



April 17, 2008

Hon. Jaclyn Brillling, Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: 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

Dear Secretary Brillling:

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 KeySpan, National Grid, Consolidated Edison, Orange & Rockland Utilities, Central Hudson, and National Fuel Gas. Intelligent Energy appreciates the opportunity to comment and respond to the New York State Public Service Commission (“Commission”) Notice Soliciting Comments on Revisions to the Uniform Business Practices (“UBP”) issued on March 19, 2008.¹ 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 preparing the proposed modifications to the UBP. Intelligent Energy hereby submits its comments and concerns with regard to the proposed modifications to the UBP.

I. Summary

Intelligent Energy commends the Commission and Staff for their thoughtful analysis of the petition filed by the New York State Consumer Protection Board and the New York City Department of Consumer Affairs (“CPB/NYC Petition”) asking the Commission to amend the UBP to strengthen its regulation over the marketing practices of ESCOs selling electricity and

¹ 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”].

natural gas services to residential and small commercial consumers in New York;² the response of the Public Utility Law Project (“PULP”) to the CPB/NYC Petition; and National Fuel Gas Distribution Corporation (“NFG”) proposed changes to its tariff to create standards for door-to-door sales practices by ESCOs in its territory. We are concerned, however, that aspects of the proposed modifications, if adopted, could have adverse implications for natural gas customers as well as for natural gas marketing in New York.

Consumer protection is the basis of consumer confidence in the energy supply market and should be a priority of the Commission. Intelligent Energy, however, suggests that there is no overriding need for implementing these modifications to the UBP. In its filing, the CPB/NYC Petition requests the modifications because based “on complaints received by our agencies, media reports and anecdotal information from consumers and the industry, it appears that problems with abusive, misleading and deceptive marketing tactics used by ESCOs in their contacts with residential and small commercial consumers are persistent and disruptive.”³ Intelligent Energy would like to point out that the Commission’s reports on monthly consumer complaints show complaints are on the decline.⁴ In 2007, the total number of initial complaints received against ESCOs declined 33% from complaints received in 2006. The total number of escalated complaints received against ESCOs were lower by 25% in 2007 from the number in 2006. Based on these hard numbers, it is difficult to see why there is a critical need to amend the UBP and impose prescriptive rules instead of allowing ESCOs to continue to adhere to the voluntary marketing principles.

Intelligent Energy is concerned with the trend toward the Commission dictating policy that impact existing laws and rules. If, according to the CPB/NYC Petition, problems exist with abusive, misleading and deceptive marketing tactics used by some ESCOs in their contacts with residential and small business customers then regulating the actions of all ESCOs is an overbroad approach to this problem. The Commission already has the power to revoke the authority of an ESCO operating in New York State if the ESCO violates the provisions of the UBP, including the failure to comply with required customer protections.⁵ The Commission should enforce the existing rules and take stronger action against those ESCOs that are engaging in abusive, misleading and deceptive marketing tactics instead of stifling competition by imposing these onerous rules on all ESCOs. Additionally, the New York State Attorney General has the authority to enforce the consumer protection laws enacted by the New York State Legislature and should take action to curb consumer abuse.

If the Commission decides to adopt these proposed modifications then Intelligent Energy would recommend that the Commission take the following actions:

- **These modifications should only apply to natural gas and electricity services:** The CPB/NYC Petition requests that the Commission strengthen its regulation over the

² 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 [hereinafter CPB/NYC Petition”] (filed December 20, 2007), p. 1.

³ CPB/NYC Petition, supra, n. 2, p. 1.

⁴ See, New York State Public Service Commission Office of Consumer Services: Monthly Report on Consumer Complaint Activity, December 2007.

⁵ See, UBP, Section 2.D.5.

marketing practices of ESCOs selling electricity and natural gas services. Intelligent Energy urges the Commission to apply these modifications only to electricity and natural gas services and not impose these rules on the sale of other energy related products.

- **Amend the various proposals prescribing “termination fee” to include “method of calculating the” termination fee.** Intelligent Energy assesses a termination fee when a customer breaches the customer agreement prior to the termination date of the agreement. However, since the date of the early termination is completely at the discretion of the customer, it is impossible for Intelligent Energy to determine at the time of entering into the agreement the amount of the early termination fee. Additionally, nobody is able to predict the market price/conditions at the time of termination and given the possibility of a volatile market, we are unable to include a set termination fee in our customer agreements.
- **ESCOs quality assurance procedures are a trade secret.**
- **The Commission should adopt procedures to ensure the confirmation of receipt by ESCOs of copies of customer complaints.** If ESCOs will be subject to sanctions for not responding in a timely manner to customer complaints, ESCOs need to know in a timely manner when their customers file complaints with the PSC.
- **The Commission does not need additional powers under which to punish ESCOs.** The Commission has adequate remedies to penalize ESCOs that engage in abusive marketing and sales practices.
- **Giving customers 30 days after receipt of the first invoice to cancel an agreement which contains an early termination fee provision will end the practice of providing fixed term agreements.**
- **The door-to-door marketing rules will stifle migration of customers to ESCOs.**

