

BEFORE THE  
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	)	Case 07-M-1514
Regarding the Marketing Practices of Energy Service Companies.	)	
	)	
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
	)	
	)	

**INITIAL COMMENTS OF DIRECT ENERGY SERVICES, LLC.**

**INTRODUCTION**

Direct Energy Services, LLC (“Direct Energy”) hereby submits these comments in response to the Commission’s March 19, 2008 Notice Soliciting Comments on Revisions to the Uniform Business Practices (“Notice”). The Notice proposes to fill a gap in New York’s Uniform Business Practices (“UBPs”), which provide “standard state-wide business procedures for distribution utilities interfacing with ESCOs” (Notice at 3). In their current form, the UBPs do not include enforceable standards for the retail marketing practices of ESCOs, nor do they provide the Commission with a range of sanctions for activities that violate the UBPs.

Direct Energy wholeheartedly supports the Commission’s efforts in this proceeding. New York has one of the most robust retail electricity and natural gas

markets in the country. More than 1.5 million customers are taking service from an ESCO, and the total number of shoppers in New York has grown for 12 consecutive months. Clearly, customers find value in the market, and we encourage the Commission to continue its work in lowering barriers to efficient competition so that the ability of customers to find that value continues to expand.

One of the barriers to efficient competition is a lack of consumer confidence in the market. This lack of confidence can take many forms but in the retail context the perception that an industry is unfair to its customers or engages in abusive practices can be particularly insidious. If a customer's experience with a retailer is burdened by a belief that sellers generally cannot be trusted, that customer will forgo purchases that, in the absence of that belief, he or she would have made willingly based on the perception of value in the offer. This effect harms customers by reducing overall consumer surplus. It matters little whether the perception of untrustworthiness is based on the actions of a few in the industry or the actions of many; the result is the same: a less robust market providing less value to customers.

Without the kind of action that will come from this docket, the New York retail electricity and natural gas markets could suffer such a crisis of confidence. While the circumstances described in the Petition filed by the New York State Consumer Protection Board and the New York City Department of Consumer Affairs ("CPB/NYC Petition") appear to have been caused by a small group of the dozens of ESCOs doing business in New York, the abusive practices of the few will undermine the work of the many. To prevent this result, Direct Energy (alone and in conjunction with other suppliers, especially through the Retail Energy Supply Association ("RESA," the trade group to

which it belongs) has consulted with CPB, the Public Utility Law Project (“PULP”), DPS staff, and other stakeholders to move toward a set of standards that will fully protect customers while also maintaining the key features of the robust retail market that the Commission has carefully cultivated for the past decade. To further this effort, RESA filed with the Commission a Statement of Marketing Principles, based in large part on voluntary principles RESA adopted in 2006, and proposed that they be made mandatory. Direct Energy supports the adoption of the Statement filed by RESA, as it applies to residential customers, which has much in common with the proposed revisions to the UBP.

The remainder of these comments will discuss certain of the specific measures proposed in the Notice, including the questions propounded by the Commission therein. RESA will be filing more extensive comments addressing all of the questions posed by the Commission in the Notice and the major proposed revisions to the UBPs. Direct Energy joins in those comments fully.

## COMMENTS

### 1. General Comments

While Direct Energy is very supportive of the Commission's desire to adopt mandatory ESCO marketing principles, it is important that the effort not devolve into a forum for those stakeholders who have consistently opposed competitive markets to air grievances that have long since been settled by the Commission in favor of competition. Marketing rules and the sanctions that will be used to enforce them should be tailored to address the actual problems encountered in the marketplace, and we encourage the Commission to eschew measures that do little to protect customers but rather seem designed to limit the ability of both customers and ESCOs to participate freely in the market. In our view, the effort to find the proper balance between protecting customers from abusive marketing practices and harming customers by limiting their options in an otherwise robust market should be based on several broad principles.

#### **A. The customer's needs and desires are paramount.**

Robust consumer protection is an essential element of a successful retail market for any product or service, and especially ones such as electricity and natural gas, which have become necessities of modern life. But protecting customers is only one part – a critical one, certainly – of the retail customer experience. Customers shop for any number of reasons and it is the sum total of the choices customers make in furtherance of their individual needs and desires that makes a true market. A regulatory body should thus be concerned with protecting the customer's right to freely express those needs and desires in the marketplace just as it is concerned with protecting the customer's right to be free from abusive and deceptive practices.

It can be easy to ignore the former in favor of the latter. In any market, a customer could be said to be fully protected from abusive marketing practices if he or she is deprived of the right to choose among a robust range of options. In the case of retail electricity and natural gas markets, however, this level of protection would substantially contravene the collective desire of the public to be able to choose from among a variety of options for power and natural gas. If one has concerns about actual or potential abusive practices with respect to a particular sales channel, (door-to-door sales, for example), customers could be said to be fully protected from those potentially abusive practices if the sales channel itself is banned. Direct Energy has observed, however, that door-to-door sales frequently result in high levels of customer satisfaction, likely due to the greater expressiveness and subtlety of in-person communication versus written or telephonic communication.

