

LAW OFFICE

USHER FOGEL

ATTORNEY AT LAW

557 CENTRAL AVENUE, SUITE 4A CEDARHURST, NY 11516

TEL: 516.374.8400 X 108

FAX: 516.374.2600

CELL: 516.967.3242

E-MAIL: ufogel@aol.com

May 23, 2008

Hon. Jaclyn Brilling  
Secretary  
NYS Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223

**Re: 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.**

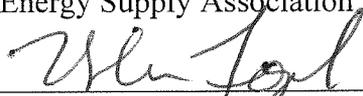
Dear Secretary Brilling:

Enclosed for filing with the Commission please find the original and five (5) copies of the “Reply Comments of Retail Energy Supply Association” in the above-captioned matter.

Thank you for your assistance in this matter.

Respectfully submitted,

Retail Energy Supply Association

By: 

Usher Fogel, Counsel

Cc: Active Parties (by electronic mail)

**STATE OF NEW YORK  
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 THE RETAIL ENERGY SUPPLY ASSOCIATION**

**I. INTRODUCTION**

These reply comments are submitted on behalf of the Retail Energy Supply Association (“RESA”)<sup>1</sup> in response to the *Notice Soliciting Comments on Revisions to the Uniform Business Practices*, issued in these proceedings on March 19, 2008.<sup>2</sup>

---

<sup>1</sup> RESA’s members include Commerce Energy, Inc.; Consolidated Edison Solutions, Inc.; Direct Energy Services, LLC; Gexa Energy; Hess Corporation; Integrys Energy Services, Inc.; Liberty Power Corp.; Reliant Energy Retail Services, LLC; Sempra Energy Solutions, LLC; Strategic Energy, LLC; SUEZ Energy Resources NA, Inc.; and U.S. Energy Savings Corp. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

<sup>2</sup> 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, and 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, *Notice Soliciting Comments on Revisions to the Uniform Business Practices* (issued March 19, 2008) (“Notice”). The due date for reply comments were subsequently extended by Hon. Jaclyn A. Brillling until May 26, 2008.

## II. PRELIMINARY STATEMENT

In response to the Notice, comments were filed by a variety of parties active in and/or directly affected by the provision of competitive energy services to retail customers. Although differing perspectives were presented on certain specific issues, the comments underscored an overall consensus on a number of important policy initiatives. All of the commentators expressed support for the Commission's effort to strengthen the marketing standards applicable to ESCOs as well as the notification provided to consumers. Where disagreement exists it is focused on how those two goals can best be achieved without impairing the robust competitive market, but not on the overall approach of establishing a retail market that will empower customers to make informed competitive choices.

The RESA Initial Comments anticipated many of the positions presented by the commenting parties; therefore these Reply Comments need not reiterate those views and arguments previously expressed. These Reply Comments respond to arguments and positions expressed by the commenting parties with which RESA takes issue in addition to those supported by RESA.<sup>3</sup>

## III. RESPONSE OF RESA TO PARTY COMMENTS

### A. Small Commercial Customers.

The Consumer Protection Board (“CPB”) argues that the proposed standards be applicable to the retail marketing of energy to both residential and small commercial customers (CPB 3). In support thereof, CPB mentions that other provisions of UBP apply to all ESCOs, small commercial customers may not have the acumen to absorb the energy information, and

---

<sup>3</sup> References to individual party comments are cited as “Party Name, page”.

concerns over identifying the affected class are overblown (CPB 3-5). These arguments are unpersuasive and as indicated in RESA's initial comments (RESA 18-19) the proposed marketing standards should only be made applicable to residential customers.<sup>4</sup>

The CPB provides no persuasive evidence demonstrating that commercial customers are unable to assimilate and understand information regarding the purchase of natural gas or electricity from an ESCO or competitive energy supplier. Just as they are able to acquire various resources and assets to manage the many aspects of the business operation for which they do not have detailed knowledge (e.g., commercial real estate property, equipment, inventory, etc.), commercial customers can apply the same skills and capabilities to the purchase of energy commodity service. Moreover, such customers are on a continuous and frequent basis exposed to sales professionals offering numerous different products and services, and are knowledgeable as to what questions should be asked and the need to confirm all information that is provided during the sales process.

