



National Fuel

May 22, 2008

Via UPS

Hon. Jaclyn A. Brillling
Secretary
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 Services 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 in the above-referenced proceeding are an original and five (5) copies of the Reply Comments of National Fuel Gas Distribution Corporation.

Thank you for your attention to this matter.

Very truly yours,

Michael W. Reville

Enclosure

cc: All Active Parties

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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REPLY COMMENTS
OF
NATIONAL FUEL GAS DISTRIBUTION CORPORATION

ESCO comments submitted in response to the Public Service Commission's ("Commission") Notice issued in the above proceedings ("Notice")¹ largely advocate *caveat emptor* for New York energy consumers. If anything, these ESCOs' apparent refusal to recognize there is a problem that needs fixing proves the need for the Commission's proposed changes to the Uniform Business Practices ("UBPs"). See, e.g., Intelligent Energy Comments at 2; Small Customer Marketer Coalition ("SCMC") Comments at 4, 28-29; Retail Energy Supply Association ("RESA") Comments at 5-6. In the Reply Comments that follow, National Fuel Gas Distribution Corporation ("Distribution" or the "Company") responds to points raised by some of the commenting ESCOs. In addition, Distribution supports, as eminently reasonable, proposals submitted by the Consumer Protection Board ("CPB") for refinement of the draft UBPs.

¹ Case 98-M-1343 et al., Notice Soliciting Comments on Revisions to the Uniform Business Practices (issued March 19, 2008).

1. Utilities Have Long Had Authority to Discontinue ESCO Services.

In Distribution's Initial Comments, the Company recognized that in substance, the UBP marketing standards could partially supplant the Company's proposed standards governing door-to-door sales by ESCOs. Distribution argued, however, that reflecting longstanding practice, enforcement of the Marketing Standards should be shared by the Commission and utilities.²

ESCOs feel otherwise. The comments reveal that some ESCOs are possessed of a misapprehension that (a) the UBPs do not currently authorize utilities to terminate ESCO service and (b) utilities as "competitors" are bent on terminating ESCO service. In comments that border on hysterical, RESA, willfully ignoring the current UBPs, loudly exclaimed:

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

RESA Comments at 32.³ This erroneous view is shared, with somewhat less histrionics, by other ESCOs. See, Comments of Gateway Energy Services Corporation ("Gateway Energy") (at 18); Comments of Intelligent Energy (at 16); Comments of SCMC (at 31-

² Distribution argued for a shared enforcement regime in its comments filed in response to the petition filed by CPB and New York City Department of Consumer Affairs.

³ On this issue, the Comments of SCMC, having been drafted by the same author, are nearly identical to RESA's.

32). These ESCOs overlook the fact that the UBPs have long permitted utilities to discontinue service to ESCOs for violations of utility tariffs, operations procedures, and UBP delivery requirements – arguably constituting some of the most important consumer protection features contained in the UBPs. See, UBP §2.F. (“Discontinuance of an ESCO’s and Direct Customers’ participation in a Retail Access Program”). For this reason, Distribution’s proposal for enforcement of its proposed door-to-door standards, or to share enforcement of Staff’s proposed Marketing Standards, are not an attempt to “displace the jurisdiction of the Commission,” as RESA mistakenly asserts. Likewise, Intelligent Energy is flatly wrong when it states, “discontinuing ESCO enrollments is a power that only the Commission should properly wield.” Indeed, this line of reasoning, if accepted by the Commission, would invalidate UBP §2.F in its entirety, and leave the Commission with the sole responsibility to suspend or discontinue ESCOs for, e.g., failure to deliver sufficient supplies of gas, or failure to maintain creditworthiness. That would render the UBP unworkable. The fact is, utilities have long maintained the authority to “discontinue ESCO enrollments” under the circumstances enumerated in the UBPs, and without causing any competitive harm to the market that the ESCOs allege.

