

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

In the Matter of Retail Access Business Rules)	Case 98-M-1343
Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies)))))	Case 07-M-1514
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))))	Case 08-G-0078
In the Matter of Electronic Data Interchange)	Case 98-M-0667

**COMMENTS OF THE NEW YORK STATE ENERGY MARKETERS
COALITION ON THE UNIFORM BUSINESS PRACTICES AND
RECOMMENDATIONS MADE BY PHASE 2 WORKING GROUPS**

The New York State Energy Marketers Coalition (“NYSEMC”)¹ appreciates the opportunity to submit Comments on the ongoing development of Uniform Business Practices (“UBPs”) by the New York State Public Service Commission (“Commission”). NYSEMC and its member companies have been active participants in the creation and revision of the UBPs, and believes that these guidelines are one important reason why New York has been a leader in the nation with regard to the careful, methodical development of competitive policy which enables energy choice for consumers while assuring utility service reliability and consumer protection.

NYSEMC members have extensive energy marketing experience, collectively exceeding three decades in nearly twenty utility franchise areas nationwide, and have participated in many coalitions, collaborations, committees, and proceedings to introduce and advance competitive markets across the country. In each instance, the philosophy of providing the highest quality customer experience, and ensuring the maximum level of consumer protection has been demonstrated in the positions taken by and, more importantly, the actions of each individual member. This philosophy is critical to

¹ For purposes of this filing, the New York State Energy Marketers Coalition consists of Agway Energy Services, LLC, Energy Plus Holdings LLC, Interstate Gas Supply, Inc., d/b/a IGS Energy, and Vectren Retail, LLC, d/b/a Vectren Source.

NYSEMC members' ongoing success. As such, NYSEMC believes in the patient, steady, and thoughtful development of retail markets using marketing practices that represent ESCOs with integrity and professionalism. NYSEMC members recognize the important public policy and business premise that consumers must be treated fairly and respectfully at all times, and work diligently to ensure continued consumer protection criteria in all transactions – including marketing, sales, product delivery, customer service inquiries, billing, and credit and collection.

NYSEMC believes it is imperative for ESCOs to support the setting of these standards to assure – not restrict – the innovations that can be introduced by marketers to include a variety of commodity purchasing options such as fixed, variable and capped prices; as well as energy equipment repair and warranty service, energy efficiency and conservation services, utility bill review and auditing, and the option to purchase green energy products. As the competitive markets continue to grow and expand, competition will drive additional innovation and products prompted by a desire to respond to consumer demand and the need of market participants to remain competitive.

Central to the success of competitive markets is the fair treatment of consumers. Competitive energy marketers know that a sustainable business model will only be developed through customer acquisition **and retention**. The latter part of this equation has significant implications for the provision of customer protections and treatment in a competitive environment, and is sometimes overlooked by those advocating the need for a more regulatory approach to these ideals. Customer retention mandates that successful marketers who have long term business plans treat their customers with fairness and deference. This begins with the ability of the consumer to understand an offer; to engage in a contractual process that is clearly presented and free from overly burdensome jargon and fine print; and that fulfills the product and/or service promised in the solicitation effort, supporting materials, contractual language, and verification of sale. Sustainable success will not be possible any other way.

NYSEMC members take very seriously their responsibility to treat consumers fairly at all times. In fact, NYSEMC members accounted for only 2% of the *escalated* complaints made against ESCOs before the NYSPSC in 2009.²

² See http://www.dps.state.ny.us/MR_Dec2009Final.pdf

BACKGROUND

On October 27, 2008, the Commission issued an Order³ adopting revisions to the UBPs, which enhanced the oversight of ESCOs by the Commission and set forth marketing standards to provide for increased residential consumer protections and disclosure requirements on the part of ESCOs. Subsequent modifications to Section 5 (Changes in Service Providers) were made in September 2009, while a group of eight (8) collaborative Working Groups were created to further consider some critical topics that were beyond the scope of the 2008 revisions yet felt to be important by all parties. The eight (8) Working Groups included:

- 1) ESCO Referral at Customer Service Initiation
- 2) Reverse Slamming (“Utility Initiated Drops”)
- 3) ESCO Consolidated Billing
- 4) Price Reporting Requirements
- 5) Direct Marketing and Provision of Customer Lists
- 6) Provision of Tax Data
- 7) 18-a Assessment
- 8) Customer Complaint Rate

Each of these Working Groups included representatives from ESCOs, utilities, and Commission Staff, as well as ad hoc representation by the Consumer Protection Bureau. In most cases, leadership of the groups was shared between ESCO and utility personnel.