CPB also glosses over the significant practical problem of determining what customers should be included in this class as the group of small commercial customers fluctuates dramatically among utility service classifications, and a general commercial class can include small to very large consumers. Furthermore, during the marketing process there is no practical way for an ESCO to be able to determine whether the commercial customer would fall within the class to which the marketing standards would apply. Usually, the customer would not have the requisite information and quite clearly neither would the ESCO. Finally, changes in customer usage could shift a customer into or out of the small commercial class after the contracts were executed, potentially changing the ESCO obligations and the contractual requirements after the

---

<sup>4</sup> The Attorney General, PULP and NFG support the view of CPB (AG 5; PULP 11; NFG 8).

fact. Therefore, in practical terms, it would be extremely difficult, if not impossible, for the ESCO to comply with the requirement during the course of normal and customary marketing activities. RESA fears that the net result of this extension of a new regulatory regime to commercial customers would be a significant reduction in competitive options available to these customers and a concomitant decrease in consumer value that would far outweigh the purely speculative benefits to commercial customers that might come from imposing a heavier regulatory burden on their energy suppliers. In RESA's experience, commercial customers rarely support additional regulatory burdens on themselves or the other firms with whom they do business and there is no evidence in the record that such customers take a different view with respect to energy services.

CPB's solution to this problem is to recommend that the "UBP be applicable to all telemarketing and direct marketing conducted by ESCOs or their representatives without a specific appointment" (CPB 5). In other words, it would apply to all customers marketed to by an ESCO on a common marketing platform. RESA is not philosophically opposed to the concept of applying enforceable standards to certain marketing channels and, in fact, in its initial response to the CPB/NYDCA Petition suggested just such a set of standards.<sup>5</sup> With respect to door-to-door sales, for example, there are standards of marketing behavior that customers have a right to expect whether they are buying energy for a home, a small store, or a small office, and RESA's initial filing reflected this position.

On the existing record, however, RESA sees an unbridgeable gap between the views expressed in its initial filing and the proposals before the Commission in this docket. This gap is

---

<sup>5</sup> Case 07-M-1514, Letter dated February 7, 2008 from the Retail Energy Supply Association, *Statement of Principles for Energy Service Companies Marketing Retail Energy to Residential and Small Business Customers in New York State*, pp. 1-2.

attributable to several factors. First, defining just which customers should be included within the “small commercial” designation is a surprisingly complex problem which has not been explored in any depth so far in this proceeding. Although a hard and fast threshold based on peak demand or inclusion within a rate class that is subject to demand-based billing might be appealing in its simplicity, it leaves many issues unresolved, such as the actual ability of suppliers to ascertain, with ease and accuracy, information sufficient to place a customer on the proper side of the threshold. The operational uncertainty and complexity that might be introduced through various approaches to defining the group could lead suppliers to avoid serving these customers, resulting in fewer competitive options and lower value for the very consumers the measures were meant to help.

Second, the use of the UBPs as a vehicle for regulating ESCO interactions with commercial customers of any size is problematical. To date, the UBPs have primarily defined the business relationships among utilities and ESCOs, not among ESCOs and their existing or potential customers. Including direct regulation of interactions among ESCOs and residential customers within the UBPs is a major expansion of scope, but this expanded regulation at least relates to a customer class that is already within the purview of the DPS’s Consumer Division and for which a regulatory structure already exists within the Department. The same cannot be said of commercial customers and questions regarding how the Department would take on and execute this new responsibility and the impact that expansion of the Department’s regulatory reach into previously uncharted territory would have on customers and ESCOs alike remain unanswered on this record.

Finally, as a general matter, the inclusion in the Notice of matters well beyond the scope of RESA’s initial filing in response to the CPB/NYDCA Petition, especially measures that would

directly regulate the contractual relationship between an ESCO and a commercial customer, has given us pause. RESA has little doubt that the consumer protection measures it suggested in response to the Petition would benefit residential and small commercial customers alike, but when appended to more onerous provisions that would tend to decrease the robustness of the small commercial market, we are constrained to favor a more circumspect and cautious approach to expanding the Department's regulatory scope.<sup>6</sup>