It is telling that these ESCOs are ignorant of the utilities’ existing authority to discontinue ESCO enrollments. It means that utilities have rarely used that authority, or have used it reasonably, and only when absolutely necessary. There is no evidence that utilities have exercised their discontinuance authority “arbitrarily” or to “shut down a competitor,” as RESA darkly predicts will happen (at 32). Indeed, the idea of utilities, who earn nothing on sales of gas or electricity commodity, would use their enforcement authority under the UBPs to engage in unfair competition with ESCOs is ridiculous in the

extreme.⁴ Ironically, if any entity should exercise its enforcement authority with utmost care, it is utilities, who lack government immunity and whose business decisions are subject constantly to review by the Commission.

The UBPs contain a detailed scheme for discontinuance, by a utility, of an ESCO's participation in that utility's retail access program, all under the watchful eye of Staff and the Commission. There are multiple safeguards in that scheme, including ample notice requirements, cure periods, Department Public Service prior review and approval and access to the UBP dispute resolution process. Distribution is merely requesting that the proposed Marketing Practices be included among the existing list of "reasons" supporting discontinuance under UBP §2F.1. Furthermore, as in the case of violations of a utility tariff or operating procedures, the Company suggests that such violations receive the maximum allowance for notice as provided under UBP §2F.7.f. With these abundant and established protections in place, ESCOs would be well protected against unreasonable or arbitrary enforcement actions by a utility.

2. CPB Proposes Reasonable Changes to the Draft UBPs.

Although Distribution generally supports Staff's proposed changes to the UBPs, the Company also agrees with some of CPB's refinements, and recommends their approval. They include the following:

⁴ PULP apparently agrees with the ESCO argument that utilities are "competing" with ESCOs. PULP Comments at 4, 10. Distribution admits that inertia may drive some utilities to continue practices like assisting customers' request to switch from ESCO to utility sales service. After all, utilities have been providing bundled sales service for over one hundred years, and old habits like providing decent customer service do not die easily. Furthermore, the Commission can, and does, penalize utilities that fail to meet customer service performance targets. But utilities are also acutely aware that retail gas supply service is fraught with risk, insofar as it is supported by the gas purchase function, with no opportunity for any gain whatsoever. So there is simply no logic to the suggestion that gas utilities subject to a flow-through gas adjustment clause might intentionally engage in anticompetitive behavior to increase the sale of supply service to retail customers.

a. Applicability of Marketing Standards to Small Commercial Customers.

Distribution agrees with CPB that the Marketing Standards should be applicable to small commercial customers. Accord, Comments of Office of Attorney General (at 5). In Distribution's significant and long-term experience with all commercial classes (i.e. accounts that consume less than 5,000 Mcf annually), while it may be true that large volume customers are sophisticated enough to fend for themselves, the same cannot be said of smaller commercial customers. For purposes of dealing with ESCOs, these customers are no different than residential customers: some are sophisticated and many are not. In fact, it is arguably true that small commercial customers are an especially vulnerable class, inasmuch as in New York, they have no advocate (other than CPB, which also tends to focus on residential concerns), and naturally are focused on running their business and not the intricacies of competitive retail energy markets.

As CPB correctly notes, the Notice provides no explanation "for denying small commercial customers protections that representatives of consumers believe are necessary" CPB Comments at 3. This observation alone suggests that the Commission needs to evaluate, fully, the reason for Staff's exclusion, which as it stands lacks a rational basis, and is merely discriminatory.

b. Affirmative Statement by ESCO Representatives.

Distribution supports CPB's proposal that "for both in-person and telephone contacts, an ESCO representative should be required to clearly state that they are not an employee or representative of any distribution utility, referring specifically to the primary distribution utility in the customer's geographic area, and that the representative is not contacting the customer on behalf of, or at the request of, any distribution utility.

CPB Comments at 6. In Distribution’s tariff filing for guidelines governing door-to-door sales, the Company proposed that the ESCO representative recite explicitly that “he or she is not an employee or agent of [the utility].” As correctly observed by CPB, a recital that the ESCO representative is not from the utility “will not drastically inhibit its ability to market effectively,” CPB Comments at 8, and it will go a long way to help prevent the kind of customer confusion that necessitated the need for this proceeding in the first place. This is a moderate and reasonable proposal that should be adopted. See also, Comments of the Office of the Attorney General (at 4); Comments of Consolidated Edison Company of New York, Inc. et al. (at 3) (recommending that “in the case of ESCO identification, affirmative [oral] statements are necessary both with respect to whom the marketer does represent and whom the marketer does not represent”).

c. Disclosure Requirements.

