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**

COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM) hereby submits comments on the Commission's proposed modifications to the Uniform Business Practices (UBP) pursuant to the March 19, 2008, Notice in the above-referenced proceeding. The proposed modifications pertain to ESCO marketing standards, enhancements to residential consumer protections and Commission oversight and remedies for marketer misconduct. As stated in NEM's previously filed comments in response to CPB's petition,[1] we support the Commission's adoption of a set of mandatory marketing standards based on the voluntary ESCO principles into the UBP. NEM notes that components of the voluntary principles are incorporated into the Commission's proposal.

[1] Case 07-M-1514**,** 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 [hereinafter "CPB Petition"].

NEM submits that the most effective consumer protection rules are premised on the fundamental requirement of accurate, affirmative statements from marketers that disclose the attributes of contracted-for products and services and likewise require accurate, affirmative statements of marketer identification. Consumer protection regulations can and should be narrowly tailored to accomplish this objective. Rules that are unnecessarily prescriptive of ESCO behavior result in increased costs being borne by the competitive marketplace and restrict ESCOs ability to offer innovative products in response to consumer preferences. For example, certain proposed UBP modifications appear to focus on price savings as the sole value proposition to be realized from energy competition. This would have the effect of undervaluing (or perhaps not valuing at all) other innovative pricing and service options that marketers have to offer. Additionally, certain proposed UBP modifications would significantly increase the risk of serving residential consumers, which would also result in a diminution of product offerings available in the marketplace.

Marketing rules that focus on accurate disclosures coupled with Commission delineation of a set of clear and reasonable penalties to address marketer misconduct should lay the framework to ensure protection of residential consumers in the State of New York. In the following comments, consistent with these principles on consumer protection rules, NEM responds to: 1) the Commission's specific questions set forth in the March 19th Notice; 2) the Commission's proposed UBP modifications; and 3) NFG's proposed door-to-door sales standards.

I. NEM Response to Commission Questions

1. Should the ESCOs be subject to the utility assessments provided by PSL §18-a?

No. PSL §18-a provides that the assessment be calculated on a revenue basis. It is not clear how this methodology could be extended to competitive suppliers in a manner that does not unfairly disadvantage competitive suppliers, and by extension, the consumers they serve. An additional complication is whether the assessment is currently collected as a function of delivery or commodity rates. As such, shopping consumers could be unfairly penalized with paying the assessment twice, in the utility delivery rate as well as the competitive commodity rate. NEM suggests that in the Commission's review of this issue it consider competitive neutrality of result, recognizing that all consumers are utility delivery customers and that shopping customers not end up being penalized for switching.

2. Should the customer of record be the only person qualified to enroll the residential account with an ESCO?

The account holder and authorized representatives of the account holder should be permitted to enroll a residential account with an ESCO.

3. Should early termination fees for residential customers be limited to: (a) a flat amount (e.g.$200); (b) an amount based upon a set fee per month multiplied by the number of months remaining on the contract (e.g. $8 x 20 months = $160); or (c) some other variation?

The focus should be on ensuring that consumers have received accurate disclosure of the terms and conditions of the service that is being offered. The manner of quantification of termination fees (for example, expressed as dollars per month, a fixed amount, a formula basis) should be clearly communicated to consumers up front. Indeed, if the consumer is

not made aware of the termination fee up front, the marketer should be precluded from collecting it.

Termination fees serve an important purpose for marketers. There are significant costs associated with terminations, particularly when the customer has enrolled in a fixed price program or other hedged pricing service (such as capped variable). The marketer must "unwind" the hedge and is subject to substantial market risk in doing so.

4. Should there be a grace period for the application of early termination fees to residential customers, and if so, what is the appropriate length of time for the grace period?

The underlying premise of this question is that the customer was not aware of the terms and conditions of the contracted-for service. NEM supports well-designed consumer protection rules that ensure accurate disclosure of terms and conditions, including early termination fees. If those rules are established and complied with, there should be no need to defer the applicability of an early termination fee, or cap its level, beyond the currently applicable three-day right of rescission as described in the Response to Question 3.

