

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Eligibility Criteria for Energy Services Companies.	Case 15-M-0127
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 12-M-0476
In the Matter of Retail Access Business Rules.	Case 98-M-1343

COMMENTS OF INTERSTATE GAS SUPPLY, INC. d/b/a IGS ENERGY, ACCENT ENERGY MIDWEST GAS, LLC d/b/a IGS ENERGY , AND ACCENT ENERGY MIDWEST II, LLC d/b/a IGS ENERGY

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I. INTRODUCTION

On February 23, 2016, the Public Service Commission of New York (“Commission”) issued an Order Resetting Retail Energy Markets and Establishing Further Process (“Order”). The Order contains sweeping changes to the rules under which energy service companies (“ESCOs”) may provide retail electric and natural gas service to existing and future residential and small non-residential customers. Specifically, the Ordering paragraph’s 1-3 provided that ESCOs shall only enroll new mass market customers or renew existing mass market customers in gas or electric service if at least one of the following two conditions is met: (1) enrollment where the contract guarantees that the customer will pay no more than if the customer were a full-service customer of the utility; or (2) enrollment based on a contract for an electricity product derived from at least 30% renewable sources. On the same day, the Secretary issued an Entry requesting comments on a set of issues discussed in the Order.

On March 4, 2016, the Supreme Court Albany County issued an Order to Show Cause restraining the Commission from enforcing paragraphs 1-3 of the Order, as well

as requiring the Commission to show cause why the Order did not exceed the Commission's jurisdiction through ultra vires price regulation, violate the State Administrative Procedure Act, and constitute an unlawful taking. A broad coalition of ESCOs including IGS Energy ("IGS") continue to challenge the legality of the Order. But, without waiving its ability to challenge the Order in any forum, IGS offers its Comments below.

II. COMMENTS

Despite the parallel ongoing legal challenges that remain unresolved, IGS is optimistic that this proceeding may provide a medium for reasonable dialogue for regulatory initiatives to enhance consumer protection and the operation of retail markets. IGS hopes to be a resource and offer constructive solutions in order to make retail competition better for customers and to address concerns regarding the New York market.

However, in doing so, it is important to make a distinction between stopping deceptive and unfair marketing practices and regulating the prices and products ESCOs may offer. Unlike utility distribution customers, ESCO customers are not captive—they are free to choose another product in the market or return to utility default service upon their own volition. Thus, the Commission should focus its efforts on crafting and enforcing rules that ensure customers are informed about the product and service in which they choose to enroll, rather than replacing the judgment of customers as to which products may or may not bring value.

It is also important to keep in mind that regulatory oversight—depending on the substance and process of the regulation—may either enhance or destroy competition.

Regulations that unduly restrict or burden a company's ability to operate or offer products to customers may drive out all companies from the market, including those companies that bring great value to customers. Striking the right balance between enacting and enforcing appropriate consumer protections, while at the same time allowing a vibrant competitive market to develop, is no small task. Yet, it is a task IGS believes can be accomplished and is worthy of accomplishing.

Unfortunately, the Order recently issued by the Commission did not strike the appropriate balance between consumer protection and allowing a competitive market to thrive and develop. As a consequence, a great deal of regulatory uncertainty and risk has arisen in the New York market. By undermining the confidence that market participants place in the regulatory process, there will likely be unintended wide-spread ramifications for not only the retail energy market but also the success of the Commission's initiative as part of Reforming the Energy Vision ("REV").

Both the retail market and the REV are inextricably linked: ESCOs and third parties will play a key role in the delivery of emerging technologies to the market that will transform the way customers use and consume energy. By discouraging ESCO activity and creating an uncertain regulatory environment, the Commission will almost certainly impede the delivery of emerging technologies and undermine the foundation necessary for competitive markets to thrive.

IGS firmly believes in the value that retail energy markets provide to consumers and has high hopes for the success of the REV in enhancing customer engagement and increasing the efficiency of the grid. Therefore, IGS offers these Comments in an effort

to balance the goals of promoting regulatory certainty, consumer protection, and innovation.

