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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.

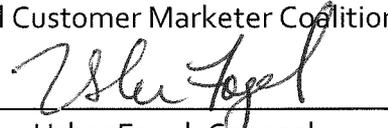
Dear Secretary Brilling:

Enclosed for filing with the Commission please find the original and five (5) copies of the "Reply Comments of the Small Customer Marketer Coalition" in the above-captioned matter.

Thank you for your assistance in this matter.

Respectfully submitted,

Small Customer Marketer Coalition

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.

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REPLY COMMENTS
OF THE SMALL CUSTOMER MARKETER COALITION

I. INTRODUCTION

These reply comments are submitted on behalf of the Small Customer Marketer Coalition (“SCMC”) in response to the *Notice Soliciting Comments on Revisions to the Uniform Business Practices*, issued in these proceedings on March 19, 2008.¹

¹ 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. Brillig until May 26, 2008.

II. PRELIMINARY STATEMENT

SCMC strongly supports the efforts by Staff to develop reasonable standards for marketing by ESCOs and third party contractors acting on their behalf, maintain adequate residential customer protection, and provide Staff and the Commission with adequate remedies to protect consumers. This requires a balancing of developing needed consumer protections without unduly impairing the orderly functioning of the competitive retail energy market. It appears that these general goals are supported by many parties filing comments in response to the Notice. Many of the commenting parties supported the effort by the Commission to enhance ESCO marketing standards and the information and notification provided to consumers during the marketing process.

In these reply comments SCMC while adhering to the positions advocated in our Initial Comments, will attempt to build on this general consensus by underscoring where it can support or must take issue with several of the specific proposals first presented by various parties in their initial comments.²

III. RESPONSE OF SCMC TO PARTY INITIAL COMMENTS

A. PUBLIC UTILITY LAW PROJECT ("PULP")

1. Assessment Fee

PULP recommends that ESCOs be subject to assessment under PSL Section 18-a (PULP 7). In support thereof it presents a laundry list of Staff activities related to the ESCO

² Citations to individual party comments are noted as "Party Name, page".

industry. This superficial analysis is unpersuasive and fails to address the complexity surrounding this issue.

As discussed in detail in our Initial Comments (SCMC 4-6), initially, it is necessary to determine how such fees are currently calculated and assessed throughout the State, the revenue implications of such assessments, how they are reflected in utility rates, and thereafter, the parties must review the rate design approach applied to this cost element on a utility- by -utility basis. Once this information is obtained and assimilated, the parties will need to examine the level of revenues sought to be secured by this change, the various methodologies for calculating an assessment fee, the associated rate design and rate case implications.

Moreover, applying the assessment fee to ESCOs would place ESCOs at a distinct competitive disadvantage that would impair the competitive standing between utilities and ESCOs. Pursuant to Section 18-a, the assessment fee is a legitimate expense for which recovery is permitted in setting the utility revenue requirement which is then embedded in the utility monopoly tariff rates.³ There is also concern that imposition of the fee would unduly burden ESCO customers. The current assessment fee reflects each utility's in-state gross operating revenues and the related assessment fee is included in the utility regulated monopoly rate. Consequently, ESCO customers are currently paying the utility's assessment fee through the utility distribution rates.⁴ If ESCOs are also made subject to the assessment

³ PSL § 18-a (2).

⁴ PSL § 18-a (2) (b) (1).

fee, such a charge would in the normal course of business be passed on to the consumer and ESCO customers would then pay the assessment fee on two separate occasions.

The potential negative competitive impact was acknowledged by the Consumer Protection Board ("CPB") which advised that in establishing an assessment fee structure, the Commission would "need to ensure that assessments on ESCOs do not have unintended anticompetitive consequences" (CPB 16).

None of these consequential concerns and issues are mentioned let alone addressed by PULP.

2. UBP Replacement

PULP proposes replacement of the existing UBPs with some new document that would purportedly create a "uniform statewide regulatory scheme" (PULP 4). This proposal is without merit. The current UBPs, in fact, constitute a uniform statewide regulatory structure that adequately regulates ESCO activity. There is no demonstrated need to replace the UBPs and erect a new set of standards.

3. Termination Fees

Alone among all the parties, PULP asserts the extreme position of opposing any early termination fees. According to PULP such fees are improper because they act to hinder consumers from changing providers if a better offer comes along (PULP 5). This argument is irrational.