Issues and discussion related to Consolidated Billing were quickly resolved and a protracted collaborative process was not needed. An 18-a Assessment Group did meet for a short period of time and offered practical ways for the New York State Department of Tax and Finance to collect additional temporary assessment fees ultimately passed as part of the 2009-2010 NYS Budget. Finally, the Commission led a group of ESCOs, utilities, and technology providers to modify its “Power to Choose” website and enable a

³ 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 Services 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, *Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation’s Tariff Filing* (issued October 27, 2009).

more interactive system for ESCOs to post current price offers and for consumers to compare prices.

The remaining Working Groups met over a several month period and each developed a comprehensive report which was posted on the Commission website⁴ and reviewed during a two-day Technical Conference held on May 20 and 21, 2010. This Conference also included discussion on Electronic Data Interchange (EDI) procedures and practices, verification procedures utilized by ESCOs, contract renewals, credit information availability when a customer returns to utility service from a single retailer ESCO, and whether a customer (or the incumbent ESCO on behalf of the customer) should be able to rescind a return to full utility service should the customer choose to remain with the incumbent ESCO. Finally, participants at the Technical Conference were provided with an overview of the revised Power to Choose website.

**WORKING GROUP REPORTS AND COMMISSION STAFF
RECOMMENDATIONS SHOULD BE CAREFULLY REVIEWED BY THE
COMMISSION AND INCORPORATED INTO POLICY DECISIONS**

The Working Group process which was initiated by Commission Staff provided an excellent chance for interested parties to informally discuss key issues that are important to competitive energy markets. Each Working Group had broad representation and afforded the opportunity for diverse views to be expressed. In addition, since meetings and conference calls were spaced over several weeks and months, adequate opportunity was provided for reflection and input by the parties. As such, NYSEMC believes that a balanced level of thinking has been provided in each report filed by the Working Groups, and that since these reports come from the industry itself, the Commission should carefully consider these reports in issuing any subsequent orders with respect to revised UBPs. Additionally, Commission Staff involvement in each step of the Working Group process has contributed significantly to this task, and as such the Commission should also carefully consider Staff recommendations associated with each Working Group report.

Because of the length and detail already provided in each Working Group report, and given that these documents have already been widely circulated and reside on the

⁴ See <http://www3.dps.state.ny.us/W/PSCWeb.nsf/All/8DD2B96E91D7447E85257687006F3922?OpenDocument>

Commission website, these Comments will be limited to including a brief summary of each report's position and NYSEMC's position on the findings. Following these Working Group Committee overviews, additional comments will be provided on EDI and the additional questions related to verification, contract renewals, credit information associated with single retailer customer and handling customer account information changes which result in return to utility service will be addressed.

CUSTOMER COMPLAINT RATE

This Working Group considered how best to assess complaints against ESCOs and provide consumers with meaningful information. While no one disagreed that having accurate complaint information was important, some stakeholders believed posting complaint "rates" on the Commission's website would be valuable to consumers, while others pointed out that developing a true rate would require a methodology that disclosed the number of customers served by any given ESCO. Overall, ESCOs believe that disclosing customer count information would be potentially harmful to their competitive position, and this sentiment has been upheld in two separate determinations by the Commission made in response to Freedom of Information Law ("FOIL") requests, wherein the Commission advised that the issue of public disclosure of the numbers of customers served by ESCOs is considered proprietary.⁵

The Office of Consumer Services ("OCS") posts on the Commission website a Monthly Report which provides an overview of complaint activity, including those related to ESCOs.⁶ Following an analysis of OCS staffing which would be required to provide extensive and marginally instructive detail on complaints, one option that was recommended was to break out ESCOs according to three (3) blocks of "numbers of customers served" for purposes of complaint reports. There was not widespread agreement to that methodology, however; and even greater concerns were raised during the Technical Conference in May.

