

THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DRM 16-853

RULEMAKING

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES
CHAPTER PUC 2000, COMPETITIVE ELECTRIC POWER SUPPLIER AND
AGGREGATOR RULES

CLEARVIEW ELECTRIC, INC.'S WRITTEN COMMENTS
TO PROPOSED RULEMAKING

Clearview Electric, Inc. ("Clearview") submits this Brief setting forth its written comments to regarding the revised Competitive Electric Power Supplier and Aggregator Rules proposed in the above-captioned docket and includes comments relating to the Governor's letter to the Commission dated January 5, 2017. Certain of the proposed regulations are not essential to the health, safety and welfare of the public because the regulation: (i) has costs that exceed the regulation's benefit; (ii) is not the least restrictive alternative that will fulfill the need that the regulation addresses; and/or (iii) unduly burdens the State's citizens or businesses and has an unreasonably adverse effect on the State's competitive business environment. Also, certain of the proposed regulations are unconstitutional.

1. Financial Security Requirements of Competitive Electric Power Suppliers.

PUC 2003.03 sets forth the financial security requirements for competitive electric power suppliers ("Electric Suppliers"). While most of the proposed amendments to PUC 2003.03 are acceptable, PUC 2003(a)(5) is unacceptable to Clearview. PUC 2003.03(a)(5) provides:

(a) The financial security instrument required by PUC 2003.01(b)(2) shall:

(5) Have an effective term of no less than:

- a. 18 months for a letter of credit or unconditional guaranty executed by the CEPS's parent company; or
- b. 12 months with a 6 month extended claims or demand period for a surety bond...

Clearview understands the need for a regulation requiring Electric Suppliers to obtain and maintain financial security to ensure that Electric Suppliers have the financial resources to pay for reparations to customers and to pay fines, penalties and assessments imposed by the PUC. Requiring Electric Suppliers to obtain and maintain essentially eighteen month terms (twelve month terms with six month extensions) for surety bonds or eighteen month letters of credit, however, is unduly burdensome, as the maximum term for which an Electric Supplier may obtain a surety bond is twelve months. Even if an eighteen month term could be obtained for a surety bond, it would significantly increase the Electric Suppliers' costs of compliance. Similarly, obtaining a letter of credit is expensive and encumbers Electric Suppliers' cash resources as most letters of credit require cash collateral in the full amount of the letter of credit.

Additionally, the significant increase in cost for maintaining such financial security places an unnecessary anti-competitive burden on Electric Suppliers that could essentially force them out of the New Hampshire market. The effect of reducing the number of Electric Suppliers in New Hampshire, therefore, deprives the public of ample choices for Electric Suppliers and may increase the prices the public pays for electricity. The cost of the PUC's proposed regulation to Electric Suppliers both economically and competitively exceeds the benefits of the regulation when there are less burdensome ways to provide the same protections to the PUC and the public.

The current regulations regarding financial security are no less burdensome. The current regulations require that Electric Suppliers obtain financial security with a five year expiration

term. The current regulations provide for a five year registration with a five year financial security term; however, the PUC often waives the regulations allowing Electric Suppliers to obtain a twelve month surety bond and a twelve month registration. This is an extraordinarily burdensome practice for the PUC and Electric Suppliers.

Clearview proposes that the PUC amend the regulations to require surety bonds and letters of credit with twelve month terms, which must be renewed not less than forty-five days prior to the expiration of the surety bond or letter of credit. In other jurisdictions, the public utilities commissions' simply require that financial security be maintained while the electric supplier is licensed. In Connecticut, for example, "an electric supplier must maintain a security in an amount that will ensure its financial responsibility..." *See* Reg. Conn. State Agencies 16-245-4. The Connecticut regulation does not require that an electric supplier maintain a security of any particular term. It is clear from the Connecticut regulation that any security maintained by an electric supplier must be in force at all times when licensed to provide electric services. Such a regulation permits the Electric Supplier to choose a security that is the most cost effective while still protecting the PUC and the public from an Electric Supplier's financial shortcomings. It should be noted that Massachusetts does not have a bonding requirement.

Clearview also proposes that the regulations be amended to require that the PUC receive notice if the bond is not renewed within thirty days of the expiration date. If the PUC were to receive notice of surety bonds that were not timely renewed, it would serve as a mechanism to measure the effectiveness of the regulation, that Electric Suppliers have appropriate financial security. A regulation requiring financial security with a twelve month term, an obligation to maintain the financial security while registered with the PUC and notice to the PUC of an Electric Supplier's non-renewal of its financial security is the least restrictive alternative and

serves the purpose of the regulation – to ensure the financial responsibility of the Electric Suppliers and protect the PUC and the public.