PULP ignores that the consumer has voluntarily entered into a term contract with an ESCO to receive commodity service at an agreed upon price. This obligates the ESCO to provide and the customer to accept the service and pay all agreed upon charges during the

applicable term of the agreement. Neither the ESCO nor the customer has the unilateral unfettered right to simply walk away from their contractual obligations simply because a better offer may be available elsewhere as suggested by PULP. To the contrary, it is basic contract law that a duly established contractual relationship binds the parties once a meeting of the minds has occurred, which thereby restricts the ability of either party to walk away from the contract should other opportunities subsequently arise. To urge abolition of contracts as now proposed by PULP, borders on the absurd.

PULP also opines that termination fees or charges violate PSL Section 31 (5) (PULP 6). This claim is erroneous. 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)).”⁵

PULP further erroneously contends that a termination fee assessed to a gas customer violates the ban on service charges codified in Public Service Law § 65(6) (PULP 10). The Commission has forcefully 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 a utility for purposes of Article 2 of the PSL.⁶ If PULP is now challenging the Commission’s authority to

⁵ 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.

⁶ 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

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.*⁷

B. Consumer Protection Board ("CPB")

a. Small Commercial Customers.

Staff asked the parties to consider whether the proposed Marketing Standards should apply to small commercial customers.⁸ In response, CPB opined the standards "be applicable to marketing of retail energy to both residential and small business customers" (CPB 3). Such expansion of the ambit of the standards is necessary according to CPB because other sections of the UBP apply to all customer classes, there is no evidence that small businesses have the acumen to consider energy offerings, and there is no practical difference in the level of knowledge between a residential and small business (CPB 4-5). These arguments are unavailing. The Marketing Standards should be limited to residential customers.

The view of commercial customers as a class that does not require the same level of protection afforded to residential customers is redolent in many consumer law statutes applicable in New York. See, e. g., Personal Property Law, Section 427; General Business Law, Section 77. Similarly, in connection with application of the 3 day right of rescission, the

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.

⁷ *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.

⁸ Notice, p. 4.

Commission previously recognized without dissent from any consumer or consumer watch dog group that “Small business customers are likely to possess the necessary business acumen to make the decision before entering into a sales agreement.”⁹

From a practical perspective, CPB provides no persuasive information demonstrating that commercial customers have insufficient acumen to comprehend information provided by ESCOs in connection with the sale of commodity. It is obvious that such business customers on a regular basis deal with salesmen offering a variety of different products and services. They carry out such business tasks without the aid of the more protective consumer statutes applicable to residential customers. In this regard, CPB fails to demonstrate that the specific complaints that engendered the Commission’s present concerns were in any material level associated with small business customers.

CPB also ignores that there are many statutes that govern marketing and business practices regardless of customer class. Pursuant to General Business Law Section 349 (a), it is unlawful for a company to engage in “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service.” Sections 350 and 350-a prohibit false advertising in the conduct of any business or the furnishing of any service. New York Executive Law §63(12) makes unlawful “persistent fraud or illegality in carrying on, conducting or transacting of business” in New York State.

CPB fails to recognize that what constitutes a small commercial customer is subject to much endless confusion and debate, as this will differ by utility and many utility commercial

⁹Case 98-M-1343, In the Matter of Retail Access Business Rules, Order Adopting Revised Business Practices (issued November 21, 2003) at p. 22.

service classifications incorporate a wide range of customers with wildly differing levels of usage. By way of example, Con Edison classifies its S.C. 2-General – Small service classification to include all commercial customers with usage requirements that do not exceed 10 kW --- an exceedingly wide group of customers.¹⁰ It is also practically impossible for an ESCO during the marketing process to determine whether the commercial customer will be considered “small”, as the ESCO is unfamiliar with the customers overall usage levels or any other characteristic that will be used to distinguish this group of customers until actually making contact with the customer.

CPB suggests that “UBP be applicable to all telemarketing and in person marketing conducted by ESCOs or their representatives without a specific appointment” (CPB 5, emphasis in original). Under this formulation, the standards would be applicable to every type of customer marketed by the ESCO, regardless of size or applicable utility service classification. Therefore, a customer like General Motors would be afforded the same level of protection as small residential customers. Obviously, this proposal is unreasonable on its face and would only serve to unreasonably and unnecessarily burden the ESCOs with costly regulatory restrictions.

b. Customer Notification

CPB proposes that regardless of marketing approach, the ESCO should affirmatively represent that the ESCO is not affiliated with the local utility (CPB 6). This negative approach is counterproductive. Instead ESCOs should affirmatively identify themselves to the customer,

¹⁰ Consolidated Edison Company of New York, Inc., P. S. C. No. 9-Electricity, First Revised Leaf 211.