II. Comments on Certain Proposed Modifications to the UBP.

A. *Section 2.B.1.b.1 should be modified to state “method of calculating the” termination fee.*

A modification to UBP Section 2.B.1.b, Section 5 attachment 2.A.2 and Section 5 attachment 3.A.2 would provide that customer agreements should contain “the price, term and termination fee, if applicable, clearly stated on the first page of the agreement.” Intelligent Energy assesses a termination fee when a customer breaches the customer agreement prior to the end of the agreement. The date on which the customer will request early termination is unknown and unknowable at the time of entering into the agreement, and Intelligent Energy is unable to predict the market price/conditions at the time of early termination, and given the possibility of a volatile market, we are unable to include a set amount of the termination fee in the customer agreement. Intelligent Energy proposes that the modification in the Sections should read: “with the price, term and *method of calculating the* termination fee, if applicable, clearly stated on the first page of the agreement.”

B. *ESCO Quality Assurance procedure required under Section 2.B.1.1 is a trade secret.*

Under the modifications to Section 2.B.1.1, the Commission will require ESCOs to submit a copy of the ESCO’s quality assurance program. Intelligent Energy requests that the Commission clarify the term “quality assurance program” to provide additional guidelines on how to comply effectively with this requirement. Additionally, Intelligent Energy urges the

Commission to classify such submissions as trade secrets. Intelligent Energy's internal policies and procedures are proprietary trade secrets the disclosure of which would cause substantial injury to our competitive position. This information would only serve to benefit our competitors and would not have any material benefit to the public. Requiring us to disclose our "quality assurance program" in no way advances the goals of protecting consumers from abusive marketing practices.

C. *For ESCOs to avoid sanctions under Section 2.D.4.j they must timely receive customer complaints.*

Under Section 2.D.4.j, ESCOs may be subject to consequences for non-compliance with UBP rules for "failure to reply to a residential complaint filed with DPS and referred to the ESCO within the timeframe established by" DPS. Intelligent Energy respectfully submits that the current QRS/SRS dispute resolution system is more than adequate and has been working well for years. If DPS Staff encounters any recalcitrant ESCO that refuses to respond to their issues Staff could issue a motion to compel and/or initiate a proceeding to remove the ESCO's authority or at least prevent the enrollment of additional customers. Intelligent Energy would urge the Commission to, at a minimum, establish procedures to confirm that ESCOs have received copies of complaints referred to ESCOs. If ESCOs will be subject to consequences for failure to reply in a timely fashion then the Commission must ensure that complaints actually reach ESCOs. Currently, Intelligent Energy receives copies of complaints via email from DPS. We have had a few instances where we did not receive complaints and thus did not provide a timely response to DPS Staff. Only then did DPS Staff contact us via telephone to inquire about the failure to respond. DPS Staff could be required to contact ESCOs via telephone to confirm receipt of complaints forwarded to ESCOs.

D. *The Commission does not need Section 2.D.6 to penalize ESCOs.*

Intelligent Energy believes that the Commission currently has adequate remedies available to punish abusive marketing practices by ESCOs. We are concerned that ESCOs could face consequences, including loss of customers and revocation of ESCO's eligibility to operate in New York, even in cases where the ESCO acted in good faith, and complied with all UBP rules, consumer protections and New York State laws but yet the customer is unsatisfied with the terms of the agreement. This is particularly operative during periods of falling natural gas prices.

Additionally, Intelligent Energy is troubled by the broad scope of the penalty that may be imposed by the "Any other measures that the Commission or DPS may deem appropriate" language in subsection b.vii of this section. This provision would subject Intelligent Energy and similarly situated ESCOs to unknown risk for which we would be unable to plan and will lead to a curtailment of valid and appropriate marketing activities.

E. *The Commission should not adopt the proposed amendments to the UBP embodied in Section 5.B.3.*

The Commission proposes to amend Section 5 of the UBP to provide that:

"When an ESCO's sales agreement for service to a residential customer

gives the ESCO the right to assess a charge for early termination of the agreement, such provision shall not be in effect until a minimum of 30 days after customer receipt of the first bill for commodity service containing charges assessed by the ESCO currently providing service.”⁶

This provision is contrary to other provisions of the UBP and counterproductive to the competitive interest of ESCOs. Establishing competitive markets is one of the most efficient and powerful tools that can be used to ensure the provision of safe and reliable energy at just and reasonable rates.⁷ Allowing customers this additional penalty-free grace period will result in ESCOs not being able to offer fixed priced products to customers or only being able to offer these products at significantly increased prices.

