STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Retail Access Business Rules	)	**Case 98-M-1343**
Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding The Marketing Practices of Energy Service Companies	)	**Case 07-M-1514**
Ordinary Tariff Filing of National Fuel Gas Distribution Corporation to Establish a Set Of Commercially Reasonable Standards for Door-to-Door Sales of Natural Gas by ESCOs	)	**Case 08-G-0078**

REPLY COMMENTS OF THE NEW YORK STATE ENERGY MARKETERS COALITION ON MODIFICATIONS TO THE UNIFORM BUSINESS PRACTICES APPLICABLE TO ENERGY MARKETING COMPANIES

The New York State Energy Marketers Coalition ("NYSEMC")[1] appreciates this opportunity to submit reply comments in connection with the proposed revisions to the Uniform Business Practices ("UBP") set forth and originally published by the New York State Public Service Commission ("Commission" or "NYSPSC") on March 19, 2008, and the submission of Initial Comments by more than twenty (20) parties. These Reply Comments are applicable to each of the cases identified above: to Case 98-M-1343, related specifically to the development and revisions of the UBP; to Case 07-M-1514, related to the petition of the New York State Consumer Protection Board and the New York City Department of Consumer Affairs regarding the marketing practices of Energy Services Companies ("ESCOs"); and Case 08-G-0078, associated with the 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. The NYSEMC recognizes the critical importance of consumer protection and offers these Reply Comments as a balanced view on the UPB, and as a supplement to its original Comments filed April 18, 2008.

[1] NYSEMC members include Interstate Gas Supply of New York, Inc. (www.igsenergy.com), Vectren Retail, LLC (www.vectrensource.com), and Commerce Energy, Inc. (www.commerceenergy.com). The NYSEMC collectively serves approximately one million residential and small commercial natural gas and electricity customers in deregulated markets located throughout twelve states across the United States.

The extensive marketing experience of NYSEMC members exceeds three decades in nearly twenty utility franchise areas nationwide. The members' philosophy of providing the highest quality customer experience and providing the maximum level of consumer protection has been well demonstrated by the actions of each individual member. This philosophy is critical to NYSEMC members' ongoing success. As such, NYSEMC believes in the patient, steady, and thoughtful development of retail markets using marketing practices that represent ESCOs with integrity and professionalism. NYSEMC members recognize the important public policy and business premise that consumers must be treated fairly and respectfully at all times, and work diligently to ensure continued consumer protection criteria in all transactions – including marketing, sales, product delivery, billing, and credit and collection.

NYSEMC REAFFIRMS THE IMPORTANCE OF TREATING CONSUMERS FAIRLY

In its Initial Comments, NYSEMC stated its strong support of the Commission's disciplined, careful, and consumer-oriented development of competitive policies, intended to foster a robust retail marketplace, and conducted in an environment intended to ensure on-going reliability while introducing energy choice for all customers. We reaffirm that commitment with these Reply Comments, and determine that many members of the energy marketing industry also support and uphold these policies, up to and including the proposed changes to the UBP and the additional Marketing Standards included in the proposed new Section 10.

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

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

NYSEMC members take very seriously their responsibility to treat consumers fairly at all times. In fact, NYSEMC members account for just over 1% of the *initial* and *escalated* complaints made against ESCOs before the NYSPSC in 2007.[2]

EXISTING GENERAL BUSINESS LAW MUST BE CONSIDERED IN CONTEXT OF ESCO MARKETING STANDARDS

Throughout the debate on the level of protections needed for residential energy consumers within the UBP, NYSEMC again affirms that Parties be aware of other, well-established statutory and regulatory constructs that exist to maximize the protection of consumers. These include, but are not limited to, the General Business Law (§ 349), New York Door-to-Door Sales Protection Act, the NYC Consumer Protection Law, and the NYS Telemarketing and Consumer Fraud and Abuse Prevention Act, to name a few. As noted in our Initial Comments, the application of these laws should not be any different for the sale of natural gas and electricity than for the sale of communications services, home improvement services, or other items. We do feel that Marketing Standards need to be *narrowly constructed* to ensure that the marketplace remains based upon free enterprise – where consumers are enabled to choose to purchase products and services not solely related to perceived savings, but also for other value-added benefits consumers find meaningful. It is