***B. Customer Notification***

The Attorney General ("AG") recommends that ESCOs should be required to include a plethora of notices and disclosures in bold print on the first page of the sales agreements addressing a variety of issues and that the customer must sign or initial accepting these terms of the contract on the page on which these notices and disclosures appear (AG 4). This proposal is unduly restrictive and coercive and should not be adopted. The proposed Staff modifications codified in UBP § 5, Attachments 1, 2 and 3 (with the modifications proposed by RESA) provide ample notification to customers of all the essential elements of the sales agreement and also contain appropriate modes by which the customer demonstrates such acknowledgment and acceptance of the sales agreement. The additional restrictions proposed by the AG are unnecessary.<sup>7</sup>

The AG suggests that ESCOs should be prohibited from using terms and sales pitches that suggest that it is "discharging an official function or conferring a special benefit through its

---

<sup>6</sup> In this context RESA supports considering a more targeted application of the final provisions of UBP Section 10.C.1.a-e in the limited instance where ESCOs are engaged in door-to-door marketing to residential and/or small commercial customers.

<sup>7</sup> Not surprisingly NFG as part of its seeming effort to elevate itself to the status of a regulatory authority also proposes similar burdensome and unnecessary restrictions (NFG 10).

offer, such as claiming to determine whether the customer is 'registered' with the ESCO, or 'eligible' for service" (AG 4). This recommendation is entirely too vague and as a practical matter is difficult to comprehend let alone incorporate in the operations of an ESCO. ESCOs by their very status are entities authorized to provide service by the Commission, thereby incurring some level of official status, and they participate in various programs such as the ESCO referral program where customers must be deemed eligible in order to participate. Accordingly this recommendation should not be adopted.

CPB proposes that ESCOs affirmatively represent that they are not affiliated with the utility (CPB 6). This view also applies to the proposed changes to Attachments 2 and 3 of Section 5. In RESA's view, the ESCO should affirmatively represent to the customer that the ESCO is an independent company providing commodity supply service. That should be the only obligation and there is no need to require an affirmative statement of what the ESCO does *not* represent. Ironically, increased references to the name of the distribution utility enhances the prospect of customer confusion as the customer upon hearing the utility name may believe it is the utility that is now offering commodity service.<sup>8</sup>

To enhance the ability of customers to make an informed choice among competitive offerings, CPB eschews support for burdensome restrictions on the use of termination fees or extensions of the applicable grace periods for contracts containing termination fees. Instead, CPB focuses on providing clear and comprehensible notification to customers of the important terms and conditions associated with ESCO commodity products. CPB recommends that "all ESCO sale agreements prominently display..., a chart detailing rates, fees and the term of service, similar to the 'Schumer Box' that is now required to accompany all credit card offers."

---

<sup>8</sup> The New York City Department of Consumer Affairs ("DCA") and Con Edison also support the view of CPB (DCA 4; Con Edison 4).

In the view of CPB the presentation of this information in a single, readily identifiable format has proven to be of considerable assistance to consumers in evaluating other types of commercial solicitations. To implement this approach CPB recommends that UBP § 2.B.1.b.1 be amended to include language providing for a Schumer Box type of declaration. (CPB 9, Exhibit 1<sup>9</sup>).

In its initial comments, RESA expressed the view that rather than impose unneeded restrictions on termination fees or other contractual components, the more useful and prudent approach was to focus on the development of a comprehensive and comprehensible notification procedure to be followed by the ESCO when engaging residential consumers for marketing purposes (RESA 12). Similarly, RESA also noted that the more sensible and useful approach which addresses concerns regarding customer understanding is to develop “appropriate notification standards to the agreement and authorization process by which enrollments are secured” (RESA 12). From this perspective, the approaches of RESA and CPB converge. Both parties focus on enhancing customer notification and understanding rather than imposing at this time any unneeded prescriptive restrictions on the ability of ESCOs to market in a commercially reasonable manner.

Despite the additional administrative and cost burdens placed upon an ESCO, upon consideration, RESA would support implementation of a “Schumer Box” display mechanism, similar to that advocated by CPB. A mechanism that would in a single, readily identifiable format provide residential consumers with key elements of the ESCO’s offer could be a valuable tool in ensuring that customers are provided with and receive the appropriate notification and information upon which to make an informed customer choice.

---

<sup>9</sup> Exhibit 1 is referred to by CPB as a “Sample” form of such notification. Presumably this sample can be modified in accord with the RESA comments noted below.

