VIA EMAIL

July 6, 2010

Honorable Jaclyn Brilling
Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350
secretary@dps.state.ny.us

RE: Case 98-M-1343 – In the Matter of Retail Access Business Rules.

Case 07-M-1514 – Petition of the New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies.

Case 08-G-0078 – Ordinary Tariff Filing of National Fuel Gas Distribution Corporation to establish a set of commercially reasonable standards for door-to-door sales of natural gas by ESCOs.

Dear Secretary Brilling:

U.S. Gas & Electric hereby supports the attached comments submitted to the New York Public Service Commission by Usher Fogel, Esq. on behalf of the Small Customer Marketer Coalition.

Please do not hesitate to contact me at (305) 947-7880 extension 4409 or mmann@usgande.com if you should have any questions regarding this matter.

Sincerely,

Michelle Mann
Compliance Paralegal

Attachment

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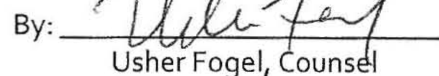
Dear Secretary Brilling:

Enclosed for filing with the Commission please find the original of the "Comments of the Small Customer Marketer Coalition" in the above-captioned matter.

Thank you for your assistance in this matter.

Respectfully submitted,

Small Customer Marketer Coalition

By: 
Usher Fogel, Counsel

Cc: Active Parties (by electronic mail)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 98-M-1343 – In the Matter of Retail Access Business Rules.

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COMMENTS OF THE SMALL CUSTOMER MARKETER COALITION

I. Preliminary Statement

In response to the *Notice Soliciting Comments on the Uniform Business Practices Phase 2 Working Group Reports,* issued in these proceedings on May 5, 2010,[1] the Small Customer Marketer Coalition ("SCMC") hereby submits the following comments in connection with the Phase 2 Working Group Reports, the

[1] Case 98-M-1343 – In the Matter of Retail Access Business Rules, Case 07-M-1514 – Petition of the New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies, and .Case 08-G-0078 – Ordinary Tariff Filing of National Fuel Gas Distribution Corporation to establish a set of commercially reasonable standards for door-to-door sales of natural gas by ESCOs, *Notice Soliciting Comments on the Uniform Business Practices Phase 2 Working Group Reports* (issued May 5, 2010) ("Notice").

various questions propounded in the Notice, and further steps to deal with electronic data interchange ("EDI").

II. SCMC RESPONSE OF SCMC TO QUESTIONS RAISED IN THE NOTICE

SCMC provides the following responses with respect to the questions identified by the Commission in the Notice.

Question: Should the term "verification agent" in Section 1, and the related statement in Section 5, Attachment A, be modified to require that the agent be an independent third party not affiliated with the ESCO and/or that the call with the marketing agent be terminated when the customer is transferred to the verification agent?

Response:

In the Notice, Staff questions whether the telephonic enrollment process should be modified to require use of independent third party verification ("TPV") vendor and also limit the term "verification agent" to an independent third party verification agent. In the view of SCMC this restrictive approach to handling customer enrollments will unnecessarily encumber the telephonic enrollment process, conflict with the existing process incorporated in the UBP, and unnecessarily increase the operating costs incurred by ESCOs without any appreciable benefit to consumers.

Under the current telephonic enrollment process codified in the UBP, an ESCO that seeks to "enter into a telephonic agreement with a customer to

initiate service and begin enrollment", is obligated to "audio record" the conversation dealing with enrollment.[2] Specifically, the UBP provides as follows:

> To enter into a telephonic agreement with a customer to initiate service and begin enrollment..., an ESCO or its agent shall audio record the telephone conversation with the potential customer.[3]

Through such audio record, the ESCO maintains proof and is able to verify that the customer has agreement to take service from the ESCO and the material terms governing the service to be provided by the ESCO. More pointedly, the applicable UBP provision does not obligate the ESCO to establish a separate verification process in addition to the audio record maintained by the ESCO. SCMC supports continuation of this established UBP procedure which only obligates the ESCO to audio record the critical aspects of the conversation with the customer.

