

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**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

**In the Matter of Energy Service Company Price
Reporting Requirements**

Case 06-M-0647

**REPLY COMMENTS OF
PUBLIC UTILITY LAW PROJECT of NEW YORK, INC.**

AND

AARP

**AARP
99 Washington Avenue
Albany, NY**

**Public Utility Law Project
Of New York, Inc.
Gerald A. Norlander, Esq.
P.O. Box 10787
Albany, NY 12201-5787
Tel: (518) 281-5991
Email: gnorland44@gmail.com**

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Introduction

AARP and the Public Utility Law Project of New York, Inc. (PULP) have reviewed the Comments filed by other interested persons and parties to this proceeding on January 25, 2013, including the late filed comments of the Utility Intervention Unit (UIU) of the Division of Consumer Protection, New York State Department of State, filed on February 1, 2013. Our Reply Comments address the major issues that diverge from the recommendations made in our Comments filed on January 25, 2013 and that note the general agreement with our recommendations, where applicable. Our Reply Comments are organized by the various entities that have filed Comments in this proceeding because of the wide difference in opinions and recommendations expressed by these divergent interests.

CONSUMER COMMENTS

The Commission has received 41 public comments to date in this proceeding.¹ These comments support the reforms that PULP and AARP have recommended in our Direct Comments with respect to the need for price disclosures, reform of door-to-door sale regulation, improved oversight and enforcement by the Commission of ESCO behavior and marketing activities, reforms with respect to variable rate contracts, and tougher reforms dealing with automatic renewal clauses. While a few comments indicated satisfaction with their current ESCO supplier, the statement by one commenter that “time will tell” if their decision was “right”

¹ The quotes in this section are taken directly from the online submissions listed as Public Comments” in the PSC DMM case file.

on their 5-year variable rate contract with one ESCO with a green power adder is troubling because the consumer focused on the price for the additional adder for green power compared to that charged by their utility's green power option but did not discuss or identify the underlying contract price or pricing mechanism that will govern the bill calculation each month.²

Many of these comments document experiences in which customers signed up with an ESCO thinking that they would save money compared to their utility's default service, but later found out that their ESCO rate had increased and now exceeded their utility price. Many of these comments reflect experiences with "teaser" or introductory rates that are then followed by variable rate prices that end up higher than promised at the time of the sale.

Originally I signed up with _____ in the mid 1990"s and was told at the time with the tax savings, my bill would never exceed what the utility would charge and I could have additional savings based on their purchasing electricity at a lower cost than the utility. In reviewing their costs that was true until around the turn of the century. Before then my rate bounced around the utility rate. After that point (around the Enron time) my rate was the same as the utility rate plus a 2 cent boost...."

"We had two firm[s] for [electric] supply basically rip us off. What both did was get us in contracts and offer us pretty rates for 1 year. At the end ... the rates went ... 2-4 times higher than the NG rates and they took 3 months or more to get away from them to another supplier. Of course they offer rebates and promises just to keep holding on..."

"It is very difficult to compare rates across ESCOs. Most do not publish rates online and require you to call a high-pressure sales line to get rates. Furthermore, their sales tactics make comparisons hard even after getting their rates. For instance, [they] may [entice] you with an introductory rate then jack up the rates after it expires and hope you don't notice."

² This individual's comment about his ESCO contract with a green power adder should be contrasted with that of another customer describing the sales conduct and contract terms of the same ESCO in which the latter customer recognized that the promise of the lower price would only be in effect for two months, followed by a variable rate "which would be determined by business and market conditions." See, <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=41126#>

One customer described an ESCO contract that was charging 90 cents per therm when the utility's price decreased to 39.5 cents per therm as a result of lower wholesale natural gas prices.

"I am in a losing proposition and had no clue."

"They misrepresented their offerings and didn't give any indication that my bills would go through the roof--\$150.00 in the last 4 months--\$179 to \$347."

Other consumers described the "hard sell" and intrusive nature of door-to-door sales and repeated telemarketing calls. Several of these comments describe sales agents promising savings when the actual contract terms do not do so with variable rates that are not explained and high termination fees. Several comments state that the ESCO tried to make it appear that the agent was a representative of the local utility or, in one case, the Public Service Commission. These comments document our concern about certain ESCOs that are repeatedly identified in these comments and whose sales agents promise savings over the utility bill in order to initiate discussions of their ESCO contract terms. Many of these comments also support the need for bill calculators to allow consumers to compare their ESCO contract rates with default service prices. Said one consumer, "Any decision I make is based on no information; it is like buying a pig in a poke while blindfolded."

CONSUMER REPRESENTATIVES. Representatives of consumers filed comments generally critical of recent developments in the New York retail electric and natural gas markets, particularly as those developments impact residential customers generally and low income customers specifically. The Comments filed by the UIU, the Attorney General of the State of New York (AG), the New York City Department of Consumer Affairs (DCA), the Federal Trade

Commission (in part) and AARP/PULP Comments all call upon this Commission to undertake significant reforms with respect to price disclosures, regulation of contract terms, regulation of certain door-to-door marketing and telemarketing practices, and, importantly, a significant improvement and increased allocation of resources to the Commission's enforcement of consumer protection policies with respect to approved³ electric and natural gas suppliers, as well as more attention paid to consumer education and complaint handling. While there are differences in some areas, the general call for reform and additional regulatory actions of other consumer organizations (with the exception of certain comments of the FTC as noted below) is consistent with the comments filed by AARP and PULP.

JOINT UTILITIES. The Joint Utilities (National Fuel Gas Distribution Co., National Grid (Niagara Mohawk and Brooklyn Union Gas), Central Hudson Gas & Electric, New York State Electric & Gas, and Rochester Gas & Electric), while focusing on the need for assurance of recovery of incremental costs incurred to implement any obligations imposed on them and urging a utility-by-utility approach to implementation of any such obligations, joins the Consumer Representatives in calling for additional reforms in certain marketing and disclosure practices, particularly with regard to door-to-door sales and contract renewals, and urges more attention to enforcement by the Commission. Therefore, the Joint Utilities also support

³ Unlike other states, the Commission does not actually license suppliers or issue certificates. Rather, one seeking to provide ESCO service makes an application to the Department of Public Service (DPS) with checklist representations and materials, and when the application is complete DPS Staff determines that the ESCO is "eligible" to provide service under terms of utility tariffs, i.e., the "Uniform Business Practices" ("UBPs"). Violation of the application requirements or UBPs is not tantamount to violation of the Public Service Law, PSC regulations, or PSC orders that would be subject to penalty under Section 25 of the Public Service Law. See *Retail Access Application for Energy Service Companies*, available at <http://www3.dps.ny.gov/W/PSCWeb.nsf/ArticlesByTitle/753D3D35C877963485257687006F39DB?OpenDocument>

additional regulatory reforms and call on the Commission to undertake additional consumer protections and actions to protect consumers.

RETAIL ENERGY SERVICE COMPANY SUPPLIERS OR ESCOS. The retail gas and electric suppliers, (ESCOs) filed Comments both individually and as part of several organizations and groups, including the Retail Energy Supply Association (RESA), the New York State Energy Marketers Coalition (NYSEMC), the National Energy Marketers Association (NEM), and the Small Customer Marketer Coalition (SCMC). Our Reply Comments will primarily respond to the ESCO Comments. In general, the ESCO Comments suggest that this Commission “stay the course” and make even more radical changes to the current retail market structure to enhance their business opportunities in New York, including the elimination of default service from distribution utilities, requiring utilities to install smart meters so that retail suppliers can offer additional products to customers, while rejecting suggestion for additional regulatory reforms and consumer protections relating to the Purchase of Receivables programs and contract renewal practices. However, even most of these retail suppliers point to the need for additional regulatory initiatives by the Commission with respect to the confusing nature of the “price to compare” under current regulatory policies and utility practices, price disclosure generally, targeted enforcement of current regulations, and enhanced consumer protections with respect to door-to-door marketing practices. Although AARP and PULP do not agree with the nature of the ESCO proposed reforms in several of these areas, the fact that ESCOs recognize the need for additional policy reforms and outreach activities by this Commission is an important first step.

One aspect of the ESCO comments is that several of these commenters purport to reflect “coalitions” or “groups,” the membership for which are not identified. The Small Consumer Marketers do not identify their membership. The National Energy Marketers Association is not identified in terms of specific entities, but only in categorical descriptions of what its members do. In contrast, RESA and NYSECM identify their membership. As a result, it is not clear whether some ESCOs have submitted comments twice or what ESCOs support what policy positions. Information requests to ascertain which ESCOs are represented by the groups are outstanding.

Finally, one generic observation about the ESCO comments is that there is an underlying theme that more radical market reforms are necessary to allow them to deliver “benefits” to customers. Suggestions include requiring investments in smart meters to deliver new pricing and efficiency programs, eliminating distribution utility obligations to provide default service (which would require all customers to take ESCO service), or allowing suppliers to issue consolidated bills. These suggestions should be rejected.⁴ None of these proposals respond to the concerns raised by the Commission and documented in the Staff’s recent review of retail market activities and consumer impacts of current ESCO offerings. Furthermore, any such initiatives would be very expensive to implement and, in our opinion, may work to divert the Commission’s attention away from the important and near term initiatives reflected in this Investigation.

⁴ Actually, the Commission approved single billing by ESCOs more than a decade ago but consolidated ESCO billing has not proven to be popular. “By this order, we direct the major gas and electric utilities to file tariff amendments as necessary to accommodate the wishes of retail access customers who prefer to receive combined, single bills from either their utility company or from their ESCO.” CASE 99-M-0631 - In the Matter of Customer Billing Arrangements, Alternative Billing Arrangements, ORDER PROVIDING FOR CUSTOMER CHOICE OF BILLING ENTITY, (Issued and Effective March 22, 2000).

However, it is important to recognize that overall the ESCO comments reflect a consensus among almost all market participants that the Commission has an obligation to undertake several specific reforms and new initiatives to more actively monitor the retail energy markets, enforce Commission requirements, and ensure additional consumer protections. As a result, there are grounds for moving forward quickly in some areas where there is an emerging consensus that additional action is required now, even if the details and finer points, or further issues remain to be resolved, possibly in later stages of the proceeding.

The balance of our Reply Comments address areas in which there is a lack of consensus or suggestions from others that deserve specific attention to ensure that they are not adopted. AARP and PULP call on the Commission to act swiftly to implement important and meaningful retail market consumer protections along the lines identified in our Comments.

DEFAULT SERVICE AND PRICE DISCLOSURE

Almost every commentator agrees that the current utility methodology of providing customer information about the “price to compare” is defective and needs reform. The lack of stable and longer term price signals about default service is a significant defect not only for residential customers that take service from their utility, but for customers who seek to compare offers among suppliers or between suppliers and their default service product. The monthly price changes and various surcharges and reconciliation factors make it impossible for customers to understand how those prices compare to any offer by a competitive supplier, and allow

suppliers to market products based on customer confusion and lack of understanding, thus contributing to misleading and unfair marketing practices.

AARP and PULP urge the Commission to adopt a more uniform policy to require distribution utilities to plan and procure default service through a prudent mix of competitive wholesale market contracts that reflect price stability in the form of biannual or annual price changes, laddered contracts to prevent volatility, and the presentation of a single “price to compare” on the monthly customer bill. While each utility’s procurement plan may differ somewhat, the overall policy should result in a stable and lowest cost, default service that is widely understood and the subject of price comparison tools and educational efforts. With such an approach, consumers can opt for more volatile prices, “green” energy, longer term contracts, or any other offer made by retail suppliers based on a “price to compare” that allows such comparisons to be made by all consumers.

AARP and PULP object to the recommendation of several retail supplier organizations that would eliminate the distribution utility’s obligation to provide default service or that would require further unbundling of commodity costs on the grounds that current delivery rates subsidize supply prices.⁵ Regarding default service obligations, there has been no change in the New York statutory and common law duty of utilities to provide service at regulated rates to customers upon request, and the issue is not the subject of this proceeding. Regarding subsidy, it is ESCO service that has been subsidized for years, directly and indirectly, by Commission activities ultimately paid for by ratepayers, by orders requiring utilities to promote ESCO service

⁵ See, e.g., Comments of NEM at 7; Direct Energy at 4; NYSEMC at 7, 10.

using ratepayer funds, and by unjustified tax breaks.⁶ Rather than focusing on whether default service should be eliminated, a policy that runs counter to the role of default service is almost all retail competition states, AARP and PULP recommend that the Commission should improve and reform the current commodity pricing policies in effect in New York promptly to eliminate volatile monthly price changes and provide a more stable price comparison tool to retail competitive offers.

REGULATION OF DOOR-TO-DOOR MARKETING

Almost every commentator urged this Commission to take prompt and significant actions to more fully regulate and enforce regulations concerning door-to-door marketing by retail suppliers in New York. High pressure and misleading door to door sales were also cited in public comments:

"If people want to switch they should initiate the switch not get calls or people knocking at their doors pressuring them. The elderly are especially vulnerable."