2. PUC 2003.01(g) Initial Registration of Competitive Electric Power Suppliers.

Proposed PUC 2003.01 sets forth the requirements for the initial registration of Electric Suppliers. Paragraph (g) of the proposed regulation sets forth the term of the registration and provides:

(g) The CEPS registration shall be valid for:

- (1) 12 months, when financial security permitting draws, claims, demands, or other recovery thereon during a period of at least 18 months but less than 30 months is provided;
- (2) 24 months, when financial security permitting draws, claims, demands, or other recovery thereon during a period of at least 30 months but less than 42 months is provided; or
- (3) 36 months, when financial security permitting draws, claims, demands, or other recovery thereon during a period of at least 42 months is provided.

The proposed regulation essentially ties the length of the original term or renewal term (see PUC 2003.02) of the registration to the length of the term of the financial security obtained. In effect, this creates only a twelve month registration renewal schedule for most if not all Electric Suppliers, as most Electric Suppliers can only obtain a surety bond with a twelve month term (See Section 1). Requiring Electric Suppliers to complete a renewal application every twelve months significantly increases the administrative burden to Electric Suppliers and unnecessarily raises the costs associated with frequently completing the renewal application. Similarly, if Electric Suppliers are required to submit renewal applications every twelve months, it will unnecessarily increase the administrative burden on the PUC and increase its costs as well.

To avoid the burdensome and costly result of this proposed regulation, Clearview proposes that the current regulation be amended to set the term of the registration to five years without any reference to the length of the financial security term. A five year registration term is consistent with other jurisdictions' registration terms. For example in Connecticut, a license to supply electricity is subject to a periodic review every five years after the date on which the license was issued. *See* Reg. Conn. State Agencies §16-245-2. Unlike the PUC's proposed regulation, the administrative costs of a regulation adopting a five year registration term do not exceed its benefits of ensuring that Electric Suppliers comply with the PUC's requirements during such registration term or face suspension, revocation or assessment of fines and penalties. Thus, a five year registration, as opposed to the PUC's proposed regulation, achieves the same purpose and provides the same benefits in a less burdensome and costly manner.

3. **2003.01(e)(4) Initial Registration of Competitive Electric Power Suppliers.**

Proposed PUC 2003.01(e) sets forth the circumstances under which the PUC must deny a registration application. Section (e)(4) provides:

- (e) The commission shall deny a CEPS application if it determines that the applicant or any of the applicant's principals or affiliates has: ...
 - (4) Been subject to consumer complaints in other states in such number or of such types as establishes a pattern demonstrating engagement in:
 - a. Misleading or deceptive marketing or sales practices;
 - b. Inaccurate billing when billed by the CEPS;
 - c. Fraud;
 - d. Slamming, meaning the initiation of the transfer of a customer to a new CEPS or aggregator without the customer's authorization;
or

- e. Other practices found by the commission to be harmful or potentially harmful to customers.

Section (e)(4) of the proposed regulation is not only too broad, but it is too vague to provide any guidance to Electric Suppliers. The regulation broadly permits the PUC to deny an Electric Supplier's application based on either the number or types of complaints the Electric Supplier has received in other jurisdictions. The proposed regulation, however, does not require that complaints be verified in a separate PUC adjudicative proceeding. The proposed regulation should permit the PUC to deny a registration application based only on complaints that involve misleading, deceptive and fraudulent conduct that are determined to exist *after* an investigation and hearing are conducted. Denying an application based on *allegations* of wrongdoing and an investigation conducted in only the licensing proceeding, without an investigation and opportunity to be heard, is arbitrary and capricious and denies an Electric Supplier its due process rights. The Proposed regulation should be amended accordingly.

Further, denying an application solely based on the number of complaints is misleading. For example, if an electric supplier serves 100,000 customers and has been the subject of 500 complaints, it accounts for only 0.5% of its customers – hardly a statistically significant number of complaints given the number of customers served. It is also misleading to deny an application based on the number of complaints without understanding the nature of the complaints, which may inappropriately keep an Electric Supplier out of the New Hampshire market for alleged minor violations. Inappropriately denying Electric Supplier applications for minor violations reduces consumers' choices for an Electric Supplier and has the potential to reduce the number of Electric Suppliers with lower prices available to customers. The proposed regulation should be amended to remove the reference to the number of complaints. In addition, if this portion of the proposed regulation remains, the word "or" should be changed to "and."

