

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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 Consumer Affairs Regarding The Marketing Practices of Energy Service Companies)))))	Case 07-M-1514
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))))	Case 08-G-0078

**COMMENTS OF THE NEW YORK STATE ENERGY MARKETERS
COALITION ON MODIFICATIONS TO THE UNIFORM BUSINESS
PRACTICES APPLICABLE TO ENERGY MARKETING COMPANIES**

The New York State Energy Marketers Coalition (“NYSEMC”) appreciates this opportunity to submit comments in response to the Notice Soliciting Comments on revisions to the Uniform Business Practices (“UBP”) as set forth and published by the New York State Public Service Commission (“Commission” or “NYSPSC”) on March 19, 2008. These comments are applicable to each of the cases identified above: to Case 98-M-1343, related specifically to the development and revisions of the UBP; to Case 07-M-1514, related to the petition of the New York State Consumer Protection Board and the New York City Department of Consumer Affairs regarding the marketing practices of Energy Services Companies (“ESCOs”); and Case 08-G-0078, associated with the 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.

The NYSEMC is a group of like-minded energy marketing companies that serve approximately one million residential and small commercial natural gas and electricity customers in deregulated markets located throughout twelve states across the United States. In New York State, NYSEMC members have focused their efforts thus far on

supplying natural gas to residential and small commercial consumers. NYSEMC members include Interstate Gas Supply of New York, Inc. (www.igsenergy.com), Vectren Retail, LLC (www.vectrensource.com), and Commerce Energy, Inc. (www.commerceenergy.com).

Although relatively new to New York State, NYSEMC members have extensive energy marketing experience, collectively exceeding three decades in nearly twenty utility franchise areas nationwide, and have participated in many coalitions, collaborations, committees, and proceedings to introduce and advance competitive markets across the country. In each instance, the philosophy of providing the highest quality customer experience, and providing the maximum level of consumer protection, has been demonstrated in the positions taken by and, more importantly, the actions of each individual member. This philosophy is critical to NYSEMC members' ongoing success. As such, NYSEMC believes in the patient, steady, and thoughtful development of retail markets using marketing practices that represent ESCOs with integrity and professionalism. NYSEMC members recognize the important public policy and business premise that consumers must be treated fairly and respectfully at all times, and work diligently to ensure continued consumer protection criteria in all transactions – including marketing, sales, product delivery, billing and credit and collection.

**NYSEMC AGREES WITH THE CRITICAL IMPORTANCE
OF TREATING CONSUMERS FAIRLY**

NYSEMC has participated in discussions with the Commission both informally and through participation in a number of proceedings to support the Commission's disciplined, careful and consumer-oriented development of competitive policies, intended to foster a robust retail marketplace, and conducted in an environment intended to ensure on-going reliability while introducing energy choice for all customers. In response to these policies, New York State has carefully cultivated the initial development of a competitive retail energy marketplace, and has begun to attract investment into the state by well-capitalized ESCOs that are committed to the growth and development of markets – and who bring the opportunity for lower prices, expanded services, energy efficiency, and environmentally-friendly offerings to the people of New York State. The number of approved ESCOs continues to grow; and with that the opportunities for competitive offerings to consumers.

Over the past several years, the Commission has repeatedly expressed its belief that consumers should have the ability to access competitive supplies of both natural gas¹ and electricity.² In addition, the Commission provided an interim review on the status of competition in 2004.³

As a result of these proactive policies, and the Commission's encouragement of cooperation between utilities, ESCOs, consumer protection groups, and other interested parties, retail energy markets have developed and grown.

Currently, more than 100 ESCOs, including companies that are large and well-capitalized, are eligible to do business in New York. In each of the service territories of the six major combined utilities, at least six electric and six gas ESCOs are actively serving customers. These ESCOs serve more than 1.3 million customer accounts, with about 40% of New York's electric usage and 46% of gas usage met by ESCOs or from other alternatives to utility supply. Competitive markets have continued to grow over the past year, with an overall statewide increase of about 44% in the number of electric customer accounts moved to ESCOs (a 15% increase in load) and an 18% increase for gas customer account movement (a 4% increase in load).⁴

The number of competitive marketers actively providing gas services in the state continues to increase, and the innovations introduced by these marketers have expanded dramatically. In addition to a variety of commodity purchasing options such as fixed, variable and capped prices, gas marketers also provide combined natural gas and electricity supply, energy equipment repair and warranty service, energy efficiency and conservation services, utility bill review and auditing, and the option to purchase green energy products. As the competitive markets continue to grow and expand, competition will drive additional innovation and products prompted by a desire to respond to consumer demand and the need of market participants to remain competitive.

