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By Electronic Filing

Donna Nickerson, Secretary
Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

**Re: Comments of Retail Energy Supply Association
Regulation Docket No. 49**

Dear Ms. Nickerson:

Enclosed please find Comments of the Retail Energy Supply Association in the above-captioned proceeding.

Please contact me should you have any questions regarding this matter.

Sincerely,

A handwritten signature in blue ink that reads 'Brian R. Greene'.

Brian R. Greene

Enclosures

c: Service List (by Email only)

The revised Rules represent an otherwise consensus document that properly balances consumer protections with the development of a competitive retail electricity market. RESA commends the stakeholders for their cooperation and flexibility in narrowing the issues to date.

The revised Rules introduce new consumer protections that will require Electric Suppliers to, among other things, provide prospective customers with additional information about their contract offers and provide additional information to customers on an ongoing basis in certain instances, such as when customers have contracts with variable monthly prices. Electric Suppliers will be required to include additional information in their marketing materials and contracts, and the revised Rules introduce a “contract summary” that explains the most pertinent terms of the contract, similar to a “Schumer Box” for credit card accounts.³ The revised Rules also enhance the renewal notices that Electric Suppliers must send when an existing contract renews or expires. These types of additional or enhanced information from Electric Suppliers to prospective and current customers make for a more knowledgeable and effective marketplace, protect customers’ interests and allow for the further development of Delaware’s competitive retail energy market.

Moreover, the revised Rules would shorten the time period for a customer to switch electricity providers,⁴ thereby allowing customers take advantage of desirable electricity supply offers. The revised Rules also address marketing channels such as door-to-door and

³ “A Schumer Box is an easy-to-read table or ‘box’ that discloses the rates, fees, terms and conditions of a credit card agreement as required under the Federal Truth in Lending Act (TILA). It requires that all credit card companies use the same standardized format so that consumers can easily understand and compare rates and fees associated with a credit card.” See <https://www.credit.com/credit-law/what-is-a-schumer-box/>. The same principle applies to the use of the Contract Summary.

⁴ As discussed below, one of the two non-consensus items is the length of the rescission period, which RESA contends should be three business days and not seven business days as Staff recommends, which would help to ensure the shortest time period possible for a customer to effectuate a switch to his or her choice of suppliers.

telemarketing solicitations, bolstering consumer protections in those areas to ensure that customers who enroll through one of these channels do so without intimidation and with full knowledge of the products they are considering.

All of that being said, two issues remain undecided. First, Section 6.2.2.7.1 (and other places throughout the revised Rules) references a three business day rescission period. RESA supports a three business day rescission period as consistent with the rescission periods in neighboring Pennsylvania and the District of Columbia (both three business days) and Maryland (no rescission period), as well as with Delaware's Home Solicitations Act and the Federal Cooling Off Period (both three business days), which apply to door-to-door sales. Staff prefers a longer, seven business day rescission period, which is not only inconsistent with neighboring jurisdictions and Delaware and federal law, but also would unnecessarily extend – by four business days – a customer's wait time to enroll in a desirable electricity product.

Second, under Section 3.3, Delmarva would be required to make available to licensed Electric Suppliers customer lists that include more information than what is included in Delmarva's current customer list. Delmarva would update the list monthly and send annual notices to customers that they could opt-out of the list for one year at a time. These provisions ensure that the list is useful to electric suppliers, who rely on similar lists in other states – primarily Pennsylvania – to develop new products that are tailored to customers, to locate and communicate with customers, and to assist in the enrollment process when a customer does not have on hand all of the information required to process their enrollment. Finally, the customer list provisions prohibit electric suppliers from using the list for reasons other than marketing or providing electricity supply service without customer consent, and require the Electric Supplier to put in place safeguards to prevent disclosure of the information in the lists. In this section,

RESA relied heavily on the policies and practices adopted by the Pennsylvania Public Utilities Commission (“PAPUC”), which mandates the provision of customer lists for its six-million-plus electricity and natural gas distribution customers in a fashion similar to what is in the revised Rules. Rather than view the PAPUC for what it is – a market leader – Delmarva and presumably Staff’s view it, and the policies and practices it has adopted, as an anomaly. That is unfortunate.

As explained below, RESA recommends that the Commission adopt the revised Rules as presented, including a three business day rescission period and expanded customer lists.

II. The three business day rescission period in the revised Rules is appropriate.

1. A three business day rescission period is consistent with Delaware law, the Federal Cooling Off Period, and neighboring jurisdictions.

RESA supports the revised Rule’s three business day rescission period, which is consistent with Delaware and federal laws, and also neighboring jurisdictions.

