**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

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| In the Matter of | ) | |
| | ) | Commission File No. R411001 |
| Telemarketing Sales Rule; Proposed Rule | ) | |

# COMMENTS OF THE GREEN MOUNTAIN ENERGY COMPANY ON THE COMMISSION'S PROPOSED AMENDMENTS TO THE TELEMARKETING SALES RULE


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Green Mountain Energy Company ("GMEC") files these comments pursuant to the Federal Trade Commission's ("Commission") Notice of Proposed Rulemaking ("NPR"), 67 Fed. Reg. 4492 et seq. (Jan. 30, 2002), regarding the Commission's proposed amendments to the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310 et seq.

GMEC appreciates the opportunity to comment on the Commission's proposals to amend the TSR. Headquartered in Austin, Texas, GMEC is the largest and fastest growing residential provider of cleaner electricity in the United States. GMEC provides cleaner electricity to consumers generated by sources such as wind, solar, water, and cleaner burning natural gas to approximately 500,000 customers in California, Connecticut, New Jersey, Oregon, Ohio, Pennsylvania, and Texas. Each of these markets is newly-restructured and closely regulated to allow consumers to freely and intelligently choose their electricity source. As the Commission itself has recognized, it is important in these early stages of electricity deregulation that new entrants into the market compete fairly within a regulatory framework that does not impose unnecessary, additional burdens that may discourage or otherwise limit legitimate practices.[1]

## I. EXECUTIVE SUMMARY

GMEC and other competitive sellers of electricity generation services in newly-deregulated markets should be exempt from the TSR. As a competitive residential

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[1] See *Prepared Statement of the Federal Trade Commission, Presented by Elaine D. Kolish, Associate Director of the Division of Enforcement Bureau of Consumer Protection, Before the Committee on Commerce, Subcommittee on Energy and Power, United States House of Representatives*, (May 26, 1999) at http://www.ftc.gov/os/1999/9905/electrictestimony.htm. (internal citations omitted).

electricity provider, GMEC is subject to a comprehensive regulatory scheme developed (and, in many states, under development) by state legislatures and Public Utility Commissions ("PUCs") nationwide.[2] Virtually all of these new laws, administrative rules, and implementing orders have taken effect since the TSR was promulgated in 1995. The consumer protections adopted by the states are tailored specifically to the sale of electricity generation services in newly-deregulated markets and thus carefully address the need to protect consumers without subjecting new market entrants to unnecessary regulatory burdens. It is unnecessary, burdensome, and confusing to subject GMEC and other competitive sellers of electricity generation services in newly-deregulated markets to an overlapping federal regulatory framework, especially where, as in the case of the TSR, the federal rules are not tailored to address the types of consumer protection issues that are likely to arise in the sale of electricity generation services in newly-deregulated markets. Moreover, applying the TSR to the sale of electricity generation services may have the unintended consequence of arresting development of state laws, which are still at formative stages in many jurisdictions as states open their electricity markets to competition. Unless the commission is interested in tailoring its Telemarketing Sales Rule to address the unique issues posed by the sale of electricity generation services in newly-deregulated markets, and in preempting state laws already in place, GMEC respectfully requests that it exempt competitive sellers of electricity generation services from the TSR.

[2] A chart providing an overview of this regulatory framework in states where energy choice is now in place is attached as Appendix A.

The comprehensive regulatory scheme imposed by the states already incorporates the key principles of the TSR by requiring electricity providers to make certain affirmative disclosures, prohibiting electricity providers from making material misrepresentations or engaging in specified abusive marketing practices, and imposing recordkeeping requirements to document compliance with these requirements. Moreover, the state regulatory framework goes beyond the requirements of the TSR in many respects, with some or all states that allow energy choice mandating that competitive sellers of electricity: (1) provide affirmative disclosures *in writing*; (2) confirm consumers' oral request to switch electricity providers by obtaining the consumers' *signatures*, employing an independent *third party verifier*, or *tape recording* consumers' consent to switch their electricity provider; (3) offer consumers the *right to cancel* service within a designated period of time after receiving required disclosures in writing; (4) comply with state-mandated *dispute resolution procedures*, including providing a toll-free number for consumer complaints; (5) *not discriminate* against consumers on the basis of race, gender, ethnicity, and other criteria, and (6) *protect the privacy* of consumers' personal information. In light of these consumer protections already in place, all of which were tailored specifically to address the sales of electricity generation services to consumers in deregulated markets, and all of which were developed after the Commission initially promulgated the TSR, it is not necessary or advisable to impose an entire federal regulatory framework on participants in this market.

To the extent that the Commission is unwilling to provide an exemption for the retail electricity industry, GMEC requests that the Commission incorporate GMEC's comments on the following points into the final version of the amended TSR or its accompanying Statement of Basis and Purpose:

- The Commission should find that disclosure of price per kilowatt/hour of electricity satisfies the disclosure requirement for total cost under Section 310.3(a)(1)(i) of the TSR because price per kilowatt/hour is the typical pricing method of electricity for residential consumers.