When Intelligent Energy enrolls a customer at a fixed price for a certain term, we must purchase gas and/or enter into certain financial transactions to ensure that we can fulfill our contractual obligations to deliver gas to the customer at the promised price. We are essentially contracting for the customer. One of the critical assumptions that go into making the financial decision is that the customer will remain with us for the agreed upon length of the agreement. For a fixed or capped price agreement, once the rescission period is over and we have purchased futures, swaps and/or options there can be no grace period for customers since the markets allow us no such grace period. If there were a grace period, we would be taking inappropriate market risk and not be able to offer fixed or capped priced products. One significant benefit to consumers of being able to choose their gas supplier is the ability to choose a fixed priced plan. Making it impossible for ESCOs to offer these fixed priced plans to consumers would defeat that feature of the choice program. A breach of contract during the first or second month is most harmful to us because of the contractual obligations made with other parties to ensure gas supply to the customer.

Allowing customers to terminate a contract up to 30 days after receiving the first bill without assessment of a termination fee effectively voids the three (3) day rescission period provision of UBP Section 5.B.2. In some cases, this provision will mean that some customers will have upwards of eighty days within which to rescind an agreement with no penalty.⁸ It is standard practice in contracts for provision of services that termination fees are assessed against customers for breaching an agreement after the rescission period and prior to the termination date of the agreement. Allowing customers to breach an agreement after the three-day rescission period without penalty absolutely turns this concept on its head. Part of the calculation of the early termination fee performed by Intelligent Energy takes into consideration the number of months remaining on an agreement. Obviously, the more months remaining on an agreement, the higher the termination fee that may be assessed. Allowing such a long rescission period without penalty will have disastrous effects on Intelligent Energy’s financial position.

⁶ Notice Soliciting Comments, *supra*, n. 1, proposed new Section 5.B.3.

⁷ Case 00-M-0504, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities (issued August 25, 2004).

⁸ Fifteen days before the distribution utility will turn the gas; one month of usage before rendering of the first invoice; and then an additional 30 days after receipt of the invoice to cancel the agreement.

Additionally, this provision may fundamentally impair Intelligent Energy's contractual rights. Consumer protection is a worthy goal and interest to be protected. However, when parties have an opportunity to negotiate the terms of their relationship, the resultant contract ought to be enforced and regulatory bodies should not replace negotiations with regulations.

Furthermore, it does not take an absurd stretch of the imagination to envision countless scenarios in which consumers knowingly and willingly enter into contracts that they fully understand and then take advantage of the extended grace period to renege on the agreements, penalty-free, if those consumers can find lower prices elsewhere. Thereby leaving the marketer, who has actively hedged to provide commodity service to those customers, to bear the financial detriment of the customers' decision to cancel.

Additionally, it should be noted that no other industry has such an extensive regulation concerning the right of rescission. The airline, phone, oil, and cable industries do not have an 80 day rescission period and natural gas should not be singled out and disadvantaged. Intelligent Energy is unaware of any similar proposals requiring home heating oil companies to provide an 80-day rescission period so that a customer can call up the home heating oil company 80 days after the delivery of 200 gallons of home heating oil and request that the oil be removed so that the oil could then be replaced with cheaper oil, possibly from a different company, in a down market.

F. *A statement from the customer accepting the terms and conditions that is unaided or prompted by the ESCO marketing representative under Section 5, Attachment 1.A.3 is impractical.*

The Commission proposes to modify the Telephonic Agreement and Authorization Requirements under the UBP to require that:

“[T]he conversation shall contain the following information: A statement from the customer accepting such terms and conditions that is unaided or prompted by the ESCO marketing representative.”⁹

It is unclear how a customer would make a statement accepting the terms and conditions of an agreement if such a statement if the ESCO marketing representative neither aids nor prompts the customer into accepting the terms. A customer cannot be expected to volunteer such a statement without some prior knowledge that the statement is required. It is impossible to envision a scenario wherein the ESCO marketing representative will be able to illicit such a statement without initiating or prompting the customer to make that statement or agree to the statement. ESCOs should be allowed to prompt the customer to answer “yes” or “no” to a question bearing upon the customer's accepting the terms and conditions.

⁹ Notice Soliciting Comments, *supra*, n.1, proposed new Section 5, attachment 1, paragraph A.3.