There are several modifications to the Schumer Box proposal made by CPB that in the view of RESA would enhance the proposal and provide a more reasonable approach to providing appropriate customer notification.

First, as proposed by CPB the chart would be located “on the top of the first page of the agreement” (CPB 9). Such a strict limitation on the location of the chart is unnecessary and too restrictive. The ESCO should have a wider level of discretion in terms of where the chart is located within the agreement given the variegated contractual formats used by different ESCOs as well as experience gained in marketing to customers. The ESCO should have the flexibility of including the chart anywhere on the first page of the agreement or on a separate sheet that comes after the first page.

Second, in connection with the elements included in the chart, several comments are in order. With respect to price, the ESCO should have the option of including a set price if it is available or explain the mechanism by which the price is determined each month. Similarly, in connection with any early termination fee, the ESCO should have the option of stating the specific fee where one is included in the contract or the general methodology that would be used in determining the early termination fee. The ESCO should also have discretion as to the size of the box so that it is sufficiently prominent to notify the customer without being unduly pervasive.

Third, in terms of electronic agreement through the Web, application of the Schumer Box should only require one additional acknowledgment “check box” and not require the consumer to check each element within the Schumer Box. Further, the mechanics for telemarketing and third party verification should add only one additional prompt in the TPV or the recording so that a customer would not be required to say yes or agree to each individual element included within the chart.

*C. UBP Section 2.D.6*

In connection with implementation of corrective actions, CPB proposes that the Commission should not be limited to the specific incident or complaint generating concern, but rather the Commission should “address the overall marketing conduct of an ESCO” (CPB 11). This recommendation is unreasonable and should not be adopted. It is imperative that ESCO be informed of the specific complaints and violations associated with its marketing conduct. Only in this manner can an ESCO investigate the matter in a proper and reasonable framework and develop a suitable response. It is unreasonable to confront an ESCO with generalized concerns about its overall marketing conduct without tying it to specific incidents of violation which are amenable to objective analysis, review and any subsequent resolution.

CPB also suggests that this section of the UBP expressly provide for an expedited process where there has been a failure to resolve the matter informally with an ESCO. This recommendation also should not be adopted. Section 2.D.6 provides a judicious and workable structure for addressing allegations of ESCO failures to comply with the Commission’s marketing standards and other requirements of the UBP. It is important that the procedures used by the Commission provide for an orderly resolution of any allegations as well as afford the ESCO the normal and customary due process rights to protect its interest and present its case. As drafted, Section 2.D.6 provides the Commission with ample discretion to implement the process in a time period consistent with the interests of the public, and there is no need to provide a separate expedited process as suggested by CPB.

***D. UBP Section 5, Attachment 1***

CPB suggests that Paragraph B of Attachment 1 be modified to ensure that the customer receives a copy of all the declarations that took place during the telephonic agreement including written statements from the ESCO that no savings are guaranteed and that the agreement is not with the utility (CPB 13). In connection with electronic and written agreements, CPB recommends that customers could be required to affirmatively indicate their understanding, perhaps by signing and initialing statements, that no savings are guaranteed or if savings are guaranteed a clear description of the conditions under which the savings will be provided, and that the agreement for service is with the ESCO and not the utility (CPB 13).

It is the view of RESA that the ESCO's obligation should be to clearly identify the ESCO as the business entity to the customer and should not be obligated to advise the customer that the ESCO is not the distribution utility. Where there is no offer of savings, there is no need to raise or discuss the matter. Where savings are part of the offer, it should be clearly delineated. However, there is no persuasive reason why both of these items should be separately listed in a manner that requires a separate signature or initialing.

The AG further suggests that ESCOs be required to provide consumers with accurate information about potential bill savings and all their advertising and marketing materials, not just in the customer agreement (AG 4). There is no reasonable basis for ESCOs to address the matter of bill savings in all of their marketing material unless such assertions are being raised in the specific offer. In other words, marketing material related to a specific offer which contains savings, will obviously include information about how the savings are determined for purposes of the offer, e.g., the customer will realize a 10% savings from the utility default service rate.

However, there should not be a blanket requirement to address the issue of savings in generic marketing materials used by the ESCO.