Section (e)(4)(e) also is overly broad and vague, as it is unclear what is meant by “other practices” and does not advise Electric Suppliers as to what “other practices” may be deemed harmful or potentially harmful by the PUC. Electric Suppliers should have advance notice of harmful or potentially harmful practices before submitting an application so that they can make an informed decision as to whether, based on their practices, they will be reasonably successful in obtaining a registration. Such an informed decision will reduce administrative burdens and costs of the Electric Supplier and the PUC where certain Electric Suppliers who have engaged in harmful or potentially harmful practices may decide not to apply. Section (e)(4)(e) should be eliminated, as the remainder of the proposed regulation sets forth specific reasons for denying a registration application which are clear and understandable.

4. PUC 2004.03 Price Disclosure.

Proposed PUC 2004.03 requires Electric Suppliers to disclose the components used to establish variable price rates and the frequency of such variation. PUC 2004.03 provides:

- (a) Each registered CEPS shall input into a shopping comparison website, maintained by the commission, information regarding the CEPS's standard pricing policies, charges, and key terms for residential and small commercial customers, as follows:
 - (1) Following its initial registration, the CEPS shall be provided a secure link to the shopping comparison website through which it shall input the required information prior to selling or offering by any means to sell electricity to any customer; and
 - (2) The required information shall be updated whenever it changes, but no less frequently than once per month, as required under RSA 374-F:4-b, II.
- (b) A CEPS shall include the following on both its website and in its terms of service for a variable price offer to residential and small commercial customers:
 - (1) A clear statement that the variable price being offered is based on market prices as shown or indicated by the ISO-NE locational marginal price for New Hampshire or some other identified price index, if applicable;

- (2) If the variable price being offered is not based on market prices or some other price index as described in (1) above, a clear statement that the variable price being offered is not based on market prices as shown or indicated by the ISO-NE locational marginal price for New Hampshire or some other identified price index, if applicable;
 - (3) A description of the variable pricing structure including each applicable component used in determining the variable price and the frequency of variation;
 - (4) The monthly average price a customer would have paid the CEPS over the preceding 12 months using either the actual variable prices charged by the CEPS to customers during such period or the currently offered:
 - a. Variable pricing structure; and
 - b. The applicable price index for the past 24 months if any;
 - (5) A graphical display by month of the variable prices required in (3) above;
 - (6) The maximum and minimum monthly price, stated separately, that a similarly situated retail customer in New Hampshire would have paid over the preceding 12 month period;
 - (7) Any applicable price cap;
 - (8) Any applicable price floor; and
 - (9) The website address where the current publicly available price per kWh required in (c) below is identified.
- (c) A CEPS charging a variable price or variable prices shall maintain a publicly available web site where residential and small commercial customers may readily obtain the applicable variable price per kWh no less than 5 calendar days in advance of the effective date of the price.
 - (d) Residential and small commercial customers shall be notified 30 days prior to the effective date of any increase in a variable price projected to increase by 10 percent or more or one cent per kilowatt-hour, whichever is less, using the customer's preferred form of communication.
 - (e) The notice required pursuant to (d) above shall confirm that the actual variable price per kWh shall be available on the CEPS website no less than 5 days in advance of the effective date of the price increase.
 - (f) Residential and small commercial customers shall be notified no less than 45 days and no more than 60 days prior to the effective date of any change in the terms or structure of a variable price using the customer's preferred form of communication.

- (g) A CEPS shall include the following on both its website and in its terms of service for a fixed price contract offer to residential and small commercial customers:
- (1) The fixed price per kWh the customer will be charged;
 - (2) The average monthly price for service a residential customer will be charged when the fixed price includes charges in addition to the fixed price per kWh in (1) above, assuming a monthly usage of:
 - a. 500 kWh;
 - b. 1000 kWh; and
 - c. 1500 kWh;
 - (3) The average monthly price for service a small commercial customer will be charged when the fixed price includes charges in addition to the fixed price per kWh in (1) above, assuming a monthly usage of:
 - a. 2000 kWh;
 - b. 4000 kWh; and
 - c. 6000 kWh;
 - (4) The term of the fixed price contract stated in:
 - a. Months; or
 - b. The effective ending meter read month;
 - (5) A description of the customer's options at the end of the term and of how the customer may exercise those options; and
 - (6) Any fees payable to the CEPS for early termination by the customer.
- (h) When a fixed price contract offer includes charges based on demand, the terms of service shall include the average price per kW of demand, or other billing determinants for demand charges, if other than a fixed rate per kW.
- (i) If the energy charge for the proposed service is based on determinants other than a fixed rate per kWh, such as time-of-use or real time rates, all applicable billing determinants, broken down by time-of-use, and a historic average price per kWh for a typical load profile, described by at least hour of day and day of week, starting at a usage of 250 kWh per month and increasing in 250 kWh increments to 1000 kWh and in 500 kWh increments thereafter to 2000kWh for residential customers and 6000 kWh for small commercial customers shall be included in the price disclosure to the customer. This breakdown shall cover an identified 12 month period ending within one year and one month of the date of the disclosure.
- (j) No variable price contract with a CEPS shall bind a residential or small commercial customer for a period longer than a one-month billing cycle.

