

May 7, 2008

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

RE: 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.

Dear Secretary Brillling:

Enclosed please find an original and five copies of comments on the revisions to the Uniform Business Practices and related matters addressed in the March 19, 2008 notice soliciting comments in the above-entitled matter (and the other two cases to which it has been joined). These comments are in response to the notice of proposed rule making published in the *State Register* of March 26, 2008 as PSC-13-08-00014-P: “Modifications to the Uniform Business Practices.”

A copy is also being sent by email to **secretary@dps.state.ny.us**.

Respectfully submitted,

Michael N. Gianaris  
Member of Assembly

Before the  
PUBLIC SERVICE COMMISSION  
Albany, N.Y.

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

COMMENTS OF  
ASSEMBLYMAN MICHAEL N. GIANARIS

On December 20, 2007, the New York State Consumer Protection Board (CPB) and the New York City Department of Consumer Affairs (NYC) filed a petition seeking strengthened consumer protections in the Uniform Business Practices (UBP) previously adopted by the Public Service Commission (PSC). CPB and NYC were responding to consumer complaints submitted to them or reported in the media and to other information concerning abusive, misleading and deceptive marketing tactics used by some energy services companies (ESCOs) in their contacts with residential and small business customers. The PSC has since combined this petition and other cases into a wider examination of what policy changes are needed to address shortcomings in ESCO marketing practices.

At that same time, my office was in the process of researching ongoing consumer concerns with the lack of consumer protections covering ESCO marketing practices and drafting remedial legislation. On March 5, 2008, I introduced this legislation (with 40 additional Assembly sponsors) as A.10180, currently in the Assembly Standing Committee on Consumer Affairs and Protection. As I noted in the sponsor's memorandum for A.10180, I believe the protections embodied in that legislation are needed to ensure "an orderly marketplace where consumers can make informed decisions on their choices for gas and electric service with the confidence that state government will prevent fraudulent practices and ensure a level playing field."

Consumer protections are needed in a decentralized marketplace not only to ensure that New Yorkers are not victimized by fraud, but also to provide the basis for a viable competitive market for energy suppliers. Consumer protections have evolved in numerous other areas of commerce to remedy the shortcomings of unregulated competition, including the sales of food (unit and item pricing), autos (lemon laws), and insurance (advertising restrictions and standard contract requirements). Similar proactive regulation of energy services will benefit not only consumers, but also the many legitimate ESCOs who risk being undercut and besmirched by unscrupulous competitors.

Before commenting on the proposed revisions to the UBP and the other policy questions raised by the PSC, a threshold question to be addressed is whether these efforts would benefit from additional statutory authority. Obviously, A.10180 represents my conclusion that they would. The PSC should not have to regulate a dispersed energy market using legal tools developed decades ago to oversee monopoly providers. I believe the Legislature will be receptive to any reasonable statutory adjustments the PSC needs to effectively protect consumers in this century.

Turning to the proposed UBP changes, I would like to note that many of them are similar to safeguards I have proposed in A.10180<sup>1</sup>. I generally believe that changes along the lines of those proposed in new UBP §10 and in my legislation represent the minimum needed to protect consumers and ensure fair competition. I urge the PSC's consideration of the following additional consumer protections included in my legislation:

- ▶ an explicit ban on contract provisions requiring prepayment for energy services.
- ▶ an extension of consumer protections to small businesses as well as residential customers. A.10180 employs a usage-based standard in defining a "small business" of not more than five times the annual usage of the average residential customer. In such cases, there is less incentive for the business to devote substantial time and resources to managing energy costs. The PSC has long acknowledged the need for some safeguards for nonresidential customers, as evidenced by 16 *NYCRR* Part 13, and this need is equally manifest in ESCO marketing to small commercial accounts. The same fraudulent tactics that can be used on a residential customer can be aimed at a busy small business owner, and similar protections must be established.
- ▶ a provision that no material change in a contract can be made without the customer's express written consent.
- ▶ a requirement that all variable charges must be clearly and conspicuously identified as such in contracts and marketing materials.
- ▶ development of an "ESCO consumers bill of rights" to be provided in writing or verbally to each prospective customer.

