STATE OF NEW YORK
BEFORE THE
PUBLIC SERVICE COMMISSION

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

INITIAL COMMENTS OF
ENERGETIX, INC. AND NYSEG SOLUTIONS, INC.
IN RESPONSE TO MARCH 19, 2008 NOTICE

Pursuant to the schedule established in the notice issued March 19, 2008 in the above-captioned proceedings soliciting comments on revisions to the Uniform Business Practices ("UBP"), Energetix Inc. ("ENX"), and NYSEG Solutions Inc. ("NSI") (referred to together as "ENX/NSI") hereby submit these initial comments.

I. INTRODUCTION: A NOTE OF CONCERN BUT A FOCUS ON FIXING THE PROBLEM

The Commission issued a notice on March 19, 2008 ("Notice") soliciting public comment on proposed specific changes to the Uniform Business Practices ("UBP") that currently provide standard state-wide business procedures for distribution utilities interfacing with ESCOs. Notice, at 3. [1]

[1] The "Notice Soliciting Comments On Revisions To The Uniform Business Practices" (March 19, 2008), available in the PSC's online files at:
http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/05BAEE184238C8D085257410006E7D5D/$File/201_Notice_FINAL.pdf?OpenElement.
The Commission's Uniform Business Practices and related documents are available on the PSC's website at:
http://www.dps.state.ny.us/ubr.htm.

The proposed changes would effect significant changes in the regulatory framework within which competitive energy suppliers operate in New York. In particular, the revisions proposed here would effectively bring ESCOs formally under the UBP and therefore under the direct regulatory jurisdiction of the PSC. Instead of setting eligibility rules for participating in retail markets and exercising general oversight (as is currently done), the new rules would make the PSC directly responsible for enforcing the rules and would vest it with a range of sanctions it could impose directly on ESCOs for violations of the new rules. In effect, the revisions would transform ESCOs into regulated sellers much like the distribution utilities, with the difference being that ESCOs would sell energy at non-tariff, market-based prices and subject to "light-handed" regulation of non-price terms and conditions of service. [2] While we can support many of the proposed UBP revisions, we do not believe that a fundamental change in the nature of the regulatory approach is needed to accomplish those objectives. The abusive marketing practices reflected in complaints to the Commission as discussed at the Technical Conference -- misrepresentation, exploitation of the elderly, the young, or those with limited language skills, abusive $500 or $1,800 exit fees for ordinary residential service -- all appear to be prohibited under the existing regulatory and legal framework, as detailed by our earlier comments in Case 07-M-1514.[3] Converting competitive suppliers into a new category of quasi-regulated "non-tariff based utilities" is simply not necessary. Moreover, the Commission's existing review procedures – not to mention the ability to revoke eligibility entirely – would appear more than adequate. In addition, for example, if some ESCO contracts are unnecessarily complex or difficult to understand, the Commission through its Staff is already in a position to recommend revisions when it reviews those contracts when they are filed with the agency to become an

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[2] In this, the proposal is roughly comparable to the Federal Energy Regulatory Commission's ("FERC") long-standing approach for regulating marketers under "blanket marketing certificates" (for gas) and market-based rate

eligible ESCO in the first place or to deny eligibility outright. No change in the rules is required to address this issue.[4]

When activity is already prohibited by law, prohibiting it a second time is not likely to be an effective remedy. Hence, even assuming the PSC has adequate authority under existing law for all the proposed changes – a point we do not concede, but do not here contest -- we are concerned that changes to the basic regulatory status of competitive suppliers may set the stage for subsequent regulatory action that could permanently damage competitive energy markets in New York. For example, any suggestion that the Commission could fix prices to be charged by competitive suppliers or require retroactive refunds would introduce significant uncertainty and tend to undermine the basis for a competitive marketing industry in the state. Accordingly, we would urge the Commission to proceed with considerable care to avoid sending any unintended signal regarding its long-term objectives for advancing competitive energy markets in New York.

Let there be no mistake however: Energetix and NSI are committed to working within the existing regulatory framework to address problems that arise in the transition to a competitive retail market and to enhancing consumer satisfaction with our competitive supply services. In that spirit and in order to help the Commission respond to the complaints that it has received, we offer the following more detailed comments.

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schedules (for electricity). See *e.g.* Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003), order on reh'g, 107 FERC ¶ 61,175 (2004) (adopting certain Market Behavior Rules and related procedural guidelines applicable to sellers' market-based rate tariffs and authorizations for electricity) and 18 CFR § 284.402 (governing "blanket" certificates for natural gas marketing).