***E. UBP § 10.C.3***

CPB proposes that Section 10.C.3.g. be modified to require the ESCO to respond to customer inquiries and complaints within five business days (CPB 15). This period is far too restrictive as it ignores the scope and complexity of the complaint. For example, if a complaint is filed on a Friday or over a weekend with a legal holiday, the ESCO will have only a few business days to act upon the matter and implement a proper and appropriate investigation. In RESA's view, if a specific time period is included, it should not be less than ten business days. This will be sufficient to provide for a prompt resolution but also provide the ESCO with sufficient time to conduct a proper and complete examination. Moreover, if additional time is required by the ESCO due to problems incurred in obtaining information from the customer then the ESCO should have the discretion to have some additional time to investigate the matter.

***F. Early Termination Fees/Grace Period***

PULP takes the extreme position of opposing any early termination fees because in the view of PULP such fees "restrict the ability of consumers to change providers by locking in customers against their will when better opportunities for service may exist" (PULP 5). As discussed at length in our initial comments (RESA 12-15) it is entirely appropriate and reasonable for ESCOs to seek and obtain damages arising from a customer's unauthorized breach of the contract prior to the expiration of its legal term. The very nature of a contractual relationship is to bind the parties once a meeting of the minds has occurred and to restrict the

ability of either party to walk away from the contract should other opportunities subsequently arise. The notion that a customer should not be obligated to meet the terms of an agreement because the customer may subsequently want to change a provider during the term of the contract, is simply absurd, and would impose significant financial hardship on ESCOs. Moreover, the PULP position would necessitate the imposition of a business risk premium by the ESCO to account for potential early termination, thus increasing the price to the end-use customer.

As indicated at the two Technical Conferences, an ESCO's risk associated with a fixed priced contract is directly related to the market movement since the contract was executed. Any limitation on termination fees, extension of the current three-day rescission period or expansion of the grace period, would impose additional business risks on ESCOs in a falling market. For example, there were two distinct periods in 2006 where market prices dropped by 15% in a one - month period<sup>10</sup> where, without the ability to impose termination fees, ESCOs could have been exposed to significant financial harm. Thus, restricting termination fees places the ESCO at considerable financial risk.

Absent the ability to impose termination fees (or the opportunity to recover real damages) for a breach of contract, the entire basis for entering into a contract and commercial relationships would become a nullity. It effectively converts the term length of all contracts to month-to-month basis or less since customers could leave at any time without financial responsibility for costs they have required their ESCO to incur. There is no reason why a consumer of energy commodity service should be able to ignore legitimate contractual obligations and walk away from lawful and existing contracts.

---

<sup>10</sup> Between February and March and September and October.

PULP also makes reference to a contractual provision used by an ESCO indicating that as it may take up to ten weeks for a customer to return to the utility for commodity supply service, the customer would be liable to the ESCO until the customer switches to the utility or another supplier (PULP 6). According to PULP such a provision improperly locks up the customer and is a limitation on customer choice. Once again PULP misreads the law and the facts. Under the UBP, an ESCO is obligated to continue to provide service pursuant to an existing contract until the customer has either returned to the utility or moves to another ESCO. Under the provision of Section 5 of the UBP, such transfer of the customer to another ESCO or utility cannot happen immediately but there are various procedural requirements that must be followed the impact of which is that a transfer to the utility or another supplier could take some time.<sup>11</sup> During this interval the ESCO is required to provide service and therefore it is entirely appropriate to include such a provision in the sales agreement.

The contention by PULP that such a contractual provision or termination fees may be violative of PSL Section 31 (5) (dealing with provision of service), is without merit (PULP 6). PSL Section 31(6) states that where service is sought for commodity only, “nothing in this section shall require the provision of such service to any and all such applicants.” In other words, the obligation to provide service codified in PSL Section 31(5) is not applicable where only the provision of electric or gas commodity service is sought by the customer. Further, the Commission has previously ruled that ESCOs “are not required to provide gas or electric service to every applicant for service (PSL Section 31 (6)).”<sup>12</sup>

---

<sup>11</sup> UBP Section 5.D and 5.H.

<sup>12</sup> Case 99-M-0631 – In The Matter of Customer Billing Arrangements, Case 03-M-0117, In the Matter of Implementation of Chapter 686 of the Laws of 2002, Order Relating to Implementation of Chapter 686 of the Laws of 2002 (issued June 20, 2003) p. 7.