- (k) CEPS shall permit residential and small commercial customers to terminate a contract for service at any time, and without requiring the customer to provide advance notice to the CEPS, by contacting the CEPS through the following means of communication:
 - (1) Telephone;
 - (2) Electronic-mail;
 - (3) Written correspondence sent by U.S. mail; or
 - (4) Electronic on-line communication options provided by the CEPS.

- (l) A CEPS shall retain records of the written notices provided to customers regarding the nature of its variable rate contract pricing terms for a period of not less than 2 years and shall make such records available to the commission upon request by the commission.

Section 2004.03(b) of the proposed regulation is overly vague and provides no guidance as to how much detail must be put into the components used in determining the variable price. For example, it is unclear if the PUC is seeking details such as the costs of obtaining electricity, personnel and overhead, and profit or is seeking to have the components simply listed without detail. The purpose of disclosing variable pricing components is to provide customers with information to make an informed decision on selecting an Electric Supplier. The failure of the PUC to specify the details that it wants disclosed for variable pricing will lead to confusion for consumers, as each Electric Supplier will be disclosing different details about its pricing. Therefore, customers will not be able to compare apples to apples and reach an informed decision on the best Electric Supplier for them.

Further, the proposed regulation should not require such detailed information that will, in the end, require frequent changes to variable prices. While variable prices offer flexibility to both suppliers and consumers, consumers also benefit from stability. Stable pricing brings certainty to consumers and Electric Suppliers retain customers when the prices do not constantly fluctuate. The regulations should, therefore, allow for general components of the variable pricing to be disclosed but not require strict adherence to formulas.

Further, section (b)(4) and (b)(6) of the proposed regulations are unclear. The regulation should specify whether the information being disclosed is for each particular customer or for an “average customer.” Further, the regulation should clarify whether the information is based on the Electric Suppliers’ rates or the standard offer of the EDC.

5. PUC 2004.20(g)(2) Other Consumer Protections.

Proposed PUC 2004.20(g)(2) provides for the return of charges for unauthorized transfers for up to twenty-four months. PUC 2004.20(g)(2) provides:

- (g) Upon the submission of a complaint pursuant to (f) above:
 - (1) The commission shall, within 10 business days of receipt of the complaint, investigate the facts and circumstances related to the complaint; and
 - (2) If, after an investigation, the commission determines that the CEPS or aggregator does not possess evidence of the customer's or customers' affirmative selection or authorization, the commission shall require the unauthorized CEPS or aggregator to refund to the customer or customers any charges already paid and any expenses incurred in connection with the unauthorized transfer of service in accordance with Puc 2004.08(k) or 2004.09(i) for up to 24 months.

Clearview agrees there is a need for a regulation to return charges to customers whose electric service was transferred without authorization; however, returning charges for up to a twenty-four month period is too long. Clearview recommends that the regulation provide a return of charges for unauthorized transfers for up to six months and that any such refund be the difference between the what the customer paid the Electric Supplier and would have paid the utility company under the standard offer had service not been transferred (collectively, the “Six Month Refund”).

The Six Month Refund will reduce the possibility of customers gaming the system and receiving a windfall. An electric customer has some obligation to recognize an unauthorized change in electric service and should be able to recognize such a change within a six month time period. When the period is longer than six months, it can potentially lead to customers gaming the system to obtain free electric service for two years. For example, if an Electric Supplier switches a customer because it obtains what it reasonably believes to be a proper authorization (i.e., from a spouse, significant other living in the home, or adult child living in the home), the customer could, under the proposed regulations, wait for twenty-four months before informing the Electric Supplier of the unauthorized transfer. The customer, therefore, receives two years of free electric service.

Further, even if the customer did not know of the unauthorized transfer, refunding the entire cost of what the customer paid provides a windfall to the customer. Rather, the customer should be reimbursed the difference between what the customer paid the Electric Supplier and would have paid the utility company under the standard offer had service not been transferred.