Central to the success of competitive markets is the fair treatment of consumers. Especially at the residential level, care must be taken by responsible providers of products and services to ensure that consumers benefit from the marketing environment. By definition, this occurs not by dictating what consumers should buy through a regulatory

¹ Case 93-G-0932, *Emerging Competitive Natural Gas Markets*, Opinion No. 94-26 (issued December 20, 1994).

² Case 94-E-0952, *Competitive Opportunities Regarding Electric Service*, Opinion No. 96-12 (issued May 20, 1996).

³ Case 00-M-504 *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities - Unbundling Track*, Statement of Policy on Further Steps Towards Competition in Retail Energy Markets (issued August 25, 2004).

⁴ Order, pp. 4-5; gas statistics from December 2006, electric statistics updated through February 2007.

construct of set prices and services, but through fair and transparent treatment that enables access to the broadest variety of product offerings; and, most effectively, allowing consumers to define what their needs are.

Competitive energy marketers know that a sustainable business model will only be developed through customer acquisition **and retention**. The latter part of this equation has significant implications for the provision of customer protections and treatment in a competitive environment, and is sometimes overlooked by those advocating a more regulatory approach to these ideals. Customer retention mandates that successful marketers who have long term business plans treat their customers with fairness and deference. This begins with the ability of the consumer to understand an offer; to engage in a contractual process that is clearly presented and free from overly burdensome jargon and fine print; and that fulfills the product and/or service promised in the solicitation effort, supporting materials, contractual language, and verification of sale. Sustainable success will not be possible any other way.

Consumers should not feel pressured to enter into a sales agreement with any ESCO to purchase a product or service that they do not understand or want. Consumers *do* have a responsibility, however, to live up to contractual obligations that they freely enter into. Of course this obligation must be conditioned on knowledgeable consent, which is achieved through clear and effective marketer communication.

As of this writing, over one million electricity and one-half million natural gas residential and small commercial customers have migrated to ESCOs in New York State, and the numbers continue to rise.⁵ In the vast majority of situations, ESCOs are marketing their products and services in a manner consistent with the Uniform Business Practices that treats consumers with fairness and equity. These ESCOs provide clear identification to the consumer, and explain up-front in simple terms the product and/or service that they are promoting. It is in their best interest to do so; otherwise they will alienate consumers and be subject to increased legal costs, reduced profits, and an impaired reputation. As in any segment of the competitive economy, there may be a small number of ESCOs whose activities do not reflect a steadfast commitment to compliance with the Uniform Business

⁵ New York State Department of Public Service migration statistics as of November 2007; see http://www.dps.state.ny.us/Gas_Migration.htm and http://www.dps.state.ny.us/Electric_RA_Migration.htm

Practice. The Commission, in fact, tracks those statistics and posts them on its Website for consumers to view. In those instances where initial or escalated complaints are filed by consumers with the Commission, the majority of complaints are filed against a very limited number of marketers. For example, for those *initial* complaints made against ESCOs in 2007, more than 75% of complaints were filed against seven (7) ESCOs. Likewise, for those complaints that rose to an escalated level, more than 60% were filed against only eight (8) ESCOs – all but two of them the same marketers from the initial complaint list.⁶ With over 100 marketers active in New York, this meant that the vast majority of complaints originated from far less than 10% of the ESCOs doing business in the state.

Of particular note, NYSEMC members accounted for just over 1% of the *initial* and *escalated* complaints made against ESCOs in 2007.⁷

**MANDATORY ESCO MARKETING STANDARDS, IF PROPERLY FOCUSED,
ARE CONSISTENT WITH THE CONTINUED EVOLUTION OF THE COMPETITIVE
MARKET AND DESIRABLE IN TERMS OF INTENT AND EFFECT**

NYSEMC recognizes that establishing a mandatory baseline of marketing standards for ESCOs would support and enhance the fair treatment of consumers. As such, NYSEMC agrees conceptually with the provisions set forth in the proposed addition of a new Section 10 to the State's UBP. The proposed marketing standards are similar in nature to the Voluntary Statement of Principles that were developed collaboratively with the ESCO industry and Commission Staff in 2006 and broadly supported by the ESCO community.⁸

In addition, there already exist a variety of other consumer protections which govern and regulate the sale of energy to residential and small commercial consumers. These include, but are not limited to, the General Business Law (§ 349), New York Door-to-Door Sales Protection Act, the NYC Consumer Protection Law, and the NYS Telemarketing and Consumer Fraud and Abuse Prevention Act, to name a few. The application of these laws should not be any different for the sale of natural gas and electricity than for the sale of

