

**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 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**

**REPLY COMMENTS OF INTELLIGENT ENERGY**

**I. Introduction**

Intelligent Energy is an Energy Services Company (“ESCO”) which markets gas supply to thousands of natural gas customers in New York State in the services areas served by various distribution utilities including, National Grid, Consolidated Edison, Orange & Rockland Utilities, Central Hudson, and National Fuel Gas. Intelligent Energy appreciates the opportunity to submit reply comments to the New York State Public Service Commission (“Commission”) Notice Soliciting Comments on Revisions to the Uniform Business Practices (“UBP”) issued on March 19, 2008.<sup>1</sup> The proposed rules will amend the UBP to address the sufficiency of the residential consumer protections provided by the UBP, the oversight provisions of the UBP and their applicability to ESCO marketing activity, and the remedies available under the UBP to staff and the Commission. We also appreciate the substantial efforts of the Commission and Staff in

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<sup>1</sup> Case 98-M-1342, CASE 07-M-1514, and Case 08-G-0078, Notice Soliciting Comments on Revisions to the Uniform Business Practices (issued March 19, 2008) [hereinafter “Notice Soliciting Comments”].

preparing the proposed modifications to the UBP. Intelligent Energy is concerned that the Commission may take a “heavy handed” regulatory approach which would significantly stifle competition and hurt ESCO creativity in offering new and innovative products to consumers. If the Commission and/or any regulatory body believes that they have a “bad actor” the current regulatory framework more than adequately allows for the imposition of sanctions required to protect New York Consumers. Additionally, changing the way ESCO’s can offer fixed price agreements will seriously hinder and could even end fixed price offerings in New York which would significantly impair a consumer’s ability to control their energy bill. Intelligent Energy hereby submits reply comments with regard to the comments filed by certain interested parties relating to the proposed modifications to the UBP.

## **II. COMMENTS ON UBP MODIFICATIONS**

### **1. Section 10**

The Consumer Protection Board in its comments urges the Commission to modify the proposed changes to Section 10 of the UBP to require among other things that ESCO identification display the name of the ESCO, that the UBP provisions apply to all in-person marketing activities, ; specify exactly what written information the ESCO representative will provide upon request, a time standard for ESCO response to consumer inquiries and complaints, and ESCO cooperation with the CPB mediation effort be required. Additionally, the Attorney General of the State of New York recommends that the Commission should strengthen its enforcement mechanisms so that ESCO failure to comply with provisions of the UBP would subject violators to potential civil penalties under Public Service Law §§ 25 and 26.

In the wake of reports of abusive and deceptive ESCO behavior, the natural response of regulators is often to offer up new rules and regulations. However, instead of simply trying to target the practices that helped spark the reports of abuse and the ESCOs that have allegedly engaged in such behavior, the proposed modifications to the UBP calls for a major overhaul of the marketing standards under the UBP. We urge the Commission to re-evaluate these prescriptive rules.

In our rules-based system, regulators try to prescribe in great detail exactly what ESCOs must and must not do to meet our obligations to our customers. A rules-based standard is characterized by bright-line tests, multiple exceptions, high levels of detail and internal inconsistencies. On the other hand, in a principles-based systems, regulators worry less about dotted “i”s and crossed “t”s, and instead evaluate companies’ behavior according to broad principles. This approach gives companies more leeway in dealing with customers—not every company needs to follow the same rules—but it also gives regulators more leeway in judging whether a company is really acting in the best interests of consumers. The principles are expressed as desired outcomes rather than processes and procedures. Principles-based regulation aims to reduce unnecessary regulatory and administrative burdens, ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted, and provide benefits for consumers from more efficient markets, more effective protection, and better responsiveness to consumers' needs.