Specifically, under Delaware’s Home Solicitations Act (“HSA”),⁵ which governs door-to-door sales, and the Federal Trade Commission’s Cooling Off Rule,⁶ residential buyers may cancel a transaction at any time prior to midnight of the third business day after the date of the transaction. Staff, however, proposes a seven business day rescission period, which contradicts the HSA and Federal Cooling Off period by adding four business days to the rescission period. Adopting a seven business day rescission period would implement one rescission period under the HSA and another under the Electric Supplier Rules. That is not appropriate.

Staff recommends a seven business day rescission period because that would be consistent with the Delaware Telemarketing Registration and Fraud Prevention Act, 6 Del. C. §

⁵ See 6 Del. C. § 4401 *et seq.*

⁶ See 16 C.F.R. § 429.1.

2501A *et seq.* (“TRFPA”).⁷ However, the TRFPA does not apply to Electric Suppliers. Specifically, under 6 Del. C. § 2503A(g)(2), “[a] seller or telemarketing business operating within the jurisdiction of the Public Service Commission” is exempt from the TRFPA. Electric Suppliers are “within the jurisdiction” of the Commission by virtue of the fact that, among other things, they must be certificated and must adhere to the Commission’s various orders, rules, and regulations, including the Electric Supplier Rules at issue in this proceeding. The TRFPA and its rescission period, therefore, do not apply to the sales activities of Electric Suppliers.

Moreover, a three business day rescission period is in line with the rescission periods in effect in Maryland, Pennsylvania, and the District of Columbia. Maryland does not require a rescission period in its electricity consumer protection regulations, and instead relies on the three business day rescission periods found in the Maryland Door to Door Solicitation Act and the Federal Cooling Off Period.⁸ The District of Columbia has adopted a residential rescission period of three days from the date of the contract.⁹ Pennsylvania regulations include rescission periods that align with its Door-to-Door Solicitation Act requirements, which mirror Delaware’s HSA – three days from the date the contract is signed.¹⁰ Thus, reducing the current rescission period to three business days is in line with Delaware’s neighboring jurisdictions.

2. A three business day rescission period is consistent with the goal of allowing customers to take advantage of products quickly.

One of the reasons that Delaware, like so many other states, decided to review its consumer protection regulations was to decrease the amount of time for a customer to effectuate

⁷ Staff Comments at 6 (filed Oct. 17, 2016).

⁸ *See, e.g.*, Md. Commercial Law Code Ann. § 14-302 (three-day rescission period for door-to-door sales); Code of Md. Regulation 20.53.07.11 (no rescission period for residential customers); Code of Md. Regulation 20.53.06.07 (no rescission period for non-residential customers).

⁹ *See* District of Columbia Consumer Bill of Rights, § 327.44.

¹⁰ 52 Pa. Code § 54.5(d).

a switch to an electric supplier. Customers are growing increasingly accustomed to making real-time shopping decisions and immediately reaping the benefits of those decisions – they expect to get what they buy in “Amazon time.” Customers today can order items online and have them arrive in the next day or two.¹¹ They can order perishable or frozen products knowing they will arrive in time for dinner the following night. They can instantly transfer money from bank account to bank account and deposit a check by taking a picture of it with their smart phone. Yet, Delaware customers currently must wait between 15-44 days to change their electricity provider. The revised Rules would decrease that wait time to three business days,¹² which is a dramatic improvement, but the Electric Supplier first must wait out the rescission period before submitting the electronic transaction to the utility to switch the customer’s service. Thus, under Staff’s proposed seven business day rescission period, a customer would actually wait 10 business days – potentially over two weeks – to enroll with an Electric Supplier. RESA recommends adoption of the revised Rules, pursuant to which a customer would wait up to six business days – the three business day rescission period plus the three business days for the utility to effectuate the switch. Staff’s proposal unnecessarily lengthens by four business days the amount of time for customers to take advantage of products they desire.

Staff has not pointed to any circumstances in jurisdictions such as Maryland, Pennsylvania, or D.C. to support a rescission period longer than three business days, nor has Staff explained why the rescission period for electricity purchases should be longer than the rescission period for other products under the HSA or Federal Cooling Off period. RESA members, who market electricity and natural gas products to customers in virtually every state where choice is allowed, see that customers generally do not understand why they cannot switch

¹¹ Amazon.com now offers *same-day delivery* in certain markets.