⁶ See <http://www.dps.state.ny.us/Dec2007.pdf>, p. 12-14

⁷ *Ibid*

⁸ The Voluntary Statement of Principles has been supported and signed by more than 30 ESCOs, which includes all NYSEMC members, and can be found at <http://www.askpsc.com/askpsc/publication/?PublicationAction=renderPublicationById&PublicationId=60693d22d6295d62db9013b138dc2120>

communications services, home improvement services, or other items. We do feel that Marketing Standards need to be *narrowly constructed* to ensure that the marketplace remains based upon free enterprise – where consumers choose to purchase products and services not solely related to perceived savings, but also for other value-added benefits. It is important that any adopted Marketing Standards not be built around just providing and guaranteeing savings. Value propositions offered through the competitive process are much broader. Standards constructed only on savings, while well-intentioned, are presumptuous about consumer demand and will stifle innovation. Competition is not about performance against a perceived, yet ill-defined, standard of price comparison. Competition is a market dynamic which drives efficient pricing and innovation.

The relationship between an ESCO and consumers needs to be based upon full disclosure of the terms and conditions associated with the contract to purchase a product or service. In this regard, the purchase of energy should be no different than the purchase of any number of other products or services which are governed by contractual relationships.

That said, NYSEMC does recognize there are unique characteristics of the emerging energy industry that bear consideration, and which can be adequately addressed by making these Marketing Standards mandatory. The remainder of NYSEMC's comments provide insight and specific suggestions on how to make the proposed Marketing Standards effective and practical.

EFFECTIVE CONSUMER PROTECTION STANDARDS
CENTER AROUND FULL DISCLOSURE IN TERMS AND CONDITIONS

To a significant degree, the need to establish mandatory Marketing Standards for any industry emanates from a public policy to provide full disclosure to consumers with regard to the terms and conditions surrounding the purchase they are making. In any transaction, it is important for the buyer to be given a clear description of what they are purchasing so that they can enter into the arrangement freely and responsibly. The seller must provide this information in sufficient detail to enable the buyer the ability to make an informed decision.

In the natural gas and electricity industries, much like the telecommunications industry prior to full deregulation, the incumbent utility had monopoly right to the service

territory, which made the need for marketing and sales activity essentially unnecessary. Now, with a choice of commodity supplier, consumers have the option to *purchase their energy supply* from a competitive, independent marketer (ESCO), while still receiving *delivery of the energy* from their distribution utility. Although customers may be purchasing their energy supply from an ESCO (with variable, fixed, or seasonal rates) as well as additional energy-related products and services, including warranty services on equipment, customers need a clear understanding that the utility will continue to deliver the natural gas or electricity to their premise, and to respond to any leaks or delivery-related problems should they occur.

This basic understanding of the segregated duties of ESCO and utility must be clearly stated to consumers during the sales and marketing process, as well as through utility communications with customers. It is a fundamental understanding that must be communicated to consumers, and is often the reason for confusion and misunderstanding surrounding the role of the ESCO and utility.

As a sale is being made by an ESCO to a consumer, it is critical that the ESCO provides an unambiguous description of what the consumer is purchasing, including an accurate description of the product specific attributes of the offering, and a succinct and accurate description of the terms and conditions of that sale and resulting contractual relationship. Whether it is a direct mail solicitation (in writing), a telephone sale (verbally; followed up by a 3rd party verification; and subsequently, in writing), or a door-to-door transaction (verbally and in writing), ESCOs must provide clear information about what the consumer is buying, for how long, and at what price. This does not preclude the ESCO from offering products that are “evergreen” (continually renewed unless cancelled by the customer), or non-specific in price (such as variable rates that change on a daily basis with the market). In fact, many products and services are sold to consumers the same way. It does, however, require that ESCOs set forth the conditions of the sale up front so that the consumer is able to make an informed decision on his/her purchase at the time of the marketing transaction.

Further, any termination fees that may result from the consumer’s cancellation of the agreement with the ESCO should be spelled out specifically for the protection of both parties. ESCOs should be permitted to collect a reasonable cancellation fee when a

customer terminates his or her relationship with the ESCO, in recognition of the administrative burden associated with filing the necessary notices with the utility, resolving and reconciling billing issues, and other database management activities. In addition, ESCOs should be permitted to recover any losses that may be incurred by a customer's cancellation of a long-term contract involving a fixed, capped-price or other hedge-backed pricing plans, since the ESCO must make a long-term financial commitment (often referred to as a hedge) to meet this obligation to the customer. By canceling a long-term arrangement, the ESCO may be forced to liquidate its physical or financial hedge at a loss.

The ESCO is entitled to recover this loss. However, the ESCO has a responsibility to clearly set forth how the penalty will be calculated in the event the customer cancels the agreement and the ESCO invokes this provision of the contract. Absent a specific description that spells out exactly how this termination expense is to be calculated, ESCOs should not be allowed to recover it from the consumer.

To summarize, ESCO contracts and agreements must stipulate the specific terms and conditions of the sale of its products and services to consumers. This is just good business.