[3] Comments Of Energetix, Inc. and NYSEG Solutions, Inc. On Petition For Rulemaking To Modify Regulation Of Marketing Practices Of Energy Service Companies (filed March 6, 2008 in CASE 07-M-1514) at 7-10. To the extent these earlier comments are not otherwise deemed part of the record in the instant proceedings, we hereby incorporate those comments herein by reference.

[4] Uniform Business Practices, Section 2.B.1.b (requiring filing of sample standard Sales Agreement for each customer class as part of application for eligibility determination).

II. An Alternative Approach and Some Concrete Suggested Changes

A. Defining the problem. The technical conference of April 3 was very helpful in providing interested parties a better understanding of the kinds of consumer complaints the Commission Staff has received in recent months and that have informed deliberations leading to the proposed rule. Discussion at the Technical Conference pointed parties towards published sources (newspapers and other media outlets as well as non-governmental organizations) that detailed consumer complaints that had previously only been alluded to in a general way.[5] We look forward as well to seeing Staff's summary analysis of these complaints which may further help frame the issues and inform the crafting of proposed solutions.

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[5] See, *e.g.* the following :

(a) "Complaints raised against energy supplier", Queens Chronicle (March 8, 2007) (available online at: http://www.zwire.com/site/index.cfm?newsid=18063464&BRD=2731&PAG=461&dept_id=574995&rfi=8) (reporting that ESCO sought $1,800 exit fee for residential customer to terminate 5 year contract where customer was promised that utility bill would be "half" of what customer was then paying, but then received bill as much "over $200 more than the bill from Con Ed" the prior year);

(b) "National Fuel targets door-to-door marketers", Buffalo News (February 16, 2008) (available for fee only at:http://nl.newsbank.com/nl-search/we/Archives?p_product=BN&p_theme=bn&p_action=search&p_maxdocs=200&s_dispstring=allfields("privatizing%20the%20enforcement")%20AND%20date(last%20180%20days%20)&p_field_date-0=YMD_date&p_params_date-0=date:B,E&p_text_date-0=-180qzD&p_field_advanced-0=&p_text_advanced-0=("privatizing%20the%20enforcement")&p_perpage=10&p_sort=YMD_date:D&xcal_useweights=no (copy published free of charge at http://www.pulp.tc/html/national_fuel_targets_door-to-.html (viewed April 15, 2008) (stating that more than 40 National Fuel customers in the Hornell area had filed complaints with the PSC in last month alleging that the same ESCO's representatives "used misleading tactics in convincing them to sign five-year fixed-price gas supply contracts that carried prices that were about 30 percent higher than current rates" and referencing a lawsuit filed against the same ESCO by Illinois Attorney General alleging that more than 450 complaints about "deceptive sales practices that falsely promised significant savings for consumers"); and

(c) "Alternative Gas Marketer Changes It's Business Practices", WIVB.com (Buffalo) (February 1, 2008) (reproduced at: http://www.pulp.tc/html/alternative_gas_marketer_chang.html) (referencing a $498 residential termination fee by same ESCO as above and stating that "hundreds" of other New Yorkers filed complaints with state agencies against the same supplier and reporting that the ESCO charging those fees had agreed to cancellation period to cancel without fees up to thirty days after the issuance of the customer's first bill from their utility); and

(d) "MADIGAN FILES SUIT AGAINST U.S. ENERGY SAVINGS CORP.: Attorney General Alleges Company Used Misleading Sales Tactics to Sell Gas Contracts", press release issue February 8, 2008 (available online at: http://www.illinoisattorneygeneral.gov/pressroom/2008_02/20080208_usesc.html) (viewed April 15, 2008) (State of Illinois alleges sale of fixed-rate gas contracts using deceptive sales tactics that falsely promise significant consumer savings in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and failing to clarify for customers that cancellation required a substantial penalty or indicating that consumers could cancel at any time without a penalty; the suit also alleges that some U.S. Energy sales agents negotiated contracts in English with non-English speakers).

