LAW OFFICE

USHER FOGEL
ATTORNEY AT LAW

557 CENTRAL AVENUE, SUITE 4A CEDARHURST, NY 11516

TEL: 516.374.8400 X 108
FAX. 516.374.2600
CELL: 516.967.3242
E-MAIL: ufogel@aol.com

April 17, 2008

Hon. Jaclyn Brilling
Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, New York 12223

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:

Enclosed for filing with the Commission please find the original and five (5) copies of the "Initial 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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INITIAL COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

These initial comments are submitted on behalf of the Retail Energy Supply Association ("RESA")[1] in response to the *Notice Soliciting Comments on Revisions to the Uniform Business Practices,* issued in these proceedings on March 19, 2008.[2]

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[1] RESA's members include Commerce Energy, Inc.; Consolidated Edison Solutions, Inc.; Direct Energy Services, LLC; Gexa Energy; Hess Corporation; Integrys Energy Services, Inc.; Liberty Power Corp.; Reliant Energy Retail Services, LLC; Sempra Energy Solutions, LLC; Strategic Energy, LLC; SUEZ Energy Resources NA, Inc., and U.S. Energy Savings Corp. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

[2] 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 Revisions to the Uniform Business Practices* (issued March 19, 2008) ("Notice").

II. PRELIMINARY STATEMENT

In response to recent attention focused on ESCO marketing in various parts of the state, the Commission identified certain areas of concern related to the oversight provisions of the Uniform Business Practices ("UBP") and their applicability to ESCO marketing practices, the remedies available under the UBP to Staff and the Commission in this area and the sufficiency of the residential consumer protections provided by the UBP.[3] After consideration of certain filings submitted by the NYS Consumer Protection Board ("CPB") and the National Fuel Gas Distribution Corporation ("NFG"), and Staff's informal review of complaints submitted by residential customers concerning ESCO activities, the Commission at least initially has determined that it is appropriate to consider modifications to the UBP that incorporate standards for marketing by ESCOs and third party contractors acting on their behalf; improve residential customer protection; strengthen the oversight of and expand the remedies available to Staff and the Commission; and other related matters and housekeeping items.[4]

To address these goals, the Commission in the Notice proposes various amendments and modifications to the extant UBP and, in addition, seeks comments from interested parties on the following ten questions.

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

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

[3] Notice, p. 3.
[4] Notice, p. 3

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?

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?

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?

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?

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

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.

9. How should the term "plain language" as used in Section 2.B1.b of the UBP be defined?

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

In response to the Commission's invitation, RESA will provide comments on the proposed modifications to the UBP and the ten questions posed by the Commission.[5]

III. RESPONSE OF RESA TO QUESTIONS PRESENTED IN THE NOTICE

RESA supports the efforts by the Commission to ensure that consumers receive accurate and timely information so that they can exercise their free choice in an informed and accurate manner. To this end, RESA member companies led and participated in an industry-sponsored initiative that resulted in the creation and implementation of the Statement of principles for Marketing Retail Energy ("Principles"). To date, thirty-one ESCOs have voluntarily adopted and become signatories to the Principles. Furthermore, RESA shares the Commission's goal of fostering the development of a competitive market structure that marries an educated consumer with an ESCO offering value added products and services.

RESA's comments herein are informed by the core principles that in developing standards that govern the marketing activities of ESCOs it is essential to carefully balance the following important goals so as to preserve for consumers both the robust retail markets that provides them with choice alongside carefully tailored consumer protections that ensure a positive marketing experience:

1. Marketing standards should ensure that customers are presented with the requisite information needed to make a purchasing decision in a deliberate and informed manner;

[5] A Technical Conference convened by Staff was held in New York City on April 3, 2008 and attended by many interested parties. The comments presented herein reflect information gleaned during the Technical Conference.

2. It is important to preserve the ability of ESCOs to provide consumers with ample choice of a variety of product and service options and offerings tailored to their specific needs.
3. The standards should not inhibit the ability of ESCOs to engage in creative and diverse marketing practices that help create and maintain a robust and competitive market and educate consumers about the energy marketplace.
4. The standards should recognize that freedom of contract is itself a value that should be preserved and eschew direct regulation of the contractual relationship between a customer and an ESCO except under overarching principles of customer protection.
5. The marketing standards must not be overbroad but should be carefully tailored to specifically address an identified material and systemic problem impacting consumers.
6. It is vitally important to minimize the ultimate cost impact to consumers and to recognize that limiting options available to customers through excessive or unnecessary intrusion into the market ultimately harms customers.
7. The marketing standards should not create redundant and overlapping restrictions that make it more difficult for consumers to receive the benefits of the products and services offered by ESCOs.

As the Commission balances these considerations, it is important to underscore that precipitous action that imposes overbroad and overly restrictive standards runs the grave risk of undermining the ability of the retail market and participating ESCOs to provide consumers with the commodity products and services they desire in a cost-effective manner. Such an approach is

inconsistent with the Commission's long- standing policy of modifying retail access practices in a deliberate and cautious manner. The Commission has repeatedly underscored that the development and maintenance of a viable and robust retail market is an on-going and iterative process that entails incremental change to address new concerns and opportunities gained through actual experience.[6]

Accordingly, it is RESA's recommendation that the Commission continue to proceed in the cautious and deliberate manner in which it has approached retail access practices so that identified problems can be carefully matched with solutions that fully protect consumers while preserving and even enhancing robust retail competition in New York.

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

The application of utility assessments to ESCOs engenders significant policy, practical and equitable considerations which at this time argue strongly against implementation of such a new policy.

Imposition of a PSL § 18-a assessment fee upon ESCOs would be highly discriminatory in effect and create an unlevel competitive playing field between ESCOs and the distribution utilities --- presently a primary competitor. The assessment fees currently applied to public

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[6] See, Case 05-M-0332 – In the Matter of Central Hudson Gas & Electric Corporation's Plan to Foster the Development of Retail Energy Markets, *Order Accepting Retail Access Plan, Modifying Rate Plan, and Establishing Further Procedures* (issued June 1, 2005), pp. 5-6; Case 03-E-0764 and 03-G-0755 – Rochester Gas & Electric Corporation – Electric and Gas Rates, *Order Adopting the Terms and Conditions of the Joint Proposal for the Purchase of Accounts Receivable and Approving Related Tariff Amendments* (issued December 27, 2004), pp. 9-10; Case 00-M-0504, Development of Retail Competitive Opportunities, *Statement of Policy on Further Steps Towards Competition and Retail Energy Markets* (issued August 25, 2004) ; Case 05-M-0858, State-Wide Energy Services Company Referral Programs, *Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject to Modifications* (issued December 22, 2005); Case 94-E-0952, 00-E-0952, and 02-M-0514, Competitive Metering, *Order Relating to Electric and Gas Metering Service* (issued August 1, 2006); and Case 98-M-1343, et al., Retail Access Business Rules, *Order on Petitions for Rehearing and Clarification* (issued December 5, 2003).

utilities are calculated in a manner as codified in PSL § 18-a, charged to each applicable utility, and each utility submits payments pursuant to procedures outlined in the statute.[7] In utility rate cases the cost of service incorporated in the utility's revenue requirement will also reflect reasonable compensation for the estimated level of the assessment fees applicable to the utility's operations as reflected in the projected rate during the case of a major utility rate filing. Consequently, pursuant to the terms of PSL § 18-a and the customary rate making practice incorporated in setting utilities' rates, the assessment fee becomes a part of a utility's cost of service, which authorizes recovery of this expense through the utility's tariffed regulated rate for utility service. Through this process the public utilities are, for all practical purposes, assured if not guaranteed full recovery of the assessment fee without any diminution in their ability to market their products and services to retail customers.