[2] See http://www.dps.state.ny.us/Dec2007.pdf, p. 12-14

important that any adopted Marketing Standards **not** be built around just providing and guaranteeing savings. Value propositions offered through the competitive process are much broader. Standards constructed only on savings are presumptuous about consumer demand and will stifle innovation. Competition is not about performance against a perceived, yet ill-defined, standard of price comparison. Competition is a market dynamic which drives efficient pricing and innovation.

As stated previously, the relationship between an ESCO and consumers needs to be based upon full disclosure of the terms and conditions associated with the contract to purchase a product or service. In this regard, the purchase of energy should be no different than the purchase of any number of other products or services which are governed by contractual relationships.

REASONABLE LIMITS ARE NEEDED FOR RECISSION AND GRACE PERIODS, AS WELL AS TERMINATION/CANCELLATION FEES

Positions on the Staff's proposed changes to the UBP were vetted in great detail through a formal Comment Period and two (2) Technical Conferences. At each venue, Staff provided an opportunity for the Parties to explore definitions, debate responsibilities of ESCOs, consumers and utilities; and, to consider reasonable approaches to the formalization of ESCO Marketing Standards as a new Section 10 to the existing UBP. In addition, there was an opportunity for the Parties to suggest additional changes to the UBP, and to comment on other issues related to competition.

NYSEMC believes that the formal Comments provided by more than twenty Active Parties in the Case offered – in many regards – a supportive and constructive framework for the Commission to finalize Marketing Standards for ESCOs that are reasonable and workable. NYSEMC does feel, however, that the following areas need additional comments to ensure the support for consumer protection *and* a robust competitive marketplace. For this reason, we limit our Reply Comments to the areas noted on the following pages.

Q3. 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?

A3. As NYSEMC noted in considerable detail as part of our Initial Comments, this question must really be considered in two parts.

NYSEMC strongly believes that ESCOs should be able to charge a *cancellation fee* associated with any contract or agreement which clearly stipulates that such a fee will be assessed for early termination of an agreement. While the fee amount, if any, should be determined by each ESCO, any fee should be fully disclosed to the consumer in clear and specific language in the contract for purchase (e.g. *"Early termination of this contract may result in a cancellation fee of $50 charged to the customer"*). With full disclosure by the ESCO, the early termination fee is an element of a bargained-for exchange between consenting parties and should be afforded deference. In Ohio, consumers dictate what they will tolerate in natural gas cancellation fees; and the market, through consumer preferences, has established what consumers deem are reasonable cancellation fee levels. As the competitive market matures in New York, a similar marketplace should develop.

However, NYSEMC acknowledges that the retail energy market is in an early stage of development. To foster an environment that encourages consumer outreach and education, and engenders consumers with a feeling of confidence as they venture into the competitive energy market, NYSEMC recognizes that the lower the level of risk associated with a consumer's choice the greater the number of consumers who will venture into the competitive market. For this reason, although NYSEMC believes a blanket and universal cap on early termination fees is based on an erroneous assumption that consumers are unable to enter into a freely bargained-for exchange, we feel that a reasonable cap on termination fees – for a defined period of time, and applicable to the commodity portion of a purchase from an ESCO only – can be supported.

To balance the potential financial and administrative risk to ESCOs caused by a cancelled agreement – which may not be large scale for a single customer, but when added together across large customer bases can create significant financial burdens and risk, NYSEMC believes strongly that any such termination cap should sunset 36 months from implementation of the modifications to the Uniform Business Practices; to be extended by mandate of the PSC only in those instances where regulatory sanction is needed on a case-by-case basis upon finding of ESCO misconduct. NYSEMC could also support an absolute cap based on the same conditions outlined above ($250 as an absolute cap is a reasonable number); although we would here strongly suggest that the PSC consider tying cancellation fee caps to the number of years in a contract (for example, for each year of the contract, the cancellation fee cannot exceed $50). Our concern is that this single issue not be considered in a vacuum, and that the limitation of cancellation fees should be, to the greatest degree possible, connected with what consumers and the marketplace dictates.