The cost of the PUC's proposed regulation in terms of potentially leading customers to game the system for up to two years of free electric service, far exceeds its benefits of punishing Electric Supplier for slamming. The proposed Six Month Refund is less restrictive and intrusive than what has been proposed by the PUC and accomplishes the same goal of sanctioning Electric Suppliers for slamming, without potentially providing free electric service and a windfall to customers. The PUC's proposed regulation is unduly burdensome, adds significant costs and has an unreasonable effect on the competitiveness of Electric Suppliers, especially where a better alternative, the Six Month Refund, is available.

Beyond this regulation, the Commission should clearly define and delineate a “safe harbor” for electric suppliers relating to authorized persons for selecting an electric supplier. Clearview suggests that the Commission clearly state that the person named on account, a spouse/domestic partner, a person over 18 living in the home or a legal representative of the person named on the account is authorized to choose an electric supplier for a residential unit.

6. PUC 2004.11 Solicitation of Customers.

Proposed PUC 2004.11 sets forth regulations regarding marketing to customers. PUC 2004.11 provides:

- (a) A CEPS or aggregator, or its representative, may solicit by telephone customers who are not listed on the National Do Not Call Registry subject to applicable rules of the Federal Communications Commission.
- (b) Any written or verbal solicitation to provide electricity shall advise potential residential and small commercial customers of the right to rescind authorization described in 2004.02(d)(14) above.
- (c) A CEPS or aggregator, or its representative, shall not while soliciting by telephone:
 - (1) Initiate any telephone call to:
 - a. An emergency telephone line, including any 911 line or any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;
 - b. The telephone line of any guest room or patient room of a hospital, health care facility, home for the elderly, or similar type facility; or
 - c. A telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;
 - (2) Use any device to send an unsolicited advertisement to a telephone facsimile machine;
 - (3) Use a pre-recorded automated message to send unsolicited advertisements to potential customers;

- (4) Initiate any telephone solicitation to a customer or potential customer before 8:00 a.m. or after 9:00 p.m. eastern time;
 - (5) Initiate any telephone solicitation to a customer or potential customer on a weekend or any state or federal holiday; or
 - (6) Initiate any telephone solicitation to a customer or potential customer unless the CEPS or aggregator has instituted procedures, as provided in (d) below, for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of the CEPS or aggregator.
- (d) A CEPS or aggregator which intends to solicit by telephone residential and small commercial customers directly or through the use of a third party service shall:
- (1) Provide the called party with the name of the CEPS or aggregator for which the call is being made and a telephone number or address at which the CEPS or aggregator can be reached; and
 - (2) Establish a written policy for maintaining a do-not-call list, including:
 - a. Maintaining a listing in conformance with the National Do Not Call Registry timelines, of New Hampshire customers and potential customers who have registered with the National Do Not Call Registry prior to conducting any telephone solicitation;
 - b. Providing notification to customers and potential customers that such a list is maintained;
 - c. Providing information about how to be placed on the National Do Not Call Registry or a supplier-specific do-not-call list;
 - d. Instituting training for personnel engaged in any aspect of telephone solicitation in the existence and use of the National Do Not Call Registry and any supplier-specific do-not-call list;
 - e. Ensuring telephone solicitations are not made to any customer or potential customer who has registered with the National Do Not Call Registry or requested do-not-call treatment consistent with the timelines required by the National Do Not Call Registry and the Federal Communications Commission regulations ; and
 - f. Providing daily updates to the do-not-call list so that customers or potential customers who have requested not to be called are not called.
- (e) Unless requested by the potential customer no less than 24 hours in advance, no CEPS or aggregator, or its representative, shall solicit a potential residential customer in person at the customer's residence.

- (f) A CEPS or aggregator, or its representative, may contact a potential residential customer in person at a location other than the customer's residence, for the purpose of selling any product or service offered by the CEPS or aggregator.
- (g) A CEPS or aggregator or its representative soliciting a potential residential customer in person in accordance with (e) or (f) above, or soliciting any potential non-residential customer in person, shall comply with all state and local laws, rules, and ordinances applicable to such solicitation, and shall, as soon as possible and prior to describing any products or services offered for sale:
 - (1) Produce identification, to be visible at all times thereafter, which prominently displays in reasonable size type the full name of the CEPS or aggregator and the representative, as well as the CEPS's or aggregator's telephone number for inquiries, verification, and complaints, and shall leave such identification with the potential customer upon request;
 - (2) Describe the relationship of the representative with the CEPS or aggregator;
 - (3) Clearly state that the representative is not working for and is independent of the potential customer's electric utility;
 - (4) State that if the potential customer purchases electricity from the CEPS, or through the aggregator, the potential customer's utility will continue to deliver the potential customer's electricity and will respond to any outages or emergencies; this requirement may be fulfilled by an oral statement to the potential customer, or by written materials left with the potential customer; and
 - (5) Where it is apparent that the potential customer's English language skills are insufficient to allow the potential customer to understand and respond to the information conveyed, or where the potential customer or another third party informs the CEPS or aggregator, or its representative, of this circumstance, the CEPS, aggregator, or representative shall either find a replacement or translator who is fluent in the potential customer's language to continue the marketing activity, or shall terminate the in-person contact with the potential customer.