Distribution supports CPB’s proposals for enhanced and simplified disclosure of essential contract terms in ESCO sales agreements. CPB Comments at 9. The Company observes that ESCOs support the concept of full disclosure. See, e.g., Comments of New York State Energy Marketers Coalition (“NYSEMC”) (at 5-6). It should be noted that full disclosure, while important, is not necessarily a solution to the problem of abusive sales practices by ESCOs. Indeed, “full disclosure” is, in many regards, a “fix” that may benefit the ESCOs more than consumers because it enables ESCOs to argue that an aggrieved customer made an informed decision and should not be relieved of the consequences. The fact is, retail gas contracts are complicated legal documents authored by ESCOs to benefit and protect the ESCOs. Even the simplest, most transparent contract is an extreme departure from what utility customers have experienced for

decades – no contract. It appears, too, that competition is generating not simpler contracts, but ever more complicated contracts, with longer terms and increasingly cryptic termination provisions. Consequently, there may be no amount of simplified disclosure that will replace the need for enhanced consumer protections for ESCO services.

d. Reciprocal Termination Fee.

CPB proposes a compromise regarding termination fees. While Distribution generally expresses no opinion about whether an ESCO ought to be permitted to assess a termination fee, Distribution Comments at 7, the Company supports CPB’s proposal for reciprocity in the assessment of such charges. That is, “if the contract allows the ESCO to cancel without penalty, the customer must have the same right to exit without termination fee.” CPB Comments at 18.

3. Distribution’s Reply to Other Points Raised by Commenting Parties.

a. Gateway Energy’s proposal to change the definition of slamming.

Gateway Energy recommends that the definition of “slamming” be modified to include the “utility’s unauthorized switch of a customer back to full utility service.” Gateway’s justification for the change is limited solely to the statement that “we have found that . . . a utility company can also de-enroll a customer, . . . without the customer’s clear intention or authorization to do so.” Gateway Energy Comments at 7. While a “de-enrollment” may conceivably happen on rare occasion because of an administrative oversight by the utility, the utility has no incentive to “de-enroll” a customer and would in all reasonable likelihood make every effort to prevent it. The rule against slamming exists as a counterweight to an ESCOs’ incentive to enroll customers. Because there is

no similar motivation for utilities, who gain nothing from a “de-enrollment,” there can be no occasion for an intentional “slam” of an ESCO customer back to utility service. On its face, it is somewhat of a ridiculous contention.

Moreover, Gateway Energy overlooks the fact that the utility will remain the supplier of last resort, and therefore the default supply service vendor, for the foreseeable future. Because of this role, there can be instances where customers are “switched” to utility service without their consent, but for reasons that are otherwise legitimate. For example, if a customer is “dropped” by an ESCO for non-payment, the customer is “switched” to bundled utility service without the customer’s consent. Likewise when customers are switched back to utility service when an ESCO discontinues service because of, e.g., bankruptcy.

Chances are, instances of “de-enrollment” without a customer’s consent may reveal, at worst, a system flaw in the utility’s enrollment procedures. The better solution for Gateway Energy or any ESCO that perceives such a problem would be to address the matter directly with the utility and seek Staff’s assistance if necessary.

b. Improper Termination of ESCO Supply Service.

Gateway and NYSEMC say that some utilities, including Distribution, improperly “terminate ESCO supply service whenever there is a change in account information.” Gateway Energy Comments at 7-8; NYSEMC Comments at 15-16. These ESCOs are apparently alleging that utilities should not return a customer’s account to utility supply service when, e.g., the customer submits a name change or other material change on the account. Distribution is unaware of this practice occurring on its system. Distribution

does not return an ESCO customer to utility supply service merely because the customer has submitted a name change request to the Company.