The same or equivalent guaranteed cost recovery status does not apply in the case of ESCOs providing competitive commodity retail supply service. In the competitive situation faced by ESCOs, the assessment fee together with all of their costs are incorporated in the price that they charge for a product whose levels of sales are not guaranteed and where the intended recovery of operating cost including any assessment charge, is also subject to the vagaries of the competitive market price. Consequently, broadening the class to which the assessment fees are applied to incorporate ESCOs would create an unlevel competitive playing field as the utility would be provided with guaranteed recovery of this charge while ESCOs would have to recover such costs solely through their competitive endeavors, which in no way ensures recovery of either all or a portion of these costs.

[7] PSL § 18-a (2).

The expansion of the eligible class for imposition of assessment fees to incorporate ESCOs also generates significant rate design and implementation concerns. First, there is the problem associated with double recovery from ESCO customers. As indicated in the statute the assessment for the local distribution utilities is a function of the utility in-state gross operating revenues and the related assessment fee is included in the utility regulated monopoly rate. Thus, ESCO customers are already being charged for the utility's assessment fee because the fee is based on the utility's gross operating revenues, which entails both distribution and commodity costs.[8] If ESCOs are also made subject to the assessment fee, such a charge would then in the normal course of business be passed on to the consumer. ESCO customers would therefore effectively be charged twice for an assessment fee – once from their utility through their regulated distribution rate and again through their commodity charge from their ESCO. Obviously, such a result would be highly unfair to ESCO customers and would undermine a competitive playing field between the utility and ESCO that could ultimately deprive customers of the benefits of choosing their own electric commodity product.

Second, the development of an equitable rate design that properly allocates costs between distribution and ESCO customers and accurately reflects the costs associated with the assessment fee imposed against both entities is a complex and daunting task that requires a complete and thorough record specifically focused on this issue before any significant Commission decision or action. This issue clearly cannot be resolved or completed in a comprehensive manner in this proceeding based upon the state of the current record and the limited comment time period codified in the Notice.

[8] PSL § 18-a (2) (b) (1).

Third, because the existing utility distribution rates were determined in utility-specific rate proceeding, the implementation of an ESCO assessment would have to be coordinated with subsequent actions in a future utility by utility rate proceedings and would likely require a protracted phase-in to ensure that it was implemented on an equitable basis.

Fourth, the concept of making ESCOs subject to the assessment fees under Article 1 of the PSL also raises a material jurisdictional question. It is anticipated that if an assessment fee is assessed against ESCOs, the jurisdiction or authority for the Commission to act in this regard would be premised on the provisions of Section 2(11) and 2(13) which define a gas corporation and electric corporation as an entity engaged in the "owning, operating or managing" of electric or gas plant. Under these definitional provisions the argument would be advanced that ESCOs are included therein and therefore the Commission is empowered to incorporate them in the assessments fees subsequent reflected in PSL § 18-a of Article 1 of the Public Service Law.

However, in 2002 the Legislature passed the "Energy Consumer Protection Act of 2002" (Chapter 686 of the Laws of 2002) which implemented various changes to the Home Energy Fair Practices Act codified in Article 2 of the Public Service Law. In this statute, the Legislature also adopted a new Section 53 to the Public Service Law, which states that for purposes of Article 2, "a reference to a gas corporation, an electric corporation, a utility company, or a utility corporation shall include, but is not limited to, any entity that, in any manner sells or facilitates the sale or furnishing of gas or electricity to residential customers". Pursuant to this new section an ESCO is deemed to be a utility corporation only for purposes of Article 2 of the Public Service Law and this does not, in any way, confer status as a utility corporation on an ESCO for

the purpose of the remaining provisions of the Public Service Law.[9] Following this interpretation, it is at least questionable whether the Commission has the authority under the Public Service Law to apply the 18-a assessment charges to ESCOs.

For these four reasons, it is RESA's position that ESCOs should not be made subject to the utility assessments provided in PSL s 18-a.

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

In accordance with well settled principles of agency and commercial law, the customer of record and any other individual with actual or apparent authority to act on the customer's behalf should be qualified to enroll a residential account with an ESCO. This principle is generally applicable to all areas of commerce in New York and there is no rational basis to apply a different standard for energy purchases by residential customers.[10]

At the Technical Conference the distribution utilities explained that their operating practice approximates this standard in that it allows the customer of record to designate a representative to act on its behalf in connection with utility service, and such designation need not be in writing.

It is also worth underscoring that application of this principle places all the risk on the ESCO. Where an ESCO accepts enrollment authorization from an individual other than the customer of record, the ESCO in the event of a challenge will have the burden to demonstrate

[9] See, Case 98-M-1343, 99-M-0631, and 03-M-0117, In the Matter of Retail Access Business Rules, et. al, *Order on Petitions for Rehearing and Clarification* (issued December 5, 2003) at p. 44.

[10] 1 NY Jur2d, Agency and Independent contractors, Section 1, p. 471; *Matter of Wingate*, 169 M2d 701 (N. Y. Sup., 1996); *Maurillo v. Park Slope U-haul*, 194 A. D.2d 142, 146. .

that such individual had the requisite authority to act on behalf of the customer. Unless, the ESCO can substantiate its claim, the agreement may not be enforceable.[11]

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?***

Questions 3, 4, 7 and 8 address the situation where a sales agreement between a customer and an ESCO contains "early termination fees." In connection therewith, the Commission requests comment on whether a variety of additional restrictions associated with contracts that contain such fees should be implemented as described in the Notice. This question reflects the Commission's concern about the level of customer understanding of termination fees and the clarity with which those fees are disclosed by ESCOs. RESA believes that these concerns can be addressed by developing appropriate notification standards through the agreement and authorization process by which enrollments are secured.

However, prior to responding to the specific restrictions presented for consideration in the Notice, it would be useful to provide an overview of a number of generic issues and concerns applicable to this subject.