¹² See Section 4.0 of the revised Rules.

to the electric supplier or product they want, when they want it, and instead have to wait simply because the utility's systems or the Commission's rules require a long wait time. There is no reason to treat a customer's decision regarding electricity any differently from his or her decisions regarding other products. A longer wait time – even the four additional business days that Staff advocates – brings with it confusion and frustration that significantly diminishes a customer's shopping experience and denies customers the benefits they have chosen, whether it is saving money on their energy bill, enrolling in a secure price for a certain period of time, or getting their renewable power more quickly.

For these reasons, RESA recommends that the Commission adopt the three business day rescission period included in the revised Rules.

III. RESA recommends the adoption of Section 3.3, customer lists.

1. The information included in the proposed customer lists enables competition.

Delaware is at a critical juncture with respect to the development of retail electric competition. After more than a decade of choice, only 10% (27,815) of Delmarva's 277,811 residential customers have switched to an Electric Supplier as of July 29, 2016.¹³ Section 3.3 of the revised Rules requires Delmarva to provide expanded customer lists to Electric Suppliers, and if adopted would be another tool for Electric Suppliers to efficiently and effectively identify, communicate with, and educate customers about available products and choice in general. The expanded customer lists would include significantly more information than under Delaware's current rule – including the customer's usage information and account number and 22-digit

¹³ See <http://depsec.delaware.gov/pdfs/electric/2016July.xls>.

Service Number – and will therefore encourage the development of competition in the mass market. Simply put, the more information available, the quicker the market can develop.

To begin with, the expanded customer lists allow Electric Suppliers to design products that satisfy customers' individual desires and budgets. Historical usage, consumption patterns, and monthly peak demand information will enable Electric Suppliers to develop new and innovative offerings tailored to the needs and desires of Delaware electricity customers. Additionally, historical usage information enables Electric Suppliers to project their wholesale costs to serve a customer, eliminating unnecessary risk premiums that increase costs for all customers. Therefore, the expanded customer lists can benefit customers by affording Electric Suppliers the tools to offer lower price offerings not available in today's market, as well as new, more customized products tailored to customers' needs.

Additionally, the expanded lists assist in the enrollment process when customers do not have or have not memorized the information they need to enroll; as an example, a customer enrolling at a kiosk or store front will not know their Delmarva account number or 22-digit Service Number that is required to enroll with Delmarva. Customers do not memorize their account number or their 22-digit Service Number like they memorize their cell phone number, nor do they walk around with their electricity bill. The Electric Supplier's ability to access a secure online list that includes information necessary to enroll is a benefit to customers, by allowing for a smooth enrollment process with the Electric Supplier and product of their choice.

2. There is no evidence of problems in other states with similar customer lists.

Delmarva and presumably Staff oppose Section 3.3, arguing that the proposed customer lists would include too much information. Delmarva and Staff ignore the reality that, in other

states, millions and millions of customers are included in opt-out lists with similar information, and no noteworthy problems have occurred.

Under the current Rule 3.7, the only information in the lists is the customer's name, billing address, and service address. Other states provide substantially more information than the current Rule 3.7. Revised Rule 3.3 would expand the information in the list to include numerous other data points, including a customer's account number, 22-digit service number, usage information, and so forth. Experiences in other states, namely Pennsylvania, do not support Delmarva's and Staff's arguments in opposition to Section 3.3.

Including more information on the customer lists has not been an issue in Pennsylvania, where retail suppliers have access to lists that contain approximately 25 data points.¹⁴ These "Eligible Customer Lists" ("ECLs") have been available to retail electricity suppliers for years and were recently expanded to include customers of natural gas utilities.¹⁵ Notably, Delmarva's new affiliate, PECO, for electricity and natural gas is one of the Pennsylvania utilities providing these ECLs to retail suppliers. Experience has demonstrated that Pennsylvania customers have benefited from greater access to supplier offers, and there have been no widespread or systemic problems with suppliers' use of the lists. Any problems have been scattered, isolated incidents and, notably, the PAPUC has not initiated any enforcement action as a result of a supplier mishandling the list or using it inappropriately.¹⁶

¹⁴ *Interim Guidelines For Eligible Customer Lists*, Docket No. M-2010-2183412, Final Order on Reconsideration entered Nov. 15, 2011 (<http://www.puc.state.pa.us/pcdocs/1157758.docx>).

¹⁵ See PAPUC Final Order in Docket No. M-2012-2324075, Sept. 23, 2013 (http://www.puc.state.pa.us/about_puc/consolidated_case_view.aspx?Docket=M-2012-2324075).

