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April 17, 2008

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

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

**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.**

**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.**

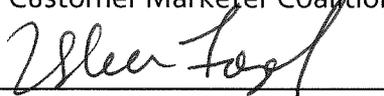
Dear Secretary Brillling:

Enclosed for filing with the Commission please find the original and five (5) copies of the "Initial Comments of the Small Customer Marketer Coalition" in the above-captioned matter.

Thank you for your assistance in this matter.

Respectfully submitted,

Small Customer Marketer Coalition

By: 

Usher Fogel, Counsel

Cc: Active Parties (by electronic mail)

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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

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**INITIAL COMMENTS OF THE SMALL CUSTOMER MARKETER COALITION**

**I. INTRODUCTION**

These initial comments are submitted on behalf of the Small Customer Marketer Coalition (“SCMC”)<sup>1</sup> in response to the *Notice Soliciting Comments on Revisions to the Uniform Business Practices*, issued in these proceedings on March 19, 2008.<sup>2</sup>

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<sup>1</sup> SCMC is an ad-hoc coalition of ESCOs engaged in the sale and provision of retail energy products and services, including the electricity and natural gas, to residential and commercial customers throughout New York. SCMC has actively participated before the Commission in connection with matters related to the development and implementation of competitive choice for all consumers.

<sup>2</sup> Case 98-M-1343 – In the Matter of Retail Access Business Rules, 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, and .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, *Notice Soliciting Comments on Revisions to the Uniform Business Practices* (issued March 19, 2008) (“Notice”).

## II. PROCEDURAL OVERVIEW

In the Notice the Commission expressed concern regarding the sufficiency of the existing provisions of the Uniform Business Practices ("UBP") to regulate ESCO marketing practices, especially with respect to residential customers, as well as the adequacy of the remedies available under the UBP to Staff and the Commission to respond to instances of marketing excesses.<sup>3</sup> These concerns were apparently precipitated by a Petition dated December 20, 2007, filed by the NYS Consumer Protection Board ("CPB") requesting that the Commission adopt various revisions to the UBP dealing with ESCO marketing practices; the tariff filing by National Fuel Gas Distribution Corporation ("NFG") dated January 28, 2006, which seeks to incorporate within the utility's tariffs provisions governing door-to door ESCO marketing practices; and Staff's review of recent complaint activity by residential customers. In view of these developments, the Commission determined that it was appropriate to consider UBP modifications that:

"(1) incorporate standards for marketing by ESCOs and third party contractors acting on their behalf; (2) improve residential customer protection; (3) strengthen the oversight of and expand the remedies available to Staff and the Commission; and, (4) other related matters and housekeeping items."<sup>4</sup>

To address these goals, the Commission invited comment from interested parties on the proposed UBP changes, and also on a series of ten questions dealing with various aspects

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<sup>3</sup> Notice, p. 3.

<sup>4</sup> Notice, p. 3

of ESCO marketing activities.<sup>5</sup> These comments are submitted on behalf of SCMC in response to the Commission's invitation.

### III. PRELIMINARY OBSERVATIONS

In concert with its long standing position, SCMC favors the efforts by Staff to develop reasonable standards for marketing by ESCOs and third party contractors acting on their behalf, maintain adequate residential customer protection, and provide Staff and Commission with adequate remedies to protect consumers. There is no disagreement as to goals; the operative issue is how those goals can be achieved in a manner that provides sufficient consumer protections without unduly impairing the orderly functioning of the competitive retail energy market.

Based upon the hard earned experience gained by our members in marketing to residential and other consumers for more than a decade, it is the view of SCMC that from a general perspective the interests of consumers and ESCOs are best accommodated by a regulatory structure that emphasizes and supports the provision to consumers information required by the consumer to make an informed choice among energy alternatives in a timely and accurate manner, rather than crippling ESCOs with overly prescriptive prohibitions that impair lawful contract rights and impose burdens that increase costs and decrease product availability.

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<sup>5</sup> In addition to issuing the Notice, Staff convened a Technical Conference convened in New York City on April 3, 2008 that was attended by many interested parties. At the meeting the parties imparted much fruitful data and comments. These comments are informed by the discussions that took place at the Technical Conference.

It is also important to remember that there are already in existence numerous statutory requirements that deal with marketing practices and which must be adhered to by the members of the ESCO community. The Commission should seek to build upon these standards and not create redundant and overlapping regulatory requirements.

Finally, it is imperative that the Commission develop and implement remedies that are designed to resolve the actual problem or structural defect in a precise manner that does not allow for overblown restrictions that are out of proportion to the problem requiring correction.

#### **IV. RESPONSE OF SCMC TO QUESTIONS PRESENTED IN THE NOTICE**

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

In view of the complex factual and policy issues engendered by the suggestion to encompass ESCOs within the ambit of Section 18-a, it is not feasible within the short comment period in this proceeding to develop a comprehensive and lucid analysis of such a policy change. SCMC recommends that such assessments should not be applied to ESCOs, and a minimum, this matter be deferred for consideration to a forum that will provide interested parties with sufficient time and resources to examine the issues and concerns associated with this expansion of the regulatory ambit of Section 18-a.

