



National Energy Marketers Association

Informal Comments of National Energy Marketers Association On Proposed Definitions-Energy Broker and Representative Strawman Proposal

The National Energy Marketers Association hereby submits its informal comments on the “Proposed Definitions-Energy Broker and Representative Strawman Proposal,” that was circulated by Staff on June 28, 2012, via email. NEM’s informal comments build upon the definitions and questions raised in the Straw Proposal and recommend a definitional structure for categorizing the various entities and business models currently in the marketplace as well as their respective responsibilities and obligations to the Commission and the consumers with which they interact. We recommend that the definitional structure provide a bright line test for compliance purposes and be capable of dynamically capturing the types of individuals and entities that currently do business in New York as well as those most likely future business models without requiring frequent regulatory updates.

NEM suggests that the essence of both regulatory compliance as well as the obligation a business entity has to those it serves can fairly and properly follow the obligation it has or should have to a supplier, a purchaser or both. In the event that an individual or entity exclusively represents one licensed supplier in any given utility service territory, then that licensed supplier is responsible for the actions of such an individual or entity as its agent.

It should be noted that individuals and/or entities can operate as aggregators, brokers or consultants depending on the transaction, the compensation structure or the contractual agreement they maintain with those with whom they do business. The regulations should be competitively neutral as to the types of business structures used. Each structure serves a different commercial objective. However, each business entity should be clear about where its loyalty lies. If an individual or entity owes a duty of loyalty to one licensed supplier in any given service territory such supplier has licensing and regulatory obligations and that individual or agent is clearly an agent of the supplier for both licensing and regulatory compliance purposes.

However, once an individual or entity represents multiple suppliers and/or represents multiple purchasers to arrange the purchase and/or sale of natural gas or electricity with more than one supplier, within any given utility service territory, than it is no longer an exclusive agent of a single supplier. This is true regardless whether the individual or entity’s activities can be characterized as an aggregator, broker or consultant. As more fully set forth below, such individuals and or entities should, at a minimum, provide notice of their identities and who should be contacted in the event of a problem with any given transaction. However, NEM urges

that the Commission and the staff invite additional comments to more fully consider the costs and benefits of any new notice, registration, training, and/or certification requirements imposed on these individuals and/or entities.

I. Commission Jurisdiction

A threshold issue in the certification, licensing, or registration of brokers by the Public Service Commission, as was suggested in the Strawman Proposal is whether and to what extent the Commission has the statutory authority to do so. The Commission's regulatory oversight that is applied to ESCOs is derived from its powers under Article 1, Section 5 of the Public Service Law which extends its "jurisdiction, supervision, powers and duties" to, "the manufacture, conveying, transportation, sale or distribution of gas (natural or manufactured or mixture of both) and electricity for light, heat or power, to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same." The Commission cited this statutory authority underpinning its recent Order adopting UBP Section 10 Marketing Standards and remedial measures,¹ in its decision to impose mandatory price reporting requirements to ESCOs,² and in its initial Competitive Opportunities proceeding that established regulatory policies for the provision of retail energy services including ESCO licensing.³

The Commission's statutory authority over ESCOs rests on the use of the term "sale" of natural gas and electricity in Section 5.⁴ In addition, in the ESCO Price Reporting Order, the Commission found that, "Requiring price reporting is merely an extension of the ESCO's pre-existing PSL Article 1 obligation to furnish data."⁵ The form and substance of the Commission's regulatory oversight of ESCOs has become well-established, however, the same cannot be said for the other entities at issue here. These entities do not take title to the natural gas or electricity, and do not "sell" it per se. That being the case, the application of the Commission's Section 5 authority to these entities is unclear. Consequently, once a decision has been reached as to whether and to what extent regulatory jurisdiction should be expanded, NEM suggests that additional comments be submitted as to the extent of notice, registration(s) and or certifications that will be required. Clearly, different business models have different potential impacts.

¹ Case 98-M-0343, Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing, issued October 27, 2008, at page 10.

² Case 06-M-0647, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms, issued November 8, 2006, at page 10.

³ Case 94-E-0952, Competitive Opportunities for Electric Service, Opinion 97-17 (issued November 18, 1997), at pages 29-35 (and affirming the decision that ESCOs are exempt from Article 4 regulation); Opinion 97-5 (issued May 19, 1997) at pages 30-31, 42-44; and Opinion 96-12 (issued May 20, 1996), at pages 67-69, 74-75.

