



**Department of  
Consumer Affairs**

April 18, 2008

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

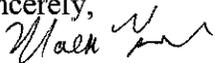
RE: CASE 98-M-1343	In the Matter of Retail Access Business Rules
CASE 07-M-1514	Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies
CASE 08-G-0078	Ordinary Tariff Filing of National Fuel Gas Distribution Corporation to Establish a Set of Commercially Reasonable Standards for Door-to-Door Sales of Natural Gas by ESCOs

Dear Secretary Brillling:

Enclosed please find an original and ten copies of the Department's Comments on Revisions to the Uniform Business Practices. We have emailed copies to all parties on the active party list.

Thank you very much.

Sincerely,

  
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Comments on Revisions to the Uniform Business Practices

April 18, 2008

**1. Introduction**

The New York City Department of Consumer Affairs (“The Department” or “DCA”) applauds the Public Service Commission (“The Commission” or “PSC”) for its proposed modifications to the Uniform Business Practices (“UBP”). We appreciate the opportunity to comment on these proposed modifications and to participate in the technical conferences the Commission is conducting.

The Department joined with the New York State Consumer Protection Board (“CPB”) in submitting a petition to the Commission to establish enforceable rules governing the marketing practices of energy service companies (ESCOs) operating in New York State to protect consumers from aggressive marketing tactics. Despite voluntary industry standards, some ESCOs used abusive, misleading and deceptive marketing tactics in their contacts with consumers. The Commission’s proposed modifications recognize the need for mandatory regulation to ensure that consumers are protected from these practices and that the playing field is leveled for honest ESCOs.

DCA enforces the New York City Consumer Protection Law and other related business laws throughout New York City. Ensuring a vibrant marketplace where consumers and businesses can benefit, DCA licenses more than 60,000 businesses in 55 different categories. Through targeted outreach, partnerships with community and trade organizations, and other informational materials, DCA educates consumers and businesses alike about their rights and responsibilities. It is this experience that informs our comments below.

## 2. Plain Language

The term “plain language” describes reader-focused text that is easily understood by the average person. Literacy research shows that many people read three-to-five grades lower than their highest level of educational attainment. Because of that gap, literacy experts recommend that materials written for the “general public” be written at about a junior high reading level.<sup>1</sup> Moreover, in New York City, approximately 25 percent of adults 21 and over do not speak English well. Another 15 percent did not complete high school and therefore, have reading levels well below the equivalent of ninth grade.<sup>2</sup> While plain language helps all consumers, it is particularly important to allow these consumers to make informed shopping decisions.

Consumers who are provided with information in plain language and enter into plain language contracts are in a much better position to make sound decisions concerning their energy choices. The use of plain language also makes good business sense. Studies show that businesses as diverse as health care providers and investment firms have substantially increased sales through the use of plain language materials.<sup>3</sup>

Plain language is variously defined and described in statutes and regulations, but the thrust is consistently explicitness and clarity.<sup>4</sup> For example, New York State’s General Obligations Law requires residential leases to be written in a clear and coherent manner using words with common and every day meanings and appropriately divided and captioned by its various sections.<sup>5</sup> The plain language requirements of the Health Insurance Portability and Accountability Act (“HIPAA”) are satisfied if a covered entity

makes a reasonable effort to: organize materials to serve the needs of the reader; write short sentences in the active voice, using “you” and other pronouns; use common, everyday words in sentences, and divide materials into short sections.<sup>6</sup>

New York City’s plain language guidelines are instructive.<sup>7</sup> As New York City and many jurisdictions have recognized, the guidelines for effective communication are relatively simple:

Only include important and directly relevant information  
Use simple language  
Keep sentences and paragraphs short  
Use the active voice  
Use Easy-to-Read Design Techniques<sup>8</sup>

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<sup>1</sup> Mark Hochhauser, *Lost in the Fine Print II: Readability of Financial Privacy Notices*, *Privacy Rights Clearinghouse* (May 2001), [www.privacyrights.org](http://www.privacyrights.org)

<sup>2</sup> Mayor’s Office of Adult Education; Mayor’s Office of Immigrant Affairs, *Easy-to-Read NYC, Guidelines for Clear and Effective Communication*. [www.nyc.gov/easytoread](http://www.nyc.gov/easytoread).

<sup>3</sup> Josiah Fisk & Lynn Riddle, *What’s Regulation Got to Do with It? Simplifying Your Communications as a Business Strategy* (2001), <http://www.ftc.gov/bcp/workshops/glb/presentations/fiskriddle.pdf>.

<sup>4</sup> See *Unfair and Deceptive Practices* §5.2.2 (National Consumer Law Center, 6<sup>th</sup> ed 2007).

