



# Public Utility Law Project of New York, Inc.

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May 27, 2008

Hon. Jaclyn Brillig  
Public Service Commission  
Three Empire State Plaza  
Albany, NY 12223-1350

*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*

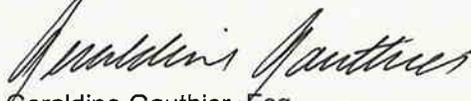
*Case 08-G-0078 – Ordinary Tariff Filing of National Fuel Gas Distribution Corporation to Establish a Set of Commercially Reasonable Standards for Door-to-Door Sales of Natural Gas by ESCOs*

Dear Secretary Brillig:

Enclosed for filing are the original and five copies of the Reply Comments of Public Utility Law Project in the above referenced cases.

All active parties on the May 15<sup>th</sup> active parties list will be served by e-mail as well as by U.S. Postal Service.

Sincerely,



Geraldine Gauthier, Esq.  
Staff Attorney

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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**In the Matter of Retail Access Business Rules**

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) **Case 98-M-1343**  
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**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 07-M-1514**  
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**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**

) **Case 08-G-0078**  
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**REPLY COMMENTS  
OF  
PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.**

**Public Utility Law Project  
of New York, Inc.**

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<b>In the Matter of Retail Access Business Rules</b>	)	<b>Case 98-M-1343</b>
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**REPLY COMMENTS  
OF  
PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.**

On March 19, 2008, the New York State Public Service Commission (“Commission” or “PSC”) issued a Notice Soliciting Comments<sup>1</sup> regarding revisions to the Uniform Business Practices (“UBP”) applicable to Energy Service Companies (“ESCOs”) operating in the state. In the Notice, the Commission proposed changes to the UBP and posed 10 questions seeking input from the active parties to this proceeding. The Public Utility Law Project of New York, Inc. (“PULP”) submitted initial comments on April 18, 2008 and hereby files its reply comments on the issues raised by the other

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<sup>1</sup> *Notice Inviting Comments on Revisions to the Uniform Business Practices*, In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (Issued March 19, 2008).

parties to this proceeding in their initial comments and during the April 28, 2008 Technical Conference.

PULP's reply is focused on the inappropriateness of mandating early termination fees ("ETFs"); the applicability of Public Service Law ("PSL") §18-a assessments on ESCOs; the impropriety of allowing third party non-account holders to effectuate, change, or disconnect utility service; and whether ESCO complaint category statistics should be regularly reported to the public by the Commission.

### *Early Termination Fees*

PULP remains firm in its opposition to the imposition of any ETFs on ESCO customers who choose to end their relationships with ESCOs before the contract expiration period. PULP disagrees with National Fuel Gas Distribution Corp. and other commenters who posit that ETFs are permissible, provided that the fee "is clearly stated and explained to the customer."<sup>2</sup> This standard would allow ESCOs to set any ETF amount, provided it is buried in boilerplate.

PSL §65(1) states in pertinent part: "Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited."<sup>3</sup> Early termination fees, as proposed, are an "unjust or unreasonable charge," particularly in the absence of any record-based cost justification.

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<sup>2</sup> *Comments of National Fuel Gas Distribution Corporation in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at p. 7.*

<sup>3</sup> N.Y. Pub. Serv. L. §65(1).

Early termination fee amounts are arbitrarily demanded by ESCOs, without any evidentiary basis to identify the ESCOs' costs occasioned by customers switching providers. The purported reason for ETFs is to protect the ESCO's investment in purchasing commodity supply for the customer, should the customer discontinue service. The ESCOs argue that their rates would invariably increase if the ETFs were eliminated.<sup>4</sup>

PULP is unpersuaded by these arguments. In view of the constant stream of consumers entering and exiting ESCO customer rolls, and the net increase in customers taking ESCO service in recent years, it is unlikely that ESCOs will suffer any net stranded costs or investments. Commodity supply purchased by the ESCO for customer "A" can certainly be allocated to customer "B," should "A" decide to bring its business back to the incumbent utility or to another ESCO. Through proper management, the prudent ESCO should consistently be able to purchase commodity at appropriate levels, obviating any need to raise rates if ETFs are prohibited. Like the ESCOs, the incumbent utilities are subject to a constant stream of consumers entering and exiting their customer rolls in direct apposition to ESCOs in their territories, yet they manage their commodity portfolios appropriately without ETFs.