⁴ See Case 98-M-0343, Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing, issued October 27, 2008, at page 10.

⁵ Case 06-M-0647, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms, issued November 8, 2006, at page 10.

Moreover, the size of a given entity can also determine its potential impact. If the Commission is expanding its statutory jurisdiction via interpretation in this regard, it is important that the costs and benefits to the consumer and the public interest are in alignment.

II. Proposed Definitions of ESCO Marketing Representative, Non-Exclusive Marketing Representative and Consultant and Related Licensing/Registration Requirements

The Straw Proposal set forth the following proposed definitions of “ESCO Marketing Representative” and “Broker”:

ESCO Marketing Representative - An individual or entity that is either the ESCO or a contractor/vendor under contract on behalf of a single energy services company (“ESCO”) in that market, conducting, on behalf of that ESCO, any marketing activity that is designed to enroll customers with ESCO.

- All representatives must receive training consistent with Section 10(b) of the UBP

Broker – An individual or entity, including an aggregator, which may or may not be under a contractual agreement with a customer who represents that customer(s) interests and negotiates or facilitates the purchase and/or sale of natural gas or electricity, or both, but does not take title to the supply

- Examples of Broker arrangements:
 - Aggregator – a person joining two or more customers, other than municipalities and political subdivision corporations, into a single purchasing unit to negotiate the purchase of electricity from ESCOs. Municipalities and townships acting on their own behalf can be exempted from brokering license requirement
- All arrangements classified as brokers are required to be certified/licensed by the New York Public Service Commission or designee

The Straw proposal uses the term Broker, Aggregator and Marketing Representative, proposes definitions and then enumerates a list of marketplace actors (business models) and asked whether those entities should be required to be licensed. NEM recommends that the Straw Proposal utilize a simple bright line definitional structure that will encompass any non-exclusive representative (individual or entity) operating in the utility franchise service territory of any New York natural gas or electricity distribution company and provide clear guidance to all of the stakeholders as to their attendant responsibilities. NEM offers this regulatory distinction between exclusive and non-exclusive representatives with respect to a given customer contact and/or within any given utility service territory as a bright line distinction between individuals and entities that are covered by existing supplier licenses and those that may need additional disclosure or registration to protect the public interest.

NEM submits that by identifying entities by virtue of their commercial allegiance and loyalty, the rules will dynamically capture the continuously evolving and expanding business models and means of communicating with energy consumers. This should promote compliance with the rules by entities currently doing business in New York as well as new entrants. Simply stated, if you are not the exclusive representative of a single supplier, with respect to a given customer contact and/or within any given utility service territory, who is licensed/approved by the state of New York to supply natural gas or electricity, then it is currently very difficult and perhaps unfair to impose responsibility for regulatory compliance for such entities and individuals onto suppliers that do not have this type of exclusive relationship, or perhaps any control whatsoever, over such entities.

NEM recommends that when an ESCO has entered into a contract with an individual or third party entity to act on its exclusive behalf with respect to a given utility service territory, that ESCO should be responsible for the individual's/entity's conduct and the individual/entity should not be required to be registered with the Commission. However, where no such exclusive contractual relationship exists, and/or where the scope of the relationship and a related contract is limited to an ESCO's activity as a billing agent on behalf of the entity, the ESCO should not be responsible for the third party entity's conduct.

Once this distinction has been made and the Commission is comfortable expanding its jurisdiction to regulate and/or oversee the market conduct of these individuals and entities, then another round of comments would be appropriate to determine the extent of registration, certification and/or licensing that may be required. Indeed it is possible that many regulated entities also have business models that are hybrid business models or could easily become such in the future. With that in mind, NEM's definitional structure encompasses the following: Exclusive ESCO Marketing Representatives and Non-Exclusive Marketing Representatives. Within the Non-Exclusive Marketing Representative category, the individual or entity could be characterized as a broker, aggregator or consultant depending on the type of transaction and the number of parties involved.

These are discussed in further detail below, including proposed definitions of each.