It should be noted that overall customer complaint rates have decreased significantly since this issue was identified as part of the Phase 1 UBP discussions. In fact, from 2008 to 2009, initial complaints dropped more than 35%, and escalated

⁵ Commission opinions rendered October 20, 2006 (p. 14) and March 16, 2010 (p. 13).

⁶ See http://www.dps.state.ny.us/MR_Dec2009Final.pdf for the latest full year report.

complaints decreased more than 30%.⁷ NYSEMC believes that a key reason for these reduced levels of complaints against certain ESCOs may be the institution of Marketing Standards (Section 10) within the UBP and their efficacy in promoting higher standards of behavior for ESCOs. In addition, the number of complaints may also be down as more consumers gain understanding about energy choice and feel less threatened when engaging with energy marketers.

Whatever the reasons, there has been a significant decrease in complaints filed against ESCOs. As such, and the fact that no clear alternative can be agreed upon, NYSEMC recommends that the Commission's current complaint handling reporting process be maintained.

PROVISION OF TAX DATA

The Tax Data Working Group convened in an effort to respond to concerns expressed by ESCOs that they would like to receive clear sales tax information from each of the utilities. Despite the fact that each billing party (ESCO or utility) is responsible for the collection, reporting and remittance of sales tax collected from customers (whether the customer is billed on a consolidated or separate basis), the fact remains that New York's taxing jurisdictions are among the most complicated and often involve state, county, village, and school district taxes for both sales and gross receipts.

ESCOs believe that since utilities already have detailed tax information related to individual usage through long-standing relationships with customers, this information should be shared with ESCOs, unless a customer objects. ESCOs understand their responsibility for collecting and remitting taxes, but would be willing to further indemnify utilities in exchange for this competitively neutral information. Utilities believe that each biller is required to obtain and retain customer tax information and exemptions, and that the tax information in their system is proprietary based on their work in having obtained it from taxing authorities.

The Working Group was unable to reach consensus on the fundamental differences that exist between ESCOs and utilities. While NYSEMC fully understands that ESCOs must bear the responsibility for tax liability on behalf of its customers, we

⁷ See http://www.dps.state.ny.us/MR_Dec2009Final.pdf for a comparison of the last two full years.

believe that tax information should be considered fungible to the point that it is commonly applied to various products and services, including energy; and that this information should be provided to ESCOs to help ensure proper billing and tax collection for the benefit of the State and Local jurisdictions. Given the utilities' current position of providing delivery service to all customers as the sole regulated entity in a given area, we believe that utilities are in a unique position and that tax information which already exists for a given customer should be cross-referenced with each ESCO to reflect the proper billing rate and tax collection on behalf of a customer. There is no competitive advantage to be gained by limiting access to this information.

ESCO REFERRALS

ESCO referral programs have been utilized in most utility service areas throughout the State of New York in recent years as a way to jump-start the market and afford interested consumers a simple way to participate in energy choice without direct ESCO intervention in the sales process. Referral programs generally require participating ESCOs to provide a guaranteed savings over the utility commodity rate during an introductory period (i.e., seven percent savings for 90 days), after which the consumer may enter into a longer term contract with the ESCO. In exchange for participation, utility CSRs automatically assign interested customers to participating ESCOs on a rotating basis following each inbound inquiry by consumers.

ESCOs have mixed views on these programs – some see significant value in them and actively participate, while others would prefer a “warm transfer” to an ESCO customer service center by utility CSRs once the customer expresses interest in purchasing energy from an alternative supplier. At issue for the Working Group was whether to expand ESCO referral programs to new service customers at the point of service initiation. Following a detailed set of discussions regarding the point of account enrollment and activation, the group reached a level of consensus that it recommends an expansion of ESCO referral programs to the point of service initiation.