The application of ETFs raises several important concerns. If the Commission fixes early termination fees, those fees can be legitimately collected by ESCOs in court under PSL §75, so long as they are not "in excess of that fixed by the Commission."<sup>5</sup> By fixing such fees, the Commission effectively provides ESCOs a filed rate "club" to

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<sup>4</sup> *Comments of Intelligent Energy* in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at p. 5.

<sup>5</sup> PSL §75.

enforce all contracts, irrespective of whether some terms and conditions of service are unjust, unreasonable, or whether those contracts are unconscionable, unenforceable, or the product of deceptive acts and practices. The consumer who wishes to challenge onerous contract provisions under New York consumer protection laws<sup>6</sup> will face an absolute defense that the ETFs are rates fixed by and on file with the Commission, and so are recoverable even if the consumer prevails in an action for unlawful or deceptive practices, or fraud. This is not an idle concern. In *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994), in affirming the dismissal of ratepayers' complaints on grounds they were barred by the filed rate doctrine, the court noted that "any filed rate — that is, one approved by the governing regulatory agency — is . . . unassailable in judicial proceedings brought by ratepayers." *Id.* at 27 F. 3d 18.

Another concern is that ETFs render sales contracts discriminatory, and in some cases, unconscionable. ESCOs commonly reserve many unpenalized "outs" in their contracts, including rights to assign, rights to withdraw from the service territory, and rights to short notice cancellation.<sup>7</sup> In addition, many ESCO contracts contain automatic renewal provisions. If the customer does nothing to stop the renewal during very narrow time frames, the contract will be renewed and cannot be terminated without the imposition of ETFs.

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<sup>6</sup> Gen. Bus. Law §349, *et seq.*

<sup>7</sup> For example, just this month an electricity retailer that promised customers a fixed rate raised its rates under the "material change" clause in the fixed rate contracts. Customers were advised in a mass mailing that they could cancel their contracts within a specified period of time to avoid a \$300 early termination fee, but the company did not offer to pay customers an early termination fee for renegeing on its own contracts. Souder, E. "National Power Raising Electricity Prices," DALLAS MORNING NEWS, May 12, 2008, available at [http://www.dallasnews.com/sharedcontent/dws/bus/industries/energy/stories/DN-nationalpower\\_13bus.ART.State.Edition1.463b3e0.html](http://www.dallasnews.com/sharedcontent/dws/bus/industries/energy/stories/DN-nationalpower_13bus.ART.State.Edition1.463b3e0.html). Examples of New York ESCO contracts with similar "outs" for the seller are at [www.pulp.tc/html/esco\\_contracts.html](http://www.pulp.tc/html/esco_contracts.html).

Still another concern is that the Commission should not set ETF rates without a rate making proceeding to adduce evidence on the actual costs of termination. No distribution utility charges a termination fee for customers who stop taking commodity and switch to an ESCO for that element of service. An arbitrary “blanket rate” for ESCO ETFs cannot be set, because there is no way to assure that the rate is either just or reasonable. In setting rates unsupported by costs, the Commission may be allowing egregiously excessive charges, because there is no analogous cost-based charge for similar services that could be used as a temporary proxy to set a reasonable rate.<sup>8</sup> If the Commission believes that rates for ETFs should be implemented, the rates should be cost based and should be developed on an evidentiary record. Also, if switching costs are really significant, full service distribution utility customers will be burdened with the costs flowing from customers switching to ESCOs, provided ESCOs alone are permitted to charge ETFs. If rates for ETFs are adopted, then PULP believes that all of the ESCOs rates, terms and conditions should be similarly filed and reviewed.