- The Commission should exempt competitive sellers of electricity generation services in deregulated markets from any requirement to comply with the Commission's proposed national do-not-call list. Rather, the Commission should defer to the determinations of state legislatures and PUCs, many of whom have adopted a state-wide do-not-call list specific to the electricity industry, and several of whom have chosen not to impose such a requirement on new entrants into newly-deregulated electricity markets. Alternatively, if the Commission does create a national do-not-call list applicable to sellers of electricity generation services in newly-deregulated markets, GMEC respectfully requests that the Commission work closely with the state PUCs to ensure that consumers who sign up for one or more state lists are automatically and regularly included on the FTC's list. To the extent the Commission can cooperate with the states in a

way that allows competitive sellers of electricity generation services in newly-deregulated markets to work with only one do-not-call list (the national list, regularly updated to include consumers added to the state PUC lists), GMEC's regulatory burden would be substantially reduced with no countervailing consumer harm.

- The Commission should revise Section 310.3(a)(3) to provide an exemption from the requirement to obtain consumers' express verifiable authorization for sellers of electricity generation services because states have already implemented strong verification procedures to protect consumers from unauthorized charges. Alternatively, if the Commission is unwilling to provide this exemption, Section 310.3(a)(3) should at least exempt transactions involving debit cards because consumers who use debit cards already understand that their account will be debited and because debit cards are currently subject to both federal and private initiatives that provide liability limitations that are comparable to those available for transactions completed using credit cards.

- GMEC agrees with the Commission that it is good policy to prohibit companies from interfering with Caller ID services. The Commission should not impose this affirmative obligation unless current logistical and engineering limitations are resolved.

- The Commission should not ban the use of pre-acquired account information obtained from third parties as contemplated in proposed Section 310.4(a)(5) because this proposal exceeds the Commission's authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act and the Federal Trade Commission Act. Alternatively, if the Commission does adopt this proposal, it should exempt names and addresses, electricity meter identifiers, and electricity usage patterns from the definition of "billing information" to avoid interfering with the electricity deregulation process.

## II. REGULATION OF THE SALE OF ELECTRICITY GENERATION SERVICES IN NEWLY DEREGULATED MARKETS

Energy markets are being restructured nationwide to allow consumers to choose the source of their electricity from among competing providers for the first time. As of the date of these comments, twenty-four states have either enacted enabling legislation or issued a regulatory order opening their energy markets to competition.[3] In seventeen states,[4] consumers can now choose their own generator of electricity.

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[3] See http://www.eia.doe.gov/cneaf/electricity/chg_str/regmap.html. These states include Arkansas, Arizona, Connecticut, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, and Virginia. California has a regulatory regime, but direct access has been suspended since September 2001. See Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.

[4] These states include Arizona, California, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Texas.

Consumers benefit from competition among energy suppliers. The Federal Trade Commission has recognized this, noting that "competition between market participants will ordinarily provide consumers with the benefits of low prices, good products, and greater innovation."[5] The Commission has also recognized, however, that with competition comes the increased risk of unfair or deceptive marketing practices.[6] Specifically, based on its observations and experience with the deregulation of the telecommunications industry, the Commission is concerned about the unlawful practices of "slamming" and "cramming" with regard to the sale of electric generation services.[7]

State legislatures and PUCs have likewise recognized the benefits and consumer protection risks associated with energy deregulation and consequent competition for customers. To that end, state legislatures and PUCs have developed a comprehensive regulatory regime tailored to this industry and designed to ensure that sales of electricity generation services to consumers are free from deception, unfairness, and abuse. Important aspects of laws in jurisdictions where consumers are now free to choose their electricity suppliers are summarized below. On information and belief, the consumer protections adopted by state legislatures and PUCs have been successful. GMEC is unaware of any existing or emerging pattern or practice of acquiring new customers

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5 See *Prepared Statement of the Federal Trade Commission, Presented by Elaine D. Kolish, Associate Director of the Division of Enforcement Bureau of Consumer Protection, Before the Committee on Commerce, Subcommittee on Energy and Power, United States House of Representatives*, (May 26, 1999) at http://www.ftc.gov/os/1999/9905/electrictestimony.htm. (internal citations omitted).

6 See id.

7 See id.

through deceptive or unfair means in newly-deregulated markets for electricity generation services.

## A. Affirmative Disclosures

All seventeen states[8] currently allowing consumer to choose from among competing sellers of electricity generation services require sellers of electricity to make affirmative disclosures, in writing, to consumers before consumers become obligated to pay for electricity generation services. These disclosures typically include, among other things:

(1) The name, address, and telephone number of the competitive energy seller;[9]

(2) Information on consumers' right to rescind their agreement within a specified number of days of their receipt of the written disclosures;[10]

(3) A full explanation of the fixed and variable prices associated with the provision of service;[11]

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8 These states include Arizona, California, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Texas.

9 This is required in Michigan, New Hampshire, Ohio, Pennsylvania, and Texas.

10 This is required in Arizona, California, Connecticut, Maryland, Michigan, New Hampshire, Ohio, Pennsylvania, and Texas.