The proposed regulation seeks to prohibit pre-recorded messages, weekend and holiday solicitation, and door-to-door sales and requires Electric Suppliers to provide daily updates to the National Do Not Call registry. Clearview's concerns with the proposed regulation and recommended amendments are as follows:

No Pre-Recorded Messages. The banning of pre-recorded messages is overly broad, unduly burdensome and is unnecessary. The proposed regulation is overly broad in that it bans pre-recorded messages to all consumers, even if there is already a relationship between the Electric Supplier and the consumer. The cost of the proposed regulation exceeds its benefits as it takes away the Electric Suppliers flexibility to use pre-recorded messages for existing customers, a less expensive alternative than other marketing efforts. The proposed regulation also is unduly burdensome as it significantly increases the Electric Suppliers costs by requiring them to engage in more time consuming, resource intensive and costly marketing efforts, having an unreasonable effect on competition.

There is no need for the proposed regulation to ban pre-recorded messages, as the Telephone Consumer Protection Act of 1991 (“TCPA”) already addresses this issue. The TCPA prohibits prerecorded messages to consumers who do not have an established business relationship with the consumer and prohibits calls to consumers on the Do Not Call List (“DNC List”). The PUC should adopt the TCPA regulations regarding pre-recorded messages because it will eliminate the issues of the proposed regulation being overly broad and unduly burdensome, as discussed above. Electric Suppliers’ compliance with the TCPA pre-recorded messages provisions will be monitored through the complaint process of the PUC and under the TCPA and violators will be assessed fines under TCPA and by the PUC. Adopting the TCPA regulations for pre-recorded messages is the least restrictive and intrusive regulation that will accomplish the purpose of the PUC’s proposed regulation.

No weekend or holiday solicitations. The proposed prohibition on solicitations on holidays and weekends impermissibly restricts Electric Suppliers’ First Amendment activities because there are less restrictive means for the PUC to accomplish its objectives. The First Amendment addresses

time, place and manner restrictions on commercial speech. To sustain a time, place and manner restriction on First Amendment activities, the government must show that the restriction is (1) content neutral, (2) serves a legitimate governmental objective, (3) leaves open ample alternative channels of communication, and (4) is narrowly tailored to serve the governmental interest. *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1552 (1986) (judgment affirmed by *City of Watseka v. Illinois Public Action Council*, 479 U.S. 1048 (1987)).

The PUC's proposed regulation is a content neutral time restriction. The regulation does not provide the reason for the regulation, but it is presumed that the regulation seeks to protect customers from being unreasonably burdened with sales calls. Clearview will assume for purposes of this brief only, but does not agree, that protecting customers from being unreasonably burdened with sales calls is a legitimate governmental objective. The proposed regulation does not, however, leave open ample alternative channels of communication, as Electric Suppliers cannot, without unreasonable burden, conduct door-to-door sales as proposed by the PUC in this regulation. Additionally, the proposed regulation is not narrowly tailored, given that the TCPA, which permits calls on weekends provided they are not made before 8:00 a.m. or after 9:00 p.m., provides a less restrictive alternative to serve the governmental objective. *See City of Wakseka*, at 1553.

Not only is the proposed regulation unconstitutional, its costs exceed its benefits, as Electric Suppliers do not have the ability to market during times when most customers are available. Customers, therefore, are denied the benefit of learning of alternatives to receiving electricity from the utility company.

The proposed regulation also is too restrictive and burdensome on Electric Suppliers. Adopting provisions of the TCPA is a less restrictive alternative that will accomplish the same goal

of the proposed regulation – to presumably ensure that customers are not unreasonably burdened by sales calls. The PUC’s proposed regulation also is unduly burdensome on Electric Suppliers and significantly increases their costs, as it requires them to resort to other more expensive and cumbersome methods of marketing such as sending advertisements through the mail. The provisions of the TCPA will not unduly burden Electric Suppliers. Finally, the complaint process at the PUC will ensure that Electric Suppliers comply with the regulations addressing telephone marketing, as will the potential assessment of fines and penalties by the PUC and under the TCPA.