- G. *Section 5, Attachment 1.A.3: A statement from the ESCO that no saving is guaranteed or if a saving is guaranteed, a clear description of the conditions that must be present in order for the savings to be provided.*

A proposed revision to Section 5, attachments 1, 2 and 3 with respect to telephonic, written and electronic agreements would require the marketer either to make a negative statement to the effect that there is “no savings guarantee” with respect to their product or to explain the terms under which savings are to be provided under the agreement. As worded, this proposed language would unfairly skew the focus in the rules toward savings as the primary value proposition to be derived from the competitive marketplace and would ultimately undermine ESCOs’ ability to offer other products.

Attachments 1, 2 and 3 already include the requirement that an agreement must provide the description of the price, terms and conditions. These provisions should properly focus on the ESCO’s affirmative statement that accurately describes the attributes of the ESCO’s product or service. Requiring a negative statement regarding a feature that an ESCO is not offering would detract from the value of a product that is being offered. This could lead to consumer confusion and create mistaken inferences about the benefits of the products and services being offered. The Commission could remedy this by rewriting the provision to require only an affirmative statement to the effect that, “If a savings is guaranteed, a clear description of the conditions that must be present in order for the savings to be provided.”

- H. *Section 5, Attachment 2.A.2 should not impose strict design rules on ESCO websites.*

The Electronic Agreement and Authorization Requirements of Section 5, Attachment 2.A.2 provides that “the price, term and early termination fee, if applicable, on the first page of the agreement.” Presumably, this would apply to websites on which customers enter into electronic agreements. Intelligent Energy urges the Commission not to impose strict design requirements on ESCOs’ websites. Intelligent Energy uses its website for marketing and customer acquisitions. Gas marketers all sell the same product. ESCOs need to distinguish themselves from each other in some manner. Since customers are making the buying decision before working with the ESCO, it is crucial to show ESCO differences before the sale. The website is one venue to show such difference. Requiring all ESCO websites to have a similar design will regulate away this marketing feature and stifle creative offerings.

- I. *The identification requirements under Section 10.C.1 for in-person contact with customers are onerous.*

Section 10.C.1 would require ESCO marketing representatives who contact customers in-person to produce identification displaying the representative’s name and photograph; and the ESCO’s name, address and telephone number. Reading these requirements, one can almost imagine the ESCO marketing representative knocking on the customer’s door, producing a badge and asking to talk about the customer’s gas service. Similar to how a police officer would produce a badge and ask questions. These rules are similar to those proposed in the Natural Fuel Gas (NFG) Gas Transportation Operations Procedure Manual (“GTOP”) and tariff filing which are obviously not meant to increase gas marketing competition, but are intended, instead, to dampen competition, slow and/or reverse migration of gas customers to gas marketers, and make it more likely that customers will remain with their distribution utilities. There should be no

confusion as to the identity of any marketer during an in-person setting since any agreement that would have to be signed and left with the customer is required to identify the ESCO and the customer has the right to rescind any agreement within three (3) business day under state law if the customer changes her mind.

- J. *ESCOs should not need to employ large numbers of foreign language experts in order to market effectively under Section 10.A.C.1.e.*

Section 10.A.C.1.e. prescribes standards applicable where, in in-person marketing, the customer either informs the representative or the representative determines that the customer's English language skills are insufficient to allow the customer to understand and respond to the information being conveyed. In New York, we have significant diversity in the ethnic and language make-up of the population. Requiring an ESCO's marketing representative to "find a representative in the area who is fluent in the customer's language" could mean having to find representatives who speak Polish, Korean, Russian, Greek, Italian, French, Czech, Spanish, Cantonese and Portuguese simply to market to customers on the same street block in Astoria. ESCOs should not need to hire employees who speak all possible languages spoken in New York in order to market in the State. Nor should customers be denied the benefits of gas choice simply because they speak a language that is not spoken by an ESCO marketing representative. The current legal structure has been and remains more than adequate to protect all New York State consumers.

III. Comments on Specific Questions Requested by the Commission

1. *ESCOs should not be subject to the assessment of cost and expenses of the Commission and DPSt provided by PSL §18-a.*

While ESCOs may be corporate persons subject to the jurisdiction of the Commission, it is not clear that "The total of such costs and expenses" [to operate the Commission and Department of Public Service] should be borne in part by ESCOs. It seems that the Commission may **only** assess fees against ESCOs under certain circumstances since Public Service Law §18-a (3) provides that:

"In the case of corporations or persons subject to the jurisdiction of the commission only with respect to safety, the chairman of the department shall ascertain from time to time. . . all direct and indirect costs of investigating (a) the safety of the pipelines conveying gas . . . and (b) the safety of any gas plant of corporations manufacturing pipeline quality gas..."¹⁰ (emphasis added).

