State of New Jersey
Board of Public Utilities

Comments of the Retail Energy Supply Association to the Energy Competition Standards Proposed Amendments: N.J.A.C 14:4-2.3, 3.2, 3.4, 3.5, 6.3, 6.5, 6.6, 6.7, 6.9, and 7.6 Proposed New Rules: N.J.A.C. 14:4-6.11 and 7.12

I. INTRODUCTION

The Retail Energy Supply Association ("RESA")[1] respectfully submits these comments in the above-referenced proceeding addressing the Proposed Amendments to the Energy Competition Standards at N.J.A.C 14:4-2.3, 3.2, 3.4, 3.5, 6.3, 6.5, 6.6, 6.7, 6.9, and 7.6 and the Proposed New Rules to the Energy Competition Standards at N.J.A.C. 14:4-6.11 and 7.12. The Board of Public Utilities' ("Board's") Energy Competition Standards are particularly significant to RESA, whose member companies are licensed third party suppliers ("TPSs") in New Jersey that provide customers with robust choices of both commodity-related services, like fixed and market-price indexed products, and green-related products such as renewable energy, demand response programs, energy efficiency, and carbon reduction.

RESA has been an active participant throughout the Board's process regarding rule re-adoption and amendments to the Energy Competition standards, which began in 2010. With regard to the current set of amendments and new rules which were published in the New Jersey Register on May 21, 2012, RESA has concerns of both a technical and substantive nature, especially concerning the new provisions regarding energy anti-slamming, government aggregation and retail choice consumer protection. Accordingly RESA submits the following specific comments and suggested changes, which will better serve energy consumers and promote the robust, competitive marketplace envisioned by the Electric Discount and Energy Competition Act ("EDECA"), N.J.S.A. 48:3-43, *et seq.*

II. N.J.A.C. 14:4-2.3(h)

RESA has several concerns with this new subsection, which provides that:

> If a TPS receives a customer drop notice from an LDC, the TPS may not submit a change order to the LDC to reinstate that customer unless it receives authorization from the customer after

[1] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

> the date of the drop notice in one of the methods set forth in N.J.A.C. 14:4-2.3(c) or it can demonstrate that the switch was done without the customer's authorization.

RESA does not support the provision for several reasons. First, New Jersey already has rigorous anti-slamming regulations that require TPSs to obtain customer authorization to confirm a customer's intent to accept service from a TPS. Additionally, New Jersey already has specific regulations and procedures to address customer allegations of slamming. These existing customer protection regulations are sufficient.

Second, this proposed new regulation unduly treats an LDC drop notice as a true and valid indication of a customer's intent to no longer receive electric or gas service from the TPS. Because the intent of this regulation appears to be intended to prevent a TPS from re-instating a customer who has not authorized such re-instatement, it inappropriately assumes that in all instances where an LDC initiates a customer drop, the customer has taken some recent action to request the drop—for example, by switching to another TPS or by requesting a switch to BGS service. However, in many cases, LDC drop notices are a result of error either on the part of the LDC or the customer (for example, where an unauthorized member of the household selects a new TPS). It is unduly burdensome to require TPSs to re-establish customer authorization in order to continue serving a customer simply because an LDC initiates a drop transaction.

Third, the proposed rule unduly places the burden and expense of confirming a customer's intent on TPSs, rather than requiring the LDCs to confirm a customer drop notice. A TPS must already meet rigorous customer authorization standards at the time of initial enrollment, including obtaining a signed contract, documenting an electronic transaction to enroll, or verifying a telephonic enrollment through an audio recording and Third Party Verification. There are no such prerequisites for an LDC-initiated drop transaction Therefore, it is inappropriate to assume that an LDC initiated drop transaction is a more "valid" indication of customer intent than a TPS initiated re-instatement transaction.

Finally, RESA does not support this rule because the term "demonstrate" is too vague, as it does not specify the particular methods by which a TPS may show that an LDC initiated drop occurred without the customer's authorization. RESA asserts that the Board should instead delineate the specific methods by which an LDC initiated drop occurred without the customer's authorization.

