

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on September 20, 2006

COMMISSIONERS PRESENT:

William M. Flynn, Chairman  
Patricia L. Acampora  
Maureen F. Harris, recused  
Robert E. Curry, Jr.  
Cheryl A. Buley

CASE 05-M-0858 - In the Matter of State-Wide Energy Services  
Company Referral Programs. PETITIONS FOR  
REHEARING, CLARIFICATION AND A STAY.

ORDER DENYING CLARIFICATION AND REHEARING

(Issued and Effective September 26, 2006)

BY THE COMMISSION:

BACKGROUND

In an Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject to Modifications (ESCO Referral Order) issued December 22, 2005 in this proceeding, it was noted that energy service company (ESCO) referral programs were one of the most successful strategies for encouraging the movement of customers from utility commodity supply to taking commodity from alternative energy providers, including ESCOs. Under an ESCO referral program, an electric or gas utility offers customers telephoning its call center with a non-emergency inquiry the opportunity to enroll with ESCOs that offer a uniform discount, over an introductory trial period, from the price the utility charges for commodity service. Customers that do not request enrollment with a particular ESCO are assigned at random; they are queued and referred to an ESCO

drawn, on a rotating basis, from the list of the ESCOs that participate in the program. It was decided in the ESCO Referral Order that gas and electric utilities that had not done so should implement referral programs.

Under Public Service Law (PSL) §22 and our Rules of Procedure, 16 NYCRR §3.7(a), petitions for rehearing of an order are due within 30 days of the service of the order. In a timely Petition for Clarification and Rehearing filed on January 23, 2006, the Public Utility Law Project of New York, Inc. (PULP) sought reconsideration of the ESCO Referral Order, alleging that new information indicates efforts to encourage the movement of residential customers to ESCOs will likely be ineffective. PULP also reiterates its claim that some features of the referral programs violate anti-trust laws.

Pursuant to the Rules of Procedure, 16 NYCRR §3.7(c), responses to petitions for rehearing are due within 15 days of the date the petition was served on the responding party. In filings dated February 7, 2006 and February 9, 2006, respectively, the Small Customer Marketer Coalition and Retail Energy Supply Association (SCMC) and Direct Energy Services LLC (Direct Energy) responded in opposition to PULP's Petition for Rehearing.

Moreover, two electric and gas utilities responded to the ESCO Referral Order with requests for relief. Orange and Rockland Utilities, Inc. (O&R), in a Petition for Clarification dated January 18, 2006, asks that the ESCO Referral Order be clarified to establish that it has obtained all necessary approvals and waivers for its existing ESCO referral program.

The relief O&R desires, however, was addressed in the O&R Referral Order,<sup>1</sup> rendering its Petition here moot.

In a Petition for Stay and Rehearing dated January 20, 2006, Rochester Gas & Electric Corporation (RG&E) asks for a stay of the ESCO Referral Order's requirement that it initiate a collaborative process on the development of its ESCO referral program by February 1, 2006. The request for a stay, however, was not granted, and collaboration over the terms and conditions of an ESCO referral program for RG&E has commenced. Therefore, its Petition is moot as well.

Finally, in a letter dated January 20, 2006 that did not set forth a request for relief, New York State Electric & Gas Corporation (NYSEG) reported that it would conduct a collaborative on ESCO referral programs as required in the ESCO Referral Order, while noting that it did not waive its right to pursue review of that Order in the courts.<sup>2</sup> No further action on NYSEG's filing is needed here.

Therefore, the filings of NYSEG, O&R and RG&E will not be considered further. The positions of PULP, Direct Energy and SCMC are set forth below.

#### POSITIONS OF THE PARTIES

##### PULP's Petition

PULP begins by expressing its concern that the PSL be followed as written. PULP indicates that, to satisfy its concern, the development of competitive retail markets should be encouraged only upon the demonstration, through actual price

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<sup>1</sup> Case 05-M-0858, supra, Order Adopting Orange and Rockland Utilities, Inc.'s Plan for an ESCO Referral Program (issued April 19, 2006).