Direct Energy therefore urges the Commission to broaden its view of the issues joined in this proceeding from simply “protecting” consumers (a worthy goal) to improving the overall quality of the experience customers encounter when they participate in the retail electricity and natural gas markets in New York. As discussed further below, this expansion of focus has direct implications for some of the proposals contained in the Notice. For example, a measure that makes it more likely that a customer who has chosen to make a change in his or her electric or natural gas provider will be unable to have that choice fulfilled due to cumbersome or confusing procedural requirements imposed on ESCOs should be treated with skepticism and disfavor.

**B. Analytical rigor should replace speculation and anecdote.**

While even the perception of a serious problem can do great harm to a marketplace, regulation itself cannot begin and end with perception. The integrity of the regulatory process depends on documenting the existence of specific problems that are best-addressed through regulation, and then narrowly fashioning regulation to cure the specific problems identified while limiting to the greatest extent possible the emergence of unintended negative consequences.

This docket has not yet reached the point where the Commission could conclude that a sufficient evidentiary groundwork has been laid for some of the measures proposed in the Notice. There appears to be evidence that various entities, including CPB, NYCDCA, the utilities, and the DPS Consumer division have collected and which has been described in general terms (in, for example, the Notice and the CPB/NYC Petition) but which has not been made a part of the public record, even in summary form. Making as much information as possible available to the public will enable the parties to discover the nature and extent of specific marketing practices that have harmed customers and to fashion appropriate and effective remedies. Where there is no evidentiary support for a particular regulatory measure or remedy, we encourage the Commission to reject it, or at least delay implementation until such time as a case can be made that the measure is truly necessary and would not cause net harm to customers.

**C. The standards themselves should not be punitive.**

As stated in the Notice, the Commission is attempting to fill what are arguably two regulatory gaps through the proposed revisions to the UBPs. The first is a lack of mandatory standards for retail energy marketing practices, and the second is a lack of a range of remedial actions to be imposed on companies that violate mandatory standards

once they are adopted. In some instances the proposals, if applied to all ESCOs without regard to existing or past practices, more closely resemble punitive actions than carefully tailored standards. For example, proposed section 5.B.3 would prohibit termination fees from being imposed “until a minimum of 30 days after customer receipt of the first bill for commodity service containing charges assessed by the ESCO currently providing service.” Applying this provision to all ESCOs as part of the standards rather than reserving this requirement as a remedy or punishment in the event an ESCO engages deceptive, misleading, or abusive practices with respect to termination fees unfairly punishes ESCOs which can provide certain kinds of services at a lower price by assessing legitimate damages in the event of early termination. Imposing this measure on all ESCOs rather than only on ESCOs that have engaged in improper conduct with respect to termination fees ultimately harms customers by forbidding them from choosing a lower price in exchange for an agreement to pay damages in the event of early termination.

A number of the proposed measures, such as the one cited above, would be better seen as remedies to be imposed once an ESCO has been found to be engaging in a deceptive or misleading practice. For example, burying early termination fee or liquidated damages provisions in fine print and failing to otherwise call the customer’s attention to them may mean that there has been no actual bargain in the customer’s mind between a lower price and a longer term commitment, and such a practice could fairly be considered deceptive by the Commission. An ESCO found to have engaged in such a deceptive practice could be punished with the requirement set forth in section 5.B.3. Imposing that requirement on all ESCOs is not justified based on the record so far available in this docket.

**D. Freedom of contract is itself a value that should be protected.**

RESA's proposed marketing principles, which Direct Energy fully supports, focus on actual marketing practices of ESCOs, which is where Direct Energy understands the regulatory gap exists in the UBPs. The proposed revisions, however, go farther and in some instances attempt to regulate directly the contractual relationship between willing buyers and sellers in the market. Section 5.B.3. discussed above is one example of this. Another is proposed section 5.A.2 (Attachment 2), which would require that sales agreements 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." This requirement presumes that "savings" is an essential element of any residential retail offering, which is not necessarily the case. Forcing ESCOs to alter their contracts in this manner will only result in confusion to customers who may be purchasing for reasons other than perceived savings (presumably compared to utility default service). (As with section 5.B.3, imposing this requirement on ESCOs which are found to have engaged in misleading claims of savings would be a fair remedy.)

**2. Responses to Questions Posed in the Notice.**

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

No. Direct Energy adopts the position set forth in the RESA comments on this question.

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

No. Direct Energy's view is that the question of authority to enroll a residential account (or any other type of account) is addressed adequately by the existing New York law of agency as it encompasses the issues of apparent and actual authority. There is no basis in

the record upon which the Commission could conclude that existing law is inadequate on this point. While it is inevitable in a market with as much activity as New York's that there will be occasional instances in which someone without legal authority switches a residential account, there is no evidence that this is a widespread problem and, more importantly, there is no evidence that any such problems are not addressed adequately by current ESCO practice. Direct Energy and other ESCOs have no interest in signing up customers who do not want their service and it has been our experience that when an account is inadvertently switched by someone without sufficient authority to do so, the matter is quickly resolved in favor of the customer.