NYSEMC believes that consumers should have the benefit of supplier choice at the inception of their utility delivery service with a utility, and we believe that referral programs are just one way to help get consumers there. However, we also believe that ESCOs should have the option to request that utility CSRs simply transfer the call of the interested consumer directly to the ESCO customer service center as the referral is

made, to help establish a clear relationship with the ESCO immediately and to afford the ESCO the opportunity to provide the customer with a more complete description of its current offer(s). We realize this would require a modification to the existing referral program structure, but believe that this option would help potentially enhance the customer's education and understanding that they are dealing with an independent energy supplier.

REVERSE SLAMMING (“Utility Initiated Drops”)

This subject emerged as a Working Group topic as a result of a disagreement between ESCOs and utilities surrounding when a customer drop occurs due to a change in account status. ESCOs believe that there are occasions when a change in status of a utility account number (i.e., due to death of a spouse, divorce, business name change, etc.) does not negate the customer's agreement with the ESCO. However, the utility automatically drops the customer from the ESCO and returns them to utility service. In these instances, ESCOs believe that utilities are interfering in the contractual relationship that exists between the ESCO and its customers, and are in violation of Section 5.H.1 of the UBP. Utilities believe that any change in account status which takes place related to the “responsible party” for the utility bill is an occasion which also results in a new utility account for the customer. As such, they believe it does change relationship with the ESCO, but believe that this can be mitigated through better communication.

The Working Group did not reach consensus on this issue, but did recommend that a separate proceeding may be in order to more fully review these issues. This issue also received significant attention during the Technical Conference, and NYSEMC believes that a practical approach would be for utility and ESCO parties to agree to work – on a utility by utility basis – to improve immediate communications when a change in account status is noted by either party, to avoid confusion or disruption on the part of the customer. Although utility customer information systems do not recognize ESCO agreements and changes in status may require a new utility account number, NYSEMC believes that this can be handled in a way that does not have to disrupt the customer's contractual relationship with their ESCO. We realize this is not an easy issue to resolve with utility legacy systems; however, we feel that a spirit of cooperation among utilities and ESCOs can go a long way to resolve this issue.

CUSTOMER LISTS

Access to accurate customer information by ESCOs has long been an area of concern by energy marketers in New York State. Making basic customer information available (i.e., name, address, phone number, fuel usage type and rate class) improves the efficiency of retail markets through direct connection between ESCOs and potential customers, thus lowering the cost of acquisition and supply. Ever since the Commission began to set forth its protocols for ESCOs to provide alternative supplies of natural gas and electricity throughout the State, the issue of customer information has repeatedly surfaced during proceedings, technical conferences, and informal meetings with the Commission and utilities.

This Working Group considered several sources of information in relation to this issue, including NYS Public Service Law, practices in other states, and individual utility practices. During the course of the meetings and conference calls, three (3) distinct straw man options were presented by the ESCO community. Unfortunately, no consensus could be reached on any of the straw man proposals, with clear division between utility and ESCO viewpoints. The utilities offered no alternative to any of the proposed straw man options.

Utilities believe that there are significant reasons why customer information should not be provided for ESCO marketing purposes. They believe they have a responsibility to protect the customer from potential identity theft, and interpret Public Service Law §65(7),⁸ which provides a prohibition of the sale or offering for sale of customer lists, as indicating that a public policy precludes these lists from being used for marketing, whether or not a charge is made for that list.

First of all, ESCOs believe that the Public Service Law does not prohibit the release of customer information for the purpose of contacting customers for marketing purposes. Utilities believe that the lack of a reference to marketing purposes is not relevant to the applicability of the law nor would provisions of customer lists at no charge necessarily negate applicability of the law. However, providing ESCOs with utility customer contact information would not constitute a “sale or offer for sale,” and could significantly increase the likelihood that the right consumers are made aware of the

⁸ See Public Service Law §65(7) (Article 4), Laws of the State of New York, which states “No gas corporation or electric corporation shall sell or offer for sale any list of names of its customers.”

energy choice options that are available to them. Further protection could be put in place by providing consumers with an opt-out provision that would prohibit release of their information. Today, ESCOs are simply targeting whole regions with their offers since they are not sure where utility boundaries are (especially in the case of natural gas specifically, or between utilities).