No Door-To-Door Sales. The proposed regulation essentially bans door-to-door solicitation. Similar to the ban on holiday and weekend telephone solicitations, banning door-to-door solicitations violates Electric Suppliers’ First Amendment rights to commercial speech. There is a four-part test that must be met for commercial speech to be protected under the First Amendment. The speech must be lawful and not misleading and there must be a substantial governmental interest in banning commercial speech. *Central Hudson Gas & Electric Corporation*, 447 U.S. 557, 566 (1980). If these two elements are met, then the test requires that the regulation directly advance the governmental interest asserted and is not more extensive than is necessary to serve that interest. *Id.*

The proposed regulation does not provide a reason for its veritable ban on door-to-door sales. Assuming that the speech of Electric Suppliers is lawful and not misleading and that the PUC has a substantial governmental interest in banning door-to-door sales, the PUC must assert that there is a direct connection to the regulation banning door-to-door sales and the governmental interest sought by the regulation. Even assuming the PUC can assert such a direct connection, the PUC must state that the regulation essentially banning door-to-door sales is no more extensive than necessary to serve the governmental interest. Given that the current regulations permit door-to-door

sales provided the Electric Supplier complies with public safety and anti-fraud measures, there is clearly a less restrictive regulation to regulate door-to-door sales. Also, the PUC has a complaint process to ensure Electric Suppliers' compliance with door-to-door solicitations.

Furthermore, if the proposed regulation is adopted, its costs will outweigh its benefits, as it eliminates an effective method of educating the public on alternative sources of electric supply and educating the public about renewable energy as stated by RESA at the Technical Session in this Docket on January 19, 2017. The current regulation does not violate Electric Suppliers' First Amendment rights and should not be amended as proposed.

Daily Updates to the Do Not Call List. The proposed regulation requiring that Electric Suppliers update the Do Not Call List ("DNC List") on a daily basis is unnecessary as the Federal regulations regarding the DNC List provide a safe harbor allowing solicitors to update the DNC List every thirty days. The DNC Federal regulations recognize that a company cannot reasonably check the DNC List every day. Neustar best practices require updates of the list of landlines ported to cell phones every 15 days, allowing one "free" call under the regulations' Safe Harbor exemption.

The proposed regulation requires significant administrative resources and unnecessarily increases Electric Suppliers' associated costs to update to the DNC List daily. Such costs exceed the benefits because it adds extra burdens on the Electric Suppliers beyond that already required by other regulations and guidelines, such as the DNC List Federal regulations. Moreover, such additional administrative costs increase the cost of customers' electric service, thereby unnecessarily burdening the customer. Adopting the DNC List Federal regulations is less restrictive and accomplishes the same goal of the PUC's proposed regulation.

7. **PUC 2005.03 and PUC 2005.04 Suspension and Revocation of Registration of CEPS.**

The proposed regulations provide for both suspension (PUC 2005.03) and revocation (PUC 2005.04) of an electric supplier's registration. PUC 2005.03 provides:

- (a) If the commission finds, after notice and an opportunity to be heard and after consideration of the factors described in Puc 2005.05 , that a sanctionable event has occurred with respect to a CEPS or aggregator and that the interests of customers of the CEPS or aggregator would not be harmed by such action, the commission shall suspend the registration of the CEPS or aggregator for a specified period of time not to exceed the remaining term of the CEPS's or aggregator's current registration under Puc 2003.
- (b) Upon the issuance by the commission of an order under (a) above, the registration of the CEPS or aggregator shall be suspended and the CEPS or aggregator shall not provide service, either directly or indirectly, to any customers in the state with respect to the supply of electricity or the procurement of such supply during the specified period of suspension.
- (c) The CEPS or aggregator subject to a suspension order issued under (a) above shall make arrangements for all of its customer accounts to be transferred and provide prior written notice to customers of such transfers in compliance with the provisions of such order and the requirements of this chapter. The CEPS or aggregator shall provide the commission with written confirmation and supporting evidence that it has complied with the foregoing requirements.

PUC 2005.04 provides:

- (a) If the commission finds, after notice and an opportunity to be heard and after consideration of the factors described in Puc 2005.05, that a sanctionable event has occurred with respect to a CEPS or aggregator and that the interests of customers of the CEPS or aggregator would not be harmed by such action, the commission shall revoke the registration of the CEPS or aggregator.
- (b) Upon the issuance by the commission of an order under (a) above, the registration of the CEPS or aggregator shall be revoked and the CEPS or aggregator shall not provide service, either directly or indirectly, to any customers in the state with respect to the supply of electricity or the procurement of such supply from and after the effective date of revocation.
- (c) The CEPS or aggregator subject to a revocation order issued under (a) above shall make arrangements for all of its customer accounts to be transferred and provide prior written notice to customers of such transfers in compliance with the provisions of such order and the

requirements of this chapter. The CEPS or aggregator shall provide the commission with written confirmation and supporting evidence that it has complied with the foregoing requirements.