Distribution does switch ESCO customers to utility supply service when the customer of record closes the account and then re-opens a new account in another name. The event that produces the switch, however, is not the name change. It is the account-holder's affirmative act of closing the account. When that happens, the prior account is terminated, and the name is then dropped from the ESCO's list of accounts.

Utilities remain responsible for managing customer accounts. When a customer submits information to a utility that modifies information on the account, especially material information like a customer's name, the "customer" has changed, for purposes of the UBPs, and is no longer identified as the same "customer" associated with the ESCO's account. See UBP §5.L. While the ESCOs may have identified an administrative issue that deserves some discussion, they have not identified violations of the UBPs. UBP enrollment and switching procedures focus on the "customer" and not the "account." See UBP §5.K. (Unauthorized Customer Transfers). If an ESCO's "customer" has closed the account and another individual has applied for service at the same location, utility systems do not (and should not) assume that the applicant is the same individual who consented to enrollment with the ESCO.

c. Uniform Affiliate Rules.

Reliant Energy Solutions Northeast, LLC ("Reliant") proposes that a uniform code of conduct governing the utility-affiliate relationship be developed and incorporated into the UBPs. Reliant Comments at 4. Reliant's proposal is motivated not by a need to enhance oversight of utility transactions with marketing affiliates, but because "the

current utility-affiliate rules are difficult to find because they are buried within the utilities' restructuring filings and settlement agreements.” Reliant Comments at 5. Reliant states as a given that “rules governing utility-affiliate conduct are generally accepted as necessary.” Reliant acknowledges, “to varying degrees, utilities already have such rules in place.” Reliant Comments at 5-6.

Distribution agrees with Reliant's observation that affiliate rules are generally accepted as necessary. Conceptually speaking, Distribution does not oppose the general idea of uniform affiliate rules as a replacement for the highly detailed, customized affiliates rules under which the Company has operated for several years. Reliant's list of “general principles” to be included in a “statewide code” are largely reflective of existing affiliate rules in New York. Distribution disagrees, however, with Reliant's contention that the Company's affiliate rules are “difficult to find.” Distribution's affiliate rules are conveniently located in Distribution's Gas Transportation Operations Procedure Manual (“GTOP”), which is available on the Company's web site.⁵ In fact, all gas utilities are required to post the GTOP, which includes affiliate rules, as applicable, on their corporate web sites.⁶ Gaining access to these sites requires little effort, even for ESCOs who lack computer skills, inasmuch as the rules are otherwise available through a simple request to the utility department that handles ESCO matters.

Reliant's position boils down to a request to convene a proceeding to establish generic affiliate rules – no mean feat – solely because Reliant apparently had trouble finding some utilities' affiliate rules, even though Reliant acknowledges that such affiliate rules exist. That is, Reliant's issue is one of notice, and not the substance of the

⁵ http://www.natfuel.com/marketers/New_Format/NFDNYmanual200805.pdf.

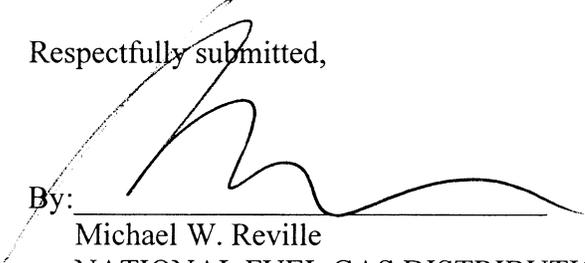
⁶ See, e.g., <http://www2.nationalgridus.com/docs/partners/marketers/Gtop.pdf>.

affiliate rules. Accordingly, the solution to Reliant's problem is not to convene a new proceeding, discard the old rules and establish new ones. Indeed, given some utilities' unique attributes, the whole exercise would likely produce nothing but a new set of utility-specific affiliate rules contained in the GTOP or another publication. While Distribution is unaware of the specifics concerning public availability of electric utility affiliate rules, the appropriate, and much simpler solution would be merely to have utilities provide a direct link to their existing affiliate rules on the ESCO services web page.

Conclusion

For all of the foregoing reasons, Distribution requests that the Commission adopt the proposed changes to the UBPs together with the modifications described above.

Respectfully submitted,

By: 

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