



Jeffrey R. Clark
Secretary and
Managing Attorney

May 22, 2008

VIA UPS NEXT DAY AIR

Hon. Jaclyn A. Brillling
Secretary
State of New York 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 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 ESCO's.

Dear Secretary Brillling:

Pursuant to the Notice Soliciting Comments on Revisions to the Uniform Business Practices, issued March 19, 2008, in the above captioned proceedings, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation herin respectfully submit their Reply Comments. Copies of the comments are being filed via regular and electronic mail.

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If you have any questions regarding these comments, please direct them to Marc Webster at (607)762-8075 or Kathy Grande at (585)771-4514.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jeffrey R. Clark". The signature is written in a cursive style with a long horizontal stroke at the end.

Jeffrey R. Clark
Attorney for
New York State Electric & Gas Corporation and
Rochester Gas and Electric Corporation

Xc: Ms. Kimberly Harriman, Staff Asst. Counsel
Active Party List via Electronic Service

- Case 98-M-1343 – In the Matter of Retail Access Business Rules
- Case 07-M-1514 – Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies
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REPLY COMMENTS OF
NEW YORK STATE ELECTRIC & GAS CORPORATION AND
ROCHESTER GAS AND ELECTRIC CORPORATION
IN RESPONSE TO PARTIES’ INITIAL COMMENTS

On April 8, 2008, parties in the instant case submitted initial comments in response to a Notice Soliciting Comments on Revisions to the Uniform Business Practices (the “Notice”) that was issued on March 19, 2008.

In addition to New York State Electric & Gas Corporation’s and Rochester Gas and Electric Corporation’s (the “Companies”) comments, the parties who provided comments were as follows: Energetix/NYSEG Solutions Inc (“ENX/NSI”); Consolidated Edison Solutions, Inc (“CES”); National Fuel Gas Distribution Corporation (“NFG”); the National Energy Marketiners Association (“NEM”); Central Hudson Gas & Electric Corporation (“Central Hudson”); the Consolidated Edison Company of New York and Orange and Rockland Utilities (“Con Ed/O&R”); the New York State Consumer Protection Board (“CPB”); the Small Customer Marketer Coalition (“SCMC”); The Retail Energy Supplier Association (“RESA”); New York State Energy Marketers Coalition (“NYSEMC”); Intelligent Energy; Reliant Energy (“Reliant”); IDT Energy; UGI Energy; New York City Department of Consumer Affairs (“DCA”); Attorney General of the State of New York (“AG”); Public Utility Project of New York (“PULP”);

Constellation New Energy and Constellation Energy Commodities Group (“CNE”); and Direct Energy (“Direct”).

The Companies hereby submit their reply comments.

The PSC’s 10 Questions:

The Companies stand by their initial comments in this case and feel that the record is complete. The parties commented on these issues in their initial comments as well as during both technical conferences that were held in this case. It is to these comments that the Companies address their reply.

Proposed Uniform Business Practices (“UBP”) Changes:

Section 1 – Definitions

SCMC and RESA state in their comments that “it is equally possible for the local utility to engage in slamming where the utility, without the customer’s authorization, de-enrolls the customer from the ESCO and returns the customer to commodity service.” They therefore ask that the term slamming should also include such a situation as identified above.

Comment: The Companies disagree with this definition change. Utilities do not engage in slamming activities. There is no showing by SCMC and RESA that this situation occurs today and thus, a definition change is not necessary. As the provider of last resort, the utility must take a customer back and, under the UBP rules, utilities are not permitted

to make an attempt to solicit customers to return to full utility service. If a customer is inadvertently returned to utility service and a customer calls the utility, they are relinked to the ESCO. The number of incidents where this occurs is small and if it does, the situation is corrected immediately. As such, there is no need to make any change to the slamming definition.

Section 2 – ESCO Eligibility

RESA requests that Section 2 of the UBP be changed to require all distribution utilities to provide consumption history for an electric account that includes both the identification of master metered accounts and the cycle number on the Historical Usage file that is provided to ESCOs prior to enrollment. Also, RESA wants the UBP to require that a “utility shall not provide more than 3 consecutive estimated reads on any account.”