NYSEMC RESPONSE TO SPECIFIC QUESTIONS FROM STAFF

NYSEMC provides specific responses to the ten (10) questions set forth in the Notice Soliciting Comments for 98-M-1343, et al:

Q1. Should the ESCOs be subject to the utility assessments provided by PSL §18-a?

A1. Not at this time. While NYSEMC recognizes that these assessments fund the operations of the PSC, PSL §18-a structures its assessments based on utility revenue. NYSEMC believes that more work is needed to understand the implications of this on ESCOs and the market. In addition, if utilities currently recover the cost of these assessments in the delivery rates to customers, application of an assessment to ESCOs (who have only commodity rates to charge) would significantly disadvantage ESCOs in the price to compare with utilities. If at some time in the future the Commission determines that ESCOs should be assessed under this section, the Commission should also ensure that utilities are similarly recovering their assessments through their commodity

charges. In addition, utilities are provided with a guaranteed rate-of-return to fund these assessments; something unavailable to competitive marketers. We are aware that other lightly-regulated entities are not currently subject to §18-a assessments. We believe this issue needs more review

Q2. Should the customer of record be the only person qualified to enroll the residential account with an ESCO?

A2. NYSEMC believes that the account holder, other members of the account holder's household, or an authorized representative of the account holder should be permitted to enroll a residential account with an ESCO.

Q3. Should early termination fees for residential customers be limited to: (a) a flat amount (e.g. \$200); (b) an amount based upon a set fee per month multiplied by the number of months remaining on the contract (e.g. \$8 x 20 months = \$160); or (c) some other variation?

A3. This question must really be considered in two parts. First, NYSEMC believes that ESCOs should be able to charge a reasonable *cancellation fee* associated with any contract or agreement which clearly stipulates that such a fee will be assessed for early termination of an agreement. While the fee amount, if any, should be determined by each ESCO, any fee should be fully disclosed to the consumer in clear and specific language in the contract for purchase. (e.g. "Early termination of this contract may result in a cancellation fee of \$XX charged to the customer.") With full disclosure by the ESCO, the early termination fee is an element of a bargained-for exchange between consenting parties and should be afforded deference. In a well developed market, the best determinant of reasonableness of cancellation fees is what consumers in the market dictate. Ohio is a good example of a well developed natural gas competitive market for residential consumers, with statewide levels nearing 50% taking service from ESCOs. In Ohio, consumers dictate what they will tolerate in natural gas cancellation fees, and the market, through consumer preferences, has established what consumers deem are reasonable cancellation fee levels. However, Ohio began its journey into natural gas competition at the residential consumer level several years earlier than New York and, as a natural result, the market is more mature than the current level of competitive development in New

York. Consumers in New York are still becoming familiar with their right to choose competitive alternatives and as such, do not have the same level of experience shopping nor has the migration rate evolved to the point at which consumers can dictate acceptable and reasonable cancellation fee levels through their purchasing decisions. Over time, consumers in New York will begin to dictate what they deem are acceptable terms, including the reasonableness of the level of cancellation fees and should be permitted this opportunity.

That being said, NYSEMC acknowledges that the retail energy market is in a nascent stage and does not benefit from the level of consumer familiarity as do mature product markets. In order to foster an environment that encourages consumer outreach and education and engenders consumers with a feeling of confidence as they venture into the competitive energy market and sample various competitive offerings, NYSEMC recognizes that the lower the level of risk associated with a consumers' choice the greater the number of consumers who will venture into the competitive market. Consequently, NYSEMC understands the posture of certain stakeholders concerning a perceived need to limit traditional competitive freedoms related to the level of cancellation fees, in order to further enhance consumer benefit. While NYSEMC believes a blanket and universal cap on early termination fees without a demonstration of ESCO misconduct a) is based on an erroneous assumption that consumers are unable to enter into a freely bargained for exchange, and b) may have a detrimental impact on product development and offerings into the market, nonetheless, providing a period of time during which residential consumers can become familiar with the competitive market and more freely move among competitive alternatives with reduced risk associated with cancellation fees may provide additional consumers with the confidence to venture into the competitive market.

Therefore, NYSEMC would support a reasonable cap on early termination fees for a period of time, if the cap applies to the sale of the commodity piece only, and not ancillary products and services bundled with the product offering. However, any such cap should sunset 36 months from implementation, a timeframe that is reasonable when balancing the desire to create an atmosphere that fosters residential consumer participation in energy markets with a

recognition that as the competitive market develops consumers will dictate acceptable levels for such fees. NYSEMC would suggest that such a cap could continue to remain available even after the expiration of such a cap in 36 months as a regulatory sanction on a case-by case basis upon a finding of ESCO misconduct. An absolute cap (for example \$250) is something that the NYSEMC could conditionally support, based upon the conditions outlined in the preceding sentences. Since the length of the contract is often a decisive factor in the amount of such a fee, it may also be appropriate to tie the cancellation fee to the number of years of the contract (for example, for each year of a contract, the cancellation fee cannot exceed \$50). Further, NYSEMC has concern regarding the precedent of this proposal and would emphasize that, on this single issue a reasonable regulatory level is acceptable, under the conditions outlined. In a fully developed competitive market, consumers will dictate the terms available in the market, and the reasonableness of those terms will be established through purchasing decisions.

