

# NYSEMC

New York State Energy Marketers Coalition

July 31, 2012

Honor Kennedy  
Office of Consumer Policy  
New York State Department of Public Service  
Three Empire State Plaza  
Albany, New York 12223-1350

**Re:** Informal Comments on ESCO Issues

- Direct Marketing and Customer Lists
- Electronic Communication with Customer
- ESCO, Energy Broker and Agent Licensing/Registration

Dear Honor,

During the initial meeting of the *Retail Energy Market Stakeholder Forum* on June 15, 2012, three topics were discussed which are now open for some informal comments by stakeholders. These topics include the following:

- Direct Marketing and Customer Lists (Zip+4)
- Electronic Communication with Customer
- ESCO, Energy Broker and Agent Licensing/Registration

Each of these topics is critically important to the proper functioning of a growing competitive marketplace, and we appreciate that Staff are looking to explore them further at this time.

These Informal Comments are being provided by the New York State Energy Marketers Coalition ("NYSEMC"). For purposes of this letter, the NYSEMC consists of Agway Energy Services, LLC, and Interstate Gas Supply, Inc. NYSEMC members have extensive energy marketing experience and have routinely participated in coalitions, collaborations, committees, and proceedings in the interest of introducing and advancing competitive energy markets nationwide. The philosophy of providing the highest quality customer experience and ensuring the maximum level of consumer protection has been demonstrated consistently by the positions and, more importantly, the actions of each individual NYSEMC member. NYSEMC believes in the patient, steady, and thoughtful development of retail markets, and in developing the retail markets by utilizing market strategies that represent ESCOs with integrity and professionalism. NYSEMC members

recognize the importance of engaging in business and public policy that aims at treating consumers with equity and respect at all times, and the significance of working diligently to ensure consumer protection during all transactions – including marketing, sales, product delivery, customer service inquiries, billing, and credit and collection.

To that end, we appreciate the opportunity to provide these informal comments so that a deeper dialogue on these three subjects may be advanced.

### **DIRECT MARKETING AND CUSTOMER LISTS**

ESCO access to accurate customer information has long been an area of concern for energy marketers across New York State. Making basic customer information readily available (i.e., name, address, phone number, fuel usage type and rate class) improves the efficiency of retail markets by establishing a direct connection between ESCOs and potential customers. In turn, this connection has the potential to lower the cost of acquisition and supply. The acquisition of customer information has been an issue ever since the Commission began to set forth ESCO protocol for the provision of alternative supplies of natural gas and electricity throughout the State. It has repeatedly surfaced during proceedings, technical conferences, and informal meetings with the Commission and utilities.

Some stakeholders feel that there are specific reasons for not providing customer information to ESCOs based on existing Public Service Law. These stakeholders believe that they have a responsibility to protect the customer from potential identity theft, interpreting Public Service Law §65(7),<sup>1</sup> which provides a prohibition of the sale or offering for sale of customer lists, as proof of public policy precluding these lists from being used for marketing, regardless of whether or not a charge is made for that list.

While ESCOs have repeatedly argued that a reasonable interpretation of Public Service Law does *not* prohibit the release of customer information for the purpose of contacting customers with an offer, and that providing ESCOs with utility customer contact information would not constitute a “sale or offer for sale,” we recognize that this is a larger issue which may ultimately need specific legislative or regulatory policy treatment. However, there has in the interim been some agreement that finding a solution which allows ESCOs more direct access to energy consumers – without

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<sup>1</sup> See Public Service Law §65(7) (Article 4), Laws of the State of New York, which states “No gas corporation or electric corporation shall sell or offer for sale any list of names of its customers.”

providing exact names or account numbers – may have some merit. As such, and following a proposal advanced by NYSEMC as part of a Direct Marketing and Customer List Working Group included in ongoing Case 98-M-1343, Central Hudson Gas & Electric voluntarily offered to provide ESCOs with access to “Zip+4” numbers. This provided a very workable alternative solution for ESCOs. Subsequent to Central Hudson’s offer, all utilities were asked by Staff to submit proposed implementation plans outlining their ability to provide “Zip+4” listings for their customers, enabling ESCOs to at least determine where natural gas and/or electricity consumers reside within a given utility area. As a result of this request, Con Edison, National Fuel, National Grid, and NYSEG/RGE all followed up with equally workable and reasonable solutions – with costs of implementation ranging from no cost to a one-time fee of \$6,500.