<http://documents.dps.ny.gov/public/MatterManagement/Details.aspx?CommentSeq=5616>

"I don't want anyone coming to my door to talk utility rates.. They can tell me anything.."

<http://documents.dps.ny.gov/public/MatterManagement/Details.aspx?CommentSeq=5612>

⁶ There is a sales tax break on utility delivery service received by customers who buy commodity electric or gas service from an ESCO. This creates an unlevel competitive playing field and enables less efficient providers to resell commodity service at or slightly above the utility price and arbitrage the tax savings. Revenue of \$59 million per year is lost due to this unjustified loophole. See Annual Report on New York State Tax Expenditures, 2012-13 State Fiscal Year, 126-127, 144, available at <http://www.budget.ny.gov/pubs/archive/fy1213archive/eBudget1213/fy1213ter/TaxExpenditure2012-13.pdf>.

"I have had several people come to my door over the last three years trying to get me to change my utility service and promising big savings. I send them on their way and ask that they don't come back. I find the whole matter to be a nuisance."

<http://documents.dps.ny.gov/public/MatterManagement/Details.aspx?CommentSeq=5618>

"Stop door to door marketing - worse than telemarketers. I got several visits in one day from several different so-called "energy company" representatives. They are very aggressive and won't take no for an answer..."

<http://documents.dps.ny.gov/public/MatterManagement/Details.aspx?CommentSeq=5604>

However, at minimum AARP and PULP ask this Commission to halt such marketing practices which prey upon the elderly and poor for at least a temporary period until significant reforms are adopted and the Commission has obtained and has demonstrated its commitment to enforcement of current and revised consumer protection policies and regulations.

With respect to specific reforms, AARP and PULP provided a list of key issues and reforms that should be adopted with respect to door-to-door and telemarketing sales channels and refer this Commission to those reforms recently adopted by the Pennsylvania PUC and referenced in our Comments.

With regard to particular proposals advanced in Comments filed by RESA and other suppliers, AARP and PULP strongly oppose any suggestion that the Commission should license individual sales agents or third party entities that are hired by suppliers to conduct door-to door

or telemarketing sales.⁷ It is crucial that this Commission issue orders to hold the DPS-approved suppliers liable for the conduct of any of their agents, whether directly employed by the supplier or under contract to provide services on behalf of the supplier. To inject the Commission directly into the oversight of individual sales agents would be resource-intensive and impractical. Furthermore, we are not aware of any State that has adopted such an approach, all of whom hold the supplier accountable for the actions of the agent. Our recommendation comports with traditional consumer protection liability in other industries. It is the obligation of the DPS-approved suppliers to monitor the conduct of their agents and demonstrate that they have internal management controls sufficient to assure compliance with the supplier's rules of conduct and all applicable New York consumer protection policies and regulations, whether adopted by this Commission or other New York state and municipal government agencies. The failure to exercise such oversight and responsibility should result in license revocation for the supplier.

Finally, we note our concern with ESCOs who recommend disclosure obligations or written documents as the means to solve the abuses associated with door-to-door marketing. It will not be possible to adopt meaningful reforms associated with door-to-door marketing based on adopting new written disclosures or third party verification requirements alone. Rather, the Commission should create a comprehensive regulation that reflects existing New York general business law, unfair trade practice policies as reflected by the AG's Comments, and specific additional reforms as reflected in the recently adopted Pennsylvania PUC Order, to address the

⁷ See, e.g., Comments by RESA at 4-5.

ongoing and longstanding deceptive and harmful sales practices that are rampant in this marketing method.⁸

LICENSING AND ENFORCEMENT

Again, there was a relatively widespread agreement, as reflected in the RESA and NEM Comments as well as those from consumer representatives, that the Commission should take more forceful and rigorous enforcement actions against suppliers that violate existing norms. However, those standards and norms need reform. AARP and PULP suggest that the Commission may need to formalize standards through clearly binding orders and regulations,⁹ and allocate resources to licensing and enforcement activities at a much higher priority manner than in the past.

As set forth in our Comments, AARP and PULP recommend that the Commission adopt more specific licensing and enforcement requirements and our Comments set forth an excellent model to reform New York's current practices and policies based on the regulatory language adopted in Maine. We would also point to the Pennsylvania licensing requirements,¹⁰

⁸ The Comments filed by the Joint Utilities are particularly helpful in documenting the various initiatives that have failed to correct these abuses in the recent past.

⁹ Presently, New York has not yet adopted statutory licensing provisions for ESCOs, and the Commission's ESCO regulatory regime is mainly embodied in "Uniform Business Practices" ("UBPs") which the Commission requires distribution utilities to adopt as part of their tariffs which govern their interfacing with ESCOs. The only potential sanction for violation of UBP tariffs by ESCOs is total disqualification from eligibility to provide supply service, a drastic (and underutilized) sanction. Violation of a distribution utility's UBP tariff by an ESCO does not carry with it the same potential sanctions that a violation of law, Commission regulation, or Commission order would have under Sections §§ 24-26 of the Public Service Law. Accordingly, changes adopted in this proceeding should be implemented by Commission rules or orders, and not only by amendment to UBP tariffs.

¹⁰ 52 Pa. Code Sections 54.31-54.43.

particularly the security and bonding requirements, as well as the documentation concerning improved management and oversight practices reflected in the recently adopted reforms for marketers that rely on door-to-door and telemarketing sales channels, in a proceeding in which AARP participated.

However, there is no substitute for actually making a commitment to evaluate and respond to customer complaint patterns, conduct investigations, and take proper enforcement actions as a result of those investigations.¹¹ The Commission should ensure that sufficient resources are available to implement such actions. To the extent that there are insufficient funds available to do so, ESCOs should pay increased fees to the Commission, a reform that the Pennsylvania Commission also recently adopted.

CONTRACT RENEWAL PRACTICES

All ESCOs objected to any additional regulations with respect to contract renewal practices. This is a self-serving recommendation because ESCOs naturally benefit from being able to retain a customer under changed or continuing contract terms without incurring the risk that the customer will not affirmatively agree to continue or renew a contract with changed terms and conditions. The practical result of the ESCO proposals is that they be allowed to rely on a fine print term that allows the ESCO to change the terms, renew the contract with changed terms, including the price, without affirmative customer agreement to such changes. The ESCO suggestion that a notice prior to the end of the contract term that informs customers of the change

¹¹ Despite rampant abuses, we are not aware of any Commission decision in a residential customer complaint case regarding an ESCO in which the Commission has taken action adverse to an ESCO.

in terms is an insufficient consumer protection in light of these fine print contract terms and still allows the ESCO to treat the customer's silence as consent.

The Commission should not rely on the claim by RESA and other ESCOs that requiring customers to affirmatively agree to material changes as a condition of renewal of the contract is likely to harm consumers and eliminate their opportunity to enjoy benefits. First, the suppliers may or may not offer any benefit to the consumer with their contract renewal terms and they are not obligated to do so. Second, if in fact the customer will benefit from the renewal terms, consumers will renew and respond appropriately. It is not reasonable to assume that a customer that affirmatively selected the supplier would not be willing to once again affirmatively select the supplier if the proffered terms will in fact provide a benefit to the customer.

At a minimum, AARP and PULP recommend that the Commission require the supplier to obtain the customer's affirmative agreement to any material change in contract terms, including the price and the pricing methodology, prior to renewal or revision to an existing contract.¹² Such a policy would require suppliers to conform to the same requirements to ensure customer authorization that are applicable to the initial contract transaction. At a minimum, AARP and PULP recommend that if contract renewals with material change in terms is going to be allowed without affirmative customer consent, that customers are notified by first class mail in a mailing separate from the monthly bill at least 45 days prior to the implementation of the revised contract

¹² NY General Business Law §349 provides "6. No material change shall be made in the terms or duration of any contract for the provision of energy services by an ESCO without the express consent of the customer. This shall not restrict an ESCO from renewing a contract by clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and of his or her option not to accept the renewal offer.... *The public service commission may adopt additional guidelines, practices, rules or regulations governing the renewal process.*" *Emphasis added.*

terms, that the renewed contract be limited to a month to month contract, and that no termination fee be allowed for such contracts unless the customer has affirmatively agreed to the revised contract terms.

VARIABLE RATE CONTRACTS

Most ESCOs objected to the notion that their variable rate contracts should disclose and conform to a publicly available index or methodology that is identified in the terms of the contract itself. In fact, several ESCOs actually appear to admit that they want complete discretion as to how to price variable rate contracts and that they deliberately do not include any information on how prices will change under their contracts. These suppliers argue that their pricing methodologies are confidential and that suppliers should not be required to reveal their rate structures to the public or their customers. The Commission should flatly reject this argument.¹³ As a result, AARP and PULP conclude that such contracts should be prohibited for residential customers. These suppliers do not in fact provide any “price” at all. There is no way that a reasonable consumer would be able to determine the basis for the monthly charges or even enforce any terms and conditions about the nature of the price that is charged and that appears on the utility’s monthly bill and for which the customer may be subject to disconnection for nonpayment. The importance of known prices is underscored by longstanding provisions of the Public Service Law which bar the collection of charges not filed and approved by the

¹³ See, e.g., Comments of Small Customer Marketer Coalition at 18; NYSEMC at 16-17.

Commission,¹⁴ as well as long standing traditional consumer protection disclosure requirements for retail competitive markets.

AARP and PULP recommend that the Commission exercise the powers conferred upon it in 2010 by General Business Law § 349(d) and take immediate action to prohibit the retail sale of energy to residential customers in contracts that fail to state an initial price and identify the methodology or publicly available formula or index that will be used to make price changes during the term of the contract. It is unfair and unreasonable to assume that any residential customer would agree to a contract with a variable rate term that in fact does not promise any restrictions on price changes or fails to identify the methodology or formula that will be used to make price changes. Again, the ability of some ESCOs to mislead customers or misrepresent the nature of the contract pricing terms in door to door and telemarketing sales is enhanced by the lack of proper regulatory oversight of variable rate contracts. The sales agent at the door may promise “savings” and describe the contract terms as offering a “benefit” to customers, but the actual contract terms describe a variable rate that is either indecipherable or nonexistent in detail and without any identified restrictions on price changes.

CUSTOMER REFERRAL PROGRAMS

¹⁴ “Defense in case of excessive charges for gas or electricity. If it be alleged and established in an action brought in any court for the collection of any charge for gas or electricity, that a price has been demanded in excess of that fixed by the commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defense to such action.” PSL § 75. The exception for variable fuel adjustment clauses is not applicable if neither the charges nor the formula used by ESCOs for fixing them is known. See *Abrams v PSC*, 7 A.D.2d 708 (3d Dept. 1982) (a “fuel adjustment formula is available for public scrutiny and criticism” before it takes force).

It would be no surprise that suppliers generally support the continuation of Customer Referral programs since these programs inject the Commission and utilities into marketing ESCO services and result in an increased customer base at very little incremental cost to the ESCO. However, for the reasons stated in our Comments, these programs should be phased out and discontinued.

PURCHASE OF RECEIVABLE PROGRAMS

ESCOs also object to any requirement that receivables be purchased by the utilities with recourse. In fact, several suppliers state or imply that such a decision would result in most suppliers leaving the New York market.¹⁵ Therefore, it is important for the Commission to carefully consider the importance of allowing suppliers to bill for their unregulated prices on regulated utility bills from the customer's perspective. This value is so significant to suppliers that they threaten to leave the New York markets if they are not allowed to require the utilities to collect the supplier portion of the bill.

ESCOs value the use of the utility bill highly because they are not able to offer products and services to customers that have a sufficient widespread acceptance and value to support their own billing and collection systems. Instead, they must rely on being associated with the trusted and regulated utility to do so and, pursuant to New York law, rely on the utility to threaten disconnection of service for electricity and natural gas charges that are not regulated to remain profitable in the retail market. PULP discovery in the pending Niagara Mohawk rate cases

¹⁵ Comments of RESA at 6; NYSEMC at 18.

revealed that approximately 30,000 Final Termination Notices are sent to ESCO customers each month, disproportionately higher than for non ESCO customers.¹⁶

The Commission should reconsider these policies in light of the significant subsidy and support that the current billing and collection system has given to ESCOs. This is not merely a matter of ratepayer subsidies in the form of identifiable expenses incurred by utilities in administering these programs. Rather, the type of subsidy at issue here is a reflection of the traditional customer acceptance of utility billing practices and reliance on the assumption about the regulatory approval and oversight of utility bills and charges that appear on these bills.¹⁷ It is these billing and collection systems that have contributed to confusion to customers and, perhaps unintentionally, allowed some suppliers to take advantage of this confusion and subsidy to sell products that do not in fact provide any value to their customers but instead provide profits to the supplier. It is appropriate of course to urge this Commission to focus on the “bad apples” and enforce regulations and consumer protection policies and improve customer education and disclosures to make sure that customers understand the bargain and affirmatively have agreed to the ESCO contract terms. But, such expensive education and enforcement would not be needed or at least needed in lesser degree if suppliers were obligated to bill and collect for their own charges.