Again, even with an absolute cap in place it is NYSEMC's position that, absent up front disclosure, ESCOs should not be allowed to recover *any* cancellation or long-term contract recovery fees. If the customer is not made aware of these fees before execution of an agreement, marketers should be prohibited from collecting them.

Q4. Should there be a grace period for the application of early termination fees to residential customers, and if so, what is the appropriate length of time for the grace period?

A4. NYSEMC believes that a seven day right of rescission period would provide an adequate period of time for the utility to send a notice to the consumer about his or her switch of supplier and to consider the purchase. We assert that a grace period should be consistent with other contractual agreements for consumer products and services, and that the real issue is the clarity of the contract with the ESCO and the customer's understanding of the terms and conditions upon which the original purchase agreement was made.

If the contract language is clear and specific, we believe that consumers should be allowed a three-day period to cancel their agreement with an ESCO without any potential penalty. In addition, NYSEMC believes that where an ESCO fails to disclose relevant conditions of the sale which cause a customer to seek termination of the relationship, the consumer should be able to cancel his or her agreement with the ESCO at no risk or expense.

Q5. Is the number of Customers served by an ESCO proprietary or trade secret information, under the standards set forth in the State Freedom of Information Law?

A5. Yes. A recent Freedom of Information Law (FOIL) request to the NYSPSC on this subject was in fact rejected.⁹ Disclosure of a given ESCO's number of customers could harm competition by disclosing information regarding specific ESCO's geographic marketing strategies, concentrated efforts, and other non-public information. Except for those instances where publicly-traded companies disclose required information to comply with other existing regulatory requirements (Securities and Exchange Commission, etc.), this information should be treated as proprietary. To require additional disclosure would discourage new marketers from entering the state.

Q6. Should the UBP provisions with respect to Marketing Standards be applicable to small commercial customers? If so, how should small commercial customers be defined?

A6. No. Irrespective of the fact that small commercial customers should be treated fairly in the marketplace; the UBP provisions – and the Commission's ability to provide oversight – are specifically geared towards residential customers. A number of pre-existing laws and regulations already protect commercial customers from improper treatment during marketing and sales activities of vendors. In fact, the Commission itself has distinguished commercial customers from residential energy consumers in a previous Order adopting revisions to the UBP specifically focused on the marketing of energy. In this Order, the Commission stated that small commercial customers "are likely to possess the

⁹ Trade Secret 06-01, request for monthly utility unredacted ESCO gas flow-through data reports

necessary business acumen to make the decision before entering into a sales agreement”.¹⁰

In addition, NYSEMC asserts that it would be very difficult to define a small commercial customer. While it may seem easier to do so for one fuel (i.e., non-demand electricity customer); some customers would be viewed as small volume commercial for one product, while they are considered large volume customers for another. The existing mechanisms that exist vary by utility.

Finally, there are a number of entities that exist to respond to specific commercial customer complaints such as the Attorney General’s Office and the Consumer Protection Bureau.

Q7. Should ESCOs that include early termination fees in residential sales agreements be required to obtain a “wet” signature on the sales agreement?

A7. The provision of *cancellation fees* or *long-term contract recovery fees* outlined in Question 3 above should be clearly and fully disclosed to consumers, either during a phone sale, direct mail, door-to-door or other “face-to-face” transaction. The confirmation of the sale should follow the required steps associated with the type of sale made (i.e., a 3rd party phone verification from a phone sale, signed contract for door-to-door, direct mail sale with a commitment to enroll via electronic, telephonic or wet signature methods, or electronic consent for Internet sale). Therefore, a “wet” signature should not be required to indicate the inclusion of an early termination fee unless the sale itself and associated contract is one that requires a signed agreement. Where a written contract is presented to the customer at the time of sale, an affirmation of the potential termination fees should be made; but no specific additional signatures should be required.

As noted above, ESCOs should be precluded from collecting any fees associated with a contract unless specifically spelled out in the agreement, phone verification script, or terms and conditions.

¹⁰ Case 98-M-1343, Order Adopting Revised Uniform Business Practices, issued November 21, 2003, at pages 21-22

Q8. How often do ESCOs enforce early termination fees for residential contracts? If available, the Commission seeks this information on an annual basis separated by contract types, e.g. fixed and variable price contracts.

