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

**Re: Case 06-M-0647 – In the Matter of Energy Service Company Price
Reporting Requirements
Case 98-M-1343 – In the Matter of Retail Access Business Rules**

Dear Secretary Brilling:

Enclosed please find the original and five (5) copies of the Reply Comments of the Small Customer Marketer Coalition and Retail Energy Supply Association.

Respectfully submitted,

Small Customer Marketer Coalition and
Retail Energy Supply Association

By: Usher Fogel, Counsel
Usher Fogel, Counsel

Cc: Service list (by electronic mail)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 06-M-0647 – IN THE MATTER OF ENERGY SERVICE COMPANY
PRICE REPORTING REQUIREMENTS

CASE 98-M-1343 – IN THE MATTER OF RETAIL ACCESS BUSINESS RULES

REPLY COMMENTS OF THE SMALL CUSTOMER MARKETER COALITION
AND RETAIL ENERGY SUPPLY ASSOCIATION

I. PRELIMINARY STATEMENT

These reply comments are submitted on behalf of the Small Customer Marketer Coalition (“SCMC”) and the Retail Energy Supply Association (“RESA”)¹ in accordance with the *Notice Soliciting Comments on ESCO Price Reporting Requirements* issued in these proceedings on May 31, 2006.²

Initial comments were received from New York State Electric and Gas Corporation/Rochester Gas & Electric Corporation; New York State Consumer Protection Board; Public Utility Law Project; Energetix, Inc.; National Energy Marketers Association; Direct Energy, Inc.; IDT Energy, Inc.; Advantage Energy; National Fuel Gas Distribution

¹ RESA member companies include Consolidated Edison Solutions, Inc., Direct Energy Services, LLC, Hess Corporation, Reliant Energy Solutions, Select Energy, Inc., Semptra Energy Solutions, Strategic Energy LLC, SUEZ Energy Resources NA, Inc., and U.S. Energy Savings Corp. The opinions expressed in this document may not represent the views of all members of RESA.

² Case 06-M-0647 – In the Matter of Energy Service Company Price Reporting Requirements and Case 98-M-13343 – In the Matter of Retail Access Business Rules, Notice Soliciting Comments on ESCO Price Reporting Requirements (issued May 31, 2006) (hereafter “Notice”).

Corp.; National Fuel Resources, Inc.; Consolidated Edison/Orange & Rockland; MX Energy, Inc.; Intelligent Energy; and the Empire State Petroleum Association.³

II. REPLY COMMENTS OF SCMC/RESA

A. Public Utility Law Project ("PULP")

Initially PULP suggests that once provided to Staff, the data submitted by ESCOs "should be available on the same timetable and with the same accuracy to third parties as it will be to Staff."⁴ In a similar vein PULP further argues that Staff should not be the only party to construct and maintain the pricing information website. In this regard, it asserts that Staff has certain handicaps in undertaking this activity in that it may create additional bureaucratic or logistical constraints hindering Staff's ability to provide the most timely price information and that in the event of a billing dispute between the ESCO and the customer Staff's neutrality to mediate the dispute may be challenged if Staff is the source for the ESCO price disclosures.⁵

The purpose of this proceeding was to establish ESCO price reporting requirements that would be provided to Staff which would then be made available to the public under a process and procedure that was administered by Staff. This is a critical feature in the development of an appropriate pricing disclosure requirements and process. Staff is uniquely positioned in this area as it is fully versed in the critical aspects associated with the provision of commodity service to residential customers on a competitive basis. Moreover it has a full and comprehensive understanding of the intricacies of retail access as well as the related complexities in developing pricing and

³ Comments of each party are cited as "Name of Party, p. ____".

⁴ PULP, p. 3.

⁵ PULP, pp. 2-3

other related comparative analyses. Consequently, the submission of pricing data should only be made to Staff which will then after examining the required reporting data present it in the approved and designated site or format maintained by Staff. Once the information is reported on the website by Staff it would be available to all members of the public and can thereafter be used by members of the public in the manner that they see fit.

Under no circumstances, however, should ESCOs be obligated to engage in the provision of reporting price data to other website portals such as Orbitz or Expedia; ESCOs should only have an obligation to report to Staff on the pricing information designated or required to be supplied as an outcome of this proceeding. This proceeding should not be improperly used to impose price reporting obligations on ESCOs to additional third-party vendors.