<sup>2</sup> NYSEG subsequently sought that review in New York State Electric & Gas Corporation v. Public Service Commission, Index No. 1535-06 (Alb. Cty. Sup. Ct.).

comparisons, that consumers benefit from competition because market prices are less than regulated monopoly prices.

According to PULP, rehearing of the ESCO Referral Order is warranted because it has new information indicating that its benefit test cannot be met. PULP claims that large industrial electricity consumers have recently complained to the Federal Energy Regulatory Commission (FERC) that wholesale and retail competition in energy markets have failed to deliver sustained benefits to end-use consumers.<sup>3</sup> PULP sees its new information as highly significant, because if even the large and sophisticated industrial customers cannot derive benefits from competitive markets, then it is highly unlikely that residential customers can secure benefits. As a result, PULP concludes that measures, like ESCO referral programs, intended to promote customer movement to competitive alternatives will likely fail because they do not yield sufficient benefits.

Repeating positions it took earlier in this proceeding, PULP maintains that there is no analysis demonstrating that customers who take service from ESCOs are better off than those that do not. As a result, PULP argues, any short-run migration realized through an ESCO referral program will be achieved by manipulation rather than from the creation of concrete price benefits. It predicts that advocates of competition will find their long-run expectations for competitive energy markets disappointed.

Turning to another issue, PULP observes that the ESCO Referral Order purports to reject the proposition that utilities, in enrolling customers through the referral programs, will serve as agents for ESCOs. PULP argues that the Order nonetheless creates an agency relationship between utilities and

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<sup>3</sup> See Docket No. AD05-17-000, Federal Energy Regulatory Commission, Electric Energy Market Competition Task Force.

ESCOs, because it sets forth a guideline requiring utilities to enroll customers "on behalf of ESCOs."<sup>4</sup> PULP would revise the guideline to remove the language it questions, or would clarify that utilities are required only to effectuate an enrollment when responding to a customer request for ESCO service, and need not to take action on behalf of ESCOs generally.

PULP reiterates its position that ESCO referral programs violate the anti-trust laws, because, it claims, ESCOs arrive jointly at the discount that will be offered in a referral program and participating customers are assigned to ESCOs that they do not affirmatively select. PULP insists that these two referral program features amount to price collusion and market share allocation, both prohibited under the anti-trust laws.

PULP protests that these anti-trust law violations cannot be shielded from review through application of the "state action" immunity. It criticizes the contrary conclusion reached in the ESCO Referral Order, and argues that the Cantor and Midcal Aluminum decisions on the state action exemption are misinterpreted there.<sup>5</sup> PULP reads those and related decisions as requiring a state agency to act in a sovereign and purely governmental capacity while pursuing regulatory goals in order to obtain the immunity.

PULP also disputes the analysis of the Energy Association decision set forth in the ESCO Referral Order,<sup>6</sup>

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<sup>4</sup> ESCO Referral Order, App. B, p. 1.

<sup>5</sup> Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

<sup>6</sup> Energy Association of New York State v. Public Service Commission, 169 Misc.2d 924 (Sup. Ct. Alb. Cty. 1996), aff'd 273 A.D.2d 708 (3<sup>rd</sup> Dept. 2000), lv. den. 95 N.Y.2d 765 (2000).

arguing that, contrary to the Order, the decision does not stand for the proposition that the PSL authorizes the introduction of retail competition as a substitute for regulation. PULP also maintains that Energy Association is decided on procedural, not substantive, grounds.

Direct Energy

Although Direct Energy believes that all of PULP's claims are meritless, it focuses on PULP's anti-trust analysis as particularly unjustified. Direct Energy asserts that ESCO participation in referral programs is voluntary and is not pre-conditioned upon an agreement among ESCOs governing each others' competitive behavior. Absent that collusion, Direct Energy argues, there can be no anti-trust law violation.