PULP argues that a termination fee assessed to a gas customer may violate the ban on service charges codified in Public Service Law § 65(6) (PULP 10). This argument is also unpersuasive. The Commission has previously determined that ESCOs are exempt from regulation under Article 4 of the PSL, which contains Section 65, and an ESCO is only considered to be utility for purposes of Article 2 of the PSL.<sup>13</sup> To the degree, PULP is challenging the Commission's authority to implement competition, that question was resolved more than a decade ago in the decision in *Energy Ass'n of New York State v. Public Service Com'n of State of N.Y.*<sup>14</sup>

CPB recommends two restrictions with respect to the ability of ESCOs to obtain early termination fees from a customer's unauthorized breach of a contract. First CPB suggests that no termination fee be permitted for contracts in which the "obligation to complete the full term of the agreement is not mutual" (CPB 17). This recommendation is unreasonable. As the Commission is well aware, in addition to the vagaries of the competitive marketplace, ESCOs are also subject to the impact of regulatory actions at both the federal and state level that can appreciably affect their ability to provide service as well as comply with the terms and conditions of existing contracts. It is customary in such instances for ESCOs to have the right to re-assess their contractual obligations where actions taken by the government materially impact upon their ability to provide service in accordance with agreements in place. In essence, these are not

---

<sup>13</sup> Case 06-M-0647 – In the Matter of Energy Service Company Price Reporting Requirements, Case 98-M-1343 – In the Matter of Retail Access Business Rules, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms (issued November 8, 2006) p. 10; Case 94-E-0952 – In the Matter of Competitive Opportunities Regarding Electric Service, Opinion No. 97-17 (issued November 18, 1997) pp. 34-5; and Case 98-M-1343, 99-M-0631, and 03-M-0117, In the Matter of Retail Access Business Rules, et. al, Order on Petitions for Rehearing and Clarification (issued December 5, 2003) p. 44.

<sup>14</sup> *Energy Ass'n of New York State v. Public Service Com'n of State of N.Y.*, 169 M2d (924 (Sup. Ct. Alb. Cty. 1996), *aff'd* 273 A. D. 2d 708 (3d Dept. 2000), *lv. den.* 95 N. Y. 2d 765 (2000). See, also, Case 05-M-0858 – In the Matter of State-Wide Energy Services Company Referral Programs, Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject to Modifications (issued December 22, 2005) p. 46.

unilateral contracts, as the inability of the ESCO to perform is not due to any action on its part but due to the hand of regulation over which it ultimately has no control and no prior knowledge.

CPB also recommends that there should be no early termination fees associated with variable-priced contracts (CPB 18). This restriction is unreasonable and should not be adopted. Termination fees are intended to provide ESCOs with remuneration for damages incurred due to the customer's unauthorized termination of the agreement before the expiration of its effective term. While the damages arising from a fixed price contract are more easily discerned, it is equally possible that an ESCO will incur damages where a fixed term variable priced contract is breached. Thus, for instance, ESCOs incur various acquisition costs in obtaining contracts regardless of whether they are variable or fixed, and in the case of some hybrid products, may fix a component of the supply cost (e.g. capacity and ancillary services) while passing through the remaining (e.g. energy) component on a variable basis. Another example is where an ESCO provides service that is priced with a cap, collar or tolerance band. These product types require ESCOs to incur costs irrespective of the customer's variable price. In addition, ESCOs may secure various supply contracts which are used to support its variable priced offerings and for which various damages may be incurred in the event of breaches by customers prior to their term. Consequently, as damages may arise and be incurred by the ESCO by the unauthorized breach of any contract whether it is variable or fixed, the ESCO should have the right to collect such damages through a reasonable and appropriate termination fee.

CPB also provides a definition for a Termination Fee (CPB 8). This definition should make clear that it only applies to residential customers.

The New York State Energy Marketers Coalition ("NYSEMC") indicates that it would support a reasonable cap on termination fees for a period of time and sees the value in extending

the current 3-business days right of rescission to 7-business days (NYSEMC 10, 18). This approach lacks rational merit.