There is sufficient reason to question whether there is any need, in the first instance, to impose additional or unique restrictions upon those ESCOs who incorporate "early termination fees" in their sales agreements. As explained by Staff at the technical conference, the operational

[11] The Staff anecdotal concern of an ESCO soliciting an agreement from a minor child is mollified as such an agreement would be voidable as a matter of law. 66 NY Jur 2d, Infants and Other Persons Under Legal Disability, Section 7, 50-51, at 189-190, 237-8.

concern arising from the use of such fees is that in a number of complaints reviewed by Staff customers indicated a lack of understanding of such fees and their impact upon the consumer. Consequently, the problem is not the use of these contractual fees but the need to ensure that customers are properly and accurately apprised of the terms and conditions associated with such fees in a timely manner. Rather than a prescriptive imposition of unneeded restrictions, the more useful and prudent approach should encompass developing comprehensive and comprehensible notification procedures to be followed the ESCO in engaging consumers for marketing purposes. However, the proposed revisions to the UBP already make appreciable strides in ensuring proper notification to the customer. Thus, for example, the proposed modifications to Section 5, Attachment 1, dealing with telephonic agreements includes in Section 5.A.2, the requirement that all the terms and conditions and prices of the ESCO's offer including those associated with termination fees be described to the customer. This is a more sensible and useful approach which addresses the concern about customer understanding of termination fees by developing appropriate notification standards through the agreement and authorization process by which enrollments are secured.

The policy of treating "early termination fees" in a highly distinct and discriminatory manner raises a serious question of definition. Although the phrase "early termination fees" is used throughout the Notice as well as the proposed changes to the UBPs, there is no definition provided which enables the ESCO community to determine what specific fees or charges are included in this phrase. Such a definitional distinction is extremely important because depending upon what charges or fees are incorporated within this phraseology, different legal and policy implications ensue.

An early termination fee can be defined to only incorporate and apply to an adhesion fee or a charge which is included in the sales agreement solely for the purpose of deterring a consumer from breaching or terminating the contract prior to the expiration of its term. On the other hand, absent an express definition of this term, early termination fees might be interpreted to include various costs and charges that are used to measure the ordinary and customary damages that an ESCO would incur in the event of a breach by the customer of the effective sales agreement. In this regard, for example, ESCOs that offer fixed or hedged products to consumers often include a fee or a liquidated damages provision to reflect the damages incurred by the ESCO in the event the customer terminates the sales agreement prior to the expiration of the term, and the ESCO must sell the hedge into the real time market. In such a situation, the charge or termination fee is directly linked to the damages incurred by the ESCO that are occasioned by the customer's breach which under accepted contract principles the ESCO is entitled to full and just compensation. To the degree the term "early termination fees" as used in the Notice and UBP is determined to include this more expansive definition that applies to charges for ordinary and customary damages stemming from a customer's breach, the Commission would be moving in an imprudent and precipitous manner.

It is both improper and ill-considered policy for the Commission to encumber or restrict an ESCO from fully and reasonably seeking compensation for direct damages occasioned by a breach by the consumer. In this vein, it is important to underscore that in any valid and binding contract between an ESCO and a customer, both parties – consumer and ESCO – enter into such a contract with certain expectations of both the other parties and themselves. Just as those who seek to protect the interests of the residential customer would require the ESCO to fulfill all of the terms of the agreement, including the provision of service when it may not be economic for

the ESCO, the same principle should apply to the customer, and such a principle does not run counter to a consumer's expectations when entering into a contract for any product or service let alone an ESCO product or service. Therefore, should the customer breach the agreement the ESCO should be entitled to seek and obtain compensation for the costs and damages incurred as a result of the breach, or a reasonable approximation thereof in the form of liquidated damages.

The Commission should not establish barriers that will inhibit or preclude the ESCO from obtaining proper compensation for damages as this will impair the underlying competitive retail market structure and also raises a serious legal concern. Where an entity has entered into a contract with consumers for the provision of energy products and services, the Commission "cannot destroy or interfere with these contract rights and obligations." [12] If consumers are dissatisfied with the service received "they can discontinue their patronage or rely on whatever contract rights they possess" against the other party.[13] In view of these considerations the definition of "early termination fees" should be limited to adhesion fees which are unrelated to the normal and customary costs and damages an ESCO would be entitled to in the event of a breach of contract by a customer.

Not only should the Commission avoid imposing restrictions on actual damages associated with early termination of an ESCO contract, but the methodology for calculating the termination fees as well as the form of such fees are matters best left to the ESCO to determine in light of the necessities of the competitive market as well as perceived needs of consumers. While in certain cases, primarily those dealing with small residential customers, a fixed fee may be the best fit for consumers in terms of comprehension and certainty, ultimately it is best for the Commission to leave such a decision to the ESCO as that decision will be made on a clear

[12] *People ex rel. Pavilion Natural Gas Co. v. Public Service Commission*, 188 A.D. 41 (3 Dept. 1919).
[13] *Id.*

assessment of market conditions and the ESCO's ability to offer customers various products and services in a cost-effective manner and will result in a broader variety of offerings to consumers.

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?**

There is no need to impose an additional grace period beyond that codified in existing consumer law for the application of "early termination fees" to residential customers. Such a restrictive condition would be unreasonable, improper and ultimately undermine the best interests of ESCOs and consumers.

If the basis for the additional grace period is to ensure that customers properly understand the implications associated with such "early termination fees" the appropriate redress is to deal with the matter during the marketing and enrollment process by providing consumers with sufficient notice of the conditions and elements associated with such fees. It is important to emphasize in this regard, that if customers are not provided with adequate notification of this element of the contract, additional time through an expanded grace period will not make the customer more knowledgeable. All it will do is lead to a greater lag before the agreement becomes binding; it will not necessarily lead to any greater understanding or knowledge on the part of the customer.

The Commission must also recognize that imposition of such a prescriptive restriction will also engender significant costs and burdens to the detriment of all interested parties. An ESCO facing the prospect of extended grace periods will either incorporate the additional risk associated with such a structure into the price of the product or discontinue the offering of

products and services in which the risk is magnified by allowing a customer to walk away from an agreement more than three days after the original contract was provided. In turn, the end result from the consumer's perspective will either be increased costs for commodity offerings or the elimination of various offerings by the ESCO community. Rising costs and diminishment of offerings is not a result which is conducive to the maintenance of a robust retail market and obviously harms both the ESCO and the consumer.

The UBPs already incorporate a grace period of three business days from when the contract is first received by a residential customer.[14] During this interval, the customer has the opportunity to review all of the terms of the sales agreement and without cost or liability back out of the contract. This is the customary standard applicable to all industries throughout the State of New York and provides a consistent and comprehensive waiting period for consumers regardless of product or vendor. There is no rational basis for treating the provision of ESCO services in a different fashion by imposing an additional grace period on that already codified in the UBP and in the consumer law applicable throughout the State of New York.

