

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

- Case 98-M-1343 - In the Matter of Retail Access Business Rules.
- Case 07-M-1514 - Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Services 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 ESCO's.

REPLY COMMENTS OF CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC.  
AND ORANGE AND ROCKLAND UTILITIES, INC. ON REVISIONS  
TO THE UNIFORM BUSINESS PRACTICES

More than twenty parties submitted comments on proposed revisions to the Uniform Business Practices (referred to herein as the "UBP"). While most of the comments support the establishment of mandatory standards of conduct as a means of addressing the potential harms caused by misleading marketing practices on the part of ESCOs, there is much variation among the commenters on the proposed requirements that should be adopted to achieve this goal. Having considered the comments filed by other parties, Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (the "Companies") hereby offer the following responses.<sup>1</sup>

**Enforcement of the UBP**

National Fuel (p. 5) proposes that the utilities, and not Staff or the Commission, should be responsible for the enforcement of ESCO marketing standards. The Companies oppose this suggestion, and believe that the Commission is the only logical and neutral enforcer of the UBP. It is not proper, in the competitive marketplace, to place

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<sup>1</sup> References to parties' comments are by short name and page number.

distribution utilities in a position to have to police ESCOs. The Companies agree with PULP's suggestion (p. 4) that this proceeding should culminate in a Commission order setting forth UBP marketing standards that will be fully enforceable by the Commission. Utilities have a duty to comply with Commission regulations. Utilities can alert the Commission to circumstances, such as circumstances affecting safety or service reliability, that relate to ESCO compliance. But the Commission is properly responsible for a uniform statewide enforcement that is impartial and even-handed.

### **Return of Customer to Full Utility Service**

Both Gateway (p. 9) and SCMC (p. 22) propose that the UBP, Section 5(H)(1), be modified to require customers to contact the ESCO, prior to contacting the distribution utility, when they are initiating a return to full utility service. The Companies oppose this proposal. As stated in the Companies' initial comments, distribution utilities have an obligation to provide customers with full utility service upon request. Returning customers to full service on request serves as an important protection for customers in the event that an ESCO delays, or refuses, to return customers to full utility service. While customers have the ability to easily switch to an ESCO, they must also have the ability to return to the utility or to switch suppliers without unreasonable delay.

The Companies have experienced complaints from customers who contacted an ESCO to initiate a return to full utility service, but the ESCO delayed or failed to initiate the return to the utility. In 2005, at the request of ESCOs, Con Edison modified its procedures regarding customer requests to return to the utility for supply. When a customer contacted Con Edison, instead of processing the request to be returned to the utility, Con Edison agreed to notify the ESCO via an EDI notification that the customer

had requested to be returned to the utility. The procedure then provided an opportunity for the ESCO to contact the customer to discuss the request and make an attempt to retain the customer. If the ESCO's attempt to retain the customer was not successful, the ESCO was to initiate an EDI drop request to Con Edison to facilitate the customer return to the utility. This procedure caused complaints from customers where, despite Con Edison's EDI notification to the ESCO indicating that the customer wanted to return to the utility, and customer calls to the ESCO making the same request, ESCOs delayed or failed to initiate the return to the utility. As a result of these customer complaints, Con Edison modified its procedures, in 2006, to ensure that customers have the opportunity to promptly return to utility service upon request. The Companies foresee similar complaints should customers be required to contact their ESCO before returning to utility service as SCMC and Gateway propose.

In its initial comments, SCMC also proposes that if the customer re-contacts his or her utility, the utility should initiate the request to return to full utility service. This proposal would create a process that would force a customer to call the utility twice, even if they have made their decision to return to utility service. Requiring customers to call twice to have their request granted would cause customer frustration, as well as increased calls to a utility's call center. The Companies also point out that ESCOs would not respond favorably to a policy requiring customers who are currently being served by an ESCO to contact their incumbent ESCO before switching ESCOs. The Companies believe that customers switching ESCOs, or returning to the utility, should be able to switch suppliers without unreasonable requirements or delays.