As we now understand it, the primary problems raised by the recent round of complaints are the following:

- *Failures to adequately identify the ESCO in marketing and contracting activities*. Some ESCO marketing representatives have left the impression with consumers that they are speaking on behalf of the utility. The problems have included cases where a voicemail message is left on the consumer's phone that does not identify the ESCO and simply invites the consumer to call back for savings off the named utility's rates.
- *Misrepresenting an offer in an unrecorded conversation compounded by misrepresenting that conversation in the recorded portion of the call*. Some consumers have complained that some marketers have promised savings off the utility's rates in the initial – unrecorded -- portion of a marketing call and then omitted such promises in the recorded portion of the call (whether recorded by the marketer or by the Third Party Verification entity). Similar complaints have been made that misrepresentations occurred in in-person or "door-to-door" solicitations. In these cases, the written contract also did not reflect the savings promised in the un-recorded portion of the call (or in-person contact). Consumers have complained that they only discovered the problem when they received an initial bill that exceeded the utility's rates.
- *Abusive early termination fees ($500 to $1,800) for long-term (4-5 year) residential contracts*. There are published reports of one ESCO charging $500 and even $1,800 exit fees for early termination of residential contracts triggering "hundreds" of complaints against that one supplier.[6]
- *Contracts that are too difficult to understand*. Staff has reviewed marketers' standard contracts and apparently concluded that some of them are unnecessarily difficult to understand.

While several other issues have been mentioned at the Technical Conference (e.g. marketing to the elderly or to minors, marketing in English to non-English speakers, etc.), the above issues appear to be the focus of concern.

B. A suggested non-prescriptive approach: the rule of reason coupled with identification of practices or terms that are "*per se*" unreasonable. A principal concern of

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See also "Buyer Beware in Seeking Lower Energy Costs" by Barbara Whitaker, New York Times, (December 2, 2007) available online at http://www.nytimes.com/2007/12/02/nyregion/nyregionspecial2/02powerwe.html?scp=1&sq=buyer+beware+AND+electricity&st=nyt (registration may be required) (referencing disputed $80 termination fee in fixed price contract).

[6] See citations in note 5, *supra*.

ENX/NSI in this proceeding is to avoid *overly prescriptive* regulation that may appear superficially appealing at first, but ultimately creates unanticipated consequences that are difficult and time-consuming to correct. The problem in this regard is that markets change faster than governments. Sometimes markets change slowly and in reasonably foreseeable ways; but at times they move abruptly and in ways that defy the "conventional wisdom". Carbon emissions regulation for example will take effect January 1, 2009 on a regional basis [7] and may or may not be adopted on a national level at some point.[8] Federal legislation may or may not preempt the regional regime. Such changes may or may not affect the way that energy is marketed in New York and may or may not affect the way products are packaged, marketed or priced. At the same time, internet-based services and communications devices are changing the way that people communicate, work and play. At present no one knows for certain how these and other trends will develop or affect retail energy marketing. Is contracting via instant messaging subject to "door-to-door" marketing rules or "telephone" rules? What about an advertisement over a Blackberry? Would a "wet signature" requirement for termination fees prohibit customers from purchasing energy over the internet? Can carbon emissions reduction credits be created by aggregated verifiable retail "negawatts"?

All one knows for certain is that there is considerable risk for unintended and unanticipated consequences if new regulations are overly prescriptive and assume that the future will look just like the past. Hence our general recommendation is that the Commission avoid

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[7] Indeed, the initial auction of emissions allowances is currently scheduled for September 10, 2008. See Northeast Regional Greenhouse Gas Initiative, "Design Elements for Regional Allowance Auctions under the Regional Greenhouse Gas Initiative", (press release issued March 17, 2008) (available at: http://www.rggi.org/docs/20080317news_release.pdf)

[8] *See e.g.* S. 2191 America's Climate Security Act of 2007 ("Warner Lieberman") (available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2191is.txt.pdf) (Committee on Environment and Public Works ordered to be reported with an amendment in the nature of a substitute favorably on December 5, 2007) (available on internet at: http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN02191:@@@L&summ2=m&) (viewed April 16, 2008).

trying to set specific prescriptions that could preclude suppliers from responding to market changes and innovation, but rather use more flexible terms that specify the applicable standards.

1. ***All contract terms and practices must be reasonable; some terms and practices may be declared "per se" unreasonable.*** Applying this principle, we would offer an alternative approach which can be readily applied to address the Commission's immediate and intensely practical concerns with early termination fees and related issues. We would recommend that the Commission adopt a general rule that all contract terms and conditions must be "reasonable", while reserving the ability to determine (by rule or in individual cases) that certain contract terms or practices are "*per se*" unreasonable. This approach allows the Commission the flexibility to condemn unreasonable, abusive or exploitive contract terms or practices (whether or not they are already prohibited by other law), but also allows suppliers to justify particular terms or practices in individual cases where they believe that contract term or practice to serve a valid purpose.