The complexities of the matters raised by this question are very significant, and require considerable factual analysis and investigation. Initially, it is necessary to determine how such fees are currently calculated and assessed throughout the State, the revenue implications of such assessments, how they are reflected in utility rates. Thereafter, the parties must review

the rate design approach applied to this cost element on a utility- by -utility basis. Once this information is obtained and assimilated, the parties will need to examine the level of revenues sought to be secured by this change, the various methodologies for calculating an assessment fee, the associated rate design and rate case implications. This is not an exhaustive list, but it highlights that this new policy requires in- depth analysis that cannot be completed in the short comment period established in the Notice.

On its face the question raises a number of serious concerns.

First, applying the assessment fee to ESCOs would place ESCOs at a distinct competitive disadvantage that would impair the competitive standing between utilities and ESCOs. Pursuant to Section 18-a, the assessment fee is a legitimate expense for which recovery is permitted in setting the utility revenue requirement which is then embedded in the utility monopoly tariff rates.<sup>6</sup> By virtue of the rate setting process and monopoly tariff rates, utilities are provided with full recovery of this fee without any offset from competitive pressures or in any way inhibiting the competitive standing of the utilities.

Obviously, such guaranteed monopoly revenue recovery is not applicable to ESCOs. In the case of ESCO cost recovery, the fee would be incorporated in their product price, but there is no guarantee of sales or attendant recovery of these costs. Essentially, the Commission would assess the fee to utilities and guarantee cost recovery, but then assess the fee to ESCOs but not provide such recovery protection. This is most discriminatory and tilts the competitive playing field in favor of utilities.

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<sup>6</sup> PSL § 18-a (2).

Second, there is also concern that imposition of the fee would unduly burden ESCO customers. The current assessment fee reflects each utility's in-state gross operating revenues and the related assessment fee is included in the utility regulated monopoly rate. Consequently, ESCO customers are currently paying the utility's assessment fee through the utility distribution rates.<sup>7</sup> If ESCOs are also made subject to the assessment fee, such a charge would in the normal course of business be passed on to the consumer, and ESCO customers would then pay the assessment twice --- once in the utility distribution rate and then through the ESCO commodity charge.

Third, the application of the assessment fee to ESCOs may be beyond the jurisdiction of the Commission. With the passage of the "Energy Consumer Protection Act" of 2002 (Chapter 686 of the Laws of 2002), a new Section 53 was added to the Public Service Law which provides that for purposes of Article 2 of the PSL, "a reference to a gas corporation, an electric corporation, a utility company, or a utility corporation shall include, but is not limited to, any entity that, in any manner sells or facilitates the sale or furnishing of gas or electricity to residential customers". Based on this language the commission has previously indicated that pursuant to PSL, Section 53, an ESCO is deemed to be a utility corporation only for purposes of Article 2 of the Public Service Law and this does not, in any way, confer status as a utility corporation on an ESCO for the purpose of the remaining provisions of the Public Service Law.<sup>8</sup> This calls into question whether the Commission has the authority to make ESCOs subject to the assessment fee codified in Article 1 of the PSL.

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<sup>7</sup> PSL § 18-a (2) (b) (1).

<sup>8</sup> See, Case 98-M-1343, 99-M-0631, and 03-M-0117, In the Matter of Retail Access Business Rules, et. al, Order on Petitions for Rehearing and Clarification (issued December 5, 2003) at p. 44.

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

SCMC submits that the customer of record and any other individual authorized by the customer to act on his/her behalf should be allowed to enroll a residential account with an ESCO. This position is entirely consistent with the law in New York which provides that a duly created agent has “the power to do things which the principal may or can do, and primarily to bring about business relations between the principal and third persons”.<sup>9</sup>

This practice is also followed by the utilities which allow the customer of record to designate a representative to act on its behalf in connection with utility service. Such designations can be made orally.

**Early Termination Fees**

The Notice posits a series of questions concerning the imposition of additional restrictions and the provision of data with respect to sales agreement that contain “early termination fees.”<sup>10</sup> To address this subject comprehensively, certain general concerns relating to this subject will be presented and then Questions 3, 4, 7, and 8 will be responded to *seriatim*.

**General Concerns**

The record in this proceeding does not provide a sufficient or reasonable basis for imposing the contemplated restrictions on sales agreements that contain early termination

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<sup>9</sup> 1 NY Jur2d, Agency and Independent contractors, Section 1, p. 471; *Matter of Wingate*, 169 M2d 701 (N. Y. Sup., 1996); *Maurillo v. Park Slope U-haul*, 194 A. D.2d 142, 146.

<sup>10</sup> See, Notice, p. 4, Questions 3, 4, 7 and 8.

fees. Based upon discussions with Staff and a review of earlier filings, the problems faced by residential customers in this regard is the alleged failure by such customers to fully comprehend the applicability of early termination fees and the terms and conditions relating thereto. As noted above, the Commission should develop and implement remedies that are designed to resolve the actual problem and not impose overblown restrictions that are out of proportion to the problem that requires correction. As the problem is an alleged knowledge gap, the proper remedy should focus on establishing procedures and practices that provide consumers with all relevant information concerning the early termination fees, rather than imposing extended grace periods, or other restrictions that undermine the ability of ESCOs effectively to provide products and services to the customer.<sup>11</sup>

The Notice and the UBP does not include a definition of what constitutes an “early termination fee”. This is an important gap to redress, as what is included in this category has important bearing upon the rationality and legality of the policy considerations raised in the Notice.