As was noted in two of the straw man proposals, this information could even be provided in a way that names, addresses and phone numbers are not even directly provided to ESCOs. As the utilities continue to believe that their customer lists should not be used for marketing, they themselves have for decades marketed to consumers in their respective communities for a multitude of purposes – whether as a dual fuel utility seeking a cross sale, natural gas utility seeking conversions from electricity, heating oil or propane to natural gas, or simply any utility looking to expand its franchise territory through building its reputation. In all cases, it has been common practice for utilities to promote its products and services to consumers from a list of information that simply stated where they resided. Providing this information to ESCOs would actually reduce frustration to utility customers who currently receive offers for products which they cannot use. Providing them with the ability to opt-out of receiving this information would ensure their protection.

OTHER STATES PROVIDE CUSTOMER INFORMATION TO ESCOS

Several other states have actively permitted ESCOs to receive customer information. Ohio is one state that has achieved significant migration and has mandated the provision of customer lists through rulemaking, citing that:

“Natural gas companies shall make eligible-customer lists available to certified retail natural gas suppliers and governmental aggregators via electronic media. Such lists shall be updated quarterly and shall, at a minimum, contain customer name, service and mailing addresses, load profile reference category, meter read date or schedule, and historical consumption data for each of the most recent twelve months.”⁹

As of September 2009, roughly 60% of all customers in Ohio participated in natural gas choice,¹⁰ with migration as high as 90% in Dominion East Ohio.

⁹ Ohio Administrative Code, Section 4901:1-29-13 (c).

¹⁰ <http://www.puco.ohio.gov/PUCO/Consumer/Information.cfm>

Pennsylvania rules allow for the release of customer information under an opt-out notification process, stating simply that utilities are to release information except that they “may not release customer information to a third party unless the customer has been notified of the intent and has been given a convenient method of notifying the entity of the customer’s desire to restrict the release of private information.”¹¹ This process has worked well since electricity and gas choice programs have been put in place; and are important given the myriad of natural gas utilities operating in the Commonwealth.

In Texas, the Electric Reliability Council (“ERCOT”) posts an updated list of meter numbers (called electric service identifier numbers, and which includes addresses) every two weeks. ESCOs import these numbers into their marketing database system, and this enables a simple way to match a prospective customer’s name with an account number. This provides protection for consumers that do not want to participate in choice, while simplifying the process (and virtually eliminating enrollment errors) for those who do wish to participate. Customers have the ability to “opt-out” of the Texas system. In addition, if a customer is trying to sign up with an ESCO in Texas, all he has to do is enter his address electronically and he will be taken to a site where he can retrieve his account number.

Finally, Connecticut Light and Power and United Illuminating both provide a list of all their customers that have not opted out to suppliers. For United Illuminating, this list is available through an ESCO portal on their website, and includes more than a dozen pieces of customer information, including name, address, customer and rate class. Neither utility provides account numbers since they use supplier’s knowledge of the account number as proof that the customer contacted the supplier and has applied for service.

During the course of the Working Group’s meetings, ESCO’s provided three (3) straw man proposals to utilities for consideration, including models where:

1. Utilities provide lists that include customer name, address and phone number directly to ESCOs;
2. Utilities provide information to 3rd party confidential mailing services where ESCOs would participate at their own expense voluntarily; and

¹¹ Pennsylvania Code, Chapter 54 (Electricity), §54.8(a), and Chapter 62 (Natural Gas), §62.78(a).

3. Utilities simply provide a list of zipcodes (zip+4) to ESCOs, along with the number of electricity and/or natural gas customers served in each specific zip+4 area.

No option was considered to be universally reasonable by the utilities and thus all were summarily rejected. Central Hudson later compiled zip+4 information on its own and has provided it to interested ESCOs in recent months. Consolidated Edison and Orange & Rockland stated that they would provide indirect access to ESCO materials and information to its customers through a third party (closely related to straw man option #2). No other utility offered alternatives to address this issue.

The objective of ESCOs in accessing this information is simple: To ensure that ESCO offers get into the hands of customers who use specific products, enabling the ESCOs to communicate the benefits of deregulation to those directly affected, provide customers with more information about ESCO alternatives and products, and do this in a more effective and cost-efficient way. A secondary benefit derived is a more customer-friendly experience upon enrollment. Providing customer information enables an ESCO to pre-populate that information in a data base which, in turn, avoids manual data entry errors that impede a customer's enrollment and lead to customer frustration.