indicating the ESCO is an independent energy services company providing commodity supply service. There is no need to require an affirmative statement of what the ESCO does not represent. Ironically, increased references to the name of the 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.¹¹

To enhance the ability of customers to make an informed choice among competitive offerings, while enabling ESCOs to operate in a workable competitive environment CPB recommends that attention be focused on providing clear and timely notice to consumers rather than extending rescission or grace periods or limiting recovery of damages.¹² CPB specifically 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.” As explained by 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 CBP recommends that UBP § 2.B.1.b.1 be amended to include language providing for a “Schumer Box” type of declaration (CPB 9, Exhibit 1¹³).

Upon considered review, SCMC concludes that the CPB approach is consistent with SCMC’s focus on providing consumers with adequate notice rather than imposing unduly prescriptive restrictions on the ability of an ESCO to exercise legitimate contract rights.

¹¹ The New York City Department of Consumer Affairs (“DCA”), Con Edison and the AG also support the CPB proposal (DCA 4; Con Edison 4; AG 4).

¹² With the Schumer Box in place, CPB does not support extension of the grace period for termination fees or limitations on termination fees (CPB 19, 20).

¹³ Exhibit 1 is referred to by CPB as a “Sample” form of such notification. Presumably this sample can be modified in accord with the SCMC comments noted below.

Accordingly, SCMC supports adoption and implementation of a “Schumer Box” notification model similar to the one suggested 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.

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

1. 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 ESCO as well as experience gained in marketing to customers. The ESCO should have the option of including the chart anywhere and on either side on the first page of the agreement or on a separate sheet that comes after the first page.
2. In connection with the data elements included in the chart, several qualifications should be incorporated in the final model. 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.

3. With respect to the use of an electronic agreement over the internet, 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 to or the recording to signify the customer's assent so that a customer would not be required to say yes or agree to each individual element included within the chart.

4. PSC Corrective Action - UBP Section 2.D.6

In assessing potential enforcement measures, CPB recommends that the Commission should "address the overall marketing conduct of an ESCO" rather than focusing on the specific act of malfeasance (CPB 11). This recommendation is unreasonable and deprives the ESCO of its appropriate due process rights. The ESCO needs to be informed of the specific complaints and violations associated with its marketing conduct under review by the Commission. With this information, the ESCO can investigate allegations and develop a suitable response and defense. However, presenting an ESCO with generalized inchoate concerns that are not linked to specific violations makes it extremely difficult for the ESCO to understand the charges that are under consideration and fashion the requisite response.

5. UBP Section 5, Attachment 1

CPB suggests that Paragraph B of Attachment 1 be modified to require 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 SCMC that the ESCO's obligation should be to clearly identify the ESCO as the business entity that will provide commodity service to the customer; the ESCO should not be obligated to advise the customer that the ESCO is not the 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, they should be clearly delineated. However, there is no useful purpose served why both of these items should be separately listed in a manner that requires a separate signature or initialing by the customer. It is unworkable and unduly cumbersome to mandate that the customer initialize numerous individual elements of the agreement. It is also unclear what the reference to "all declarations" encompasses. It is a vague term that can include a basic salutation as well as detailed pricing elements. Consequently, the ESCO's obligation should be limited to complying with the enumerated standards codified in the proposed standards modified to reflect SCMC's comments.

6. Marketing Standards - 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 suggested period

does not provide sufficient time for the ESCO to review and investigate particular complaints. Such internal investigations, depending on the nature of the complaint, may entail review of internal documents, conversations with ESCO employees, and contact with outside vendors. This can take considerable time and is not always amenable to completion within 5 business days, especially if the complaint is filed near the weekend or over a period that includes a legal holiday. Accordingly, SCMC recommends that the time period for responding to all customer complaints should not be less than ten business days. This will allow sufficient time to provide for a prompt resolution to the customer while enabling the ESCO to conduct a proper and complete examination. Moreover, in the case of unusual situations where additional time is required by the ESCO due to problems incurred in obtaining needed information from the customer, the ESCO should have the discretion to have some additional time to investigate the matter.

7. Early Termination Fees/Grace Periods

CPB initially proposes that early termination fees be prohibited for those contracts in which the “obligation to complete the full term of the agreement is not mutual” (CPB 17). This recommendation does not reasonably reflect the complexities of providing commodity service. Together with accommodating market forces, ESCOs are also subject on a prospective basis to the impact of regulatory and state actions at both the federal and state level that can significantly affect their ability to provide service, comply with the terms and conditions of existing contracts, and even stay in business.¹⁴ It is customary in such instances for ESCOs to

¹⁴ In this regard, in New York, the Tax Law was previously changed to include electricity and natural gas as commodities covered by the Sales and Use tax law; in California a statute was passed effectively shutting down

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. It is most reasonable for an ESCO to reflect this known contingency in its contracts.