The introduction of an extended grace period which essentially immunizes the customer from paying damages to the ESCO for its early termination of the sales agreement, also improperly and unreasonably undermines the ESCO's legal right to full redress for all damages associated with the customer's breach of a duly executed sales agreement. As noted above, the Commission does not have the power to unilaterally destroy or interfere with the contract rights and obligations willingly entered into in a sales agreement between the deliverer of energy and a consumer. But that is exactly what happens in the event the Commission imposes an extended

[14] See, UBP § 5, Attachment 1. A. 8.

grace period. Thus, for example, under UBP § 5.B.3., a new section is proposed under which the grace period would not take effect until 30 days after the customer's receipt of a first bill for commodity service. In essence this would provide a grace period of approximately 75 days from when the contract was first entered into.[15] Under such a provision, the ESCO would not know if in fact he has secured a binding agreement with the customer until 75 days subsequent to agreement being reached. In the event the ESCO provided a fixed price or hedged product, the ESCO faces the likely prospect that the costs incurred in providing that hedge will not be reimbursed by the customer as the customer now has some 75 days to walk away from the agreement. This leads to a structure in which the Commission has directly interfered if not obliterated an ESCO's legal right to obtain redress for damages associated with a customer's unauthorized breach of a sales agreement.

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?

The Commission through the Secretary has already ruled that the matter of the number of customers served by ESCO is deserving of proprietary trade secret information under the standards clarified in the Freedom of Information Law (FOIL) and is exempt from disclosure under FOIL. This decision was rendered in a letter ruling by Honorable Jaclyn A. Brilling, Secretary dated October 20, 2006. A copy of this decision is annexed hereto as Attachment A. The Secretary concluded that disclosure of a list of ESCOs with total number of customers would likely cause substantial injury to the competitive positions of ESCOs, particularly new

[15] The 75 day period reflects the combination of the initial 15 day period to be enrolled by the utility, the first billing cycle of 30 days, and the 30 days of grace.

entrants and those that have chosen to concentrate their marketing efforts in specific geographic areas of the State.[16]

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?

The specific standards clarified and presented in the new proposed Section 10 to the UBP should be limited as currently proposed to residential customers and should not made applicable to small commercial customers.

The detailed restrictions and prescriptions codified in the new Section 10 arise from the manifest concern on the part of the Commission to address the unique circumstances of residential consumers who are potentially less sophisticated and may lack a comprehensive knowledge of the energy market. Such conditions are not generally applicable to commercial customers who by their very nature are used to running a business operation that requires assimilating data concerning all aspects of their business operations and entering into agreements with a variety of counterparties. Therefore, even if commercial customers are not fully conversant in the energy market, they will have the ability to ask the right questions and secure the requisite information in order to make an economic choice among various alternatives.

Limiting the applicability of Section 10 to residential customers will not leave small commercial customers bereft of the necessary protections. An ESCO has an overarching obligation to treat **all** customers in a lawful and accurate manner. An ESCO may be subject to severe disciplinary actions as well as revocation of eligibility to operate in New York for failure to comply with required customer protections (UBP Section 2.D.4.c) and the failure to adhere to policies and procedures described in its sales agreements (UBP Section 2.D.4.b). In addition,

[16] Ruling, p. 5.

during the marketing process, the ESCO must under the existing and proposed UBP requirements provide accurate information to consumers regarding the prices and terms and conditions associated with taking service from the ESCO.[17] Finally, the ESCO's marketing activities are also subject to numerous state laws governing fraudulent and misleading behavior.[18]

In sum, there are sufficient protections under the UBP and general common and statutory law to ensure that ESCOs act in a reasonable manner when marketing to small commercial customers.[19]

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

A "wet signature" requirement will not provide additional protection to customers, but will limit the ease with which consumers can choose an energy supplier and reduce the number of ESCOs offering residential customers energy options.

RESA supports Staff's effort in this rulemaking, to insure that consumers understand the terms of the ESCO agreements they execute. However, a "wet signature" requirement merely inhibits the customer's ability to choose from the most diverse group of products and services offered by competitors by imposing additional unnecessary restrictions. If the customer does not understand the underlying concept or elements of the early termination fees, simply stamping his

[17] UBP Section 5, Attachments 1, 2 and 3.
[18] See, General Business Law, Sections 349 (a) and 350, and Executive Law, Section 63(12).
[19] In the event the Commission in the future considers expansion of the approved Marketing Practices to include customers other than residential customers, it would be reasonable to first provide objective data highlighting the need to cover such additional customer classes and the policy justification for extending the standards. This will help the parties address the matter in more comprehensible and fruitful manner.

signature on the document provides no additional protection or indication of expanded knowledge by the consumer. In an environment where the terms and conditions associated with early termination fees are adequately provided to the consumer the addition of a wet signature requirement is unnecessary.

Furthermore, it is both impractical and unnecessary to impose such an additional requirement. In the case where there is direct in-person marketing to the consumer, the customer will annex their signature to the document. Similarly where there is electronic marketing over the internet, the customer through the electronic process will affix their electronic or digital signature to the document. Therefore as a practical matter the greatest level of restriction association with this additional requirement will be in the case of telemarketing activities where customers are contacted over the telephone and marketing and enrollment is done telephonically without securing a "wet" signature. However the Commission already has an elaborate set of standards governing telephonic marketing (UBP Section 5, Attachment 1) which ensures that all relevant information is provided to the customer, the customer's assent is recorded in an appropriate telephonic method and for residential customers an additional three day rescission period is established. The record is devoid of any evidence that the existing standards that govern telephonic marketing are not at least as effective in promoting customer understanding as a blanket wet signature requirement would be. Under these circumstances requiring a wet signature with telemarketing merely imposes an additional marketing burden on this important method for securing new customers. Furthermore, the clear trend in all areas of commerce is to

employ technologies that simplify commercial transactions while safeguarding the rights of consumers.[20]

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

The data relating to ESCO practices in connection with enforcement of early termination fees for residential customers is a proprietary matter that is left to the discretion of each individual ESCO. Accordingly, such information will not be provided by RESA in the context of these comments.

9. How should the term "plain language" as used in Section 2.B1.b of the UBP be defined?

The term "plain language" has previously been defined in Section 5-702 of the General Obligations Law and the case law developed there under. As noted in the statute, an agreement in plain language means written "in a clear and coherent manner using words with common and every day meanings" and appropriately divided and captioned by its various sections."[21] The continued use of this well established definition is reasonable and does not require any further modification at this point.

[20] See, e. g., New York Electronic Signatures and Records Act, N. Y. S. Tech Law, Section 104, 301-309 and Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001-7006.
[21] GOL, Section 5-702 (1) and (2).

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

There are several areas dealing with retail access programs and practices, and the UBPs that warrant further consideration and expeditious action by the Commission.

A. ESCO Direct Marketing Program

A key factor in creating and maintaining a robust retail energy market is meaningful and cost effective access to customers that have not yet chosen ESCO service and are currently receiving commodity service from the local distribution utility. It is vitally important that individual ESCOs have the opportunity of marketing their products and services to the universe of customers that have yet to migrate to ESCO service. A program that can be of considerable use in furthering the education of energy consumers, as well as, enhancing ability of ESCOs to market their products in a manner that serves the interests of consumers and ESCOs is an "ESCO Direct Marketing Program." ("EDMP")

In September 2006, National Grid convened a collaborative with the ESCO community under the aegis of its Competitive Opportunities Plan,[22] for the purpose of developing the EDMP. As discussed by the utility and the ESCOs the EDMP would entail the following key components: the utility would distribute customer names and addresses to a neutral third party mail house; ESCOs would be allowed to arrange with the mail house for the mailing of their marketing materials to utility customers; the customer names and addresses would not be disclosed to the participating ESCOs; and ESCOs would fund the program costs.[23]

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[22] Case 05-M-0333 - In the Matter of Niagara Mohawk Power Corporation's Plan to Foster the Development of Retail Energy Markets. (Competitive Opportunities Plan)

[23] A more detailed summary of the EDMP is annexed hereto as Attachment B.