The Commission could, if it chose, determine that some particular practices – a $1800 (or even $500) exit fee for residential service comes to mind – are so clearly abusive that they are *per se* unreasonable and that no further Commission action would be required to prohibit them. In that case an ESCO that insisted on including a *per se* unreasonable term would be subject to the range of sanctions enumerated in Section 2.D.6 of the UBP.

With regard to other contract provisions or marketing practices, a party could, for example, petition the Commission to find that a term or practice was unreasonable in either a rulemaking or on a case-by-case basis. The ESCO could defend the practice as reasonable by showing that it served legitimate objectives, that it was appropriately tailored to meet the objective, that any potential adverse consequences were outweighed by the benefits etc. The Commission would resolve disputes as they arose and thereby provide guidance to market participants. Since a finding of unreasonableness could result in the imposition of heavy sanctions, such action could, of course, only be taken by the Commission itself, and on the basis of an adequate record.

This approach, we believe, will help preserve the flexibility of market participants to innovate and respond to changing conditions while maintaining Commission oversight to protect the public interest.

A draft of the relevant UBP section showing how this approach could be adopted is appended for review by the stakeholders and the Commission. In essence, it is a general requirement that all contract provisions and marketing practices must be reasonable, followed by a list of provisions or practices that the Commission has determined to be *per se* unreasonable.

2. *Exit fees are reasonable and necessary; $1800 fees are likely not.* There is seemingly no legitimate justification for a $500 or $1800 exit fee for residential contract for gas or electricity service The defense offered of early termination fees as a price risk management tool at the April 3 Technical Conference was intended to apply to reasonable termination fees. For example, the publicly available contracts for residential gas service from Energetix and NSI currently provide for a $35 fee.[9] That was the context in which our defense of early termination fees was offered at the Technical Conference. It was only in researching media reports *following* the April 3 Technical Conference in an effort to find the reports that were mentioned at the Technical Conference that counsel located the published reports of $1800 fees that were mentioned in an anecdotal fashion at the Technical Conference.[10]

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[9] The fee for a commercial customer may be more ($50) and in addition may include the cost of terminating supply arrangements made on the customer's behalf.

[10] See the complaints and citations in note 5, *supra*.

The wide gap in fees also illustrates the importance of applying a "rule of reason" here. Price risk is real and hedging and managing that risk requires careful management and is not free. Profit margins on energy commodity sales can be wiped out in extremely brief periods by unexpected adverse price swings in the wholesale market. There is a vast amount of data documenting price movements in the wholesale market and the Federal Energy Regulatory Commission now publishes (or republishes) multiple data series that document the extent of price volatility in the wholesale markets it oversees.[11] The manner in which a supplier bears and manages this risk is an important part of the competitive equation and is likely to vary over time. It would plainly not be appropriate for the Commission to try to determine the pricing structure for competitive suppliers.

That said, the Commission could certainly review questionable fees and determine that fees above a certain level are unreasonable or establish other particularized requirements for imposing a higher-than-usual fee (e.g. assurances of adequately informed consent or the like). We would respectfully but strongly stress however that such fees can serve a critical role in the price risk management process and as part of the overall competitive pricing structure and may properly change over time. Pricing flexibility in this area is critically important and must be preserved.

C If the Commission ultimately determines that competitive suppliers are subject to regulatory assessments, the details of how such assessments could be equitably structured and avoid introducing competitive distortions should be addressed in a separate

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[11] The entry page for this data is found on the FERC's website (all viewed April 15, 2008) at:
http://www.ferc.gov/market-oversight/market-oversight.asp.
Gas price volatility is documented (among many other places) at:
http://www.ferc.gov/market-oversight/mkt-gas/trading/ngas-tr-fut-prmp-pr.pdf.
Electricity price volatility (for NY ISO) is documented (among many other places) at:
http://www.ferc.gov/market-oversight/mkt-electric/new-york/elec-ny-rto-pr.pdf.
For entry to all of the FERC's New York market information, see:

proceeding. The question of imposing regulatory assessments on competitive suppliers is complex and unrelated to setting uniform business practices or standards for retail marketing. It should, therefore, be severed from this review of Uniform Business Practices. Based on the Notice and the discussion at the Technical Conference, it appears that Commission revenues under the current utility-assessment mechanism are falling and that the Commission is therefore evaluating revisions to the current model to increase revenue by extending regulatory assessments to the competitive suppliers. The question of how the Commission compensates for a decline in its traditional funding sources is, however, one for the Commission and/or the legislature to address, not competitive energy suppliers