<sup>5</sup> N.Y. Gen. Oblig. Law § 5-702 (Consol. 2008).

<sup>6</sup> Health Insurance Privacy and Portability Act, Final Privacy Preamble, 65 Fed. Reg. 82548 (Dec. 28, 2000).

<sup>7</sup> See *Easy-to-Read NYC, Guidelines for Clear and Effective Communication*, [www.nyc.gov/easytoread](http://www.nyc.gov/easytoread).

<sup>8</sup> Similarly, Washington State’s plain language guidelines direct their agencies to: Understand customer needs ; Include only relevant information ; Use words your customers use ; Use the “active voice” ; Use

Given that ESCOs may need to present material to consumers that is technical, the Federal Trade Commission's ("FTC") instructions to businesses on writing technical information on privacy notices is pertinent:

If you must use technical terms, you can still help your reader understand them. Define the term in a text box close to its use; include a glossary in the notice; on your website, hyperlink the term to a definition or use a simpler term or phrase in the text and link to the technical term<sup>9</sup>

ESCOs should not construe plain language requirements as authorizing them to omit information necessary for consumers to make informed choices. Provision of complete information is essential to enable consumers to "shop around" and compare their choices quickly and inexpensively. As the U.S. Securities and Exchange Commission explains, plain language

does not mean deleting complex information to make the document easier to understand. For investors to make informed decisions, disclosure documents must impart complex information. Using plain English assures the orderly and clear presentation of complex information so that investors have the best possible chance of understanding it.<sup>10</sup>

Finally, like the FTC, New York City's plain language guide stresses that those creating documents and materials should assess the usability of their documents on an ongoing basis. The PSC should similarly encourage and work with ESCOs to conduct focus groups to evaluate the efficacy of their efforts to translate their documents into plain language. The Department stands ready to assist the PSC in conducting plain language training to advance these important principles.

### **3. Communications with consumers whose primary language is not English**

Effective communication is at the core of informed decision making. It is axiomatic that ESCOs do not and cannot communicate effectively with consumers whose primary language is not English if their marketing, communications and contracts are solely in English. More troubling is the fact that the ESCOs' failure to communicate in languages other than English is conducive to fraud and deception and has been the subject of consumer complaints. Given its aggressive and affirmative marketing through door-to-door sales and telemarketing to consumers whose primary language is not English, the language requirements urged by the Department and CPB in their petition are appropriate and justified for this industry.

In its draft marketing standards, the Commission embraced the Department and CPB's concern that where the consumer has limited English proficiency, ESCO marketing and communication

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personal pronouns ; Keep sentences and paragraphs short ; and Design clear pages Washington State Executive Order 05-03, <http://www.accountability.wa.gov/plaintalk/default.asp>.

<sup>9</sup> Federal Trade Commission, Getting Noticed: *Writing Effective Financial Privacy Notices*, <http://www.ftc.gov/bcp/conline/pubs/buspubs/getnoticed.shtm>

<sup>10</sup> U.S. Securities and Exchange Commission, *A Plain English Handbook: How to create clear SEC disclosure documents by the Office of Investor Education and Assistance US Securities and Exchange Commission* (1998) <http://www.sec.gov/pdf/handbook.pdf>

must not be in English. A few ESCOs, however, questioned the feasibility of this fundamental requirement at the Commission's technical conference and in comments already submitted.

As a licensing agency in a City in which over 170 languages are spoken, the Department has significant experience in communicating effectively with businesses and consumers whose language is not necessarily English. To provide effective communication, the Department contracts with an independent company that provides over the phone interpretation, as well as in person and document translation services. When it appears that the consumer or businessperson has limited English proficiency, our staff shows that individual a "language identification card" and the individual can identify his/her language. The staff then calls the language line and communicates over the telephone through the interpreter. The Department also utilizes multilingual staff volunteers in some situations.

As drafted, the PSC's rules do not allow the use of translation services like those utilized by the Department. The Department recommends revising the rules to permit the use of translation services. Given some of the ESCOs' doubts that marketing representatives will be unable to assess language proficiency or identify the consumer's language, we also recommend the use of language identification cards described above. This will facilitate the ESCOs' ability to market effectively, clearly and truthfully to consumers whose primary language is not English.

Finally, ESCOs' success in communicating effectively with consumers whose primary language is not English requires ESCOs to train and test their marketing representatives and to provide incentives to representatives to comply with these requirements. At the same time, ESCOs that fail to comply with this requirement must be subject to the penalties under the UBP for this serious violation.