11 These states include Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, Pennsylvania, and Texas.

(4) The price per kilowatt/hour for the service;[12]

(5) Billing and payment dates;[13]

(6) The duration of the agreement, including consumers' right to terminate the agreement upon a change of its terms, and early termination fees in other cases;[14]

(7) A description of the dispute resolution procedures available to the consumer;[15] and

(8) Consumers' rights to be included on a do-not-call list maintained by the state PUCs for sellers of electricity.[16]

## B. Prohibited Misrepresentations

All seventeen states allowing energy choice prohibit sellers from making misrepresentations with respect to the sale of electricity generation services to consumers.

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[12] These states include California, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, and Texas.

[13] These states include Michigan and New Hampshire.

[14] Arizona, California, Connecticut, Maryland, Michigan, New Hampshire, New Jersey, Ohio, Pennsylvania, and Texas.

[15] Arizona, Maryland, Massachusetts, New Hampshire, Ohio, Pennsylvania, and Texas.

[16] These states include New Hampshire and Texas. (Five other states have do not call restrictions, but do not require sellers to affirmatively disclose such restriction.)

## C. Rules Designed to Prevent Abusive Practices

### 1. Slamming Protections

All seventeen jurisdictions allowing energy choice have adopted rules designed to prevent the unauthorized switching of consumers' electricity generation providers. Five of these states[17] require a written signature as the exclusive means to confirm consumers' verbal consent to switch electricity generation providers. Ten of these states[18] require sellers to either obtain a written signature, use third-party verification, or tape-record the sales transaction to confirm consumers' verbal consent to switch their electricity provider. Two states[19] have chosen to assure consumers' consent by an opt-out mechanism, requiring that competitive sellers of electricity generation services give consumers written disclosures and a prescribed period to cancel their consent before obligating consumers. Fourteen states[20] provide consumers with a right to cancel after receipt of written disclosures with respect to the switching of their electricity service, even where their consent is otherwise confirmed by signature, third-party verification or tape-recording.

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17 These states include Arizona, California, Illinois and Rhode Island.

18 These states include Connecticut, District of Columbia, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, and Texas.

19 These states are Connecticut and Maine.

20 These states include Arizona, California, Connecticut, District of Columbia, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, and Texas.

### 2. Do-Not-Call Lists

Five states[21] have established special do-not-call lists specifically applicable to sellers of electricity generation services, which are typically maintained by state PUCs. Another state[22] requires sellers of electricity generation services to maintain its own do-not-call list. Yet another state[23] requires sellers of electricity generation services to comply with the Direct Marketing Association's do-not-call list.

### 3. Call Time Restrictions

Like the TSR, eight states impose restrictions on the telemarketing of electricity generation services.[24]

### 4. Dispute Resolution

All seventeen states[25] allowing energy choice require sellers of energy generation services to comply with state-mandated dispute resolution procedures.[26]

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21 These states include California, Maine, Maryland, Ohio, and Texas.

22 This is required in the District of Columbia.

23 This is required in New Hampshire.

24 These states include Connecticut, District of Columbia, Massachusetts, New Hampshire, New Jersey, Ohio, Oregon, and Texas.

25 These states include Arizona, California, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Texas.

26 These states include Arizona, Connecticut, Illinois, Massachusetts, New Hampshire, New York, Ohio, Oregon, and Texas.

### 5. Privacy Protections

Eleven states[27] have imposed privacy restrictions on the use of consumer's personal information.

### 6. Recordkeeping Requirements

Thirteen states require that sellers of electricity generation services to consumers maintain records of written authorization for service, consumers' written service complaints, tariffed and nontariffed transactions, among other things, for specified periods of time.[28]

## III. ARGUMENT

### A. Competitive Sellers Of Electricity Generation Services In Deregulated Markets Should Be Given A Complete Exemption From Compliance With The TSR.

Because competitive sellers of electricity generation services are already subject to a comprehensive regulatory scheme tailored to this industry, the Commission should defer to the states and exempt competitive sellers of electricity generation services in deregulated markets from compliance with the TSR both for outbound telemarketing and

[27] These states include Arizona, California, Connecticut, District of Columbia, Maine, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, and Texas.

[28] These states include Arizona, California, Connecticut, Illinois, Maine, Maryland, Michigan, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, and Texas.

also for inbound telemarketing generated from responses to direct mail, including calls generated by facsimile and electronic mail solicitations.[29]

### 1. The Commission Should Exempt The Sale Of Electricity Generation Services In Deregulated Markets Because States Have Imposed Substantially Similar Laws, And Because The Imposition Of Further Federal Laws Would Burden Competition And Provide No Countervailing Consumer Benefits.

An exemption from the TSR is appropriate because state legislatures and PUCs have already imposed the relevant consumer protections found in the TSR on sellers of electricity generation services in newly-deregulated markets. Importantly, these new laws appear to be working well so far. *As of the date of their comments, the record of this rule-making proceeding is devoid of a single reference to deceptive, unfair or abusive acts and practices in connection with the telemarketing of electricity generation services.*

#### a. State Legislatures And PUCs Require Affirmative Disclosures.

Section 310.3(a)(1) of the TSR requires telemarketers to disclose, before a consumer pays: (1) total costs and quantity of the item that is the subject of the sales offer; (2) material restrictions, limitations and conditions; (3) information regarding the seller's

