

**STATE OF NEW YORK  
BEFORE THE  
PUBLIC SERVICE COMMISSION**

CASE 98-M-1343	)	In the Matter of Retail Access Business Rules
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
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

**REPLY COMMENTS OF  
ENERGETIX, INC. AND NYSEG SOLUTIONS, INC.  
IN RESPONSE TO MARCH 19, 2008 NOTICE**

Pursuant to the schedule established in the notice issued March 19, 2008 in the above-captioned proceedings (as extended) Energetix Inc. (“ENX”), and NYSEG Solutions Inc. (“NSI”) (referred to together as “ENX/NSI”) hereby submit these Reply Comments.

**I. COMMENTS**

*1. The need to ensure due process rights under SAPA prior to imposing penalties in an adjudicatory proceeding.* Proposed Section 2.D.6 sets out the procedures the Commission and the Department of Public Service (DPS) would follow prior to imposing penalties on ESCOs for violations of the new rules. These procedures provide for a written notice to be followed by a “request” for the ESCO to take “appropriate corrective action or provide remedies” within a “cure period” to be established by the Department. If the ESCO fails to take corrective action or provide

remedies within the cure period (and following notice to the ESCO and an “opportunity to respond”), the Commission may proceed to impose penalties.<sup>1</sup> These penalties are potentially severe and indeed may include the revocation of the ability to continue ongoing business as well as “[a]ny other measures that the Commission or DPS may deem appropriate”.

The proposed rule doesn’t, however, spell out the actual procedures to be followed prior to the imposition of penalties. We would suggest that it would be helpful and appropriate for the new rule to reference the applicable minimum procedural requirements that are detailed in the New York State Administrative Procedure Act (“SAPA”)<sup>2</sup> and which would appear to apply in any event. After all, terminating a business’ legal ability to conduct its business and serve its customers is an extreme sanction. We believe such action (whether viewed as termination of a license or imposition of a penalty) should only be imposed in an adjudicatory proceeding under Article 3 of SAPA, which provides of course for the preparation of a hearing record and a written order of the agency that is grounded on that record.

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<sup>1</sup> The proposed Section 2.D.6.a. provides in full as follows:

6. In determining the appropriate consequence for failure to comply with Section 2.D.4, the Commission or DPS may take into account the nature, circumstances, and gravity of the failure, as well as the ESCO’s history of previous violations.
- a. The Commission or DPS shall:
    - i. Notify the ESCO in writing of its failure to comply;
    - ii. Request that the ESCO take appropriate corrective action or provide remedies within the DPS directed cure period;
    - iii. Upon failure of the ESCO to take corrective actions or provide remedies within the cure period, the Commission may impose the consequences listed below; and
    - iv. Consequences shall not be imposed until after DPS provides notice to the ESCO and the ESCO has been afforded an opportunity to respond.

<sup>2</sup> An unofficial version of the SAPA is available for convenience at:  
<http://caselaw.lp.findlaw.com/nycodes/c112.html> (viewed May 22, 2008).

Accordingly, we respectfully urge the Commission to revise the proposed rule to reference and incorporate the due process protections of the SAPA. Suggested wording changes to Section D.6.a to accomplish this could read as follows:

- “a. The Commission or DPS shall:
- i. Notify the ESCO in writing of its failure to comply;
  - ii. Request that the ESCO take appropriate corrective action or provide remedies within the DPS directed cure period;
  - iii. Upon failure of the ESCO to take corrective actions or provide remedies within the cure period, the Commission may impose the consequences listed below; and
  - iv. Consequences shall not be imposed until after ~~DPS~~the Commission<sup>3</sup> provides notice to the ESCO, ~~and the~~ and an ESCO has been afforded an opportunity for the ESCO to respond and issues a final decision, determination or order pursuant to an adjudicatory proceeding under Article 3 of the New York State Administrative Procedure Act.”

Since the SAPA sets minimum rules applicable to all agencies, these new Commission rules would be subject to the SAPA provisions governing adjudications and the termination of an agency approval in any event. Still, including a reference to the applicable SAPA provisions may be helpful to avoid confusion and assure all members of the public that fundamental due process rights will be preserved.

