NATIONAL ENERGY MARKETERS ASSOCIATION

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California Customer Choice Team
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Via email: customerchoice@cpuc.ca.gov

**RE: Comments of the National Energy Marketers Association on "California Customer Choice – An Evaluation of Regulatory Framework Options for an Evolving Electricity Market (Draft Green Book)"**

Dear California Customer Choice Team:

The National Energy Marketers Association (NEM)[1] hereby submits comments on "California Customer Choice – An Evaluation of Regulatory Options for an Evolving Electricity Market (Draft Green Book)." The Commission initiated this process last year in recognition that significant consumer participation and engagement with Community Choice Aggregation (CCA), rooftop solar and Direct Access (DA) is a potential impetus for restructuring the current utility-rendered commodity service model and regulatory structure. The Commission convened an en banc hearing and workshop and accepted stakeholder comments to explore the issue. The Draft Green Book is the next step in this project.

[1] The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies.

The Draft Green Book does not recommend specific policy actions to be taken. Rather, it sets forth a framework for stakeholders to share their views. The Draft Green Book postulates that "[w]ithout a coherent and comprehensive plan, the current policies in place may drift California to an unintended outcome and breakdown in services like the Energy Crisis." The Draft Green Book recognizes that a clear long-term vision for the regulatory framework is needed. NEM agrees. Indeed, by articulating a clear long-term vision for the State's regulatory framework it will provide all stakeholders with much-needed regulatory certainty that is necessary to incent and support the investment of competitive at-risk capital to provide consumers with innovative energy solutions to meet ambitious State policy goals. Consumer benefits of energy choice are maximized, and risks are minimized, when market participants have regulatory certainty about the timing and implementation of competitive market expansion and then have regulatory certainty about the rules, policies and practices they must comply with going forward.

NEM agrees with the Commission that the time is now to seize upon the technological innovations that are rapidly being realized in the competitive energy sector, consumers increasing awareness of energy choice options and desire to control their own energy destiny, and the existing knowledge base that has been accrued about retail energy competition through California's experience to-date and through the experience of other states, to develop a long-term and forward-looking regulatory framework that reflects these consumer preferences and technological advancements. Consumers today have a much greater understanding of energy and energy options as evinced by the robust participation in Direct Access and CCAs. Consumers are increasingly interested in managing their energy usage and making energy purchasing decisions. This is driven by numerous factors including the desire to exert increased control over household and/or business energy costs, in response to environmental concerns and a desire to make "green" choices, to have an improved and customized customer service experience, and to utilize innovative energy technologies. Utility monopolies are poorly suited to develop, create and offer energy choices. Utility rate-setting processes and tariff approval processes only accommodate a one-size-fits-all approach to products and result in a regulatory lag that prevents cutting-edge innovation from being introduced in a timely fashion. Competitive energy providers can rapidly respond to evolving consumer preferences and meet the demands of the 21st century energy consumer.

**Future Role of the Regulated Utility**

The Draft Green Book explains that "[a] significant challenge for California as customer choice expands is addressing the evolving role of the investor-owned utilities." (page 19). In that regard, it asks what is the future role of the utilities in the new regulatory construct? (page 6). Further, "[s]hould the incumbent electric utilities be allowed to compete with other market participants, or should they be limited to offering a platform for other electricity suppliers?" (page 7). Consistent with our previously filed comments in this project, NEM recommends that the utilities exit the commodity merchant function and focus their resources on their core competency of ensuring the reliable maintenance of delivery infrastructure. If the utility does not have to divert its finite resources to perform competitive commodity-related functions as well as monopoly distribution functions, and instead is incented to focus on upgrading and maintaining distribution facilities this should encourage utility delivery system reliability, resilience and robustness. This is becoming more important as DER deployment is becoming increasingly widespread. The competitive marketplace should be relied upon to supply commodity and commodity-related products, services, information and technologies. When the utility exits the commodity merchant function and focuses on its core delivery functions, this shifts commodity-related risks away from captive ratepayers and to competitive suppliers. It is far more efficient and will encourage greater investment in both utility delivery infrastructure and competitive energy products and services, if ratepayer-backed capital is directed to delivery infrastructure maintenance and upgrades while competitive suppliers' at-risk capital is focused on developing and providing energy and energy-related products, services and technologies. Consumers should not be required to take risks that the market is willing to bear. Competitive market participants are expert at controlling supply-related risks, and they do so without the requisite guaranteed return of and return on utility investments, the risks of which are borne by captive ratepayers.  The Provider of Last Resort function should also be performed by a competitive entity or entities.  As part of the process of transitioning to competitive entities acting as POLR, the Commission may want to examine the validity of separating the performance of this backstop role by the need being met, i.e,, low income consumers, credit challenged consumers, or consumers that do not currently have a competitive supplier.