In practice, some ESCOs have made use of a verification process to substantiate their telephonic enrollments. In certain instances, ESCOs have made use of its own internal verification process, and other ESCOs have decided to engage a TPV vendor. Nonetheless, such additional verification approaches were instituted at the ESCO's discretion and were not mandated by the UBP. The applicable standard merely requires that the ESCO audio

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[2] UBP Section 6, Attachment 1.A
[3] *Id.*

record the material aspects of the conversation with the customer which underscore the customer's decision to initiate service and begin enrollment.

There is no compelling reason to modify this process or mandate the use of a TPV. It is the ESCO that ultimately has the burden to demonstrate that the customer was properly enrolled in accordance with the UBP. The ESCO should retain the ability to meet that burden through an audio recording of the critical aspects of the conversation with the customer. The use of an additional verification process --- whether an internal ESCO process or TPV --- could be used by an ESCO, but it should be discretionary and not mandated by the UBP.

Further, the use of TPV does not appear to create any material incremental benefits. The critical goal encapsulated in the UBP is to obligate the ESCO to create and maintain a record demonstrating that the customer was properly enrolled with the ESCO. This is adequately accomplished by use of an audio recording as currently reflected in the UBP. The audio recording will address the factors set forth in the UBP and will be able to demonstrate that the customer was properly enrolled with the ESCO. In contrast, mandating a TPV erification can lead to a material increase in the operating costs of the ESCOs, which in turn would increase the ultimate retail cost to the consumer. The cost of TPV can range from $3 to $5 per customer. This is a considerable cost especially for residential customers with lower total bills and consumption levels. It is illogical to impose a new mandate that engenders higher costs with little

benefits. Further, additional problems can arise if TPV is mandated where the outside vendor incurs server problems, there are long hold times, or calls are dropped. In such cases, customer enrollments would be lost and customers will become disenchanted with the process. It therefore makes sense to allow the ESCO to simply audio record and/or use an internal verification procedure.

SCMC therefore recommends that the existing UBP standard requiring an audio record should be maintained and that the term verification agent set forth in Section 1 of the UBP and the standards codified in Section 5, Attachment A should not be modified to require that the agent be an independent third party not affiliated with the ESCO.

Further, SCMC does not support the practice whereby the call with the marketing agent would be terminated when the customer is transferred to the verification agent. It is important that contact be maintained with the customer because customers often have questions during the verification process that the verifying entity may not be able to respond to. If the agent is still on the phone, the call can be transferred back to the agent. It therefore can facilitate the enrollment process to allow the marketing agent to maintain access to the customer.

<u>Question:</u> **Should ESCOs be required to solicit affirmative consent from customers for contract renewals where changes in the terms of the original contract occur? If so, what is the appropriate process in terms of the number and timing of notices provided to the customer prior to contract expiration?**

<u>Response:</u>

In these comments, SCMC will focus its attention on the proposal developed by Staff and presented at the Technical Conference held on May 21, 2010. This proposal was codified in a document entitled "*Contract Renewals When ESCO's Change Anything Other Than Price: Affirmative Consent Required*".

Staff proposed that where the renewal includes a new price for a subsequent term specified in the original agreement and no other terms or conditions are being modified, the issuance of a renewal notice would be sufficient; however, if any other item in the contract is being modified besides price, notice and affirmative consent would be required.

In connection with the notice obligation, Staff proposed that the customer be provided with two separate notices, the first to be sent 60 days before expiration of the existing sales agreement which would alert the customer that the contract is expiring and that renewal price information will be provided in the subsequent notice; the second notice would be sent at least 30 days before the expiration of the existing sales agreement and would include the renewal price, describe how the customer terminates the agreement,

provide contact information should the customer elect not to renew the agreement, and state that if the customer does not contact the ESCO within 15 days the agreement will be renewed.