The arguments by PULP that Staff is not uniquely able to construct and maintain the appropriate price reporting mechanism via the website or other portal, are unpersuasive. The concerns expressed by PULP that the existing website would become an information bottleneck overlooks that the website would obviously need to be modified to incorporate the data reported by ESCOs pursuant to any subsequent Commission policy statement or order. However, once the website is so modified there is no reason to conclude that it would become an information bottleneck and prevent individuals from securing information needed to make a comparison of ESCO prices and services.

The concern raised by PULP that due to the State's web presence the website will have constraints on the ability to provide the most timely price information, is also

unconvincing. As set forth at length in our initial comments, any workable website must allow for the updating of pricing information on a timely and immediate basis. Thus the website development emanating from this proceeding should and will address the Staff's ability to provide ESCOs with the opportunity to provide timely price information.

The assertion by PULP that Staff's neutrality in mediating billing disputes between ESCOs and customers may be challenged if Staff is providing the source for ESCO price disclosures, is without merit. PULP erroneously assumes that pricing disclosure by the ESCO would only be made to Staff; it ignores the critical factor that regardless of the website or other public reporting disclosure, the ESCO under the UBP is required to provide pricing information directly to the customer as part of the enrollment process.⁶ All of the information provided by the ESCO including that set forth in its Sales Agreement as part of the enrollment process will be reviewed by Staff in the event of a billing dispute. Furthermore, Staff's intimate knowledge of the publicly disclosed information of ESCOs would put it in the unique position to properly and expeditiously resolve any disputes that may arise between customers and an ESCO.

PULP supports disclosure of the prices charged for commodity, as well as the state taxes applicable to the commodity sale; in connection with the variable rates it seeks identification of the factors on which the variable rate will be adjusted, how frequently the adjustment will be made, and the notice that will be provided to the consumer of the new rate.⁷ The provision of the specific state taxes applicable to the commodity sale is an unnecessary detail that would further complicate the reporting information, as well as cause additional confusion. This sales tax will, of course, differ by area and municipality

⁶ See, UBP § 5(B).

⁷ PULP, p. 5.

and disclosure does not serve much of a purpose as the sales tax is similar for all commodity purchases, whether those made by the utility or ESCO. As this element remains invariant regardless of the provider, and is subject to modification in every locality, its inclusion would simply add an unnecessary complexity to the disclosure process.

In connection with a variable rate, it is important to recognize that at its core a variable rate is one that is designed to move in tandem with market conditions and usually is not precisely formulaic, but allows an ESCO discretion to adjust the price, both to reflect market conditions and to continue to provide a competitive edge in the marketplace. Therefore, the suggestion by PULP that where there is a variable rate the disclosure should identify the factors on which the variable rate will be adjusted, overlooks that a specific formula with exact factors and percentages may not be available and applicable to this type of rate. In connection with the notice associated with a variable rate, there should be no ongoing notice requirement if, for example, the customer has signed up for a monthly variable rate and the customer is informed up-front that the rate will vary on a monthly basis. Under such circumstances where the customer upon signing is advised when the rate will change, no further notice would be required.

PULP also recommends that the public disclosure of information should also include a copy of the ESCO's written agreement.⁸ This proposal should not be adopted. It is critically important that the price reporting requirements be kept simple, clear, that every effort be made to minimize negative competitive impacts. The particular contract that each ESCO has developed is proprietary; the Sales Agreement contains information and provisions developed by each ESCO at its own cost and expense and reflects the

⁸ PULP, p. 6.

ESCO's approach to best meeting the needs of consumers and market conditions. While the ESCO pursuant to the UBP must provide a copy Sales Agreement to the customer, it is totally inappropriate to require the ESCO to post its contract in a public forum, as now suggested by PULP. This intrusion into the competitive operations of an ESCO will only act to inhibit the development of competitive activities, as well as create a disincentive for ESCOs to operate in the State of New York.

PULP supports the disclosure of historic monthly data that would incorporate monthly price data and the typical bills for each of the previous six months and for the previous year.⁹ As noted in our initial comments, SCMC/RESA strongly recommends that the price reporting requirement not include disclosure of historic data. Providing historical data engenders a comparison that is inaccurate and creates misleading impressions. ESCOs generally price on a real time basis. In contrast, utility commodity charges pursuant to tariff are subject to various true-ups, adjustments, and other out-of-time factors which are not reflective of the actual price for that particular month or historical period.

Further, historic data is not of much use in providing the customer with a true picture of what the cost will be on a going-forward basis, and based upon past behavior, tends to create erroneous assumptions on the part of the consumer, notwithstanding disclaimers to the effect that past performance is no indication of how the future will be. This is especially true in periods of volatile pricing, which has now become the norm in the gas industry. Further, certain ESCOs may offer pass-through of certain charges, such as NYISO specific costs, which only become known at a later point in time and which further tend to complicate the development of a workable historical analysis. In addition,

⁹ PULP, p. 6.

