

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

COMMENTS OF UGI ENERGY SERVICES, INC.

UGI Energy Services, Inc. (“UGIES”) hereby submits the following comments on: 1) the New York Public Service Commission’s (the “Commission’s”) specific questions set forth in the March 19, 2008, Notice Soliciting Comments (the “Notice”) in the above-referenced proceeding 98-M-1343; 2) the Commission’s proposed modifications to the Uniform Business Practices (“UBP”) in the same proceeding; and 3) National Fuel Gas Distribution Corporation’s (“NFGDC’s”) proposed door-to-door sales standards in the above-referenced proceeding 08-G-0078.

UGIES is a licensed Energy Services Company (“ESCO”) in New York State that currently serves only commercial and industrial natural gas customers. As such, UGIES’ comments are limited to those issues or concepts which effect ESCO service to commercial and/or industrial customers including small commercial customers. UGIES opposes any attempt by the Commission to extend the rules and remedies it is considering

for residential customers to small commercial customers. In UGIES' view, the rights of small commercial customers are already adequately protected under existing consumer protection laws and negotiated contract provisions.

I. UGIES Response to Select Commission Questions

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

No. Cost responsibility should follow cost causation. The Commission has not made any demonstration that significant Commission resources are devoted to either the processing of ESCO licenses or the prosecution of ESCO-directed consumer complaints. Further, the assessment of ESCOs under the PSL §18-a methodology would be punitive and anti-competitive. One aspect of PSL §18-a is that it provides that utility assessments be calculated on a revenue basis. ESCO revenues are predominantly derived from energy commodity sales and are offset by commodity costs to a much greater extent than traditional utility revenues. Thus a revenue-based assessment would represent a proportionally larger financial burden to ESCOs. An additional complication is that at this time it is not clear as to whether the utility assessments are currently collected as a function of delivery or commodity rates or both and if the method varies by utility and/or product (electric and gas). If assessments were to be applied to ESCOs, it would have to be assured that it is done in a manner that does not unfairly disadvantage ESCOs and by extension the customers they serve. Therefore, UGIES suggests that since all customers remain utility delivery customers (whether they are with an ESCO or not) the simplest and fairest way for the Commission to collect assessments would be to apply them to

utility delivery charges and collect them from the utility. Thus, there would be no way that customers choosing an ESCO could end up paying higher assessment rates than those being provided commodity by the utility.

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?

Yes. UGIES notes that on October 20, 2006 there was a decision in Trade Secret Case 06-1, based on a Freedom of Information Law request, denying release of "Unredacted ESCO Gas Flow-Thru Data Reports" which include amongst other items the number of customers for each ESCO.

In the Trade Secret 06-1 case, it was determined on appeal that, "disclosure of a list of ESCOs, with total number of customers...would be likely to cause substantial injury to the competitive positions of ESCOs, particularly new entrants and those that have chosen to concentrate their marketing efforts in specific geographic area in the State." The Commission noted that disclosure of the total number of customers served by each ESCO would reveal each ESCO's position in the market and that disclosure raised the potential for consumers to incorrectly perceive the meaning of the information as related to a marketer's reliability or financial capability. UGIES agrees with the Commission's prior findings that disclosure of the number of customers served by an ESCO would cause substantial injury to an ESCO's competitive position.

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. Small commercial customers generally possess the commercial and legal expertise to undertake energy purchasing activities without additional consumer protections. Pre-existing consumer protection laws already protect these consumers from false and misleading activities. The Commission has previously recognized the relative sophistication of small commercial customers. When the Commission previously reviewed a proposed UBP change that would have provided a three day right of rescission to small commercial customers, the Commission declined to do agree to this change. The Commission distinguished residential customers that, “may need additional time to reconsider their commitment to a new supplier,” from small commercial customers that, “are likely to possess the necessary business acumen to make the decision before entering into a sales agreement.”¹ This conclusion remains true today, as small commercial customers have gained additional experience in conducting all forms of energy purchase and risk management transactions.

If contrary to the foregoing, the Commission were to adopt marketing standards applicable to small commercial customers UGIES would suggest that as to gas, a small commercial customer should be defined as one using 5,000 therms per year or less. Any such standards should recognize the fundamental differences between residential and small commercial markets rather than imposing a rote extension of the existing residential regulations.

¹ Case 98-M-1343, Order Adopting Revised Uniform Business Practices, issued November 21, 2003, at pages 21-22.

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

The Commission reviews the standard sales agreement forms for each customer class for all ESCOs seeking licensure and is currently able to effectively ensure the clarity and completeness of ESCO contract language on a case-by-case basis. Moreover, pre-existing State law provides guidance for the term “plain language” as used in the UBP.

For example, the General Obligations Law Section 5-702 currently requires the use of plain language in consumer transactions such that written agreements are to be, “1. Written in a clear and coherent manner using words with common and every day meanings; 2. Appropriately divided and captioned by its various sections.” UGIES maintains that no additional standards for Commission contract review are needed.

II. UGIES’ Comments on Specific Proposed Modifications to the UBP

1. Maintaining ESCO Eligibility Status (Proposed Section 2.D.2-A.)

The Commission has proposed a revision in this section that would require ESCOs to resubmit their application package every three years as part of the process of maintaining their eligibility status. UGIES suggests that the current obligation to submit the January 31 statement² coupled with the obligation to report other specific changes throughout the year is all that is necessary for Commission review and any additional requirements would be unduly burdensome for the ESCO.

² See UBP Section 2.D.1. delineating the information set forth in the January 31 Statement.