COMMENTS ON ADDITIONAL QUESTIONS RELATED TO UNIFORM BUSINESS PRACTICES

As a component to this Proceeding, input is being sought on five (5) additional areas related to the further development of UBPs. NYSEMC is pleased to provide brief comments on these areas as well.

VERIFICATION FOLLOWING SALE TO CUSTOMER

During the Technical Conference held on May 21, Commission Staff asked whether the term "verification agent" defined in Section 1 and referenced in Section 5 of the UBPs should be modified to require such agent be an independent third party who is not affiliated with the ESCO, and/or whether calls with marketing agents should be terminated when the customer is transferred to the verification agent.

ESCOs utilize different methodologies to complete the sales verification process. NYSEMC believes that different methods can achieve consumer protection, but that there needs to be a clear separation between the sales process and the verification to ensure that the purchase is fully understood by the customer. Verification can then proceed without prompting or undue influence. This separation provides for a sound transaction in which customer consent is memorialized.

For sales made over the telephone, sales representatives must notify the customer that they are going to record the verification.

For residential door-to-door sales, verification is to be completed via telephone by a separate agent. In verifying these door-to-door sales, the verification agent confirms that the sales agent is not influencing the conversation between the customer and verification agent.

We believe this separation enhances the integrity of the transaction and protects the consumer.

CONTRACT RENEWALS – AFFIRMATIVE CONSENT WITH PRICE CHANGE

It is commonplace for many ESCOs to put into place evergreen (i.e., recurring) contracts with customers. In most cases, these contracts set forth terms and conditions which do not change over time and are consistently applied to the account based on a fixed or variable price.

Commission Staff are asking if ESCOs should be required to solicit affirmative consent from customers for contract renewals when changes in terms and conditions associated with the original contract occur; and, if so, on what kind of schedule?

NYSEMC believes that customers should receive notice with each contract renewal. If the renewal notice simply includes a new price for a subsequent term specified in the original agreement (i.e., one year fixed), and no other terms or conditions are being modified, this renewal notice should be sufficient. In instances where any other material item in the contract is being modified (i.e., length of term, application of termination fees, etc.), affirmative consent is required.

More specifically, in instances where a fixed price/fixed term agreement is entered into by a customer, all of the terms are spelled out which are binding to each party; i.e., length of initial term, renewal terms (if any, including the fact that the price is fixed and subject to change upon renewal), contract termination process, etc. Following the affirmative consent of this initial contract, subsequent affirmative consent is not required when:

- a) the renewal term does not exceed the original term of agreement,
- b) there is no introduction of fees or assessments which were not included in the original agreement, and
- c) the ESCO complies with the articulated renewal process.

Basically, if nothing changes except the price, no additional affirmative confirmation is required.

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, the ESCO must provide two (2) notices to the customer --- the first of which alerts the customer that the contract is expiring and that renewal price information will be provided in a subsequent notice, and the second of which:

- (i) provides the renewal price,
- (ii) provides contact information should the customer elect NOT to renew the agreement, and
- (iii) states that if the customer does not contact the ESCO, the agreement will be renewed.

The second notice containing renewal price information should be mailed no less than 30 days prior to the expiration of the current term of agreement.

Examples:

1. Contract renewal from initial fixed rate with no termination fee going to fixed rate with no termination fee = **renewal notice only.**
2. Contract renewal from initial fixed rate with a specified termination fee going to a fixed rate with the same identical specified termination fee = **renewal notice only.**
3. Contract renewal from variable rate with no termination fee going to fixed rate with termination fee = **affirmative consent required.**
4. Contract renewal from variable or fixed rate with any other material change in terms in conditions other than price = **affirmative consent required.**

SINGLE RETAILERS - CREDIT INFORMATION TO UTILITY AND/OR ESCO

There is a growing area of concern for the logistics involved when the customer of a single retailer ESCO wishes to switch suppliers or return to full utility service. While not a widespread problem, in National Fuel Gas Distribution Company a single retailer is not currently required to provide credit information on the financial performance of a customer to the utility and/or pending ESCO prior to a customer switch. This puts the utility and or/pending ESCO at potential risk.