ESCO participation in a referral program, Direct Energy contends, depends exclusively upon compliance with the regulatory requirements established in the ESCO Referral Order. As a result, Direct Energy declares, the referral programs and participation in them fall squarely within the state action immunity from application of the anti-trust laws. Direct Energy disputes PULP's analysis of Midcal Aluminum to the contrary, arguing that PULP's listing of the requirements that it says must be satisfied to qualify for the state action exemption go far beyond the requirements actually found in that decision.

Midcal Aluminum, Direct Energy explains, establishes a two-prong test -- clear articulation of a policy and active supervision of that policy -- for obtaining the state action immunity. According to Direct Energy, the ESCO Referral Order clearly articulates the Commission's determination, in the exercise of the discretion afforded it under the PSL, that the best way to arrive at reasonable rates for energy consumers is to transition from fully-regulated commodity markets to competition. The ESCO Referral Order analysis, Direct Energy

maintains, is sufficient to establish that ESCO referral programs fall within the ambit of the state action exemption.

The fundamental purpose of the anti-trust laws, Direct Energy stresses, is to promote competition, not to preserve government regulation. Direct Energy argues that PULP's position here is directly contradictory to the pro-competitive intent underlying the anti-trust laws, because PULP would deploy that law to stall the implementation of ESCO referral programs, thereby impeding the development of retail competitive markets for energy supply. Direct Energy concludes that the implementation of ESCO referral programs does not raise anti-trust concerns.

SCMC's Response

SCMC dismisses PULP's claim that it has new information, arguing that "pulling some comments made by certain parties in a federal matter" does not constitute evidence sufficient to justify rehearing.<sup>7</sup> SCMC believes that PULP has failed to undermine the detailed findings presented in the ESCO Referral Order on the benefits attending the introduction of retail competitive markets for energy supply. SCMC contends that, as PULP has not submitted any information or argument that supports denying customers the advantage of participating in ESCO referral programs that provide for a guaranteed discount during an introductory period, its Petition should be denied.

SCMC sees no reason to grant the clarification PULP requests, on the role of utilities in acting as agents for ESCOs. The ESCO Referral Order, SCMC maintains, clearly establishes that utilities are not agents for ESCOs, and no more need be said.

SCMC characterizes PULP's analysis of the state action exemption from anti-trust law as unpersuasive. SCMC believes

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<sup>7</sup> SCMC Filing, p. 3.

the state action immunity issue need not ever be reached, because an ESCO's participation in a referral program is not a conspiracy to fix prices in violation of the anti-trust laws. ESCOs, SCMC points out, do not enter into any written or otherwise binding agreements on the level of the discount that is offered in the referral programs, and do not even agree to charge only the referral program discount, because they are free to offer other discounts to customers outside the scope of the program.

In any event, SCMC contends, the ESCO Referral Order clearly establishes that the requirements of the state action immunity are met in the approval of each individual utility's ESCO referral program. SCMC therefore concludes that all of PULP's arguments lack merit.

#### DISCUSSION AND CONCLUSION

Under our Rules of Procedure, 16 NYCRR §3.7(b), rehearing may be sought on the grounds that an error of law or fact has been made or that new circumstances warrant a different conclusion. PULP's Petition for Rehearing fails to establish that any of these grounds exist.

PULP maintains that criticisms of energy markets submitted in a proceeding before FERC constitute new information demonstrating that competitive energy markets have failed to yield benefits to consumers. The arguments questioning the benefits of competition made before FERC, however, are the same as the arguments on that issue that PULP made previously in this proceeding.

Those arguments were rejected in the ESCO Referral Order, where it was decided that PULP had not justified "revisiting the principle of customer choice, with the purpose of restricting customers' freedom to avail themselves of competitive market features like the [ESCO referral program]



discount.”<sup>8</sup> An argument previously made in this proceeding, conducted under the PSL, does not become new because of its repetition in a subsequent FERC proceeding, conducted under federal law. Moreover, the arguments made before FERC do not undermine the specific findings we made in the ESCO Referral Order, in the exercise of our authority under the PSL.<sup>9</sup> As a result, the arguments PULP cites do not constitute new information warranting rehearing.