Comment: The Companies first point out that RESA’s request pertains to Section 4 of the UBP (Customer Information), not Section 2. The changes that RESA wants made to the historical usage file are not part of the EDI 814 HU transaction set. What RESA is requesting would require a change to that set. As such, this is not the forum to discuss such changes and should be made only after a showing of need and careful consideration by the EDI collaborative. ESCOs are provided the meter reading cycle in an EDI 814 Enrollment response, and it is not necessary to receive that transaction in the EDI 814 HU. Additionally, the historical usage that is provided to an ESCO shows the previous billing dates, which an ESCO can use to figure out the meter reading cycle from the Companies.

RESA's requested change that the UBP require that a utility can not provide more than 3 consecutive estimated reads on any account should be rejected outright. This request is in direct contravention with Section 11.13 of Title 16 of the New York Code of Rules and Regulations. The Companies estimate a meter read, for most accounts, on every other bill. However, there are numerous accounts where the Company is unable to coordinate access to the meter with the owner, landlord, or tenant, causing the account to be estimated. RESA's request would force a utility to stop sending any billing determinants to the ESCO after 2 consecutive estimates when the utility could not get an actual read. Such a request is impractical, illogical, and inconsistent with the regulations and should be rejected.

2.C.1: This section pertains to the DPS Review Process. Central Hudson noted in their comments that "a DPS re-application process...does not alter or limit a utility's right to include commencement limits in its operating agreements with ESCOs that may differ from those imposed by the Commission."

Comment: As stated in our original comments, the Companies feel strongly that the UBPs should require ESCOs to go into production in a utility's service territory within 6 months of successfully completing EDI phase 3 testing. [Companies comments at page 5]. The Companies support and agree with Central Hudson's position above and would, absent new rules being promulgated to address the Companies' concerns, request that the

PSC recognize the utilities' rights to impose commencement limits within our operating agreements.

2.D.6: This new section, proposed by the PSC, specifies the process that the DPS must follow to investigate and address concerns regarding ESCO failure to comply with the UBPs and the potential associated consequences to the ESCOs. In their initial comments, CPB expressed that "...the document by which an ESCO is notified of its failure to comply with the UBP (Section 2.D.6.a.i) should be made public, perhaps posting it on the PSC's website." Intelligent Energy wants this section removed because they believe that "the Commission has adequate remedies available to punish abusive marketing practices by ESCOs."

Comment: The Companies support the comment by CPB. By posting the failure of the ESCOs to comply with the UBP, the PSC would be allowing more information into the marketplace and would allow consumers to make a more informed choice. A truly competitive market relies on free information to allow the consumer to make an informed choice. Potential and existing ESCO customers are best served by being able to see which ESCOs have failed to perform according to the UBPs and thus, may decide for themselves whether they want to ask a potential ESCO about the UBP violation when making a supply decision.

The Companies vehemently oppose Intelligent Energy's recommendation to remove this entire section. The Companies do not believe that the PSC currently has adequate

remedies in place to address abusive marketing practices. In fact, based on recent experience, the Companies found that the PSC had little recourse other than the ability to completely discontinue an ESCO's ability to provide service in a utility's service territory. The proposed consequences would allow the PSC a much broader range of solutions which could actually benefit ESCOs. By rejecting this section, the PSC would have to disqualify an ESCO for marketing abuses; whereas, the new rules could allow a temporary suspension from enrolling new customers until such time as the cause of a marketing problem is investigated and resolved. Upon successful resolution, the ESCO could begin marketing again. The Companies do not understand why an ESCO would rather that the PSC only have the discontinuance of service option when a much milder remedy could be used to address a problem. The Companies feel that the need for this section is very real and timely, and supports its inclusion in the UBPs.