¹⁶ During past few weeks, counsel for RESA spoke with the Director of the PAPUC's Office of Competitive Market Oversight (OCMO) and confirmed these facts. Counsel for RESA, with the Director's permission, encouraged Delaware stakeholders to contact the Director and discuss Pennsylvania's experience with customer lists. Counsel provided the Director's phone number but is not aware if any other stakeholder contacted the Director.

The revised Rules address an Electric Supplier's access to and use of the list. Working with stakeholders, RESA agreed to edit the revised Rules to include how a supplier must keep its list, who has access to the list, how it can be used, and who can view the information on the list.¹⁷ Pennsylvania, with *millions* of electric and gas customers, has proven that the provision of customer lists with numerous data points can assist in the development of competitive retail markets without causing the problems that some might have this Commission believe it will.¹⁸

3. Continuation of Delaware's "opt-out" methodology is reasonable and should be adopted, but should not be a "forever" opt-out election.

Similar to the current Delaware Rule 3.7, revised Rule 3.3 would require customers to opt out of the customer list. The difference is that Delmarva has interpreted the current rule to say that once a customer opts out, they are opted out forever unless they advise Delmarva otherwise. Under the revised Rule, Delmarva would be required to "refresh" its list annually, notifying customers that they must confirm their selection on an annual basis or their information will be included in the upcoming list. RESA supports an opt-out list with annual refreshers.

First, the opt-out process is a reasonable way to implement customer lists; Delaware already decided this issue years ago.¹⁹ For its part, the PAPUC held in 2011 that: "[w]e find that

¹⁷ See Section 3.3.3 of the revised Rules.

¹⁸ Other states also provide a substantial amount of information in their customer lists on an opt-out basis. For example, Virginia has limited opportunity for choice, but a licensed supplier can go to Dominion Virginia Power's website and pull the following information about Dominion's approximately 2.2 million customers: (i) customer name; (ii) service address; (iii) billing address; (iv) either an account number, a service delivery point, or universal identifier, as applicable; (v) meter reading date or cycle; (vi) wholesale delivery point, if applicable; (vii) rate class and subclass or rider, as applicable; (viii) load profile reference category, if not based on rate class; and (ix) up to twelve months of cumulative historic energy usage and annual peak demand information as available. See 20 VAC 5-312-60 (<http://lis.virginia.gov/cgi-bin/legp604.exe?000+reg+20VAC5-312-60>). Also, in Massachusetts a supplier can access substantial information as well. See https://www9.nationalgridus.com/masselectric/home/forms/5_opt_out.asp.

¹⁹ Order No. 7023, Regulation Docket No. 49 (September 5, 2006).

the opt-out process is a reasonable and efficient means by which customers can exercise their right to withhold confidential information,” and that “without access to ECL information, the process of switching a customer to the electric service of an [electric supplier] would be extremely impaired.”²⁰ It also held that: “the opt-out process has been working well in Pennsylvania for many years....”²¹ Maryland, Massachusetts, and Virginia have also approved opt-out customer lists, with the Virginia Commission holding that: “an ‘opt-out’ approach is necessary to help foster a competitive market.”²² Massachusetts also adopted an opt-out policy:

... after consideration of the comments received on this issue, the Department finds that an “opt-out” system better meets the legislative purpose of providing suppliers efficient access to information that would expand consumers' competitive options. The affirmative action required of consumers in an opt-in program may limit the benefits of the Customer Information Lists because many customers may not be sufficiently motivated to respond to their distribution companies before an opt-in deadline. An opt-out program will minimize the affirmative actions a customer must take, thereby increasing the likelihood these customers will be able to benefit from an active competitive market. The more information available, the quicker that market will develop. At the same time, a well-designed opt-out program will appropriately recognize consumer's privacy concerns by ensuring that they are provided with a reasonable opportunity to keep their usage information private.²³

Second, Delmarva's and Staff's arguments appear to be based on the faulty premise that an opt-out process somehow endangers customers and puts their information at risk. These speculative fears are not supported by examples of actual breaches of customer security either in Delaware or any other opt-out jurisdiction. Delmarva and Staff cannot point to studies or

²⁰ Final Order on Reconsideration at 15, Docket Nos. M-2010-2183412, M-2009-2104271, and P-2009-2135500 (entered Nov. 15, 2011).

²¹ *Id.* at 16.

²² *In Re: Rules for Retail Access*, PUE- PUE-2001-00013, 210 P.U.R.4th 423 (June 19, 2001). Virginia's rules were adopted prior to the General Assembly's decision in 2007 to re-regulate; in any event, licensed suppliers can still, and do, access the customer lists on Dominion Virginia Power's website.

