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By Overnight Mail

March 28, 2003

Hon. Janet H. Deixler
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Case 99-M-0631 – In the Matter of Customer Billing Arrangements.
Case 03-M-0117 – In the Matter of the Implementation of Chapter 686 of the Laws of 2002.

Dear Secretary Deixler:

In accordance with the *Notice Requesting Comments,* issued in these proceedings on February 24, 2003, enclosed for filing with the Commission are the original and ten (10) copies of the *Reply Comments of the Small Customer Marketer Coalition.*

A copy of the Comments has been served upon all the parties listed on the Service List dated March 11, 2003, in accordance with their accepted service method.

Respectfully submitted,

Small Customer Marketer Coalition

By: ______________________
Usher Fogel, Counsel

Cc: Service List (by e-mail and/or regular mail)

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 99-M-0631 - In the Matter of Customer Billing Arrangements.

CASE 03-M-0117 - In the Matter of the Implementation of Chapter 686 of the Laws of 2 2002.

REPLY COMMENTS OF THE SMALL CUSTOMER

MARKETER COALITION

I. PRELIMINARY STATEMENT

These reply comments are submitted on behalf of the Small Customer Marketer Coalition ("SCMC") in accordance with the Notice Requesting Comments ("Notice"), issued by the Commission in these proceedings on February 24, 2003. The initial comments submitted by the parties reflected a fair level of consensus on the need to establish objective standards for compliance that would allow the ESCO and utility to implement the provisions of the statute in an efficient and cooperative manner. Although there some disagreement exists on certain narrow questions of law posed in the Notice, for the most part the conclusions reached by most of the parties were not antithetical to each other.

SCMC also believes it is necessary to emphasize that a strong undercurrent of concern expressed in the comments was the need to develop and

implement specific rules and guidelines to govern implementation of this restructured HEFPA environment. It is difficult to posit comprehensive positions on hypothetical cases and abstract legal questions, rather than to realistic, tactile, and specific rules and procedures.

As expected, all the LDCs sought adoption of broad parameters for costing the reimbursement they would be entitled to for effecting a termination. SCMC believes adoption of any specific costing formula at this time is premature. It is first necessary for the utilities to unbundle their existing HEFPA related costs, identify the true incremental costs associated with implementing termination under Chapter 686, and determine to what degree joint terminations will be conducted. Only after these issues are addressed will the Commission be in a position to adopt a specific costing methodology.

II. SCMC RESPONSE

A. Chapter 686 of the Laws of 2002

Question #1. *What is the effect of these provisions generally and on the provision of HEFPA protections in a single retailer model?*

Response: NYSEG avers that all rules and regulations, including those in existence and those promulgated in the future, will have equal applicability to ESCOs and LDCs. This

view may be read incorrectly to imply that in developing its rules and regulations the Commission could not incorporate differing criteria to reflect actual differences between ESCOs and LDCs. This would be short sighted and ignore the normal level of discretion available to the Commission. From SCMC's perspective the Commission should develop and apply those rules and regulations that are reasonably related to an ESCO and are consistent with the statute.

Question #2. *What other provisions of law, if any, might require an ESCO to provide commodity service to residential customers, upon request?*

Response: NYSEG asserts that using its general powers of regulation under the PSL, the Commission could impose an obligation to serve as a condition of ESCO participation in retail access. This vague argument is without merit. There are no specific powers enumerated in the PSL that authorize the PSC to impose an obligation to serve on an ESCO or any other similar entity.

Question #3. *What is required for effective notice and documentation, including form, manner and content; what time limits and other procedures are required for transmitting the notice and disconnecting service? Should ESCOs submit sample termination notices for Department review?*

Response: In its comments, National Fuel Gas Corporation broaches the concept of the DPS reviewing and approving each termination request. We do not believe it is practical to involve the DPS in every termination; not only would it materially tax the resources of the DPS, but it would also lead to additional delays in the termination process.

NYSEG initially contends that that passage of Chapter 686 does not require any change in existing requirements, and ESCOs must comply with all existing regulations. It is senseless to argue that passage of Chapter 686,which revolutionized utility regulation, will not engender changes to existing rules and regulations. Obviously, the Commission will need to reexamine the existing regulatory structure to accommodate the changes wrought by Chapter 686.

This utility also asserts that the time period for conducting a termination for an ESCO should mirror the period used by the utility, and further contends in its response to Question # 10 that such period is at least 20 workable days. At this point, it is useless to make such categorical assertions. Instead, the Commission needs to establish time periods that are consistent with the statute and can be implemented in a practical matter and cost-effective manner.