Under the proposed UBP language in Section 5.B.3. the grace period could potentially extend upwards of seventy-five days. The increased risk associated with the prolonged "grace period" will result in marketers being unable to offer fixed price products or only being able to do so at significantly increased prices, neither of which scenario is in the best interest of consumers. The availability of competitive fixed price options in the marketplace has historically been ascribed a high level of importance by the Commission.

A prolonged grace period, however, would be tantamount to devaluing these same fixed price products.

Other important negative consequences will flow from the adoption of the proposed grace period. It would fundamentally impair marketers' contractual rights and perhaps impermissibly restrict interstate commerce. Moreover, it could encourage consumers to knowingly and willingly enter into contracts that they fully understand and then unfairly take advantage of the extended window to back out of the deal without consequence if they find a lower priced offer. Meanwhile, the marketer that actively hedged to provide commodity service to that customer would bear the financial detriment of the customer's decision.

5. Is the number of Customers served by an ESCO proprietary trade secret information, under the standards set forth in the State Freedom of Information Law?

Yes. NEM notes that a recent FOIL request of this nature was appropriately rejected. In that case, Trade Secret 06-1, a FOIL request was made for utilities monthly, "Unredacted ESCO Gas Flow-Thru Data Reports" that are submitted to Commission Staff. Amongst other information, the reports disclose: 1) gas ESCOs serving customers on the utility's system, and 2) the number of customers (non-residential, residential-heating and residential-non-heating) for each ESCO. The information is not reported on an aggregated basis. It is reported on an ESCO by ESCO basis, with each ESCO identified in the Report.

Under Section 87(2)(d) of the Freedom of Information Law, an agency "may deny access to records or portions thereof that" . . . "are trade secrets or are submitted to an agency by

a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." In the Trade Secret 06-1 case, it was determined on appeal that, "disclosure of a list of ESCOs, with total number of customers and associated volume of gas of each ESCO on a statewide basis would be likely to cause substantial injury to the competitive positions of ESCOs, particularly new entrants and those that have chosen to concentrate their marketing efforts in specific geographic area in the State." The Commission noted that disclosure of the total number of customers served by each ESCO would reveal each ESCO's position in the market. A more important factor cited as leading to substantial competitive injury by the Commission was the potential for consumers to incorrectly perceive the meaning of the information as related to a marketer's reliability or financial capability.[2] NEM agrees there should be no question that disclosure of the number of customers served by an ESCO would cause substantial

[2] The Commission reasoned that,

> ESCO employees and other knowledgeable market watchers are most likely aware of the relative size of the ESCOs operating in the State, though public disclosure of this information would have some value because it would confirm their educated guesses. Disclosure of the total number of customers each ESCO has in the State and of the total volume of gas moved to such customers would have more value because it would make clear each ESCO's exact position in the statewide market.
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> The value to competitors, however, is not the only measure of competitive [sic] injury. More important in this context is the distortion of the perception of potential customers that would be occasioned by the disclosure of the number of customers and associated gas volumes on a statewide basis. A public disclosure of such information would not take into account the fact that ESCOs can enter and exit a utility market for a number of reasons, which has nothing to do with their reliability or price offerings. For instance, an ESCO that just entered the State, or one that has chosen to concentrate the marketing of its products and services in the service territories of one or two utilities, would be likely to be harmed if on a statewide ranking list it were to appear last. Customers or potential customers probably would incorrectly perceive that the ESCO that has fewer customers or delivers less volume as not being financially, operationally or otherwise capable of providing service when, in fact, the ESCO has just entered the market.

Trade Secret 06-1, Letter Decision, issued October 20, 2006, pages 4-5.

injury to an ESCO's competitive position as it would reveal elements of the ESCO's strategic business plan. Moreover, it is unclear what legitimate purpose would be served by disclosing this information.

6. Should the UBP provisions with respect to Marketing Standards be applicable to small commercial customers? If so, how should small commercial customers be defined?