ESCOs are very appreciative of the proposed plans and are anxious to move ahead. However, one utility – **Orange & Rockland (“O&R”)** – asserts that a software licensing agreement with an outside billing vendor prevents O&R from sharing or reproducing the Zip+4 information. While NYSEMC does not have access to the agreement O&R references, it seems reasonable that a simple discussion with O&R’s software vendor could result in a solution which would allow them to extract the Zip+4 information without breaching the utility’s agreement with the vendor. It would not make sense that zip code information itself be considered confidential, as access to the information produced by the software does not mean that the methodology or process itself need be shared. We respectfully ask that Staff intervene in a conversation with O&R to hopefully find a workable solution to this bottleneck, and seek whatever waivers necessary to allow them to participate and comply with the PSC’s request.

The reason ESCOs are seeking zip code information is simple: to ensure that the appropriate ESCO offers get into the hands of customers that use specific types of energy (i.e., natural gas), enable ESCOs to communicate information about energy choice to those who are directly affected, and to provide customers with more information about ESCO alternatives and products, all in the most effective and cost-efficient way possible. Additionally, access to consumer zip+4 codes will ensure a friendlier customer enrollment experience because providing this basic customer information will enable ESCOs to pre-populate databases which, in turn, helps avoid the manual data entry errors that can impede the process and lead to frustration.

## **ELECTRONIC COMMUNICATION WITH CUSTOMER**

The use of electronic communications today permeates multiple aspects of consumers' lives. In some cases, it is the most influencing communication vehicle affecting individual lives. It is becoming commonplace for Facebook, YouTube, LinkedIn and Twitter to be used for everyday commerce – now used in every industry including grocery shopping, car sales, health care delivery and personal finance. This rapid evolution continues even as the technology and ways to use it changes and evolves daily. Therefore, considering electronic communication within the context of energy purchasing is realistic and practical.

To that end, Commission Staff have begun to explore how electronic communication figures into ESCO and utility operations in a way that helps ensure consumers are being treated fairly, and that the same basic protections afforded by compliance with the sales and marketing practices outlined in Section 10 of the Uniform Business Practices (“UBP”) be applied when considering electronic communication.

NYSEMC believes that at the option of the customer, any and all ESCO and utility correspondence should be made available in electronic format. Following considerable discussion and careful debate – much of it following the initial thought process explored by an ad hoc group which included NYSEMC – we now believe that all aspects of sales and marketing, customer acquisition, and ESCO/utility operations should be considered within the context of electronic communication so long as it is compliant with the Uniform Business Practices (UBPs). NYSEMC believes that the UBPs provide some of the best, most thoughtful guidance on ESCO/utility operations in a competitive marketplace within the nation; and as such, these practices can lend themselves to incorporate social media and electronic communication.

Therefore, NYSEMC advocates that all basic consumer interfaces, including sales activity and marketing, enrollment notices, verification letters of customer intent, disclosure notices, renewal notices, welcome letters, bill notifications, and all other transactions would be allowable so long as the UBPs were met. NYSEMC realizes that this is new ground and that it will evolve over time. At the same time, NYSEMC members are cognizant of the fact that the technology and capabilities of electronic communication are developing so quickly that putting a fence around a limited number of allowable transactions (i.e., verification letters only) would hamstring the competitive

process and deprive consumers of interaction with ESCOs in ways that are becoming routine.

NYSEMC believes that consumer protection is a key consideration as social media and electronic communication are adopted increasingly; however, we also realize that these forms of communication are becoming the norm for consumers, and to restrict their use in any way would be detrimental to the industry, and likely impossible to control. Consumers in many cases are demanding the use of social media for interactions.

Simply stated, we are pleased that Staff have recognized social media and electronic communication are growing exponentially in the marketplace, and advocate that their use in all aspects of consumer interaction should be required to comply with the UBPs.

While additional edits may be required to the UBPs over time to accommodate specific aspects of electronic communications with consumers, NYSEMC believes that social media is just one more form of communication that will continue to evolve and change at a faster pace, and that framing the content of communication (disclosures, terms & conditions, etc.) with customers is far more critical than attempting to frame the vehicle used for delivery of this communication (email, phone calls, Twitter, Facebook, etc.). Clearly, electronic communication is the future and cannot be hampered for ESCO-consumer transactions. Stakeholders need to continue to ensure compliance with the UBPs, even as the technology continues to change dramatically from day-to-day.

## **ESCO, ENERGY BROKER AND AGENT LICENSING/REGISTRATION**

As competitive energy markets have evolved, so too have the ways in which consumers interact with ESCOs. While commercial and industrial energy customers have for decades dealt with various representatives other than their actual energy provider, residential consumers are still becoming accustomed to working with ESCOs.

