STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on October 18, 2012

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca
Gregg C. Sayre

CASE 12-M-0476 - Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State.

CASE 98-M-1343 – In the Matter of Retail Access Business Rules.

CASE 06-M-0647 – In the Matter of Energy Service Company Price Reporting Requirements.

ORDER INSTITUTING PROCEEDING AND SEEKING COMMENTS REGARDING THE OPERATION OF THE RETAIL ENERGY MARKETS IN NEW YORK STATE

(Issued and Effective October 19, 2012)

BY THE COMMISSION:

For several months, Department of Public Service Staff (Staff) has been reviewing the performance of the retail electricity and natural gas markets, particularly for residential and small non-residential customers. This review has raised a number of concerns with the current operation of these markets, which Staff has brought to our attention. These include the practical difficulty of comparing prices of electricity and natural gas that are available from the utility and Energy Service Companies (ESCOs), and the fact that a large sample of data indicate that many residential and small non-residential ESCO customers paid a higher price than they would otherwise have paid as full-service utility customers, as discussed further below. Accordingly, we are instituting a new proceeding to assess the residential and small non-residential retail energy markets in New York State. The Secretary shall issue a notice seeking comments in response to the questions appended to this Order in this new proceeding as well as in cases 98-M-1343 and 06-M-0647.

BACKGROUND

The energy industry in New York was restructured more than a decade ago. Currently, utilities provide commodity service that, for residential and small non-residential customers, reflects some hedging[1] to reduce retail price volatility.[2] All customers of major electric and natural gas utilities in New York State have the choice to purchase energy from their utility, or from an ESCO. Approximately 85 ESCOs are certified to provide electricity in New York State and over 100 ESCOs are certified to provide natural gas.

In the current retail market, ESCOs can compete directly with the utility or can offer options for consumers which the customer’s utility does not. These options include products with less price hedging or certainty than the utility offering, products with more hedging or price certainty than the utility offering, electricity reflecting a greater percentage of renewable resources than the utility offering, and value-added services such as home heating equipment repair and maintenance, airline miles or similar rewards. We do not set or regulate the rates charged by ESCOs.

[1] A hedge is a contract which establishes, at the time of the contract, the price for energy that may be supplied at a future date.

[2] The utilities incur costs in procuring the electricity or natural gas for full-service customers. These costs are recouped by the utilities, generally through a merchant function charge.

This Commission has supported the development of retail electricity and natural gas markets. Until 2008, we had approved programs under which utility ratepayers subsidized measures to promote the development of retail competition.[3]

OVERVIEW OF THE PERFORMANCE OF RETAIL ENERGY MARKETS

Staff is conducting a review of the performance of the residential and small non-residential energy markets to determine if these markets are functioning as intended, and to identify opportunities for improvement. As part of this review, Staff met several times with groups of ESCOs and/or their trade associations. Staff also met with representatives of large energy utilities and other interested parties. In addition, Staff has requested and analyzed data from utilities concerning the prices charged and/or dollar amounts billed by ESCOs in their service territories, in comparison with what would have been billed by the utility for the same service. Staff also reviewed ESCO-related consumer complaints received by the Department in the last year.

Utility customers in the three major categories of large non-residential, small non-residential and residential, can choose to procure their energy commodity from an ESCO or from their incumbent utility. Overall, Staff reports that retail competition appears to appeal to large non-residential customers. The vast majority of these relatively sophisticated customers obtain their energy commodity from an ESCO and, in doing so, report savings and/or benefits from ESCO-provided hedging or risk management services.

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[3] Case 07-M-0458 – Proceeding on Motion of the Commission to Review Policies and Practices Intended to Foster the Development of Competitive Retail Energy Markets, Order Determining Future of Retail Access Programs (Issued October 27, 2008).

In contrast, Staff reports that its review of retail energy markets for residential and small non-residential customers has raised several concerns. For residential customers, ESCO offerings that include a broad range of value-added services have not developed as expected.[4] Staff reports that the majority of ESCO offerings are variable-priced products with no value added services. Based on information on ESCO websites, several ESCOs offer products with prices fixed for more than one year. Similarly, several ESCOs offer electricity solely from renewable resources and Staff reports that one ESCO offers home heating repair and maintenance services.

Staff's analysis of comparative ESCO pricing or billing data also raises concerns.[5] The pricing and billing data for residential and small non-residential customers reveals a wide range of prices paid by ESCO customers. Based on the limited data reviewed, customers of some ESCOs paid lower prices for electricity and/or natural gas than they would have were they full-service utility customers, some customers paid more and some customers paid considerably more. Some of these price

[4] Id. at 4.