[29] The Commission proposes in its NPR to modify Section 310.6(f) to clarify that direct mail solicitations include solicitations sent via facsimile and electronic mail. See 67 Fed. Reg. 4531.

refund policy; and (4) information pertaining to prize promotions.[30] State PUCs have imposed similar pre-obligation affirmative disclosure requirements, as well as additional disclosures tailored to the sale of electricity generation services in deregulated markets. As noted previously, seventeen states[31] require these disclosures which typically include the following: The name, address, and telephone number of the competitive energy seller;[32] information on consumers' right to rescind their agreement within a specified number of days of their receipt of the written disclosures;[33] a full explanation of the fixed and variable prices associated with the provision of service;[34] the price per kilowatt/hour for the service;[35] billing and payment dates;[36] the duration of the agreement, including consumers' right to terminate the agreement upon a change of its terms, and early termination fees in other cases;[37] a description of the dispute resolution procedures available to the consumer;[38] and consumers' rights to be included on a do-not-call list

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30 See 16 C.F.R. § 310.3(a)(1).

31 These states include Arizona, California, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Texas.

32 This is required in Michigan, New Hampshire, Ohio, Pennsylvania, and Texas.

33 This is required in Arizona, California, Connecticut, Maryland, Michigan, New Hampshire, Ohio, Pennsylvania, and Texas.

34 These states include Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, Pennsylvania, and Texas.

35 These states include California, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, and Texas.

36 These states include Michigan and New Hampshire.

37 Arizona, California, Connecticut, Maryland, Michigan, New Hampshire, New Jersey, Ohio, Pennsylvania, and Texas.

38 Arizona, Maryland, Massachusetts, New Hampshire, Ohio, Pennsylvania, and Texas.

maintained by the state PUCs for sellers of electricity generation services.[39] In addition, some states require electricity sellers to comply with the disclosure and other requirements of state telemarketing laws.[40]

### b. State Legislatures And PUCs Prohibit Misrepresentations in the Telemarketing of Electricity Generation Services.

Section 310.3(a)(2) of the TSR prohibits telemarketers from making any direct or implied misrepresentations regarding: (1) total costs and quantity of the item that is the subject of the sales offer; (2) material restrictions, limitations, or conditions; (3) material aspects of the performance, efficacy, nature, or central characteristics of the item for sale; (4) information regarding the seller's refund policy; (5) information pertaining to prize promotions; (6) material aspects of an investment opportunity; or (7) a seller's or telemarketer's affiliation with, or endorsement by, a government or third-party organization.[41] Similarly, seventeen states have adopted regulations or orders that prohibit electricity sellers from misrepresenting material terms of offers for electricity generation service as well as misrepresenting the nature of the service itself.[42] In each of

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39 These states include New Hampshire and Texas. (Five other states have do not call restrictions, but do not require sellers to affirmatively disclose such restriction.)

40 These states include Maine, Maryland, Massachusetts, Michigan, New Hampshire, Ohio, and Oregon.

41 See 16 C.F.R. § 310.3(a)(2).

42 These states include Arizona, California, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Texas.

these states, the misrepresentations enumerated in §310.3(a)(2) would violate the state laws regulating the sale of electricity generation services in deregulated markets.

### c. State Legislatures And PUCs Also Prohibit Abusive Practices in the Telemarketing of Electricity Generation Services.

Section 310.4 of the TSR prohibits telemarketers from engaging in the following abusive telemarketing acts or practices: (1) threats, intimidation, or the use of profane or obscene language; (2) requesting or receiving payment to help improve a persons credit record, history, or rating; (3) engaging in a recovery room program; (4) requesting or receiving an advance fee loan; (5) engaging in an abusive pattern of telemarketing calls, such as continuously or repeatedly calling a person at a number with the intent to annoy or harass that person, and calling a person who has stated that he/she does not wish to receive telemarketing calls, calling a person at any time other than between 8 a.m. and 9 p.m. local time at the called person's location; and (6) failing to initially disclose during a telemarketing call the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services, and information regarding prize promotions.[43]

States have likewise recognized the need to protect consumers from abusive practices in the sale of electricity generation services. To that end, at least five states[44] have

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43 See 16 C.F.R. § 310.4.

44 These states include California, Maine, Maryland, Ohio, and Texas.

implemented state-maintained do-not-call lists specific to the electricity industry. Two other states impose do-not-call limitations requiring sellers of electricity generation services to maintain their own lists or to subscribe to the Direct Marketing Association. Although states have typically not imposed the other prohibitions set forth in Section 310.4 of the TSR, such as the prohibitions involving offers of advance fee loans and recovery services or improving credit history, as well as threats and abusive calling patterns, these prohibitions are not applicable to the sale of electricity generation services.

### d. State Legislatures And PUCs Impose Recordkeeping Requirements.

Section 310.5 of the TSR requires a seller or telemarketer to keep, for a period of 24 months from the date the record is produced, the following records regarding its telemarketing activities: (1) every substantially different advertisement, brochure, telemarketing script, and promotional material; (2) the name and last known address of each prize recipient and the prize awarded if the prize is valued at $25 or more; (3) the name and last know address of each customer, the goods or services they purchased, the amount paid, and the date the items were shipped; (4) the name, home address, telephone numbers, and titles of all current and former employees directly involved in telemarketing; and (5) all verifiable authorizations required under the TSR.[45]

[45] See 16 C.F.R. § 310.5.