CPB further recommends that an ESCO should not include an early termination fee with a variably-priced contract (CPB 18). According to CPB, such contract types do not engender damages that need to be recovered through the fee. This position is at odds with the relevant facts. Early termination fees are designed to provide ESCOs with recovery of damages arising from the customer's unlawful termination of the agreement before the expiration of its effective term. The ESCO may incur damages when this occurs regardless of the nature of the product. Although, the potential damages associated with a fixed price contract are more stark (essentially the cost of the unused hedge), an ESCO will also incur damages where a fixed term variable priced contract is breached before the expiration of the term. The ESCO will need to recover customer acquisition cost, underlying supply costs that support the entire portfolio including variable products, and potential credit costs. Consequently, it is just and reasonable to allow for a reasonable early termination fee in all commodity supply contracts.¹⁵

It is also important to further underscore the considerable incremental financial risk that will be engendered in the event the grace period applicable to agreements containing

the competitive retail energy market; and on an ongoing basis this Commission and other entities have materially modified the security obligations of ESCOs. These examples highlight that an ESCO does not have complete control over its own destiny.

¹⁵ CPB also proposes a definition for a Termination Fee that would be included in the UBP (CPB 8). This definition acceptable to SCMC, but it should only apply to residential customers.

termination fees is extended for residential customers beyond the current three day right of rescission. The proposed UBPs in Section 5.B.3 would set a grace period of 30 days following the receipt of the first bill. As noted at the Technical Conference, this effectively provides a grace period of approximately 75 days from when the customer first agreed to take service from the ESCO. To gauge the potential financial impact of this change the following analysis was performed for the period October 1, 2007 – April 30, 2008. Initially, a fixed energy only price was developed for each day based upon the Platts-ICE forward on peak/off peak curves and assuming 100% load factor customer. After this value per day was calculated, a comparison was made to the highest offer price available in the market over the next 75 days, which revealed a 25% increase/decrease from the offering price that would have been made to the customer. During the period examined this 25 % differential represents the financial risk faced by an ESCO whose contract was subject to 75 day grace period. In the event the customer walked away from the contract after 75 days, the ESCO would be left with a fixed supply that in the market was subject to a 25% differential. This risk factor is highly understated as it reflects a 100% load factor customer (as the load factor declines the price rises), and does not include capacity, ancillary services, acquisition cost or lost margins.

C. ATTORNEY GENERAL("AG")

1. Notification

The AG proposes that first page of the sales agreement be plastered conspicuously in bold print with a series of "notices and disclosures", 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). The proposed UBPs, as supplemented by the SCMC comments, adequately address the matter of customer disclosure; the additional restrictive proposals of the AG are unnecessary and overly cumbersome.¹⁶ Moreover, requiring an additional customer signature tends to slow down the marketing process and make it more cumbersome for the customer

The AG would also require ESCOs to file their “sales force/contractor training materials” with the Commission (AG 4). Under the proposed UBPs (Section 2.B.I) the ESCO will need to provide the Commission with a copy of its quality assurance program. This filing will allow the Commission to monitor ESCO compliance with the Marketing Standards and accuracy of ESCO marketing material. This type of filing adequately addressed the Commission’s ability to monitor ESCO marketing behavior, and there is therefore no need to require the submission of additional training materials as suggested by the AG.

The AG proposes that ESCOs be prohibited from using marketing language that suggests the ESCO is “discharging an official function or conferring a special benefit through its offer” (AG 4). This recommendation is unreasonable and at odds with the reality of the ESCO status. Under the UBP ESCOs are entities authorized by the Commission to provide service to end users. Accordingly, they are an entity with official recognized status and there is no reason they should be prohibited from communicating this fact to consumers. Furthermore, there can be programs such as the ESCO Referral Program where a customer

¹⁶NFG also proposes imposition of similar (NFG 10).

must be eligible to participate. Such information should also be communicated to customers.¹⁷

The AG unreasonably recommends that ESCOs provide consumers with accurate information about “potential bill savings in 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/contractual material unless such assertions are being raised in the specific offer. In other words where an offer incorporates savings it will be explained in the marketing materials or the sales agreement. There should be no generalized universal requirement that obligates the ESCO to address the issue of savings in all marketing materials.