2.D.6.a.iii – This section states that “Upon failure of the ESCO to take corrective actions or provide remedies within the cure period, the Commission may impose the consequences listed below”. SCMC and RESA would like this reworded to say, “Upon failure of the ESCO to take corrective actions or provide remedies within the cure period, which shall be commensurate with the level of time required to implement the cure requested by the Commission, the Commission may impose the consequences listed below.”

Comment: The Companies oppose this change because the proposed additional language is overly broad and creates a question as to what defines “commensurate”. The

decision regarding what is a reasonable cure period for individual violations should be open for discussion between the DPS, the ESCO, and the affected utility. The language proposed by SCMC and RESA adds verbiage where none is warranted and, in doing so, creates potential conflict with the process.

2.D.6.a.iv – This section states that, “Consequences shall not be imposed until after DPS provides notice to the ESCO and the ESCO has been afforded an opportunity to respond.” SCMC and RESA suggests amending the section to read, “Consequences shall not be imposed until after DPS provides notice to the ESCO and the ESCO has been afforded an opportunity to respond to said notice and complete the requisite corrective action.”

Comment: The Companies feel that the proposed addition is too proscriptive upon the DPS. The Companies believe that, in the case of an ESCO misrepresenting itself or other egregious marketing practices, it may be necessary for the DPS to temporarily suspend an ESCO until remedial actions can be taken to minimize the damage caused to customers. SCMC and RESA’s request, while not outrageous or excessively unreasonable, fails to recognize that such action may be necessary on an emergency basis. The language proposed by SCMS and RESA would not allow the DPS to act in an expedited manner.

2.D.6.b.i – This section deals with consequences that may be imposed by the DPS if an ESCO fails to comply with section 2.D.4. This section states that the consequence could include “suspension from any Commission approved retail program.” NYSEMC

requests that the language be amended to read “suspension from any Commission approved utility programs on the utility system where the failure took place.” Similar language changes were proposed by SCMC and RESA. Additionally, CES stated that they feel that wording should be changed to “suspension from a specific Commission approved retail access program or programs.”

Comment: The Companies agree that, in general, the DPS should try to suspend an ESCO only in the service territory in which the violation occurred. However, the proposed language by NYSEMC, SCMC, RESA and CES is too proscriptive and would not allow the DPS to act broadly if a violation, or series of violations, showed an ongoing or egregious disregard for the UBPs and consumer protections. If such extreme behavior occurs on the part of an ESCO, the Companies would look to the DPS to suspend an ESCO across the state and evaluate if further actions, up to and including revocation of an ESCO’s eligibility in New York State, should occur.

2.D.6.b.iii – This section states that one of the consequences that the DPS may impose on the ESCO is the “imposition of a requirement to record all telephonic marketing presentations, which shall be made available to DPS for review.” UGI avers that this proposed language should “only apply where the customer sale is initiated and completed during telephone calls and does not otherwise involve other forms of communication which may document the terms of the agreement between the ESCO and customer.”

Comment: The Companies disagree with UGI’s proposed language. In the case of a marketing infraction where there is sufficient cause to believe that the ESCO is misrepresenting themselves, the DPS should be allowed to require proof that all sales pitches, be they telephonic or in person, are conducted properly. As such, an improperly conducted door-to-door campaign may lead the DPS to question the validity of a telephonic sales campaign as well. If this happens, the DPS should be allowed to require that the entire telephonic marketing presentation be taped.

2.D.6.b.vii – This section allows the Commission or DPS to take any other measures (beyond those identified in items i through vi of this section) that they may deem appropriate. RESA, SCMC, NEM and NYSEMC all feel that this language is unnecessary, too broad, and undefined, and thus should be removed.

Comment: It is impossible for the PSC to be able to know every possible problem that may occur and every possible action that they may have to take. If this language is removed, it essentially would allow only those actions identified in sections 2.D.6.b.i through 2.D.6.b.vi. Without this language, the PSC would continue to be limited in actions that it could take to address ESCO violations of the UBPs. As a result, the Companies disagree with the changes proposed by RESA, SCMC, NEM and NYSEMC and feel that the section should not be amended from its original wording.