Having expressed our negative views of the current situation, AARP and PULP assume that the Commission will not eliminate the ability of ESCOs to make use of the utility bill for

¹⁶ Direct Testimony of William Yates on behalf of PULP at 8; Case No. 12-E-0201 and No. 12-G-1202 (August 31, 2012). Mr. Yates’ testimony was attached to PULP and AARP’s Direct Comments in this proceeding.

¹⁷ Traditionally a utility could not collect any bill if *any* of the charges on it were not approved by the PSC. PSL § 75.

billing and collection of ESCO charges, and cannot, without statutory amendment, prohibit utilities from collecting unpaid supplier charges through regulated collection practices, including disconnection for nonpayment. However, we recommend reforms that comport with the current statutory directive. The Commission should require utilities to separately state the unpaid charges for both regulated distribution service and supplier charges on termination notices and state the amount that the customer must pay or promise to pay pursuant to an installment payment agreement to avoid disconnection. This amount should not exceed what the customer would have paid pursuant to utility default service. Any unpaid supplier charges in excess of this amount should be returned to the supplier for collection by means of lawful debt collection methods. This policy may require utilities to incur additional costs to program their collection programs to ensure compliance; such incremental costs should be reviewed by the Commission to ensure that they are reasonable and efficient in the utility's next base rate case. Another significant consumer protection included in our Comments is that utilities should be required to disclose the supplier's rate structure on the customer bill so that the customer, similar to utility charges, can visually compare the rate stated on the bill with the rate disclosed in the contract. This added transparency may alert customers to the effects of fraudulent and deceptive "bait and switch" practices, and is a reform that could be taken under General Business Law 349(d).

ESCOs always have the option of issuing a separate bill for their own services or using the distribution utility's billing system to bill and collect their charges. The use of the utility's billing system has such a significant value to suppliers and such potential negative consequences

for residential consumers so that the use of the utility's billing system should be allowed only with the added consumer protection as recommended by AARP and PULP.

ESCOs that seek to issue a consolidated bill that includes regulated distribution services should be required to demonstrate that they have complied with all the applicable service quality, customer service, and consumer protections associated with the regulated distribution utility and ESCO charges in their communications and collection activities with customers.

LOW INCOME CUSTOMERS AND THE RETAIL COMPETITIVE ENERGY MARKET

Most commenters did not recommend that the Commission take actions that would eliminate the low-income customer's right to select an ESCO. PULP and AARP would not oppose such an action, even if taken temporarily during the period when reforms to market rules and consumer protections are considered and adopted. At a minimum, this Commission has an obligation to take additional steps to reform its regulations and initiate appropriate enforcement actions, perhaps in conjunction with the AG. In addition, the Commission should create targeted educational programs and outreach to and for low-income customers in light of the clear evidence that low income customers have selected ESCOs at a higher rate than other customers and, as documented by both the Staff analysis and the PULP analysis, are paying more for essential electricity and natural gas service compared to utility default service.

Low income and payment troubled customers are naturally interested in saving money on their utility bills. However, because of the importance of affordable energy due to their lack of

income, they may be susceptible to misleading and deceptive marketing tactics by suppliers who may be taking advantage of the desire for savings without actually providing a product that results in savings. Some suppliers are also taking advantage of customer ignorance about comparative shopping, the role of the utility's default service and their right to continue that service, lack of information about default service pricing, as well as situations in which the customer has disabilities and lack English speaking and written comprehension skills sufficient to detect misinformation or the fine print terms and conditions. In light of the harms, both present and future, to these customers and their ability to maintain affordable energy services, AARP and PULP urge the Commission to work closely with the providers of financial assistance programs, community action agencies, local community support groups, and other consumer representatives to assist lower income and other vulnerable customers in making decisions about the retail energy markets in New York. This outreach effort should be directed to educating customers about the various ESCO offers and how such proposals might impact the customer's bill for gas and electric service, as well as how to read and understand fine print contract terms.

CONSUMER EDUCATION

All commenters endorse consumer education. However, the lack of specificity of the purpose and content of such education and who should pay for these initiatives were a troubling omission. For example, all the ESCO representatives endorsed additional consumer education as a means of encouraging customers to shop and compare and select a competitive supplier, acknowledging that customers need more education about pricing options in light of the

difficulties of comparing prices to the utility's commodity prices. Most suppliers endorsed the historical bill calculator. However, none of the suppliers offered to pay for customer education designed to support their retail market profits, thus implying that ratepayers should be required to fund such new programs. In addition, suppliers want utilities to pay for the billing enhancements designed to allow comparison between supplier and utility commodity prices.

AARP and PULP support consumer education by the Commission, but only if undertaken pursuant to a publicly developed education plan that reflects research and performance metrics designed to ensure that the educational messages are effective and widely understood. Most importantly, this should be designed to promote improved disclosure and consumer protection policies recommended in our Comments. We urge the Commission to require ESCOs to pay a fair share of any consumer education program that is intended to implement retail shopping and migration on the grounds that ESCOs will benefit from such initiatives.

COMMENTS FILED BY THE FEDERAL TRADE COMMISSION

AARP and PULP take this opportunity to respond to the Comments filed by the Staff of the FTC's Bureau of Economics and Office of the General Counsel. While these Comments appear to endorse some level of reform and emphasize the importance of careful research to create useful disclosures and educational messages, other aspects of these Comments appear to emphasize reliance on competitive markets to deliver benefits to residential and low-income customers. The FTC Comments fail to take into account the recent analysis of ESCO contracts

and their adverse impact on consumers undertaken by the Commission Staff, the AG's enforcement actions in New York, nor the analysis that PULP undertook in the recent National Grid base rate case proceeding which showed that ESCO customers paid approximately \$130 million more for their service in the past two years, that many low income customers were among those who paid the most, and the ESCO customers receive disproportionately more Final Termination Notices. The FTC Comments do not reference any actions they have taken regarding ESCO practices in New York, or for that matter, in any other state. They reflect no knowledge of the enforcement actions undertaken by the New York AG or other state regulatory agencies pursuant to state statutes that mimic the Unfair Trade Practices Act and the long regulatory history at the FTC and at the state level to document, define, and prohibit misleading and unfair sales practices for a wide range of consumer oriented markets. Instead, the FTC Comments are replete with dogma about competitive markets and mainly rely on the theory that if only customers had the right disclosures, they would make the proper choices.

Furthermore, the FTC allegation that "internet in-home automation technology" is going to result in ESCOs offering energy management tools and "an improved customer experience" is unproven and another example of vague and unenforceable "visions" about what ESCOs could do as opposed to what they actually do. [At 1] Not only has New York not adopted a requirement that smart meters should be installed on a system wide basis, but even where such smart metering systems are installed in other jurisdictions, there are no "in-home automation" systems being installed or funded by ratepayers. Therefore, the suggestion by the ESCOs and the FTC that "smart grid" technologies will ensure that retail suppliers will offer value to

customers that will somehow compensate or equal the costs that ratepayers would typically be required to incur to support such investments by utilities should be rejected in the context of this proceeding.

AARP and PULP agree about the need to create careful disclosure designs and consider the impact of research in such designs. However, the FTC's Comments do not recognize that such research was undertaken prior to the implementation of restructuring and retail competition for energy markets. The National Council on Competition and the Electric Industry sponsored research and policy papers on this very issue in 1998. The Council was a joint effort of NARUC and the National Conference of State Legislatures. Among the papers published by the Council on this topic included:

Information Disclosure for Electricity Sales: Consumer Preferences from Focus Groups

Full Environmental Disclosure for Electricity: Tracking and Report Key Information

Disclosure of Fuel Mix and Emissions by Retail Electric Service Providers: Issues of Confidentiality vs. Public Right to Know

Information Disclosure for Electricity Sales: Consumer Preferences from Focus Groups. Rocky Mountain West

Information Disclosure for Electricity Sales: Consumer Preferences from Focus Groups. West Coast

Information Consumers Want In Electricity Choice: Summary of Focus Group Research

Label Testing: Results of Mall Intercept Study

Consumer Research on Tracking Approaches and Product versus Supplier Labeling

Synthesis Report: A Summary of Research on Information Disclosure

Model Electricity Consumer Protection Disclosures

The *Model Electricity Consumer Protection Disclosures* report with recommended Electricity Facts Consumer Disclosures based on the research undertaken by the Council is attached to these Reply Comments. This Report made recommendations for standardized price and material term disclosures that, if followed in New York, would respond to many of the concerns raised by Comments in this proceeding. Among the important recommendations that AARP and PULP endorse is that fixed rate contracts that include recurring charges in addition to kWh charges disclose the impact of those fixed recurring charges on the actual kWh price for typical customer usage profiles and that variable rate contracts contain uniform disclosures that allow the customer to understand how the supplier's variable rate methodology has performed in the recent past.

Finally, AARP and PULP were particularly disappointed in the FTC's Comments with respect to the statement that, "Some beneficial offerings appealing to consumers, however, might be curtailed by a rule requiring that all variable price offers be based on public price information." The FTC Comments also suggest that a supplier's costs and prices may depend on the relationship between fuel and electricity prices at the generator's location and public price indexes. [At 11] Such statements reflect a lack of knowledge of the wholesale and retail electricity markets. ESCO's are not "generators" for the most part; they do not typically own generation; and they do not receive or deliver power based on any particular generator's prices. Rather, ESCOs typically purchase electricity derivatively, through financial contracts in the

wholesale market based on short-term transactions or by the management of a portfolio of wholesale market purchases and hedges. Finally, there are unfortunately (and to the dismay of many consumer advocates), no “public price indexes” on which retail customers can monitor wholesale market prices for retail electricity service. Rather, there are obscure databases of “locational marginal prices” available on an hourly and monthly average basis for locations that are not identified in a manner that any consumer could rely upon to determine wholesale market prices.

The purpose of the PULP and AARP recommendations with respect to variable rate price disclosures is not to require that an ESCO use any particular methodology or even a publicly available index. Rather, our recommendation is that an ESCO using variable rates state specifically how its monthly price will vary, whether by an adder to a public index, a formula, or a methodology that is explicit and capable of being replicated by a reasonable person. The alternative is to allow suppliers to market electricity or natural gas products to residential customers that allow the supplier to change prices every month based on the supplier’s total discretion. When early termination fees accompany such contracts, the harm to consumers is compounded.

Conclusion

The Commission should undertake a wide range of reforms in its retail competition programs on behalf of residential customers. AARP and PULP support the Commission’s initiative in initiating this proceeding and urge the Commission to act

promptly and substantively to respond to our recommendations as set forth in our Direct Comments. Our recommendations endorse the following key actions that the Commission should promptly undertake:

- Order each gas and electric utility to implement a bill calculator and widely promote its existence and why it should be used by consumers;
- Improve bill and other publicly available disclosures of the Price to Compare;
- Reform the Commission's and the utility consumer education about retail competition to ensure that customers understand how to shop and compare offers among ESCOs and comprehend material contract terms so that unrealistic messages or "savings" are eliminated;
- Involve and support local community agency and social assistance agency information about the retail energy markets and provide the technical assistance to train these agency personnel to educate clients about retail market offers and key contract terms;
- Revise the Power to Choose website to ensure that marketers must offer the products listed on this website and that the ESCO terms and conditions are publicly available to any individual upon request and without being subjected to sales communications or initiating a request to enroll;
- Eliminate Customer Referral Programs;

- Enact a temporary moratorium on allowing low income customers enrolled in utility programs and receiving LIHEAP to enroll with any ESCO without a contractual commitment to charge a rate lower than the utility's Price to Compare for the entire contract term;
- Consider additional reforms for door-to-door marketing and telemarketing sales methods;
- Upgrade and improve the Commission's oversight of ESCO's in terms of being allowed to conduct sales in New York as well as supervising ESCO conduct and contract terms to take actions to enforce New York consumer protection laws, perhaps in formal cooperation with the Attorney General;
- Regulate and reform minimum contract terms with respect to variable rates, early termination charges, and renewal terms;

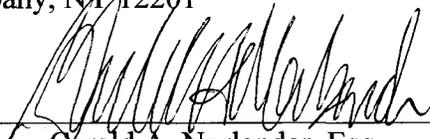
- Reform the Purchase of Receivables programs to prohibit a utility from demanding payment of ESCO charges that would exceed what the customer would have paid for default service to avoid termination of service.

March 1, 2013

Respectfully submitted,

AARP
99 Washington Avenue
Albany, NY
And
Public Utility Law Project of New York,
Inc.
P.O. Box 10787,
Albany, NY 12201

By



Gerald A. Norlander, Esq.

Attachment: *Model Electricity Consumer Protection Disclosures* report

Model Electricity Consumer Protection Disclosures

**A Report to the National Council on Competition and the
Electric Industry**

Consumer Information Disclosure Project

By

Jerrold Oppenheim
National Consumer Law Center

Barbara R. Alexander
Consumer Affairs Consultant

The National Council on Competition and the Electric Industry

October 1998

The Consumer Information Disclosure Series

Papers in the Series

Information Disclosure for Electricity Sales: Consumer Preferences from Focus Groups

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Synthesis Report: A Summary of Research on Information Disclosure

Model Electricity Consumer Protection Disclosures



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Foreword

The National Council and Its Research Agenda

In November 1996, the National Council on Competition and the Electric Industry (the National Council) initiated its Consumer Information Disclosure Project to assist state regulators and legislators address consumer information needs in a competitive electricity environment. This effort followed the National Association of Regulatory Utility Commissioners' November 1996 resolution calling for enforceable, uniform standards that would allow retail consumers to easily compare price, price variability, resource mix, and the environmental characteristics of their electricity purchases.

