

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

<b>In the Matter of Retail Access Business Rules</b>	)	<b>Case 98-M-1343</b>
<b>Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies</b>	) ) ) ) )	<b>Case 07-M-1514</b>
<b>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</b>	) ) ) )	<b>Case 08-G-0078</b>

**REPLY COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Energy Marketers Association (NEM) hereby submits these reply comments in response to other stakeholders' comments and guided by NEM's previously stated support for the Commission's adoption of a set of mandatory marketing standards based on the voluntary ESCO principles into the UBP, components of which were incorporated into the Commission's proposal in the instant case. NEM noted in its initial comments that the most effective consumer protection rules are premised on the fundamental requirement of accurate, affirmative statements from marketers that disclose the attributes of contracted-for products and services and likewise require accurate, affirmative statements of marketer identification. Consumer protection regulations can and should be narrowly tailored to accomplish this objective. Conversely, proposals that would require negative statements about what is NOT being offered by an ESCO detract from the value of what IS being offered. Proposals that would require negative statements in reference to entities that are NOT making the competitive offering detract from the consumer perception of the entity that IS making the competitive offering.

NEM's reply comments are intended to illustrate how certain stakeholders' proposed measures would impose significant unnecessary requirements on the nascent retail marketplace that are burdensome to comply with and will not appreciably enhance consumer protections. Concomitantly, the additional measures would force higher costs on competitive marketers resulting in higher energy prices and inhibiting market innovation for consumers.

Overall, the proposals from these other stakeholders are blunt instruments for addressing a limited perceived problem. The incidents that precipitated the proposed marketing rules have only been shown to be isolated in nature and occurrence. Surely, deceptive marketing practices should not be countenanced. NEM's proposed approach of accurate, affirmative marketing disclosures appropriately accomplishes the objective of protecting consumers, and, contrary to the approach others would have the Commission consider, would continue to allow the market to deliver the pricing, service and product innovations that consumers desire.

Moreover, it bears noting the environment in which efforts to impose marketing restrictions is occurring. By this NEM means that consumers continue to be constrained in their ability to assess marketer offerings when the de facto comparison point continues to be the utility regulated service. By maintaining the continued apples-to-oranges comparison of ESCO versus utility service, we have not materially advanced the debate. And, until utility rates are made comparably transparent this will continue to be true. There are vital pieces of information to which a consumer must have access to allow informed comparisons to occur. The current applicable utility rate should be conveyed to consumers in a transparent manner: 1) be fully unbundled on an embedded cost basis, 2)

disclose whether and how utility hedging is reflected, 3) disclose how frequently the utility rate is subject to change, 4) disclose that the utility rate is subject to adjustment for true-ups, and 5) disclose what current rate adjustments are in effect. The timing of ESCO pricing disclosures in comparison with utility rate disclosures compounds the lack of comparability amongst them. ESCOs find it increasingly difficult to develop product offerings that are competitive with the utility inasmuch as ESCOs need to submit their prices to their marketplace before utilities even submit their monthly expected cost of commodity. This inhibits consumers from making informed choices and also creates a competitive disadvantage for ESCOs. Without these disclosures pertaining to utility rates being made available to consumers, and on a timely basis, the value of corresponding disclosure requirements imposed on marketers will be limited inasmuch as a baseline construct for comparison will be lacking.

NEM notes that many of the proposals from the other stakeholders were previously addressed in NEM's initial comments and so NEM will not burden the record by repeating those positions here. NEM's reply comments are focused on novel issues raised in the stakeholders' initial comments and offer the following recommendations and observations:

1. Overly prescriptive disclosure format requirements will inhibit market innovation;
2. The proposal that sales force/contractor training materials be submitted to the Commission could be impossible to comply with;
3. Early termination fees serve a valid purpose in the retail marketplace;
4. ESCOs must be given adequate notice of prohibited behaviors and compliance penalties;
5. The scope of oversight of the UBP marketing principles should be limited to the Commission;

6. Customers seeking to return to full utility service should continue to be required to contact their ESCO about their decision; and
7. Marketing standards should be implemented on a prospective basis that permits timely ESCO compliance.

**I. Overly Prescriptive Disclosure Format Requirements Will Inhibit Market Innovation**

As a general matter, NEM is concerned that certain stakeholder proposals could ultimately discourage innovative product offerings by narrowly prescribing the format of acceptable terms and conditions of sales contracts. Going forward, if the “accepted” terms and conditions are too prescriptive, marketers will be limited in the types of products and services they can offer within strictly circumscribed boundaries. For example, the Consumer Protection Board (CPB) proposed requiring a first page disclosure chart of terms and conditions of the sales agreement. (CPB at 9). The Attorney General (AG) similarly suggested a list of disclosures to be included on the first page of ESCO customer agreements. (AG at 3-4). By comparison, the Commission’s proposed UBP revisions would require stating price, term and termination fee, if applicable on the first page of the ESCO sales agreement. (See UBP Section 2.B.1.b.1.).

It is helpful to refer to the Commission’s recent decision on ESCO price reporting to inform this issue. In the Price Reporting Order, the Commission was mindful that, “[w]hile the price reporting requirements imposed on ESCOs should be sufficient to obtain the additional information needed to enhance price transparency and price discovery, compelling overly extensive or intrusive reporting could unnecessarily constrain the flexibility that is characteristic of competitive markets.”<sup>1</sup> The clear

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<sup>1</sup> Cases 06-M-0647 and 98-M-1343, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms, issued November 8, 2006 at page 3.

corollary to be drawn in the instant case, is that by rigidly dictating the format of the terms and conditions of ESCO sales agreements, ESCOs will be confined to a cookie cutter approach to the types of offerings they can make. As such, the benefit of product innovation attendant with the competitive market will be lost.