Hence, ENX/NSI can offer no recommendation here as to how the Commission ought be funded.[12] In the event that the Commission ultimately concludes that competitive suppliers should be made subject to regulatory assessments, however, we would urge the matter be addressed in a separate proceeding that could consider among other things the potential for inequitable imposition of cost reasonability and the risk of serious competitive distortions. The concern is that the question of *how* a regulatory assessment may be structured for competitive suppliers is an area ripe for unintended consequences (which could even include an *reduction* in regulatory oversight of competitive supply). Accordingly, and as explained below, we would urge the Commission to approach this issue with considerable caution and refrain from trying to address it in the context of revising Uniform Business Practices.

If ultimately required by the Commission, regulatory assessments imposed on ESCOS should be recovered in an equitable manner that does not create competitive distortions. The

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http://www.ferc.gov/market-oversight/mkt-electric/new-york.asp.

[12] We understand also that there may be substantial uncertainty and difference of views with regard to the legal basis of imposing regulatory assessments on competitive energy suppliers. While we do not express a view on that

Commission should recall certain fundamental differences between a regulated utility and a competitive energy supplier. Unlike utilities, competitive suppliers lack the ability to impose charges on their customers other than what has been previously agreed to by the customer. Competitive suppliers don't have a "customer charge" or other non-bypassable "wires" or "pipes" charge to which an assessment charge can be added. Similarly, competitive suppliers have no ability to use a reconciliation charge or other form of deferred account to increase prices in a future period to recover "undercollections" from the past. Hence, devising an equitable assessment charge for a competitive business is a much more delicate process than for a regulated utility.

Moreover, there are serious issues of equity involved in allocating assessment cost responsibility among ESCO. A review of the complaint statistics published on the Commission's website shows that a very small number of ESCO's are responsible for a very large percentage of the complaints. Moreover, while the number of customers served by each ESCO is (appropriately) not included in the public data, it would appear that it is not the ESCOs with the largest number customers that have the largest number of complaints. Moreover, the research detailed above suggests that perhaps the most serious complaints are focused on the merest handful of competitive suppliers.

This suggests a considerable risk of imposing a disproportionate percentage of assessment costs on those that are not primarily responsible for the complaints -- and should not therefore be responsible for bearing the costs of intervention by the Commission and Staff. In sum, a regulatory assessment allocation based on the number of customers an ESCO serves or on its total sales would appear to be seriously inequitable. In essence, it would result in charging

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topic at this time, it is clear that questions as to the legal basis for such assessment should be fully resolved before the Commission proceeds.

those ESCOs that comply with the UBP standards for the regulatory costs imposed by those who do not. This would violate one of the first principles of regulatory rate making which is the matching of rates to cost responsibility.

Worse, it could create a perverse incentive to drive customer service down to the lowest common denominator. Since ESCO's with poor compliance procedures would effectively avoid the costs required for assuring compliance, they would tend to achieve a cost advantage over their competitors, allowing them to underprice competitors in the market – and then watch those competitors bear a higher percentage of the regulatory assessments, thereby gaining a second competitive advantage.

One way to address this issue would be to allocate regulatory assessments among ESCOs based on their per-customer complaint ratio (the number of complaints received per 1,000 customers for example). This would force ESCOs with high complaint ratios to bear the cost imposed by their poor record rather than those with good compliance procedures and high customer satisfaction. This allocation mechanism would better match costs with cost responsibility and would avoid creating a perverse "race to the bottom" incentive.

As the Commission can readily see, these are complex matters that are quite outside the scope of addressing uniform business practices for marketing and solicitation. Hence we respectfully submit that the matter should not be addressed here. If the Commission ultimately determines that competitive suppliers should be subject to assessments as regulated companies, we would strongly recommend that the Commission address that issue in a separate proceeding.

III. Answers to Specific Questions

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

Response: As detailed above, this matter should not be addressed in the instant proceeding.