In the absence of a specific definition, early termination fees may be viewed as encompassing the recovery of customary damages that an ESCO would be exposed to in the event of an unlawful breach by the customer of the sales agreement prior to the expiration of the contract term. In this regard, ESCOs who provide a fixed price product may include a fee or a liquidated damages provision to provide for recovery in the event of early termination.

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<sup>11</sup> Parenthetically, this approach is already incorporated in the proposed revisions to the UBP. The proposed modifications to Section 5, Attachment 1, dealing with telephonic agreements includes in Section 5.A.2, require that all the terms and conditions and prices of the ESCO's offer including those associated with termination fees be described to the customer.

Where the customer breaches during the term the ESCO will need to sell the hedge into the market, and thereby may incur a loss. The termination fee is directly linked to the damages incurred by the ESCO arising from the customer's breach. As the ESCO is fully entitled to recover damages in the event of an unlawful early termination, the term "early termination fees" as used in the Notice and UBP should not include charges for ordinary and customary damages stemming from a customer's breach. By way of illustration, if a residential consumer signs a twelve month lease on an apartment, and then unlawfully terminates the lease before its term, the landlord is entitled as damages an amount equivalent to the rent for the remaining term. The courts cannot interfere with the landlord's right to collect damages, and neither is the customer provided with the ability to thwart the collection of legitimate damages by the landlord.

It is highly inappropriate to restrict an ESCO from seeking compensation for direct damages occasioned by a breach by the consumer. In reality, just as the customer would demand the ESCO to fulfill all of the terms of the agreement including the provision of service when it may not be economic for the ESCO, the same principle should apply to the customer.

It is also potentially unlawful for the Commission to erect barriers that interfere with an ESCO's contractual right to obtain compensation for damages. Where an ESCO has entered into a contract with consumers for the provision of commodity supply, the Commission "cannot destroy or interfere with these contract rights and obligations." If consumers are dissatisfied with the service received "they can discontinue their patronage or rely on whatever

contract rights they possess" against the other party.<sup>12</sup> In view of these considerations the definition of "early termination fees" should be limited to fees that are unrelated to the usual and customary damages an ESCO would be entitled to in the event of a breach of contract by a customer.

3. **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?**

The precise structure of the fee recovery structure is a detailed business matter that will reflect the particular business approach of each ESCO and should thus be left to the discretion of the ESCO.

4. **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?**

The Commission should not apply an extended grace period with respect to "early termination fees" included in a sales agreement with residential customers.

First, the UBPs already include a grace period of three business days from when the contract is first received by a residential customer that is applicable to the entire agreement including any early termination fee.<sup>13</sup> This is the consumer standard applicable to all industries

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<sup>12</sup> *People ex rel. Pavilion Natural Gas Co. v. Public Service Commission*, 188 A.D. 41 (3 Dept. 1919).

<sup>13</sup> See, UBP § 5, Attachment 1. A. 8.

in New York and is deemed of sufficient duration to adequately protect consumer interests. No party has presented any sufficient justification for applying a more onerous standard to the provision of commodity-related service.

The use of an extended grace period is an overblown remedy that fails to address the underlying problem. As noted above, based upon discussions with Staff and a review of earlier filings, the concern is the alleged failure by residential customers to adequately understand how and under what conditions such fees are applied by the ESCO. This concern is properly addressed by establishing procedures and practices during the marketing and enrollment phases that ensure customers are provided with sufficient information to make an informed choice. Burdening the ESCO with an extended grace period will not make the customer more knowledgeable.

The imposition of an extended grace period unlawfully interferes with the ESCO's legal right to full redress for all damages associated with the customer's breach of a duly executed sales agreement. As noted above, the Commission does not have the power to unilaterally destroy or interfere with the contract rights and obligations willingly entered into in a sales agreement between the deliverer of energy and a consumer. Such an unlawful outcome would be the result of applying an extended grace period. As proposed, UBP, Section 5.B.3 sets the grace period to extend from 30 days after the customer's receipt of a first bill for commodity service. This would provide a grace period of approximately 75 days from when the contract was first entered into. Under these circumstances, the customer could walk away from the contract without any liability for at least 75 days subsequent to agreement being reached. This

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amounts to a free extended option and leads to a regulatory standard by which the Commission has directly interfered with the ESCO's legal right to obtain redress for damages associated with a customer's unauthorized breach of a sales agreement.

This approach fails to adequately comprehend that adoption of this standard will significantly raise the costs of commodity service and hinder the offering of various products and services. The energy commodity markets are often times extremely volatile and even where prices do not fluctuate wildly, price quotes are only relevant for periods of hours or days, not months. Thus, the ESCO facing an extended grace period will need to estimate the potential costs of being left with the burden of disposing of the supplies acquired more than two months earlier to serve the customer.<sup>14</sup> The ESCO will either incorporate the additional risk/cost in the price of the product or discontinue the offering of certain products and services. In either event the harm to the consumer is palpable and direct --- increased product cost and/or diminution product offerings.

7. **Should ESCOs that include early termination fees in residential sales agreements be required to obtain a "wet" signature on the sales agreement?**

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

SCMC concurs with Staff that the terms and conditions associated with early termination fees should be fully disclosed to the consumer, as contemplated in the proposed

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<sup>14</sup> It is also conceivable that the risk and cost may not be subject to quantification given the level of market volatility and the length of the grace period.