No. Small commercial customers possess the requisite sophistication to enter in many complex transactions attendant with their businesses and do so without the cloak of additional consumer protections. Pre-existing consumer protection laws already protect these consumers from false and misleading activities. It is unclear on what basis energy transactions are distinguishable as requiring additional cumbersome consumer protections for this class of customer. Indeed, when the Commission previously reviewed a proposed UBP change that would have provided a three day right of rescission to small commercial customers, the Commission declined to do so. The Commission distinguished residential customers that, "may need additional time to reconsider their commitment to a new supplier," from small commercial customers that, "are likely to possess the necessary business acumen to make the decision before entering into a sales agreement."[3]

NEM notes that from a practical perspective it may be difficult to define what would constitute a small commercial customer for the purposes of Commission enforcement of such rules. They are classified differently in the different utility service territories. It may also be difficult to determine how to apply such standards in the case of customers

[3] Case 98-M-1343, Order Adopting Revised Uniform Business Practices, issued November 21, 2003, at pages 21-22.

that would be considered “small commercial” with respect to one commodity and not the other.

If contrary to the foregoing, the Commission were to adopt marketing standards applicable to small commercial customers, the standards should be different than those applicable to residential customers, representative of the different levels of knowledge and sophistication of these groups and the different nature of the contractual agreements that are entered into to serve them.

7. Should ESCOs that include early termination fees in residential sales agreements be required to obtain a "wet" signature on the sales agreement?

No. When the customer agreement is premised on the accurate disclosure of information, there should not be a wet signature requirement associated with the inclusion of early termination fees in residential sales agreements. Verbal and electronic verifications have been employed successfully, and there is no evidence that sales channels that currently use those verification methods (web and telemarketing) should be restricted to wet signature verifications. A wet signature requirement for all sales channels would be a costly barrier to choice.

8. How often do ESCOs enforce early termination fees for residential contracts? If available, the Commission seeks this information on an annual basis separated by contract types, e.g. fixed and variable price contracts.

It should be a matter of the ESCO’s discretion whether to enforce early termination fees. Likewise, it should be left to ESCO discretion whether to disclose this information to the Commission; some may be willing while others may be more reluctant.

9. How should the term "plain language" as used in Section 2.B.1.b of the UBP be defined?

Pre-existing state law provides guidance for the term "plain language" as used in the UBP. For example, the General Obligations Law Section 5-702 currently requires the use of plain language in consumer transactions such that written agreements are to be, "1. Written in a clear and coherent manner using words with common and every day meanings; 2. Appropriately divided and captioned by its various sections." NEM submits that this definition provides appropriate guidance.

10. Are there additional modifications to the UBP that should be considered?

One issue that the Commission should consider as suggested in the comments of NEM and others in response to the CPB petition was the formation of a standing collaborative group for the purpose of exploring and attempting to resolve competitive market-related issues such as the one in the instant case in a more informal and less litigious manner. It need not be incorporated as part of the UBP per se. The collaborative group could facilitate consensus-based resolutions and permit stakeholders to conserve limited resources.

NEM also requests that the Commission act expeditiously to review the utility compliance filings on the implementation of a process for customers to be provided with real-time remote access to their utility account number. The Commission's Order in Case 98-M-1343 to improve access to customer information was issued on November 7, 2006.[4] Utility compliance filings were made at the end of December 2006. However, an Order

[4] It bears noting that in the interim since the Commission Order was issued, the New Jersey Board of Public Utilities Board's in Docket No. A07110885 proposed to implement a customer account number look-up procedure in which utilities would provide Third Party Suppliers (TPSs) and Clean Power Marketers

evaluating the compliance filings has not been issued. As suggested in NEM's previously filed comments on the proposal, improved access to customer account numbers will facilitate cost-effective customer enrollment and participation in choice. Customers generally do not know their utility account number and often find it difficult to locate a utility bill in a timely manner when discussing service options with a marketer. If New York customers are to be able to truly participate in retail choice, then marketer offerings must become as ubiquitous as telecom offerings and available in locations as convenient as "energy fairs" and/or local shopping malls. Real-time remote access to the account number would support this objective.