Some of these items may require supporting statutory amendments. A.10180 includes other provisions, such as civil penalties, independent third-party enforcement under the General Business Law, and extension of these standards to protect customers of the Long Island Power Authority, that would clearly require legislative action. I would welcome the PSC's support in achieving enactment of all statutory changes needed to support reasonable and necessary consumer protections.

### ***Proposed UBC Changes***

With regard to the terms of the proposed changes to the UBC, I have the following observations and recommendations:

- ▶ The actions taken by the PSC should not be strictly limited to remedying specific, documented problems that have already been substantiated, as some have argued. The PSC should also engage in proactive regulation, to avoid the tailoring of deceptive marketing practices to be "one step ahead" of whatever regulations are currently in place.

---

<sup>1</sup> The bill summary and a link to the full text can be accessed at <http://www.assembly.state.ny.us/leg/?bn=A10180>

► In addition to ensuring that the an ESCO marketer does not misidentify himself or herself as a utility employee, the UBP should contain proscriptions against stating or implying that either the utility or the PSC is requiring the customer to change providers or has endorsed the specific ESCO products being offered.

► In addressing the issue of ESCO marketing away from the ESCO's "place of business", the UBP should recognize that there are other locations besides mall kiosks that could fall within this provision, such as festival booths and mobile offices. The marketing representative should not be relieved of individual identification requirements unless any such location has the appropriate identifying information.

► In addition to requiring ESCOs to remove a customer's name from a marketing database on request and to abide by "do not call" registries, the PSC should consider requiring distribution utilities to maintain a "do not switch" registry of utility customers who have indicated that they do not wish to be contacted by ESCO marketers. I believe that this is already a practice in the State of Illinois.

► It is proposed that ESCOs must maintain an internal dispute resolution process for handling customer complaints. The UBP should also provide that this process must be set forth in writing and made available to customers and filed with the PSC.

### *Other Questions*

In its March 19<sup>th</sup> notice the PSC sought comments on a number of related questions. I would like to submit the following observations:

► Without taking a position on whether ESCOs are or should be subject to the assessments under PSL §18-a, I would note that states customarily impose some kind of charge to defray the costs of regulating a category of business operation. An alternative to the §18-a assessment could be a statutory fee, which could be set on either a flat or sliding scale basis.

► Enrollment in an ESCO should only be permitted by or with the express consent of the customer of record. It must be remembered that "enrollment" is not a single act, but two – commencement of service with a new supplier and termination of an existing business agreement between the customer of record and the previous supplier. ESCO efforts to terminate that arrangement by dealing with an unauthorized person should be treated as slamming.

► A.10180 limits termination/early cancellation fees to \$100 or twice the estimated average monthly bill, estimated at the time the contract is offered in accordance with the procedures set forth in Parts 11 and 13. The authorization for a higher fee based on estimated usage is recognition that a fee higher than \$100 may be appropriate for some small commercial users.

► It is inappropriate to address trade secret protections for information on an ESCO's customer base in this venue. Public Officers Law §89(5) establishes an explicit and generally exclusive process for determining whether information submitted to a state agency should be excepted from disclosure as a trade secret. That process, as spelled out for PSC operations in 16 *NYCRR* §§6-1.3 & 6-1.4, should be observed for any data for which trade secret protection is sought.

► At the technical conference held in New York City and Albany on April 3, 2008, several participants requested more information on the nature of the consumer complaints the PSC was receiving. The PSC staff indicated that they could produce additional statistical information but wanted to protect confidentiality, I am concerned that reducing these complaints to statistical form alone may serve to disguise how abusive some of these deceptive practices are, and thereby minimize the need for remedial action. I recommend that the PSC also prepare narrative descriptions of some of the complaints in “case study” form, with individually-identifying details altered sufficiently to avoid any confidentiality issues.

► The PSC’s record should also not ignore recent accounts of deceptive practices in other states or Canadian provinces, such as the alleged enrollment in Illinois of natural gas customers who were told they were only signing a petition for lower gas prices. As stated above, these regulations need to be proactive and anticipate potential abuses, not merely react to past occurrences.