Section 3 – Creditworthiness

3.B.1.b – This section states that where the ESCO enters into a purchase of receivables consolidated billing arrangement with the distribution utility, the ESCO shall have satisfied the distribution utility’s creditworthiness requirement. Con Ed/O&R suggest that the language for this section should be modified “to ensure that ESCOs who serve customers under more than one billing option provide appropriate security with respect to their load billed under the dual bill option.”

Comment: The Companies agree with Con Ed/O&R’s suggestion. Absent this clarification, an ESCO could serve thousands of customers and only have 1 customer under consolidated billing (with purchase of receivables) and satisfy the terms of this section. Section 3 was designed to ensure that ESCOs provide proper security to compensate utilities for the risk of providing service in case of ESCO default. Unless Section 3.B.1.b is clarified, it improperly imposes risk on the utilities.

Section 5 – Changes in Service Providers

Section 5.D – This section addresses customer enrollment procedures. Con Ed/O&R state in their petition that they have experienced situations where an ESCO will resubmit the customer’s initial enrollment after the ESCO has received a notice that the customer is switching to another ESCO. Con Ed/O&R state that the ESCOs who resubmit the original enrollment “claim that they have a valid sales agreement with the customer and ignore the fact that the customer has elected to switch provider.” Con Ed/O&R would like to add an item that limits an ESCO’s ability to resubmit an enrollment after an ESCO has been notified that the customer is switching to another ESCO.

Comment: The Companies strongly support Con Ed/O&R's suggestion. Customers should be allowed to make a decision to change service providers and not feel that they are subject to having the original enrollment resubmitted. The Companies join with Con Ed/O&R in the belief that such an action by an ESCO constitutes slamming.

Notwithstanding the fact that the incumbent ESCO may have a valid agreement with a customer, which may or may not include a wet signature, if the ESCO has a dispute regarding the validity of any subsequent switch for that customer away from the ESCO, the ESCO needs to seek redress from the PSC or a court of law. Merely resubmitting the enrollment places the utility in the middle of what is, in essence, a contractual dispute between the ESCO and the customer. Such a dispute should not include the utility.

5.D.4 – RESA and SCMC request that the petition filed by U.S. Energy Savings LLC filed on August 17, 2006 be acted upon.

Comment: This case is already before the Commission and the record is complete. The Companies request that the PSC ignore all comments on this petition from RESA and SCMC since the SAPA period is passed for parties to provide comments. If the PSC wishes to continue that case, it should reissue a SAPA notice and ask for interested parties to add to the record.

5.H.1 – Under this section, the UBP states that a customer who wants to arrange for a return to full utility service must first contact the ESCO and the distribution company.

Con Ed/O&R feel that a customer should not be required to contact the ESCO and the utility to arrange a return to utility supply service. Con Ed/O&R feels that if a customer contacts an ESCO, the ESCO can notify the utility via an EDI 814 drop transaction. Further, they feel the language in this section should be modified to state that a customer contacting the utility and requesting to return to full utility service should be reminded to speak to their ESCO about returning to full utility service. However, if the customer has already contacted the ESCO, or doesn't want to call the ESCO, the utility should honor the customer's request and process an outbound EDI 814 drop transaction.

Additionally, SCMC states that ESCOs are not being properly notified by the customer of the decision to return to utility service, and this has created confusion as to what procedure should be followed by the utility where there is no assurance that the ESCO has been contacted by the customer. SCMC provides proposed language changes on page 22 of their comments.

Comment: The Companies fully support Con Ed/O&R's recommendation. A customer should not be required to contact both the ESCO and utility. The Companies have experienced a situation where the customer has been directed to contact the ESCO several times to initiate a return to full service and the ESCO, after saying yes to the customer's request, ignores them and does not process the drop. Utilities need the ability to be responsive to such customer requests. The customer should not be held hostage by an ESCO who does not process a drop when a customer requests it. Such a seemingly

passive-aggressive stance creates extreme customer frustration and negatively affects customers' attitudes toward retail access.