***2. Potential termination of eligibility by simple notice during triennial application proceeding.*** Proposed Section 2.D.2-A raises a similar issue. It would require ESCO’s to re-submit an application every three years. While apparently intended merely to refresh the Commission’s records and ensure that all of the requisite information for each ESCO remains current and accurate, the wording of the proposed

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<sup>3</sup> This change is made to track paragraph (iii) above, under which it is the Commission that may impose the penalties under the rule.

section would appear to allow the termination of an ESCO's eligibility by mere notice from the DPS and without any procedural protections at all. The proposed rule states that an ESCO's eligibility is continuous from the date of the DPS eligibility letter, "*unless otherwise notified by the DPS that the application submitted in compliance with this provision is deficient or as otherwise provided in Section 2.D.4*" (emphasis supplied).<sup>4</sup>

As so worded, the proposed rule would thus appear to allow the termination of eligibility by a mere notice that an ESCO's three-year application is "deficient" without providing any standards to govern the determination. This formulation effectively makes an ESCO's ability to pursue its business and serve its customers dependent on an un-circumscribed and undefined power of the DPS to terminate an ongoing business that may have hundreds of thousands of customers.

While we recognize that Staff indicated at the Technical Conference that this is not the intent, we remain concerned that it is the effect. The provision creates an unnecessary risk in the New York energy marketplace for suppliers and may tend to discourage companies thinking, planning -- and indeed contracting -- for long-term energy supplies to commit to this market. At a minimum, it may encourage suppliers to avoid contractual commitments for energy supply that extend beyond the next applicable three year review date. Alternatively, a supplier could include contractual termination

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<sup>4</sup> The section as proposed in the March 19 Notice provides in full that:

2-A. An ESCO shall resubmit its application package to DPS every three years, starting from the date of its eligibility letter, consistent with the requirements of Section 2.B. An ESCO's status as an eligible supplier is continuous from the date of the DPS eligibility letter, unless otherwise notified by the DPS that the application submitted in compliance with this provision is deficient or as otherwise provided in Section 2.D.4. If the three year anniversary date falls within one month of the January 31, the ESCO shall resubmit its application package in lieu of the January 31 statement.

provisions that protect it from such risk – but such provisions of course tend to shift termination risk to wholesale suppliers further upstream and tend to unnecessarily raise costs. Similarly, the provision creates risks for suppliers entering into supply commitments to retail customers that extend beyond the next applicable three year review period. Either the ESCO will reserve the contractual right to terminate the supply commitment at the end of each three year period (presenting a less dependable and therefore less attractive market to energy suppliers) or the Commission will be faced with the prospect of abrogating contracts. Neither prospect will encourage an orderly migration of customers to competitive serves.

We would suggest rewording the provision to make it clear that the three-year filing is therefore *a filing requirement* (not a re-application requirement) intended to ensure the accuracy of the Department’s information on each licensed ESCO but does not allow eligibility to be revoked every three years through a mere deficiency notice. As noted above, terminating a business’ legal ability to continue to serve its customers requires compliance with the due process protections of an adjudicatory proceeding under the SAPA. A suggested reworded provision might read as follows:

2-A. An ESCO shall ~~update~~resubmit all the information submitted in its original application package to DPS every three years, starting from the date of its eligibility letter, consistent with the requirements of Section 2.B. An ESCO’s status as an eligible supplier is continuous from the date of the DPS eligibility letter, unless revoked by the Commission for violation of these rules in accordance with Section 2.D.5 and Articles 3 and/or 4 of the New York State Administrative Procedure Act. ~~otherwise notified by the DPS that the application submitted in compliance with this provision is deficient or as otherwise provided in Section 2.D.4.~~ If the three year anniversary date falls within one month of the January 31, the ESCO shall ~~resubmit~~ its updated information~~application package~~ in lieu of the January 31 statement.