For all of the foregoing reasons, RESA urges the Board not to adopt this proposed new rule. However, if the Board determines that there is a need to establish customer intent in cases regarding LDC initiated drop transactions, RESA submits that the LDCs should be required to verify customer intent before initiating a drop transaction. Such a requirement would be both equitable and would also avoid potential disruption in customer service. RESA offers the following revision, should the Board wish to adopt this approach:

> An LDC may not submit a customer drop notice to a TPS, unless the LDC obtains oral or written confirmation from the customer verifying that the customer has authorized the drop. An LDC must provide the TPS with such documented customer authorization.

> Following the receipt of an authorized drop notice for which the LDC has obtained oral or written confirmation, the TPS may not submit a change order to the LDC to reinstate that customer unless it has valid authorization from the customer to continue to supply electric generation service to the customer consistent with one of the methods set forth in N.J.A.C. 14:4-2.3(c).

RESA believes that this revised language protects customers, while also providing both the necessary specificity and a more proportionate share of burden among LDCs and TPSs.

III. N.J.A.C. 14:6.3 (l)

RESA believes that the prohibition on exit fees for leaving a government energy aggregation program should be applicable to both residential and non-residential customers, rather than just residential customers. The same policy—i.e., promoting energy competition and choice consistent with EDECA—should apply for all customers, regardless of whether they are residential or commercial.

IV. N.J.A.C. 14:4:6.5 (g)

RESA believes that in addition to including the information about the customer's right to opt-in or opt-out of a government-private energy aggregation program as set forth in §14:4-6.5(f), the Board should also be required to include in the form notice specific information about how customers could shop for electricity generation service with a TPS. In order to convey such information, the form notice should reference the portion of the Board's website that contains a list of TPSs and their contact information in each service territory.

V. N.J.A.C. 14:4-6.6 (s)

RESA believes that in addition to including the information about the customer's right to opt-in or opt-out of a government-private energy aggregation program as set forth in §14:4-6.6(r), the Board should also be required to include in the form notice specific information about how customers could shop for electricity generation service with a TPS. In order to convey such information, the form notice should reference the portion of the Board's website that contains a list of TPSs and their contact information in each service territory.

VI. N.J.A.C. 14:4-7.6 (a)

For several reasons, RESA does not support the new requirement in this provision that:

> On or before the date the TPS submits a change order to an LDC, and within 24 hours of when a customer authorizes a contract renewal, the TPS shall send a copy of the TPS contract to the customer.

First, TPSs are not required to submit a change order when a customer renews a contract and imposing this requirement through this subsection would be inconsistent with the current

Energy Competition standards, as well as unnecessary, unduly burdensome and costly to both TPSs and customers. Second, the 24-hour timeline is unrealistic and unworkable for TPSs to send a contract to customers either upon initial acceptance or customer authorization of a contract renewal. RESA submits that a five-day timeline would be more appropriate and reflective of market conditions, while still meeting customer expectations. Finally, RESA believes that the requirements in this subsection should only apply to residential customers, since commercial customers do not need any such requirement.

In addition to these concerns with the first new requirement in the provision, RESA also has concerns with the second requirement that:

> The TPS may do this by an electronic method or regular mail at the option of the customer, or if the customer signed up in person, the TPS may hand deliver the contract to the customer.

RESA submits that sending a copy of the agreement using the method selected "at the option of the customer," adds a new and unnecessary level of administrative complexity for TPSs. Instead, RESA believes that the language should be modified to enable TPSs to decide whether to provide a copy of the contract by regular mail, electronic mail or hand delivery, and then give customers the option to request a follow-up copy of the contract using an alternative method.

To address the aforementioned concerns, RESA submits that the proposed language at the end of this subsection should be modified to read:

> A TPS must send residential customers a copy of the TPS contract upon the initial establishment of service and when a customer authorizes contract renewal. The TPS may do this by an electronic method or by regular mail, or if the customer signed up in person, the TPS may hand deliver the contract to the customer. Upon initial establishment of service, a TPS must send the residential customer a copy of the TPS contract within five business days after the customer accepts the TPS contract. When customer authorization of a contract renewal is necessary, the TPS shall send the residential customer a copy of the renewal contract within five business days after the customer authorizes contract renewal.

RESA believes that this modified language represents the appropriate balance between market conditions and the needs of residential customers.

VII. N.J.A.C. 14:4-7.6 (l)

RESA does not support the Board's proposed addition of this subsection, which would require that:

> The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law.