Likewise, thirteen states[46] currently allowing consumers to choose their supplier of electricity generation services have imposed recordkeeping requirements regarding the sale and provision of electricity. For example, the State of Maryland[47] and Maine[48] require sellers of electricity generation services to, among other things, retain records of customer complaints as will enable them to review and analyze its procedures and actions as an aid in rendering improved service.

### e. Additional Obligations Imposed On Sellers Of Electricity Generation Services

State laws, PUC rules and implementing PUC orders provide consumers with the relevant protections found in the TSR. The state laws also go far beyond the TSR to provide protections tailored to the sale of electricity generation services in newly-deregulated markets. Specifically, competitive sellers of electricity generation services are required to, among other things, (1) provide affirmative disclosures in writing,[49] (2) confirm consumers' oral request to switch electricity providers by obtaining the consumers' signatures, employing an independent third party verifier, or tape recording consumers'

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46 These states include Arizona, Connecticut, Illinois, Maine, Maryland, Michigan, New York, Ohio, Pennsylvania, Rhode Island, and Texas.

47 See MD. REGS. CODE § 20.30.04 to 04.11.

48 See CODE ME. R. § 65-407-305 (2002).

49 These states include Arizona, California, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Texas.

consent to switch their electricity provider,[50] (3) offer consumers the right to cancel service within a designated period of time after receiving required disclosures in writing,[51] (4) comply with state-mandated dispute resolution procedures,[52] including providing a toll-free number for consumer complaints, (5) not discriminate against consumers on the basis of race, gender, ethnicity, and other criteria,[53] and (6) protect the privacy of consumers' personal information.[54]

As outlined immediately above, states are responding to deregulation by implementing a myriad of consumer protections. The Commission should defer to the comprehensive regulatory framework states have developed, and are continuing to develop, for the sale of electricity generation services and exempt the sale of electricity generation services in deregulated markets from compliance with the TSR.[55]

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50 These include Arizona, California, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio Oregon, Pennsylvania, Rhode Island, and Texas.

51 This is required in Arizona, Connecticut, District of Columbia, Maine, Maryland, Massachusetts, Michigan, New Jersey, Ohio, Pennsylvania, and Texas.

52 This is required in Arizona, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Rhode Island.

53 This is required in Connecticut, District of Columbia, Illinois, Maryland, New Jersey, New York, Rhode Island, and Texas.

54 These states include Arizona, California, Connecticut, District of Columbia, Maine, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, and Texas.

55 It should be noted that some states have chosen to apply the TSR to the sale of electricity generations services, but most have not. The Commission's exemption should allow states to opt-in to the Commission's requirements if they choose to do so. The Commission should not arbitrarily impose the requirements of the TSR on the electricity industry because the law is still developing at the state level. Fifteen of the 24 state laws were passed after 1995; Eleven regulatory orders at the PUC level have been adopted since 2000.

## B. If The Commission Will Not Provide An Exemption From The TSR For The Electricity Industry, It Should Adopt GMEC's Recommendations And Comments With Respect To The Following Issues:

### 1. Alternatively, The Commission Should Exempt Inbound Telemarketing By Competitive Sellers Of Electricity Generation Services Resulting From Direct Mail, Facsimile, E-Mail, And Other Forms Of Advertising.

The Commission currently allows, under Section 310.6(f) of the TSR, an exemption from compliance with the provisions of the TSR for inbound telemarketing calls generated as a result of direct mail solicitations that include the disclosures required by Section 310.3(a)(1) of the TSR.[56] The disclosures required by Section 310.3(a)(1) of the TSR are already required by the states to be provided to consumers, in writing, no later than before the consumers become obligated to pay for electricity generation services. Moreover, thirteen states impose disclosure obligations on advertising for electricity generation services in deregulated markets,[57] which prohibit misrepresentations and establish compliance with state and federal regulations governing advertising. The difference between the TSR and state law, therefore, is the timing of these disclosures.

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[56] Section 310.3(a)(1) of the TSR requires telemarketers to disclose, before a customer pays for goods or services, (1) the total costs to purchase, receive, or use the goods or services that are subject tot eh sales offer; (2) all material restrictions, limitations, or conditions to purchase, receive, or use the goods or services; (3) if the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement that this is the seller's policy, or, if there is a refund policy, a statement of all material terms and conditions to such policy; and (4) in any prize promotion, the odds of being able to receive the prize (and if the odds are not calculable in advance, the factors used in calculating the odds), the fact that no purchase is required to win a prize or participate on the promotion, and the no purchase/no payment method of participation in the promotion. See 16 C.F.R. § 310.3(a)(1).

[57] These states include Arizona, California, Connecticut, District of Columbia, Illinois, Main, Maryland, Michigan, New Jersey, Ohio, Oregon, Pennsylvania, and Texas.

The Commission should defer to the states regarding the disclosures required to be made in advertising and other solicitations, and the timing of making all other disclosures in connection with the sale of energy generation services in deregulated markets and provide an exemption to the TSR under section 310.6(f) for competitive sellers of electricity generation services in newly-deregulated markets, at least where such sellers are subject to pre-obligation affirmative disclosure requirements.

