



Public Utility Law Project

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October 7, 2005

Hon. Jaclyn Brilling, Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 05-M-0858 – In the Matter of Statewide Energy Services Company
Referral Program.

Dear Secretary Brilling:

Enclosed for filing with the Commission please find the original and ten (10) copies of the Reply Comments of the Public Utility Law Project of New York in the above-captioned matter.

Respectfully submitted,

Ben Wiles
Public Utility Law Project of New York, Inc.
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Albany, NY 12207-1715

Cc: All parties on Active Parties list (10/06/05)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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In the Matter of Statewide Energy
Services Company Referral
Program.

Case 05-M-0858

**REPLY COMMENTS OF PUBLIC UTILITY LAW PROJECT
ON PROPOSED GUIDELINES FOR
STATEWIDE ENERGY SERVICES COMPANY
REFERRAL PROGRAM**

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**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**In the Matter of Statewide Energy
Services Company Referral
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Introduction

Pursuant to the Notice of the New York State Public Service Commission ("PSC" or "Commission") issued July 26, 2005, and a subsequent extension of time granted to all parties, the Public Utility Law Project of New York, Inc. ("PULP") provides the following reply comments on proposed guidelines for a statewide "energy services company referral program."

PULP filed comments in this matter on September 9, 2005. In these comments, PULP urged the Commission to exercise utmost caution in establishing formal or informal guidelines for programs intended to "migrate" residential customers to the new wireless and pipeless gas and electric utilities called "energy services companies" or "ESCOs." In PULP's view, care must be taken not to confuse or disadvantage customers who can ill afford costly mistakes in their home energy decisions. More importantly, care must be taken that these customers do not, despite their best efforts which would

under current procedures be sufficient to protect them from fraud and misjudgment, find themselves weaker, less protected and worse off than they are today.

POINT I

THE COMMISSION MUST NOT ADOPT EVALUATION CRITERIA FOR THE ESCO REFERRAL PROGRAM WHICH ARE "ESCO- CENTRIC"

The Comments of the Small Marketer Coalition and Retail Energy Supply Association (collectively, "SCMC") describe in an "overview" six "critical elements" for an "effective" ESCO referral program. SCMC Comments at 4. PULP agrees with SCMC that the Commission should make explicit the elements or criteria by which any Commission-sponsored ESCO referral program would be evaluated. The SCMC criteria, however, are essentially criteria to define or optimize the benefits that ESCOs derive from the referral program.

Specifically, the SCMC criteria require:

- a defined consumer benefit
- a simple marketing message
- easy administration by the utility and the ESCO
- minimized implementation costs
- equitable treatment of all ESCOs
- maximum customer participation

In SCMC's view, a "defined consumer benefit" is actually a limitation on consumer benefits, since by "defining the benefit, i. e., the introductory discount, the program is actually limiting the benefit that can be provided to customers, and capping the amount that a competitive market would require a participating ESCO to pay to customers for their participation in the referral program. The SCMC's "simple marketing message" means that customers are less likely to receive a statement of the terms of service to which they may agree before they agree to participate in the program. "Ease of administration" means that time consuming explanations by utility or ESCO consumer

services representatives that would be helpful to consumers in making the choice of an ESCO would be avoided. Indeed under SCMC's random selection proposals, to promote "ease of administration", there may be no choice at all to be made by the consumer. By "minimizing implementation costs", ESCOs relieve themselves of the costs associated with a consumer friendly referral program – a savings for them, with reduced benefits or protections for consumers. The SCMC call for "equitable" ESCO treatment means that ESCOs providing better service or cheaper prices – clear consumer benefits – receive no market incentive to do so. Finally, the SCMC call for "maximized customer participation", institutionalizes a criteria for success based on participation – the number of customers who switch service – rather than benefit – the amounts that switching customers actually save.

In contrast to the SCMC criteria, PULP's comments described nine different criteria by which the success of an ESCO referral program should be tested. Specifically, these criteria are:

- Price visibility – customers must be able to discover the price they will be paying before agreeing to take service from a new provider
- Effective comparison shopping – customers should be able and encouraged to make a straightforward "apples to apples" comparison of competing supply offers.
- No undue reliance on utility messages or promotional terms – customer choice to switch should be based on reproducible cost savings discovered by the customer without utility prompting.
- No slamming – customers should not find themselves, as a result of the program, with service from an ESCO provider they did not choose
- No cramming – customers should not find themselves, as a result of the program, with service whose non-price terms they did not choose
- No redlining – all customers should have access to ESCO utility service on the same terms
- Protection from remarketing – customers who elect not to try ESCO service should be protected from further remarketing campaigns
- Level playing field – any measures to facilitate the switching of customers to ESCOs should be equally applicable to customers switching ESCOs or switching from ESCOs to traditional utility service

- Accessible complaint procedures – customers using the ESCO referral process must have ready access to the complaint resolution mechanisms available from the PSC and the Department’s CSR staff should be trained to address these complaints before the program is put in place.