The Companies feel that the proposed language offered by SCMC is acceptable, but it raises questions that need to be addressed before such language is put in place.

Specifically, how can a utility guarantee that a customer has indeed contacted their ESCO before calling the utility to drop service? Such a requirement would force customers who don't want to contact their ESCO to be untruthful to the utility and the utilities should not be expected to police customers and confirm that the customer has indeed contacted the ESCO first. In light of these limitations, the Companies feel that Con Ed/O&R's language is preferable over SCMC's proposed language.

Section 5, attachment 1 – This section pertains to telephonic agreement and authorization requirements. SCMC objects to part A.3 of this section which has been amended to state that an ESCO must get the following: “a statement from the customer accepting such terms and conditions that is unaided or unprompted by the ESCO marketing representative.” SCMC states that the standard is “impossible to implement in practice as some communication between the customer and the ESCO representative is necessary in order to have the customer indicate the acceptance of the agreement.”

Comment: In general, the Companies agree that a certain amount of prompting is necessary (e.g. “Do you agree to purchase your supply service from XYZ ESCO?”). However, the Companies want to ensure that the ESCO marketing representative is not

telling the customer to say “yes” or is not pressuring the customer in any way. Further, a customer who is accepting such terms and conditions telephonically should be responding positively to the exact information that was presented during the original sales pitch to ensure consistency between what was offered originally and what is needed to complete the transaction.

Section 9 – Billing and Payment Processing

ENX/NSI states that in many cases ESCO information is “effectively buried five or six pages back in the billing details.” They claim that customers may not read the details of the bill and thus, they would not see the ESCO detail but only the summary information. They are requesting that a collaborative or a workshop is necessary to develop a “holistic” approach to consolidated billing.

Comment: The Companies do not believe that any change is warranted in bill formats. Bill formats have been extensively reviewed by the PSC, DPS staff, ESCOs and the utilities. The Billing Proceeding from Case 00-M-0504 addressed formats as well as bill unbundling to ensure that bills would be presented in a clear format for customers. Further, the Companies have not heard of many (if any) complaints about the current consolidated billing format. It would, therefore, seem incomprehensible that the alleged marginal benefit of less confusion to a very few customers would warrant the extraordinary cost of collaborative meetings and bill reformatting that would be incurred as a result of such a proceeding. Therefore, the Companies believe that ENX/NSI’s request needs to be rejected unless a showing of extreme need can be made.

Section 10 - Marketing Standards

10.C.1.b – Con Ed/O&R states that, “ESCO representatives should be required to positively affirm that they are not employed by, and do not represent, the distribution utility when they are soliciting customers.” Also, Con Ed/O&R proposes that during solicitations, the ESCO representative must state the name of the ESCO they represent at the beginning of the contact.

Comment: The Companies fully support Con Ed/O&R’s proposed change to this section. The Companies have found that the largest amount of customer confusion is caused by customers who believe that the ESCO marketing representative is from the utility. Whether such confusion is intended or not, the language proposed by Con Ed/O&R would help alleviate that confusion. In their initial comments, many ESCOs stated that such a requirement would be too negative and would impair their ability to complete a sale with the customer. In response, the Companies feel that such a declaration would immediately allow customers to know that the ESCO is not the utility and would allow them to evaluate the ESCO’s sales pitch based purely on its own merit. Additionally, the Companies feel that if Con Ed/O&R’s requested change is rejected or modified, all ESCO marketing reps must be required to tell a customer that they are not the utility if they are asked a direct question of whether they are the utility or represent the utility.

The Companies also support Con Ed/O&R's request that the ESCO marketing representative must state that they are with the ESCO. Such a requirement would go a long way to avoiding customer confusion. Marketing theory states that customers remember the first and last things they hear on a list or in a sales pitch. This is called the Primacy and Recency Effect. By requiring up front disclosure, customers would remember the ESCO name and not be confused.