**3. Reasonable early termination or cancellation fees.** As the Commission is aware, early termination or cancellation fees have been the source of considerable debate. In our prior comments, we have stressed the important role reasonable fees can serve in a comprehensive marketing plan. *See* Initial Comments of Energetix Inc. and NYSEG Solutions, Inc. (filed April 18, 2008), at 7-9. Moreover, at the April 28 Technical Conference, it was noted by several participants that much of the concern raised regarding early termination fees was an indication of an underlying problem of customer confusion over what the customer was purchasing and committing to – or in some instances a matter of outright misrepresentation (and in particular where the recorded portion of a marketing telephone call did not accurately represent the substance of the preceding “pitch”).

We continue to believe that reasonable fees can play an important role in an overall competitive pricing structure, assisting suppliers in managing price and volume risk, and administrative costs. We would urge the Commission to avoid an overly-prescriptive approach that “throws the baby out with the bath water”. We understand that other ESCO reply comments being filed here will provide a more detailed discussion of the role of such contractual provisions in managing and compensating for supplier risks and we commend those comments to the Commission’s consideration.

**4. Clarification regarding authorization of customer of record or authorized representatives.** In the discussions at the Technical Conference on April 28, there was considerable discussion regarding whether the rules should permit ESCOs to be able to continue to deal with an authorized representative of the customer of record as has been the practice to date. To put it another way, the question now is whether the Commission wishes to make a customer's ability to contract for competitive energy supply a *non-delegable* power that can only be exercised in a personal capacity and cannot be delegated to any agent or representative.

ENX/NSI continue to believe that it is important for the rule to explicitly recognize that contracts entered into with an authorized representative of the official "customer of record" are valid and binding contracts. Our concern is that if the rule states that only the "customer of record" may contract for service, then contracts entered into by fully authorized representatives of the customer of record are apparently void on their face – even where they were in fact entered into with the full knowledge and authorization of the customer of record

To be sure, the ESCO takes the risk that the person they are dealing with is authorized and in the event of a dispute the contract may be voided by the ESCO if the person with whom the ESCO dealt was not authorized to do so. This is why the representatives contacting customers do not deal with just anyone on the other end of the telephone line, but seek to make sure that the person is an adult who is capable of understanding the offer being made *and is authorized to proceed*. But if *only* the customer of record may act and the customer is precluded from delegating that ability,

then arguably the agreement would be void *ab initio*, potentially creating retroactive liability and other uncertainty or confusion. Moreover, because people are accustomed to authorizing others to speak for them frequently on various matters in everyday life, a rule precluding such authorization for competitive energy supply runs counter to people's everyday practices and may create a very real barrier to switching. This recalls the frustration that people frequently encounter feel when trying to follow up with the doctor's office on behalf of a busy spouse by picking up X-rays or similar test results or medical records – for under Federal law<sup>5</sup> the health care provider is prohibited from communicating the medical information to anyone other than the patient except in limited and defined circumstances. While such restrictions are understandable in light of the sensitivity of medical information, they are unnecessarily restrictive and anticompetitive in the case of an ESCO endeavoring to market competitive energy supply.

Accordingly, we would urge the Commission to make it clear that the customer of record may continue to authorize someone to act on their behalf in dealings with ESCOs and that the existing rules governing signatures and telephonic authorizations be retained.

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<sup>5</sup> See, e.g. Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, Aug. 21, 1996, 10 Stat. 1936. The final rule implements the privacy requirements of act ("Privacy Rule") were issued at 67 Fed. Reg. 53182 (August 14, 2002).

II. CONCLUSION

We appreciate the Commission's deliberate approach to reviewing the issues raised in these proceedings and respectfully urge the Commission to review the comments carefully before deciding how to proceed.

Respectfully submitted,  
ENERGETIX, INC. AND  
NYSEG SOLUTIONS, INC.

By: Original signed on behalf of Robert J. Hobday

Robert J. Hobday  
50 Methodist Hill Drive  
Suite 1500  
Rochester, NY 14623  
Phone: 585-487-3610  
Fax: 585-359-8688  
Email: [rhobday@energetix.net](mailto:rhobday@energetix.net)

Of Counsel:  
Philip M. Marston, Esq.  
MARSTON LAW  
218 N. Lee Street,  
Suite 300  
Alexandria, VA 22314  
Tel: 703-548-0154  
Email: [pmarston@marstonlaw.com](mailto:pmarston@marstonlaw.com)

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cc: Parties on Active Parties list compiled by PSC via email