ESCOs in a previous period may have offered various rebate programs, which would not be effective on a going-forward basis and would further tend to distort any comparative analysis.

Finally, if the ESCO's historic data is used in a comparison with the utility commodity costs, further confusion will be engendered because that analysis will fail to take into account the other savings that accrue to a customer by migrating to retail access service, such as the tax savings on the distribution portion of the bill, as well as the elimination of the MFC charges. In sum, provision of historic monthly data should not be incorporated within the ESCO's price reporting requirements.

It is suggested by PULP that the price reporting requirements established by the Commission in this proceeding should also be extended to the utility because the distribution utilities are also making an offer of service in the comparative market. Therefore it recommends that each utility must be part of the price disclosure program emanating from this proceeding.¹⁰ This suggestion underscores the fears which permeate most of the comments filed by the ESCO community in this proceeding.

In our view, introduction of formalized reporting requirements becomes a slippery slope in which ESCOs are treated like utilities and we move away from a comparative deregulated structure to one which is highly regulated and structured. Incorporating the utility in the price reporting requirements exemplifies and underscores these fears with great clarity. Under the rubric proposed by PULP, utilities will now become viewed as a competing provider thus potentially undermining the comparative position of ESCOs and transmogrifying this proceeding which was intended solely to provide consumers with information about ESCOs, not utilities. Moreover, this approach

¹⁰ PULP, p. 7

is unworkable as in addition to the existing reporting scheme affecting utilities which include tariffs and monthly commodity cost filings as well as typical bill estimates prepared by the PSC, it will be necessary to structure the utility data in such a manner that it is comparable to every ESCO that may provide comparative commodity service in the utility service territory. This is an impossible and unworkable task and moves us down the slippery slope of structured utility type tariff filings which are antithetical to competition.

PULP further asserts that the information supplied by ESCOs under the program must be "accurate and current." Further that the pricing shown in the disclosure "must be the same as that which is actually offered by the ESCO when the customer calls up for service."¹¹ SCMC/RESA concurs that the information supplied by the ESCO should be accurate and current as of the time it is filed with the Staff. Nonetheless, in view of the volatility and fast moving nature of the commodity markets all pricing information must contain a disclaimer that the price is subject to change in light of market conditions. Thus, it is inappropriate to include the further requirement as urged by PULP that the price reported by the ESCO will always be the same price in effect as of the time the customer calls up for service. By way of example, if the filing is made on the first of the month and the customer does not call until the 15th of that month, intervening market changes may require a modification of the ESCO's offer.

In connection with the enforcement of the price disclosure requirements adopted by the Commission in this proceeding, PULP proposes that if an ESCO fails to make public the price which it intends to charge customer then its contract with the customer

¹¹ PULP, p. 11

should provide for a "default price to be used instead."¹² According to PULP, the default price would be the applicable price until the ESCOs preferred price change is put through the price disclosure mechanism and the customer is given the opportunity to accept or reject the new price. Further PULP suggests that the default price should be set to reflect a 7% discount from the utility price.¹³

SCMC/RESA believes that it is premature at this time to develop enforcement mechanisms that would be used in concert with a price disclosure program. Instead SCMC/RESA recommends that the Commission adopt a policy statement calling for the implementation of a price reporting mechanism and then provide Staff and parties a 12 month period to work out the details of the program as well as to take note of the problems, concerns and the problems that arise with implementation of the program. After that 12 month transition period the parties would examine what mechanisms are most appropriate given the actual experience and the lessons learned during the prior 12 months. Consequently, we take issue with the use of default prices as suggested by PULP as premature and potentially complicated process to ensure proper enforcement of the program requirements by ESCO. Instead the more lucid approach is to develop the specific program components, examine the problems and concerns that arise in implementing the program and thereafter first assess the appropriate enforcement mechanisms.

¹² PULP, p. 13

¹³ PULP, p. 14

III. CONCLUSION

SCMC/RESA respectfully urges the Commission to adopt the recommendations contained herein and thanks the Commission for the opportunity to present their views on the important issues raised in these proceedings.

Respectfully submitted

Small Customer Marketer Coalition and
Retail Energy Supply Association

By: Usher Fogel, Counsel
Usher Fogel, Counsel

Dated, Cedarhurst, New York
August 18, 2006