UBPs.<sup>15</sup> With these standards in effect, there is simply no need to impose the further requirement of a wet signature. Moreover, the Commission already has an elaborate set of standards governing telephonic marketing (UBP Section 5, Attachment 1) which ensures that all relevant information is provided to the customer, the customer's assent is recorded in an appropriate telephonic method and for residential customers an additional three day rescission period is established. Under such a structure, where the interests of consumers are fully protected, imposition of the wet signature requirement is unreasonable. Moreover, simply affixing a signature does not necessarily indicate that the customer has the additional understanding and comprehension of the ESCO's offering.

It is also necessary to clarify whether the question contemplates that the wet signature would be applicable to Electronic Agreements obtained on the ESCOs web site. Simply stated, it makes little sense to apply this standard to an electronic agreement, as the whole point of this form of enrollment is to facilitate use of the internet and thus avoid other more invasive marketing approaches. In addition, the customer's clear assent is obtained by specific references and clicks on the web site.

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<sup>15</sup> See, UBP, Section 5, Attachment 1. A.1,

8. *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.*

This information is proprietary and confidential reflecting the individual business practice of ESCOs operating in New York. This information will therefore, not be provided in the context of these comments.

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

The Commission has previously determined that the of the number of customers served by ESCO is deserving of proprietary trade secret information under the standards clarified in the Freedom of Information Law (FOIL) and is exempt from disclosure under FOIL. This decision was rendered in a letter ruling by Honorable Jaclyn A. Brillling, Secretary dated October 20, 2006.

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

The Marketing Standards codified in the proposed UBP Section 10 should not be made applicable to small commercial customers.

First, there is no compelling need justifying this expansion of marketing oversight. There is an entire body of state law that governs marketing and business practices regardless

of customer class. Pursuant to General Business Law Section 349 (a), it is unlawful for a company to engage in “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service.” Sections 350 and 350-a prohibits false advertising in the conduct of any business or the furnishing of any service. New York Executive Law §63(12) makes unlawful “persistent fraud or illegality in carrying on, conducting or transacting of business” in New York State.

In addition to these statutory provisions the UBP also contains constraints on marketing to all customers. An ESCO may be subject to severe disciplinary actions as well as revocation of eligibility to operate in New York for failure to comply with required customer protections (UBP Section 2.D.4.c) and the failure to adhere to policies and procedures described in its sales agreements (UBP Section 2.D.4.b). In addition, during the marketing process, the ESCO must under the existing and proposed UBP requirements provide accurate information to consumers regarding the prices and terms of conditions associated with taking service from the ESCO (UBP Section 5, Attachments 1, 2 and 3).

The underlying basis for the development of Section 10 arose in response to the concern that residential customers who, due to their alleged lack of knowledge of commercial transactions require additional protections. This concern does not apply to commercial customers who are conversant with commercial activity on a daily basis.

Further, determining what constitutes a small commercial customer is subject to much endless confusion and debate, as this will differ by utility and many utility commercial service classifications incorporate a wide range of customers with wildly differing levels of usage. It is also practically impossible for an ESCO during the marketing process to determine whether

the commercial customer will be considered “small”, as the ESCO is unfamiliar with the customers overall usage levels or any other characteristic that will be used to distinguish this group of customers until actually making contact with the customer

Accordingly, there are sufficient protections under the UBP and statutory law to ensure that ESCOs act in a reasonable manner when marketing to small commercial customers.

9. **How should the term “plain language” as used in Section 2.B1.b of the UBP be defined?**

The term “plain language” as applied to a written agreement for a personal transaction has previously been defined in Section 5-702 (1) and (2) of the General Obligations Law and the case law developed there under. The continued use of this well- established definition is reasonable and further modification at this time does not appear warranted.

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

The Commission has recognized that the development of the retail access program is an ongoing organic process that over time requires useful modifications and programmatic changes in order to meet the ever changing challenges presented by the competitive retail markets.<sup>16</sup> In this light, it would be most appropriate for the Commission to consider

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<sup>16</sup> See, e. g., Case 98-M-1343, et al., Retail Access Business Rules, Order on Petitions for Rehearing and Clarification (issued December 5, 2003); Case 05-M-0858, State-Wide Energy Services Company Referral Programs, Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject to Modifications (issued December 22, 2005); Case 94-E-0952, 00-E-0952, and 02-M-0514, Competitive Metering, Order Relating to Electric and Gas Metering Service (issued August 1, 2006); and Case 00-M-0504, Development of Retail

expeditious review and adoption of the following recommended improvements to the UBP and the retail access infrastructure.

**A. UBP Definition of Slamming**

Section 1 of the UBP currently defines slamming as the “Enrollment of a customer by an ESCO without authorization.”<sup>17</sup> Under this definition only an ESCO is deemed an entity that may engage in slamming activity. However, in reality, this assumption is no longer valid. With the expansion of customer migration, it is equally possible for the local utility to engage in slamming where the utility without the customer’s authorization de-enrolls the customer from the ESCO and returns the customer to utility commodity service. In such a case the customer is harmed and treated in an inappropriate manner. Therefore, the term slamming should also include a utility that improperly returns an ESCO customer to full utility service.

**B. Improper Reversion of Customers**

In recent months concern has arisen in connection with the current practice of some or all the utilities to unilaterally terminate ESCO supply service where there has been a change or modification to the customer’s account information.<sup>18</sup> Under this practice, termination of supply service occurred unilaterally by the utility without any prior notification to the ESCO or the customer.