Question #6. *May the distribution utility refuse to disconnect its service if it is not satisfied with ESCO procedures for HEFPA compliance?*

Response: Con Edison proposes that the ESCO post security or an insurance policy to cover the LDC for an erroneous termination. This approach should not be adopted. The

ESCO will be obligated to comply with HEFPA and the Commission rules; failure to comply will have serious legal consequences. There is no need to impose additional financial costs to address the same matter. Further, utilities are not required to post security or an insurance policy to assure their compliance with HEFPA; ESCOS should, therefore, not be treated in a discriminatory manner

Question #13. *Are ESCOs eligible for receipt of direct payments from social service agencies?*

Response: A number of parties opined that ESCOs would not be eligible for payments from social service agencies. This view is in error. Section 53 encompasses ESCOs within the ambit of a utility subject to the provisions of HEFPA. In turn, Section 35 (1) (d) specifically directs service to be reconnected "upon the receipt of a commitment of a direct payment...from the social services official of the social services district in which the customer resides". This language is applicable to all customers served by a utility subject to the provisions of HEFPA, regardless if the utility provides commodity service only or full sales service. Consequently, ESCOs are clearly eligible for receipt of direct payments from social service agency. Further, it would be illogical to preclude such payments, as the ESCO, just as the utility, now has the ability to effectuate a discontinuance of service of commodity and distribution service.

NYSEG and others argue that social service payments to ESCOs are not permitted because the ESCOs cannot guarantee the restoration of service. This view, however, is unpersuasive because neither can the distribution utility guarantee the

restoration of service with the introduction of the ESCO termination rights codified in Chapter 686. Both parties—the ESCO and LDC-- have the ability to effect a termination of distribution service and thus are both eligible to receive direct payments from social service agencies. In connection with HEAP, payments can be made to a home energy supplier, which clearly includes an ESCO that provides electricity and/or natural gas.

From a practical perspective, it would be helpful for the PSC to coordinate efforts with the Department of Social Services to allow for the seamless implementation of this new payment arrangement with ESCOs.

Question #17. *Does this provision require allocation of customer payments if the distribution utility and the ESCO each have a separate DPA with the customer or if the ESCO is the only entity that has a DPA with the customer?*

Response: As noted in our initial comments, Section 37 (1) specifically addresses the criteria associated with a DPA, including how payments made under a DPA are to be allocated. Where a DPA is not involved, the allocation of customer payments is governed by Section 32 (5)(c). Thus, if the utility does not have a DPA, the payment allocation for the utility is subject to Section 32 (5)(c). Con Edison asserts that under all conditions the allocation of partial payments should provide a priority for DPA obligations and payments owed to the utility. The amendment to section Section 37 (1) states that payments under a DPA are to be allocated first to each utility based on the current charges owing to each utility and on a pro-rata basis for arrears. There is no payment priority afforded to the distribution utility.

C. <u>A Reasonable Implementation Solution</u>

It is now evident that implementation of the new regulatory structure required to implement Chapter 686, as well as the complex internal utility and ESCO administrative systems necessitated by this new structure, will not be completed or operational by June 18, 2003, the effective date of the statutory amendments. And, regardless when the requisite rules are finalized, the affected parties will inevitably desire a phase-in and testing period to assure that the programs are operating properly and that adequate compatibility exists between the LDC and ESCO systems.[1] This prospect of an inability to comply with the statute has created a high level of uncertainty and concern over whether, when, and how implementation of the provisions of Chapter 686 can and will realistically occur.

In our view, there is a compelling need to have some mechanism in place by June 18, 2003 that can address this serious concern and also recognizes the reality of the current situation. SCMC therefore recommends that the Commission should direct all distribution utilities to provide ESCOs with the option of having their accounts receivables associated with customers covered by HEFPA, purchased by the distribution utility without recourse. The utility that purchased the receivables, rather than the ESCO, would institute, at its discretion, any procedures to terminate distribution service. [2]*The Retail Access Credit ("RAC") available to an ESCO choosing this option would be*

[1] One need only examine the lengthy time period associated with implementation of the electronic data interchange system (Case 98-M-0667) to realize that making the revised HEFPA an operational reality could take some time.

[2] Under Chapter 686, the utility would now have the right to terminate distribution service for outstanding ESCO charges.

reduced by the cost associated with uncollectible commodity charges presently included in the RAC.

This option would provide a suitable mechanism to address HEFPA implementation problems. Initially, ESCOs choosing this option would forego the right to seek termination of service for non-payment, since the utility as purchasee of the receivables, would now determine whether such termination is implemented. This would immediately ameliorate the pressures upon LDCs to comply with ESCO requested terminations. The utility at its discretion would determine if and when termination was to be instituted, and if it chose to go this route, it would merely have to follow its existing HEFPA procedures and operating guidelines. In contrast, implementing an ESCO requested termination would involve new and more complex procedures. The utility would be made whole financially because the RAC is reduced by the uncollectible commodity rate; thus, it would still retain rate recovery for the uncollectibles purchased from the ESCO. Moreover, the distribution utilities could follow the procedures used by Orange and Rockland Utilities, Inc., which has, since 1999, purchased ESCO accounts receivables without recourse.

With this option in place, the uncertainty surrounding what will happen on June 18, will significantly ameliorated, and the parties can take the time needed to ensure proper implementation of all requisite rules, systems and procedures.

SCMC strongly urges the Commission to give serious consideration to this proposal.

Respectfully submitted,

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Dated: March 28, 2003
Cedarhurst, New York