To implement this resolution, the National Council has initiated a multi-part research agenda. The research agenda is designed to identify and provide state regulators and legislators with technical information, consumer research and policy options. The tasks currently being undertaken are described below. A report, describing the result of the research, will be prepared for each of the tasks. Copies will be made available on the National Council's website as they become available.

Task 1—Options Identification and Tracking Overview. This task identifies the major disclosure and labeling options for environmental and resource mix. Emphasis for the options focuses on information that currently is available for use in possible labels. The task also identifies the likely mechanisms that could be used to trace transactions from generators through sellers, aggregators or marketers to retail buyers.

Task 2—Price and Service Disclosure Generally. This task identifies the major disclosure options for items other than environmental and resource mix—for example, pricing elements, price change formulas, service options, and fixed vs. variable rates. The task focuses on items that might be included in simple labels, (e.g., price) as well as other items such as risk, and important contract terms and conditions that might be provided to consumers in other forms.

Task 3—Stakeholder Outreach. The National Council has held three regional meetings to collect input from stakeholders on a variety of issues with particular emphasis on suggested label content and format. Other issues included whether label information should be historical or prospective; the required level of accuracy; the treatment of energy efficiency, emission offsets, and allowances; the frequency and location of information; and enforcement.

Task 4—Customer Focus Groups. This task involves customer focus groups in six states, including focus groups with consumers who have participated in retail competition pilot programs (e.g., New Hampshire). The groups provided feedback about how they perceive competition and on the categories of information consumers want before choosing among electricity suppliers. The groups also were asked for their reactions to different marketing materials.

Task 5—Baseline Tracking Survey. This task consists of a nationwide telephone survey to collect information about knowledge, attitudes and practices relevant to consumer decisions about electricity service. This task also establishes national and regional baseline data on the issues.

Task 6—Disclosure Testing. The purpose of this research is to test labeling options for consumer acceptance, ease of use, comprehensibility and task performance (i.e., ability to perform label use tasks). Labeling options will be tested in a controlled, experimental setting that simulates realistic use situations to quantitatively assess label performance.

Task 7—New England Project. This task involves working with public utility commissions (PUCs) and stakeholders in the six New England states and making recommendations for uniform disclosure requirements.

Task 8—Large-Scale Pilot Programs. This task involves large-scale testing of disclosure in the context of retail pilot programs to help design and evaluate the testing of different aspects of disclosure. We have had several conversations with commissions and utilities that are planning retail access pilot programs.

Task 9—Regional Disclosure Projects. This task applies the experience on the process used in New England to develop proposed uniform disclosure requirements for other regions. In each region, the National Council will work with commissions and all other stakeholders to develop uniform disclosure requirements that fit the needs of the regional market.

Task 10—Consumer Acceptance of Alternative Tracking Approaches. There are two approaches to tracking information used for disclosing information to consumers on fuel mix and emissions. One approach is a contract or settlement approach and the other is tradeable tags. Both approaches are described in detail in other National Council reports. A fundamental concern raised about the tradeable tag approach is that it will suffer from a lack of consumer acceptance. The purpose of this research task is to assess consumer acceptance of alternative tracking approaches and determine whether and to what extent using one approach over the other influences consumer choice.

Reports are available on-line at the National Council's home page: <http://eetd.lbl.gov/NationalCouncil>.

Acknowledgments

Advice was generously provided by participants in the workshops associated with the National Council's New England Project—Tom Austin, David Moskowitz and Cheryl Harrington of the Regulatory Assistance Project (RAP), and Nancy Brockway of the National Consumer Law Center (NCLC). Finally, colleagues at NCLC offered their considerable experience of the last 28 years with consumer disclosure issues in other industries. Much of this experience is distilled in NCLC's 14-book library, *The Consumer Credit and Sales Legal Practice Series*.

This report also has profited from Barbara Alexander's consulting work with the Pennsylvania Office of Consumer Advocate and the New Jersey Division of Ratepayer Assistance on electric restructuring in their states, and her publications and training programs provided to and for RAP on consumer protection issues associated with retail electric competition.¹ However, our views should not be construed as endorsement by these organizations. The errors and omissions of the report are those introduced by the authors.

About the Authors

Jerrold Oppenheim

Jerrold Oppenheim has represented consumer and environmental interests for 26 years, specializing in cases involving public utilities. A graduate of Harvard College and Boston College Law School, Mr. Oppenheim has held prominent positions in the attorney generals' offices in New York and Massachusetts, representing consumer interests in energy and utility cases. Before that, he directed consumer and utility legal assistance programs in New York and Chicago. He was also the founding director of Renewable Energy Technology Analysis (RETA) at Pace University Law School. He now is practicing at the National Consumer Law Center, a public interest law firm based in Boston, where he works as attorney, policy advisor and expert witness.

Barbara R. Alexander

Barbara Alexander is a Consumer Affairs Consultant with more than 15 years' experience in consumer and utility regulation. She is a former superintendent of Maine's Bureau of Consumer Credit Protection (1979-82) and was the first director of the Consumer Assistance Division of Maine's Public Utility Commission (1986-96). In March 1996, she began her own consulting business as a consumer affairs consultant.

Ms. Alexander is an attorney (University of Maine School of Law, 1976) and a graduate with honors from the University of Michigan (1968).

1. See Alexander, Barbara, and NCLC, *Consumer Protection Proposals for Retail Electric Competition: Model Legislation and Regulations*, Regulatory Assistance Project, October 1996.

Executive Summary

Choice is coming. In many states, consumers soon will have to do something they have never thought about before: decide which supplier will provide electricity to their home or business. This means customers will, for the first time, have a reason to compare prices, service options and differing contract terms.

Clearly, the arrival of customer choice carries with it the potential for customer confusion. Is \$5 per month and 10 cents per kilowatt-hour (kWh) better than \$10 per month and 8 cents per kWh or \$6 per month and 12 cents per kWh with a 40 percent off-peak discount? Furthermore, the sale of electricity may be bundled with other products, such as alternative meters (that may offer additional energy management services or pricing options) or even with other products, such as Internet access or telephone services.

Recognizing this, the National Association of Regulatory Utility Commissioners (NARUC) in November 1996 urged

... states adopting retail direct access programs to include enforceable standards of disclosure and labeling that would allow retail consumers easily to compare the price, price variability, resource mix, and environmental characteristics of their electricity purchases.

Among other purposes, NARUC announced its belief that "... the electric industry should facilitate informed customer choice that will promote efficient markets ..." The full text of this resolution is included in this report as appendix A.

This report focuses on the uniform disclosure of price and consumer protection information. Other reports prepared by the National Council on Competition in the Electric Industry (the National Council) address energy supply and environmental emissions disclosures. Our recommendations rely on information gained at regional workshops on consumer disclosures sponsored by the National Council and convened during June 1997 in Seattle, Minneapolis and Philadelphia; at meetings from April through September 1997 of the National Council's New England Disclosure Project; and on consumer focus groups. This report also is based on a review of existing state electric and telephone utility disclosure requirements, rules under consideration in several states to implement consumer choice and competition, and state and federal provisions applicable to other industries, such as consumer credit, home finance, used cars, and insurance and retail sales.

The National Consumer Law Center (NCLC) also conducted a literature search, performed legal research, and gathered additional information from people at and documents published by government agencies that are involved with disclosure issues. These included the Federal Reserve Board, the U.S. Food and Drug Administration, the Securities and Exchange Commission, the Federal Trade Commission, and several state agencies, as well as numerous public utility commissioners and staff members, state legislators and staff members, consumer advocates, utility and supplier representatives, and assistant attorneys general.

Overview

Residential and small commercial customers soon will be dealing with sellers of two different types of services in a retail electricity marketplace: *electricity* suppliers and *distribution* (transport and local delivery) utilities.²

Electricity suppliers include generators, marketers, aggregators and brokers that will be marketing electricity supply directly to retail consumers. In some cases, distribution companies also will act as a supplier, as a competitive supplier, or as a regulated supplier of default or supplier of last resort. Metering and billing for suppliers may be performed by the supplier, by the monopoly distribution company or by a separate firm that provides metering and billing on a competitive basis.

Distribution utilities will resemble the traditional regulated entity that will provide and bill for delivery and transmission services. In some states the distribution utility also will bill and collect for default service (provider-of-last-resort) and standard offer service.

The recommendations in this report focus on consumer disclosure and consumer protection issues, especially related to pricing and other disclosures for competitive electricity suppliers. This includes disclosure of key consumer protection policies. The recommendations in this report do not extend to matters that relate to distribution utilities, except to the extent that distribution utilities also act as a competitive electricity supplier. Nevertheless, it is recommended that regulators review existing distribution utility disclosure to see if it reflects the additional needs of choice and competition.

The proposed rules and models do not include the energy supply and environmental emissions disclosures being developed by others. Those disclosure requirements should be added to the proposed rules concerning price and consumer protection policies. In addition, the recommendations assume the continuation of state policies, including winter disconnection rules, regulation of late fees and deposits, minimum notice periods prior to cancellation of the contract or disconnection of service, and conventional bill disclosures, such as meter reading dates, how estimated bills are handled, and whether the utility commission's telephone number and dispute resolution policy are stated on the bill. The recommended disclosures are intended as illustrative of these disclosures.

The objective here is to balance simplicity and clarity with comprehensiveness. Toward this end, a tiering of disclosures is recommended. The disclosures customers need first and most prominently should appear in the marketing labels and on the front of the bill. Information consumers need next may appear on the back of the bill. The most comprehensive disclosures are in the Terms of Service brochure—which, we recommend, is to serve as the written contract between the retail supplier and the consumer. The Terms of Service brochure is provided at the time the contractual relationship is initiated and periodically thereafter.

2. *Electricity* is used throughout this report to refer to what regulatory insiders call generation services. *Distribution* is used to refer to transport and local delivery services.

Items to Be Disclosed

Price

The ability to compare prices between like products is essential to a well-functioning retail market. In the absence of “apples-to-apples” price information, consumers are more likely to choose not to choose.³ At present customers are accustomed to receiving a single, all-inclusive bill, and they have no reason to be familiar with the differences between electricity and transport charges. Customers also are accustomed to relative price stability in the bills they receive for electricity. To become knowledgeable shoppers, they will have to learn to distinguish between competitive and regulated services and to recognize and shop among a variety of price terms. In an effort to use consumer-friendly terms, we label the unbundled bill elements as *electricity* (generation or energy), *transport* (transmission), and *local delivery* (distribution, access, customer charge and other state-regulated charges). These terms are used throughout this report.

The consumer research performed by the National Council indicates a strong interest in price information and a real potential for confusion in the way price is disclosed.⁴ Customers prefer a simple total bill amount or price per kWh for both electricity and local delivery/transport services. It probably is not practical to provide this simplicity in a market where suppliers advertise across boundaries of various distribution utilities and want to use uniform billing formats and disclosures in a region or state. Furthermore, since the local delivery/transport portion of the bill will remain regulated, consumers will not shop for that portion of the service. It will thus be important to focus consumer attention on the electricity (generation) portion of the bill, where comparative shopping will be fruitful.

To respond both to these price concerns and the importance attached to them, the proposed disclosures recommend prominent price disclosure in advertising materials, and the Terms of Service brochure that customers will receive at the time they agree to become a customer of a particular supplier. This disclosure—particularly if accompanied by a right of rescission within three to five days of receipt of the brochure—will allow customers to make sure that the pricing terms are (as they understood them) the same as those advertised in the marketing materials.

Recently completed consumer research by the National Council tested consumers’ ability to use price information given in various forms, including average price per kWh and average total monthly bills. Consumers were tested on their ability to perform simple calculations to find the lowest cost products and to determine what the monthly bill would be at two different usage levels. The price options included displaying simple block rate designs (e.g., \$10 per month plus 3 cents per kWh for the first 500 kWh and 4 cents for all use over 500 kWh), average prices per kWh at three different usage levels, and average monthly bills at three different usage levels. The study found that consumer performance was substantially improved when all products displayed price information in the same manner. Consumers also

3. National Consumer Law Center, Comments of Low-Income Intervenors in Massachusetts. DPU Docket 95-100 (August 12, 1996).

4. See Alan S. Levy et al., *Information Disclosure for Electricity Sales: Consumer Preferences From Focus Groups*, The National Council on Competition and the Electricity Industry, July 1997.

performed best when average monthly bill formats were used. They performed worst when block rates were displayed.⁵

By itself, this study suggests that uniform price disclosure in the form of average monthly bills should be used, with average kWh price information a close second. However, we expect that the marketing of electricity will most likely focus on price per kWh and that sellers will feature price per kWh in their advertising materials and media messages. Requiring labels with average monthly bills and without average price per kWh would probably be confusing. Reporting both in a uniform label may violate the goal of simplicity. Thus, we have a slight preference for the use of average prices per kWh required uniform labels.