Some commentators have expressed the view that ESCOs should pay some of the cost of operating the Commission since complaints are lodged against ESCOs and the Commission's staff incurs costs and expenses in handling these complaints that would not be incurred but for the ESCOs. The number of complaints received by the Commission is clearly not dispositive of general bad conduct by ESCOs. Clearly, customers can lodge complaints for any number of

¹⁰ Public Service Law §18-a (3).

reasons against an ESCO. A more accurate indicator of ESCO's acting badly would be the resolution of the complaints and the determination of whether the ESCOs involved in the complaint did something wrong. In 2007, the Commission received 1902 complaints against ESCOs¹¹ of which 323 were escalated. This meant that 83% of all complaints against ESCOs were resolved at the initial stage.¹² The number of escalated complaints against ESCOs is very small compared to the number of customers served by ESCOs. Therefore, assessing fees against ESCOs would effectively mean subsidizing the distribution utilities.

The fees and expenses of operating the Commission are properly assessed to distribution utilities since they are allowed to recoup those costs from consumers. Assessing additional fees to ESCOs would in effect result in higher costs to consumers. If the goal here is consumer protection and the provision of safe and reliable energy at just and reasonable rates then imposing additional cost on consumers is contrary to those goals. Additionally, there is some confusion as to whether assessments are currently collected based on delivery or commodity rates. Customers who switch between utility and a marketer or between marketers could conceivably pay the assessment fee twice, once in the utility delivery rate and again in the competitive commodity charges. Therefore, in analyzing this issue, the Commission should consider the fact that all customers are utility delivery customers and thus these fees should properly be assessed at the utility level.

2. *The customer of record should not be the only person qualified to enroll the residential account with an ESCO.*

Any authorized adult in the household who has access to the utility bill should be qualified to enroll an account. One of the primary policy goals of the retail access program is the development of programs that will foster the large-scale migration of customers to ESCOs, especially where workably competitive markets exist.¹³ Allowing only the customer of record to enroll an account does not advance the goal of fostering market development. This provision would also be contrary to the competitive interest of ESCOs.

The New York Home Energy Fair Practices Act ("HEFPA") ensures fair treatment of all residential energy customers, and serves to strengthen consumer protections and consumer confidence in New York's competitive energy market. HEFPA provisions contemplate that a resident of a household other than the customer of record may apply for gas service and enter into an agreement. Section 11.2 (a) (3) defines the term "applicant" to include any person who requests all or any part of gas services "at a premises to be used as his or her residence or the residence of a third party on whose behalf the person is requesting service."¹⁴ Additionally, the

¹¹ According to the New York State Public Service Commission (NYPSC), 486,826 or 11.4 percent of residential customers were purchasing natural gas from ESCOs as of November 2007, up from the 9.1 percent participation in November 2006 and the 7.8 percent participation in December 2005. Only 1.8 percent of the State's residential customers were participating in December 1999. See, EIA, Status of Natural Gas Residential Choice Programs by State as of December 2007 (available at: www.eia.doe.gov/oil_gas/natural_gas/restructure/restructure.html).

¹² See, Monthly Report on Consumer Complaint Activity, *supra*, n. 4.

¹³ Case 00-M-0504, *supra*, n. 7, p. 25.

term “residential customer” or “current residential customer” contemplates that a third party may make an application for service or enter into an agreement for the provision of commodity supply.¹⁵

Additionally, existing provisions of the UBP provide protection from unauthorized account enrollment. If an ESCO, or its agent, enter into a telephonic agreement with a customer then upon enrollment the ESCO, or its agent, shall provide a copy of any sales agreement to the customer by mail, e-mail or fax within three days after the agreement and authorization occurs. Furthermore, under Section 5.B.2 the “ESCO shall provide residential customers the right to cancel a sales agreement within three business days after its receipt.” Therefore, if the person who enrolled the account was unauthorized to do so and if the customer of record wishes to cancel the enrollment then there is more than sufficient notice and time to cancel the enrollment.

UBP Section 5.E.1 provides adequate consumer protection by requiring that “the distribution utility shall send no later than one day after acceptance of an enrollment request a verification letter to the customer notifying the customer of the acceptance. The notice shall inform the customer that if the enrollment is unauthorized or the customer decides to cancel it, the customer is required immediately to notify the distribution utility and pending ESCO.” Again, if the person who enrolled the account was unauthorized to do so and if the customer of record wishes to cancel the enrollment then there is more than sufficient notice and time to cancel the enrollment.

3. *The early termination fees for residential customers should be pursuant to a market-based approach.*

Where the customer desires a fixed or capped price agreement, termination fees must include any loss in market value of futures or swaps and the unpaid cost of options purchased on the customers’ behalf and unused. Otherwise, we will no longer be able to offer fixed or capped priced products. When Intelligent Energy enrolls a customer at a fixed price for a certain term, we must purchase gas and/or enter into certain financial transactions to ensure that we can fulfill our contractual obligations to deliver gas to the customer. We are essentially contracting for the customer. One of the critical assumption that go into making the financial decision is that the customer will remain with us for the agreed upon length of the agreement. The early termination of an agreement has actual financial costs associated with that decision. When an early termination occurs, we must “unwind” the hedge and that leaves us exposed to significant market risk.