Upon further investigation, several utilities, including NYSEG, National Grid and National Fuel, have advised that where the customer experiences a name change or other data

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*Competitive Opportunities, Statement of Policy on Further Steps Towards Competition and Retail Energy Markets* (issued August 25, 2004).

<sup>17</sup> UBP, Section 1, p. 4.

<sup>18</sup> This is the subject of a complaint filed Agway Energy Services, Inc. with the DPS Staff by letter dated January 28, 2008.

modification that precipitates a utility account number change under the utility's record keeping system, the ESCO supplier will be dropped from the account. This will occur in an automatic fashion and will not be preceded by any prior notice to the ESCO or the customer. Moreover, under this process, the termination of ESCO service will occur even if the customer has not expressed any interest or desire to return to utility commodity service.

It thus appears that ESCO commodity supply service will be unilaterally terminated by utilities where there is a modification in customer data that engenders a change in the customer's utility account number. It is respectfully submitted that this practice violates the Uniform Business Practices ("UBP"), conflicts with the legal obligations of the utility to act in a just and reasonable manner to the customer and the ESCO, and creates a tortuous interference by the utility with the ongoing contractual relationship between the ESCO and the customer.

Section 5. H. 1 of the UBP sets out in specific detail the process by which a customer served by an ESCO effects a return to full utility service. As codified in the UBP, a customer "arranges for return to full utility service by contacting the distribution utility and the ESCO." Each provider contacted by a customer expressing the desire to return to utility service, must within two days, "notify the other provider that a customer requested a change in service..." As is clearly presented in the UBP, a customer must first express a "desire" to terminate ESCO service before the utility is authorized to return such customer to full utility service. And where such desire has been provided, notification must be afforded to the ESCO and the utility. The overarching obligation of the utility and the ESCO to comply with the directions and desires of

the customer is further emphasized in Section 5. K. 1 of the UBP which states that a “change of a customer to another provider without the customer’s authorization ... is not permitted.”

It is patently clear that the current utility practice of dropping the ESCO where there is a change in customer data that engenders an account number change, is violative of these sections of the UBP. A return to full utility service by an ESCO customer must be preceded by the customer first expressing the desire to terminate ESCO service and return to the utility. Absent satisfaction of this UBP codified precondition, the utility has no authorization to effectuate a change in providers or transfer the customer to utility service. Under the current practice the change in provider is being instituted by the utility solely on the basis of a change in the customer’s data without first determining whether the customer wants to return to full utility service. Moreover, even if the customer wants to remain with the ESCO the utility in a unilateral manner will still drop the ESCO as the supplier --- thereby directly thwarting the will of the customer.

By their unilateral actions utilities are denying consumers the right to choose their supplier of choice in direct contravention of the Commission’s policy favoring the provision of competitive choice and the development of a robust competitive market.<sup>19</sup> Moreover they are acting in direct opposition to the express provisions of the UBP.

In summary, the practice of the utilities runs afoul of the UBP, is clearly unjust and unreasonable, and unlawfully impairs the contractual relationship existing between the ESCO

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<sup>19</sup> See, e. g., Case 07-E-1507 and 06-M-1017 – *Order Initiating Electricity Reliability and Infrastructure Planning* (issued December 24, 2007), p. 4 and p. 7 FN 17 citing Case 07-M-0458, *Order on Review of Retail Access Policies and Notice Soliciting Comments* (issued April 24, 2007), pp. 4-5.

and the customer. For these reasons it is imperative that the utilities immediately discontinue the practice of dropping the ESCO where there is a change in customer data that generates a change in the account number. To achieve this objective in a comprehensive and expeditious manner we strongly suggest that Staff issue a notice to all utilities directing them to fully comply with the provisions of the UBP before dropping an ESCO which, at a minimum, precludes a utility from terminating ESCO service and returning the customer to full utility service unless and until the customer first expresses the desire to return to utility service.

### **C. Customer Data**

To enhance the efficiency of the retail access enrollment process, it would be most efficacious if all utilities posted customer usage data on the secure ESCO website. This enables ESCOs to obtain this vital information in a quick and efficient manner. Some utilities require that ESCOs request the data through an EDI transaction or by e-mail. Such a process creates the need for additional transactions and delay.

Additionally, it is important for the utilities to post historical usage data which is accurate as of the date issued. In the past experience has indicated that such data has, at times, been in error.

### **D. Customer Drops**

In the event of a customer drop/cancellation, the utilities will provide some form of notification to the ESCO. This notification is not uniform among the utilities, and there is limited information concerning the reason for the drop. It is requested, that the utilities in concert with Staff and the ESCOs develop a consistent format for reporting customer drops that also incorporates information concerning the reason for the cancellation.

**E. Customer Tax Data**

To properly enroll and service a customer it is necessary to obtain the relevant tax data concerning the customer's account. This can be difficult as the customer may not be fully aware of the relevant tax status, thus adding delay to the enrollment process. This information is already in possession of the utility and from an operational perspective can easily be provided to an ESCO who has obtained the requisite consent required under UBP Section 4. Accordingly, it is requested that the Commission direct the utilities to provide such data to ESCOs.