The disclosure should be provided in a cents per kWh format. Although suppliers may actually price their product with a mixture of fixed and variable prices, as well as time or day and seasonal differentials, consumers cannot easily determine the effect of these various pricing schemes on their monthly bill.⁶ Our recommendation is similar to the concept adopted in the Truth in Lending Act, in which interest charges are uniformly disclosed as an annual percentage rate (APR). The APR must be calculated according to a uniform methodology that takes into account the fixed and variable features of the creditor's interest rate plan. Price disclosure does not control how suppliers price. Rate designs may be simple or complex. Price disclosure translates suppliers' rate designs into a uniform cents per kWh format, thereby simplifying price comparisons. Consumer research shows this simplification is essential for consumers to identify the supplier and product of choice.

To relate the fixed and variable aspects of the supplier's electricity charges to actual monthly bills, the cents per kWh disclosure should be provided at four typical usage levels. Inclusion of prices for typical price levels enables the customer to find the usage level closest to his or her own level and also to anticipate how the bill would change if the household's usage changes. This goal can best be achieved by providing a broad range of typical usage levels, such as small (300 kWh), general (500 kWh), water heating (900 kWh) and space heating (1,500 kWh). Showing average prices at a wide range of usage levels also allows customers to determine which rate designs perform well at a particular usage level.

The unit pricing of electricity also should be provided on the customer's bill, whether issued by the distribution company on the supplier's behalf or directly by the supplier. At this point, the customer's usage is known and the unit price should be disclosed as the actual, average price in cents per kWh charged by the supplier for the customer's usage for that billing period. Over time, the customer can become familiar with the actual cost of the particular supplier's price design on his or her actual usage pattern. The customer's historical usage pattern also should appear on all supplier bills.

5. A forthcoming National Council report, *Label Testing: Results of Mall Intercept Study*, summarizes the results of large-scale disclosure testing and provides quantitative evidence of the extent of consumer confusion caused by the lack of simple price comparison.

6. Ibid.

Unit pricing of consumer goods⁷ occurs throughout the economy and has become a widespread requirement that consumers have learned to rely upon. Many states, for example, require food products to be labeled with unit prices so consumers can make product-to-product price comparisons. The results of the 1997 New Hampshire electric competition pilot program confirmed that customers want uniform price disclosure. Suppliers who marketed to customers in this pilot program were not required to make any disclosures. Perhaps as a result, New Hampshire focus groups expressed their frustration with pricing that defied “apples-to-apples” comparison. A poll conducted for the New Hampshire Public Utilities Commission (PUC) found that 84 percent wanted uniform price information; 71 percent of those who were changing suppliers said price was a strong factor. In its final plan, the New Hampshire PUC required that customer bills disclose prices and price components so that customers can readily calculate charges using information provided on the bill.⁸ Rather than require consumers to calculate their average price per kWh, our proposal provides this information automatically to all consumers.

Because price is such essential information, state regulatory agencies may want to require that all marketing materials contain a prominent display of the recommended average price per kWh terms. Regulators also may want to consider exercising prior approval of these materials.

Variability of Price

Price variability is one of the key elements identified by both NARUC and focus groups. This essential information is provided by disclosure of both the basis for variation (e.g., spot markets, fuel, the consumer price index) and a price history, in much the same way as variable rate mortgage information is disclosed.⁹ Because of the importance attached to these disclosures, they appear prominently on the price disclosure label on the Terms of Service brochure with more detailed explanations in the brochure itself. The customer’s monthly bill also should disclose whether the contract has a fixed or variable price and, if the price is variable, how the price has changed that month. All advertising should disclose the fact that the price is subject to change during the term of the contract (without historical information). The brochure also should include all other charges.

Time-of-use rates also may be a new pricing term for many customers. Marketing materials, Terms of Service and billing disclosures for such time-of-use products should require unit

7. For example, N.J. Admin. Rules §§13:45A-14.1 et seq.

8. New Hampshire PUC, Final Plan, Restructuring New Hampshire’s Electric Utility Industry, DR 96-150, February 28, 1997, at 102-103.

9. The Home Equity Loan Consumer Protection Act of 1988 [Pub. L. No. 100-709, 102 Stat. 4725 (1988)] requires that any home equity loan secured by a variable rate note must provide consumers with a 15-year historical table illustrating the rate changes based on an assumed \$10,000 initial extension of credit, a statement of the frequency of the rate adjustments and other specific variable rate information. The law also imposed substantive limitations on the frequency of the changes in the interest rate or APR and a requirement that the index referenced for the variable rate changes must be outside the creditor’s control and publicly available to the consumer.

pricing at the average on-peak and off-peak patterns for average load profile for the customer's class.¹⁰ The Terms of Service also should identify the on-peak and off-peak periods. With respect to conservation or energy management services, the supplier may separately disclose the likely effect of these services on the customer's overall electricity bill, but this disclosure must be based on a thorough evaluation of the energy (and capacity) savings of the services provided for the particular region of the country.

Electricity Sold with other Services

Public input workshops about information disclosure held in Seattle, Minneapolis and Philadelphia and discussions of the New England Disclosure Project raised additional complications regarding price disclosure. How should price be disclosed when products unrelated to electricity—such as telephone service—are bundled with electricity? It will be difficult for customers to figure the stand-alone price of electricity or to compare offers where suppliers offer electricity solely as part of a bundled product carrying a single price.

There are several disclosure options.

- The supplier could be required to disclose the price of electricity at the price at which it would be willing and able to sell on a stand-alone basis. This option works well when the supplier is willing to sell electricity separately, but does not work when the seller does not sell the bundled products separately.
- The supplier could be required to disclose the entire monthly price as a function of the price of electricity, i.e., 1,000 kWh for \$50 or 5 cents per kWh. This option also would allow the supplier to list those services or products that are included in the total price. This would allow customers to compare the price of all products that bundled electricity with the same or similar services. This option would not help consumers compare and value the price of any one part of the bundled mix.
- The supplier could be required to disclose the price of electricity based on its fair market value for the sale of residential (or commercial) electricity in the particular area. Under this approach, suppliers will be tempted to set the price for the electricity portion of the product as low as legally allowed.¹¹ This could mislead consumers and substantially weaken their ability to comparison shop. This option also would require some agency—whether it is the state commission, the attorney general or the FTC—to hear and adjudicate complaints.

10. This information should be derived from regional average load shapes.

11. The Maine, Pennsylvania, New Hampshire and California commissions, among others, already have determined that only distribution companies can threaten disconnection of service, but that this remedy is not available to suppliers or to distribution companies that are attempting to collect charges on behalf of suppliers. These same commissions, however, do allow the distribution company to use the disconnection tool for the collection of the standard offer or provider of last resort service.

For more discussion of this issues see appendix B, which contains excerpts from the National Council's report on *Uniform Disclosure Standards for New England* (pp.11-13, November 1997). That report rejected the third option and recommended that suppliers be given the option to disclose price either by rolling the cost of all goods into the price of electricity or by disclosing the same price for both the bundled and unbundled version of the product.

Many sellers have offered one-time premiums or other inducements (e.g. \$25 in cash, a bird feeder, etc.) to entice consumers to select their service. Consumer focus group research suggested that these inducements should not be reflected in price calculations. Consumers are able to take these types of offers into account. Thus, we recommend that one-time inducements or premiums not be computed in disclosed prices. They must, however, be described and valued in the Terms of Service brochure.

Non-Electricity Price Terms and Disclosure of Customer Protections

Other information desired by focus group participants included consumer complaint incidence and procedures for resolving disputes. We propose that all bills (on the back) and Terms of Service brochures contain information about dispute resolution and, where applicable, reference to the public utility commission as mediator. We recommend that commissions publish an annual report on all licensed energy suppliers and utilities with the complaint ratio of each supplier and utility. This information should reflect customer calls to both the utility commission and state attorney general, as well as any formal enforcement actions that were taken in the previous year.

NCLC research and experience, as well as the workshops in Seattle, Minneapolis and Philadelphia, and discussions of the New England Disclosure Project, raised additional disclosure issues.

- Customers need to know the consequences of their default, especially the potential for late charges and, eventually, cancellation of their contract. Most customers are aware of the potential for disconnection for nonpayment for regulated charges billed by the distribution company. However, our recommendations assume the customer cannot be disconnected or threatened with disconnection for the failure to pay for the unregulated supplier charges.¹² Bills issued by suppliers (or by distribution companies on behalf of suppliers) should inform the customer of the contract cancellation notice and procedures. The distribution bill and, if applicable, the supplier bill should continue to inform customers about the right to a payment arrangement and the time period within which payment must be made to avoid a notice of cancellation or disconnection. The due date to avoid late fees or further collection efforts should appear on the front of the bill. The back of the bill should contain information about dispute and collection procedures.
- The Terms of Service brochure explains rules with respect to deposits, catch-up bills and the availability of default service.

12. Pennsylvania, for example.

- Many customers do not know about protections that are available to them. Protections may include low-income payment programs, winter rule protections, the right to a payment arrangement, and energy management services. These programs vary among the states, and the bill should disclose their availability as appropriate and a contact telephone number for further information. Depending on the state and the provisions, disclosure should be required by suppliers, distribution companies¹³ or an independent, state-wide administrator.¹⁴ For example, low-income discount rates typically have a penetration rate of 50 percent or less. Therefore, a listing of available protections and discounts is published on the back of the bill together with a toll-free number to obtain more information. The objective is to provide simple notice that protections exist and encourage inquiry to obtain details. Similar information commonly is disclosed in many states.
- Customers will need to know the length of the contract and the early termination penalties, if any. This important information should be highlighted as part of the Terms of Service brochure and indicated, as well, on the front of the bill. Many customers have complained about the terms of certain cellular telephone contracts where an up-front, free cellular phone is promised in return for a service contract with a minimum duration of several years. This same approach may occur for electricity services, especially if suppliers can offer customers alternative meters as part of their electricity services. Furthermore, some states may set a minimum term for last resort service. They seek to require a minimum contract term or early termination penalty in such situations.
- “Slamming,” the unauthorized switching of suppliers, is the largest source of complaints to the Federal Communications Commission that has emerged from telephone competition. Appropriate disclosures to respond to slamming depend upon the rules chosen to regulate it.¹⁵ For example, if a code is required to confirm the identify of a customer, then the code should be printed on the distribution utility’s bill. Similarly, rules may require that an order to switch be in writing and include a peel-off label that is provided with the distribution utility bill to be affixed to the ordering contract. To order electricity supply, the consumer would peel the label from the distribution utility bill and affix it to an order for supply service. In this way, verification would be provided that the customer had placed the order. The purpose of this report is not to propose substantive anti-slamming rules but, rather, to suggest disclosures that further the anti-slamming policies.

13. California, for example.

14. The need for disclosure of the consequences of early termination has arisen in other consumer transactions as well. For example, the Consumer Leasing Act, 15 U.S.C. 1667 et seq., and Federal Reserve Board regulations, 12 C.F.R. 213 (auto lessor must conspicuously disclose early cancellation penalty); Iowa Code §3211.5(2)(m) (motor vehicle service contracts); 940 Mass. C.M.R. 3.13(2) (consumer fraud statute requires disclosure of cancellation policy); Idaho Admin. Code 04.02.01, subchp. O, rules 150, 152 (layaway cancellation policy must be disclosed). Analogously, truth in lending requires disclosure of the cost of prepayment.

15. Even in the absence of specific rules, however, slamming is a violation of consumer fraud statutes. For example, *Zimmerman vs. Bell Tel. Co. Of Penna.*, 551 A.2d 602 (Pa. Cmwlth. 1988) (inside wire).

- Conventional utility and consumer transaction disclosures should be retained, including provision of a toll-free, 24-hour telephone number for service problems, disclosure of the use of credit reports,¹⁶ a statement of warranty limits and disclaimers,¹⁷ and disclosure of all other material terms and conditions.¹⁸

16. Fair Credit Reporting Act, 15 U.S.C. §1681m, 1681b(3)(E); Equal Credit Opportunity Act, 15 U.S.C. 1691(d).

17. If there are any limits or disclaimers, the Uniform Commercial Code requires that they be conspicuously disclosed. For example, *Tribble Trucking Corp. vs. General Motors Corp.*, 14 U.C.C. 63 (N.D. Ga. 1973). See Federal Trade Commission Used Car Rule, 16 C.F.R. 455.1(b), 455.2(b), 455.3(b) (detailed prescription of language, including sticker requirement); Federal Trade Commission Magnuson-Moss Act rules, 16 C.F.R. 701.3, 702.3(a), 703.1, 703.2 (consumer warranties must be conspicuously and comprehensively disclosed in simple language before the sale)

18. For example, optional services should be so identified with itemized price disclosures. Wis. Adm. Code PSC 165.043(4) (optional telephone services may not be provided without disclosure of price, optionality, and existence of alternative sources); Federal Trade Commission Funeral Industry Practices Rule, 16 C.F.R. 453.2-453.4 (optionality of certain services must be disclosed). Similarly, under consumer fraud statutes, exclusions, reservations, limitations or conditions of an offer must be disclosed (e.g., Utah Consumer Protection Regulation R152-2-2).