Unfortunately, this collaborative was not completed and the effort to implement such a marketing program has languished for a considerable period of time.

This collaborative would represent an initial transitory movement towards providing ESCOs with wider relevant access to customer data in an efficient manner that fully protects the rights of consumers. RESA respectfully requests that the Commission initiate a collaborative to address the EDMP and other customer data initiatives within 90 days after issuance of an Order in this proceeding.

B. Contest Period Should be Enacted

On August 17, 2006, U.S. Energy Savings LLC filed a petition for a "Contest Period" to be achieved through amendments to Section 5.D.4 and 5.E.1 of the UBP that will address the rights of an incumbent ESCO in relation to a customer that has potentially migrated to another ESCO. This matter was noticed under SAPA and comments were submitted by a variety of interested parties. However, the Commission has yet to act on the petition. It is requested that the Commission act expeditiously and authorize the amendments requested in the petition.

At present, the distribution utility is permitted to cancel a pending ESCO enrollment and reinstate the customer with the incumbent ESCO only when contacted directly by the customer in this regard. UBP Section 5.E.1 The Contest Period maintains the current practice of providing notice of a pending change in service providers to the incumbent ESCO, in addition to the customer, but adds notification to the pending ESCO. In doing so, it continues to ensure that a change in service provider only occurs with the knowledge of all parties. In some instances, a customer may forget he or she is under contract with another ESCO or is unaware another member of the household or a business partner entered into an agreement with another ESCO.

By informing the pending ESCO of such a situation at enrollment, the Contest Period will enable that ESCO to choose not to enroll the customer rather than bind the customer to another energy supply contract.

The Contest Period proposal adds the incumbent ESCO to the list of eligible parties (which include the customer and the utility) that may cancel a pending enrollment using EDI. This change will give the incumbent ESCO the same authority to act on behalf of the customer now held by the utility and the pending ESCO. Under the current UBP, the customer wishing merely to keep service with the incumbent ESCO is burdened with having to contact both the utility and the pending ESCO. The Contest Period will decrease the number of parties the customer must contact and will provide a benefit to utilities and other ESCOs through fewer calls to their customer service centers.

C. Accent Petition

The Commission has already concluded that it is appropriate to implement procedures for making customers' utility account numbers more readily available to ESCOs. To this effect in response to a petition from Accent Energy Group LLC,[24] the Commission directed the utilities to propose procedures that allowed customers' access to their utility account numbers from random locations. In response thereto, the utilities made the requisite filings. However, to date, the Commission has not acted and approved these filings. RESA urges the Commission to approve the procedures proposed by the utilities and thereby allow for customers to access their account numbers from random locations.

D. Service Initiation

[24] Case 98-M-1343 – Accent Energy Group LLC, *Order Denying Petition and Making Other Findings* (issued November 7, 2006)

RESA also requests the uniform enhancement of the ESCO Referral Program to incorporate this option at the point of service initiation to the customer. This measure will help address one of the fundamental inequities in the market, namely the current requirement that customer's establishing distribution service for the first time or after a move must start out on utility bundled service, severely limiting customer choice and forcing ESCOs to expend marketing funds on "winning" the customer away from the utility that was handed the customer for free. To the extent the PSC approves such ESCO referral programs a collaborative to address detailed implementation measures should be initiated within 60 days after issuance of an Order in this proceeding. By applying the ESCO Referral Program on a statewide basis at the initial point of service, the ESCO will have the opportunity to access the customers on a more level playing field with the utility.

E. Additional UBP Market Enhancements

RESA respectfully requests consideration of these market enhancement modifications to the UBP:

With regard to the Customer Contact Information Set, RESA proposes that UBP Section 2. a be amended to require all the distribution utilities, upon an ESCO request, to provide consumption history for an electric account that includes:

a) Identification of master metered accounts; and,

b) The cycle number on the Historical Usage file that is provided to ESCOs prior to enrollment, with customer consent.

With respect to provision of monthly consumption data:

a) utility must provide ESCO with monthly read information for billing purposes. To the extent the utility does not obtain a read each month for a customer account the utility shall provide the ESCO with an estimated read;

b) utility shall not provide more than 3 consecutive estimated reads on any account

Section 6.B should be amended to directly prohibit distribution utilities from soliciting customers for their default supply service in the course of responding to customer inquiries, during distribution utility education outreach, or any utility marketing activities. Distribution utilities continue to have an inherent advantage as provider of default supply service, increasing the challenge for ESCO marketing efforts. In light of the State's policy supporting the benefits of retail energy competition for consumers, this advantage should not be exacerbated by allowing utilities to market their default supply service through call center operations or distribution utility outreach.

Finally, the Commission should consider amendments to the UBPs to:

A. Require utilities to provide ESCOs with standardized test data to support EDI testing; and

B. insure that a current commercial customer of an ESCO is not switched back to utility default supply service without notice, when the commercial customer is purchased by another entity and/or changes its name. Business customers have been surprised to find when these commercial transactions occur in their normal course that the utility – at least in some cases -- has switched the

business account back to default service without notice to the customer.

IV. RESA COMMENTS ON UBP MODIFICATIONS

SECTION 1

In this section which sets forth the definition of the terms used in the UBP, a new term "ESCO Marketing Representative" is provided. RESA has no objection to this new term.

SECTION 2

Section 2.D.4.j states that an ESCO may be subject to disciplinary action if the ESCO fails to respond to a residential complaint "within the timeframe established by the DPS' Office of Consumer Services." The obligation to comply must be linked to a timeframe is consistent with that set forth in the applicable regulations and statute governing complaints by residential customers. Therefore, RESA respectfully suggests that this section be amended to read as follows:

> *"Failure to reply to a residential complaint filed with DPS and referred to the ESCO within the timeframe established by the DPS' Office of Consumer Services consistent with all applicable regulations and the Public Service Law."*

Section 2.D.6.a.iii indicates that an ESCO may be subject to disciplinary action due to its failure to take corrective actions or provide remedies within the cure period. RESA does not object to substantive direction of this provision but requests that the language be modified to reflect that the cure period established by DPS should be commensurate with the level of work required in order to effectuate the cure requested by the Commission. Accordingly this Section should be redrafted to read as follows:

> *"Upon failure of the ESCO to take corrective actions or provide remedies within the cure period, which shall be commensurate with the level of time required to effectuate the cure requested by the Commission, the Commission may impose the consequences listed below;"*

Section 2.D.6.a.iv needs to reflect that the consequences shall not be imposed until after the ESCO has the opportunity to respond to the notification from the Commission and effectuate the cure requested by the Commission. Therefore, RESA suggests that this Section be amended to read as follows:

