

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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In the Matter of Retail Access Business Rules. : Case 98-M-1343

Petition of New York State Consumer Protection :
Board and the New York City Department of : Case 07-M-1514
Consumer Affairs Regarding the Marketing :
Practices of Energy Service Companies.

Ordinary Tariff Filing of National Fuel Gas :
Distribution Corporation to establish a set of : Case 08-G-0078
commercially reasonable standards for door-to- :
door sales of natural gas by ESCO's.
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**INITIAL COMMENTS OF THE OFFICE OF
THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,
ANDREW M. CUOMO**

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April 18, 2008

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INTRODUCTION

These comments of the Office of the Attorney General are filed in response to the Public Service Commission's ("Commission" or "PSC") Notice¹ regarding proposed changes to its Uniform Business Practices rules ("UBP") addressing marketing practices by energy service companies ("ESCOs").²

The UBP "provides standard state-wide business procedures for distribution utilities interfacing with ESCOs."³ According to the Commission, its proposed UBP revisions are intended to "(1) incorporate standards for marketing by ESCOs and third party contractors acting on their behalf; (2) improve residential customer protections; [and] (3) strengthen the oversight of and expand the remedies available to Staff and the Commission."⁴ The Office of the Attorney General supports these efforts to strengthen the rules. These comments make recommendations for additional provisions to ensure protection for consumers.

INTEREST OF THE ATTORNEY GENERAL

The Office of the Attorney General enforces consumer protection and antitrust laws, including laws that prohibit fraudulent or deceptive business practices. The Office has received and reviewed hundreds of consumer complaints about ESCOs over the years and has taken

¹ Case 98-M-1343, *Notice Soliciting Comments On Revisions To The Uniform Business Practices*, issued March 19, 2008 ("Notice"). The Notice requested comments from interested parties by April 18, 2008 and replies by May 12, 2008.

² ESCOs offer electricity and natural gas commodities supply to residential and business customers, who continue to receive delivery service from regulated utilities.

³ Notice *supra*, at 3.

⁴ *Ibid.*

enforcement action against a number of ESCOs.⁵ The Office’s enforcement experience shows that some ESCOs have engaged in fraudulent practices, such as switching consumers’ suppliers without authorization, impersonating utility staff, making false and misleading promises of bill savings, violating statutory home solicitation rules, improperly renewing annual contracts without proper notice and consent, and demanding unreasonable early termination fees when dissatisfied customers sought to cancel their contracts. The Office of the Attorney General has a keen interest in Commission efforts to apply tougher regulatory requirements to ESCOs in order to protect consumers.

DISCUSSION

The Commission’s proposed revisions to the UBP represent significant improvements to its current ESCO marketing standards. Clarifying and strengthening the rules will provide needed protections for consumers from unscrupulous ESCO marketers and will create a more level playing field so that legitimate ESCOs can compete fairly. The following recommendations would further strengthen the rules:

1. The Commission should strengthen its enforcement mechanisms by clarifying that ESCO compliance with the UBP is mandatory. In this way, ESCO failure to comply with the UBP provisions would subject the violator to potential civil penalties of up to \$100,000 per violation under Public Service Law §§ 25 and 26.

2. The UBP should clarify that its “plain language” provision includes the requirement under the General Obligation law § 5-702 that all consumer transaction contracts be “[w]ritten in a clear and coherent manner using words with common and every day meanings.” The UBP

⁵ See <http://www.oag.state.ny.us/telecommunications/telecommunications.html>.

should also incorporate the provisions of Civil Practice Law and Rules § 4544, which states that consumer contracts printed in less than eight points (or 5.5 points upper case) may not be used as evidence at trial by the party who drafted the document, making such contracts unenforceable by the merchant.

3. The UBP should require that the following notices and disclosures be set forth conspicuously in bold print on the first page of the ESCO customer agreements:

- a. The length of the contract term and how the customer will be notified of any renewal options;⁶
- b. A clear statement of the price for the electricity or gas if it is fixed for the length of the contract or, if the price is variable, a statement that the price can change with changing market rates;
- c. A statement that the ESCO is not an agent of the local utility and that the customer will continue to be billed by the utility for electricity and/or gas delivery service;
- d. A statement that no bill savings, compared with the local utility or another ESCO, are guaranteed, unless the specifics of such assurance are clearly set forth;
- e. Any early termination fee that applies, with notice that the customer will not be charged the fee if the contract is cancelled within 30 days of receipt of the first bill; and

⁶ Any automatic contract renewal provisions must comply with the General Obligations Law § 5-903 requirement of a reminder notice 15 to 30 days before expiration of the initial term.

- f. Notice that the customer may cancel the contract in writing within three business days from receipt of the written agreement with no obligation.⁷

The customer of record should sign or initial accepting the essential terms of the contract on the page in which these notices and disclosures appear.

4. The UBP should require ESCOs to file their sales force/contractor training materials with the Commission so that it can better monitor ESCO compliance with the UBP.

5. In order to avoid intentional or unintentional confusion on the part of consumers as to the identity of an ESCO marketer, the UBP should require the ESCO agent to make an affirmative statement at the point of sale that the representative is employed by an ESCO, not by the local utility.

6. ESCOs should be specifically prohibited from using terms in sales pitches that suggest that it is discharging an official function, or conferring a special benefit through its offer, such as claiming to determine whether the customer is “registered” with the ESCO, or “eligible” for service.

7. The UBP should require that ESCOs and their marketing contractors provide consumers with accurate information about potential bill savings in all their advertising and marketing materials, not just in the customer agreement.

8. The UBP should require ESCOs to affirmatively disclose to residential

⁷ The UBP proposed revisions extend the three-day cooling off period protection of Personal Property Law §§ 425 *et seq.* to electronic and telephonic sales, in addition to home solicitations, which is appropriate.

customers whether or not ESCO budget billing is an available billing option.⁸

9. The UBP should require that the contract clearly and prominently disclose the amount of the potential ETF. If the fee is not a fixed sum, a clear estimate of the range of such possible fees should be provided.

10. The UBP should require that the amount of any ETF must be prorated over the term of the contract, depending on when the termination occurs (*e.g.*, only 1/4 of the maximum ETF would apply if a customer terminates after 3/4 of the term).

11. The UBP allows an ESCO to cancel its contract with consumers on as little as 15 days notice without compensation to the customer, so long as the customer is returned to the local utility for full service. The UBP should prohibit ETF clauses in contracts in which the ESCO gives itself this right to cancel.

12. The UBP, including all revisions, should be extended to apply to small business customers, not just residential customers. To effectuate this, the UBP should contain a definition for small business customers based on utility service classification or average energy consumption level.

CONCLUSION

The Commission should adopt the proposed UBP revisions, together with the Office of the Attorney General's recommended improvements.

Dated: April 18, 2008
New York, New York

Respectfully submitted,
ANDREW M. CUOMO

⁸ These arrangements estimate a residential customer's annual consumption and bill one-twelfth of the expected annual cost each month, with an annual adjustment for actual usage.

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