When and Where Should Disclosure Be Made?

To be meaningful and effective in the promotion of competition, disclosure—especially price disclosure—should occur as early as possible in the consumer’s comparison shopping. Thus, advertising requirements¹⁹ are preferable to disclosures that are required only at the time of contracting. Similarly, requiring at least a few basic disclosures—principally price, price variability and term of contract—in all advertising is preferable to making the disclosure obligation contingent upon a particular advertising claim. Advertising includes all media sources, including direct mail, telemarketing and the Internet.

Advertising can appear in writing, orally and visually. Our proposal does not require the use of a mandatory electricity label for oral or visual advertising on TV and radio, although it may be practical and desirable to require some type of minimal disclosure for these media.²⁰ However, all such advertisements should be required to inform consumers that an Electricity Facts Label is available and should be consulted to determine the effect of any offer on a specific customer’s usage pattern. This approach is similar to the mandatory reference to the prospectus that accompanies any offer to sell securities.

The next most useful time for disclosures is when the customer receives a Terms of Service brochure either upon request or shortly after agreeing (either in writing or orally) to become a customer of a particular supplier. This disclosure must appear within several days of initiation of the contract, and it will be most effective if it is accompanied by a right of rescission that would allow the customer to cancel the contract without penalty within a certain time period, usually three business days.²¹

The monthly bill is the next most useful disclosure point, although by the time a monthly bill arrives, the customer probably has become contractually bound, particularly if there is a minimum contract term or an early termination penalty. However, periodic disclosure of continuing consumer protections provides important information when it is needed. Therefore, the bill disclosures seek to translate the customer’s promised price and rate design into the actual price per kWh charged for the usage during the current monthly period. This disclosure then will allow the customer to track usage and price in a manner that is relevant

19. For example, warranty disclosure stickers must be affixed to used cars. See note 6, above. The Telephone Disclosure and Dispute Resolution Act, for another example, mandates a preamble of required pricing information and an opportunity to hang up without incurring charges before audio-text telephone charges (900 numbers) can be incurred. Truth in lending (TIL) requires mass mailings and unsolicited phone calls regarding open end credit (credit cards) to clearly and conspicuously disclose interest rates (including variable rates and regular rate, if different), minimum finance charge, fees (certain fees may be omitted by telemarketers), balance computation method and grace period. In the case of telemarketing, written disclosures also must be made at or before the delivery of the credit card (Federal Reserve Board, Reg. Z). On the other hand, TIL disclosures need be made in advertising only if any credit term is mentioned. In that event, the full disclosure requirement is triggered (Reg. Z, Commentary, 226.16).

20. The effort by the Truth in Lending Act to require certain interest rate disclosures as part of all consumer credit advertising has had mixed success.

21. California, Pennsylvania and Massachusetts require a three-day right of rescission for customers upon receipt of the mandated contract disclosures.

to the customer's actual, not hypothetical, usage pattern. At this point the customer can take action to change suppliers if necessary.

We also recommend that the Terms of Service brochure be provided to consumers twice a year to assist the customer in comparing the current contract with other offers in the competitive marketplace.

What Should the Disclosures Look Like?

Focus group research has confirmed that consumers tend not to read labels in detail and are interested in simplicity. The proposed bill, brochure and advertising formats attached to this report reflect an effort to balance the goal of simplicity with the need to provide the essential information discussed above.

Several states have addressed the need for simplicity in consumer transactions by enacting statutes calling for “plain language” and “clear and conspicuous” disclosures. Enacted statutes and rules have included broad requirements of clarity,²² specified detailed guidelines, and even given exact language to use.²³ Obviously, the more specific rules are more constraining, but they also are less likely to be misunderstood or to engender the kind of disagreement that results in litigation.

Established guidelines include:

- Short sentences and paragraphs
- Common words
- Personal pronouns to refer to contracting parties
- Simple and active verbs²⁴
- Present tense²⁵
- Short words
- No technical terms
- No Latin or foreign words or words used with obsolete meanings
- Maximum of one condition per sentence
- No double negatives²⁶

There are even more specific tests in some states, such as the Flesch Reading Ease Test: number of words divided by number of sentences, result multiplied by 1.015; add to this the number of syllables, divided by the number of words, all multiplied by 84.6; subtract this total from 206.835. The result must be 40.²⁷

22. Examples of such requirements for clarity and coherence include Haw. Rev. Stat. §487A-1; Me. Rev. Stat. Ann. Tit. 10 §1124; Minn. Stat. Ann. §325G.31; Mont. Code Ann. §§30-14-1101 et seq.; N.Y. Gen. Oblig. Law §5-702.

23. For example, Food and Drug Administration, Nutrition Facts, 21 C.F.R. §101.9, 101.15; Federal Trade Commission Used Car Rule, 16 C.F.R. 455.2 (sticker); Federal Reserve Board, Reg. Z (optional model truth in lending forms).

24. Conn. Gen. Stat. §42-152(b).

25. Ore. Rev. Stat. §180.545.

26. 73 Pa. Stat. §2205.

27. Haw. Gen. Stat. §431: 10-106. *Accord*, W. Va. Code §33-29-4. Rudolph Flesch devised this test after research into the reading level of typical Americans, as well as the sentence complexity and length conditions that determine readability at different educational levels. This memorandum would probably not pass the Flesch test.

Another objective test, allowed in Connecticut in place of its more general plain language requirement includes less than 22 words per sentence and 75 per paragraph on average, a maximum of 50 words in a sentence and 150 in a paragraph, and an average of less than 1.55 syllables per word.²⁸

The plethora of plain language requirements reflects a consensus that consumer protection requires contracts and disclosures that are easily understood. By specifying a “safe harbor” model form of disclosure, policymakers make the job of complying easier for sellers. The model provides sellers a method of compliance that is not unduly burdensome. For this reason, the model bill, brochure and advertising label are provided as compliance options.

There also is consensus on certain physical formatting requirements that make the specified disclosures more easily understood. These include use of 10-point type²⁹ and sharp contrast between disclosure and background.³⁰ General Federal Trade Commission regulations require that audio disclosures be at “a rate that renders the message intelligible to the receiving audience, and, in any event, at a cadence or rate no faster than that principally used in the advertisement” and that the disclosures be delivered “at a reasonably understandable volume” that is at least at the same level as that principally used in the advertisement. TV and video disclosures must be in a color or shade that readily contrasts with the background. No audio or video technique may significantly detract from the disclosures.³¹ The proposed rules reflect these requirements.

28. Conn. Gen. Stat. §42-152 (c).

29. Calif. Lemon Law, Cal. Civ. Code §1793.23; F.T.C. Used Car Rule, 16 C.F.R. 455.2 (text, other requirements larger); N.J. Stat. Ann. §56:12-10; Haw. Rev. Stat. §§431:10-104 et seq. (insurance); W. Va. Code §§33-29-1 et seq. (insurance).

30. F.T.C. Used Car Rule, 16 C.F.R. 455.2 (black ink); Calif. Lemon Law, Cal. Civ. Code §1793.23 (black type on white); Conn. Gen. Stat. §42-152 (b); 73 Pa. Stat. §2205.

31. 16 C.F.R. 308.2, 308.3 (pay-per-call).

Enforcement

The first line of enforcement should be the utility regulatory agency, which has the strongest immediate stake in the success of competition as a means of controlling prices. Necessary tools³² include fines and license suspensions with respect to suppliers, and adjustments in the authorized rate of return for regulated utilities.

In addition, violation of disclosure rules could be explicitly made a violation of the state's Unfair And Deceptive Practices (UDAP) Act,³³ which gives the state attorney general (and, often, private litigants) enforcement authority. This can be accomplished by joint action with the attorney general or may, in some states, require legislation. Care needs to be taken when drafting this legislation to assure that the utility regulatory agency retains full authority over these issues and is not preempted by jurisdiction of the state attorney general or other agency.

Consumers, their advocates, and competitors also probably will police disclosures and bring violations to the attention of those with enforcement authority. The utility commission will be in a position to carefully analyze such complaints and determine if a pattern of violation exists and whether more formal enforcement action should be undertaken.

32. In some states, statutory revisions may be necessary to create these enforcement tools. It will be particularly important for the commission to have authority to impose significant fines to complement its licensing authority.

33. In most states, however, violation of a regulation will be considered a violation of UDAP. Furthermore, while most state UDAP statutes exempt public utilities or other fully regulated industries, such as banking and insurance, the lack of price regulation of suppliers probably will bring this industry under the authority of the attorney general and the UDAP.

Model Rules for Suppliers that Are not Distribution Utilities

Advertising Materials

- A. A bold font box labeled “Electricity Facts” that contains the following disclosures shall be included in any printed advertisement or marketing materials.³⁴
1. Where the price offered is fixed during the term of the contract, the average charge, expressed as cents per kWh for electricity for usage labeled as:
 - “small usage (300 kWh),”
 - “general use (500 kWh),”
 - “water heating (900 kWh),” and
 - “space heat (1,500 kWh).”

Where billing is based on season or time of day, the price shall be shown for each usage category using a usage profile based on regional or statewide data.

2. A statement about the variability of the contract price for electricity. If the price is subject to variation during the term of the contract, a description of the basis for and frequency of price changes (if any) during the contract period, such as “varies with U.S. Consumer Price Index,” or “varies with time of day and time of year.” If the contract price does not vary, the disclosure shall state “fixed price.”
3. If the price is subject to variation during the term of the contract, the supplier shall disclose the historic price information based on the most recent 12-month period. If this information is not available for a full year, the historic price information should be stated a) for a full year as if the offered terms and conditions were in effect or, if that is not possible (for example, because the index does not have one year of history), b) for as long a period as data are available. The nature of the data disclosed shall also be disclosed, e.g., “Price Range in Last Year If Offered Terms and Conditions Had Been in Effect,” or “Price Range in Last Six Months (Longest Period Available).”
4. Where billing is based on season or time of day, identification of the on-peak season or times.

34. With respect to the label, the focus of this report has been on the price and contract provisions. The supply mix and air emission information are drawn from other National Council reports and are included here for the sake of completeness.

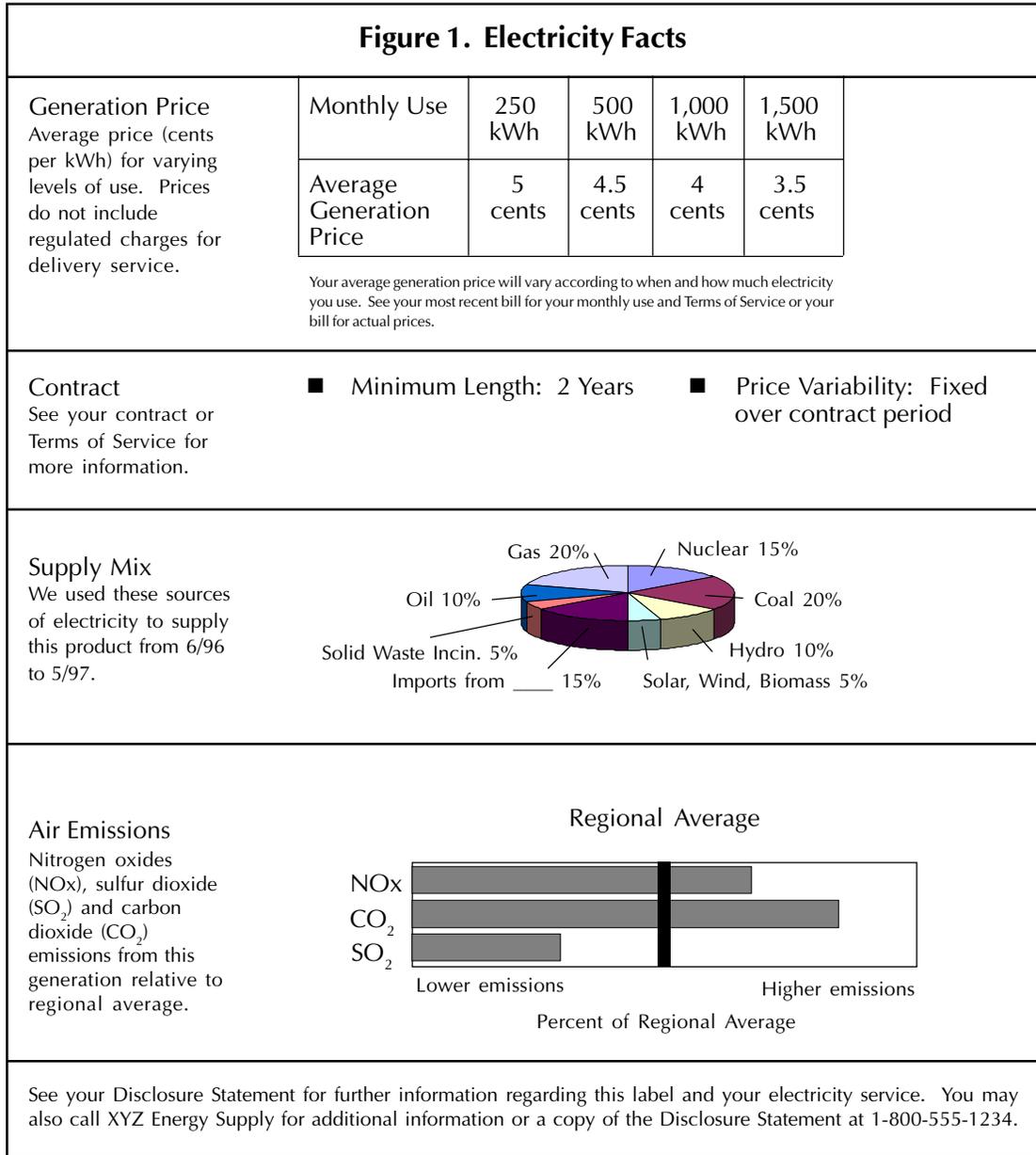
5. Where conservation services are offered in conjunction with electricity services, the supplier may provide a separate price disclosure based on the effect of these services in comparable climates and dwellings. The intent is to show prices for equivalent service where conservation service is substituted for electricity service.
 6. Where any other product is bundled in the price, the price for electricity shall be separately disclosed.
 7. The value of one-time premiums shall not be factored into prices.
 8. Minimum contract length or duration.
 9. Whether there are any charges or penalties if service is cancelled before the end of the minimum contract length.
 10. Material exclusions, etc.
- B. Any TV or radio advertisement that contains a price for an electricity product shall contain the following statement: "You have the right to obtain an Electricity Facts Label that will allow you to compare prices and other important facts among suppliers. Call _____ for your Electricity Facts Label."