²³ Investigation by the Department of Telecommunications and Energy on its own Motion into Competitive Market Initiatives, Opinion at 18, 2001 Mass. PUC LEXIS 66.

concrete facts to support their fears. The reality is just the opposite, with the Pennsylvania experience showing that opt-out lists with the same types of customer information proposed in the revised Rules have not been a problem.²⁴

Third, revised Rule 3.3.3 – which was further revised within the past two weeks after discussions between the stakeholders – sets forth the Electric Supplier’s responsibilities regarding safeguarding the list and who can access it, thereby addressing Staff’s and Delmarva’s unsupported concerns that Electric Suppliers will disclose the information:

An Electric Supplier shall put in place proper safeguards to prevent the disclosure of information contained in the customer list provided by the EDC. As such, the information contained in the customer list is to be used by the Electric Supplier only for the purpose of marketing and providing electricity supply services directly to Customers. An Electric Supplier shall keep the customer list in a secure and protected location. An Electric Supplier may provide access to the information in the customer list to those authorized by the Electric Supplier who require such information to market and provide electricity supply services to Customers. Otherwise, an Electric Supplier shall not disclose information contained in the customer list except upon authorization of the Customer.²⁵

Fourth, the opt-out election should not be forever, thus the requirement in revised Rule 3.3.1 that the utility send a notice every year requiring the customer to confirm his or her election to opt-out. Without a refresher, the lists are allowed to become stale as customers are not reminded of the opportunity to be included in the list. Case in point: in Delaware, approximately 112,000 customers since 2006 have opted out, including when they initiate service over the phone during a discussion with Delmarva or online on Delmarva’s website. Thus, with approximately 312,000 total customers, that means almost 36% of customer have opted out over a 10-year time period, without receiving any notices to get back on the list. The PAPUC, in

²⁴ See footnote 16.

²⁵ See revised Rule 3.3.3, as amended by the stakeholders after publication in the October 1, 2016 Delaware *Register of Regulations*.

requiring utilities to refresh their lists and send notices to customers every three years, held that reminding customers of their ability to be included in the list is a benefit to customers and competition: “[w]e believe these updates are in the best interest of all market participants as they allow customers to be periodically reminded of their ability” to opt out of the list.²⁶ It does not do the customer, or the market, any good to allow for stale opt-out elections.

Therefore, RESA recommends that the Commission adopt the annually-refreshing opt-out procedure in revised Rule 3.3.

4. Customer lists with sufficient information will enable electric suppliers to utilize marketing channels preferred by many consumer advocates.

Importantly, the customer list provision in the revised Rules includes information necessary to facilitate enrollments. As explained above, customers do not generally carry their electricity bills with them, nor have they memorized their account number or their 22-digit Delmarva Service Number, which is required to process an enrollment. In that sense, purchasing an electricity product is very different from purchasing other goods or merchandise; even in the case of cell phone service, a customer would need to provide his or her phone number, which most everyone has memorized or they have their phone with them. Not so with electricity.

As a result, assuming a customer has not opted out of the list, the information in the proposed customer list helps to ensure a smooth enrollment. An Electric Supplier can access the secure list, use the information in the manner prescribed by the revised Rules, and enroll the customer even at venues such as at a mall, storefront, or kiosk when the customer is sure to not have all of his or her enrollment information.

²⁶ Final Order, Docket No. M-2010-2183412 (entered October 23, 2014)(directing the utilities to perform triennial company-wide solicitations to allow customers to opt-out of inclusion on the Eligible Customer Lists).

On the flip side, without access to the customer information set forth in the revised Rules, Electric Suppliers will be effectively limited to marketing at places where customers have easy access to their electricity bills – *e.g.*, at customers’ homes. While the revised Rules address consumer protections for door-to-door and telemarketing solicitations, consumer advocates generally prefer other marketing channels. At venues away from the home, such as at a mall or storefront, a prospective customer can easily disengage from discussion with an Electric Supplier, and whatever intimidation factor that is allegedly present at a home sale does not exist. Yet, without the customer list information set forth in the revised Rules, Electric Suppliers will have little choice but to go where the information is easily accessible, which means additional resources dedicated to door-to-door and telemarketing sales channels.

IV. Conclusion

If ever there were a bright light at the end of a long tunnel, this is it. After over four years, RESA requests that the Commission adopt the revised Rules as presented on November 1, 2016, including: (1) the three business day rescission period that appears in various places in the revised Rules; and (2) the customer list provisions in Section 3.3.

Respectfully submitted,
RETAIL ENERGY SUPPLY ASSOCIATION
By Counsel



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