> *"Consequences shall not be imposed until after DPS provides notice to the ESCO and the ESCO has been afforded an opportunity to respond to said notice and complete the requisite corrective action."*

Section 2.D.6.b.i should be amended to reflect that the ESCO may only be suspended from an individual retail access program or a component of a program and that such suspension need not be applicable to all retail access programs. Accordingly, RESA suggests amending this Section to read as follows:

> *"Suspension from a Commission approved retail access program either in whole or, where appropriate, in part."*

Section 2.D.b.iv indicates that the Commission may require reimbursement to customers who do not receive the savings promised. This form or relief should be limited to residential customers, as commercial customers are more fully cognizant of their rights and do not require such additional protection by the Commission. Accordingly, RESA suggests having this Section read as follows:

> *"Reimbursements to residential customers who did not receive savings represented in the ESCO's sales agreement or substantially demonstrated to have been included in the ESCO's marketing presentation."*

Section 2.D.6.vii provides a remedy that includes "Any other measure that the Commission or DPS may deem appropriate." In view of the significant powers codified in the new Section b which includes revocation of the ESCO's eligibility to operate in New York, this additional element is unnecessary and far too broad and undefined. Consequently, RESA suggests that this Section be eliminated.

SECTION 5

Grace Period

Section 5.B.3 proposes that a grace period of 30 days after the customer's receipt of the first bill for commodity service should apply for a residential contract that includes a termination fee. This provision should be eliminated for the reasons detailed above in the earlier discussion concerning termination fees.[25]

Section 5 Attachment 1 incorporates various requirements applicable to the telephonic agreements and authorization process. Section 5, Attachment 1.A.3 requires the ESCO to

[25] See *supra* pp. 15-17.

provide "A statement from the customer accepting such terms and conditions that is unaided or prompted by the ESCO marketing representative." This language is totally impractical as some level of prompting or inquiry from the ESCO marketing representative is necessary in order to elicit the customer's acceptance. Accordingly, RESA recommends that the new proposed language be eliminated as it will be of practical necessity for the ESCO marketing representative to inquire from the customer whether he/she accepts the terms and conditions.

Section 5, Attachment 1.A.5 requires the ESCO to provide a statement that "no savings is guaranteed or if a savings is guaranteed, a clear description of the conditions that must be present in order for the savings to be provided." This language essentially requires the ESCO to make a negative statement even if there is no savings associated with the product that is provided by the ESCO. Marketing is designed to be a positive experience in which the customer is provided with accurate information which hopefully will lead to a sale. If the marketing presentation is filled with negative information the likelihood of completing the sale becomes markedly reduced. Moreover, if the ESCO is not marketing any particular savings there is no reason for the ESCO to then inform the customer that no savings is guaranteed unless the ESCO so desires. Consequently, RESA recommends that the proposed restriction codified in this Section be eliminated and the following requirement be added in its place.

> *"Where the ESCO has represented that specific savings will be guaranteed, the ESCO shall provide a clear description of the conditions that must be present in order for the savings to be provided."*

Section 5, Attachment 1.A.6 requires a statement from the customer acknowledging that the customer understands that the agreement for services is with the ESCO and not the local

distribution utility. This negative inference from the customer again creates a negative marketing perception. Instead it should be the straightforward obligation of the ESCO to inform the customer in the conversation that the ESCO is an independent company providing commodity supply service. That should be the only obligation and there is no need to require an acknowledgement from the customer to this effect or that the ESCO is not the local distribution utility. These comments also apply to the proposed changes to Attachments 2 and 3 of Section 5.

Section 5, Attachment 3.A.2 requires the inclusion of certain pieces of information (i.e., price, term and early termination fees) on the *first* page of the agreement. Many ESCOs currently utilize a form of 'master enabling agreement' whereby the general terms and conditions are presented and signed without reference to transaction-specific items. The transaction-specific provisions (e.g., price and term of deal) appear on a separate page (often called a "Transaction Confirmation"). This format prevents the parties from having to renegotiate the general set of terms and conditions that govern their relationship each time a transaction is negotiated. While this may be a workable form of contracting with residential customers, ESCOs should not be required to contract with commercial customers in a particular format. Absent construal of the Transaction Confirmation as the 'first page of the agreement", this new requirement would severely restrict an ESCOs ability to contract with customers, as it would require a new set of terms and conditions to be negotiated each deal term, as the potentially transaction-specific "price, term and early termination fees" would need to appear on the first page thereof. Thus, this addition to the UBP should be removed or, at a minimum, have restricted application to residential customers.

RESA recommends that a working group be formed to examine the telephonic recording script and process and any associated third-party verification process to ensure that it is serving its original purpose of preventing slamming and affirming consent rather than acting primarily as a barrier to the expression of customer consent by forcing customers who have already expressed a desire to switch to undergo a difficult process in order to have their expressed desire fulfilled. Losing good sales through the telephonic process injures customer goodwill and wastes valuable resources.

SECTION 10

Section 10.C.1.a.iii provides as follows:

> "Identifies the ESCO's or marketing representative's name in a manner that does not resemble the name or logo of a distribution utility;"

In this context the phrase "or marketing representative's" is confusing in that it is the name of the ESCO that should not resemble the logo of the distribution utility not the name of the actual representative. Consequently, RESA recommends that this Section be modified to read as follows:

> *"Identifies the ESCO's name in a manner that does not resemble the name or logo of a distribution utility;"*

RESA further recommends that Section 10.C.1.a.iv be amended to replace the term "the" after the first word with "a" as the ESCO may have various business locations and it is not necessary to limit identification to only one business address.

Section 10.C.1.b provides as follows commencing with the second sentence:

"In addition, the ESCO marketing representative must clearly indicate that taking service from an ESCO will not affect the customer's distribution service and such service will continue to be provided by the customer's distribution utility."

As proposed this requires two separate statements from the ESCO which complicate the marketing process as well as inhibiting comprehension by the customer. Thus, RESA recommends that this sentence be modified to read as follows:

"In addition, the ESCO marketing representative must clearly indicate that distribution service will continue to be provided by the customer's distribution utility."

This same modification should also apply to Section 10.C.2.c.

Section 10.C.1.d states that the customer will be provide with written material upon request. This obligation should logically only applies to written material concerning the ESCOs products and services. RESA therefore recommends amending this Section to read as follows:

"ESCO marketing representative will provide the customer with written information concerning the ESCOs products and services immediately upon request."

Section 10.C.2.f requires removal of customer names in the ESCO's marketing database upon such request by the customer and also obligates the ESCO to abide by the requirements of the state and federal do not call registry. This Section should be eliminated in its entirety. ESCOs are already subject to the do not call registry and all the regulations and obligations created there under. Accordingly, it is RESA's position that this provision is unnecessary and this Section should therefore be eliminated.