Retaining the utility in the merchant function with the utility's instant economies of scale, dominant market position, and guaranteed cost recovery makes it impossible to realize the benefits of competition. This is because it inherently distorts the market and requires a significant amount of regulatory intervention and oversight to try to ensure a level competitive playing field. A utility has multiple unfair competitive advantages as the incumbent monopoly commodity provider because it has instant market share without customer acquisition costs as well as guaranteed cost recovery without the risks faced by their competitive supplier counterparts in the market. In addition, a regulatorily-determined price will always be a poor proxy for a true market-based price as it suffers from timing lags, reconciliations, lack of transparency, and does not reflect the full costs of providing 24/7 no-notice commodity service.

Commodity supply and related services, information and technologies are inherently competitive functions. Allowing the utility to remain in the commodity merchant role, and provide other competitive products, discourages competitive entities from doing so, thereby reducing downward pricing pressure and the realization of efficiencies in the marketplace.

The retail choice jurisdictions that have chosen to retain the incumbent utility monopoly as a direct competitor with other competitive suppliers in the marketplace to provide commodity and other energy-related products and services, have delayed and diminished the full realization of the benefits of energy choice. Such is the case in three of the four markets studied in this project: New York, Illinois and the UK. By comparison, the decision in Texas to have utilities exit the commodity function has been at the foundation of a truly compelling success story for consumers and retail competition. In the Texas retail market, there is robust consumer shopping, robust supplier participation and numerous, diverse product offerings, coupled with an approximate 60% reduction in rates since the introduction of competition.

**<u>Structural Underpinnings of a Well-Functioning Competitive Retail Marketplace</u>**

Part V of the Green Book sets forth observations and future considerations for stakeholders based on Staff's review of markets in New York, Illinois, Texas and Great Britain. NEM's summary of the observations that Staff gleaned from the examination of these retail markets include:

1) Consumer education is critical to consumer engagement and price transparency;
2) Consumer protection laws and regulations apply to all LSEs marketing to customers;
3) Customer demand and market forces should be relied upon to drive innovation, rather than regulatory mandates;

4) A designated Provider of Last Resort exists to serve transitioning customers;

5) Generation investment is a function of the competitive marketplace;

6) Clearly defined roles for utilities and competitive market participants is important, including associated functional bill unbundling into competitive and non-competitive functions;

7) Commission establishment of standard business practices that are applicable to all market participants selling energy to consumers ensures consistency and competitive neutrality;

8) The establishment of a neutral price comparison website for consumers to compare competitive options fosters price transparency and facilitates customer engagement; and

9) Competitive energy providers make custom tailored offerings to meet local customer needs.

NEM agrees that the above-stated observations in the Draft Green Book are central tenets of a well-functioning competitive retail marketplace. Coupled with clear Commission policy regarding the utility role as the delivery services provider and exit from competitive commodity merchant functions, the adoption of policies based on these observations would provide a strong foundation for a competitive retail electric market in California going forward.

Specifically with respect to consumer protection requirements and marketing standards as referenced in the list above, NEM and its members developed and adopted a "Consumer Bill of Rights"[2] evincing marketers' commitment to ethically serve energy consumers. NEM's Consumer Bill of Rights addresses the need for clear marketer responsibilities and consumer expectations with respect to appropriate marketing practices. NEM and its members also developed and adopted "National Marketing Standards of Conduct"[3] that set forth a list of practices that form a common basis for doing business in today's energy marketplace. These

[2] Available at: http://www.energymarketers.com/Documents/Consumer_Bill_of_Rightsfinal_formatted.pdf
[3] Available at: https://www.energymarketers.com/Documents/ACF74.pdf

business practices pertain to competitive supplier marketing and sales activities, supplier agents, customer enrollment, customer contracts and complaint resolution.

Other retail choice jurisdictions have developed robust rules and policies related to consumer protection requirements, supplier certification and marketing practices. NEM submits that the regulations adopted by the Pennsylvania Public Utility Commission[4] and Public Utility Commission of Texas[5] represent best practices in this regard and would be useful resources to consult.