NYSEMC believes that all single retailers should conduct their own credit analysis on potential customers, and that no ESCO should be required to share customer credit or payment history with any other entity. Experience in other states such as Georgia indicates that ESCOs are fully capable of determining customer creditworthiness, and keeping this process proprietary helps ensure compliance with the Fair Credit Reporting Act.

The transfer of a customer from one Single Retailer to another Single Retailer should not require the customer be first returned to the utility.

We suggest that a separate Working Group may need to be established to further study this issue.

CUSTOMER REQUEST TO RESCIND SWITCH & REMAIN WITH INCUMBENT ESCO

On January 26, 2010, the Retail Energy Supply Association (“RESA”) filed a Petition with the Commission 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.¹²

NYSEMC agrees with RESA that the Commission should amend the UBPs to allow ESCOs to retain a customer that originally requests or is scheduled to return to their utility for energy supply, if that customer (or the ESCO acting with authority upon their behalf), later changes their mind and decides to stay with the original ESCO during

¹² Case 98-M-1343 – In the Matter of Retail Access Business Rules, Case 98-M-0667 – In the Matter of Electronic Data Interchange. *Petition of the Retail Energy Supply Association* (filed January 26, 2010).

their contract period. This is commonly referred to as a “win back” of the ESCO customer.

RESA’s Petition sought to make a few much-needed revisions to UBP Section 5.H.1 that would clarify and ensure that consumer rights are protected, and that all utilities and ESCOs abide by a uniform protocol throughout possible permutations of switching that may result from ESCO or utility action. In particular, these revisions would prohibit utilities from terminating customers from ESCO supply without engaging the customer directly to determine their intent. Any electronic data interchange (“EDI”) Drop Notice would be allowed to be rescinded if the customer (or their ESCO, acting upon the authority of the customer), made such a request within the effective date timeline.

We believe that the revisions suggested by RESA will help to tighten up a current loophole that exists in the UBP, and that these revisions are fair and equitable to all concerned – the customer, the utility, and ESCOs. As noted in the Petition, these revisions “ensure[s] that the utility is following the express wishes of the customer¹³.”

It is important to note that the revisions proposed by RESA will not impair any customer obligations that exist in a contractual relationship with a given ESCO. In fact, they may help the customer more fully understand the terms and conditions which apply in their existing supply agreement. This will allow for a fully informed decision on the part of the customer.

UTILITY CSRs MUST REMAIN NEUTRAL WHEN ASKED ABOUT ESCOs

At the Technical Conference held in May 2010, the National Energy Marketers Association (“NEM”) proposed a revision to Section 6 of the UBP to some specific language about the manner and nature of information provided by utility customer service representatives (“CSRs”) when discussing energy choice with customers. The specific revision suggested was as follows:

“Because of distribution utilities’ position as a source of information for all customers, distribution utility customer service representatives should not offer explicit or implicit opinions about the nature or effect of any

¹³ Case 98-M-1343 – In the Matter of Retail Access Business Rules, Case 98-M-0667 – In the Matter of Electronic Data Interchange. *Petition of the Retail Energy Supply Association* (filed January 26, 2010), p.5.

ESCO's offers or marketing or sales efforts and materials should not discourage customers from choosing service by any ESCO.¹⁴

We agree with NEM that this revision helps to emphasize the importance of competitive neutrality with utility customer service representatives. Specifically, when asked about the details or comparison of an ESCO's price to a utility price, utility CSRs should refer consumers back to the ESCO. The utility CSR cannot – and should not – provide any detailed information about an ESCO rate, terms or conditions, nor should they provide any opinion on the quality of the ESCO offer. Their role should be to politely direct the consumer back to the ESCO for more information. CSRs should fully disclose the utility price, stating clearly how long that price is in place (i.e., until the end of the current month, quarter, etc.). Beyond that, CSRs should refer consumers to the utility's "energy competition" website, where all approved ESCO's contact info should be listed. Even if they didn't have any of this information, they should not engage in a discussion about price comparison, but simply refer the consumer back to the ESCO who made the offer.