[5] Staff analyzed two years of data (August 2010 – July 2012) from National Grid's upstate operations, which includes for each ESCO, the difference between what residential customers actually paid and what they would have paid the utility. In addition, Staff analyzed comparative pricing or billing information for the five ESCOs serving the largest number of customers, including three monthly observations (Summer 2011, Winter 2011/12 and Summer 2012) from Consolidated Edison Company of New York, Inc. (Con Ed) and Central Hudson Gas & Electric Corporation (Central Hudson), and data from two twelve-month periods (through August 2012) for National Fuel Gas (NFG). This additional data, which is not comparable to the analysis of National Grid's data, includes information for both electricity and natural gas service, in both summer and winter periods, and in some cases, for both residential and small non-residential customers.

variations may reflect value-added services offered by ESCOs, such as fixed prices and electricity from renewable sources.

Information for Current ESCO Consumers

Staff reports that it is very difficult for energy consumers, particularly residential and small non-residential customers, to know and compare the prices for electricity and natural gas commodity available from the utility and ESCOs. ESCOs are not required to offer a standard product or products. Moreover, ESCOs primarily promote prices that are currently available, whereas most utilities generally present only historic prices. Further, after selecting an ESCO, energy consumers may experience price changes that were not clearly identified in their contract. For example, many ESCO sales agreements do not specify a particular price and instead state that the price will be determined by the ESCO.

For these reasons, Staff notes, it is difficult for most residential and small non-residential customers to determine whether they achieved the expected benefits, including savings, by purchasing their energy commodity from an ESCO. Similarly, it is difficult for customers to evaluate the value-added services, if any, they obtained from their ESCO to determine if those services continue to meet those customers' needs. Providing ESCO customers with easy and timely access to comparative pricing and/or billing information would inform customers and make it easier for them to calculate the price premium paid for offerings and choose a supplier, thereby increasing competitive pressure on ESCOs to the benefit of consumers through a more effective and efficient market.

As a first step to develop such tools, Staff worked with Central Hudson and NFG to design and implement a web-based historic bill calculator for residential and small non-residential customers. After the ESCO customer enters his or her account number, this tool produces the dollar amount that the customer would have paid if commodity had been purchased from the utility, as well as a direct comparison with the actual dollar amount paid as an ESCO customer. This information is presented for as long as the customer has had service from the ESCO, up to one year for NFG customers and two years for Central Hudson customers, so as to minimize the impact of credits or charges that may be reflected in any single bill cycle. Statements explaining the tool and how it should be interpreted by customers were developed by Staff, with input from ESCOs and the applicable utilities. These tools have been in place since June 2012, and are now being promoted by the utilities.

Data for Potential Customers

As explained above, Staff’s review has found that it is difficult for residential and small non-residential customers to know and to compare prices of electricity and natural gas commodity services available from the utility and ESCOs. Similarly, for customers shopping for ESCO service, it is difficult for customers to learn how the prices charged by an ESCO compare with those charged by other ESCOs.

Collecting and publishing historical pricing data for each ESCO could help discipline retail energy markets. Data could be collected and published for several classes of products offered by ESCOs, including products with a variable price and no value added attributes.

Energy consumers could also be well-served by additional tools that assist them in comparing prices prospectively. The Power-to-Choose (PTC) website is a starting point for residential consumers to learn about their energy options when shopping for an ESCO. In addition, ESCO’s are not currently required to offer contracts at the prices listed on the PTC website. In 2010, the PTC website was modified to enable ESCOs to input their own prices as frequently as they like. We may wish to consider enhancements to this website to increase its usefulness to consumers and changes to the price reporting requirements. Such changes may also enhance competition in the retail energy markets.

ESCO Referral Programs

In 2005, we approved an ESCO Referral Program for energy utilities to encourage the development of retail markets for energy supply by having the utility assist residential and small non-residential customers “in exploring the benefits of retail access by referring them to ESCOs.”[6] Under that program, the utility offers residential and small non-residential customers contacting it for non-emergency reasons, the opportunity to enroll with ESCOs who have agreed to offer a 7% discount off of the price of utility energy commodity service for a two-month introductory period. Customers that do not request enrollment with a particular ESCO are assigned to a participating ESCO at random, on a rotating basis. Con Edison, Orange & Rockland, Central Hudson and National Grid upstate currently operate such programs.[7]

[6] Cases 05-M-0858 and 05-M-0332, State-Wide Energy Services Company Referral Programs; Central Hudson Gas & Electric Corporation’s Plan to Foster the Development of Retail Energy Markets, Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject to Modifications (issued December 22, 2005), p 2.