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

Response: Plainly, only an authorized person should be qualified to enroll the account. But the Commission should exercise some particular care in limiting who is qualified to enroll an account. Our strong recommendation is that the Commission should make it clear that either the customer of record "***or an authorized representative***" is qualified to enroll the account and that ESCOs may reasonably rely on statements by a customer that he or she is authorized to enroll the account. In many cases the "customer of record" may be one spouse in a married couple because that was the name provided the utility when the account was established for whatever reason (e.g. because it preceded the marriage, because one spouse was adamant that the account be set up in his or her name, because of mere happenstance or other reasons). Another not-uncommon situation is where service is in the name of a spouse who dies and where the surviving spouse does not change the "customer of record" information. Still another not-infrequent pattern is where the "customer of record" is one person in a couple (married or not, sharing the same last name or not, etc.) that share a house or apartment.

If the Commission states that only the "customer of record" may enroll the account and defines that to mean only the person whose name appears on the utility's records as the customer of record, that will create practical problems for the ESCO. The first problem is that the ESCO does not know who the "customer of record" is and so is in no position to "police" the customer's qualifications (other than obviously not dealing with infants or others who do not reasonably appear qualified to switch the account, as discussed below).

A certain amount of judgement must be exercised here – judgement that will not be infallible. In most cases, where the person on the phone with their bill, account number etc. tells the ESCO to "sign them up", there is no practical way for the ESCO to second-guess the allocation of decision-making within that household – nor, we assume, does the Commission or consumer protection groups wish for ESCOs to try to exercise that role.[13] In such a case it is entirely reasonable for the ESCO to enroll the account.

Nevertheless in some cases, there may arise disagreements within the household over whether Spouse A or Party A should have consulted with or obtained the agreement of Spouse B or Party B prior to making the change – regardless of whether Spouse A or B or Party A or B is the "customer of record" for purposes of utility billing or not.

Our strong recommendation therefore is that ESCOs must be allowed to reasonably rely on the representations of an adult who appears to understand the choice being offered them, provides the account number and related information, etc. and who represents that they are authorized to sign up the account. ESCOs must also be allowed reasonable discretion to make judgements as to whether the customer is in fact capable of making the choice. In a market of millions, disputes will arise and companies like

[13] Indeed, we note that formal proceedings have recently been filed at the Public Service Commission against a utility that declined to contract with a 17 year old minor. See "National Grid Policy of Denying Utility Service to Minors Challenged", (posted April 1, 2008 at http://www.pulpnetwork.blogspot.com/) (viewed April 16, 2008). Unless ESCOs are allowed to exercise reasonable judgement in enrolling customers, they could apparently be sanctioned under the revised UBP both for enrolling a 17 year old minor as well as for declining to do so. We would urge the Commission to avoid such a nonsensical result and set rules that are sufficiently clear to allow ESCOs to comply.

ENX/NSI will obviously work to resolve them. In the vast majority of instances, there is no dispute; in the vast majority of cases where there is a dispute, the ESCO can resolve the matter without the need for regulatory intervention.

Hence, the Commission should make it clear that either the customer of record "or an authorized representative" is qualified to enroll the account and that ESCOs may reasonably rely on statements by a customer that he or she is authorized to enroll the account.

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?

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.

Responses to Questions 3-4 and 7-8 regarding Early Termination Fees:

3. Rule of reason. As noted above, we would recommend that the Commission adopt a "rule of reason" approach, setting more prescriptive standards in particular instances by determining that particular term is "*per se* unreasonable". As noted, the termination fee for a residential customer served by either Energetix or by NSI is currently $35, as shown by the publicly available (and downloadable) general terms and conditions. [14] Depending on other aspects of the offer and changing market conditions, a considerable higher termination fee could be entirely justifiable, however (e.g. based on longer term

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[14] The fee for a commercial customer may be more and explicitly may include the cost of terminating supply arrangements made on the customer's behalf.

fixed price commitment, other aspects of marketing strategy etc., evaluation of pricing conditions in the market, etc.). Hence, while an $1800 would obviously appear difficult to justify absent extremely unusual circumstances, the Commission should proceed with care before trying to set a particular level that it deemed *per se* unreasonable.

4. Grace period. With regard to a "grace period" for customers to terminate a contract subject to a cancellation or exit fee without paying the fee, that too may be subject to a rule a reason approach. The Commission should distinguish here cancellations "for cause". If the customer wishes to cancel after receipt of the first bill because the bill shows that the ESCO misrepresented or lied in inducing the customer to sign up, one assumes that the customer could cancel without paying a fee because the contract itself would not be enforceable in such circumstances. The problem in that case would not be an early termination fee, the problem would lie in the original misrepresentation that goes to the heart of the validity of the contract itself.