In any event, lack of full, up front disclosure by an ESCO should negate that ESCO's ability to recover any cancellation or termination fees. If the customer is not made aware of these fees before execution of an agreement, marketers should be prohibited from collecting them.

Finally, NYSEMC believes that consumers should enjoy the same rights with respect to early cancellation that an ESCO reserves for itself in the contract. If, for example an ESCO permits per the terms of its contract with the customers that it can cancel a fixed price agreement mid-term without a cancellation penalty and absent any breach by the customer, then the customer should have the same right to cancel without the imposition of an early termination fee. This would in no way interfere with imposition of contractual provisions or other remedies at law in the event either party is in breach of the customer contract.

Q4. 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?

A4. After careful consideration of the concern of the Commission, the CPB, DCA, Attorney General's office and others; and following a close review of all other Comments made to date, NYSEMC recommends that the following protocol be adopted as part of Section 5, Part B, Subsections 2 and 3), and Attachments 1, 2, and 3 with regard to the grace period/rescission period associated with all enrollments:

<u>For Telephonic, Direct Mail Return Card or Web-based Agreements with Customers (Attachment 1, 2 and 3 – where applicable):</u>

- ESCOs shall be permitted to enroll customers by notice to the utility on the day that the sale is made and executed.
- The utility shall send a written notification to the customer within one day of receipt of the enrollment by the ESCO, stating that the customer has seven (7) days from the postmarked date of the notice to contact the utility and/or the new ESCO and cancel the enrollment. At the same time, notification would be sent from the utility to the incumbent ESCO supplier (if any), informing the ESCO that the customer is intending to make a switch.

This protocol will ensure a rescission period greater than three (3) days from the time of the sale, easily exceeding this standard requirement in general commerce.

<u>For Door-to-Door Sales or Other In-Person Sales Made Away from the ESCO's Place of Business resulting in a Signed Agreement (Mall kiosks, Home Shows, etc.); (Attachment 3, where applicable)</u>:

- ESCOs shall be required to hold a signed agreement for three (3) days before sending an enrollment notice to the utility, to assure informed consent on the part of the customer. Enrollment notice may be submitted to the utility at the completion of the 3-day period.
- The utility shall send a written notification to the customer within one day of receipt of the enrollment by the ESCO, stating that the customer has seven (7) days from the postmarked date of the notice to contact the utility and/or the new ESCO and cancel the enrollment. At the same time, notification would be sent from the utility to the incumbent ESCO supplier

(if any), informing the ESCO that the customer is intending to make the switch.

This protocol – for door-to-door sales and similar face-to-face transactions – will help ensure a rescission period equal to more than ten (10) days from the time of the sale, ensuring that customers engaged in this form of transaction are provided ample time to rescind their decision without placing the ESCO at a commercially impractical disadvantage.

In addition to this suggested change, a statement should be added to the UBP that if any other federal or state mandated rescission period exists for door-to-door sales (now or in the future), that ESCOs are further required to conform to that requirement.

NYSEMC believes that the methodology set forth above provides a reasonably balanced compromise to establish a set of practices for ESCOs to ensure adequate protection for consumers while not unduly stifling an effective sales channel.

Thus, if the contract language is clear and specific, we believe that consumers should be allowed at least a three-day period to cancel their agreement with an ESCO without any potential penalty; which, on a practical level will be achieved with the 7 day rescission period outlined above. In addition, NYSEMC believes that any circumstance where the ESCO fails to disclose all conditions of the sale, which causes a customer to seek termination of their relationship, the customer should be able to cancel their agreement with the ESCO at no risk or expense.