The Companies proposed in their initial comments a procedure whereby a customer who contacts the utility to arrange for full utility service should be reminded to speak to the ESCO about their returning to full utility service. If the customer has already contacted the ESCO, or wants to proceed without contacting the ESCO, however, the utility should nevertheless honor the customer's request and notify the ESCO within two days. The Companies propose modifications to Section 5(H)(1) to clearly indicate that utilities have the obligation to return customers to full utility service upon request.

The Companies propose that Section 5(H)(1) be modified to read:

A customer arranges for a return to full utility service by contacting the distribution utility or ESCO. An ESCO contacted by the customer shall, within two days, notify the utility that the customer requested a change of service. A utility contacted by a customer shall remind the customer to contact the ESCO about their returning to full utility service provided, however, that if the customer has already contacted the ESCO or wants to proceed without the contacting ESCO, the utility shall honor the customer's request and notify the ESCO within two days. If a change to full utility service results in restrictions on the customer's right to choose another supplier or application of a rate that is different than the one applicable to other full service customers, the distribution utility shall provide advance written notice to the customer.

### **Reversion of Customers to Full Utility Service**

Gateway (p. 7), NYSEC (p.15) and SCMC (p. 17) all complain about an alleged practice whereby utilities transfer ESCO customers back to full utility service, without proper authorization, where there has been a change or modification to the customer's account information.

SCMC, Gateway Energy and NYSEMC ("ESCO Parties") all contend that it is improper for utilities to terminate ESCO supply service or revert a customer back to bundled utility service when an account number changes on a service. These ESCO Parties argue that this utility practice violates the UBP in that it results in changing the

customer's provider without the customer's authorization. However, the ESCOs' argument disregards the fact that while the ESCOs contractual relationship is with a specific person, enrollment of a customer in a retail choice program is based on a specific account. Contrary to the ESCOs' claims, the utility's ability to tie ESCO enrollment to a specific account number actually protects the customer from slamming, as opposed to causing a customer to be slammed.

The Companies will change an account number when the name on the account changes, the customer enters bankruptcy or, in the case of Orange & Rockland, when the customer's service is terminated for non-payment. ESCOs have not raised the latter two circumstances as instances where they are harmed by the lack of continuity in service. Once there is a different customer, the utility must terminate the ESCO's service as well as any consolidated billing and purchase of receivable arrangement with respect to the account (UPB, Sec. 9(F)(4)). Under the circumstances, a continuation of ESCO service with the new account may not serve either the ESCO or the customer's interests or desires.

Because the ESCOs did not raise non-payment or bankruptcy issues in their comments on improper ESCO termination, in all likelihood their primary objection is to account number changes associated with name changes on accounts. As noted above, however, the establishment of a new account upon a name change protects the customer, the ESCO and the utility and, therefore, should not require any changes in the current practices of the utilities with respect to retail choice enrollments. When there is a new customer on an account, under Commission regulations the new customer becomes solely and exclusively liable for charges on the new account and the customer on the

predecessor account remains liable for past charges. The process protects the new tenant, resident, business, etc. from having to assume the charges of a prior occupant and protects the prior occupant from becoming liable for the new charges incurred by a new occupant.

To automatically maintain the pre-existing ESCO on a new account would risk slamming because there is no way that the utility knows that the new person on the account has authorized the ESCO to provide service to the new account. For example, an account may be in a husband's name, a divorce occurs and the husband moves out. The ex-wife assumes responsibility for the account and, as a result, a new account is established. If the ESCO's contract was with the husband, then its relationship with the account has ended with the initiation of a new account by the wife. In order to protect customers from being slammed in these circumstances, the enrollment processes were set up so that a customer's authorization for ESCO service must be obtained for new accounts.

This leaves the remaining issue of circumstances in which the new customer expressly informs the utility that the customer wants to maintain ESCO service on the account. However, as noted in other forums, such as utility rate cases, the Companies' systems were not designed to facilitate the enrollment by ESCOs of newly established accounts, *i.e.*, to provide ESCO service during the first billing period on a new account. So even if the customer wants to continue with an ESCO after a new account is established, the Companies' billing systems cannot currently accommodate this. The processes necessary to change this, and the attendant costs for those changes, are currently being studied by the Companies as part of their respective rate cases, and

interested parties will have an opportunity to comment on this issue when those studies are completed.<sup>2</sup> For the Commission to simply order the Companies to effectuate this new procedure immediately, as requested by the ESCOs, ignores the fact that this is not technically possible and the cost implications of making the necessary system changes, including appropriate means of cost recovery, need to be addressed before such changes are considered.