II. Specific Proposed Modifications to the UBP

The Commission has proposed revisions to existing UBP provisions as well as a new section on marketing standards. NEM supports the Commission's adoption of a mandatory set of marketing standards into the UBP based on the voluntary ESCO principles. As an overarching principle, NEM believes that consumer protection standards should be founded on the premise that marketers be required to provide accurate, affirmative descriptions of the attributes of the products and services they are selling to consumers. When the rules are designed based on this premise of adequate disclosure of terms and conditions, other more prescriptive measures of marketer behavior become unnecessary. And, when the marketer fails to provide accurate disclosure, a clear set of consequences follows from the transgression. However, by focusing the rules on disclosure standards, the Commission can avoid imposing more

(CPMs) with a customer's account number upon obtaining the customer's consent. The proposal is intended to, "ensure ease of access/enrollment for customers and provide for customer protections."

obtrusive rules that would limit marketers' ability to provide innovative products and services.

A. UBP Section 2, Eligibility Requirements

The Commission has proposed changes to the pre-existing application requirements and process for maintaining ESCO eligibility status. A new section sets forth penalty provisions for ESCO misconduct.

1. Quality Assurance Program (Proposed Section 2.B.1.l.)

This section makes reference to an ESCO's "quality assurance program." In order to promote ESCO compliance with this requirement, NEM requests Commission clarification of this term.

2. Maintaining ESCO Eligibility (Proposed Section 2.D.2-A.)

The Commission has proposed a revision in this section that would require ESCOs to resubmit their application package every three years as part of the process of maintaining their eligibility status. NEM suggests that the on-going obligation to submit the January 31 statement[5] coupled with the obligation to report changes in business relationships with customers, business information, price reporting and complaint resolution personnel should be sufficient. Indeed, the proposed three year reporting requirement would seem to merely duplicate information already provided by marketers to the Commission.

3. Penalty Provisions (Proposed Section 2.D.6.)

The proposed language in Subsection b.iv. sets forth a penalty in the form of reimbursement to customers associated with savings-based products. The language as

[5] See UBP Section 2.D.1. delineating the information set forth in the January 31 Statement.

written, including the term "substantially demonstrated," is an open-ended and unclearly defined obligation. NEM suggests that Subsection b.iv. should be reworded as, "Reimbursements to customers limited to the specific savings referenced in the ESCO's sales agreement."

Similarly, proposed Subsection b.vii. references a penalty in the form of, "Any other measures that the Commission or DPS may deem appropriate." With broad language such as this, the ESCO is subject to an unknown risk for which it cannot plan. With this level of risk present in the marketplace, it will deter even valid and appropriate marketing activity.

B. UBP Section 5, Changes in Service Providers

The proposed changes in this section pertain to the potential application of a grace period before marketer assessment of a termination fee as well as changes to pre-existing rules on telephonic, electronic and written enrollment.

1. Grace Period for Assessment of Early Termination Fee (Proposed Section 5.B.3.)

A new provision is proposed in Section 5.B.3. that would provide a grace period for a marketer's assessment of an early termination fee. Specifically, the early termination fee would not go into effect until at least thirty days after the customer receives its first bill for ESCO commodity services. The implementation of this provision would impose a significant increase in risk and costs borne by the competitive marketplace, which could ultimately result in a decrease in competitive offerings to consumers in the State. The appropriate focus of the rules should be on clear and accurate disclosure of the attributes

of the competitive product or service. For further discussion see Response to Commission Question 4 above.

2. Unprompted Customer Acceptance of Terms and Conditions (Proposed Revision to Section 5, Att. 1 Telephonic Agreements)

A proposed revision to Attachment 1 on Telephonic Agreements would require "unaided or prompted" customer acceptance of the terms and conditions of the agreement. From a practical perspective, NEM does not understand how this could be accomplished inasmuch as some form of question or statement should be expected to reasonably precede the customer's acceptance.