Q10. Are there additional modifications to the UBP that should be considered?

A10. NYSEMC requests that the Commission consider four additional areas of modification in the UBP.

First, as noted in its Initial Comments (and supported by other Parties), NYSEMC strongly believes that access to customer information is an important consideration that the Commission should consider with regard to its marketing

standards, the development of the competitive marketplace, and with specific regard to the UBP.

In its Order denying the Petition of Accent Energy, LLC for utilities to provide customer account information to facilitate the ability of ESCOs to enroll customers, the Commission required that each utility file plans[3] on how they could make account information easily available to their customers; so that they could contact utilities from shopping mall kiosks, home shows, or other public access points, and obtain their account information. Utilities did file plans; however, no disposition of those plans has taken place by the Commission. This matter is important to NYSEMC members, who respectfully request that the matter be expedited for review.

While numerous sources and services for providing consumer information are available, the current information on commercially available customer lists is not utility specific and, thus, inaccuracies are unavoidable.

This information is especially important in the context of natural gas marketing. Unlike electricity, where virtually every household is a consumer, natural gas infrastructure does not exist in every neighborhood. The ability to market to only those consumers who are able to make choices regarding a product reduces acquisition costs, reduces unwanted solicitations, and avoids customer confusion.

A <u>second</u> issue of importance to ESCOs is the impact that an even minor change to customer information has on an ESCO-consumer relationship. Currently, upon even the slightest change in customer information (title, address, etc.), most utilities issue a new account number to the consumer which results in the customer reverting to the utility for commodity supply, without any consideration for the ESCO sales relationship that may exist. This action becomes, in effect, a "reverse slam," where the utility vitiates an existing contractual relationship between the customer and ESCO, with no communication to the ESCO except the EDI customer drop notification.

[3] Case 98-M-1343, *In the Matter of Retail Access Business Rules, Petition of Accent Energy, LLC,* Order Denying Petition and Making Other Findings (issued November 7, 2006)

A third issue for consideration as part of the proposed changes to the UBP is the timing on the release of the Monthly Cost of Electricity or Gas data to the Commission and public. ESCOs find it increasingly difficult to develop product offerings that are competitive with the utility since ESCOs need to quote prices in the marketplace before utilities even submit their monthly expected cost of commodity. This does not enable a consumer to make an informed choice, and therefore creates a competitive disadvantage for the ESCO.

Finally, following a process which provides due process, if the Commission determines that an ESCO has violated the UBP Marketing Standards, there should be an automatic suspension of the ESCO's solicitation and marketing activities on a given utility system for a minimum of 14 days. This suspension will allow the Commission to fully investigate complaints received, and provide the ESCO an opportunity to adjust its practices, if necessary. Subsequent unresolved violations of the UBP should carry suspension of the ESCO from a given utility system for increasingly longer periods of time, up to and including decertification by the Commission for solicitation activity in New York State for a period of up to one year.

CONCLUSION AND OFFER OF CONTINUED COOPERATION

NYSEMC applauds the recent creation of the Office of Retail Access as part of the Department of Government and Industry Relations. We believe that the designation of an ESCO point-of-contact will help ensure compliance with the UBP, and will foster a collaborative relationship between ESCOs and the Commission. NYSEMC members are available to the Office of Retail Access for any assistance and information we can provide.

Great progress has been made in New York to bring the benefits of a competitive retail energy market to consumers. The majority of ESCOs recognize the trust which has been placed in them by the Commission and are committed to fair and equitable treatment of all customers, and the full development of a consumer-driven energy market with new and innovative services, green products, competitive prices, and energy efficiency tools. However, more work needs to be done, and efforts to cultivate a workably competitive

marketplace cannot stop with the issuance of formal marketing standards. Continued vigilance by the Commission, cooperation by utilities, investments by ESCOs and creative, forward-looking thinking by all interested parties is required to further the stated Commission goal to enable meaningful choice to all energy consumers in the State of New York.

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

Respectfully submitted,

New York State Energy Marketers Coalition

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