Additionally, there is no method of identifying when a customer will breach an agreement thereby rendering the assignment of a fixed charge to the termination fee highly impracticable. A fixed termination fee would result in the inclusion of part of the risk of early

¹⁴ Section 11.2(a) (3) of Home Energy Fair Practices Act (“HEFPA”); and the Energy Consumer Protection Act of 2002.

¹⁵HEFPA Section 11.2(a) (2) provides that “The term *residential customer or current residential customer* includes any person who, pursuant to an application for service or an agreement for the provision of commodity supply made by such person or a third party on his or her behalf, is supplied directly with all or any part of the gas. . .”

termination into the price of our gas commodity and this will mean higher prices for customers who honor their agreements.

4. *There should not be a grace period for the application of early termination fees to residential customers.*

As per our comments on question 3, above, for a fixed or capped price agreement, once the rescission period is over and we have purchased the futures, swaps and/or options there can be no grace period for customers since the markets do not allow us such a grace period. If there were a grace period, Intelligent Energy would be taking inappropriate market risk and we would not be able to offer fixed or capped priced products. One significant benefit to consumers of being able to choose their gas supplier is the ability to choose a fixed priced plan. Making it impossible for ESCOs to offer these fixed priced plans to consumer would defeat that feature of the choice program.

Intelligent Energy does not coerce customers into entering into agreements. Most customers agree to have Intelligent Energy supply their gas because we offer competitive prices. When enrolling a customer, Intelligent Energy complies with all of the requirements set out in the UBP and ensures that customers are advised of their rights under New York State laws and rules. Intelligent Energy provides customers with a welcome letter and copy of the customer agreement spelling out the terms and conditions. At Intelligent Energy, we provide our customers with enough information regarding the early termination fee and the cancellation period so that offering an additional grace period within which to apply the termination fee is unnecessary.

Furthermore, it does not take an absurd stretch of the imagination to envision countless scenarios in which consumers knowingly and willingly enter into contracts that they fully understand and then take advantage of the extended grace period to renege on the agreements penalty-free if those consumers can find lower prices elsewhere. Thereby leaving the marketer, who has actively hedged to provide commodity service to those customers, to bear the financial detriment of the customers' decision to cancel.

5. *The number of customers served by an ESCO is proprietary trade secret information under the standards set forth in the State Freedom of Information Law (FOIL).*

The pertinent provisions of the New York State FOIL provide that:

“Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”¹⁶

Clearly, the number of customers served by Intelligent Energy is a proprietary trade secret the disclosure of which would cause substantial injury to our competitive position. This

¹⁶ Freedom Of Information Law §87-2(d).

information would only serve to benefit our competitors and would not have any material benefit to the public. Requiring Intelligent Energy and other ESCOs to disclose the number of customers served does not advance any legitimate public purpose nor furthers the goals of increasing government responsive and responsible to the public by making the public aware of governmental actions and extending public accountability.¹⁷

6. *The UBP provisions with respect to Marketing Standards should not apply to small commercial customers.*

The Commission should retain the distinctions between residential and commercial customers. Distinguishing between residential and commercial customers would prove difficult. This distinction would require some arbitrary classification, which would obviously include customers who use more gas than some customers who are not classified as small commercial customers. Additionally, commercial customers are also classified differently in different utility service territories. The Commission has recognized the distinction between residential and commercial customers by stating that some approaches to migration “are best designed for residential customers and others for nonresidential”¹⁸ and “we will provide that only residential customers have the right to rescind a contract because they may need additional time to reconsider their commitment to a new supplier. Small business customers are likely to possess the necessary business acumen to make the decision before entering into a sales agreement.”¹⁹

ESCOs operating in New York State must comply with all of the laws and rules in the State governing businesses and their conduct. Under New York law, it is unlawful to engage in deceptive acts or practices or false advertising²⁰ in the conduct of any business, trade or commerce or in the furnishing of any service in New York State.²¹ The attorney general is charged with bringing action to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. Additionally, the law provides for a private right of action. Clearly, small commercial customers are adequately protected in New York State without limiting the kinds of service and products that ESCOs can offer to commercial businesses.

Although under New York law, the term “consumer” is consistently associated with an individual or natural person who purchases goods, services or property primarily for personal,

¹⁷ Freedom Of Information Law §84.

¹⁸ Case 00-M-0504, supra, n. 7, p. 24.

¹⁹ Case 98-M-1343, In the Matter of Retail Access Business Rules, Order Adopting Revised Uniform Business Practices, issued November 21, 2003, at pages 21-22.