Section 10.C.3.c. and 10.C.3.f both say the same thing and create redundant obligations. Accordingly, RESA recommends that Section c be eliminated and Section f. modified to read as follows:

> *"Ensure that any product or servicing offering that are made by an ESCO contain information written in plain language that is designed to be understood by the customer. This shall include providing any written information to customer in a language in which the ESCO marketing representative has substantive discussions with the customer in which a contract is negotiated."*

V. RESA REPLY COMMENTS TO THE CPB PETITION AND NFG TARIFF FILING

In its petition dated December 20, 2007, the CPB requests that the Commission adopt various revisions to the UBP dealing with ESCO marketing practices. In a similar vein, NFG by its tariff and GTOP[26] filing dated January 28, 2006, seeks to incorporate within the utility's tariffs provisions governing door-to door ESCO marketing practices within the NFG service territory. It is respectfully submitted that both of these filings are superseded by the modifications now proposed for review in this proceeding which deal with all aspects of ESCO marketing practices. Accordingly, the comments presented herein apply equally as well to the proposals submitted by CPB and NFG.

The Commission should summarily reject the proposal by NFG to establish ESCO marketing standards in the utility tariff and GTOP and arrogate unto itself the power to unilaterally terminate an ESCO's authority to market in the NFG service territory in the event NFG determines that the ESCO has violated the door-to-door standards. This proposal is unlawful, irresponsible and in conflict with the UBP.

[26] Gas Transportation Operations Procedures

Adoption of NFG's proposals would imbue NFG, a direct competitor of ESCOs, with the power to terminate ESCO activity in its service territory. It will ensconce the utility into the position of judge, jury and executioner over its competitors' activities. It is analogous to allowing one company to shut down its competitor. This approach is clearly a violation of standard antitrust principles and is highly uncompetitive.[27] Moreover, it directly violates Section 8 of the UBP which sets forth a detailed complaint resolution process by which the Commission not utilities determine whether ESCOs have acted improperly, and what, if any, disciplinary action should be taken. The proposal warrants complete rejection as an effort to displace the jurisdiction of the Commission.[28]

VI. CONCLUSION

RESA appreciates the opportunity to address the important issues raised in this proceeding and respectfully requests that the Commission adopt policies consistent with the comments presented herein.

[27] NFG candidly acknowledges that its ability to discontinue "ESCO enrollments if the utility reasonably determines that an ESCO is violating" NFG's unilaterally imposed standard, constitutes the "most significant effect" of its proposal. See Case 08-G-0078, NFG Letter dated January 28, 2008, p. 3.

[28] In connection with door-to door marketing, the proposed UBP provisions codified at Section 10.C adequately address the needs of consumers. Additionally, there are a plethora of statutes governing such marketing activities. See, e. g. NYS Personal Property Law, Sections 427-431.

Respectfully submitted,

Retail Energy Supply Association

By: 
Usher Fogel, Counsel

Dated: April 17, 2008
Cedarhurst, New York

ATTACHMENT "A"

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350
Internet Address: http://www.dps.state.ny.us

October 20, 2006

Richard C. Roman
1058 Shave Rd.
Schenectady, NY 12303-5526

Andrew D. Fisher, Esq.
Associate General Counsel
IDT Energy Inc.
520 Broad Street
4th Floor
Newark, NJ 07102

Usher Fogel, Esq.
Attorney for SCMC and RESA
557 Central Avenue
Suite 4A
Cedarhurst, NY 11516

Jodi S. Larison
Senior Business Development Manager
UGI Energy Services, Inc.
1100 Berkshire Blvd., Suite 305
Wyomissing, PA 19610

Re: Request for Certain Information in Unredacted ESCO Gas Flow-Through Data Reports for November and December 2005 (Trade Secret 06-1)

Dear Sirs and Madam:

This letter constitutes my determination of the Appeal filed on August 3, 2006 on behalf of the Small Customer Marketer Coalition (SCMC), the Retail Energy Supply Association (RESA) and Hess Corporation (Hess) (collectively, Marketers) from the determination of the Records Access Officer (RAO) dated July 14, 2006 that certain material in the reports identified above was not entitled to an exception from disclosure as a trade secret or confidential commercial information. Mr. Richard Roman, the person who had requested the reports pursuant to the Freedom of Information Law (FOIL), Article 6 of the Public Officers Law (POL), responded to the Appeal on August 7, 2006. On August 8, 2006, IDT Energy Inc. and UGI Energy Services, Inc. filed letters in support of the appeal. Affidavits supplementing the appeal were submitted on August 22, 2006, to which Mr. Roman responded on the same date.

Argument

Marketers assert that the RAO's determination, concluding that the specific information sought in the FOIL request is not entitled to an exception from disclosure as a trade secret or confidential commercial information, was erroneous as a matter of law, citing cases including Encore College Bookstores, Inc. v. Auxiliary Service Corporation, 87 N.Y.2d 410 (1995). They claim that public disclosure of the information sought would also be contrary to the policy established by the Commission.[1] They cite the reporting Order's statement that those handling the information, which in that case was information regarding the number of customers an energy services company (ESCO) had and the amount of electricity being sold would be vigilant to guard against improper disclosure and assert that the same protection has been afforded similar information filed regarding gas marketers. Marketers assert that the Commission's policy of protecting ESCO-specific information was recently affirmed when Administrative Law Judge (ALJ) William Bouteiller granted trade secret protection to monthly, firm-specific, load data for ESCOs operating in the State.[2]

Marketers opine that the Commission's policy would be undermined if ESCO-specific information on the number of customers, the volume of gas for each customer class and the throughput on each utility's system were disclosed. They argue, further, that a change of policy must be made only after notice and an opportunity for comment is given and only when the reasons for the change in policy have been explained. They contend as well that affirming the RAO's determination would hinder the development of robust competition by creating uncertainty as to the policy to be followed regarding ESCO-specific information.

Marketers claim that disclosure of ESCO-specific customer information would allow competitors to interfere with supply arrangements and develop strategies to target specific products, services and market segments. They allege that ESCOs have expended a significant amount of resources in developing their marketing plans and strategies and that it would be unfair for competitors to be able to obtain this information at virtually no cost. Marketers contend that the RAO's determination contained unsupported speculation that competitors would develop their own marketing strategies without looking at any available operational data from competing ESCOs. Marketers argue that the determination requires the demonstration of actual competitive injury, whereas the courts have required only a showing of the likelihood of substantial competitive injury.

Marketers opine, finally, that Mr. Roman is seeking the information in question for undisclosed purposes and has not explained how the public would be better off if such information were disclosed. Nor, according to them, has anyone shown how a change in policy from disclosing only aggregated ESCO data to disclosing individual ESCO-specific information would be beneficial.

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[1] Case 94-E-0952, Competitive Opportunities Regarding Electric Service (the Reporting Order), (issued January 28, 1999).