In the principles-based regime, the focus on outcomes is a critical difference from the prescriptive approach. Focusing on outcomes allows firms to work with the regulator to determine how the regulatory outcomes envisaged in a principle are to be reached (rather than simply conforming to a rigid process) and then to implement internal systems they think best

designed to achieve that goal. A principles-based approach removes the requirement to comply with specific rules and shifts the focus of supervision away from “box-checking” compliance. The call for principles-based regulation is really an appeal for higher ethical principles in the conduct of business. Technical compliance with the law suffices in a rules-based system but the principles-based system looks further to the stated objective of the rule. It is intended to elevate the spirit of the law above the letter.

The difference in approach lies, perhaps, in providing an opportunity for collaboration with regulators. Such collaboration allows ESCOs to build consensus on what constitutes a desirable regulatory outcome while improving the ESCO–regulator relationship. For consumer protection, consumer organizations must be comfortable with the principles that result and fewer and simpler rules can be easier for consumers to understand.

In October 2007, the New York State Insurance Superintendent Eric Dinallo released a draft regulation that would make the New York Insurance Department the first in the nation to establish principles-based regulation. The draft includes 10 principles for industry and 10 principles for regulators.<sup>2</sup> Similar to the financial industry, the retail energy marketplace is extremely creative and innovative and regulation must be just as nimble, and the best way to protect consumers and promote fair and honest competition is with principles-based regulation.

The Commission does not have to invent principles-based rules to govern ESCO marketing practices. The Commission could easily incorporate the *Statement of Principles for Marketing Retail Energy to Residential and Small Business Customers in New York State* into the UBP without adding more rules. These principles are reasonable rules that can be easily

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<sup>2</sup> New York Insurance Department Issues First Principles-Based Regulation Proposing Principles for Both Regulated and Regulators, Issued Nov. 5, 2007.

incorporated into the business philosophy and operations of ESCOs with little or no expense. In fact, most ESCOs should already be operating in accordance with such principles.<sup>3</sup>

**2. Disclosure Requirement – Section 2.B.1.b.1**

The CPB recommends that all ESCO sales agreements prominently display on their first page, or a separate page attached to the front, a chart detailing rates, fees and the term of service, similar to the “Schumer Box” that is now required to accompany all credit card offers.

Intelligent Energy submits that requiring a Schumer Box is unnecessary. Clearly stating the price, term and termination fee, if applicable, on the first page of the agreement provides adequate disclosure information to customers.

**3. Maintaining ESCO Eligibility Status – Section 2.D.6**

The CPB urges the Commission to post on its website the document by which an ESCO is notified of its failure to comply with the UBP. The CPB claims that this is a small step to help ensure the enforcement of the UBP is conducted in an open and transparent manner, increases consumer awareness of violations of the UBP and provides powerful incentive for ESCOs to comply with these requirements. The CPB fails to consider that the mere fact that a customer files a complaint is not dispositive of a violation of the UBP by an ESCO. Customers can file complaints with the DPS for any reason, some of which involve legitimate violations of the UBP and others simply a customer expressing frustration or unhappiness because current energy prices are lower than fixed term prices that the customer agreed to. Posting all complaints against an ESCO on the Commission’s website essentially makes it seem that the ESCO has violated the UBP. Public disclosure of such information would not take into account the fact that

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<sup>3</sup> Id.

the ESCO can successfully defend against the customer's complaint. Customers or potential customers probably would incorrectly perceive that the ESCO is a bad actor if only the complaints are made public and not the resolution of the complaint.

#### **4. Comments on ConEd's Proposals**

In its comments, ConEd proposes modifications to the UBP to ensure that customers who wish to return to full utility service are returned upon request by requiring that the customer should not be required to contact the ESCO and the utility to arrange to return to full utility service. Intelligent Energy submits that the current provision of Section 5-H-1 perfectly captures the relationships amongst the customer, ESCO and utility by providing that:

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.