The proposed regulations for suspension and revocation are virtually the same. PUC 2005.03 is essentially a revocation of the Electric Supplier's registration as it must transfer its customers to another provider during the suspension, which is no different from the revocation in PUC 2005.04. It is recommended that PUC 2005.03 permit the Electric Supplier to continue to service its current customers without the ability to market and obtain new customers.

The proposed regulation exceeds its benefits, as it places the same harsh punishment on an Electric Supplier whose registration has been revoked. Amending the proposed regulation to permit Electric Suppliers whose registrations have been suspended to continue to service its customers but not market to new customers is less restrictive and intrusive and accomplishes the same purpose. Furthermore, the transfer of an Electric Supplier's customers during the suspension is unduly burdensome where a less restrictive alternative is available and has an unreasonable effect on Electric Supplier competition where Electric Supplier can be placed out of the market for violations that do not rise to the level of a revocation.

8. PUC 2004.20(d)(3) Other Consumer Protections.

PUC 2004.20(d)(3) prohibits discrimination by CEPS and provides:

(d) No CEPS or aggregator shall discriminate in the application process, the provision of service, or the termination of a contract, on the basis of any of the following:...

(3) Geographic area...

The proposed regulation seeks to prohibit discrimination by geographic area. While an electric supplier will not discriminate against customers by geographic area, an electric supplier should

be able to “target” geographic areas for marketing. There is a difference between targeted marketing and geographic discrimination in customers. There is nothing in the regulations addressing this, but it should be addressed in the regulations for clarity.

9. **PUC 2004.10 Competitive Electric Power Supplier Enrollment of Customers.**

Proposed regulation PUC 2004.10 provides that the commencement of Electric Supplier’s contract occurs on the customer’s scheduled meter read date.

- (a) When a CEPS enrolls a new customer, the enrollment shall be effective for the customer's scheduled meter read date that follows EDI notification to the utility by the CEPS, provided that EDI notification occurs no less than 2 business days before the customer's scheduled meter read date. Otherwise, the enrollment shall be effective for the customer's next meter read date.
- (b) Within 5 business days of expiration of the applicable rescission period without rescission by a residential or small commercial customer, the CEPS shall send a welcome letter to the customer by the customer's preferred form of communication containing:
 - (1) The name of the CEPS;
 - (2) The price per kWh the customer will be charged, if a fixed price contract, or the current price and basis for price variation if a variable price contract;
 - (3) The term of the fixed price contract, if applicable;
 - (4) The e-mail address or website for the supplier's customer service department; and
 - (5) A telephone number for the supplier's customer service department.

Clearview proposes that the PUC open a docket to require EDCs to adopt Smart Meter technology. Smart Meters allow EDCs to perform off-cycle meter readings to switch customers to an Electric Supplier sooner and at virtually no extra costs or resources. Clearview understands that this recommendation may be more appropriate for a separate docket to

determine how Smart Meter technology is being deployed and the benefits to competition that can come from it.

10. Other Issues

a. The EDCs provide Electric Suppliers with an “eligible customer list.” A customer may opt out of being on the list. For example, Pennsylvania requires that EDCs provide electric suppliers with an eligible customer list.

b. The EDCs should get paid on a pro rata basis based on the charges on the bill if the customer does not pay the entire bill. Right now, the utility gets paid first under the Settlement Agreement in Docket No. IR 13-244. Clearview proposes that this docket be re-opened to fairly pay electric suppliers and the utility with equal priority.

c. As an alternative to re-opening Docket No. IR 13-244, Clearview proposes that New Hampshire adopt purchase of receivables (“POR”) billing by the EDC. POR alleviates any need for a hierarchy in receivables and has been successful in many other States.

d. Customers receiving EAP should be eligible to keep their EAP when switching to an electric supplier.

Clearview proposes that the PUC open a docket to investigate these issues further.

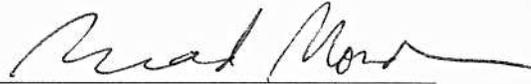
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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, a copy of this brief has been sent to the service list in this docket (attached).

A handwritten signature in black ink, appearing to read "Brad Mondschein", written over a horizontal line.

Brad N. Mondschein