10.C.2.f – NEM, SCMC and RESA all state that this section, which requires that ESCOs remove customers' names from the marketing database upon customers' request is redundant and should be removed because it is already part of the rules governing the Federal Do-Not-Call Registry requirements.

Comment: Notwithstanding whether this is in the Federal do-not-call registry requirements, the Companies believe that this requirement should also be in the UBP. The Companies have heard complaints from customers who have asked an ESCO to remove their name from their marketing database repeatedly. Some customers have claimed they have asked up to 20 times to have their names removed, without success. By leaving this language in the UBP, the Companies feel that there would be the opportunity to seek relief of such violations through administrative remedies rather than through the courts.

10.C.3.h – NEM objects to this language that would require them to, "cooperate with the DPS and PSC regarding marketing practices proscribed by the UBP and with local law

enforcement in investigations concerning deceptive marketing practices.” NEM has concerns that an ESCO might be unable to protect itself from self-incrimination in an investigation.

Comment: The Companies are disturbed by NEM’s objection. Such a provision would not override any parties’ rights to protection from self-incrimination. Rather, this objection implies that there might be something to hide and would tend to underscore the need for these rules.

Other Unspecified UBP Changes

1) SCMC and RESA both state that utilities “unilaterally terminate ESCO supply service where there has been a change or modification to the customer’s account information.” SCMC states that NYSEG, among others, has “advised that where the customer experiences a name change or other data modification that precipitates a utility account change under the utility’s record keeping system” and drops customers from the account. SCMC and RESA state that this practice violates the UBP and conflicts with legal obligations of the utility to act in a just and reasonable manner. SCMC also even states that this could be considered tortuous interference with a contract.

Comment: The Companies strongly object to SCMC and RESA’s comments and ask that they be rejected. When a customer account number is changed (i.e. the old account is ended and a new account is established), it is done so because a material change has occurred. A simple name change, as SCMC and RESA state in their comments, is insufficient to be considered a material change. However, if the party responsible for an

account changes, a new account must be established. The Companies' legal rights for credit and collection require us to ensure that the account is in the correct name and that the correct party is being billed. If such a change occurs, then the old account is no longer valid. In such a case the ESCO will receive an EDI 814 drop because the old account has ended. Additionally, the Companies have a seamless move process in place whereby if a customer requests one, and the change warrants such a seamless move, the new account will be established with the ESCO and no change in service provider will have occurred. Finally, SCMC and RESA do not need a UBP change to address these concerns, if they are real. If SCMC and RESA feel that the Companies have indeed violated the UBPs, they have had the ability to seek relief via the Dispute Resolution Process outlined in Section 8 of the existing UBP. SCMC's and RESA's claim is baseless and should be rejected.

2) NYSEMC commented if the Commission determines that an ESCO has violated the marketing practices of the UBP, there should be an automatic suspension of the ESCO's solicitation and marketing activities for a minimum of 14 days. NYSEMC argues that such a suspension period would allow the PSC enough time to investigate the complaints and allow an ESCO to change their marketing practices.

Comment: The Companies support this plan by NYSEMC. It is logical and speaks to the problems that have been expressed by the parties and experienced by the Companies. Such a "cooling off period" would indeed allow the PSC to investigate customer claims

further and would provide an incentive for ESCOs to meet with the utilities and the PSC to establish a correction plan.

3) RESA requests that a collaborative to discuss the establishment of an ESCO Direct Marketing Program be instituted within 90 days.

Comment: The Companies object to yet another collaborative regarding retail access marketing practices. In addition to the instant case, utilities have had to submit plans regarding ESCO Referral Programs, the Accent Petition, and in the case of NYSEG, the ESCO Introduction Program. The Companies suggest that any consideration of any ESCO Direct Marketing Program discussion should be delayed until such time as all the other pending cases regarding marketing or customer data access are resolved.

Conclusion

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

Respectfully Submitted,

Jeffrey R. Clark
Attorney for
New York State Electric & Gas Corporation and
Rochester Gas and Electric Corporation