[7] NYSEG/RG&E and National Grid downstate have proposed to implement ESCO Referral Programs, but we have not taken action on those filings. ESCOs have not reported any interest in a decision on these filings. National Fuel Gas had an ESCO Referral Program until 2008, but abandoned it due to reportedly high implementation costs.

These programs facilitate customer enrollment with ESCOs by allowing ESCOs to avoid marketing, verification and enrollment costs. Many ESCOs serving residential and/or small non-residential customers in New York participate in these programs, including ESCOs for which the Department has received a large number of complaints. Customers may be enticed by the introductory discount and then may remain customers of a particular ESCO because of inertia, paying prices substantially above what they would have been charged by the utility.

In directing that these programs be established, we stated that these programs are “an interim, near-term strategy, and would expect that [these programs] would be made obsolete and be superseded by ESCOs undertaking customer care functions for residential customers over the longer term.”[8]

It is appropriate to consider whether these programs should be continued in their current form, modified or eliminated altogether. Possible modifications would be to: (1) only allow participation by ESCOs that guarantee future savings for some time period beyond the initial two month introductory phase, e.g., during the first year a customer remains enrolled with that ESCO; or (2) require that an ESCO obtain a customer’s affirmative consent to remain with the ESCO prior to the expiration of the introductory period.

Low-Income Customers

Staff reports that data provided by one utility includes, for each ESCO, the number of that ESCO’s customers that participate in the utility’s low-income assistance programs

[8] Case 00-M-0504, Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy markets and Fostering Development of Retail Competitive Opportunities, Statement of Policy on Further Steps Toward Competition in Retail Energy Markets (issued August 25, 2004), p. 29.

and the number of that ESCO's customers that do not participate in those programs. The data indicate that customers participating in utility low-income assistance programs are more likely to obtain their energy commodity from an ESCO than residential customers who do not participate in these programs. Further, Staff reports that some ESCOs have substantially more customers participating in the utility's low-income assistance programs, on a percentage basis, than the overall population. Coupled with the fact, explained above, that many residential ESCO customers pay more than had they purchased their energy commodity from the utility, this raises a concern that the current operation of the retail energy markets may be in conflict with one of our statutory policy requirements. Specifically, it is this Commission's policy that the continued provision of electric and natural gas service to customers is in the public interest.[9] Residential retail energy markets, as currently operating, may be inconsistent with the Commission's efforts to assist low-income customers in maintaining electricity and natural gas service, such as the authorization of more than $100 million annually for ratepayer-funded financial assistance programs. Changes to the residential retail energy markets may be useful to align their operation with the public's interest in the continued provision of energy service to all customers.

Door-to-Door Marketing

Staff reports that several ESCOs conduct door-to-door marketing of residential and small non-residential customers. Such marketing is generally conducted in densely populated areas, which often includes lower-income households or

[9] Public Service Law, Section 30.

households where English is not the primary language spoken in the home.

As explained by Staff, door-to-door marketing is typically conducted by ESCO employees or contactors, where the marketer is compensated primarily based on the number of customers that individual enrolls. Staff’s review has found that such marketing is often associated with what customers perceive to be high-pressure sales techniques, which may not be conducive to customers making an informed decision concerning their energy supply. The most common complaints received by the Department concerning door-to-door marketing are aggressive sales representatives, unauthorized change of energy providers attributable to the sales representative using the utility account number obtained from the customer in door-to-door marketing even though the customer did not sign a contract, marketers misrepresenting themselves and marketers making false or misleading statements.

Changes to current door-to-door marketing safeguards could benefit customers and improve the transparency of the marketplace. These changes may include, but are not limited to, requiring ESCO marketers to begin any interaction with a disclosure statement, limiting termination fees for contracts arrived at through door-to-door marketing, or placing other restrictions on this marketing method.

ESCO Contracts

We have adopted Uniform Business Practices (UBPs) that include numerous detailed requirements regarding the practices that must be used for receiving, processing and fulfilling requests for changing a customer’s electricity or natural gas provider, including the content of the sales agreement, terms and conditions applicable to customers solicited via door-to-door sales, and customer enrollment procedures. In contrast, the UBPs contain very few requirements concerning information that must be provided to existing ESCO customers.