**<u>Omissions and Misstatements in the Draft Green Book</u>**

Comments were additionally requested on topics related to customer choice that were not covered in the Draft Green Book as well as corrections to misstatements in the document. In NEM's view, the reflection of these two areas for comment on the Draft Green Book are interrelated. NEM submits that the state market models that were selected for study - New York, Illinois and Texas - were implemented for the purpose of directly providing individual consumers with competitive energy options from competitive retail suppliers (what is referred to in California as "direct access," but for example, referred to as "retail choice" elsewhere). Yet, the Draft Green Book is overwhelmingly focused on the customer aggregation model and appears to predominantly view and evaluate the four markets chosen through that lens. This seems to have distorted some of the analysis of these markets. While Direct Access and CCAs are both forms of customer choice, the mechanics, the participants, the value propositions, the benefits to be achieved, amongst other features, are different. Notwithstanding the current

[4] See 52 Pa. Code § 111, Marketing and Sales Practices for the Retail Residential Energy Market and 52 Pa. Code § 54.31, Electricity Generation Supplier Licensing.
[5] See Texas Administrative Code 25.107 Certification of REPs and 25.471 Consumer Protection Rules for Retail Electric Service.

restrictions on Direct Access participation in the State, in order to properly evaluate California's long-term regulatory structure, the Draft Green Book should have included a more comprehensive analysis of the expansion of Direct Access, separate and apart from CCAs. The overwhelming consumer demand for Direct Access participation has been consistently demonstrated by year over year, fully-subscribed enrollments up to the shopping cap. This clear expression of consumer preference for an individual choice of competitive retail supplier should be actively considered and incorporated in the regulatory structure that is ultimately adopted.

Moreover, the PCIA mechanism and statutory customer "indifference" concept as understood in California has inaptly been used as a baseline for reviewing competitive neutrality in the other markets studied in the Draft Green Book. Competitive neutrality should refer to the nature of the results achieved for all market participants. The antiquated PCIA mechanism in California has resoundingly resulted in conferring an unfair advantage to the utility to retain consumers by distorting the relative value of energy shopping for consumers. Punishing customers for shopping by assessing unreasonable exit fees is not a competitively neutral result. (compare for example the discussion on page 39 of the Draft Green Book).

In the individual state sections of the Draft Green Book, there is a lack of clarity and distinction between direct access and CCAs, and even the role of regulated utility. For instance, in the discussion of the New York retail electric market, there is repeated reference to ESCO (the term for competitive retail supplier in this jurisdiction) "tariff and payment options." (pages 31 and 34). To be clear, competitive retail suppliers do not offer tariffs. Utility rates are set forth in tariffs as part of the regulatory rate-setting process that is utilized to ensure that utility monopoly rates are just and reasonable. Competitive retail supplier pricing is set as a function of downward pricing pressure in the competitive marketplace. This distinction is important in ascertaining the appropriate amount of regulatory intervention in the market.

In the discussion of the Illinois retail electric market, the Draft Green Book appears to confuse the distinction between consumers shopping directly from a Retail Electric Supplier (RES) (the term for competitive retail supplier in this jurisdiction) versus consumer participation as part of a buying group in a municipal aggregation program. There are currently 1.8 million residential customers taking service from a RES[6] (the Draft Green Book only attributes this shopping to municipal aggregation at page 36), which is inclusive of individual customers shopping directly with a RES as well as government aggregation programs.[7] Moreover, the RESs that won the competitive bid process to serve municipal aggregation customers do so with energy procured in the competitive market, not from energy procured by the Illinois Power Authority as part of a centralized procurement process as suggested by the Draft Green Book. (pages 36-37). Indeed, the Illinois Power Authority's role is to procure power for non-shopping, default service residential and small commercial customers of Ameren, ComEd, and MidAmerican utilities. A final point of clarification is that the Office of Retail Market Development within the Illinois Commerce Commission was created by statute for the express purpose of promoting retail competition,[8] in other words to facilitate competitive retail offerings for the benefit of consumers. It does not function as a consumer watchdog as implied by the Draft Green Book. (page 38).

The Texas retail electric market is widely viewed as one of, if not the most, successful retail markets that has been implemented. The treatment of the Texas market model in the Draft Green

[6] https://www.pluginillinois.org/default.aspx
[7] Illinois Commerce Commission, Office of Retail Market Development, 2017 Annual Report, page 24.

Book could easily lead one to falsely conclude otherwise. In some cases, this is because there are sentences that are unclearly worded. For example, "The predominant provider of electricity in Texas is served by non-utility third party providers, or REPs." (page 41). The intent of this sentence is unclear, but for clarity it is worth reiterating that the utility has exited the commodity merchant function in Texas. The diversity of Retail Energy Provider (REP) product offerings and consumer value propositions in Texas are also significantly understated in the Draft Green Book by generalizing that "customers are primarily driven by cost" (page 46) and narrowly describes customers "enter[ing] a contract to lock in a low price." (page 47). While price savings are a driver of consumer shopping, Texas customers have a wide menu of product offerings to meet individual consumer preferences related to price certainty, renewable energy options, value-added products and services, and free weekends amongst others.[9]

**Conclusion**

NEM appreciates this opportunity to submit these comments on the Draft Green Book and provide input into the Commission's Customer Choice Project.

Respectfully submitted,

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8 Illinois Retail Electric Competition Act, 220 ILCS 5/20-110.
9 http://www.powertochoose.org/en-us/