**F. Return of Customer to Full Utility Service**

To effectuate the return of a customer from an ESCO to utility commodity service, the parties must comply with UBP, Section 5.H.1 which provides:

A customer arranges for a return to full utility service by contacting the distribution utility and ESCO. Each provider contacted by the customer shall, within two days, notify the other provider that a customer requested a change of service and remind the customer of the need to contact the other provider to initiate the change in service providers, or arrange for a conference call with the other provider and customer. An ESCO, acting as a customer's agent, may contact the distribution utility to initiate a return to full utility service from ESCO service. If a change to full utility service results in restrictions on the customer's right to choose another supplier or application of a rate that is different than the one applicable to other full service customers, the distribution utility shall provide advance notice to the customer.

In practice this procedure has not resulted in ESCOs being properly notified by the customer of the decision to return to utility service, and has created confusion as to what procedure should be followed by the utility where there is no assurance that the ESCO has been contacted by the customers. This creates problems for the ESCO, as there is no timely

notification of the loss of the customer, and the customer may have created new liability exposure. To redress these deficiencies, it is requested that Section 5.H.1 be modified as follows:

#### H. Customers Returning to Full Utility Service

1. A customer arranges for a return to full utility service by contacting the distribution utility and ESCO. *A customer must contact the ESCO prior to the distribution utility initiating a return to full utility service. The distribution utility must direct any customer requesting a return to full utility service to contact their ESCO before the distribution utility is able to initiate a return to full utility service so the customer may learn of any previous contract requirements, such as early termination fees, the customer may be subject to in their agreement with their ESCO. A customer may then re-contact their distribution utility to request a return to full utility service or request their ESCO to initiate the return to full utility service on the customer's behalf.* ~~Each provider contacted by the customer shall, within two days, notify the other provider that a customer requested a change of service and remind the customer of the need to contact the other provider to initiate the change in service providers, or arrange for a conference call with the other provider and customer. An ESCO, acting as a customer's agent, may contact the distribution utility to initiate a return to full utility service from ESCO service. If a change to full utility service results in restrictions on the customer's right to choose another supplier or application of a rate that is different than the one applicable to other full service customers, the distribution utility shall provide advance notice to the customer. [The new language is in italics].~~

#### G. Utility Response to Customers

It is fairly common for customers to make inquiries with utilities concerning the price of utility service in comparison to the price paid by the customer to an ESCO. To ensure that customers receive accurate information, it is imperative that they be made aware that the price quoted by the utility reflects a snapshot in one point in time, that the price will fluctuate

on a monthly basis, and the price is subject to retroactive adjustments. In addition, the customer also is not charged the Merchant Function Charge and also benefits from tax savings. It is requested that utilities be directed to provide this information to customers who make inquiries concerning the price of utility commodity service.

#### **H. Contest Period Should be Enacted**

On August 17, 2006, U.S. Energy Savings LLC filed a petition for a "Contest Period" to be achieved through amendments to Section 5.D.4 and 5.E.1 of the UBP that will address the rights of an incumbent ESCO in relation to a customer that has potentially migrated to another ESCO. This matter was noticed under SAPA and comments were submitted by a variety of interested parties. However, the Commission has yet to act on the petition. It is requested that the Commission act expeditiously and authorize the amendments requested in the petition. The Contest Period maintains the current practice of providing notice of a pending change in service providers to the incumbent ESCO, in addition to the customer, but adds notification to the pending ESCO. In doing so, it continues to ensure that a change in service provider only occurs with the knowledge of all parties.

#### **I. Electronic Signature**

UBP Section 5, Attachment 3.A.5 requires a signature on the sales agreement. The UBP, however, is silent as to the use of an electronic signature. Currently, both under New York and federal law an electronic signature may be used by a person in lieu of a written

signature and such electronic signature is fully binding.<sup>20</sup> In view of the ubiquitous presence and use of electronic signature technologies and their compatibility with New York law, the Commission should revise the UBP to indicate that where a written signature is required, the obligation can be fulfilled by use of an electronic signature.

#### **J. Accent Petition**

The Commission has already concluded that it is appropriate to implement procedures for making customers' utility account numbers more readily available to ESCOs. To this effect in response to a petition from Accent Energy Group LLC,<sup>21</sup> the Commission directed the utilities to propose procedures that allowed access by customers to their utility account numbers from random locations. In response thereto, the utilities made the requisite filings. However, to date, the Commission has not acted and approved these filings. SCMC urges the Commission to approve the procedures proposed by the utilities and thereby allow for customers to access their account numbers from random locations.

### **V. SCMC COMMENTS ON UBP MODIFICATIONS**

#### **UBP Section 1**

This section provides the definition for the term "ESCO Marketing Representative". As drafted, it is fairly broad and can be read to encompass the term "Energy Broker" that is

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<sup>20</sup> See, New York Electronic Signatures and Records Act, N. Y. S. Tech Law, Section 104, 301-309 and Electronic Signatures in Global and national Commerce Act, 15 U.S.C. Section 7001-7006.

<sup>21</sup> Case 98-M-1343 – Accent Energy Group LLC, Order Denying Petition and Making Other Findings (issued November 7, 2006)

currently in the UBP. There is no justification for adding the marketing restrictions proposed in the UBP upon an energy broker, an entity that does not engage in traditional marketing activities, but merely acts as a conduit between commercial entities. In this regard the UBPs should be clarified to indicate that the term Energy Marketing Representative does not apply to an Energy Broker.