As noted in our Initial Comments,<sup>15</sup> absent a clear definitional distinction, imposing a cap or extended grace period on termination fees or prohibiting them altogether acts to improperly restrict an ESCO from its contractual right to seek and collect normal and customary damages arising from a customer's illegal termination of a duly binding contract. This will inevitably increase the risk and cost of providing commodity service, and lead to a diminution in the number of products offered to customers. In this regard, CPB did not seek to impose a cap on such fees. Instead CPB opined that the fee could be assessed but "should be reasonably related to the actual damages an ESCO could be expected to suffer if the contract is ended prematurely" (CPB 19). Similarly, CPB did not support extending the grace period because such action "might inhibit ESCOs from offering the kinds of fixed price options that consumers often prefer" (CPB 20). RESA concurs with this more reasonable view expressed by CPB which seeks to support the normal and customary competitive relationship between the ESCO and the customer, while focusing on providing enhanced notification procedures (which RESA supports) for vulnerable customers.<sup>16</sup>

Moreover, as NYSEMC recommends extending the "rescission period", the harm to ESCOs is heightened. In the Notice, Staff proposed consideration of an extended period for early termination fees, and a proposed change to the UBP that extended the effective date of the

---

<sup>15</sup> RESA 6-11.

<sup>16</sup> DCA also favors extending the grace period (DCA 5). The suggestion by DCA that its future service contract law provides a potential model for the calculation of termination fees is not persuasive (DCA 5). As presented by DCA the statute deals with a commercial contract where the total cost to the customer is known from the inception of the contractual relationship. The situation faced by an ESCO is entirely different as the total cost to the consumer is subject to the customer's prospective usage levels, which only are known after the contract is completed.

ESCO's right to charge a termination fee.<sup>17</sup> Staff did not envision expanding the period during which the customer could rescind the agreement in its entirety. But, that is the effect of the NYSEMC recommendation for it would allow the customer to rescind the entire contract for up to 7-business days, rather than the current 3-business days period incorporated in the UBP.<sup>18</sup>

National Fuel Gas Distribution Corp. ("NFG") suggests that the three day rescission period run concurrently with the period during which a customer can cancel an enrollment request under UBP Section 5.E.2 (NFG 8). For the reasons noted above,<sup>19</sup> this effort to extend the rescission period is without merit.

#### **G. Return to Utility Service**

A number of differing proposals were presented in connection with the UBP § 5.H.1, which lists the process by which customer return to utility service. The Small Customer Marketer Coalition (SCMC) proposed that this section be modified to require the customer to contact the ESCO before being able to affect a return to full utility services (SCMC 22). Con Edison, in contrast, recommends that a customer can arrange for return to full utility service by contacting "the distribution utility or ESCO." (Con Edison 6) In our view the proposed modification of SCMC is superior and should be adopted by the Commission.

The typical situation addressed by this section of the UBP deals with a customer that is currently contracted to take service from an ESCO and decides to return to the utility. In other words it is a customer taking service from the ESCO for a term and under certain specified contractual conditions. In this scenario it is only reasonable that that the ESCO is provided with

---

<sup>17</sup> Notice, p. 4; proposed UBP Section 5.B.3.

<sup>18</sup> NFG also seems to support this view (NFG 8).

<sup>19</sup> See *supra*, pp. 10-12.

notice of the customer's decision to effectively terminate the existing contractual relationship and return to the ESCO. This is true for a number of fundamental reasons.

First, as the contracting party with the customer, it is critically important that the ESCO be apprised of the customer's decision to terminate the existing agreement. Additionally, as that action by the customer can engender legal consequences to the detriment of the customer, it is only logical and prudent to provide the ESCO with the knowledge and the opportunity to advise the customer of the potential pitfalls associated with the move and if possible to retain the customer pursuant to the terms of the existing contract. This can only occur if we ensure that the customer notifies the ESCO and the ESCO is able to make contact with the customer. Absent this prerequisite, the customer could simply notify the utility of its desire to return to utility service and the ESCO would have no assurance of ever being able to contact the customer again either to advise the customer of potential legal consequences or to attempt to change the customer's mind and retain the customer on retail access.

Consequently, this goal can only be met where it is probable that the customer will contact the ESCO prior to returning to full utility service. This is only protected under the proposed modification presented by SCMC rather than that by Con Edison.

