



National Energy Marketers Association

Informal Comments of National Energy Marketers Association On Electronic Communications Straw Proposal

The National Energy Marketers Association hereby submits its informal comments on the “Electronic Communications” Straw Proposal that was circulated by Staff via email on June 28, 2012. Given this early stage of the Straw Proposal, NEM has largely limited its comments to the major policy direction which the Straw Proposal should take. Specifically, NEM’s overall recommendation regarding the Commission’s oversight of electronic communications is that the proper focus should be on obtaining valid enrollments, renewals, and verifications in accordance with the Uniform Business Practices as opposed to regulating the type of electronic medium used in the electronic transaction.

There are numerous legal and public policy grounds that argue against the Commission proscribing only a very limited set of electronic communications and other technologies that are acceptable for ESCO use. Innovations in electronic communications are transforming the way Americans engage in commerce, and they are continuing to evolve at a rapid pace. Restricting permissible electronic transactions with the consumer to only those transactions that take place on an ESCO or utility website portal will stifle industry innovation. The Straw Proposal should allow and encourage industry innovation while adopting UBP safeguards, to the extent that they do not already exist, that remedy any perceived or actual opportunity for wrongdoing that might result from technological innovations.

I. Validity of Electronic Agreements Under the Uniform Business Practices

The Commission’s Uniform Business Practices sets forth in Section 5.B. the methods by which an ESCO may, “solicit and enter into a sales agreement with a customer.” The methods specifically enumerated are electronic agreement, telephonic agreement and written agreement. A more detailed explanation of the electronic enrollment process is set forth in Section 5, Attachment 2, “Electronic Agreement and Authorization Requirements.” UBP Section 5, Attachment 2 lists the requirements that the ESCO must follow to form a valid electronic agreement with the consumer, including necessary disclosures, the electronic process by which the consumer’s consent is to be obtained, a requirement that the customer click a box to indicate it agrees or does not agree to authorize the enrollment, the tolling and length of the rescission period, and customer information requirements to verify the customer’s identity. In addition, UBP Section 10.C.3.a. concerns the provision of the Energy Consumer Bill of Rights to a customer in the context of an electronic enrollment.

Of particular note, the UBP explicitly recognizes the validity of electronic agreements and does not seek to limit or narrowly define what constitutes a valid electronic agreement or the means by which it may be obtained. Attachment 2 provides that, “To enter into an electronic agreement with a customer to initiate service and begin enrollment or to obtain customer authorization for release of information, an ESCO, or its agent, shall electronically record communications with the potential customer.” In other words, the way in which the Commission has treated electronic communications to date, by not adopting overly restrictive technological definitions or approving one means of obtaining an electronic agreement versus another, is appropriate. Given the rapidly changing nature of technology and all of the new ways it is and will be used to allow consumers and businesses to communicate, this approach supports innovation and growth. The current focus in the UBP on ensuring the validity of enrollment underlying the electronic agreement (as opposed to regulating the electronic medium used to obtain it, i.e., web portal, email, social media, text, etc.) should be retained and recognized in the Straw Proposal.

II. Validity of Electronic Signatures and Electronic Records Under Federal and State Law

From a federal and state law perspective, the Straw Proposal’s potential restriction of electronic communications would run afoul of the federal Electronic Signatures in Global and National Commerce Act¹ as well as the New York State Electronic Signatures and Records Act.² The Straw proposal would provide that, “Electronic transactions with the customer should only take place from an ESCO or utility website portal. No enrollments, renewals, verifications or other customer correspondence are allowed on any other digital medium (i.e., Facebook, Twitter, etc.)” NEM submits that the proposal to restrict permissible electronic communications to only those taking place on website portals is violative of both the federal and state E-Sign laws that recognize the validity and enforceability of electronic signatures and electronic records irrespective of the medium through which the electronic signature is obtained or the electronic record is formed. Therefore, ESCOs should be permitted to use social media, text, email and other electronic communications to effectuate enrollments, renewals, and verifications, in addition to web portals, so long as the ESCOs are compliant with UBP procedures.

The federal Electronic Signatures in Global and National Commerce Act at 15 U.S.C. § 7001(a) describes generally the scope of electronic-based transactions that are to be recognized as legally effective, valid and enforceable under law.

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce—

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

¹ 15 U.S.C. 7001 et. seq.

² New York State Technology Law, Article 3.