IGS also believes that transparency is key to an effective marketplace including price transparency and transparency to the customers about the products and services they will receive. Thus, IGS supports appropriate and reasonable consumer protection enhancements in the form of additional notice requirements and disclosures to ensure that customers are reasonably informed with respect to the products and services they utilize. These consumer protection enhancements can accomplish goals without unwise and unwarranted regulation of ESCO pricing.

Moreover, the potential for abusive practices is most prevalent in sales channels which pose unique oversight challenges. Door to door solicitation is an example. IGS would support the Commission playing a key role in registering agents, tracking complaints against those agents, administering competency tests as a requisite prior to selling and penalizing ESCOs that are in violation of the rules.

Finally, IGS would support strengthening the Commission's ability to enforce consumer protection rules in order to keep ESCOs that do violate rules accountable for their actions. IGS would also support strengthening the standards by which an ESCO can enter the market to ensure ESCOs have the financial and technical capability to serve customers and have a vested stake in the New York markets over the long run.

Comments to specific questions are provided below:

- 1. Whether prospective ESCO sales to mass market customers, including renewal of expiring contracts, should be limited to products that include guaranteed savings or a defined energy-related value-added service. If not, precisely how should this requirement be broadened or narrowed?**

ESCOs should not be limited to marketing guaranteed savings, renewables or

not yet defined “value added” products and service. The key to developing a successful competitive market is ensuring the ability to introduce new and innovative products to customers, and allowing the preference of customers to be the ultimate determiner of whether a product is made available in the market. There are an abundance of products that customers may value and many reasons why a customer may value a product that cannot be known before-the-fact.

Just as an example, when text messaging service was first offered, many people thought that individuals should not be willing to pay for a text message because people could just make a phone call instead. Had an administrative agency used this logic to prohibit companies from charging for text messages, a very valuable product would have been stopped in its infancy. There is no shortage of similar examples where the conventional wisdom said that a customer would not find value in a particular product but ultimately that product brought great value to customers.

It is also important to remember that customers that enroll with ESCOs have affirmatively elected to receive service from an ESCO. Unlike utility distribution customers, ESCO customers are not captive and are free to choose other products or return to utility default service. IGS certainly does not condone customers being tricked or misled into enrolling with an ESCO service. But stopping deceptive and misleading marketing practices is a wholly separate issue from prohibiting a customer from willingly purchasing a product. The Commission should do everything in its power to stop customers from being tricked or deceived. The Commission should not, however, replace the judgment of the customer for its own judgment about which products do and do not provide value.

Ultimately, pre-determining what are considered “value added” products will severely hamper product innovation. We don’t know today what products customers will value in the future. If ESCOs are forced to offer only products that the Commission pre-determines have value, ESCOs will have limited to no opportunity to test out new products in the market.

Finally the Commission should not mandate that ESCO prices be below the utility rate. Comparing utility pricing to ESCO pricing is not an apples-to-apples comparison. An ESCO product may be a wholly different product than utility default service, and an ESCO product may contain features and costs not included in default service. Further, the utility rate is not market based, but is distorted by subsidies and true-ups; and, unlike the products offered by ESCOs, the utility default price does not reflect all costs of doing business which are imbedded in non-commodity recovery mechanisms (e.g. distribution rates).

Requiring ESCOs to provide guaranteed savings at all times creates a heads you win, tails I lose scenario, where ESCO’s must beat the utility price, but the utility price is not required to offer the same guarantee. No other competitive market has an arbitrary and subsidized price proxy by which all other products must match that price, regardless of product differences.

Finally, to the extent the Commission wishes to have a tool that allows customers to compare prices, the Commission should consider an index that tracks the average price of products available in the market, not just the utility price to compare. For instance the mortgage industry generally posts average available mortgage rates for customers to use for price comparison purposes. To be clear, IGS is not advocating

that ESCO pricing should be required to be tied to average ESCO pricing; rather, average pricing in the market is a more appropriate price comparison metric than the utility default service price.