### **UBP Section 2**

The requirement codified in Section 2.D.4.j that an ESCO is subject to disciplinary consequences where there is a failure respond to a residential complaint "within the timeframe established by the DPS' Office of Consumer Services", requires clarification. The time frame applicable to a complaint response must be tied to the response periods codified in the applicable HEFPA regulations and statute. To reflect this clarification, the following amended language is proposed:

*"Failure to reply to a residential complaint filed with DPS and referred to the ESCO within the timeframe established by the DPS' Office of Consumer Services consistent with all applicable regulations and the Public Service Law."*

Another provision in this Section of the UBP codified in Section 2.D.6.a.iii provides for disciplinary consequences where the ESCO does not effectuate the remedy within the cure period. SCMC suggests that further clarification is warranted to underscore that the cure period established by DPS must be commensurate with the remedial work the ESCO has been requested to undertake. To reflect this concept, the following alternate language is offered for consideration:

*"Upon failure of the ESCO to take corrective actions or provide remedies within the cure period, which shall be commensurate with the level of time required to implement the cure requested by the Commission, the Commission may impose the consequences listed below;"*

Section 2.D.6.a.iv provides that disciplinary action will not be imposed until the ESCO has the opportunity to respond to a notice issued by the DPS. As the ESCO also requires the opportunity to implement remedial action, the UBP should also state that consequences shall not be imposed until after the ESCO has the opportunity to implement any required remedial action. The corresponding language would read as follows:

*"Consequences shall not be imposed until after DPS provides notice to the ESCO and the ESCO has been afforded an opportunity to respond to said notice and complete the requisite corrective action."*

As currently drafted, Section 2.D.6.b.i could be read to require the DPS to suspend the ESCO from all programs rather than providing the DPS with the discretion to restrict ESCO participation in individual retail access programs. To clarify this authority, the following revised language is proposed:

*"Suspension from an individual Commission approved retail access program."*

Under proposed Section 2.D.b.iv, the Commission may require the ESCO to provide reimbursements for savings that did not materialize. Although this protection may have some relevance to residential customers, it is unnecessary in the case of the far more sophisticated

commercial customers. To reflect this distinction, the following revised language is proffered for consideration:

*"Reimbursements to residential customers who did not receive savings represented in the ESCO's sales agreement or substantially demonstrated to have been included in the ESCO's marketing presentation."*

Section 2.D.6.vii provides a remedy that includes "Any other measure that the Commission or DPS may deem appropriate." This over broad catch- all provision is unwarranted. In view of the new comprehensive remedial structure incorporated in Section 2, it is unnecessary to pile on with a broad undefined additional punitive power. Accordingly, this Section should be eliminated.

#### **UBP Section 5**

Section 5.B.3 adds a new troublesome provision that would instill a grace period of 30 days after the customer's receipt of the first bill for commodity service for residential sales agreements that include an early termination fee. In view of the comments and arguments discussed above in connection with early termination fees, this provision should be eliminated in its entirety.<sup>22</sup>

In the draft UBPs, Section 5 Attachment 1 is modified to include additional requirements applicable to the telephonic agreement and authorization process that require further revision and modification.

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<sup>22</sup> See *supra*, pp. 10-12.

Section 5, Attachment 1.A.3 obligates the ESCO to provide "A statement from the customer accepting such terms and conditions that is unaided or prompted by the ESCO marketing representative." This standard is impossible to implement in practice as some communication between the customer and the ESCO representative is necessary in order to have the customer indicate acceptance of the agreement. Consequently, this provision needs to be eliminated from the final draft.

Section 5, Attachment 1.A.5 mandates that the ESCO provide a statement informing the customer that "no savings is guaranteed or if a savings is guaranteed, a clear description of the conditions that must be present in order for the savings to be provided." As drafted, this language endangers the ability of ESCOs to market their wares to the public. Where an ESCO offers a fixed or hedged product that does not include any promise of savings, there is no need to require the ESCO to inform the customer that no savings are guaranteed. To the contrary, this will erroneously create a negative perception by the consumer concerning savings, even though this is not a savings proposition. Simply stated, representations concerning savings are only appropriate where the ESCO has premised the sale on the existence of such economic benefit or has directly tied the price to some savings estimate. To reflect these considerations, the following revised language is proposed:

*"Where the ESCO has represented that specific savings will be guaranteed, the ESCO shall provide a clear description of the conditions that must be present in order for the savings to be provided."*

Pursuant to proposed Section 5, Attachment 1.A.6 the ESCO must obtain a statement from the customer acknowledging that the customer understands that the agreement for services is with the ESCO and not the local distribution utility. It is illogical to place this perception in a negative that is, underscoring what is not associated with ESCO service. The more logical and comprehensible approach needs to focus in an affirmative manner on what the ESCO is providing to the consumer. Therefore, the ESCO should inform the customer that the ESCO is an independent company providing commodity supply service. This is an appropriate affirmation. There is no need to require an acknowledgement from the customer that the ESCO is not the local distribution utility.<sup>23</sup>

#### **UBP Section 10**

Section 10.C requires the representative to have identification that includes numerous pieces of information. As it may be difficult to include all of this data in a readable format on one side of the identification badge or card, the ESCO should have the ability to use both sides of the identification to reflect the requisite information.