First, this new rule imposes added risk on TPSs, which will likely lead them to price their products in an upward manner. Second, this rule will increase administrative complexity for TPSs, as well as confusion among customers, as TPSs will be motivated to lengthen their contracts and make them more vague to protect themselves from any type of market change that may arise. Third, RESA is not aware of any particular public outcry or examples of TPSs using amendment provisions in an inappropriate manner. Indeed, material change provisions are common in contracts for all kinds of products (credit cards, mortgages, etc.). Finally, this rule is unnecessary, because customers are always free to reject contracts with "material change" clauses and choose BGS service or shop with another TPS that does not have such a provision.

For the foregoing reasons, RESA believes that the proposed new provision should be altogether rejected. However, should the Board determine that there is a need to explicitly prohibit "material change clauses" absent a customer's affirmative consent, RESA submits that the rule should be modified in such a way as to mitigate the mechanical and practical challenges it poses for TPSs. First, the rule should not apply to non-residential customers, which are more sophisticated than residential customers and frequently execute contracts that include provisions permitting amendments under certain circumstances. Second, the rule should provide similar flexibility for non-material changes as it provides for material changes. The current proposed language leaves the definition of "material change" open to additions ("including, <u>but not limited to</u>"), but does not leave the definition of a "non-material change" open to such additions. Similar flexibility should be provided for non-material changes, to allow TPSs to make ministerial changes without affirmative consent from the customer. Third, the rule should exclusively apply to any new contracts entered into after the effective date of the rule since having to revise existing contracts would be burdensome and cost prohibitive. Finally, the rule should be amended to provide that execution of specific pricing provisions in an original contract are not a "material change." For example, if the contract is for an introductory fixed rate with a variable price after month three (3), then the TPS should be free to change the price starting in month four (4) without obtaining affirmative consent. Similarly, if the contract provides for the pass-through of certain cost items as they change, then the TPS should be able to update the price for those items without providing customer notice each time.

To address the aforementioned concerns, RESA submits that the proposed language at the end of this subsection should be modified to:

> Residential contracts entered into after the date this rule goes into effect may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. "Non-material" terms include, but are not limited to, those regarding the address where payments should be sent or the phone number to be used for customer inquiries. Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law. Changing the price in a manner specifically agreed to by a customer in the original contract shall not be considered a "material change."

As another alternative to this proposed rule, RESA believes that the Board might enact a rule requiring that TPSs provide language in their residential contracts providing that any material change would not be valid without notice to the customer within fifteen (15) days of the change and the opportunity for the customer to rescind the contract. Such a requirement would inform residential customers of any changes to their contracts and also allow them to cancel without incurring early termination fees or other types of charges.

VIII. N.J.A.C. 14:47.12

RESA has several concerns with the new provision's requirement that:

> The TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, without the customer's affirmative consent.

First, such a provision is unnecessary because the rules already provide consumer protections against supplier misrepresentations with respect to pricing. Second, the proposed provision would prohibit TPSs from providing innovative, hybrid products that include fixed rates for certain components and variable or pass-through rates for other components. Consequently, it would limit customer choice. Finally, it is unclear how the provision would impact "change of law/regulations" provisions which TPSs use to protect themselves in case of extraordinary legislative or regulatory change. For example, a TPS serving a customer under a fixed priced product, with such change in law language has explicitly reserved the right to adjust the price in certain circumstances when changes to laws or regulations increase the cost to serve customers. It would not be appropriate to require affirmative consent from a customer to pass through increased costs that are explicitly allowed under such a contractual arrangement. In order to address these concerns, RESA recommends that the Board eliminate this provision.

IV. CONCLUSION

RESA submits that the proposed changes it recommends herein better reflect the current state of the competitive energy marketplace, while promoting its further growth. Therefore, RESA encourages the BPU to incorporate the suggestions contained herein before adopting the final rules.

Respectfully submitted,



Murray E. Bevan

Bevan, Mosca, Giuditta & Zarillo, P.C.
Counsel for the Retail Energy Supply Association
222 Mount Airy Road
Suite 200
Basking Ridge, NJ 07920
(908) 753-8300
mbevan@bmgzlaw.com

Dated: July 20, 2012