A8. An ESCO's decision to enforce its cancellation fees or long-term contract recovery fees is subject to its own business discretion. Under certain conditions or circumstances, the ESCO may agree to waive a fee or negotiate a modified contractual arrangement with a given customer as any provider of products or services may choose depending on the competitive market.

Regardless, this fee information should not be a required disclosure. If, during discussions with the NYSPSC, a choice is made to disclose this information, that would be the choice of the ESCO.

Q9. How should the term "plain language" as used in Section 2.b.1.b of the UBP be defined?

A9. Section 5-702 of the New York State General Obligations Law sets forth that the term "plain language" is language that is written in a clear and coherent manner, using words with common and everyday meaning. NYSEMC submits that this definition is adequate and sufficient for Section 2.b.1.b. of the UBP.

Q10. Are there additional modifications to the UBP that should be considered?

A10. Yes. NYSEMC believes that access to customer information is an important consideration that the Commission should consider with regard to its marketing standards, the development of the competitive marketplace, and with specific regard to the UBP.

In its Order denying the Petition of Accent Energy, LLC for utilities to provide customer account information to ease the ability of ESCOs to enroll customers, the Commission required that each utility file plans¹¹ on how they could make account information easily available to their customers; so that they could contact

¹¹ Case 98-M-1343, *In the Matter of Retail Access Business Rules, Petition of Accent Energy, LLC*, Order Denying Petition and Making Other Findings (issued November 7, 2006)

utilities from shopping mall kiosks, home shows, or other public access points, and obtain their account information. Utilities did file plans; however, no disposition of those plans has taken place by the Commission, nor have they been posted on the Commission Web site Document Room for easy public access.

This matter is important to NYSEMC members, who respectfully request that the matter be expedited for review.

As a correlative matter, marketing efficiencies are essential to ensure that product offers and ESCO communications reach consumers statewide. While numerous sources and services for providing consumer information are available, the current information on commercially available customer lists is not utility specific and, thus, inaccuracies are unavoidable. Sending the wrong information to the wrong consumer causes customer confusion and results in needless costs by the ESCOs. The release of basic, non-sensitive utility customer information, limited to name and address, would enable marketers to craft the proper message and reach the proper customer and to pre-populate data in customer information systems that would enhance the consumer experience when the customer contacts an ESCO. Providing the non-sensitive customer information reduces marketing and acquisition costs, and ultimately allows ESCOs to pass those savings on to consumers in the form of lower energy costs

This information is particularly important in the context of natural gas marketing. Unlike electricity, where virtually every household is a consumer, natural gas infrastructure does not exist in every neighborhood. The ability to market to those consumers who are able to make choices regarding a product reduces acquisition costs and unwanted solicitations.

A second issue of importance to ESCOs is the impact that an even minor change to customer information has on an ESCO-consumer relationship. Currently, upon even the slightest change in customer information (title, address, etc.), most utilities issue a new account number to the consumer which results in the

customer reverting to the utility, without any consideration for the ESCO sales relationship that may exist. This action becomes, in effect, a “reverse slam,” where the utility eliminates the contractual relationship of the customer with the ESCO, with no communication to the ESCO except the EDI customer drop notification.

Another issue for consideration is the timing on the release of the Monthly Cost of Gas data to the commission. ESCOs find it increasingly difficult to develop product offerings that are competitive with the utility because ESCOs are forced submit prices for public disclosure before the utilities are required to submit their rates.

Finally, once the Commission determines that an ESCO has violated the solicitation rules, there should be an automatic suspension of the ESCO’s solicitation and marketing activities for a minimum of 14 days. This suspension will allow the Commission to fully investigate complaints received, and provide the ESCO an opportunity to adjust their practices if necessary.

RECOMMENDATIONS TO THE NYS UBP: SECTION-BY-SECTION COMMENTS

With regard to the proposed revisions to the existing UBP, as well as the new section (10) on Marketing Standards, NYSEMC recommends the following specific changes:

SECTION 2

B. Application Requirements

1.b.9.1 (p. 6) – Quality Assurance Program

It is NYSEMC’s understanding that an acceptable Quality Assurance Program would be a compilation of ESCO practices that help to ensure compliance with the UBP; including, but not limited to the ESCO’s review process for marketing materials, handling complaints, 3rd party verification system, key management contacts, etc.

D. Maintaining ESCO Eligibility Status

2.D.2.a (p. 7) – Resubmission of Application Package

NYSEMC believes that the requirement to resubmit its application package to the Commission every three years is redundant, since the Commission already required annual submittals in 2.D.1.