Notwithstanding that the ESCO Referral Order specifically rejects a proposal to require utilities to act as agents for ESCOs,<sup>10</sup> PULP, quoting language it selected from the ESCO Referral Program guidelines, claims an agency relationship has, in fact, been created. PULP’s interpretation of the guideline language is strained; the language merely requires utilities offering referral programs to undertake the ministerial task of enrolling customers, instead of requiring ESCOs to perform the enrollment function. Because, under a referral program, customers enter the competitive market through a contact with a utility call center, this approach to the enrollment function is administratively convenient and efficient. Neither rehearing nor clarification of the guideline language is needed.

PULP reiterates its claim that ESCO referral programs violate anti-trust law prohibitions against price fixing and customer allocation. Its analysis of substantive anti-trust issues, however, was rejected in the ESCO Referral Order, where

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<sup>8</sup> ESCO Referral Order, p. 43.

<sup>9</sup> ESCO Referral Order, pp. 42-46. As discussed there, contrary to PULP’s interpretations, Energy Association decides that the PSL authorizes us to effectuate the development of retail competitive markets for energy supply.

<sup>10</sup> ESCO Referral Order, pp. 29-30.

it was noted that courts would most likely apply the "rule of reason" in reviewing allegations that ESCO referral program provisions conflict with anti-trust law standards.<sup>11</sup> Under that approach, courts are unlikely to find that either price fixing or customer allocation violations of the anti-trust laws arise out of referral programs.<sup>12</sup>

PULP also repeats its argument that the state action immunity from application of the anti-trust laws would not adhere to the ESCO referral programs. Upon rehearing, PULP premises this argument primarily upon its analysis of the Cantor and Midcal Aluminum decisions.

Those decisions, however, do not support PULP's analysis of the requirements it says must be satisfied before state action immunity can be obtained. As discussed in the ESCO Referral Order, Cantor, which pre-dates Midcal Aluminum, is distinguishable from the circumstances here.

The Midcal Aluminum decision and its progeny are correctly analyzed in the ESCO Referral Order.<sup>13</sup> In that decision, the Supreme Court of the United States found that a state agency that "clearly articulates" and "actively supervises" a policy authorized under State law has immunized the policy and participants in it from anti-trust sanctions. PULP would add to that two-prong test for obtaining the immunity more requirements -- that the state agency show it had taken a

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<sup>11</sup> ESCO Referral Order, pp. 49-52.

<sup>12</sup> As discussed at ESCO Referral Order, p. 50 n.28, there is no agreement to allocate customers among ESCO participants in a referral program because, notwithstanding the random customer assignment feature of the programs, ESCOs continue to pursue each other's customers and customers are free to switch to other providers (subject to contractual limitations typical to consumer transactions).

<sup>13</sup> ESCO Referral Order, p. 54 n.1.

purely governmental action in a sovereign capacity and that the immunity was needed to achieve its regulatory goals. Support for imposing those additional requirements cannot be found in Midcal Aluminum and its progeny.

Moreover, the two prong test for obtaining state action immunity actually established in Midcal Aluminum and its progeny is met through the ESCO Referral Order and our approval of ESCO referral programs for each utility. Consequently, PULP's analysis of the anti-trust laws is not persuasive; courts would most likely find that the state action immunity is a defense to any anti-trust action brought against ESCO referral programs.

Therefore, PULP has failed to state a claim on any of the grounds for rehearing that it presents and its arguments otherwise lack merit. Its Petition for Rehearing is denied.

The Commission orders:

1. The Petition for Rehearing of the Public Utility Law Project is denied.

2. No further action will be taken on the Petition for Clarification of Orange and Rockland Utilities, Inc. and the Petition for Stay and Rehearing of Rochester Gas & Electric Corporation because the relief requested is moot.

3. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING  
Secretary