²⁰ General Business Law §350. The term "false advertising" means advertising, including labeling, of a commodity . . . In determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity . . . to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

²¹ General Business Law §349.

family or household purposes, GBL §349's consumer orientation does not preclude the application of GBL §349 to disputes between businesses per se.²² The New York Court of Appeals has found that GBL §349 does apply to disputes involving commercial businesses.²³ A commercial business seeking to recover pursuant to GBL §349 could charge conduct of the ESCO that is consumer-oriented and show as well that the ESCO is engaging in an act or practice that is deceptive or misleading in a material way and that the commercial business has been injured by reason of the ESCO's deceptive practices.²⁴ The threshold requirement of consumer-oriented conduct is met by a showing that "the acts or practices have a broader impact on the consumer at large" in that they are "directed to consumers" or "potentially affect similarly situated consumers". Therefore, commercial businesses can bring private action to enforce the consumer protection provisions of GBL §349. Thus, the distinction between residential and small commercial customers should be maintained.

7. *ESCOs that include early termination fees in residential sales agreements should not be required to obtain a "wet" signature on the sales agreement.*

A recorded sale is far better proof of sale than a wet signature. The UBP's Telephonic Agreement and Authorization Requirements embodied in Section 5 provides adequate protection to consumers.²⁵ In Intelligent Energy's call scripts used in telephonic agreements, we inform customers that part of the terms and conditions of the agreement is that there is a termination fee. We also include this provision in the welcome letter that we send to customers along with the copy of the customer agreement. These efforts combine to make it very clear to customers that they may be assessed a termination fee for ending the agreement before the termination date. Requiring a "wet" signature would remove the requirement that telephone calls are recorded since the "wet" signature agreement would become the proof of the agreement. In the future, ESCOs would no longer be able to make available the audio recording of the customer's agreement and/or authorization. The investigation of disputes would be limited to the "wet" signature agreement and the memory recall of the customer and the ESCO representative. This would end telemarketing and on-line sales efforts as we know it.

Wet signatures require that a representative of the ESCO show up at the customer's door. If the goal of these amendments to the UBP is to curb abuse in door-to-door marketing and sales practices then this surely is not a sensible way to solve that problem.

The Commission's goals and objectives of protecting New Yorkers must also take into consideration the goals and objectives of other federal, state and local entities. For example, the

²² See, Cruz, etc., et al., v. NYNEX Information Resources, et al., 263 A.D.2d 285, 703 N.Y.S.2d 103 (2000).

²³ See, Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529 (1995).

²⁴ Id., at 25-26.

²⁵ The section requires that ESCOs obtain a statement from the customer providing or verifying the customer's name, postal and, any e-mail address, distribution utility customer account number, and any additional information needed to verify the customer's identity. See, UBP, Section 5, attachment 1.

United States Congress passed the Electronic Signatures in Global and National Commerce Act²⁶ in 2000 with the legislative goal of promoting electronic commerce by providing a national framework for electronic signatures and transactions. Electronic records and signatures have the legal and commercial equivalence of paper records and handwritten signatures. Electronic records help to decrease the cost of business, increase the speed at which business is done, and add security to electronic business transactions. Many gas customers are also customers of banks,²⁷ securities brokerage firms²⁸, mortgage companies,²⁹ credit card companies, insurance companies,³⁰ telephone companies,³¹ cable and satellite companies, etc. All of these industries allow customers to enter into agreements by signing electronic signatures over the internet or through a telephone recording. Consumers can enter into a variety of agreements, such as opening brokerage and retirement accounts, buying insurance, applying for a mortgage, some of which impose severe penalty for early termination and others that involve significant risk of loss, without providing a “wet signature”. Enrolling with an ESCO for gas service and having the utility as a supplier of last-resort surely involves significantly less risk than entrusting your life savings to a financial institution or obtaining a variable rate mortgage and therefore ESCO enrollment should not impose more burdensome restrictions. If the Commission were to adopt this proposal, it would become easier in New York State to mortgage your house than to sign up for gas supply for that house.

8. *The Commission should not require ESCOs to report the frequency of enforcement of early termination fees for residential contracts as part of the UBP.*

The Commission should consider the frequency of enforcement of early termination fees for residential contracts as confidential information the disclosure of which would cause substantial injury to ESCOs’ competitive position. The Commission, therefore, should not

²⁶ Electronic Signatures in Global and National Commerce Act is commonly referred to as the “E-SIGN Act”. 15 U.S.C §7001 et seq.

²⁷ The Federal Truth in Lending law provides that:

(f) Electronic signatures. An electronic signature as defined under the E-Sign satisfies any requirement under this part for a *consumer’s signature or initials*. 12 CFR § 226.36.