Additionally, ESCOs Parties' argument that utilities should stand on the same footing as ESCOs with respect to the definition of slamming is untenable. Utilities' role as default service provider implies the customer will "default" to the utility in circumstances where no other provider is authorized to provide service to the customer. The utility needs no express authorization from the customer to provide this service. In any event, in circumstances where a customer is inadvertently or erroneously de-enrolled and returned to utility service without the consent of the customer of record for the account at issue, the utility has a responsibility to the customer to correct the error. This responsibility is the basis for the Companies' request that the customer of record contact the utility directly if the customer receives an enrollment letter for an enrollment that he/she did not authorize and the customer wants to remain a full-service utility customer. Under these circumstances, the Companies should not have to require the customer to authorize the Companies to continue providing supply service.

### **Customer Tax Data**

Gateway (p. 9) and SCMC (p. 21) request that the Commission direct the utilities to provide relevant tax data concerning a customer's account to the ESCOs. This is

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<sup>2</sup> On May 23, 2008, Con Edison submitted to Staff and interested parties its report on the enrollment of new accounts in retail access through its *PowerMove* program.

inappropriate as ESCOs must have their own records of customers' tax status to justify the level of tax collection on the sale of their goods and services.

Every vendor is responsible to collect applicable sales taxes on their sales transactions and remit the taxes to the State and local taxing authorities, as appropriate. The vendor is liable to the State for under-collection and to the customer for recent over-collection to the extent the vendor relied on incorrect information in assessing the tax due. ESCOs should not attempt to shift to utilities responsibility for the accuracy of sales tax collections by proposing to rely on tax status information on utility records. Moreover, some sales tax status information must be derived from certificates provided by customers to vendors named therein. Other vendors cannot rely on these certificates but must obtain them in their own names. For these reasons, each market participant has been and should continue to be responsible for obtaining this information for itself.

### **Estimated Bill Reads**

RESA (p. 26) proposes that utilities should be prohibited from providing more than three consecutive estimated bill reads on any account. This proposal would limit a utility's right, by statute and regulations, to render estimated bills when access to a customer's meter is impaired. The Commission's request for additional enhancements to the UBP can not be interpreted as an opportunity to limit legislatively-established rights and responsibilities. Section 39 of the Public Service Law and 16 NYCRR section 11.13 provide utilities with the ability to provide estimated bills in circumstances where, after reasonable attempts to do so, the utility is unable to gain access to a customer's meter to obtain actual meter readings. RESA's proposal is an attempt to limit this ability. There is no evidence presented that utilities do not use reasonable efforts to gain actual meter

readings, and RESA's proposal to limit estimated bill reads to three consecutive bill reads should be denied.

### **Utility Affiliate Relationships**

Reliant recommends that the Commission incorporate a Utility Affiliate Code of Conduct into the UBP as part of this proceeding. Reliant, however, provides no evidence of behavior between utilities and affiliates that warrant modification to the existing regulatory framework for affiliate codes of conduct for any individual utility(s) or New York utilities in general. Distribution utilities have affiliate codes in place that were developed jointly with Staff and other interested parties (including ESCOs) and approved by the Commission as part of comprehensive corporate restructuring programs specific to each utility.

Further, Reliant's suggestion is unnecessary and outside of the scope of this proceeding. Each and every requirement of the UBP applies to each and every utility affiliated ESCO operating in New York. That is the correct approach since, from the distribution utility's standpoint in implementing its retail choice programs, utility affiliated ESCOs should be subject to the same uniform business practices as all other ESCOs and Reliant has provided no evidence to the contrary. Reliant's suggestion should be dismissed.

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Respectfully submitted,  
/s/  
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