The reasons for seeking to amend this provision is unclear nor is it obvious how customers would benefit from this change. Additionally, since an ESCO has an ongoing contractual relationship with a customer, the ESCO should be a participant in the discussions relating to returning the customer to the utility. The ESCO has a valid contractual obligation to the customer to supply commodity. The utility has a valid contractual obligation to deliver the commodity to the customer. It is appropriate that all three parties are involved when the customer decides to switch.

### **III. Conclusion**

In closing, we applaud the Commission's thoughtful analysis of the proposed amendments to the UBP. We urge the Commission, however, not to create and impose stringent

rules on ESCOs that will stifle competition and hurt marketing efforts. In addition, we believe that the potential ramifications of these amendments would be significant enough that the Commission should provide additional time for ESCOs, distribution utilities and other concerned parties to comment on the proposal and the Staff to review the issues and potential consequences.

We would be happy to meet with the Staff to discuss our comments. We very much appreciate the opportunity to comment. Should you have any questions, please feel free to contact the undersigned at 201-592-3213.

Sincerely,

INTELLIGENT ENERGY

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Michael D'Angelo, Esq.  
Director, Regulatory Affairs

## **Appendix A**

**ISSUED 11/05/2007**

**FOR IMMEDIATE RELEASE**

**New York Insurance Department Issues First Principles-Based Regulation Proposing Principles for Both Regulated and Regulators**

Insurance Superintendent Eric Dinallo today released a [draft regulation](#) that would make the New York Insurance Department the first in the nation to establish principles-based regulation. The draft includes 10 principles for industry and is accompanied by 10 principles for regulators. The draft regulation will be distributed for discussion by the industry and consumers and will be on the agenda of the New York State Commission to Modernize the Regulation of Financial Services, which Dinallo chairs.

Principles-based regulation aims to reduce unnecessary regulatory and administrative burdens, ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted, and provide benefits for consumers from more efficient markets, more effective protection, and better responsiveness to consumers' needs.

“New York must have the best, most effective regulation of financial services in order to remain the financial capital of the world,” Dinallo said. “Today that means principles-based regulation. The financial services marketplace is extremely creative and innovative and our regulation must be just as nimble. Thus, the best way to protect consumers and promote fair and honest competition is with principles-based regulation.”

“The essential goal of regulation is not rote compliance with a long list of rules, but ensuring appropriate outcomes. These principles focus both the regulator and the regulated on such outcomes and tell regulated companies our expectations for how they will conduct their business. It brings the issue of compliance to the highest levels of a company – to the Board of Directors and the management committee. It provides the flexibility to fit the different business models of thousands of different companies, while improving consumer protection,” Dinallo said.

“As a code of conduct, the principles are reasonable rules that can be easily incorporated into the business philosophy and operations of regulated parties with little or no expense. In fact, most regulated entities should already be operating in accordance with such principles,” Dinallo said. “Importantly, the principles will not expose companies to additional private lawsuits because New York’s Insurance Law generally does not provide for private rights of action. Only the regulator can enforce the principles. This is, in fact, a significant competitive advantage for New York.”

“The principles ask companies to be ethical to their core, rather than focusing on technical requirements. Indeed, if a company is generally conforming to the principles, but violates a rule in a way that does not harm the public, we should take that into account,” Dinallo said. “It is clear that detailed rules alone have not prevented misconduct. In fact, principles eliminate loopholes and gaps between rules that could allow activities that harm consumers or mislead regulators.”

“The Commission will discuss the principles at the upcoming January meeting. This is an opportunity for the Commission to focus on a key competitiveness issue – the ability of our regulatory system to keep up with ever-evolving and innovative markets,” said Scott Rothstein, Executive Director of the Commission. “The principles do not pre-empt existing law or regulation. But they make clear the fundamental purposes behind those laws and regulations and can serve as scaffolding around the existing regulatory structure, providing support and guidance as products, practices and markets evolve.”