²⁸ National Association of Securities Dealers (NASD) Rule 11870 provides that:

“(3) For purposes of this Rule, customer authorization pursuant to a transfer instruction could be the customer’s actual signature, or *an electronic signature* in a format recognized as valid under federal law to conduct interstate commerce.”

²⁹ Federal Deposit Insurance Corporation (FDIC) Special Rules for Certain Home Mortgage Transactions provide that:

(ii) *Telephone disclosures*. A creditor may provide new disclosures by telephone if the consumer initiates the change and if, at consummation. 12 C.F.R 226.31(c).

³⁰ The E-SIGN Act provides that:

(i) Insurance: It is the specific intent of the Congress that this subchapter and subchapter II of this chapter apply to the business of insurance. 15 USC 7001(i).

³¹ The FCC’s rules allow some transactions and communications to be made by electronic means. “A telecommunications carrier may use a written or electronically signed letter of agency to obtain authorization and/or verification of a subscriber’s request to change his or her preferred carrier selection.” See, Federal Communications Act, 47 C.F.R 64.1130.

require ESCOs to provide this information as a general course. The Commission may ask an individual ESCO to provide this information during the course of an investigation into a complaint or on occasions when disclosure of such information is critical to the Commission's decision-making process.

9. *Definition of the term "plain language" as used in Section 2.B.1.b of the UBP.*

Plain language should mean writing in a clear and coherent manner using words with common and every day meanings.³² Since the General Obligation Law already defines the term "plain language" that definition should prevail. The Commission already has great discretion in reviewing an ESCO's written materials and can exercise that discretion during the approval process and during the annual submission. Additionally, by their very nature terms and conditions do constitute a legally binding agreement which may wind up being interpreted by our legal system. As such, some legal phrasing is required to both protect the consumer and the ESCO.

10. *Additional modifications to the UBP that should be considered*

Intelligent Energy respectfully requests that the Commission consider making it easier for ESCO's to enroll customers and obtain usage information.³³ The current system is cumbersome, time consuming and very technical. Other utilities and states allow constant and continuous access to customer information such as name, address, account number and usage all without any consumer issues and/or slamming issues. The Atlanta Gas Light Eneract system allows marketers to obtain usage information immediately which greatly helps the ability to obtain an accurate price quote which can often result in lowering the price for a customer. This is especially true for commercial customers. It would be extremely helpful for ESCOs to have a similar system in each utility which would help us better service the consumers and give ESCOs the ability to offer much better pricing.

Additionally, Intelligent Energy would fully support the requirement that all utilities allow ESCO consolidated billing³⁴. Currently only NFG allows ESCO consolidated billing under the Single Retailer Model. ESCOs should have the right to directly bill their customers without having to add an extra bill to the customer. Merely forcing ESCOs to dual bill or utility consolidated billing do not fully allow consumers to exercise their right to choose. ESCOs contend that they can bill much more competitively than a utility and we should at least be given the opportunity to do so in more than just a single territory.

Intelligent Energy also respectfully requests that the Commission revisit UBP Section 3 concerning "creditworthiness" as the current standards clearly over protect the utilities even in a "worse case scenario". This over protection requires additional capital and cost to be needlessly

³² General Obligation Law §5-702.

³³ See, UBP, Sections 4 and 5.

³⁴ See, UBP, Section 9.

tied up and pledged to the utilities which could be better spent lowering the commodity cost and passing more savings on to the New York consumer.

IV. Comments on NFG's Proposed Door-to-Door Marketing & Sales Standards

Intelligent Energy opposes the proposed amendments to NFG's GTOP and tariff which would establish standards for door-to-door sales by natural gas ESCOs doing business in NFG's service territory. Rules governing door-to-door sales by ESCOs in New York are not appropriate subject matter for NFG's GTOP Manual and Tariff. The GTOP governs operational rules intended to support the reliability of the system and the relationship between ESCO and the utility in such areas as communications protocols, determination of delivery quantities, and the like. Rules governing door-to-door sales and marketing are properly addressed in the UBP.

NFG argues for the authority under its GTOP "to suspend or discontinue ESCO enrollments if [NFG] reasonably determines that an ESCO is violating a [door-to-door sale] Standard." This would imbue NFG with the Commission's powers and leave ESCOs at NFG's mercy. Promising to provide ESCOs with all process and protections under the UBP will not protect ESCOs from unreasonable and arbitrary enforcement. No utility should be able to exercise these powers over entities with which the utility competes for customers. It will surely not advance retail competition if NFG can suspend or discontinue ESCO enrollments. Discontinuing ESCO enrollments is a power that only the Commission should properly wield.

V. 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

Michael D'Angelo, Esq.
Director, Regulatory Affairs