These customer sales channels take many forms – direct mail, telemarketing, door-to-door, website, social media, organizational affinity relationships, and even “friends and family” sales teams. In the great majority of instances, customer interaction is a positive experience and conducted with a clear understanding and respect for consumer rights and protections. In a small number of instances in relation to the total

amount of activity, ESCOs or ESCO representatives (brokers and agents) use tactics which are not compliant with the UBPs and which tarnish the reputation of ESCOs and their representatives who are working diligently to create a healthy marketplace of diverse products and services based on consumer demand.

New York is a bit unique in that ESCOs are not actually licensed, but rather determined to be “eligible” to operate within the State once the Retail Access Application process has been successfully completed. While this process is comprehensive and rigorous, it does not culminate in the award of a “license to sell.” While perhaps nothing more than terminology, NYSEMC would suggest that in order to more specifically address bad actors among the ESCO community who are non-compliant with the UBPs, the current approval process should be deemed a license which can be revoked in whole or in part as determined by Staff and/or the Commission when warranted.

From a procedural standpoint, the ESCO approval and triennial renewal process seems to work well (other than the workload burden it creates for Staff). Therefore, in preparing to enter a market and comply with specific Department of Public Service procedures, little else would seem needed by individual ESCOs for approval. The process could remain virtually the same; yet the establishment of a designated **license** could potentially provide the Commission with more teeth in its need to exercise enforcement in those instances where repeated and egregious marketing practices were employed by an individual ESCO. During both informal and formal discussions with ESCOs and Staff, NYSEMC has come to the conclusion that the Commission should take more decisive and punitive action in the enforcement of UBP compliance. To support this effort, NYSEMC strongly believes ESCO eligibility should be designated by a license which is clearly subject to suspension or revocation.

However, as much as NYSEMC believes that ESCOs must be held accountable for their marketing, sales and operations practices, it is far less clear on how to treat energy brokers and agents. Definitions are widely varied throughout the industry with regard to the differing roles of an energy “broker” or “agent,” and the distinction of such designation seems to be largely driven by marketing representative exclusivity (agent) versus non-exclusivity (broker). Short of these common identifiers, little consistency exists – and in a growing energy marketplace which is seeking to create innovative and value-added products and services that go beyond pure commodity sales, it is not even realistic to limit these definitions.

The critical factor here is consumer protection and operation of a marketplace that does not enable third-party vendors – whether representing a single ESCO or multiple ESCOs – to game the sales process and leave a string of customer complaints without any accountability.

One school of thought suggests that third-party vendors who represent more than one ESCO in a single utility market should be “registered” with the Public Service Commission. The thought is that when multiple ESCOs are effectively represented to the customer from a single contact point without direct accountability to the Public Service Commission, it is difficult to attach specific actions to an accountable party. However, a complementary enforcement structure is needed to support this.

Another school of thought is that brokers who represent multiple ESCOs are not problematic – since the consumers themselves have invited or allowed the broker to work on their behalf to find the most suitable ESCO supplier. However, this is only the case when the customer has engaged the broker as opposed to the broker representing multiple suppliers.

In instances when a broker works exclusively with a single ESCO, direct accountability to the Commission does not likely provide any additional benefit, since in all sales the activity of the broker can be directly tied to the ESCO on whose behalf the activity is being conducted. Thus, direct accountability to the Commission is achieved through the ESCOs certification.

Although NYSEMC is cautious about the roles that energy agents and brokers play with their customers we believe that additional dialogue in this area is warranted.. We believe that the recently formed Retail Energy Marketers Stakeholders Forum is a proper starting place for this dialogue.

At the same time, NYSEMC would like to reiterate its view that the Commission should take a more aggressive stance with ESCOs who repeatedly violate UBPs and show even the perception of disregard for consumer rights and protection. In a similar fashion, NYSEMC does not feel it is necessary to seek registration or licensure for friends/family that refer ESCOs to others – this would be the responsibility of the ESCO ultimately signing up the customer.

In the end, it is the responsibility of the ESCO to ensure its activities, and those of others which represent them with their customers, to be in compliance with the UBPs.

## **CONCLUSION**

NYSEMC applauds the continued support and guidance of the Commission and its Staff by working with ESCOs, utilities, and consumer protection agencies to bring the benefits of a competitive retail energy market to consumers. We appreciate this informal comment process – along with the Retail Energy Markets Stakeholders Forum – to vet issues before going to the formal procedural and public comment phase. We recognize the trust that has been placed in us by the Commission and we are committed to fair and equitable treatment of all customers, as well as the full development of a consumer-driven energy market with new and innovative services, green products, competitive prices, and energy efficiency tools. We know more work needs to be done, and that continued vigilance is needed by the Commission, utilities, ESCOs and other interested parties to further the stated Commission goal of enabling all energy consumers in the State of New York to engage in choice.

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

Respectfully submitted,

**New York State Energy Marketers Coalition**



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