D. NEW YORK STATE ENERGY MARKETERS COALITION (“NYSEMC”)

1. Termination Fees/Grace Period

NYSEMC indicates that it would support a reasonable cap on termination fees for a period of time and discerns value in extending the current 3 day right of rescission to 7 business days (NYSEMC 10, 18). This approach should not be adopted.

¹⁷ The AG erroneously avers 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). The issuance by the Commission of an order by the Commission adopting uniform business practices is binding upon all entities subject to the jurisdiction of the Commission, including ESCOs. The applicability of various provisions of the Public Service Law to ESCOs however, is subject to differentiation depending upon the particular section. The Commission has expressed the view while the provisions of Article 2 are applicable to ESCOs, other provisions are not necessarily imposed upon independent ESCOs.

As noted in our Initial Comments,¹⁸ imposing a cap or extended grace period on termination fees or prohibiting them altogether acts to improperly hinder an ESCO from recovering normal and customary damages arising from a customer's illegal termination of a duly binding sales agreement. 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.¹⁹

The competitive risk stemming from extending the grace period and restricting termination fees was also noted by CPB. The CPB took the view that termination fees were appropriate but they "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). SCMC 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 for vulnerable customers.²⁰

¹⁸ SCMC 7-9.

¹⁹ See *supra* at 15.

²⁰ 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.

E. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. ("Con Edison"

1. UBP Section 5.H.1

SCMC in its Initial Comments (SCMC 21-2) proposed that Section 5.H.1 be modified to require that the customer contact the ESCO before being able to affect a return to full utility services (SCMC 22). Con Edison in its comments recommends that a customer can arrange for return to full utility service by contacting "the distribution utility or the ESCO." (Con Edison 6), and is not obligated to contact the ESCO. The Con Edison proposal is unreasonable and should not be adopted.

This UBP section addresses the circumstance where a customer that is currently taking service from an ESCO under a duly effective contract, decides to return to full utility service. In this context, it is vitally important that the ESCO as the entity obligated to provide service in the first instance be provided with notice of the customer's decision to effectively terminate the existing contractual relationship and return to the utility.

It is also important to emphasize that the customer's decision to abandon the ESCO can have serious legal and financial ramifications, including liability for damages as well as potential suspension of utility distribution service. Consequently, it make much more sense for the ESCO to have the opportunity of advising the customer of the specific consequences that termination of supply service will engender --- information which the utility does not have, and , where possible, convince the customer to maintain service with the ESCO or fulfill the obligations and/or requirements of the duly binding agreement.. This can only occur if the process incorporated in the UBP ensures the customer notifies the ESCO and the ESCO is able to communicate directly with the customer. Under the approach advocated by Con Edison the

customer would only need to contact the utility of its decision to return to utility service, and there would be no obligation on the part of the customer to directly contact the ESCO.

Therefore, the ESCO would have no assurance of ever being able to contact the customer again either to advise the customer of potential legal consequences, attempt to change the customer's mind and retain the customer on retail access, or to communicate the benefits of remaining a customer of the ESCO.

In view of these circumstances, 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.

F. National Fuel Gas Distribution Corporation ("NFG")

1. Marketing Standards

NFG continues to urge that it be authorized to unilaterally regulate ESCO marketing practices (NFG 3). In a dramatic and unprecedented grab for regulatory authority, NFG seeks to acquire the individualized power to suspend an ESCO where, in the sole 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 (SCMC 31-2), approving NFG's proposal would confer upon NFG, a direct competitor of ESCOs, the authority to terminate ESCO activity in its service territory. It will place the utility in the position of judge, jury and executioner over its competitors' activities. It is analogous to allowing one company to shut down its competitor. 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 and not the 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 the jurisdiction of the Commission.

In support of its preposterous proposal, NFG erroneously observes 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 an immediate threat to the integrity of the distribution system or a direct obligation to the utility. Thus, for example, it includes a failure of delivery by the ESCO, an act that will likely cause “a significant risk or condition that compromises the safety, system security, or operational reliability of the distribution utility’s system...”²¹ This standard obviously does not apply to individual ESCO marketing practices that pose no immediate danger to the integrity of NFG’s distribution system.

IV. CONCLUSION

SCMC 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.

²¹ UBP Section 2.F.1.a

Respectfully submitted

Small Customer Marketer Coalition

By: 
Usher Fogel, Counsel

Dated: May 23, 2008
Cedarhurst, New York