registration is not necessary for a NGS's employees and their exclusive agents or brokers in any given utility service territory, or Multi-Level Marketing representatives for whom the NGS is and should remain directly responsible. This could be as straightforward and low cost as requiring these individuals to file their names and contact information with the Commission to produce a unique identification number that would be presented to a residential consumer during direct sales or marketing activities and would permit the actions of these individuals to be traceable by the Commission as well as the industry in the case of a pattern of complaints.

III. Clarification of the Terms “Broker,” “Energy Consultant” and “Non-Selling Marketer” Is Necessary to Improve the Accuracy of the Regulatory Definitions

If the Commission proceeds with either licensing or registration requirements as proposed, NEM recommends that certain of the proposed definitions should be clarified to more accurately express the nature of the relationship between the entity, the NGS, and the consumer as well as to better describe the nature of the function that the entity performs.

A. Definition of Broker

The Commission is proposing to adopt a definition of “broker” for the retail natural gas market that mirrors the definition of “broker” included in the Electricity Generation Customer Choice and Competition Act⁴ and the regulations for the retail electric market.⁵ By the terms of the proposed definition, a broker would be required to be licensed. NEM suggests that the definition would benefit from the clarification that the broker is acting “on behalf of” NGSs when it is performing its service. This reflects common industry usage and understanding of that term. Accordingly, NEM recommends that the revised definition of “broker” should be reworded as follows:

Broker – An entity, licensed by the Commission, that acts **on behalf of more than one NGS** as an agent or intermediary in the sale and purchase of natural gas but does not take title to natural gas supply. (additions in bold).

B. Definition of Energy Consultant

NEM explained in detail in its initial comments in this proceeding that of all of the entities that potentially fall within the current definition of “marketing service consultant” that may require additional Commission scrutiny and the removal of the licensing exemption would be “energy consultants” that act on behalf of consumers in the marketplace. The energy consultant may have a direct contract with the consumer to arrange for the sale of natural gas on the consumer’s behalf. Alternatively, the energy consultant may not have a contract with the consumer but will gather bids from multiple suppliers for the consumer and receive its compensation through the NGS’s bill, in which case the energy consultant has

⁴ 66 Pa.C.S.A. § 2803.

⁵ Broker – An entity, licensed by the Commission, that acts as an intermediary in the sale and purchase of electric energy but does not take title to electric energy. See section 2803 of the code. 52 Pa. Code 54.31.

an agreement in place with the winning NGS for the NGS to act as its billing service provider.

The Commission noted its intention in the ANOFR that energy consultants be deemed to fall within the proposed definition of “broker.” (ANOFR at 14). NEM submits that for the sake of clarity in the regulations and to promote consistency in the industry understanding of these entities that a separate definition of “energy consultant” should be included.⁶

NEM recommends that the definition of “energy consultant” be phrased as follows:

Energy Consultant – An entity, licensed by the Commission, that acts on behalf of one or more consumers as an agent or intermediary with one or more NGSs for the sale and purchase of natural gas but does not take title to natural gas supply.

One of the issues relevant to the treatment of energy consultants under the regulations is the disclosure of their fee to consumers. One of the components of the energy price to consumers is the energy consultant’s fee. Adequate disclosure related to energy consultant fees is necessary for full and complete price transparency and for the consumer to be adequately informed as to the nature of the transaction.

C. Definition of Non-Selling Marketer

The Commission has proposed the use of a new term “non-selling marketer” that, “is an entity whose activities are limited to providing only marketing and sales support services on behalf of one or more NGS firms.” (ANOFR at 15). Non-selling marketers under contract to more than one licensed NGS or which have a contract with an end-user retail

⁶ Although the definitions of “broker” and “aggregator” in the electric regulations are drawn from statute, there is no such governing statutory language for the natural gas market. As such, there is latitude for the Commission to separately delineate a definition for “energy consultant,” particularly since it would promote a more accurate description of the entity and therefore facilitate regulatory compliance and understanding.

natural gas customer are proposed to be required to be licensed. A non-selling marketer that is performing pursuant to an exclusive contractual relationship with an NGS would be exempted from licensing. NEM has three suggestions to clarify this proposed term.

First, as a general matter, NEM recommends that the title of the definition itself, “*non-selling marketer*,” may not correctly identify the types of activities that these entities undertake and could be better expressed in a manner consistent with industry usage and understanding. In that regard, NEM would propose that these entities instead be denominated as “marketing services providers” or “sales channel partners.” Since the proposed definition of these entities incorporates the concept of “providing retail marketing services to retail customers,” NEM believes this is consistent with the Commission’s intent in framing the definition.

NEM agrees with the Commission’s use of the exclusivity of the relationship of the “non-selling marketer” with the NGS as the basis for determining whether licensing should be required. NEM suggests that the definition could be improved in this regard if the concept of exclusivity was measured by the conduct of the non-selling marketer’s activities in a single utility service territory. This is a reasonable basis for assessing these relationships and limiting the extent of the licensing requirement for this type of entity. NEM suggests that this change be reflected in proposed Section 62.102(f) as follows:

A non-selling marketer under contract to only one licensed NGS **in a single utility service territory is not required to obtain a license. . . .**” (additions in bold).

In addition, the proposed regulations at Section 62.102(f) state that, “a non-selling marketer under contract to only one licensed NGS *may* not be required to obtain a license.”

(emphasis added). However, in the text of the ANOFR, after agreeing with the argument of NEM that when an entity has an exclusive relationship with a single NGS that the need for a separate license is obviated by the NGS responsibility for the entity's actions, the Commission found that, "a non-selling marketer: under contract to a single NGS *will not* be required to obtain a license." (emphasis added). NEM suggests that the language in Section 62.102(f) be modified to reflect the Commission's finding in the ANOFR and restated as, "a non-selling marketer under contract to only one licensed NGS *in a single utility service territory is not required* to obtain a license." (additions in bold).

IV. Conclusion

NEM appreciates this opportunity to provide further input into the Commission's review of its licensing requirements for natural gas suppliers. NEM suggests that the proposed regulations in the ANOFR would benefit from the following changes:

- 1) Rather than adopt a uniform licensing procedure for all entities, the licensure process should be tailored to the activities that the different entities perform and the relative technical fitness and financial expertise required to perform their different roles; and
- 2) The definitions in the proposed regulations for the terms "broker," "energy consultant" and "non-selling marketer" should be clarified to more accurately express the roles and functions of these entities in the marketplace.

Sincerely,

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