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

The federal E-Sign Act at Section 7006 defines the terms “electronic record” and “electronic signature” as follows:

(4) Electronic record

The term “electronic record” means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

(5) Electronic signature

The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

Likewise, the New York State Electronic Signatures and Records Act recognizes the enforceable legal status of electronic communications. At Section 304(2) it provides that, “In accordance with this section unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.” Section 305(3) further provides that, “An electronic record shall have the same force and effect as those records not produced by electronic means.”

The New York State Electronic Signatures and Records Act in Section 302 defines the terms “electronic,” “electronic record” and “electronic signature” as follows:

1. "Electronic" shall mean of or relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
2. "Electronic record" shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities.
3. "Electronic signature" shall mean an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record.

Both the federal and state E-Sign Acts were implemented to facilitate commerce by recognizing the increasing importance of electronic transactions in so many facets of personal and business dealings. Under both laws, an electronic signature has the same legal effect as a wet signature and an electronic record is as valid as a record formed by other means. Significantly, neither law delineates the myriad ways the electronic signature and electronic record may be gathered and retained. While today this may occur through websites, emails, texts, and social media pages, the next wave of innovation in electronic commerce is unknown. By framing the laws in this

fashion it ensures that technological innovation is encouraged. The Straw Proposal's approach to electronic communications should be the same. In other words, retaining the focus in the UBP on ESCOs providing the disclosures and following the processes necessary to create a valid enrollment, renewal or verification, rather than narrowly focusing on one form of technology by which it may be accomplished.

III. The Proposed Restriction on Electronic Communications Should Not Be Implemented on Public Policy Grounds

NEM further maintains that it is poor public policy to restrict electronic transactions with the customer to ESCO or utility website portals. Simply stated, the Straw Proposal should avoid picking "winners and losers" on the basis of technology. The rules should be structured to reward the companies that innovate and find ways to serve consumers faster, better, cheaper, and more efficiently rather than choosing one form of technology and requiring all market participants to conform without regard to their individual business plans and internal processes. Another important consideration is the fact that technology changes too fast for anyone to anticipate where it will go or what its best use will be. As such, regulating in a way that favors one technology (web portals) is likely to lead to rules that quickly become obsolete and outdated. Additionally, ESCOs currently use different electronic means to communicate with consumers (email, web, text, etc.), and the Commission shouldn't unnecessarily restrict ESCO business models now in place that have evolved to meet consumer needs, so long as the ESCO is compliant with UBP requirements.

A final consideration specific to the prohibition against using social media for electronic transactions is that ESCOs can and will utilize these venues as part of their business plans to attain statewide, regional and national brand recognition, scope and scale. So long as the activities on the social media outlets are in compliance with the Commission's rules, ESCOs should be permitted and encouraged to engage in cost-effective ways to reach consumers and educate them about energy choice options. Indeed, NEM is not aware of any other jurisdiction contemplating a restriction on electronic communications as is being proposed here.

IV. Response to Specific Straw Proposal Provisions and Language

For the foregoing reasons, NEM urges that the Straw Proposal should retain and recognize the current focus in the Commission's regulations on ESCOs obtaining valid enrollments, renewals, and verifications in accordance with the Uniform Business Practices as opposed to regulating the type of electronic medium used in electronic transactions. Below NEM will respond to the specific Straw Proposal provisions in view of its overall recommendation. (changes to language are indicated in strikethrough and bold).

Electronic Communications

- ~~To the extent possible, and a~~At the option of the customer **and the ESCO**, ESCO and utility correspondence should be **offered to be** made available in electronic format for enrollment notices, verification letters of customer intent, disclosure notices, renewal notices, welcome letters, and other transactions. Uniform Business Practices (UBP) should be updated to allow for this option while ensuring compliance with consumer protection.
- ESCOs and utilities should maintain a database of electronic transactions, and provide explicit customer acknowledgement when electronic transactions are utilized.

NEM RESPONSE: The first paragraph should be modified as shown above such that the language recognizes that the use of electronic communications should be at the option of the customer and the ESCO but should not be a requirement. The use of the phrase “To the extent possible” leans heavily toward creating a presumption that electronic communications must be used. NEM submits that the language changes it proposes will more clearly permit customers and ESCOs to elect other options for communicating with each other.