Terms of Service Brochure

The brochure shall serve as the contract between seller and buyer. The brochure shall contain a statement on the front that it contains important information that is available in other languages by calling a specified toll-free telephone number; this statement shall be provided in English, Spanish, Chinese, Vietnamese, French, Polish, Russian, ..., [OR: every language that, according to the latest census, is spoken by more than ___ percent of customers in the state].

Contract Initiation

A. The brochure must contain a bold font box labeled “Electricity Facts” (see figure 1), which contains the following disclosures:



1. Where the price offered is fixed during the term of the contract, the average charge, expressed as cents per kWh for electricity (supply or generation or energy) for usage labeled as:
 - “small usage (300 kWh),”
 - “general use (500 kWh),”
 - “water heating (900 kWh),” and
 - “space heat (1,500 kWh).”Where billing is based on season or time of day, the average charges shall be shown for each usage category using a usage profile based on regional or state-wide data.
2. A statement about the variability of the contract price for electricity. If the price is subject to variation during the term of the contract, a description of the basis for and frequency of price changes (if any) during the contract period, such as “price changes every six months based on the U.S. Consumer Price Index,” or “price changes based on time of day and time of year.” If the contract price does not vary, the disclosure shall state “fixed price.”
3. If the price is subject to variation during the term of the contract, the supplier shall disclose the historic price information based on the most recent 12-month period. If this information is not available for a full year, the historic price information should be stated a) for a full year as if the offered terms and conditions were in effect or, if that is not possible (for example, because the index does not have one year of history), b) for as long a period as data are available. The nature of the data disclosed also shall be disclosed, e.g., “Price Range in Last Year If Offered Terms and Conditions Had Been in Effect,” or “Price Range in Last Six Months (Longest Period Available).”
4. Where billing is based on season or time of day, identification of the on-peak season or times.
5. Where conservation services are offered in conjunction with electricity services, the supplier may provide a separate price disclosure based on the effect of these services in comparable climates and dwellings. The intent is to show prices for equivalent service where conservation service is substituted for electricity service.
6. Where any other product is bundled in the price, the supplier must state the price for electricity separately, if sold separately, or state the total price for the unbundled products as that of electricity.
7. The value of one-time premiums shall be stated, but not factored into prices.
8. Minimum contract term or length.
9. Whether there are penalties to cancel service before the end of the minimum contract period.

- C. The supplier's policy with respect to deposits, including whether required; conditions for return of deposit; interest rate paid on deposit; and method by which interest is paid.
- D. A description of the supplier's policies in relation to consumer rights with respect to estimated meter readings, late payments, late fees, fees that may be charged to the customer for returned checks, and all other fees and charges; the availability of payment arrangements; special programs for low-income customers; and the supplier's collection policies if the customer is unable to make payment in full in a timely manner. This disclosure shall include a description of the Notice of Cancellation and other collection methods employed by the supplier, including third-party debt collection, reporting unpaid debt to consumer reporting agencies and use of small claims court or other legal debt collection methods, where applicable.
- E. A statement about the use of credit reports, in compliance with the Fair Credit Reporting Act.
- F. A statement about limitations on and disclaimers of warranties, in compliance with state law, including the Uniform Commercial Code.
- G. The supplier's dispute or complaint handling policy, including a toll-free number where customers can call for questions or complaints. The supplier also shall inform customers of their ability to contact the state public utilities commission (including toll-free complaint hotline, if any, operated by the state commission) for information about any licensed supplier and to file a complaint or dispute concerning the activities of any supplier.
- H. A statement about how the customer can cancel the contract, with all applicable notice provisions and penalties or charges for early cancellation.
- I. All other material terms and conditions, including, but not limited to, exclusions, reservations, limitations and conditions of the contract offered by the supplier.
- J. In a bold font type, the customer's right to cancel the contract within three days of receipt of the Terms of Service brochure without penalty or further obligation with a description of the method that the customer can use to cancel the contract and the mailing address or telephone number where this can be accomplished. The front of the Terms of Service brochure must inform the customer of the location of this disclosure in the brochure.

Semiannual notice

At least semiannually the supplier shall issue to each of its residential and small commercial customers a Terms of Service brochure or bill insert that contains Items A, B, C, D, F, G, I and J.

Annual notice

Once yearly the supplier shall issue to each of its residential and small commercial customers a Terms of Service brochure or bill insert that contains Items A through J.

Notice of Cancellation of Contract

The supplier shall inform the customer at least ____ days prior to cancellation of the contract due to a default by the customer. The notice shall inform the customer of the following:

- The reason for the contract cancellation.
- How the customer can avoid cancellation.
- The amount of all fees or charges for early contract termination pursuant to the Terms of Service disclosed to the customer at the time of the initiation of the contract.
- The amount overdue.
- The toll-free telephone number the customer can call to discuss the notice or file a complaint, and the supplier's obligation to suspend cancellation activities to investigate the customer's complaint concerning a disputed amount.
- The customer's right to obtain Provider of Last Resort Service and the telephone number of the provider, as well as the customer's right to obtain electricity services from another licensed supplier.
- The availability of deferred payment arrangements, budget billing, extreme weather protections, illness protections and low-income discounts.
- The collection activities that the supplier will initiate if the customer does not pay or make acceptable arrangements with the supplier, including the use (if used by the supplier) of debt collection agencies, small claims court and other legal remedies allowed by law. At no time must the supplier imply that the customer's ability to access the electric distribution system will be affected by the customer's nonpayment.
- The commission's complaint number and the statement, "If you are not satisfied with our response to your inquiry or complaint, you can call the state agency that licenses electricity suppliers and file a formal or informal complaint by calling the following telephone number, _____ or writing to the following address....."

Monthly Bill

- A. Use of the sample bill and brochure formats shall be compliance with this section.
- B. *Bill front.* The following information must be contained on the front of every bill to every residential and small business customer that has no demand meter or that has a demand of less than _____. These disclosures must accompany any writing issued by the supplier that informs the customer about the amount due on a current account or that confirms an automated billing transaction and, in any event, no less than monthly.
1. Name and address of the supplier and the supplier's license or certificate number issued by any state regulatory authority.
 2. Customer's service address.
 3. Account number.
 4. Price plan described in plain language.

5. Service period for which the bill is rendered.
6. Date the bill is rendered.
7. Date payment must be made to avoid a late charge or other collection action, specifying whether this is date of mailing, date of receipt or date of payment to agent.
8. A toll-free telephone number the customer can call during specified hours for questions or complaints about the bill, in a bold type font.
9. Meter identification number, if provided by the distribution company.
10. Whether the bill is based on actual, estimated or customer reading of meter.
11. The meter reading on which the bill is based and the next previous reading.
12. The usage for which the bill is rendered, the customer's usage for the prior 12 consecutive months or, if not available to the supplier, the number of months that the supplier provided service to the customer, and the actual average cents per kWh paid by the customer for each month for which the historical usage is provided.³⁵
13. Balance on the next previous bill, payments since that bill and balance due (if any).
14. The charges for which the bill is rendered, including an itemization of each element or product showing the rate, charge and provider for each element, as well as the total of all current charges.
15. The customer's historical use for the most recent 12 months.
16. A box or other typographically separated graphic labeled "Billing Facts," that contains:
 - a. The average unit price of the current electricity charges for the current billing period, expressed in a cents per kWh form.
 - b. A statement concerning the term of the contract and a reference to any applicable early termination charges.³⁶
 - c. A statement whether the contract price is fixed or variable. If the price is variable, the basis for price changes must be stated, including the differential pricing based on time of day or time of year or contract price

35. This information is available and should be divulged by the distribution company.

36. We recommend that suppliers be required to provide a notification of contract renewal or contract termination for at least two billing cycles.

subject to an index. If the price of electricity is fixed during the term of the contract, this statement must be provided.

- d. A statement that the bill contains the charges for electricity only and that the customer must also obtain transport and delivery service from their local distribution utility.

17. The information required by anti-slamming rules, e.g., a unique identification number or peelable label.

C. *Bill back.* The following information must be contained on the back of every bill or a separate page included with the bill.

1. A statement that states the supplier's policy with respect to past due payments, applicable late fees, and methods by which the customer can make payments;
2. A statement of the consequences of nonpayment, specifying the time at which events occur, including, but not limited to, when a notice of cancellation of the contract will be mailed. In addition, the supplier shall disclose whether the customer can negotiate a payment arrangement or qualify for additional billing options such as budget billing.
3. Unless already provided on the front of the bill, a 24-hour, toll-free telephone number, in a bold font, that customers can call to talk with a company representative about service problems or complaints,
4. A statement that describes the supplier's complaint handling process and the customer's right to avoid collection action by filing a timely dispute. If the complaint hot line is different from the number disclosed on the front of the bill, that number should be provided in bold type.
5. A statement that refers the customer to the Terms of Service brochure for further detailed information.
6. If the supplier requires deposits, the conditions that will trigger a request for a deposit, its maximum amount, whether interest will be paid on the deposit amount and the amount of such interest, and the conditions under which the customer can obtain a refund of a deposit.

Model Rules for Distribution Utilities that Serve as the Electricity Supplier or that Bill for the Electricity Supplier

Monthly Bill

- A. A distribution utility must disclose the same information as required for suppliers if the distribution company bills for electricity services on behalf of any supplier or bills the customer for Provider of Last Resort Service.
- B. The disclosures provided on behalf of any suppliers must be conspicuously labeled with the name of the supplier and graphically separated from the distribution portion of the bill. A distribution company that provides a separate page for the supplier portion of the bill shall comply with this provision.
- C. With respect to the distribution (i.e., regulated) portion of the bill, the distribution company shall, in addition to any other requirements for utility bills as set forth in the rules and regulations of the state public utility commission, include the following information.
 - 1. *Bill front.* The following information must be contained on the front of every bill to every residential customer and small commercial customer with no demand meter or less than ___ kW demand.
 - a. Typographically separated, the separate charges for each distribution and transmission service, any unbundled charge specified by the commission (transition charge) and the total of all regulated charges.
 - b. The total of all charges, including those billed by the distribution company for others.
 - c. A statement of the average unit price for the current regulated charges on the bill.
 - d. The customer's usage per month (including percentage on-peak, if applicable to the distribution company's rates) and average cents per kWh charges for at least the previous 12 calendar months.
 - e. The information required by anti-slamming rules, e.g., a unique identification number or a peelable label.
 - f. The amount of any late fees, if applicable.
 - 2. *Bill back.* The following information must be contained on the back of the bill.
 - a. A statement describing how partial payments are credited if the distribution company bills for any unregulated or competitive charge.
 - b. A statement of the consequences of nonpayment, specifying the time at which events occur, except that this statement shall distinguish between the regulated and unregulated charges in describing the collection action that will be taken by the distribution company and supplier.

- c. A 24-hour, toll-free telephone number, in a bold font, that customers can call to talk with a company representative about service outages, if different from the toll-free number that appears on the front of the bill.
- d. A statement about the availability of payment arrangements, alternative payment plans, and any special protections that may exist during the winter period for customers to retain the distribution portion of their service.
- e. A statement about how to complain about a bill; the provider's internal appeal process; and that, if not satisfied with the response of the provider, the customer can appeal any question or complaint to the state public utilities commission, including the regulator's telephone number for appeals and complaints.
- f. A notice of programs and services available to low-income customers, including discounts and conservation programs, and a toll-free telephone number (in a bold font) customers can call to obtain the protections and discounts, if different from the telephone number on the front of the bill.
- g. Notification of how to retain service in the event of a medical emergency.
- h. The following statement: "You have the right to obtain a Provider of Last Resort" electricity service if you cannot obtain electricity service from a licensed supplier. To find out the price for this service and how to apply, call _____.