### 2. National Do-Not-Call List.

The Commission proposes to amend the TSR to include a new Section 310.4(b)(1)(iii), which provides for the creation of a national do-not-call list maintained by the Commission. Telemarketers would be required to purge their lists of all consumers who have placed themselves on the national list.

#### a. The Commission Should Exempt Competitive Sellers Of Electricity Generation Services In Deregulated Markets From Any Requirement To Comply With The Commission's Proposed National Do-Not-Call List.

GMEC respectfully requests that the Commission exempt competitive sellers of electricity generation services in deregulated markets from any requirement to comply with the Commission's proposed do-not-call list. Five[58] of the seventeen states that now allow consumers to choose their electricity generation provider have determined that it is necessary and appropriate, balancing the need for consumer protection with the importance of promoting competition in newly-deregulated markets, to impose

[58] These states include California, Maine, Maryland, Ohio, and Texas.

mandatory compliance with state-maintained do-not-call lists specific to electricity generation sales. Other states have chosen to impose a requirement that electricity sellers maintain their own do-not-call lists,[59] or to comply with the Direct Marketing Association's ("DMA") do-not-call list.[60] This matter is, therefore, being actively considered by the states, some of which have developed do-not-call lists or otherwise imposed do-not-call restrictions, and some of which have chosen not to do so. It would not be prudent or responsible for the Commission to override states' decisions not to impose a do-not-call list requirement, or to impose compliance beyond what states have deemed necessary and appropriate for the sale of electricity generation services in deregulated markets.

In addition, imposing a national do-not-call list would be burdensome and confusing to competitive suppliers. As the Commission has expressly acknowledged, unnecessary, additional regulations imposed on the newly-deregulated market for the sale of electricity generation services should be avoided because they "may, among other things, unintentionally discourage or limit otherwise legitimate practices."[61] Moreover, conflicting guidance may increase costs and uncertainty for marketers[62] and would be unfairly burdensome to emerging electricity suppliers who are trying to compete in the

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59 This is required in District of Columbia.

60 This is required in New Hampshire.

61 See *Response to the National Association of Attorneys General Request for Comments on Discussion Draft of Proposed Green Guidelines for Electricity, Comment of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission*, (August 10, 1998), *at* http://www.ftc.gov/be/V980020.htm.

62 See id.

recently restructured electricity market. Accordingly, the Commission should defer to states' choice regarding whether to adopt a state-wide do-not-call list, and exempt competitive sellers of electricity generation services in deregulated markets from any requirement to comply with the Commission's proposed national do-not-call list.

### b. If The National Do-Not-Call List Is Adopted, It Should Work In Conjunction With State Do-Not-Call Lists.

If the Commission does not exempt competitive sellers of electricity generation services in deregulated markets from the new national do-not-call list, the FTC list should work in conjunction with state do-not-call lists, including sector-specific do-not-call lists such as those for the sale of electricity generation services, to make sure that consumers who have registered for state-maintained do-not-call lists are automatically and regularly included on the national do-not-call list, and that consumers who have registered for the national list are automatically included on the state do-not-call lists. In addition, the Commission should work with the states to help ensure that states will exercise their prosecutorial discretion not to bring law enforcement actions where companies have complied with the FTC list. Without such a framework, telemarketers will be subject to a patch-work of confusing state do-not-call laws as well as a federal framework with no countervailing consumer benefits.

### 3. Required Disclosures: The Commission Should Recognize That The Disclosure Of "Total Cost" Is Satisfied By Providing The Cost Per Kilowatt/Hour.

Section 310.3(a)(1)(i) of the TSR requires telemarketers to disclose the total cost to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer before a customer pays for goods or services. GMEC strongly urges the Commission to deem the disclosure of the price per kilowatt/hour of electricity a satisfactory means of fulfilling the disclosure requirement of Section 310.3(a)(1)(i). Per kilowatt/hour rates is the typical pricing method of electricity for residential consumers; total cost and quantity are concepts that are not applicable to the electricity industry. State laws recognize this, requiring that competitive sellers of electricity generation services in deregulated markets disclose prices to be charged for generation services, price variability information, actual pricing structure or rate design, and clear descriptions of the price, terms and conditions.[63] For example, California law requires disclosure of the price of electricity expressed in a format which makes it possible for residential and small commercial customers to compare and select among similar products and services on a standard basis, and disclosures of the total price of electricity on a cents-per-kilowatt-hour basis.[64] Massachusetts requires a label which presents the price of generation service, standard offer generation service or default generation service as an

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[63] These states include Arizona, California, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, and Pennsylvania.

[64] See CAL. PUC:394 to 396.

average unit price in cents per kilowatt-hour.[65] Accordingly, because it is impossible for sellers of electricity to calculate total cost and quantity for a residential consumer, GMEC recommends that, for the retail electricity industry, the Commission should interpret "total cost" to mean "price per kilowatt-hour," and exempt electricity providers from quantity disclosures.