The only information that the UBPs require ESCOs to provide existing customers concerns material changes to an existing contract and contract renewals. The UBPs require a customer's consent regarding contract renewals that include a material change such as a longer length of a renewal contract's term or the addition of termination fees. The UBPs do not require express consent from a customer for a change in rate, or a contract renewal involving a change in rate.

Staff notes that the absence of a requirement that customers provide express consent to changes in their contracts raises concerns regarding both fixed and variable priced contracts. For example, a contract that renews at a new fixed rate, could bind a customer to a contract with a significant change in the rate through inaction.[10] Similarly, expiring fixed price contracts can renew at a variable price determined by the ESCO, without express authorization of the customer. ESCOs are not required to provide notice of the variable price that would be applicable in the first month, or any subsequent month, of the automatically renewed contract.

Moreover, the narrative description in some variable-price ESCO contracts of how the applicable energy price will be determined, does not adequately inform customers of the prices that they may be charged. Instead, such contracts include

[10] We have previously noted concern about this issue and received comments in 2008 and again in 2011 on whether UBPs should be revised to require a customer's express authorization for renewal of a fixed price contract at a new rate. Case 98-M-1343, Supra, Order Implementing Chapter 416 of the Laws of 2010 (issued December 17, 2010), p. 9, footnote 4. Those comments were specifically with regard to residential customers and customers solicited through door-to-door marketing.

general statements that indicate that the ESCO has discretion to charge prices that do not depend on market factors.

Customers might benefit from requiring ESCOs to specify a rate methodology, including a formula that the customer could use to determine the applicable price, in variable rate contracts. Additionally, it may benefit customers if any changes to contracts, including to the price, require the customer’s express consent.

Purchase of Receivables

Utilities provide billing and collection services for the vast majority of ESCOs serving residential customers. Utilities also purchase accounts receivable from most of the ESCOs providing service in their service territory. We previously adopted the Purchase of Receivable (POR) model to, among other things, reduce ESCO costs and ensure that customers receive the full benefits of the Home Energy Fair Practices Act (HEFPA), minimize the switching of payment troubled customers back to full utility service, and promote residential retail access.

Receivables are purchased either with recourse or without recourse. When receivables are purchased without recourse, the value of the receivables being purchased is generally discounted based on historical net write off percentages, and the utility assumes full responsibility for collections from customers. The applicable discount is based on the payment history of all ESCO customers or all ESCO customers in a specific service class, and does not vary by ESCO. In contrast, where receivables are purchased with recourse, if the customer does not pay his or her bill, the utility charges a portion of the write off to the ESCO and the ESCO assumes responsibility for the collection of those amounts. The amount charged back to the ESCO is the difference between what the customer owed the utility including ESCO charges and what the customer would have owed the utility had he or she been a full service customer of the utility.

As noted above, Staff's review of available data indicate that in at least one utility's service territory, the proportion of ESCO customers that participate in the utility's low-income assistance program is higher than for the utility's full-service customers. Staff reports that the policy of allowing utilities to purchase receivables without recourse, with a single discount rate applicable to all ESCOs, may facilitate the ability of individual ESCOs to shift the cost of uncollectibles attributable to their own customers, to all other ESCOs. This policy should be reviewed as it may substantially weaken the incentive that exists in most competitive markets, for firms to acquire customers who are willing and able to pay, as well as the incentive for firms to charge reasonable prices.

CONCLUSION

To address these and other issues, the Secretary shall issue a notice seeking comments from interested parties on the questions included in the appendix to this Order. These questions are designed to elicit comments on each of the concerns identified in this Order, namely: (1) Information for Current ESCO Customers; (2) Data for Potential Customers; (3) ESCO Referral Programs; (4) Low Income Customers; (5) Door-to-Door Marketing; (6) ESCO Contracts; (7) Purchase of Receivables; and (8) Other Proposals. The questions also seek comments on actions this Commission could take to improve the operation of the retail energy markets in New York for the benefit of customers. We encourage Staff to engage consumers in order to seek input on these issues and to consider whether additional public input, including through public hearings, is necessary.

The Commission orders:

1. A new proceeding is instituted to assess certain aspects of the residential and small non-residential retail energy markets in New York State.

2. The Secretary is directed to seek comments in response to the questions contained in the appendix to this Order.

3. These proceedings are continued.

By the Commission,

Jaclyn A. Brilling
Digitally Signed by Secretary
New York Public Service Commission

(SIGNED) JACLYN A. BRILLING
Secretary

Information for Current ESCO Customers[1]

1. What are the benefits and costs of requiring that utilities develop and make available historic bill calculators through utility websites and/or smart phones to enable ESCO customers to compare their actual charges to what they would have paid if they were a full-service utility customer? How should such tools be designed so that they are easy to use, factually oriented, and produce accurate and useful information for ESCO customers?