3. Statement Regarding Savings-Based Products (Proposed Revision to Section 5, Attachments 1, 2 and 3)

A revision that is proposed with respect to telephonic, written and electronic agreements would require the marketer to either make a negative statement to the effect there is "no savings guarantee" with respect to their product or to explain the terms under which savings are to be provided under the agreement. As worded, this proposed language would unfairly skew the focus in the rules on savings as the primary value proposition to be derived from the competitive marketplace and would ultimately undermine ESCOs ability to offer other products.

Provision A.2. in Attachments 1, 2 and 3 already includes a requirement that the price, terms and conditions be described in the agreement. The focus here should be on the marketer's affirmative statement that accurately describes the attributes of the marketer's product or service. Requirements for a negative statement about what is NOT being offered detract from the value of what IS being offered. This could mislead consumers

and create mistaken inferences about the benefit of the deal before them. A possible solution would be to reword the provision to only require an affirmative statement to the effect that, "If a savings is guaranteed, a clear description of the conditions that must be present in order for the savings to be provided."

4. Identification of Marketer (Proposed Revision to Section 5, Attachment 1)

The proposed revision to Attachment 1 would require a customer acknowledgement that the contracted-for service is with the ESCO, not the utility delivery company. As discussed elsewhere in these comments, it is appropriate to require marketers to offer an affirmative statement that accurately describes their company. Additionally, that statement may distinguish that the ESCO provides commodity service and that the utility is still required to deliver and respond to emergency matters. However, as worded the proposed language carries a negative implication that does not seem competitively neutral.

C. Proposed UBP Section 10, Marketing Standards

The Commission has proposed a new Section 10 to the UBP setting forth proposed marketing standards for ESCOs and their marketing representatives.

1. Marketing Representatives Knowledge of Rates (Proposed Section 10.B.3.)

The language in proposed section 10.B.3. would require the marketing representative to have "knowledge of rates" in addition to the requirement of "knowledge of ESCO's products and services" set forth in Section 10.B.2. NEM requests clarification of whether this reference is intended to refer to knowledge of utility rates. If so, this could be

difficult for an ESCO to practically comply with given the numerous utilities with numerous rates. If not, this would appear to be duplicative of the language in Section 10.B.2.

2. Appearance of ESCO Name and Logo on Identification (Proposed Section 10.C.1.a.iii.)

In the case of in-person contact, the proposed language would require production of identification that "does not resemble the name or logo of a distribution utility." NEM suggests that rather than incorporate a subjective standard based on potential resemblance to a utility's name or logo, that the language should be modified to permit utilization of the "ESCO's legitimate trade name and logo" on its representatives' identification.

3. ESCO Contact Information (Proposed Sections 10.C.1.a.iv. and 10.C.1.a.v)

This proposed language would require that the marketing representative's identification include the ESCO's business address and telephone number. Undoubtedly, the consumer should know this information. However, the requirement to include this much information on a representative's badge may not accomplish the desired result, i.e., when the representative leaves, so does the information. And, how large can the badge realistically be expected to be such that the information would be readable? It seems that it would be most helpful from a consumer perspective to include the ESCO contact information on ESCO literature that is left behind if requested.

4. Identification of Marketer (Proposed Section 10.C.b.)

This proposed section prohibits misrepresentation as to the ESCO, "working on behalf of, or [being] affiliated with a distribution utility." It also would require a statement on the

continuance of utility delivery service. As worded, the proposed language carries a negative implication that does not seem competitively neutral. It is clearly appropriate to require marketers to offer an affirmative statement that accurately describes their company. Additionally, that statement may distinguish that the ESCO provides commodity service and that the utility is still required to deliver and respond to emergency matters.