### 4. Express Verifiable Authorization.

The TSR currently requires a telemarketer to obtain express verifiable authorization in all sales involving a payment "drawn on a person's checking, savings, share, or similar account."[66] The TSR provides that authorization will be deemed verifiable if any of three specified methods are employed to obtain it: (1) express written authorization by the customer; (2) express oral authorization that is tape recorded; or (3) written confirmation of the transaction that is sent to the customer before submission of the draft for payment.[67] The Commission proposes to amend the TSR by extending these requirements to other payment methods, such as debit cards.[68]

#### a. Section 310.3(a)(3) Should Provide An Exemption For The Marketing Of Electricity Generation Services

Requiring marketers of electricity generation services to comply with the Commission's proposal would be duplicative and unnecessarily burdensome. States have already

65 See MASS. REGS. CODE tit. 220 § 11.00.

66 16 C.F.R. § 310.3(a)(3).

67 See id.

68 See 67 Fed. Reg. 4506.

implemented strong verification procedures to ensure that consumers authorize the switch to a different electricity generation provider and that consumers understand they will be responsible for a provider's charges. States typically handle this matter in one of three ways: (1) they require a consumer's signature to prove authorization of the switch, (2) they allow authorization by signature or by third-party verification, or (3) they require consumers to enter into a written contract with a right to cancel period.

The imposition of additional requirements by the Commission for specific payment methods would not provide consumers with additional protections, but would be burdensome and confusing for sellers of electricity generation services. Accordingly, the Commission should exempt marketers of electricity generation services from its proposed amendment to Section 310.3(a)(3).

**b. If The Commission Is Unwilling To Provide This Exemption, Section 310.3(a)(3) Should Not Cover Transactions Involving Debit Cards.**

The Commission proposes to amend the TSR to extend the protections of Section 310.3(a)(3) to other payment methods, such as debit cards, because it is concerned that (1) consumers who use certain types of payment methods may not be aware that they can be billed for a purchase through such methods, and (2) many emerging payment methods do not offer consumers the protections provided by, or comparable to those available under, FCBA and the TILA. Neither of these concerns applies to the use of debit cards, which are used by a not insubstantial proportion of Green Mountain's customers to pay for their electricity generation services.

With debit cards, there is little danger that consumers will give their account numbers to telemarketers without knowing that their accounts will be debited. Unlike demand drafts, for example, which may be unfamiliar to consumers, debit cards are used in the same manner as credit cards. Moreover, the public and private sectors have provided debit card users with protections comparable to those available under the Fair Credit Billing Act ("FCBA") and the Truth in Lending Act ("TILA"). Indeed, there is no evidence in the record of this entire rule-making proceeding suggesting that consumers do not understand that by giving their debit card numbers, their accounts will be debited. GMEC understands that the law firm of Collier Shannon Scott, PLLC, has filed extensive comments on this issue, and fully supports these comments.

### 5. Caller ID Blocking

The Commission proposes to amend the TSR to include a new Section 310.4(a)(6), which would prohibit the blocking, circumventing, or altering of the transmission of the name and telephone number of the calling party for purposes of caller identification ("Caller ID"). GMEC agrees with the Commission that it is good policy to prohibit companies from interfering with Caller ID services. The Commission should not, however, impose affirmative Caller ID transmission requirements in the future unless current logistical and engineering limitations are resolved.

As the Commission recognized in the NPR, many telemarketing companies, as well as many other commercial enterprises, are dependent upon private branch exchange

("PBX") equipment[69] for their telephone systems. PBX equipment generally sends a signal to a local telephone company's switch for one telephone number, but does not identify the telephone number that is used behind the PBX. Accordingly, Caller ID information cannot be transmitted when using PBX equipment. GMEC is not aware of any new switch technology that would enable the identification of telephone numbers used in connection with PBX equipment.

In addition, Common Channel Signaling System No. 7 ("SS7")[70] is needed to send or receive Caller ID information. There are some regions in the U.S. that still do not have SS7 technology in their local telephone switch. To the extent that a telemarketer and/or a customer are served by a switch lacking this technology, compliance with a requirement to transmit full Caller ID information would be impossible.

Finally, telemarketing companies often operate under contract on behalf of many companies. It would be logistically impossible for them to continuously alter the transmission of the relevant Caller ID information to match the client on whose behalf they are calling.

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[69] PBX is a private telephone network that is used within one entity. Users of the PBX share a particular number of outside telephone lines in order to make telephone calls external to the PBX.

[70] SS7 is a global standard for telecommunications defined by the International Telecommunications Union. SS7 defines the procedures and protocol by which network elements in the public switched telephone network exchange information over a digital signaling network to effect wireline and wireless call setup, routing, and control. Among other things, SS7 is used for basic call setup, local number portability, and enhanced call features such as Caller ID, call forwarding, and three-way calling.

### 6. Pre-Acquired Account Information

#### a. The Commission's Proposal To Ban The Use Of Pre-Acquired Billing Information Obtained From Third Parties Exceeds The Commission's Authority Under The Telemarketing And Consumer Fraud And Abuse Prevention Act And Under The Federal Trade Commission Act.