UTILITY WEBSITE LINKS TO COMPETITION SHOULD BE EASY TO LOCATE

Most New York State utilities have a fairly direct path from their websites to information about energy choice and the list of alternative suppliers/ESCOs. However, NYSEMC has a concern that the National Fuel Gas website may be sending the wrong message to consumers.

When "national fuel gas" or "national fuel gas distribution company" is entered into a Google search, all significant search results come up with www.natfuel.com. This website is the corporate website for all National Fuel Gas companies, including its exploration and production, pipeline and storage, utility, and energy marketing entities. An unknowledgeable consumer may then navigate to the "energy marketing" hot link thinking that this will bring them to the list of ESCOs available for alternatives to the utility. Unfortunately, this brings them directly to National Fuel Resources, the unregulated ESCO subsidiary of National Fuel Gas.

Only through a rather complicated string of navigation moves can consumers ultimately find their way through the utility website and to a page that describes energy

¹⁴ See NEM document posted at:
<http://www3.dps.state.ny.us/W/PSCWeb.nsf/All/8DD2B96E91D7447E85257687006F3922?OpenDocument>

choice. Then, after nearly a dozen paragraphs of warnings and precautionary statements about the risks involved in choosing an alternative supplier, the website visitor may find a soft link that simply states “To view this list of authorized Marketers, please [see below](#),” after which the visitor sees additional information on consumer protection and finally a link to authorized ESCOs on the National Fuel Gas system. Ironically, the link to access the list of ESCOs is even smaller than the rest of the print on the page.

We certainly understand NFG’s need to have a corporate website for presentation of its overall business model; however, the current configuration of the site provides, at best, confusing and ambivalent information to consumers. For this reason, we raise the issue here and suggest that a statement be added into the preamble for Section 4 or other appropriate place that requires utilities to provide direct links from their homepage to a list of approved ESCOs serving customers in their service area.

RECOMMENDATION FOR AN EDI WORKING GROUP

NYSEMC is aware that a myriad of issues surround the ongoing implementation and management of EDI related issues relative to transactions between ESCOs and utilities. This is a dynamic landscape, and one that stretches Commission resources beyond their current staffing capabilities.

Nonetheless, this area is critical to ESCOs and utilities alike, and the need for consistency and uniformity wherever possible is necessary.

During the Technical Conference, there appeared to be consensus among most in attendance that a Working Group dedicated to EDI issues would be a valuable addition to the coordination of uniform practices and ease of doing business. While there are debates as to whether a specific platform or process should be utilized, there was no debate as to the value of a coordinated effort among all parties.

For this reason, we support the establishment of a Commission-sanctioned EDI Working Group, to be comprised of representatives from ESCOs, utilities, EDI vendors, and Commission Staff. Leadership of this group should be chosen from among the interested parties, and should rotate if necessary over time. There should also be a clear directive that any recommendations made by the Working Group are to go before

Commission Staff, and that any impact on regulations should follow standard regulatory process protocol through the State Administrative Procedures Act.

CONCLUSION

NYSEMC applauds the continued support and guidance of the Commission and its Staff in working with ESCOs, utilities, and consumer protection agencies to bring the benefits of a competitive retail energy market to consumers. The majority of ESCOs recognize the trust which has been placed in them by the Commission and are committed to fair and equitable treatment of all customers, and the full development of a consumer-driven energy market with new and innovative services, green products, competitive prices, and energy efficiency tools. However, more work needs to be done, and efforts to cultivate a workably competitive marketplace cannot stop with the issuance or revision of formal business practices. Continued vigilance by the Commission, cooperation by utilities, investments by ESCOs and creative, forward-looking thinking by all interested parties is required to further the stated Commission goal to enable meaningful choice to all energy consumers in the State of New York.

NYSEMC reaffirms its commitment to working closely with the Commission to achieve these goals.

Respectfully submitted,

New York State Energy Marketers Coalition



Michael Meath
Regulatory Consultant
New York State Energy Marketers Coalition

President
Strategic Communications, LLC
3532 James Street, Suite 106
Syracuse, New York 13206

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