SCMC has carefully reviewed the Staff proposal and will comment on the following issues relating to the matter of notice and affirmative consent: identification when notice is *not* required; treatment of variable price contracts; defining what is a price change; use of two notices; and reflecting contract changes mandated by law.

The Staff proposal identifies the conditions when notice and/or affirmative consent would be required in the renewal process. However, it is unclear from the proposal when the notice requirement would **not** be applicable. Staff appears to be concerned with distinct changes in price and other terms of the contract and the term applicable to the renewal period. Thus, in describing the conditions applicable to the notice obligation, Staff avers: "However, in any event, if the renewal price per unit for a subsequent term of agreement *greater than one-month* is greater than the then existing price per unit," (emphasis added) the ESCO must send the appropriate notice. From this language it appears that from Staff's perspective if the renewal period becomes a month to month contract the ESCO would not be obligated to provide notice in the event of a price change.

SCMC concurs with this view and recommends that the ESCO should not be obligated to provide notice or obtain affirmative consent where the contract renews at a variable price for a month to month term. This policy is eminently reasonable and equitable. As the term of the renewal is month to month, the customer can usually subsequently terminate the agreement on a mere 30 days notice. Thus, the customer is not locked into any type of long term arrangement, and can exit quickly from any contractual obligation. Further, the renewal incorporates a variable price per month which is merely reflective of an underlying formula rather than a specific price. Therefore, as further discussed below, the customer is contracting for the supply of commodity at a price to be determined in accordance with the methodology set forth in the agreement. The customer is not agreeing to a particular price but to a price methodology. Consequently, the renewal at the variable price does not entail decreases or increases in price; more accurately it reflects the operation of the variable pricing methodology. In sum, renewal to a month to month variable price contract incorporates a limited term and a pricing methodology that will be consistently applied during the length of the contract.

Under these conditions, the notice and affirmative consent requirement should not apply to a contract that renews to a month to month term with a variable monthly price.

The Staff approach necessitates provision of notice where there is a "new price" or a renewal price that is "greater" than the existing price per unit. The proposal, however, does not define what constitutes a "new price" or what happens if there is no change at all in the price. In the case of a monthly variable price contract, the customer and ESCO recognize that that commodity service will **not** be provided at a specific price during the term of the contract; instead the parties have agreed to the provision of service in accordance with the pricing methodology codified in the agreement and Customer Disclosure Statement. Under this construct, if, for example, the existing contract includes a 12 month term with a variable price and the renewal will also be for 12 months at a variable price, it does not appear that the renewal reflects a "new price" or a "greater price" as there has only been agreement to a methodology not a price. In this situation it is reasonable to conclude that the ESCO would not be obligated to provide a notice renewal.

There is also some ambiguity with respect to a fixed price contract. If, for example, the existing contract is for a12 month term at a fixed price of 10 cents/dKt, and the renewal is for the same term and fixed rate, it does not appear that the renewal involves a "new" or "greater Price that would warrant the issuance of a notice. In a similar vein, if the renewal contract involved the same term but included the same price or a lower fixed price of 8 cents/dKt, the price may be "new", but it is not "greater" than the old price.

In view of these open questions, SCMC respectfully requests that Staff clarify that in the following cases the ESCO would not have to provide a renewal notice or obtain affirmative consent.

A. The existing contract is for 12 months at a variable monthly price, and the renewal is also for 12 months at a monthly variable price.

B. The existing contract is for 12 months at a specific fixed rate and the renewal is for the same term and same fixed rate.

C. The existing contract is for 12 months at a specific fixed rate and the renewal is for the same term and at a lower fixed rate.