#### **4. Disclosure that ESCO not affiliated with the public utility**

The Commission did not adopt in its proposed modifications the Department and CPB's recommendation that ESCOs must affirmatively state that they are not affiliated with the public utility. The Department urges the Commission to do so.

Because of the relatively recent entry of ESCOs into the marketplace, many consumers assume that they are dealing with their traditional utility when they are discussing the purchase of natural gas and electricity. In New York City, some ESCOs exploited this perception by representing themselves as Con Ed representatives, a representation furthered, in some instances through the use of deceptive or misleading badges or other means of identification.

While the Commission has included in its proposed modifications several provisions requiring ESCOs to identify themselves, the misperception and potential for deception will not be cured unless ESCOs are affirmatively required to state that they are not the public utility representative.

#### **5. Termination fees**

The Department is hopeful that the Commission's adoption of marketing rules will curb the abusive and deceptive practices that prompted the Department and the Consumer Protection Board to file their petition. It is likely that fewer consumers will seek to terminate their contracts with ESCOs if they enter such contracts armed with complete and accurate information in understandable language.

Nonetheless, the Commission must safeguard consumers from ESCOs using excessive termination fees to hold consumers hostage. Consumer choice is a precept underlying the deregulation of energy and that choice must continue to exist even after a consumer chooses a provider. Legitimate and compelling factors such as cost, customer service or environmental concerns may lead a consumer to seek to switch providers during the contract period. Permitting consumers to cancel their contracts without incurring high penalties will also keep ESCOs true to the terms which motivated the consumer to enter the contract and will encourage ESCOs to maintain high levels of service and customer accountability.

Further, in assessing the issue of termination fees, the Commission must take into account the aggressive sales practices in which at least some have engaged and the fact that marketing is accomplished largely through door-to-door sales and telemarketing. The experience of regulators and consumers with future-service contracts in a range of unrelated products-- from dance lessons, to vocational schools to membership campgrounds -- suggests that even when regulated, the marketing of such contracts, particularly when done through telemarketing and door-to-door sales continues to present opportunities for deceptive and misleading practices. Allowing excessive termination fees not only locks consumers into contracts induced through such conduct, but encourages the perpetuation of such conduct.

Termination fees are intended to offset costs, not to serve as penalties or profit centers. Unfortunately, ESCOs have used the fees for both purposes. Accordingly, the Department urges the PSC to evaluate closely the cost basis for such fees before permitting ESCOs to impose them. Eliminating the fees, or alternatively, prorating such fees and setting a reasonable cap on such fees would enable consumers to exercise choice during their contract period, keep ESCOs honest in their marketing practices, provide incentives for ESCOs to strengthen customer service and allow the ESCOs to recover actual expenses. The Department's future service contract law provides a possible model for the calculation of termination fees; it provides that:

A consumer who cancels a contract for future services cannot be charged more than the full contract price. However, up to the amount of the full contract price, the consumer may be charged the total of the following amounts: (1) 5 percent of the cash price, or \$50, whichever is less; (2) the cost to the seller for any goods the consumer used or the consumer is keeping; (3) the portion of the full contract price representing services received by the consumer (if a consumer cancels a contract for lessons by missing consecutive lessons that represent at least 25 percent of the lessons in the entire course, those missed lessons up to 25 percent can be treated as services received by the consumer) <sup>11</sup>

Clear and conspicuous disclosure of any early termination fees in marketing materials is critical to enable consumers to shop smartly and compare ESCOs' actual costs. In addition, such fees must be disclosed clearly and conspicuously in contracts and in any verbal representation as to costs.

Finally, the Department supports the proposal to require ESCOs to offer a grace period before termination fees are applied. The Department recommends that the trial period cover at least one billing cycle. This trial period will allow the consumer to evaluate the quality of service without penalty and will foster better business practices and a healthy competition among ESCOs to retain customers. As with the other recommendations we urge with regard to termination fees, this recommendation is particularly appropriate given the aggressive marketing tactics these rules are

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<sup>11</sup> Rules of the City of New York, Title 6 § 5-31(b) (2008)

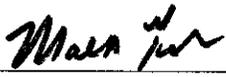
intended to address and the fact that consumers enter ESCO contracts as a result of door-to-door sales or telemarketing, both modes of marketing with potential for fraud and deception

## 6. Conclusion

The Department urges the Commission to consider our petition and recommendations in the final rules it adopts with regard to ESCO regulation. We look forward to working further with the Commission and sharing the Department's expertise to facilitate fair marketing by ESCOs and to protect consumers.

Respectfully submitted,

Jonathan Mintz  
Commissioner  
New York City Department of Consumer Affairs

By:   
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