“Principles-based regulation gives the regulator the right tools to begin changing its relationship with the regulated. An essential part of a principles-based approach is an open door between the regulator and companies so the companies can seek and receive guidance. We expect to turn regulation from periodic ‘gotcha’ exams into a continuing dialogue. Companies that deal honestly with the Department can expect to be treated honestly in return. But we will, if anything, be more stern with serious violations,” Dinallo said.

The [proposed new regulation](#) continues and codifies the Insurance Department's move towards principles and risk-based regulation under Superintendent Dinallo, who took office this year. This approach has already been applied in the settlement of the World Trade Center insurance claims and in the implementation of the workers' compensation reforms, where the Department has introduced free-market principles. This is the third significant draft regulation circulated by the Department for public comment in the last month that reflects the new principles-based approach. The first requires property insurers to create a reserve for catastrophes such as hurricanes. The second treats top-rated non-U.S. reinsurers the same as U.S. companies on the issue of posting collateral.

The Department has also developed a proposed list of principles for regulators, which it intends to issue as a Circular Letter. The principles for the regulators will establish a baseline for interactions between the Department and regulated entities, and are intended to focus regulatory action on key areas of risk, while fostering competition and innovation.

Implementing a principles-based approach will require continuation and acceleration of the changes already begun in the Insurance Department's movement towards a risk-focused approach to regulation of financial solvency. Under the principles-based approach, the staff's new role in assessing adherence to outcomes and recognizing prospective risk in insurance companies will require robust professional judgment, reinforcement from management and continual training. The list of principles for regulators will assist in this migration as it provides the foundation for the professional judgment exercised by staff.

In developing the principles, the Insurance Department has already reached out to several insurers, insurance trade groups and other interested parties. The Insurance Department will continue to conduct outreach by circulating a working draft of the proposed 10 principles-based regulations to the insurance industry and consumers. It will then go through the formal proposal process, which includes publication in the New York State Register and a formal 45-day comment period for written comments.

## **10 Principles for the Insurance Industry**

- (1) A licensee shall lawfully conduct its business with integrity, due skill, and diligence.
- (2) A licensee shall take reasonable care to organize and control its affairs responsibly and effectively, with adequate risk management systems.
- (3) A licensee shall maintain adequate financial resources.
- (4) A licensee shall observe proper standards of market conduct.
- (5) A licensee shall pay due regard to the interests of its clients and treat them fairly.
- (6) A licensee shall pay due regard to the information needs of its clients, and communicate information to them in a way that is clear, fair and not misleading.
- (7) A licensee shall manage conflicts of interest fairly, both between the licensee and its clients and between clients.
- (8) A licensee shall take reasonable care to ensure the appropriateness or suitability of its advice and discretionary decisions for any person or other entity that is entitled to rely upon such.
- (9) A licensee shall ensure that the assets of any client for which the licensee is responsible are adequately protected.
- (10) A licensee shall interact with the superintendent and other regulators in an open and cooperative way, and shall disclose to the superintendent any information relating to the licensee of which the superintendent would reasonably expect notice.

## **10 Principles for Regulators**

- (1) Regulators, and the regulatory system as a whole, should assess risk comprehensively and concentrate resources on the most important areas.
- (2) Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent and objective in the decisions they make.
- (3) Guidance from the regulator should be readily available and easily understood.
- (4) Interested parties should be consulted as appropriate prior to issuance of written guidance by the regulator.
- (5) When developing new regulations, the regulator should consider how they can be implemented and enforced using existing systems and data to minimize the administrative burden on regulated entities.
- (6) No investigation or inquiry should take place without an appropriate basis.
- (7) The regulator should not require a regulated entity to provide unnecessary or needlessly duplicative information.
- (8) All regulatory action should be proportionate to the issue being addressed.
- (9) Regulators should allow and encourage competition and innovation, while ensuring against insolvency and protecting consumers and markets, and only intervene as necessary to protect consumers and markets.
- (10) Regulators should respect the responsibility of a firm's senior management for its activities and for ensuring that its business complies with requirements and hold senior management responsible for risk management and controls.