[2] Case 05-E-1222, New York State Electric & Gas Corporation, Ruling Granting Trade Secret Protection for ESCO Marketer Data (issued February 2, 2006)

Three affiants, each with several years of experience in the retail energy industry, state that disclosure of the number and type of customers of each ESCO and its throughput of gas transacted on each utility's system would be likely to cause substantial harm to ESCOs operating in New York. Mr. Gartman claims that disclosure would adversely affect the ESCO's ability to procure natural gas supplies because suppliers could demand higher prices if they knew exactly what volume of gas the ESCO needed on a particular utility's system, especially in situations where few supply alternatives are available. Thus, he alleges that the information has substantial commercial value. The affiants explain that the ESCOs by which they are employed have spent years and much effort, including a significant amount of resources (and continue to do so as they compete in New York's retail energy markets), developing particular market strategies and that disclosure of the information sought in the FOIL request would assist competitors in replicating their strategies in a very short time. Such disclosure would, they opine, assist new entrants in deciding on the timing of entry into the New York market, which markets to enter and which market segments to target or to avoid. Disclosure to competitors at almost no cost of customer-specific and volumetric information would, they contend, devalue the efforts of ESCOs in New York, as well as undermining the development of competitive markets. The affiants claim that ESCOs look at whatever information about competitors is available when developing their marketing strategies and would use ESCO-specific information about customers and volumetric requirements if it were to become available.

Mr. Roman responds that, according to a Department of Public Service (DPS) White Paper, retail competition in New York is robust, so there is no need to exempt from public disclosure the specific information he seeks (a listing of ESCO, from the largest to the smallest giving the total number of customers within the State and the quantity of decatherms of gas each ESCO moves to consumers it does business with on a statewide basis). He alleges that Marketers have not demonstrated that disclosure of that information would cause them any real damage, since the affidavits they submitted focused on more disaggregated information. He also claims that the disclosure on the Commission's Web site of the number of contacts (inquiries or complaints) received concerning particular ESCOs has not inhibited their marketing efforts.

Discussion

Turning first to Mr. Roman's arguments, his reference to a White Paper was apparently to DPS Staff's Report on the State of Competitive Energy Markets (issued March 2, 2006). That report does not claim, as Mr. Roman indicates, that retail competition in New York is now robust. Rather, the report specifically "identifies opportunities for continued progress toward robust competition..." (page 1) and states that the Commission "has sought the development of robust retail competition by supporting key initiatives ..." (page 28).

Mr. Roman's claim that disclosure of contacts received concerning particular ESCOs has not harmed their ability to market their services is inapposite. The fact that public disclosure of some information about particular ESCOs has apparently had no adverse effect on their marketing efforts does not mean that disclosure of other information would be benign.

Mr. Roman makes a cogent point when he asserts that Marketers have not focused on the specific information he seeks. While Marketers may be correct that disclosure of ESCO-specific information on the number and type of customers, the volume of gas for each customer class and the throughput each utility's system would be likely to cause substantial competitive injury but the question presented here is more limited.

Before addressing the ultimate question, consideration will be given to other Marketers' arguments. The assertion that the Reporting Order established a policy of protecting ESCO specific information from public disclosure is incorrect. Rather than providing an automatic exemption form disclosure, the Commission stated:

> The filings of similar information for the gas industry, and as directed in the Telecommunications Competition Monitoring Report, have not been afforded blanket trade secret protection. We see no reason why the normal regulatory process should not be followed for the Interim Reporting Requirements. The Public Officers Law and our regulations [See, 16 NYCRR Section 6-1.3.] specify the applicable procedure for seeking, and determining the entitlement to, exceptions from disclosure of information contained in records filed with us. Those handling such information will be vigilant to guard against improper disclosure, and we will not circumvent normal procedures at this time.[3]

The ALJ's ruling in Case 05-E-1222 granted trade secret protection to monthly, firm-specific, load data for ESCOs operating in the State; it did not relate to the specific information sought in the FOIL request. Marketer's questioning Mr. Roman's purpose for seeking particular information is not pertinent to the issue of whether such information must be disclosed. As the Court in observed in Gould vs. New York City Police Department, 89 N.Y.2d 267, 274 (1996) "Access to government records does not depend on the purpose for which the records are sought."

Marketers' contentions that the RAO misapplied the applicable test for determining whether commercial information should be disclosed are without merit. Marketers simply disagree with the application of that test enunciated in Encore, supra. They assert that the determination was based on unsupported speculation that competitors would develop their own marketing strategies without looking at any available information regarding ESCOs. By contrast, the affiants contend that ESCOs look at all available information concerning their competitors when developing their marketing strategies and would use ECSO-specific information if it were publicly disclosed.

Given the affiants' assertion that ESCOs use available information concerning their competitors when creating their marketing plans, the question presented is whether disclosure of the specific information sought in the FOIL request would be likely to cause substantial competitive injury. ESCO employees and other knowledgeable market watchers are most likely aware of the relative size of the ESCOs operating in the State,

[3] Case 94-E-0952 supra, p 4

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.

The value to competitors, however, is not the only measure of competitive of completive 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 has 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. Given these considerations, disclosure of a list of ESCOs, with total number of customer 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.

Having considered all the arguments of the marketers and Mr. Roman, I conclude that the appeal should be granted and that the specific information sought in the FOIL request should be exempted from disclosure.

Very truly yours,

Jaclyn A. Brilling
Secretary

cc.: FOIL file
Trade Secret 06-1 file
Hon. Robert J. Freeman, Executive Director
Committee on Open Government

ATTACHMENT "B"

ESCo Direct Mail Program

Donna Mimas

September 19, 2006

Objectives

- Stimulate competitive market development
- Protect customer privacy by not distributing customer names/addresses directly to several parties
- Assist ESCos in communicating with customers in their target market(s)
- Protect ESCo marketing information

How it Works

- RFP developed and distributed to several mail houses
  - ESCo recommended 3rd party mailhouses will be included on the RFP list
- Several different service options will be included in the RFP
  - Postcards
  - Letter Size Self-Mailers
  - #10 or 6x9 Envelope
  - Publications
- Low cost bidder offering all services identified in the RFP will be selected
- Winning bidder will need to sign a Non-Disclosure Agreement with National Grid

nationalgrid

How it Works cont.

- National Grid will provide the following to the 3rd party mail house on a monthly basis (sales customers only):
  - Electric - Customer Name, Mailing Address, Service Class, New York ISO Zone, Operating Center, Usage Indicator (reflective of size)
  - Gas - Customer Name, Mailing Address, Service Class, Operating Center, Usage Indicator (reflective of size), heat vs. non-heat
  - Energy Type Indicator (i.e. electric, gas, both)
- ESCo will contact 3rd party mail house to arrange for the specific services they want (identify sort criteria desired)
- ESCo will provide National Grid with all materials at least one week prior to mailing

nationalgrid

How it Works cont.

- ESCo provides mailhouse with the materials they want mailed
  - All materials will be pre-packaged
  - 3rd party is only responsible for affixing the mailing label
- ESCos responsible for all costs associated with mailings they requests including:
  - Information preparation
  - Postage
  - 3rd party costs
  - Incremental costs incurred by National Grid

Next Steps

- Comments/Questions about the proposal
- ESCos to provide 3rd party mail house contacts to Donna Mimas by October 13
- RFP Developed and Distributed in November
- Program Kickoff December/January