## **II. The Proposal That Sales Force/Contractor Training Materials Be Submitted to the Commission Could Be Impossible to Comply With**

The AG proposes that ESCOs be required to file their sales force/contractor training materials with the Commission, purportedly to assist the Commission in monitoring compliance with the UBP. (AG at 4). NEM submits that this proposal could effectively be impossible to comply with inasmuch as these materials are updated on a continual basis. Also important, this information is considered commercially sensitive. Overall, the heavy-handed oversight attendant with this type of disclosure requirement is inconsistent with the approach the Commission has taken to competitive market development and has not been justified by the record developed herein.

NEM notes that the AG proposal also references contractor training materials. It is unclear if this is intended to refer to brokers. There may be an issue with respect to Commission oversight of broker activity.<sup>2</sup> The Commission may wish to distinguish and separately consider issues that are associated with broker behavior.

## **III. Early Termination Fees Serve a Valid Purpose in the Retail Marketplace**

Certain parties in their initial comments raise concerns about the use of Early Termination Fees in ESCO contracts. (PULP at 10, DCA at 5). NEM reiterates its

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<sup>2</sup> For example, if a broker is representing multiple marketers and violates a rule in the course of its business, how would the Commission identify which ESCO is responsible for the violation?

position that termination fees serve a valid purpose in offsetting marketer costs, in particular, unwinding hedges associated with fixed price or other hedged price products. By the same token, consumers must receive accurate disclosure of the circumstances under which the fee will be assessed and the manner in which the fee will be quantified. If the marketer fails to make such disclosure to the consumer up front, the marketer should be precluded from collecting the early termination fee.

#### **IV. ESCOs Must Be Given Adequate Notice of Prohibited Behaviors and Compliance Penalties**

The CPB proposes to expand the instances in which Commission compliance penalties are assessed to extend beyond specific incidents or complaints, to also “address the overall marketing conduct of an ESCO.” (CPB at 11). NEM is concerned that a generic catchall in the nature of “overall marketing conduct” as suggested by CPB would provide marketers with no substantive notice of whether their conduct could potentially be the subject of Commission action. The lack of notice would also raise significant due process concerns.

#### **V. The Scope of Oversight of UBP Marketing Principles Should Be Limited to the Commission**

CPB suggests that proposed UBP Section 10.C.3. be modified to include a requirement of ESCO cooperation with CPB mediation efforts for consumer complaints. (CPB at 15). NEM urges against inclusion of this requirement. NEM believes that the UBP marketing principles should be limited in their scope to the oversight exercised by this Commission, inasmuch as this Commission and its Staff are the entities that will enforce said principles.

## **VI. Customers Seeking to Return to Full Utility Service Should Continue to be Required to Contact Their ESCO About Their Decision**

UBP Section 5.H.1. currently provides that when a customer wants to arrange a return to full utility service it should do so by contacting BOTH the distribution utility and the ESCO.<sup>3</sup> ConEd/O&R propose that customers should not be required to contact both entities. (ConEd/O&R at 5-6). ConEd/O&R go on to argue that, “as the provider of last resort, distribution utilities have the obligation to return customers to full utility service upon request.” (ConEd/O&R at 6). This proposal is problematic for a number of reasons, and customers that wish to return to full utility service should continue to be required to contact their ESCO about their decision. First, by taking away that required point of contact, it could eliminate the ESCO’s opportunity to potentially resolve a source of customer dissatisfaction. It may also remove the opportunity to remind the customer to consider the contractual consequences of termination. The proposal would also appear to provide the utilities (direct ESCO competitors) with the ability to terminate a contract that exists between two other parties – the marketer and the choice consumer.

## **VII. Marketing Standards Should Be Implemented on a Prospective Basis that Permits Timely ESCO Compliance**

As a general observation, NEM urges that any changes adopted by the Commission in this rulemaking be implemented on a prospective basis for new customers. The terms and conditions previously agreed to by existing ESCO customers should be grandfathered under any new rules to avoid imposing costly retroactive compliance obligations. Moreover, given the significance and potential scope of these rules, NEM urges that

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<sup>3</sup> NEM members report that this current UBPs requirement may not be strictly adhered to by utilities.

marketers be provided with an adequate amount of time to incorporate the final rules into their marketing practices and agreements.

## **VIII. Conclusion**

NEM appreciates this opportunity to submit further comments on marketing standards for New York energy markets. The Commission has previously exercised a light-handed approach in its oversight that has fostered development of the nascent retail market. All of the stakeholders – consumers, marketers, utilities – have been well-served by this approach. NEM’s recommendations in the instant case are in keeping with this approach, namely to focus marketing standards and consumer protection rules on the fundamental requirement of accurate, affirmative statements from marketers that disclose the attributes of contracted-for products and services and likewise require accurate, affirmative statements of marketer identification. NEM submits that by focusing the rules on the adequacy and accuracy of disclosure, it should minimize the need for overly prescriptive and punitive behavioral rules. Therefore, it will retain for marketers the flexibility to do what they do best – offer innovative products, services and pricing options to consumers.

Sincerely,

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