A. Exclusive ESCO Marketing Representatives – These are the individuals/entities that are traditionally considered to be an ESCO's legal agent (i.e., employees, third party contractors). Exclusive ESCO marketing representatives are those that transparently represent a single ESCO on an exclusive basis with respect to a given customer contact and/or within a given utility service territory. An agent that is operating under the identity of an electric or gas marketer so that the consumer associates the transaction with that of the marketer, and that agent is operating under an exclusive agreement with the marketer, should not need to be separately registered. Any complaints or inquiries that the Commission might receive would be made under the name of the marketer, and the agent's conduct would be actionable under the marketer's license with the Commission. This will ensure accountability for agent conduct. No

registration of exclusive ESCO marketing representatives should be required. NEM suggests the following modification to the Straw Proposal definition of ESCO Marketing Representative, consistent with this structure:

Exclusive ESCO Marketing Representative - An individual or entity that is either the ESCO or a contractor/vendor under contract on behalf of a single energy services company (“ESCO”) **with respect to a given customer contact and/or within a given utility service territory** ~~in that market~~, conducting, on behalf of that ESCO, any marketing activity that is designed to enroll customers with ESCO.

- All representatives must receive training consistent with Section 10(b) of the UBP

B. Non-Exclusive Marketing Representative – These individuals and entities do not have an exclusive contractual relationship with a single ESCO to perform marketing activities in a given utility service territory. In other words, they are simultaneously “brokering” multiple ESCO offerings to consumers or, alternatively, they could be aggregating multiple consumers to act as the exclusive or non-exclusive agent on their behalf to negotiate supply contracts among multiple suppliers. These individuals and entities are engaged in negotiating and/or otherwise facilitating the purchase and sale of natural gas and/or electricity by and between multiple ESCOs and/or consumers, but they do not take title to the commodity in the underlying transaction. The ESCO should not be accountable for the behavior of non-exclusive marketing representatives regardless of what business model they employ, unless an objectionable activity was explicitly directed or condoned by the ESCO.

If the Commission makes such a determination to require non-exclusive marketing representatives to be independently registered/certified/licensed, the registration process could entail the non-exclusive marketing representative providing the Commission with its business address, name(s) of persons that the Commission should contact in the case of consumer inquiries and complaints, and a certification that the non-exclusive marketing representative understands and is in compliance with the Section 10 requirements of the UBP. If this distinction is made in the regulatory compliance requirements, non-exclusive marketing representatives should at a minimum independently identify their own company, separate and apart from the ESCOs for which it is negotiating transactions, in the course of its dealings with consumers.

This is necessary to establish accountability for the non-exclusive marketing representative’s actions. It will also allow the consumer to have a means of identifying the individual/entity to the Commission should concern arise about improper conduct. The non-exclusive marketing representative should be required to transparently disclose to both consumers and ESCOs the nature of its arrangement, the cost of the representative’s service, how it is paid and by whom it is paid.

NEM suggests the following modification to the Straw Proposal definition of Broker, consistent with this structure:

Non-Exclusive Marketing Representative - Individuals or entities that are engaged in negotiating and/or otherwise facilitating the purchase and sale of natural gas and/or electricity by and between multiple ESCOs and/or multiple consumers, and that do not take title to the commodity in the underlying transaction. Non-exclusive marketing representatives include Brokers, Aggregators, and Consultants.

Brokers - An individual or entity that is a contractor/vendor under contract with and/or conducting on behalf of itself or more than one energy services company (“ESCO”), any marketing activity that is designed to enroll customers with those ESCOs, within any given utility service territory.

Aggregator – An individual or entity joining two or more customers, other than municipalities and political subdivision corporations, into a single purchasing unit to negotiate the purchase of electricity or natural gas from one or more than one ESCOs. Municipalities and townships acting on their own behalf can be exempted from brokering license requirement.

Consultant - An individual or entity, which may or may not be under a contractual agreement with one or more consumers, who represents or purports to represent the consumer interests and negotiates or facilitates the purchase and/or sale of natural gas or electricity by one or more consumers from one or more ESCOs.

III. Classification of Entities Under the Exclusivity Definitional Structure and Attendant Obligations

In addition to setting forth two proposed definitions of “ESCO marketing representative” and “broker”, the Straw Proposal also listed types of entities and suggested, “the final regulations will need to provide precise clarity on the following types of entities and whether the licensing requirements are imposed upon them.” Consistent with NEM’s proposed definitional structure, we believe that each of these types of entities can be categorized as either an “Exclusive ESCO Marketing Representative,” a “Non-Exclusive Marketing Representative,” or their activities should not constitute sales or marketing activities at all. Whether or not an entity has an obligation to become registered, certified or licensed with the Commission would flow from that categorization as well as its size and potential impacts.