Section 5: Changes in Service Providers

Application of Electronic Enrollments and General Use of Social Media

- ~~Electronic transactions with the customer should only take place from an ESCO or utility website portal. No enrollments, renewals, verifications or other customer correspondence are allowed on any other digital medium (i.e., Facebook, Twitter, etc.).~~**Electronic transactions with the customer should be performed in a manner that is compliant with existing UBP rules on enrollments, renewals, and verifications.**
- ESCO and utilities that utilize electronic transactions for official components of the business relationship (i.e., enrollment, renewal, verification, etc.) must specifically inform customers of their privacy policies with regard to the use and disposition of their information.
- ESCOs and utilities that utilize electronic transactions for enrollment shall maintain a database of customer acknowledgement as they would a paper transaction.

NEM RESPONSE: Consistent with our overall recommendation, NEM proposes to strike the first paragraph and reword it to focus on the current UBP rules as the basis for valid electronic transactions.

Consumer Privacy Issues and Protections

- ~~• No customer information which is obtained by ESCOs or utilities is to be sold or transferred to outside third parties for any purpose without the expressed permission of the customer.?~~
- In addition to the provisions outlined in the UBPs, ESCOs and utilities are required to comply with all other applicable industry standards or regulations which provide guidance with respect to customer privacy and marketing practices. Among other criteria that may apply, specific regulatory provisions can be found at <http://www.ftc.gov/privacy/protect.shtm>, <http://business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business>, and <http://business.ftc.gov/legal-resources/all/34>. Other statutory and regulatory provisions may also apply (additional research needed).

NEM RESPONSE: The first paragraph is overly broad in that it may implicate the situation wherein an ESCO is engaged in the sale of its business to another ESCO and shares customer information pursuant to that transaction. If the ESCO's contract with the customer discloses that the contract may be assigned, it should be permissible notwithstanding the proposed language in the first paragraph. The language is also overly broad because ESCOs may validly obtain customer information from outside sources, aside from the customer, to facilitate marketing. However, the proposed language may also restrict the sharing of that information. NEM submits that the first paragraph is also potentially duplicative of the requirements set forth in the second paragraph. NEM therefore proposes that it should be deleted. If, despite the foregoing, the first paragraph is retained it should be reworded as follows:

No customer information which is obtained by ESCOs or utilities from their customers is to be sold or transferred to outside third parties for any unrelated purpose without the express permission of the customer.

ESCO Consumer Bill of Rights (ECBR)

- ~~• ESCOs and utilities should make the ECBR available to consumers at any time a sale is made. Once a prospective customer has indicated intent to purchase, the ECBR should be provided as one component of the documents which are provided to the customer for enrollment. For electronic sales, the ECBR should be provided as a non-avoidable screen which a residential customer must affirmatively click to verify they have seen the document, prior to effecting an enrollment.~~ If the customer is enrolling with an ESCO through a utility, sponsored referral program, the utility should also provide the ECBR (electronically or via USPS at the customer's option).

- ECBR is not required to be part of mass mailings for marketing purposes only. ~~If such mailing includes the ability to sign up for ESCO service, the ECBR must be included in the mailing.~~

NEM RESPONSE: NEM requests clarification that this section is intended to apply to electronic communications only. Assuming that to be the case, in the Commission’s recent Order³ adopting the ECBR it described the manner in which the ECBR should be provided in the case of electronic agreements. NEM proposes that the language from the Order be utilized in the first paragraph for the sake of clarity and consistency. With respect to the second paragraph, again assuming this is intended to apply to electronic communications only, we believe that the use of the term “the ability to sign up” may be overly broad in practice inasmuch as many emails provide some way to “push” through to the offeror’s main website where an enrollment could be performed. We propose striking the second sentence of that paragraph.

Proposed Language Modifications

5.B.1.d. – All enrollments initiated via electronic methods (other than telephone sales which meet the provisions of the UBP) must be completed ~~on the ESCO’s official company website or through the ESCO’s official company e-mail address~~ in accordance with requirements in Attachment 2 – Electronic Agreement and Authorization. ~~Enrollments cannot be initiated through social media or other electronic means (Facebook, Twitter, text message, etc.).~~

NEM RESPONSE: This section should be reworded consistent with our recommendation that the focus of the regulations remain on performing an enrollment consistent with the UBP requirements and without limitation as to the electronic medium that is used.

5 – Attachment 2.A. – Reiterate 5.B.1.b.

NEM RESPONSE: Please clarify what is intended by this language.