2. What are the benefits and costs of requiring that utilities include a line item on ESCO customer bills that identifies what the customer would have paid had supply been purchased from the utility? Precisely what information should be published on the bill so that it is most useful to customers?

3. What are the benefits and costs of requiring that utilities explain to payment-troubled ESCO customers contacting the utility, or provide to such customers in a subsequent mailing, what the customer would have paid had the energy supply been purchased from the utility, and the difference between that amount and what they were actually billed for energy supplied by the ESCO? What information should utilities provide to existing low-

[1] Questions 1 – 3 are being addressed for National Grid’s upstate operations in the context of that utility’s current rate case (Cases 12-E-201 and 12-G-202). Similarly, questions 2 – 3 are being addressed for Central Hudson’s operations in the context of a proceeding to evaluate the proposed acquisition of that utility by Fortis (Case 12-M-0192). Comments on these issues are invited here as these measures might be implemented through this case in other utility service territories.

income and payment-troubled ESCO customers to assist them in making informed decisions and how should utilities provide that information?

Data for Potential Customers

4. What are the reasons why the Commission should, or should not, collect monthly data on prices charged by ESCOs to residential and small non-residential customers for all or some of their products? How would Commission publication of all or part of this data assist customers and/or impact retail competition? What level of data aggregation would be sufficient to adequately address the need to maintain the confidentiality of customer-specific data.

5. What are the advantages and disadvantages of requiring ESCOs to honor rates and terms posted on the Commission's "Power to Choose" website? What are the benefits and costs of requiring that ESCOs post all of their offerings on that website? What other enhancements to the site should be considered to increase its usefulness to consumers?

ESCO Referral Programs

6. What is the basis for continuing the existing ESCO Referral Programs in the service territories of Con Edison, Orange & Rockland, Central Hudson, and National Grid (upstate)? If these programs should continue, should they be modified, and how long should they be maintained?

Low Income Customers

7. What are the advantages and disadvantages of allowing customers participating in any state or federal energy assistance program, such as the Home Energy Assistance Program, or in any utility-sponsored affordability program, to obtain commodity service from an ESCO? How does the analysis change if the ESCO guarantees a price no higher than that charged by the utility?

Door-to-Door Marketing

8. What are the legal and policy reasons for permitting or prohibiting door-to-door marketing of electricity and/or natural gas to residential and/or small non-residential customers?

9. What are the reasons why the Commission should continue to permit termination fees in sales contracts made between ESCOs and residential and small non-residential customers through the door-to-door marketing channel? Are there circumstances under which termination fees for such contracts would be appropriate (*e.g.*, fixed-rate contracts), and what should an ESCO be required to demonstrate to be able to include termination fees for door-to-door marketing in its sales contract?

10. Are there other conditions or requirements that should be imposed on door-to-door marketing by ESCOs, such as a requirement that such marketers begin an interaction with a potential customer with a disclosure statement? An example of a possible disclosure statement is: "My name is ____. I represent ____. ___ can provide you with your electricity and/or natural gas. I do not work for

or represent your utility." How should such a requirement be enforced?

11. Should the Commission have the authority to preclude or limit an ESCO's door-to-door marketing in the future in specific circumstances?

ESCO Contracts

12. What are the advantages and disadvantages of modifying the Uniform Business Practices to require ESCOs to obtain affirmative consent from customers for contract renewals involving a change in price? What are the advantages and disadvantages of requiring ESCOs to obtain affirmative consent from customers for all contract renewals?

13. What are the advantages and disadvantages of requiring ESCOs to provide their rate methodology and related billing calculations to customers with variable rate contracts? What are the advantages and disadvantages of requiring all variable rate methodologies to be based on specified formulas tied to publicly available information, with the formulas varying by ESCO? If this is to be required, when and how should ESCOs provide this information?

Purchase of Receivables

14. What would be the impact of requiring utilities to purchase receivables with recourse and thereby have ESCOs assume whole or partial responsibility for the uncollectibles of their customers? Should this be a requirement? What would be the impact of discontinuing

POR without recourse for some ESCOs and how would those ESCOs be identified?

Other Proposals

15. What other modifications to existing retail market programs or practices, including modifications to the UBPs, should be considered, and why?