#### ***H. Miscellaneous***

PULP urges that the Commission enact a new set of standards that would replace the UBPs (PULP 4). According to PULP the creation of a single document would establish a uniform statewide regularly scheme enforceable with specific penalties by the Commission and would somehow better serve the public interests. RESA vigorously disagrees with PULP's assertion. In fact, the UBPs developed by the Commission have represented the input and

collaboration of all affected parties representing all interest groups including consumers, and constitute an effective a statewide regulatory framework enforceable by the Commission. Over time, the standards codified in the UBPs have been modified in response to changing market developments. Consequently there is no need to replace the UBPs by a new set of standards. Such a move would be wasteful, duplicative and serve no useful public policy purpose.

The AG asserts that the Commission should strengthen its enforcement mechanism by clarifying that ESCO compliance with the UPB is mandatory and that ESCOs would be subject to the provisions of Public Service Law § 25 and 26 (AG 2). This modification is ill informed and unnecessary. The issuance of an order by the Commission adopting uniform business practices is binding upon all entities subject to the jurisdiction of the Commission. This is a well-established principal and further clarification in this regard is not necessary. The applicability of various provisions of the Public Service Law to ESCOs however, is subject to differentiation depending upon the particular section. Thus, to date, the Commission has taken the view that only the provisions of Article 2 are specifically applicable to ESCOs and that other provisions are not necessarily imposed upon independent ESCOs. Consequently, ESCOs are at this time not subject to the provisions of Public Service Law § 25 and 26.

### ***I. National Fuel Gas Distribution Corporation***

NFG continues to urge that it be authorized to unilaterally regulate ESCO marketing practices through inclusion of door-to-door standards authored by NFG in its tariffs and GTOP (NFG 3). In a blatant unprecedented grab for regulatory power, NFG seeks to elevate itself to the status of a regulatory body with the power to suspend an ESCO where, in the opinion of NFG, an ESCO has failed to abide by standards developed and imposed by NFG (NFG 4-5).

As noted in our Initial Comments (RESA 35), approving NFG's approach would confer upon NFG, a direct competitor of ESCOs, the authority 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. It is analogous to allowing one company to effectively shut down its competitor within a circumscribed geographic market or service territory. This approach is clearly a violation of standard antitrust principles and is highly uncompetitive. Further, it would directly violate Section 8 of the UBP which sets forth a detailed complaint resolution process by which the Commission not utilities determine whether ESCOs have acted improperly, and what, if any, disciplinary action should be taken. The proposal warrants complete rejection as an effort to improperly displace and circumvent the jurisdiction and lawful authority of the Commission.

In support of its fundamentally weak position, NFG erroneously notes that it currently has the ability to initiate discontinuance procedures against ESCOs pursuant to UBP Section 2.F.1 (NFG 5). This section of the UBP deals with ESCO behavior that poses a threat to the integrity of the system or a direct obligation to the utility. Thus, for example, it includes a failure of delivery by the ESCO, or act in a manner that will likely cause "a significant risk or condition that compromises the safety, system security, or operational reliability of the distribution utility's system..."<sup>20</sup> This standard obviously does not apply to individual ESCO marketing practices that pose immediate danger to the integrity of NFG's distribution system.

#### **J. Disclosure of ESCO Data**

In our Initial Comments (RESA 17), we noted that the Commission had previously ruled that the matter of the number of customers served by ESCO is deserving of proprietary trade

---

<sup>20</sup> UBP Section 2.F.1.a

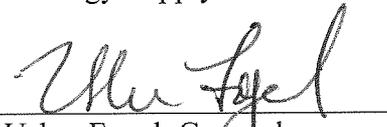
secret information under the standards clarified in the Freedom of Information Law (FOIL) and is exempt from disclosure under FOIL. A number of parties assert that such data should be disclosed.<sup>21</sup> The contentions raised by these parties were previously reviewed and rejected by the Commission.

**IV. CONCLUSION**

RESA appreciates the opportunity to address the important issues raised in this proceeding and respectfully requests that the Commission adopt policies consistent with the comments presented herein.

Respectfully submitted

Retail Energy Supply Association

By:   
Usher Fogel, Counsel

Dated: May 23, 2008  
Cedarhurst, New York

---

<sup>21</sup> PULP 11; CPB 20.