5. Communications with Non-English Speaking Consumers (Proposed Section 10.C.1.e. and 10.c.2.e.)

The proposed provisions would require that when a customer informs a marketer representative, or "where it is apparent," that the customer has insufficient English language skills to understand the agreement that a representative that speaks the consumer's language be utilized or the contact be terminated. This proposal is troublesome because it requires a representative to exercise a lot of subjective judgment as to whether the transaction should be permitted to proceed, and it could be difficult in certain situations to ascertain in hindsight whether the representative acted in good faith.

The current UBP Section 5(B) incorporating Attachment 1(C) already includes the requirement that ESCOs, "shall conduct the telephone conversation in the same language used in marketing or sales materials presented to the customer." This is a rational approach. If the Commission becomes aware of a pattern of an individual ESCO abuse of this nature, that may be more appropriately addressed in the Commission's complaint resolution and penalty process.

6. Customer-Requested Marketing Restrictions (Proposed Section 10.C.2.f.)

This proposed section requires the removal of customer names from an ESCO marketing database upon request as well as compliance with federal and state do-not-call restrictions. As recognized in the proposed language itself, there are pre-existing laws that prohibit contact with consumers on do-not-call lists. Accordingly, this language may be unnecessarily duplicative of current obligations.

7. Complaint Investigation (Proposed Section 10.C.3.g.)

Under the terms of this proposed section, ESCOs would be required to, "promptly and fairly investigate customer inquiries and complaints concerning marketing practices." While not disputing the need for ESCOs to timely respond to customers, this proposed language is not specific enough about the nature of the ESCO obligation. Additionally, the Commission already has a QRS and SRS dispute resolution process in place that has been working very well for years.

8. Investigations of Marketing Practices (Proposed Section 10.C.3.h.)

In the instance of investigations of potential deceptive marketing practices, the proposed language would require ESCO cooperation with the DPS, PSC and local law enforcement. Under this expansive "cooperation" requirement, there is concern that an ESCO may be unable to protect itself against self-incrimination in the course of an investigation. These basic rights should be preserved and protected for the ESCO.

III. NFG's Proposed Door-to-Door Sales Standards

NFG proposed door-to-door sales standards to be applicable in its service territory that would be set forth in its Gas Transportation Operation Procedure (GTOP) Manual and referenced in its tariff.[6] NEM previously submitted comments on NFG's filing in the context of the CPB Petition into the record of this case. This included a recommendation that utility-specific marketing rules should be avoided in favor of a consistent UBP-based approach as well as an explanation as to why utility enforcement of marketing rules would be inappropriate. NEM continues to urge Commission consideration of those recommendations as well as the following additional issues: 1) door-to-door sales standards are not an appropriate subject matter for a utility's GTOP; and 2) NFG's proposed extension of time of the customer's right to rescind without penalty should be rejected.

At a basic level, door-to-door sales standards are not an appropriate subject matter for a utility's GTOP. The utility GTOP, by definition, pertains to operational rules intended to support the reliability of the system and marketer-utility interactions, such as communication protocols, responsibilities during an OFO, and determination of delivery quantities. In contrast, door-to-door sales standards are by their very nature marketing rules. As such, any rules in this regard are best determined by the Commission and set forth in the UBP to ensure uniform application and compliance.

NFG proposes in Section 8 of the proposed door-to-door sales standards that the three day rescission period set forth in NY Personal Property Law (and also the UBP) be

[6] Case 08-G-0078, Proposed Tariff Amendment, dated January 28, 2008.

modified such that ESCOs be required to permit customers to cancel a contract without penalty if the ESCO or NFG is notified prior to the customer's enrollment date. As similarly argued elsewhere in these comments, NEM suggests that leaving the rescission period open for that length of time would preclude marketers from offering fixed and capped rate products. It would simply be too risky. NEM recommends that the proper approach to the problem alluded to is to focus on adequate disclosure of the terms and conditions of contracted for service.

IV. Conclusion

NEM appreciates this opportunity to comment on the Commission's proposed UBP modifications as well as the opportunity to engage with Staff and other stakeholders in the technical conference to develop a set of marketing standards and consumer protection rules that safeguard consumers while still providing marketers with the latitude to devise innovative products and services.

Sincerely,

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