- 2. What specific products or categories of products should constitute energy-related value-added services. For example, if energy efficiency products are to qualify, should a specific minimum energy savings be required and if so, of what amount? If certain commodity-only products are to qualify, such as fixed price products or green energy products, should any restrictions be placed on the prices for such products and, if so, how should those restrictions be determined?**

IGS continues to believe that the Commission should not limit ESCO marketing to products that the Commission has pre-determined to be “value added.” But, if the Commission wishes to only allow “value added” products to be sold to customers—and doing so is found to be within the Commission’s jurisdiction—the definition of value added needs to be broadly defined and flexible to allow for new products to be introduced into the market. It is important that ESCOs be able to introduce new products in the markets—without undue burden or regulatory scrutiny—so as to not unduly hinder innovation and development of products and services.

It is also important that, to the extent it is ultimately determined that ESCOs can only offer pre-determined “value added” products to customers, the Commission at a minimum allow ESCOs to provide these additional products and services to *existing* customers, without receiving additional affirmative consent from the customer. IGS is supportive of providing value added services to existing customers and should be permitted to do so by giving notice to the customer of their additional beneficial attribute with an opportunity to reject the attribute. This process should be sufficient to enroll *existing* ESCO customers in a “value added” product.”

Finally, to the extent ESCOs are ultimately limited to offering only a pre-determined list of “value added” products, IGS submits the following non-exhaustive list of products and services the Commission should consider “value added”:

- fixed rates for two years or more. This product is similar to a fixed-rate mortgage. While mortgage rates change from day to day, consumers find value in the stability and certainty of a fixed-rate over a set period of time;
- renewable energy;
- flat bill;
- home warranty;
- energy efficiency;
- demand response or time of use rates;
- smart thermostats;
- commodity products bundled with distributed generation products or renewable energy development.

Finally, the Commission should take into consideration that non-energy attributes included in an ESCO product may add value to a customer.

3. Whether other requirements, in addition to those identified in question 1 above, should be imposed on ESCO marketing or sales to mass market customers.

Rather than restrict what products ESCOs can offer customers, the Commission should focus on 1) creating rules that require that customers be informed and have proper notice of the products they choose and 2) enforcing rules against deceptive marketing practices.

With that in mind, in order to protect against deceptive marketing IGS would support enhanced standards for door to door marketing. The Commission should consider a door-to-door agent registry process and also some formal or informal education requirements of door-to-door agents that sell ESCO products.

For door-to-door sales, IGS would also support providing an acknowledgement form (separate from the contract) to a customer that must be signed or initialed by the customer to effectuate a door to door sale. The acknowledgement form should contain key information to the customer about the nature of the sale including an acknowledgement that the customer was:

- Informed that the sales agent does not represent the utility but rather is a representative of the ESCO;
- Informed of the price they will be paying;
- Informed of any renewal provisions, if any;
- Informed of the rescission period;
- Informed of any cancel fees, if any.

A similar customer acknowledgement form is required in the State of Ohio for door-to-door sales, and works reasonably well and does not create an undue burden to the customer or the ESCO.

4. What changes, if any, should be made to the three-day period for residential customer rescission/cancellation of an agreement with an ESCO. Should this period be extended to 30 days?

The three-day rescission period is consistent with federal law; however, IGS would not oppose a rescission period of seven to ten days. But a longer rescission

period would potentially limit ESCOs ability to enter into wholesale hedges consistent with the products they sell to customers.

5. Whether a rescission/cancellation period should be applied to small non-residential customers. If so, what period is appropriate?

Commercial customers are more sophisticated, have higher levels of usage and are more experienced in purchasing decisions. Consequently, these customers do not need the same level of protection. Moreover, due to the higher volumes of energy these customers use, an ESCO will likely hedge or otherwise purchase the commodity immediately for the customer to support the retail price contained in the contract with the customer. Therefore, IGS does not support extending the already applicable rescission period for small commercial customers.