5 – Attachment F. – The ESCO shall maintain a record of the customer’s acceptance of verification e-mail or other electronic transaction from the ESCO’s official company website, including date and time, in a retrievable format for two years from the effective date of the customer’s acceptance and/or authorization or for the length of the agreement, whichever is longer.

³ Case 98-M-1343, Order Adopting Chapter 416 of the Laws of 2010, issued December 17, 2010, at page 11.

NEM RESPONSE: NEM requests clarification as to whether this is intended to be a new Attachment to Section 5. Additionally, we note that this obligation is already set forth in UBP Section 5.K.3., and its additional recitation would be duplicative.

Section 10: Marketing Standards

Following are proposed changes to the marketing standards:

10. A. – This Section describes the standards that ESCOs and ESCO marketing representatives must follow when marketing residential and nonresidential customers in New York State.

NEM RESPONSE: No suggested changes.

10.C. – Whenever seeking to initiate a sales agreement (through electronic, telephonic, door-to-door, or other interaction with the prospective customer, ESCOs must disclose up front that they are an independent supplier of energy and not associated with public utility.

NEM RESPONSE: NEM assumes this language is meant to be inserted at the beginning of Section 10.C. NEM additionally notes that this requirement is already set forth elsewhere in UBP Sections 10.C.1.b. and 10.C.2.c, regarding door-to-door and telephonic contact with customers. To promote consistent construction, it may be preferable to state in a new paragraph at 10.C.3. that the ESCO disclose it is an independent energy supplier and does not represent the distribution utility.

~~**10.C.3.b.** – If ESCOs employ the use of other electronic communications (e.g., social media sites, text messaging) for marketing purposes, the customer must be directed to the ESCO’s official company website or official company e-mail address for affirmative actions including enrollment, renewal verification, etc. If the ESCO intends to utilize electronic transactions to complete or renew a sale, the company website must electronically provide contain the ESCO Consumer Bill of Rights; provision of the terms and conditions of the sales agreement; and, any other documentation and instructions the consumer may need to complete the enrollment process, including authorization and verification.~~

NEM RESPONSE: This section should be reworded consistent with our recommendation that that the focus of the regulations remain on performing an enrollment or renewal consistent with the UBP requirements and without limitation as to the electronic medium that is used.

10.C.3.c. – ESCOs must provide the customer with a non-avoidable check box and verification e-mail to accept the terms and conditions of the sales agreement or non-automatic renewal as part of an electronic transaction.

NEM RESPONSE: No suggested changes.

10.C.3.d. – ESCOs must provide easily identifiable instructions to the customer which enable the customer to opt-out of receiving further electronic information from the ESCO. Upon receiving this request from a consumer, ESCOs must comply with this request within three (3) business days of receipt of this request (note - this is another way to approach 3-day recession period via electronic communications).

NEM RESPONSE: No suggested changes.

10.C.4.f. – ESCOs and utilities which receive customer inquiries and complaints concerning marketing practices ~~must acknowledge receipt of the inquiry and/or complaint within two (2) business days of receipt of the inquiry or complaint, and~~ must provide a response to the customer in the same medium in which the inquiry or complaint was received within five (5) business days **of receipt.**

NEM RESPONSE: The Straw Proposal offers no rationale for the additional compliance obligation proposed here of acknowledging receipt of an inquiry or complaint within two business days. It is in NEM members best interest to respond to consumer concerns as quickly as possible. However, it is unclear how adding this additional notice requirement will contribute to consumer protection. We suggest the current obligation to investigate customer inquiries and complaints within five business days of receipt is sufficient and should be retained.

Section 2, Eligibility Requirements

ESCO Use of Social Media

2.B. – ESCOs planning to utilize social media as part of their official marketing and sales strategy with consumers are required to indicate this intent as part of their Marketing Standards Quality Assurance Plan (Section 10).

NEM RESPONSE: Further clarification of this proposal is needed as to the extent of the obligation in order to understand what would be required of an ESCO to be compliant.

Housekeeping

D.5.b. – Inclusion of natural gas, to read as “Consequences for non-compliance in one or more of the categories set forth in UBP Section 2.D.4 may include one or more of the following restrictions on an ESCO’s opportunity to sell electricity and/or natural gas to retail customers:”

NEM RESPONSE: No suggested changes.

V. Conclusion

NEM appreciates the opportunity to offer its suggestions on the Electronic Communications Straw Proposal and looks forward to further dialogue on this important issue.