2.D.4.j (p. 8) – Replies to Residential Complaints

The Commission should specify a timeframe within which an ESCO must respond to a residential complaint filed with the DPS' Office of Consumer Services. NYSEMC recommends that once notified by the Office of Consumer Services, an ESCO should respond to the DPS within five (5) business days. However, a response within such an aggressive time frame should not require a resolution within that time frame given the potential complexities of any complaint.

2.D.6.b.i (p. 9) – Consequences for Failure to Comply

Should read: "Suspension from any Commission approved utility programs on the utility system where the failure took place."

2.D.6.b.iv (p. 9) – Reimbursements to Customers

Should read: "Reimbursements to customers who did not receive savings promised in ESCO's sales agreement."

2.D.6.b.vii (p. 9) – Other Measures the Commission May Deem Appropriate

This should be deleted. It is too broad and is otherwise covered by items i-vi.

SECTION 5

B. Customer Agreement Procedures

5.B.3 (p. 26) – Charges for Early Termination

Should read: "When an ESCO's sales agreement for service to a residential customer contains specific provisions that entitle the ESCO to a *long-term contract recovery fee* in the event the customer cancels the long-term agreement, the calculation of any fee must be clearly delineated in the original sales agreement, along with a description of how this recovery fee will be calculated (using indices, future market prices, etc.). If the customer is not made aware of how this long-term contract fee is to apply in the originally executed agreement, the ESCO shall be precluded from collecting such fee."

In addition, NYSEMC believes strongly that ESCOs cannot be held to a protracted grace period that extends beyond a reasonable rescission period. The proposed 30 day grace period is completely unrealistic and commercially impractical for ESCOs offering long-term contracts, and would place ESCOs in circumstances of significant financial risk; causing ESCOs to eliminate future fixed or capped products from future offerings.

However, NYSEMC does see the value in extending the 3 day right to rescind to 7 business days following the post mark date of a notice sent from the incumbent utility, to provide the consumer with a meaningful rescission period and opportunity to review the terms and conditions, other offers in the market and to discuss with their incumbent marketer, if any, other opportunities they may wish to present.

SECTION 5 - ATTACHMENT 1 – Telephonic Agreement and Authorization Requirements

A. Provisions (p. 34)

3. NYSEMC believes this may be written in error. It would be impossible to obtain the required verification from a customer without asking a question that prompts a response. We believe it could be written: “A statement from the customer in response to a question from a verification agent accepting the terms and conditions of the ESCO contract.”
5. Should read: “If savings are guaranteed, or guaranteed under only certain circumstances, the ESCO must provide a clear description of the conditions that must be present in order for the savings to be provided.” ESCOs should not be required to state that no savings are guaranteed. Some ESCOs do not market based on savings.
6. Should read: “A statement from the ESCO clearly indicating that energy supply will be provided by the ESCO, and that energy delivery shall continue to be provided by the customer’s utility; and that said utility will also be available to respond to leaks or other emergencies should they occur.”

SECTION 5 - ATTACHMENT 2 – Electronic Agreement and Authorization Agreement

A. Provisions (p. 36)

2. Should read similarly to the Telephonic Agreement language above:

“The sales agreement containing the prices, terms and conditions applicable to the customer, with price, term, cancellation fees or long-term contract recovery fee, if applicable, on the first page of the agreement. In addition, if savings are guaranteed, or guaranteed under only certain circumstances, the ESCO must provide a clear description of the conditions that must be present in order for the savings to be provided.”

SECTION 5 – ATTACHMENT 3 – Written Agreement and Authorization Requirements

A. Provisions (p. 38)

2. Should read similarly to the Telephonic and Electronic Agreement language above:
“The sales agreement containing the prices, terms and conditions applicable to the customer, with price, term, cancellation fees or long-term contract recovery fee, if applicable, on the first page of the agreement. In addition, if savings are guaranteed, or guaranteed under only certain circumstances, the ESCO must provide a clear description of the conditions that must be present in order for the savings to be provided.”

PROPOSED SECTION 10 – Marketing Standards

B. Training of Marketing Representatives (p. 61)

3. Should read: “Knowledge of ESCO rates, payment options and the customers’ right to cancel, including the applicability of an early termination fee.” NYSEMC believes the addition of the word ESCO is needed; since marketing representatives should not be responsible for utility rates.
4. NYSEMC does not believe that marketing representatives can realistically be versed in all applicable provisions of the Home Energy Fair Practices Act (HEFPA). We would suggest that the other requirements of the UBP set forth adequate information to protect the consumer, and that including this specific provision would add undue burden.

C. Contact with Customers (p. 61)

1. NYSEMC believes this could be more simply stated as follows: “ESCO marketing representatives who contact customers for the purpose of selling any product or service offered by the ESCO will, as soon as possible and prior to describing any products or services offered for sale by the ESCO:”

1.a.iv – NYSEMC recommends that this provision be removed, and that a new requirement be added to this section that reads as follows: “Marketing representatives shall be required to leave behind information that provides the name, address, telephone number, and website URL of the ESCO.”

