

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.

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

By Notice issued March 19, 2008, the Public Service Commission (the "Commission") invited comments on proposed revisions to its Uniform Business Practices (referred to herein as the "UBP"). The goals of the proposed changes are to impose marketing standards on ESCOs, to improve residential consumer protections, and to provide better remedies to Staff and the Commission for ESCO failure to comply with the UBP. Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (the "Companies") hereby offer their comments regarding the proposed changes and also offer some proposals for further revisions to the UBP.

The proposed changes stem, in part, from a Petition filed with the Commission by the New York State Consumer Protection Board ("CPB") and the New York City Department of Consumer Affairs ("DCA"), dated December 20, 2007, seeking to incorporate into the UBP, with modification, a voluntary ESCO Industry Statement of Principles. The Statement of Principles sets forth standards related to: 1) training of

ESCO marketing representatives; 2) door-to-door and telephonic ESCO marketing practices; and, 3) ESCO conduct. In addition, in response to ESCO marketing activity in its service territory, National Fuel Gas Distribution Corporation (“NFG”), filed a new tariff with the Commission to incorporate a section in its Gas Transportation Operating Procedures manual governing ESCO door-to-door marketing practices. A technical conference was held on April 3, 2008, at which time the reasons for the proposed changes were discussed and the parties were given an opportunity to discuss them and offer suggested revisions.

The Companies 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. In particular, the Companies see a need for mandatory standards of conduct addressing the manner in which ESCOs identify themselves when soliciting customers by telephone and in door-to-door sales. Further, the Companies offer several suggestions for modifications to the UBP to update the UBP so that it better reflects the competitive marketplace as it exists today.

Proposed Modifications to the UBP

- DPS Eligibility: Section 2-C-1

Section 2, Item C-1 proposes the following language:

ESCOs deemed eligible to provide commodity service by the DPS must commence service within two-years from the date of the letter notifying the ESCO of their eligibility status (eligibility letter). An ESCO commencing service after the two-year anniversary date must submit a new application pursuant to Section 2.B and may be required to conduct additional Phase I testing before eligibility status may be granted.

In view of the requirement of an annual statement that the information and attachments in an ESCO's Retail Access Eligibility Form and application package are current (Section 2.D(1)(a)) and the new proposed Section 2.D(2-A) requiring that ESCOs resubmit their application packages to DPS every three years, the provisions of proposed Section 2.C(1) appear unnecessary, redundant and confusing. Rather than having two separate periods for review of eligibility by DPS Staff, *i.e.*, two years for ESCOs that have not commenced service (a term that is not defined in the proposed section) and three years for all other ESCOs, the Companies propose that the three year review period is adequate for all ESCOs. Additionally, proposed Section 2.D(2-A) should be revised to expressly provide that once an initial eligibility letter is issued, utilities should be entitled to rely on it unless and until they are informed otherwise by DPS Staff.

- Marketing Standards: Section 10-C-1-b

Section 10, Item C provides standards for the ESCO's contact with prospective customers. The Companies support the standards set forth in Item C, with one important exception: ESCO representatives should be required to positively affirm that they are not employed by, and do not represent, the distribution utility when they are soliciting customers.

The Companies repeatedly field calls from customers asserting that "someone identifying themselves as a Company employee" came to their door and: (i) insisted on seeing their bill to assess whether or not they were being charged correctly; (ii) claimed they were entitled to discounted service; or (iii) argued that they had to sign up with an ESCO for service by a date certain. ESCO misrepresentations regarding who they are and what they offer in the energy marketplace are harmful in two ways. First, they mislead customers who enroll out of fear of the loss of utility service and then complain they have been "slammed." Second, the contact time represents a missed opportunity to properly educate customers regarding how the competitive marketplace works and who plays what role in it. In fact, such conduct on the part of ESCOs needlessly risks alienating the very customers who are potential participants in retail choice.

ESCO representatives need to affirmatively represent who they work for when conducting in-person or telephonic solicitations. The ability to make a legitimate sale is dependent on such identification. Additionally, however, because of the on-going transition in the industry to a competitive market and taking into consideration the nexus between the utility and the ESCO in serving the customer, the ESCO representative also needs to make it clear to the customer that he or she does not represent the utility and is not contacting the customer on behalf of the utility. In the case of ESCO identification, affirmative statements are necessary both with respect to whom the marketer does represent and whom the marketer does not represent. Moreover, with an in-person or telephonic encounter, these representations must be made orally. Providing the customer with written materials is simply "too little, too late" for a situation in which the customer is

confused or has been misled with respect to the identity of an ESCO representative.

The Companies propose that during in-person or telephonic solicitations, ESCO representatives must, at the initiation of the contact, clearly state the name of the ESCO represented by the marketing representative and the marketing representative's association with the ESCO. The Companies propose the following language be substituted for the current first sentence in Section 10-C-1-b and Section 10-C-2-c:

Shall never represent that the marketing representative is an employee, working on behalf of, or representing a distribution utility and shall clearly state that the representative is not an employee or representative of any distribution utility, referring specifically to the primary distribution utility in the customer's geographic area, and that the representative is not contacting the customer on behalf of, or at the request of, the local distribution utility at the onset of the solicitation.

This foregoing representation will clarify for the customer, from the onset, that the representative is working for an ESCO and not on behalf of the local utility.