As is readily seen from the above descriptions and from PULP’s earlier comments, these criteria reflect the consumer’s interests in the promotion of any retail competition program, including the ESCO referral program specifically at issue in this case. In contrast to the SCMC criteria, they are “consumer centric”, not “ESCO centric”, and are clearly a better reflection of the Commission’s interests in retail access than SDMC’s “critical elements”.

POINT II

“RANDOM ASSIGNMENT” OF RESIDENTIAL CUSTOMERS TO ESCOs MUST BE REJECTED

In the Commission’s July 26, 2005 Notice, the Commission defined one of its proposed guidelines for the ESCO referral program as requiring each customer to “affirmatively choose a specific ESCO.” Notice at 2. In opposition to this guideline, several parties urge that customers not be required to affirmatively choose in order to participate in the program, and that non-choosing, participating customers should be assigned randomly to the participating ESCOs. Random selection, however, seldom reflects a consumer’s interest in a competitive market.

With random selection, the consumer is not required to discover the price of the electricity he or she buys. Indeed, because the selection is random, the consumer can not discover the price, and the process produces the opposite of price transparency. Because the price is unknown, the consumer does not comparison shop, and because the ESCO itself is unknown, the consumer is precluded from making a comparison on non-price terms as well. Because the customer uses the utility to make the selection, random

selection emphasizes, rather than minimizes, utility participation in the referral process and promotes the consumer's undue reliance on that participation as a consumer protection. Finally, since the customer does not identify in advance the ESCO from which service will be bought or disclose the non-price terms associated with the ESCO's service, the random selection appears to promote both slamming and cramming.

More fundamentally, random selection is exactly the opposite of customer choice. With random selection, the customer actually makes no shopping choice. If random selection is adopted, the Commission ends up promoting customer behavior (choice of supplier without discovery of essential price and non-price information) inimical to the customer's interests and training customers to accept market offers without demanding the information that would be essential to the customer's self-protection.

POINT III

THE COMMISSION SHOULD TAKE NO ACTION TO AUTHORIZE A PRICE-FIXED UNIFORM DISCOUNT

The Commission's July 26, 2005 Notice prescribes a ESCO referral program in which each ESCO establishes independently the discount that will be offered to customers switched to that ESCO under the program. Several parties object to the requirement that ESCOs will independently set their own discount rates and urge that the program require all ESCOs provide the same uniform discount. Most parties recommending a uniform discount rate recognize that restricting participating ESCOs to a uniform discount rate raises significant issues under state and federal price fixing statutes. To remedy this problem, parties urge that the Commission supervise and approve the selection of this uniform rate.¹

¹ See comments filed by National Energy Marketers Association (Commission should find that collaborative discussions was not conduct in restraint of trade), SCMC (Commission order a uniform discount under just and reasonable standard), Niagara Mohawk (uniform discount provided under Commission-approved tariff).

The Commission should take no action to approve conduct that is, in effect, price fixing. It is not the Commission's historic role to absolve or defend price fixers, and it should not take on this role simply to "make competition work." Indeed, such a role is plainly inconsistent with the Commission's overall policy goals to promote competition. Indeed, if the Commission is actually seeking to bring reduced energy costs to consumers through competition, it is plainly inconsistent with this goal to limit, for any period of time, the savings that the competitive supplier can offer to the participating residential consumer.

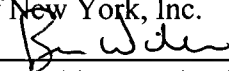
Even if the Commission were inclined to take some action to supervise and approve a uniform fixed discount in this program, such action could only be sustainable if there were a record to justify the choice of a particular discount. This record would have to include cost information from the ESCOs showing the cost savings attributable to the referral program and showing how and the extent to which these costs are being passed along to consumers through the discount. While the Commission would have the same flexibility to choose a particular discount under the just and reasonable standard, some record would have to be created to justify the particular rate chosen, and parties arguing for a greater discount to consumers would have the opportunity to test the evidence being relied upon and to introduce alternative cost studies to support a higher rate. None of this has been done in this or any other case, and nothing is proposed as a process by which it might be accomplished. In the absence of this record, even if the Commission were inclined to choose and approve a single uniform discount rate, it could not do so.

Conclusion

As stated in PULP's earlier comments and in these reply comments, if the Commission concludes that an ESCO referral program will be beneficial to consumers, it should modify the proposed Staff guidelines for these programs to create a consumer-centric program consistent with the attributes of an optimal system for switching utility providers outlined by PULP in its earlier comments. It should not structure the referral program merely to optimize the benefits afforded to ESCOs from such a program. Accordingly, the proposed guidelines in their present form should not be adopted. Revisions are required to assure price visibility and price comparability, promote rational economic choices, establish regulations, tariffs, and standards for utility services related to the switching of providers, and ensure fair practices and uniform consumer protection remedies.

Respectfully submitted,

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