Staff proposes that the notice requirement encompass two separate notices. The first notice is to be sent 60 days before expiration of the existing sales agreement and inform the customer that the agreement renewal information will be provided in the subsequent notice. The second notice must be sent at least 30 days before the expiration of the existing sales agreement and include: "(i) the renewal price (ii) describe how the customer terminates the agreement and provides contact information should the customer elect NOT to renew the agreement (iii) and state that if the customer does not contact the ESCO within 15 days, the agreement will be renewed."

SCMC recommends that the notice process only require the issuance of one rather than the two notices proposed by Staff. The issuance of two

separate notices for each customer would be extremely costly and impose significant resource burdens especially on those ESCOs serving mass customer base. Further, it may increase rather than lessen the clarity of information provided to the consumer. With the issuance of two notices the customer may forget what each separate notice says and develop additional confusion regarding the renewal process.

SCMC therefore recommends that the ESCO shall only be required to send one notice to the customer at least 60 days but not later than 30 days before the expiration of the existing sales agreement, which shall notify the customer that the contract is expiring, the renewal price, describe how the customer can terminate the agreement, provide contact information, and clearly indicate that if the customer does not contact the ESCO at least 15 days before the expiration of the contract, the agreement would be renewed. This method would provide the customer will all the requisite information in a clear and timely manner.

As proposed by Staff, affirmative consent must be obtained from the customer if there is any change in the "terms and conditions" in the contract other than price. SCMC recommends that Staff consider modifying this broad standard. History has shown that ESCOs are frequently obligated to modify their agreements to incorporate changes in laws, rules and regulations adopted by

the Commission, the legislature and other governmental bodies. These changes are not caused by the ESCO but are the result of governmental intervention.

Accordingly, where the ESCO is modifying the terms and conditions of a contract to accommodate changes in laws, rules and regulations, the ESCO should not be required to obtain affirmative consent.

Question: In the single retailer model, should the single retail provider be required to provide to the distribution utility and/or pending ESCO the same customer credit information that the distribution utility is currently required (Section 4.4) to provide to the pending ESCO?

Response:

In view of the unique conditions applicable to the single retailer model ("SRM"), the single retail provider should provide to the distribution utility and/or pending ESCO the same customer credit information that the distribution utility is currently required to provide to the pending ESCO.

Under the SRM both delivery and commodity service is the responsibility of the ESCO. The ESCO acquires the delivery service from the utility and provides the service to the customer in addition to the commodity. Under this construct, the utility does not maintain current credit information regarding the customer as the utility bills the ESCO directly for delivery or transportation service. Consequently, current credit information is only available from the single retail ESCO provider. In the event the customer seeks to move to another ESCO or return to full utility service, the utility and ESCO as well, must determine whether

the customer should post security before receiving delivery service from the utility or new commodity service from the ESCO, Resolution of the need for security or collateral necessitates review the customer's more recent credit history. As the only source for this data is the incumbent SRM provider, it is reasonable to require that such information be provided to the distribution utility and/or pending ESCO. Further, absent provision of this data, the LDC may feel compelled to impose a security requirement in the event the customer chooses to migrate to another ESCO or even back to the utility. This would unnecessarily restrict the ability of customers to migrate to their supplier of choice.

Question: Should UBP Section 5.H.1 be amended to permit a customer, or the incumbent ESCO on behalf of the customer, to rescind a customer request to return to full utility service should the customer choose to remain with the incumbent ESCO?

Response:

SCMC supports amendment of Section UBP § 5.H.1 to permit a customer, or the incumbent ESCO on behalf of the customer, to rescind a customer request to return to full utility service should the customer choose to remain with the incumbent ESCO.

This approach establishes a convenient process that enables the ESCO to retain service from the incumbent ESCO rather than return to utility service. It also provides the ESCO with the opportunity of speaking with the customer and discussing issues associated with a return to full utility service. The customer may not be aware of potential liability that may occasion the termination of

ESCO service or the customer's decision may have been influenced by erroneous information. After speaking with the ESCO, the customer may decide to maintain retail access service. In this case, the ESCO acting on behalf of the customer can then notify the utility to cancel the scheduled return to utility service.