Our focus is on the much more common situation where the customer simply changes their mind for whatever reason and wishes to terminate the agreement. As discussed at the Technical Conference, allowing 30 days following receipt of the first bill *for fixed rate* service could create something like a 75 day price-risk exposure for the supplier, which would not be reasonable.[15] Imposing such an extended price risk exposure on the suppliers would likely force suppliers to increase their prices for fixed rate service or refrain from offering fixed rate suppliers entirely.

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[15] We note that one supplier has apparently adopted such an approach – but only following "hundreds" of complaints against it for charging extraordinarily high (e.g. $1800) exit fees and following formal lawsuit instituted by the Attorney General in another jurisdiction. The willingness of that supplier to then offer an extended cancellation period under such circumstances should not, we respectfully submit, be viewed by the Commission or its Staff as indicative of a reasonable "grace period" for suppliers conducting more prosaic business.

The exposure to price risk in this case is, however, a continuum: the shorter the cancellation period, the less the price risk, the longer the cancellation period, the greater. Hence, the Commission may well conclude that that the existing statutory 3 day cancellation period is not adequate and extend it for a reasonable period of, for example, an additional two weeks. That allows time for a customer change their mind for whatever reason, but avoids imposing a huge price risk exposure on the supplier.

7. Wet signature. The signature/customer approval procedures in the UBP have been adequate for documenting customer consent in several million retail contracts in New York over the last several years. As noted above, the problem with early termination fees in the complaints as reported in the news reports has not been that the customer did not consent to the agreement – but that the agreement contained unreasonable or abusive termination fees (or that misrepresentations were made to obtain consent). The solution to unreasonable termination fees is to prohibit unreasonable termination fees.

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?

Response. Yes, the number of customers served should be treated as competitive sensitive and a trade secret and not disclosed to the public. In a competitive marketplace, different suppliers experiment with differing marketing approaches. Marketing strategies may include a host of factors including changing pricing strategies, focusing on fixed pricing versus various indexed-based or other variable prices, offering promotions to stimulate interest, etc. A major shift in marketing strategy of course will not be unknown to competitors. What is *not* known to the competitors is the *result* of that shift – and it is *that* information that is competitively sensitive and appropriately deemed a trade secret under the applicable law. If the Commission were to make public the number of customers (or the total sales) of each ESCO, then suppliers would be able to evaluate the success – or failure – of their competitors without having to incur the costs and risks themselves. If competitors are allowed to duplicate success or avoid unsuccessful approaches without incurring similar costs and risks, the result will inevitably be less innovation and a less dynamic marketplace.

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?

Response: The Marketing Standards are being developed with the residential customer in mind, not a business owner that does not require special protections. For example, the Home Energy Fair Practices Act (L. 1981, ch. 713) ("HEFPA") and the Energy Consumer Protection Act of 2002 (L. 2002, ch. 686) extend special protections to residential customers only. Moreover, the Commission's regulation implementing these statutes define the term "residential customer" quite carefully and makes it clear that it does not include commercial or industrial customers.[16] The Commission should follow the same approach here.

9. How should the term "plain language" as used in Section 2.B.1.b of the UBP be defined?

RESPONSE: It was pointed out at the Technical Conference that the term "plain language" is already defined in New York. The state adopted a general requirement to use plain language in consumer transactions that has been effective since 1978. See General Obligations Law, 5-702 (a) (1) (requiring written documents to which a

[16] See NYCCR 16, Section 11.2 (a) (2).

consumer is a party where the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes to be written "in a clear and coherent manner using words with common and everyday meanings"). This definition of "clear and coherent manner using words with common and everyday meanings" would appear acceptable.

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

Response: Yes, we believe that the Commission may wish to consider addressing another source of potential customer confusion that arises during utility consolidated billing. The discussion to date in these proceedings has focused on what might be termed the "front-end" of the customer experience – initial contact with the customer; ensuring fair and complete representation of proposed offers by an ESCO; preventing the kind of exploitive or abusive practices detailed in complaints the Commission has received, etc. These "front-end" issues are obviously important because the customer's initial contact with a competitive supplier tends to frame the customer's views and confusions or misrepresentation introduced then may carry forward for many months.

But we would suggest that another other area of business practices is equally prone to introducing customer confusion and could therefore be appropriately addressed here. This is the question of how the ESCO billing information – including the ESCO's identity as separate entity from the utility – is presented on the utility's bill. From a managerial standpoint, there is just as much opportunity for customer confusion in these post-sale communications as in the initial marketing and contracting phase. Indeed, the opportunity for the customer to be confused as to the identity of the energy supplier is perhaps even greater because the information is viewed month after month in the communication received from the utility.