It is recommended that the Commission decide first whether it is in the public interest and within its current budget and resource scope to increase its jurisdiction to include all the entities that could potentially be covered by the fact that they are in reality in business for themselves, and not legitimately an exclusive agent of any regulated third party. As mentioned before, taking this approach will allow the regulations to keep pace with market development and the evolving nature of marketing energy choice options to consumers. As this market continues to expand, so

too will the number of individuals and entities and business models that will serve the consuming public.

We have addressed the types of entities listed in the Straw Proposal and explained their categorization below.

Consultant – This is one of the entities encompassed within the Non-Exclusive Marketing Representative definition proposed under NEM’s definitional structure and should be categorized as such.

Friends and Family Programs – As asked in the straw proposal, “If an ESCO has a friends and family referral program, does that customer act as a broker? There will not be a contract between customer and ESCO, but often the customer will receive [sic] gift card or discount on energy rate if their referrals enroll with ESCO.” NEM construes this to mean the circumstance wherein an ESCO customer will provide the ESCO with contact information for friends/family which it believes may be interested in receiving information about competitive offerings. In this case, the customer is sharing contact information but the customer is not engaging in any marketing activity with its friends/family designed to sell the commodity. Customers would and should not believe that by sharing contact information that they have engaged in anything that would rise to the level of PSC-regulated conduct. This type of activity would not be encompassed within the definitional structure suggested by NEM.

Websites - Website portals that permit consumers to do comparison shopping among multiple supplier offerings should not be require to be licensed with the Commission. Website portals are distinguishable in that the consumer initiates the “contact” by accessing the site and then independently evaluates the offers that are set forth therein. As to the underlying terms of the marketer offer, this is again reachable under the marketer’s license with the Commission, should there be any misconduct.

Telesales Broker – The Straw Proposal asks, “Brokers that market multiple ESCOs products via outbound telephone solicitation in the market? How should they be classified and do they currently exist in the market?” Under NEM’s definitional structure this type of entity would be classified as a Non-Exclusive Marketing Representative based upon their activity of simultaneously “brokering” multiple ESCO offerings to consumers in a single utility service territory. In making this determination NEM recommends that the determination be made within a given utility service territory. If the relevant “market” is defined as anything larger that a single utility service territory, this conclusion should be reviewed, as it could have a significant impact on competition.

Multi-Level Marketing (Network Marketing) – Network Marketing representatives are agents of the ESCO and sign a contractual agreement with the Network Marketing Company memorializing the terms of their relationship. Network Marketing representatives are also

individual energy consumers themselves, purchasing the energy commodity from the Network Marketing company. A Network Marketing representative will promote the network marketing product within the representative's individual network of friend and family relationships. In other words, a Network Marketing representative is an Exclusive ESCO Marketing Representative under NEM's definition, *"An individual or entity that is either the ESCO or a contractor/vendor under contract on behalf of a single energy services company ("ESCO") with respect to a given customer contact and/or within a given utility service territory, conducting, on behalf of that ESCO, any marketing activity that is designed to enroll customers with ESCO."* Their conduct is properly reachable as an agent of the network marketing company, and as such, this obviates the need for independent registration of network marketing representatives.

Industry Association - Affinity groups such as these are simply conduits of the ESCO offer. Consumers understand that if they avail themselves of the offer that they are dealing with the ESCO itself, not the affinity group. The affinity group is not holding itself out as representing the ESCO, it is merely communicating to its members that there is an offer that they may avail themselves of from the ESCO. And, the affinity group is not in the energy business. Any issues related to the terms and conditions of the offer are clearly traceable to the ESCO itself and are reachable under the ESCO's license. Industry associations do not fall within NEM's definitional structure and should not need to be registered with the Commission.

Third Party Verification Companies – As described in the Straw Proposal, a third party verification company is an, "Independent party used in the enrollment process to ensure authenticity of sales." The important consideration with respect to these entities is that they act as a "check" on the information that was originally communicated to the consumer by the marketing representative. The TPV company is not engaging in a marketing activity, they are not promoting the energy product or offering any new information to induce the consumer to switch. They are merely ensuring the validity of the underlying enrollment. In NEM's judgment, TPV companies therefore do not fall within the definitional structure and should not be required to be registered with the Commission.

IV. Conclusion

NEM appreciates the opportunity to offer its suggestions on the Straw Proposal and appreciates Staff's efforts to engage the stakeholder community in examining this issue.