1.b – NYSEMC recommends that this section be reworded as follows: “Shall immediately identify themselves as representatives of *[ESCO Name]*, an independent energy marketer of *[natural gas and/or electricity]*. During the sales presentation, the marketing representative must also state that if customer purchases *[natural gas/electricity]* from *[ESCO Name]*, that the customer’s utility will continue to deliver their *[natural gas/electricity]* as well as respond to any leaks or emergencies.

3. Conduct

3.f – The first sentence in this item is not needed; it is clearly stated in 3.c.

3.g - NYSEMC suggests the following specific requirement: “Once notified by the Office of Consumer Services regarding a residential complaint, an ESCO should respond to the DPS within five (5) business days.”

**THE PROPOSED NATIONAL FUEL GAS DOOR-TO-DOOR STANDARDS
SHOULD BE ADDRESSED AS PART OF THE UBP**

In January, National Fuel Gas Distribution Corporation (“NFG”) submitted proposed amendments to its tariff which sought to establish a set of standards for door-to-door sales of natural gas by ESCOs doing business in the NFG utility service territory.¹² In conjunction with its tariff filing, NFG sought to create an immediate revision to its Gas Transportation Operation Procedure (GTOP) Manual effective within 30 days. Subsequently, the Commission requested that NFG delay its implementation of the immediate GTOP provision while it considered comments it received on the proposed tariff amendment, and the matter was consolidated with the other dockets named above.

NYSEMC believes that the formalization of marketing standards for all parties as part of the UBP can best take into consideration the concerns of consumers, consumer protection agencies, the State Attorney General, and others; while at the same time

¹² Case 08-G-0078, Proposed Tariff Amendment of National Fuel Distribution Company, filed January 28, 2008

addressing concerns raised by individual utilities such as NFG that have been attempting to establish their own marketing practice procedures separately. As such, we believe that specific recommendations related to the proposed NFG door-to-door standards are fully addressed in the comments provided herein with regard to the UBP.

NYSEMC does not see the need for utility-specific marketing standards, and would strongly recommend that all marketing standards be uniform across the state, by being incorporated and provided for solely within the revised UBP. In addition to the possibility of utilities developing standards that may advantage their interests, multiple standards increase confusion for consumers and marketers.

**THE COMMISSION SHOULD RE-ESTABLISH
A POINT-TO-POINT CONTACT FOR ESCOS
AND CONSIDER AN ESCO MARKETING PRACTICES ADVISORY GROUP**

NYSEMC believes that the former Office of Retail Market Development provided an important connection between ESCOs and the Commission, which enabled open communication and the collaborative resolution of marketing-related issues of importance to the Commission. We believe that absent the redeployment of this office, designation of an ESCO point-of-contact would be a positive step the Commission could take to help ensure compliance with the mandatory Marketing Standards, and to foster an ongoing relationship between ESCOs and the Commission. To that end, NYSEMC would gladly commit to full participation in an “*ESCO Marketing Practices Advisory Group*,” which we recommend be put in place by the Commission as part of this comprehensive effort. NYSEMC members and representatives have significant experience in the energy and energy services industry – both regulated and unregulated – and would enthusiastically participate in a statewide effort to address ongoing consumer protection issues in a manner that would support growth of the competitive market while providing consumer safeguards. Consideration for a variety of energy marketing related issues could be reviewed and considered by the aforementioned Commission Advisory Group, to provide a vehicle to address evolving customer protection issues while continuing to enhance the consumer benefits derived through competitive markets.

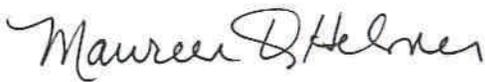
CONCLUSION

As the Commission, NYSEMC and countless others have observed, great progress has been made in New York to bring the benefits of a competitive retail energy market to consumers. The great majority of parties involved are committed to fair and equitable treatment of all customers, and the full development of a consumer-driven energy market with new and innovative services, green products, competitive prices, and energy efficiency tools. However, as these same entities have also appropriately observed, the job is not complete. The formal adoption of uniform statewide ESCO marketing standards will advance the state towards a fully robust retail market. But, efforts to cultivate a workably competitive marketplace cannot stop with the issuance of formal marketing standards. Continued vigilance by the Commission, cooperation by utilities, steady investments by ESCOs and creative, forward-looking thinking by all interested parties is required to further the stated Commission goal to enable meaningful choice to all energy consumers in the State of New York.

NYSEMC reaffirms its commitment to working closely with the Commission to support and expand competitive retail markets in this state.

Respectfully submitted,

New York State Energy Marketers Coalition



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