In our experience, the ESCO information may in some cases be effectively "buried" five or six pages back in the in the billing details. For a harried consumer paying the bill, there is a substantial possibility (or even likelihood) that the person paying the bill will only look at the summary page. In such a case, where the customer sees only the utility information month after month, he or she can be forgiven for being confused into thinking that somehow or other the energy supply is coming "from the utility". As we noted in our March 6, 2008 comments in CASE 07-M-1514, (at 13) the risk of confusion is especially great where the customer acquisition is through an "ESCO Referral" program using the so-called "ESCO Contract" option where a consumer may have no contact with the ESCO other than receiving the initial mailing of the ESCO's terms and conditions with *all subsequent communication* coming from the utility.

When an ESCO bills its customers directly, it is responsible for presenting accurate information in a clear and readily-understandable format. But when the ESCO's billing information is sent to the customer by the utility under the consolidated billing option, there is plainly a potential for customer confusion that is not within the control of the ESCO. Notwithstanding Section 9 of the UBP, different utilities handle ESCO billing differently, interpreting the Section 9 standards differently from one utility to another with regard to various issues as to how and where the ESCO information is presented on the bill. Presumably this lack of uniformity stems in large part from the impact of legacy billing systems that were not initially designed to include ESCO billing. Different utilities have developed different "work-arounds" to integrate ESCO billing into their existing systems and the result is a bit of an uncoordinated “hodge-podge” of billing practices.

Because the resolution of the matter might involve some expenditures by the utilities, the problem is likely to persist unless the Commission takes the initiative to address it. It may be that a collaborative or a workshop would be appropriate to allow stakeholders to develop a more “holistic” approach to consolidated billing that respects the technical demands of a billing system while eliminating the potential for confusion resulting from how the ESCO billing information in presented to the customer in the consolidated bill and establish consistency across utilities.

IV. PROCEDURAL AND OTHER RECOMMENDATIONS

A. Explicitly defer NFG's Tariff and GTOP filing pending the outcome of the general review. At the Technical Conference, Staff indicated that National Fuel Gas Distribution Company has agreed to defer implementation of its proposed tariff filing and GTOP filing to govern door-to-door sales until July 1. We respectfully urge the Commission to provide a clear directive that such a sharp deviation from the existing Uniform Business Practices will not be allowed to be put into effect by NFG prior to Commission action in the instant proceeding. Because competitive suppliers need time to synchronize competitive offers and marketing campaigns, an unapproved filing such as that of NFG – that either may or may not go into effect in a few weeks – tends to introduce uncertainty into the marketplace. We would urge the

Commission to seek to minimize unnecessary uncertainty by providing written guidance that the NFG changes will not be allowed to be put in place prior to Commission approval.

Respectfully submitted,

ENERGETIX, INC. AND NYSEG SOLUTIONS, INC.

By: *Original signed on behalf of*
Robert J. Hobday
50 Methodist Hill Drive
Suite 1500
Rochester, NY 14623
Phone: 585-463-3610
Fax: 585-235-3023
Email: rhobday@energetix.net

Of Counsel:
Philip M. Marston, Esq.
MARSTON LAW
218 N. Lee Street,
Suite 300
Alexandria, VA 22314
Tel: 703-548-0154
Email: pmarston@marstonlaw.com

Dated: April 17, 2008

cc: Parties on Active Parties list compiled by PSC via email

ATTACHMENT

SUGGESTED CHANGES TO SECTION 2. D.1 OF UNIFORM BUSEINSS PRACTICES TO IMPLEMENT "RULE OF REASON" APPROACH

A new 2.D.1 is inserted (renumbering the existing sections) as follows:

D. Maintaining ESCO Eligibility Status

1. Reasonable contract terms and practices.

a. *The rule of reason.* All contract terms and marketing practices must be reasonable. Following a finding by the Commission upon an adequate record that an ESCO has failed to comply with this requirement, the Commission may impose sanctions under Section 2.D.6 of these rules.

b. *Contract terms or practices that are per se unreasonable.* The Commission has determined that the following particular contract terms or marketing practices are *per se* unreasonable:

i. Early termination or cancellation fees for individual residential accounts in excess of $*XXX*;

c. *Additional contract terms or marketing practices* The Commission, upon an adequate record, may determine that additional particular contract terms or marketing practices are also *per se* unreasonable and will be added to the list in Section D.1.b.above.

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