2. Penalty Provisions (Proposed Section 2.D.6)

The proposed language states that “the Commission or DPS may take into account the nature, circumstances, and gravity of the failure.” Consideration of these factors should not be discretionary. UGIES proposes that this language be changed to read as follows “the Commission or DPS will take into account the nature, circumstances, and gravity of the failure.”

3. Penalty Provisions (Proposed Section 2.D.6.a.ii.)

The proposed language states that the “Commission or DPS shall Request that the ESCO take appropriate action or provide remedies within the DPS directed cure period.” UGIES suggests that even if utilizing best efforts some cures may require a longer time than others. UGIES proposes that the proposed language for this section be revised to read as follows the “Commission or DPS shall Request that the ESCO take appropriate action or provide remedies within the DPS directed cure period which will be based on a reasonable amount of time given the nature of the issue to be cured.”

4. Penalty Provisions (Proposed Section 2.D.6.b.iii.)

The proposed potential penalty “of a requirement to record all telephonic marketing presentations” if adopted should only apply where the customer sale is initiated and completed during telephone calls and does not otherwise involve other forms of communication which may document the terms of the agreement between the ESCO and customer.

5. Penalty Provisions (Proposed Section 2.D.6.b.iv.)

The proposed language in this Section sets forth a penalty in the form of reimbursement to customers associated with not having received a “promised” savings. The language as written includes the term “substantially demonstrated” a non-specific term. UGIES suggests that the language, as to this potential penalty should be reworded as follows “Reimbursements to customers who did not receive the savings promised in the ESCO’s sales agreement or which can otherwise be proven as to have been promised.”

6. Proposed Revisions to Section 5, Attachments 1, 2 and 3

A proposed revision to Item 5 on Attachment 1 and Item 2 on Attachments 2 and 3 with respect to telephonic, written and electronic agreements would require ESCOs to make the statement “that no savings is guaranteed” with respect to their product or “if a savings is guaranteed” to provide “a clear description of the conditions that must be present in order for the savings to be provided.” UGIES suggests that Item 5 on Attachment 1 and Item 2 on Attachments 2 and 3 should be reworded as follows “If a savings is guaranteed, the ESCO must provide a clear description of the conditions that must be present in order for the savings to be provided.”

7. Proposed UBP Section 10, Marketing Standards

The Commission proposed a new Section 10 to the UBP setting forth proposed marketing standards for ESCOs and their marketing representatives to follow when marketing to residential customers but asked in Question 6 in the Notice as to whether these proposed standards should also apply to small commercial customers. As answered above, UGIES does not feel it is appropriate to apply these proposed standards to small commercial customers and therefore, feels that the applicability of the language in this proposed

Section needs to should clearly be limited to residential. If the Commission adopts and extends these proposed Marketing Standards to small commercial customers, UGIES would suggest the following changes.

8. Contact with Customers (Proposed Section 10.C.1.a.iii.)

In the case of in-person contact, the proposed language would require production of identification that “does not resemble the name or logo of a distribution utility.” UGIES suggests that this language should instead require production of identification that shows the “ESCO’s legitimate trade name and logo” on its representatives’ identification.

9. Contact with Customers (Proposed Sections 10.C.1.a.iv. and 10.C.1.a.v)

This proposed language would require that the marketing representative’s identification include the ESCO’s business address and telephone number. Undoubtedly, the consumer should know this information. However, the requirement to include this much information on a representative’s badge may not accomplish the desired result, i.e., when the representative leaves, so does the information. And, how large can the badge realistically be expected to be such that the information would be readable? It seems that it would be most helpful from a consumer perspective to include the ESCO contact information on ESCO literature that is left behind, as is suggested in Proposed Section 10.C.1.b.

10. Contact with Customers (Proposed Sections 10.C.1.e. and 10.c.2.e.)

The proposed provisions would require that when a customer informs a marketer representative, or “where it is apparent,” that the customer has insufficient English

language skills to understand the agreement that a representative that speaks the consumer's language be utilized or the contact be terminated. The current UBP Section 5(B) incorporating Attachment 1(C) already includes the requirement that ESCOs, "shall conduct the telephone conversation in the same language used in marketing or sales materials presented to the customer." This is a rational approach. If the Commission becomes aware of a pattern of an individual ESCO abuse of this nature, that may be more appropriately addressed in the Commission's complaint resolution and penalty process.

III. UGIES' Comments on NFGDC's Proposed Door-to-Door Sales Standards

NFGDC proposed to set forth in its Gas Transportation Operation Procedure ("GTOP") Manual and reference in its tariff door-to-door sales standards (the "Standards") to be applicable to ESCOs in its service territory.³ In its proposal, NFGDC does not limit the proposed applicability of these proposed Standards to residential customers. As the UBP already covers marketing procedures and is currently proposing to expand its coverage, NFGDC should not be allowed to develop its own Standards. Additionally, marketing standards of any type are not an appropriate subject matter for a utility's GTOP- a document which pertains to operational rules intended to support the reliability of the system and marketer-utility interactions, such as communication protocols, responsibilities during an OFO, and determination of delivery quantities not marketing rules such the proposed Standards. NFGDC's proposed standards should be denied.

IV. Conclusion

UGIES appreciates this opportunity to comment on the Commission's proposed UBP modifications as well as the opportunity to engage with Staff and other stakeholders in the technical conference to provide input as to and gain further understanding of the proposed UBP modifications.

Respectfully submitted,

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³ Case 08-G-0078, Proposed Tariff Amendment, dated January 28, 2008.