6. Whether and under what circumstances ESCOs should be required to post performance bonds or other forms of demonstrated financial capability. If so, what magnitude is appropriate and how can this be administered most efficiently?

Without taking a position on the Commission's authority, IGS would generally support reasonable financial assurances required by ESCOs. Most states have some sort of collateral requirements. ESCO financial assurances would help ensure companies that compete in New York are serious and also have some sort of financial stake in the market. Financial assurance may also ensure that market participants adhere to appropriate standards of service. But, financial assurances should not be used as collateral to support guaranteed savings products mandated by Commission order.

IGS believes that the details of any additional collateral requirements would likely need to be determined in a collaborative process or a separate proceeding. That said,

from a high level, it may be reasonable to impose a minimum financial assurances that each ESCO must post as a condition of engaging in business as an ESCO in New York. After the minimum financial assurance is posted, the Commission should also consider increasing the financial assurance requirement based on the customer count or load served by the ESCO in New York. Finally, IGS believes that different standards for financial assurance should not be adopted for each utility, but rather any financial assurance requirement should be the same for all utilities.

7. Whether the Commission should reconsider the framework for ESCO oversight under the Public Service Law and, if so, what changes should be made.

The Commission's authority stems from Public Service Law—the Commission's powers cannot exceed that which the statute provides. Thus, the Public Service Law itself establishes the framework through which the Commission may apply its oversight to ESCOs. As discussed further in response to question 8, the Commission already has effective oversight tools within the existing framework that, for one reason or another, the Commission has refrained from utilizing. The Commission should utilize its existing authority prior to considering changes to the oversight framework.

That being said, IGS has served retail energy customers in New York for several years. IGS values its brand and recognizes that the value of its brand may be impacted by the collective behavior of other ESCOs. Therefore, IGS is supportive of enhancements to existing consumer protections standards that strike the appropriate balance between protecting customers without constraining innovation and ESCO products.

For instance, the Commission should consider initiating an ESCO certificate process to ensure that an ESCO is qualified to operate in the state of New York. The NYPSC should actively enforce its certification process and reject applications that do not have the technical and managerial expertise or financial wherewithal to serve customers in New York. The Commission should have the authority to fine ESCOs (with assured due process) for violating rules. The Commission should also have the authority to suspend and revoke licenses.

Finally, the Commission should have the financial resources it needs to fund its enforcement efforts. IGS would not be opposed to using dollars from ESCO penalties applied consistent with the UBP to fund Commission enforcement. IGS would also not be opposed to accessing a reasonable lump sum fee paid for by all ESCOs that could be used to fund enforcement of consumer protection. Similar assessments are used in other states to help fund enforcement efforts by state utility commissions.

8. What penalties may apply to ESCOs that violate the UBP or other Commission Orders or provisions of the PSL (for example, the application of PSL §§ 25 and 25-a).

IGS generally is supportive of the Commission being able to penalize ESCOs, and suspend and revoke licenses, and pursue other appropriate enforcement mechanisms to the extent such enforcement is within the Commission's jurisdiction. Due process, however, must be afforded before the Commission takes actions against an ESCO. Under the UBP, ESCOs may be penalized for, among other things, "failure to comply with the UBP terms and conditions," "failure to comply with other Commission Orders, Rules, or Regulations," or "failure to comply with required customer

protections.”¹ Penalties for violating the UBP range from “suspension of the ability to enroll new customers,” “reimbursement to customers who did not receive savings promised in the ESCO’s sales agreement,” “revocation of an ESCO’s eligibility to operate in New York,” and “*any other measures that the Commission may deem appropriate.*”²

III. CONCLUSION

For the reasons stated herein, IGS urges the Commission to consider these Comments and ensure that any changes to the regulatory landscape strike the appropriate balance between promoting regulatory certainty, consumer protection, and innovation.

Respectfully submitted,

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¹ UBP, at 8-9, Section 2 (D) (5).

² *Id.*, at 10-11, Section 2 (D) (6) (emphasis added).