The suggested change implicit in this question is a good example of a measure that might address a perceived (although as yet undocumented) problem but which would also degrade the overall customer experience and impose unnecessary burdens on both customers and ESCOs. For example, in most households where two spouses reside, only one is the customer of record. There would be no policy justification for requiring ESCOs to terminate in-person or telephonic sales calls where the "non-customer" spouse answers the door or the telephone and the "customer" spouse is not home. Moreover, requiring ESCOs to demand some type of evidence where someone other than the customer of record claims to be authorized to act on that person's behalf would also be an unwarranted burden on customers and ESCOs. In the case of telephone sales, there is no practical means of providing non-verbal "proof" of authority, so imposing such a requirement would simply eliminate, without justification, an entire category of existing sales.

**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?**

Direct Energy also adopts the views described in RESA's comments on this point. To the extent the term "termination fee" includes actual damages or liquidated damages pursuant to a valid customer agreement, the answer to the stated question should be "none of the above" as there is no justification for imposing a blanket limitation on such damages for residential or any other customers. As discussed above, customers should be allowed to choose to agree to pay an ESCO's fair damages in the event of early termination in exchange for the more favorable pricing that such an agreement will allow for hedged products. Imposing this limitation on the rights of customers and ESCOs to freely contract in a blanket manner, even where an ESCO has no history of misleading or abusive practices with respect to termination fees, is unwarranted and unsupported by evidence currently available in the record. If an ESCO does engage in deceptive practices with respect to termination fees, then a limitation on the ability to collect such fees would be an appropriate remedy in the context of administrative action taken against that ESCO for engaging in the underlying deceptive behavior. Such a limitation is not appropriate as a matter of course for all market participants.

**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?**

For the same reasons discussed in response to Question 3, the response to this question is no although, as above, imposing a grace period on ESCOs that engage in misleading or abusive practices with respect to termination fees would be entirely appropriate.

**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?**

As discussed in RESA's comments, it is Direct Energy's understanding that the answer to this question is yes based on existing New York law.

**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?**

No. There is neither a sufficient evidentiary record nor a well-enunciated policy justification for applying the ESCO marketing standards in the Notice to commercial customers. There is also a strong likelihood that extending marketing standards to commercial customers would give rise to many unintended consequences which would inevitably result in fewer options and less value for a segment of the market that enjoys a robust and growing range of options. For example, some suppliers who do not market to residential customers and who are thus not equipped to comply with the more extensive protections that typically apply to residential customers (such as those proposed in the Notice) will simply choose to stop serving the small commercial sector if residential-type consumer protection measures are extended to those customers. Also, even the smallest commercial customers frequently have the ability to act collectively in purchasing power, thus becoming effectively as sophisticated as much larger customers. Moreover, Direct Energy sees this customer segment as increasingly robust and competitive, and we believe ESCOs who serve this customer group poorly will be punished severely by the market.

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

No. This would be tantamount to a ban on termination fees for anything other than in-person sales, and there is no basis for doing so. There is also no basis for concluding that requiring a wet signature on a contract that contains a termination fee would be any more effective at calling the customer's attention to this provision than would existing measures such as the three day rescission period.

**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.**

Direct Energy would be pleased to provide this information on a confidential basis to DPS staff.

**9. How should the term “plain language” as used in Section 2.B.1.b of the UBP be defined?**

Direct Energy adopts the views expressed in RESA’s comments on this point (which are sufficient, plainly).

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

Direct Energy concurs with the suggestions set forth in the RESA comments on this point.

Beyond these points, Direct Energy also encourages the Commission, before rendering a final decision in this matter, to convene a working group to examine in detail the UBPs from the perspective of customers who are shopping for electricity and natural gas. The participants in this proceeding have a wealth of experience in dealing with customers, and this would be an opportune time to harness that experience not only in the name of “consumer protection” but also in the name of “customer satisfaction.” Among other goals, the working group should be directed to improve the customer experience from the point where the customer has chosen to switch to the point where the customer actually begins receiving service from his or her new provider. Direct Energy believes strongly that the Commission can use this proceeding not only to improve consumer protection but to do so while also improving the overall customer experience in the New York retail market, which would redound to the benefit of all market participants.

Direct Energy appreciates the opportunity to provide comments on this important matter.

Respectfully submitted,

Christopher H. Kallaher  
Director, Gov't & Regulatory Affairs

Seth R. Lamont  
Manager, Gov't & Regulatory Affairs

162 Cypress Street  
Brookline, MA 02445  
(617) 879-0668 (voice)  
(617) 879-0661 (fax)  
(617) 549-3002 (cell)  
chris.kallaher@directenergy.com  
[www.directenergy.com](http://www.directenergy.com)