Section 10.C.1.a.iii provides as follows:

"Identifies the ESCO's or marketing representative's name in a manner that does not resemble the name or logo of a distribution utility;"

In this context the phrase "or marketing representative's" is confusing in that it is the name of the ESCO that should not resemble the logo of the distribution utility not the name of the actual representative. Moreover, this phraseology is confusing as the representative

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<sup>23</sup> These comments with respect to Section 5 Attachment A apply as well to Section 5, Attachment 2, Section A.2 and Attachment 3, A.2.

should only use the ESCO's logo or name and not any other formulation.<sup>24</sup> Accordingly, this

Section should be modified to read as follows:

*"Accurately identifies the ESCO's name and log;"*

Section 10.C.1.a.iv should be amended to replace the term "the" after the first word with "a" as the ESCO may have various business locations and it is not necessary to limit identification to only one business address.

Section 10.C.1.b provides as follows commencing with the second sentence:

*"In addition, the ESCO marketing representative must clearly indicate that taking service from an ESCO will not affect the customer's distribution service and such service will continue to be provided by the customer's distribution utility."*

This obligation to provide two separate representations --- that service from the ESCO will not affect distribution service **and** distribution service will continue to be provided by the LDC --- is duplicative and potentially confusing to the customer. It is more sensible for the obligation to incorporate the following statement:

*"In addition, the ESCO marketing representative must clearly indicate that distribution service will continue to be provided by the customer's distribution utility."*

This revised language would also apply to Section 10.C.2.c.

Per Section 10.C.1.d states, the customer is to be provided with written material upon request. From a common sense perspective this obligation need only encompass written material concerning the ESCOs products and services. This Section should read as follows:

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<sup>24</sup> This plausibly presumes that the ESCO's name is not similar to the utility name.

*"ESCO marketing representative will provide the customer with written information concerning the ESCOs products and services immediately upon request."*

Section 10.C.2.f requires removal of customer names in the ESCO's marketing database upon such request by the customer and also obligates the ESCO to abide by the requirements of the state and federal do not call registry. This Section should be eliminated in its entirety. ESCOs are already subject to the do not call registry and all the regulations and obligations created there under. Accordingly this provision is unnecessary and should be eliminated.

Section 10.C.3.c and f seek the same goal of providing the customer with information in a comprehensible manner. It would therefore be appropriate to excise Section c, and conflate its standard into Section f in the following manner:

*Ensure that any product or service offering that are made by an ESCO contain information written in plain language that is designed to be understood by the customer. This shall include providing any written information to customer in a language in which the ESCO marketing representative has substantive discussions with the customer in which a contract is negotiated."*

## **VI. SCMC COMMENTS ON THE CPB PETITION AND THE NFG FILING**

The proposed UBP amendments incorporated in the Notice already address the relief sought by CPB in its petition, by reflecting many of the provisions of the voluntary marketing code and expanding the level of information to be provided to the consumer. Similarly, the UBP revisions also respond to the relief sought by NFG by including standards for in-person

contact with customers.<sup>25</sup> It thus appears that the matters raised by CPB and NFG have been assimilated into and subsumed by the proposed UBP revisions. Under these circumstances, the comments included submitted by SCMC in response to the Notice should also reflect SCMC's response to the proposals championed by submitted by CPB and NFG in their earlier filings.

The Commission should summarily reject the proposal by NFG to establish ESCO marketing standards in the utility tariff and GTOP and arrogate unto itself the power to unilaterally terminate an ESCO's authority to market in the NFG service territory in the event NFG determines that the ESCO has violated the door-to-door standards. This proposal is unlawful, irresponsible and in conflict with the UBP.

Adoption of NFG's proposals would imbue NFG, a direct competitor of ESCOs with the power to terminate ESCO activity in its service territory. It will ensconce the utility into the position of judge, jury and executioner over its competitors' activities. This approach is clearly a violation of anti-trust principles and is highly uncompetitive.<sup>26</sup> Moreover, it directly usurps Section 8 of the UB, which sets forth a detailed complaint resolution process by which the Commission rather than the utilities determine whether an ESCO has acted improperly, and what, if any, disciplinary action should be taken. The proposal warrants complete rejection as an effort to displace the jurisdiction of the Commission.

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<sup>25</sup> In connection with door-to door marketing, the proposed UBP provisions codified at Section 10.C adequately address the needs of consumers. Additionally, there are numerous regulations governing such marketing activities. See NYS Personal Property Law, Sections 427-431.

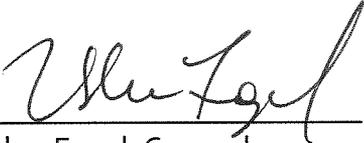
<sup>26</sup> The clear aim by the utility to control the commercial activities of its ESCO competitors is underscored by the statement that the ability to discontinue "ESCO enrollments if the utility reasonably determines that an ESCO is violating" NFG's unilaterally imposed standard, constitutes the "most significant effect" of its proposal. See Case 08-G-0078, NFG Letter dated January 28, 2008, p. 3.

VII. CONCLUSION

SCMC appreciates the opportunity to address the important issues raised in this proceeding and it is respectfully requested that the Commission adopt UBP modifications and retail access policies consistent with the comments presented herein.

Respectfully submitted,

Small Customer Marketer Coalition

By:   
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Dated: April 17, 2008  
Cedarhurst, New York