This type of amendment is also consistent with the Commission's more recent *Order Granting Petition*,[4] wherein the Commission authorized use of a contest period where a customer or an incumbent ESCO with the customer's authorization was authorized to cancel a pending enrollment with a new ESCO by providing timely notice to the utility. The Commission determined that such a procedure was acceptable because it would "automate the process for fulfilling a customer's desire to remain with the incumbent ESCO."[5] The same principle is applicable to the instant amendment as the contemplated notification procedure would automate the process to fulfill the customer's desire to retain commodity service from the ESCO and not return to utility supply service.

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[4] Case 98-M-1342 – In the Matter of Retail Access Business Rules and Case 98-M-0667 – In the Matter of Electronic Data Interchange, *Order Granting Petition*, issued September 22, 2009.
[5] *Id.*, p. 11.

III. PHASE 2 WORKING GROUP REPORTS

The following comments are provided by SCMC in connection with the working group reports.

A. Report of ESCO Referral at Initiation Working Group

The focus of this working group was consideration of the expansion of the existing ESCO Referral Program to encompass the point of service initiation. Through the ESCO Referral Program the utility refers customers to an ESCO that has agreed to provide a two month introductory discount from the utility commodity price. The Commission has approved the extension of the Con Edison referral program to the point of service initiation. The working group examined whether its expansion to other utilities would be appropriate. As codified in the report, the parties looked with favor upon this type of expansion with the caveat that its implementation would need to reflect and accommodate the vagaries of each utility operating system.

. SCMC reiterates its support for the application of the ESCO Contract Approach that is currently used by Con Edison, O&R and NIMO, which is easier to administer and implement by the ESCO and utility and has worked well in all of these service territories. In addition, expansion of the program should reflect an equitable cost sharing and recovery mechanism (for initiation and on-going operating costs) which reflects that all customers benefit from the existence of

this program as all customers will have the ability to receive the cost reduction in the first two billing cycles. To the extent that a portion of the initiation costs are shared by ESCOs at program inception, an appropriate cost share should be applied to new ESCO's entering the program. Also this should not become a profit center for the utility. Once all costs are recovered the costs charged to ESCOs to enter the program should be distributed amongst all the ESCO's currently in the program.

SCMC actively participated in the working group and supports the conclusions codified in the report.

B. Working Group On Utility Initiated Drops Or Reverse Slamming

This report encompasses an accurate portrayal of the disagreement that has arisen in connection with the extant policy of the utilities to return a customer, without notice, to utility commodity service when there is a change in the data applicable to that customer account. Such a return is effectuated even in the situation where the customer has not requested that service with the ESCO should be terminated and commodity service be provided by the local utility. At this point, as noted in the report, the ESCO and utilities failed to achieve any resolution of this highly contentious utility policy.

At its heart, the utility position centers on the proposition that the local distribution utility that only provides delivery service, maintains sole power to

return a customer to full utility service in the event that any condition precipitates an account number change, regardless of the intention or desires of the customer. This position essentially ignores the current competitive environment where commodity is provided by the ESCO pursuant to a contractual relationship with the consumer. Prior to the inception of competitive retail markets, the utility provided both delivery and commodity service and was the sole source provider to the customer. In such an environment, it was appropriate for the utility to modify the provision of service in light of an account number change or any other factor that modified the identity of the customer vis-à-vis utility service. In the current deregulated retail market, however, there are two separate and distinct providers of two separate and distinct products and/or services. It is therefore highly inappropriate for the utility to assume information provided by the customer to the utility which, based upon the utility's practices, engenders a change in account number, empowers the utility to terminate the customer's ESCO service. The world has been transformed and the utilities need to come to grips with reality.