##### i. The Telemarketing And Consumer Fraud And Abuse Prevention Act

The Commission's proposal to ban the use of pre-acquired billing information from third parties exceeds the Commission's authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act (the "Telemarketing Act"), 15 U.S.C. § 6101, and therefore is not a lawful use of the Commission's rule-making authority. In the Telemarketing Act, Congress specifically directed the Commission to enact rules regulating the following abusive telemarketing acts or practices:

> (A) [A] requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;
>
> (B) [R]estrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers;
>
> (C) [A] requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services; and
>
> (D) [A] requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts or money or any other thing of value, shall promptly and

> clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

See 15 U.S.C. § 6102(a)(3)(A)-(D). None of the above-noted practices outlined by Congress remotely relates to the use of pre-acquired billing information. Accordingly, the Commission has no authority to regulate the use of pre-acquired billing information as an abusive telemarketing act or practice under the Telemarketing Act.

### ii. The Federal Trade Commission Act

The Commission's proposal to prohibit the transfer of pre-acquired account information as an abusive practice not only finds no support in the Telemarketing Act, but is also an improper use of the Commission's unfairness standard in a rule-making proceeding. The Commission has no authority to regulate the transfer of pre-acquired account information under the unfairness standard because there is nothing in the Telemarketing Act or its legislative history that indicates that Congress intended for the Commission to make determinations as to whether telemarketing practices are "abusive" by evaluating them under the unfairness standard. Moreover, Congress had the opportunity to affirmatively require that the unfairness standard of Section 5 be used to evaluate abusive telemarketing practices, but did not do so.[71] In light of Congress's strong disapproval of the Commission's previous uses of the unfairness standard in telemarketing

[71] Congress amended the Federal Trade Commission Act to define "unfairness" in the same year that it passed the Telemarketing Act. See id.

proceedings,[72] it is reasonable to assume that if Congress had intended for the Commission to use the unfairness standard in determining which telemarketing acts and practices are "abusive," it would have said so expressly.

### b. If The Commission Intends To Adopt This Proposal, It Should Exempt Names, Addresses, Electricity Meter Identifiers, And Electricity Usage Patterns From The Definition Of "Billing Information."

The Commission proposes to add a new Section 310.2(a)(c), which defines "billing information" as "any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card." If the Commission intends to adopt its proposal to amend the TSR to add a new Section 310.4(a)(5) to ban the use of pre-acquired billing information obtained from third parties, it should exempt names, addresses, electricity meter identifiers, and electricity usage patterns from its definition of "billing information."

There are unusual circumstances in the electricity industry that counsel against an absolute prohibition on company access to pre-acquired billing information impracticable. For example, the Texas electricity industry model depends heavily on a numerical identification system for electricity meters called an ESI ID. Each ESI ID is composed of two sets of numbers. The first set of numbers indicates the utility currently providing electricity to the consumer. The second set of numbers identifies the consumer's meter. Together, the two sets of numbers compose a unique identifier for

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72 See FTC Improvements Act of 1980, P.L. 96-252 (May 28, 1980).

every electricity meter in Texas. To facilitate competition among sellers of electricity generation services, the Texas Public Utility Commission ("PUCT") provides a comprehensive customer list to competitive electricity retailers so that they may easily identify the location of customers' electricity meters. This customer list includes the ESI ID as well as the consumer's name and address, which, in the retail electric industry, is the consumer's "billing information." Competitive sellers of electricity generation services also receive information on each such consumer's electricity consumption history, which is used to help them meet their legal obligation to offer consumer's "levalized" billing.

The availability of the PUCT's list is crucial for both competition and consumer protection reasons. If the list were not available to all retailers, incumbent utilities would have an unfair advantage because competitors would not have access to this essential information. Release of this information under Texas' deregulatory scheme is also instrumental in preventing billing errors. By including consumers' unique ESI ID numbers, GMEC and other competitive sellers of electricity generation services are able to make sure that the consumer who agreed to switch electricity generation service providers is the consumer who is, in fact, switched. The Commission's proposal would presumably prohibit lists of this sort, which would result in unfair consequences for the electricity generation services industry and a higher potential of billing errors for consumers. Accordingly, GMEC respectfully requests that the Commission exempt

names, addresses, electricity meter identifiers, and electricity usage patterns, from any new restrictions on pre-acquired account information.

### c. If The Commission Chooses Not To Exempt Names And Addresses From The Definition Of "Billing Information," It Should Add A Provision To Section 310.4(a)(5) Stating That Pre-Acquired Account Information May Not Be Obtained From Third Parties, "Except As Otherwise Permitted By Law."

If the Commission chooses not to exempt names and addresses from its definition of "billing information," it should add a provision to its proposed Section 310.4(a)(5) that provides that pre-acquired billing information many not be obtained from third parties, "except as otherwise permitted by law." The Commission should explain in its Statement of Basis and Purpose that the phrase "except as otherwise permitted by law" applies in circumstances where the transfer of account information is provided for by federal or state laws designed to promote competition in newly-deregulated markets.

## IV. CONCLUSION

For the foregoing reasons, GMEC respectfully requests that the Commission revise its current recommend changes to the TSR to address the proposals discussed herein. GMEC would be happy to meet with the Commission of the Staff to discuss these comments.

Respectfully submitted,

GREEN MOUNTAIN ENERGY COMPANY

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