Additional Modifications to the UBP

- **Creditworthiness: Section 3-B-1-b**

Section 3 Item B-1-b establishes that an ESCO shall satisfy a distribution utility's creditworthiness requirements if:

The ESCO enters into a billing arrangement with the distribution utility, whereby the distribution utility bills customers on behalf of the ESCO and retains the funds it collects to offset any balancing and billing service charges provided that the distribution utility has a priority security interest with a first right of access to the funds. The ESCO shall submit an affidavit from a senior officer attesting to such utility interest and right.

The Companies propose modification to this language to ensure that ESCOs who serve customers under more than one billing option provide appropriate security with respect to their load billed under the dual bill option. The Companies have had ESCOs argue that this provision, as currently written, allows the ESCO to enroll a few customers in the utility's consolidated billing service as security against balancing charges payable by the ESCO for not only those customers but a much larger group of other customers as well.

In these situations, the billing arrangement should be judged inadequate to satisfy the UBP creditworthiness requirements. ESCOs who do not satisfy creditworthiness requirements in any other way outlined in section 3 Item B should be required to post security for balancing charges associated with service to the dual billed customers in accordance with Section 3 Item D. The language in section 3- B-1-b should be modified by adding the following sentence:

An ESCO serving customers outside of such billing arrangement, who does not satisfy the creditworthiness requirements under any of the provisions of Section 3-B, must satisfy a distribution utility's security requirements for those customers served outside of such arrangement in accordance with Section 3-D.

- Changes in Service Providers: Section 5-H-1

Section 5-H -1 establishes a procedure for customers to return to full utility service. The Companies propose modifications to the language to improve the process and to protect consumers from ESCOs who, in response to a customer's request, refuse or delay returning customers to full utility service. Section 5-H-1 currently states:

A customer arranges for a return to full utility service by contacting the distribution utility and ESCO. Each provider contacted by the customer shall, within two days, notify the other provider that a customer requested a change of service and remind the customer of the need to contact the other provider to initiate the change in service providers, or arrange for a conference call with the other provider and customer. An ESCO, acting as a customer's agent, may contact the distribution utility to initiate a return to full utility service from ESCO service. 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 notice to the customer.

The existing language requires the utility to inform the customer that the customer must contact the ESCO to initiate the return to full utility service and appears not to permit the utility to honor the customer's request without the ESCO's sanction. This has led customers to be retained in retail access programs even after they request the ESCO to return them to bundled utility service. The Companies have received complaints alleging that ESCOs inform customers who contact them to arrange for full utility service that they can not process the request and that the customer must contact the utility to arrange for such service. The Companies have also received calls from customers, on a daily basis, indicating that they have

contacted their ESCO, understand any possible termination fees associated with their contract, and still request to be returned to full utility service.

In order to ensure that customers who wish to return to full utility service are so returned upon request, the Companies propose the following modifications. First, a customer should not be required to contact the ESCO *and the utility* to arrange to return to full utility service. A customer who contacts an ESCO to return to full utility service should not be required or reminded to call the utility. ESCOs have existing EDI communication standards to communicate to the utility their customers' requests to be returned to full utility service, making a call to the utility an unnecessary requirement. Second, the language should be modified to clarify that, while 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, the utility should nevertheless honor the customer's request and notify the ESCO within two days. Section 5-H-1 should clearly indicate that, as the provider of last resort, distribution utilities have the obligation to return customers to full utility service upon request. This serves as an important protection for customers in the event that an ESCO delays, or refuses to return, customers to full utility service upon request. While customers have the ability to easily switch to an ESCO, they must also have the ability to return to full utility service without unreasonable delay. The Companies propose that Section 5-H-1 be modified to read:

A customer arranges for a return to fully 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 notice to the customer.

- Changes in Service Providers: Section 5-D

Section 5-D establishes customer enrollment procedures. The Companies have experienced a practice whereby an ESCO, after receiving a notice from the utility that the customer will be switching to another ESCO or returning to the utility, utilizes the initial enrollment authorization to re-

enroll the customer. The ESCOs claim that they have a valid sales agreement with the customer and ignore the fact that the customer has elected to switch providers. To limit the ESCO's authority to do so, the Companies propose an additional item under this section to clearly indicate that an ESCO's initial enrollment authorization should not be used to re-submit an enrollment after the ESCO receives notice from the utility that the customer is switching to another ESCO or is returning to full utility service. The Companies believe that submitting an additional enrollment to the utility without contacting the customer to obtain an additional enrollment authorization constitutes "slamming." When an ESCO receives notice from the utility indicating that the customer is switching to another ESCO or returning to full utility service, this notice indicates that the customer has exercised its option to switch providers. This decision on the part of the customer should be honored by all parties, unless and until the customer authorizes some other action. The Companies propose a new provision, Section 5-D-9 to read as follows:

An ESCO's initial enrollment authorization is no longer valid should the ESCO receive notice from the utility that the customer is switching to another ESCO or is returning to full utility service. An ESCO must obtain a new enrollment authorization from the customer before submitting an additional enrollment to the utility.

As a final comment, we note that we mentioned at the Technical Conference the insertion in Section 2-B-1-m of a reference to an OCS Utility Contact Form. The form is to be used by ESCOs. We suggested that the form be renamed the OCS ESCO Contact Form.

The Companies support the proposed revisions to the Uniform Business Practices with the above-discussed revisions and suggestions.

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Respectfully submitted,

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