This issue is fully ripe for Commission resolution. The matter of utility termination of ESCO service due to account information changes was first presented to the Commission in a complaint filed on behalf of Agway Energy Services, dated January 28, 2008. Thereafter, it was the subject of consideration of one of the Phase 2 UBP working groups. And, most recently, it was the subject

of a petition filed on behalf of the Retail Energy Supply Association.[6] The issue has been fully analyzed, scrutinized and refracted. The time for resolution has arrived.

C. Working Group On Tax Data

The report provides a comprehensive and accurate presentation of the critical issues separating the ESCO community and the utilities with respect to dissemination of tax related customer data. The utilities argue that they should not be obligated to release such information to the ESCO even when such a request has been authorized by the customer. In contrast, the ESCOs cogently contend that release of tax data is entirely appropriate where the requisite authorization has been obtained from the customer.

Although much discussion concerning this matter has occurred, it is fundamentally a relatively simple issue to resolve. In adopting the UBP, the Commission carefully considered the question of what type and under what conditions, the distribution utilities would be required to release customer data in their possession to the ESCO. In connection therewith it adopted Section 4 of the UBP which identifies the practices "for release of customer information by distribution utilities" to the ESCO (UBP Section 4.A). The Commission further

[6] Case 98-M-1343 – In The Matter of Retail Access Business Rules and Case 98-M-0667 – In The Matter of Electronic Data Interchange, *Petition of the Retail Energy Supply Association*, dated January 26, 2010 ("RESA Petition").

elaborated that the appropriate customer authorization for such a release would incorporate identification of the specific data, provision of a toll-free number to cancel such authorization, and some additional steps. This section of the UBP on its broad terms is applicable to all customer information retained by the utilities and there is no exception included in the UBP for tax related data. It is time for the utilities to be directed to comply with the clear mandate codified in the UBP.

Ultimately, it is the responsibility of the ESCO to report and remit taxes; therefore, ESCO's should have the ability to ensure that the proper tax rates are charged by all services related to the customer, and it is extremely helpful to reconcile or eliminate tax differences between the utility and ESCO's while still protecting the customer's privacy.

C. Direct Marketing/Provision of Customer List Working Group

The working group report dated August 21, 2009 presents a comprehensive summary of the issues and the position of the parties in connection with providing access to customer marketing avenues.

D. Complaint Rate Working Group

The working group report accurately describes the position of the parties and the concerns raised by OCS Staff. SCMC further underscores that no action or modification to the current complaint reporting mechanism should be

instituted that would, in any way, impair the protection from disclosure for ESCO related data, pursuant to Section 89(5)(b)(3) of the Public Officers Law that has been repeatedly affirmed by the Commission.[7]

IV. EDI

The EDI conference held on May 20 was most useful and provided further clarification of the EDI issues that required resolution as well as some potential solutions. At this point, however, it is premature to adopt a final or conclusive approach regarding future implementation of EDI. SCMC recommends that a Working Group be established to examine EDI related issues that would be required to report back to the Commission within a defined time period.

V. CONCLUSION

SCMC thanks the Commission for the opportunity to comment on these important retail access issues, and looks to the issuance of a final determination consistent with the views expressed on belay of SCMC in these comments.

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[7] See, Trade Secret 06-1, Request for Certain Information in Unredacted ESCO Flow-Thru Data Reports for November and December 2005 (issued October 20, 2006); Trade Secret 08-1, Request for Copy of the Unredacted ESCO Gas Flow-Thru Data reports for November 2007 and January 2008 (issued May 19, 2008); Trade Secret 09-1, Request for Copy of Unredacted ESCO Customer Data-Preliminary Customer enrollment by ESCO and Customer (issued May 11, 2009); Trade Secret 09-10, Request for Records Showing 2009 Breakdown of Revenue and Number of Residential Customers for Gas & Electric per ESCO per Utility Company (Cases 930G-0932 and 94-E-0952) (issued March 16, 2010).

Respectfully submitted,

Small Customer Marketer Coalition

By:
Usher Fogel, Counsel

Dated: Cedarhurst, New York
July 6, 2010

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