Terms of Service

A distribution company shall issue a Terms of Service brochure, which is the contract between seller and buyer. The brochure shall contain:

- A. The same disclosures required by suppliers at the time the customer initiates Default or Provider of Last Resort Service.
- B. A statement of how to obtain default service,
- C. A statement of the availability of no-cost or low-cost conservation services available from the distributor along with a toll-free number consumers can call for more information,
- D. A summary of the customers' rights and responsibilities concerning delivery and transportation services, at least annually.

Provisions Applicable to Suppliers and Distribution Utilities

Disclosure Format

- A. Charges for each element of each service, and each service must be separately stated in standard pricing units.
- B. The term “electricity” shall be used for supply, generation or energy.
- C. The term “transport” shall be used for transmission.
- D. The term “local delivery” shall be used for the combined charges for distribution, access, customer charges, and all other state-regulated periodic charges.
- E. All disclosures must be clear, conspicuous and coherent.
- F. All disclosures must be written in plain, easily understood English. This includes the following requirements:
 - 1. Short sentences and paragraphs.
 - 2. Everyday words using commonly understood meanings, with no technical terms, Latin or other foreign words, or words used with obsolete meaning.
 - 3. Simple and active verb forms.
 - 4. Present tense.
 - 5. No double negatives.
 - 6. No sentence with more than one condition.
- G. All disclosures must be made available in all languages that are spoken by a significant number of customers in the state.
- H. Except where otherwise provided, all disclosures must be in at least 10-point type.
- I. All disclosures must be in a color that contrasts with the background to the same degree as black type on white paper.

Enforcement

- A. The commission may order compliance with these rules by utilities and suppliers.
- B. Each failed disclosure to each customer is a separate violation.
- C. Each violation is subject to a penalty of \$____.
- D. Each violation with respect to each customer is subject to a rebate to each customer of \$____.
- E. The commission may suspend or revoke the license of a supplier that demonstrates a pattern of violations.
- F. The commission may set the regulated return at the low end of a reasonable range where a utility demonstrates a pattern of violations.

Commission Report

The commission will periodically publish a report that will, at a minimum, contain a listing of all the suppliers licensed to sell electricity at retail in the state, including their name, telephone number and address; the supplier’s complaint ratio (calculated based on the number of customer complaints received by the commission and the volume of electricity sold in the

state or the average number of customers, whichever is known by the commission); and any enforcement action taken or initiated by the commission during the prior year with respect to any supplier.

Model Bill

Figure 2 shows a typical bill (front and back) issued by a competitive electricity supplier for residential and small commercial customers.

Bills issued by distribution companies that also provide electricity or bills issued by distribution companies on behalf of competitive suppliers might contain additional information, but would otherwise be very similar.

Figure 2. Model Bill		
Your Supplier		
Street Address, City, State, Zip, Telephone Number		
You	Prior Balance	\$0.00
Service Street	Payment Received	\$0.00
City, State, Zip	Current Charges	<u>\$0.00</u>
Account Number: 000000000	Amount Due	\$0.00
	Date Due:	00/00/00
Billing Facts		
Price		
Peak Use (10 a.m. to 6 p.m. July and August, except holidays)	___ kWh @ \$.___ kWh	
Off Peak Use (all other hours)	___ kWh @ \$.___ kWh	
TOTAL	___ kWh	
Average Price	\$.___ kWh	
Amount Due	\$0.00	
<i>Your average price will vary according to your actual usage pattern.</i>		
CONTRACT TERMS		
The contract length is monthly. It will be automatically renewed unless we hear from you. There are no early termination charges.		
COSTS EXCLUDED		
The bill does NOT include charges for use of wires and local delivery charges, which will be billed by your local utility.		
If you have any questions about your bill, call 1-800-POWER between 7 a.m. and 9 p.m.		

Account Number: 000000000	Rate: Residential	Billing Date: 00/00/00											
Service Period: 00/00/00 through 00/00/00	Number of days: 30												
Meter Number: 123456													
Begin date: 00/00/00	Begin reading: 00000000												
End date: 00/00/00	End reading: 00000000												
Your Electricity usage in kWh:													
	12/97	11/97	10/97	09/97	08/97	07/97	06/97	05/97	04/97	03/97	02/97	01/97	12/96
Daily	00	00	00	00	00	00	00	00	00	00	00	00	00
Monthly	00	00	00	00	00	00	00	00	00	00	00	00	00

Bill Back

Your payment must be received by the due date stated on the front of this bill to avoid late charges. We charge a late fee of 1.5 percent per month or 18 percent per year.

If you do not pay your bill in full, we can send you a Notice of Cancellation of Contract at least 10 days before the contract is canceled. Call us to discuss your payment problems. We want to be your electricity supplier. We will not cancel your contract while a dispute is pending about any portion of your bill. Call the number on the front of this bill. If you are not satisfied with our response, you can call or write to the state public utilities commission, [address and toll free number].

We do not require deposits. {OR: *Your deposit* will be returned if you pay by the due date for six months in a row. We will credit your account with interest on your deposit at the rate of 12 percent per year.}

Service Problems? We will help you with any aspect of the electricity service we provide to you. We will refer you to your local distribution utility to report any outages or problems with your power.

Notice of Protections and Discounts

You are entitled to a *discount or payment assistance* from your distribution utility if you receive one of the following public benefits: food stamps, Medicaid, transitional assistance, LIHEAP, SSI. You will also be eligible for *energy conservation* services that will reduce your bill. Call your local distribution company for further information, or call us and we will refer you.

If a *landlord* fails to pay the bill for the common areas of the building, tenants may pay the bill and deduct the amount from their rent. Alternatively, tenants may transfer the bill to their own name and pay only future bills and deduct those payments from their rent.

TO RECEIVE ANY OF THESE PROTECTIONS, CALL **1-800-COMPLAIN**.

IF YOU ARE NOT SATISFIED, CALL **1-800-GET-HELP**. [regulator]

Appendix A. Resolution of the National Association of Regulatory Utility Commissioners (1996)

RESOLUTION IN SUPPORT OF CUSTOMER "RIGHT-TO-KNOW" AND PRODUCT LABELING STANDARDS FOR RETAIL MARKETING OF ELECTRICITY

WHEREAS, at least 30 million consumers in six states will begin choosing among competitive electricity providers in early 1998 and retail access to competing electricity suppliers is under consideration in many other states; and

WHEREAS, electricity purchases make up a significant portion of the budget of many households; and

WHEREAS, the production of electricity imposes very substantial environmental impacts; and

WHEREAS, pilot retail access programs have shown that customer confusion and misleading claims are highly likely; and

WHEREAS, clear and uniform disclosure will promote efficiency through informed product comparisons; and informed customer choice cannot occur in a retail electricity market without full disclosure of all relevant and important facts; and

WHEREAS, the desirability and feasibility of such disclosure is clearly established in nutrition labeling, uniform food pricing, truth-in-lending and many other federal consumer protection programs; and

WHEREAS, the National Association of Regulatory Utility Commissioners (NARUC) at its November 1994 meeting adopted a resolution on competition and stranded benefits calling for new proposals to preserve environmental and diversity benefits in a more competitive marketplace; and

WHEREAS, The NARUC at its July 1996 meeting adopted principles to guide the restructuring of the electric utility industry which included market-based mechanisms to promote effective consumer choice and to preserve renewable resources, resource diversity, and environmental protection; now therefore be it

RESOLVED, that The National Association of Regulatory Utility Commissioners (NARUC), convened at its 108th Annual Convention in San Francisco, California, believes that the electric industry should facilitate informed customer choice that will promote efficient markets, resource diversity, and environmental quality; and be it further

RESOLVED that the NARUC supports initiatives leading to minimum, enforceable, uniform standards for the form and content of disclosure and labeling that would allow retail and wholesale consumers easily to compare price, price variability, resource mix, and environmental characteristics of their electricity purchases; and be it further

RESOLVED that the NARUC urges states adopting retail direct access programs to include enforceable standards of disclosure and labeling that would allow retail consumers easily to compare the price, price variability, resource mix, and environmental characteristics of their electricity purchases.

Appendix B. Uniform Consumer Disclosure Standards for New England (Pages 11-13: Price Disclosure for Bundled Products)

How should the label deal with variable prices such as prices that vary with the spot market price?

Recommendation: The label should reflect the average price, based on the average electricity price during the last month of the most recent quarter. The label should indicate the basis of the displayed price.

Variable prices, including prices based on spot market prices will, by definition, be changing constantly. Consumers will receive the exact pricing terms in any service contract and in the required *Terms of Service*. The label will tell the consumer that the average prices displayed are variable (as opposed to fixed). Consumer familiarity with fixed versus variable rate loans and mortgages will make it easier for consumers to understand variable priced electricity.

To facilitate comparison shopping—particularly comparison shopping between products using variable pricing—and minimize gaming opportunities, we recommend that the average prices represent a snapshot on a particular day for all suppliers. The label should clearly indicate this fact and refer consumers to the *Terms of Service* for more information.

How can price be disclosed for bundled products? For example, what if a firm offers electricity to customers who also receive Internet access or cable television service at a bundled rate?

Recommendation: Suppliers have the option to disclose price either by rolling the cost of all goods into the price of electricity or by disclosing the same electricity price for both the bundled and unbundled version of the product.

The issue of how to display average prices when electricity is bundled with other products is particularly difficult. It involves a careful balance between giving customers an understandable way to compare prices without discouraging product innovation through price displays that bias against bundled products.

It is difficult, if not impossible, to determine the stand-alone price of electricity where a supplier offers it only as part of a bundled product with a single price.³⁷

It is not clear whether bundled products will be common. In the telecommunications market, for example, the move to competition has resulted in fewer, not more, bundled products as compared to the regulated market of 15 years ago.

37. These problems caused some stakeholders to recommend that PUCs require all suppliers that offer bundled electricity to also offer it on an unbundled basis.

Bundled products and services should not be confused with suppliers that offer multiple products and services, which we believe that suppliers are likely to do. We also expect there will be discounts for buying multiple products from the same supplier. We have seen deep discounts on software when bought as part of a larger package, discounts on insurance if the consumer has home and auto insurance with the same supplier, lower service charges if checking and savings accounts are with a single bank, and discounted prices if multiple telephone services such as caller ID, call waiting and call forwarding are bought as a package. An electricity firm might sell either electricity or Internet access and offer a discount to customers who purchase both.

Where a supplier's *only* electricity offer is bundled with other services, there are three options.³⁸ Firms that offer bundled products could be exempted from the requirement to report price. In this case, the price section of the label would indicate that electricity price information is not available separately. This option is not recommended because suppliers that wish to make price comparisons difficult could bundle electricity with some trivial product simply to avoid disclosing price in the label and, at the same time, could display price information in their marketing materials in a fashion that places their product at an advantage.

The second option is to require the supplier to allocate the total price between the bundled products and disclose the allocated price of electricity, with an added note that the price is available only if the consumer purchases specific other services or products shown in the *Terms of Service*. This option is better than the first. Although there is a clear potential for gaming, the note on the label and the unbundled prices in the *Terms of Service* may be enough to discourage suppliers from showing artificially low electricity prices in the label.

The third option is to calculate an electricity price based on the total price paid for all bundled services, with an added note that other services are included in the price of electricity. We believe this option is better than the first and may be better than the second. This option should discourage suppliers from limiting their electricity offers to bundled products, a move that may be desirable, at least in the early years of retail electricity competition. On the other hand, under this option the label will be seen in conjunction with other marketing materials created by the supplier. This contrasts with natural gas price comparisons being experimented with by the Ohio PUC. In the Ohio price comparisons, the consumer is given a single page comparing the average prices of all suppliers. Any bundling of services or other complexities of price offers are necessarily limited in this type of disclosure.

We recommend that firms that offer electricity on *both* a bundled and unbundled basis (with or without a discount for buying multiple products) have the option of disclosing price in one of two ways. The supplier could elect to roll the costs of all goods into the disclosed average price of electricity as described in the third option above, or it could report the unbundled electricity price for both the bundled and unbundled version of the product.

38. Based on experience in other markets, we do not expect there will be many circumstances in which sellers will offer electricity only if consumers buy a bundled product. Most sellers that offer bundled services also will offer electricity on an unbundled basis.

How should one-time price inducements be reflected in price disclosure?

Recommendation: Price inducements should not be reflected in the disclosure of average electricity price.

A related issue is the treatment of one-time sales inducements. In New Hampshire, several firms used inducements such as bird feeders or cash to attract new customers. Focus groups in New Hampshire and elsewhere indicated that customers preferred price disclosure that ignored inducements. Given a clear electricity price, consumers seem to be able to recognize the one-time inducements.