A further concern is that the 2002 Energy Consumer Protection Act (“ECPA”) expressly extended HEFPA protections to transactions between residential customers and ESCOs.<sup>9</sup> There is absolutely no provision within HEFPA or its implementing regulations that permits the imposition of ETFs by either ESCOs or utilities.

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<sup>8</sup> See, *Order Modifying Suspension Fees and Other Tariff Provisions And Granting Further Relief*, In the Matter of the Implementation of Chapter 686 of the Laws of 2002, Case 03-M-0117 (Issued and Effective October 25, 2004) at pp. 9-10. “While we do not endorse any of the specific methodologies employed by the utilities in setting the bill calculation fees, and they differ widely, ***we also do not find that any of the utilities has tariffed a fee that is egregiously excessive.*** As a result, it is not necessary to address the methodological disparities among the utilities immediately, or modify now any of the utility bill calculation fees (which are in effect on a temporary basis). These charges, however, shall be reviewed at the time of each utility's next rate proceeding or extension of its rate plan. . . .” (emphasis added).

<sup>9</sup> Chapter 686 of the Laws of 2002, the Energy Consumer Protection Act of 2002. See, PSL §30; 16 NYCRR §11.1.

PULP opposes the New York State Attorney General's position that ETFs may be imposed if the customer cancels the ESCO contract after 30 days.<sup>10</sup> Thirty days is not nearly sufficient to adequately protect customers, because customers may not even have received their first bill yet or have any way to know whether the ESCO has met its promised contractual obligations.

Finally, under the New York State Court of Appeals decision in *Kovarsky v. Brooklyn Union Gas Company*, service charges by natural gas utilities for halting and restarting service at a customer's request are prohibited under PSL §65(6), which permits only charges for the "gas supplied."<sup>11</sup> A gas service charge is allowed only where service is disconnected and reconnected for nonpayment of bills.<sup>12</sup> Early termination fees are a service charge, and are therefore unlawful when applied to gas service.

ESCOs argue that as sellers of commodity gas only, in contrast to the distribution utility, they are not subject to the provisions of PSL §65, because it is part of PSL Article 4. But PSL §64 clearly provides that Article 4 applies to the "furnishing" of gas, as distinguished from conveyance and transportation. ESCOs "furnish" gas. By the plain language of PSL §64, the requirements of Article 4 apply.<sup>13</sup>

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<sup>10</sup> *Comments of the Attorney General of the State of New York*, in *In the Matter of Retail Access Business Rules*, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 18, 2008), at p. 3.

<sup>11</sup> *Kovarsky v. Brooklyn Union Gas Company*, 279 N.Y. 304 (1938).

<sup>12</sup> PSL §65(6)(b).

<sup>13</sup> ESCOs are "gas corporations" and "electric corporations" within the meaning of PSL §§2 (11) and (13), because they "own, operat[e] or manag[e]" gas plants and electric plants, as those terms are defined PSL §§2(10) and (12). "Plant" is defined as "real estate, fixtures and personal property owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of [gas or electricity] for light, heat or power. . . ." *Id.* ESCOs' offices, fixtures, and personal property including contracts used to facilitate the sale of gas and electricity fall within these broad statutory definitions of "gas plant" and "electric plant."

## ***ESCOs are Subject to Public Service Law §18-a Assessments***

### **A. ESCOs Are Subject to Subject to the Commission’s Jurisdiction**

The Retail Energy Supply Association (“RESA”) acknowledges that the Commission’s jurisdiction or authority to assess ESCOs under PSL §18-a “would be premised on the provisions of §§2(11) and 2(13) which define a gas corporation and electric corporation as an entity engaged in the “owning, operating or managing” of electric or gas plant.”<sup>14</sup> In the same breath, RESA asserts that ESCOs are utilities *only* for purposes of Article 2, which “does not, in any way, confer status as a utility corporation on an ESCO for the purpose of the remaining provisions of the Public Service Law.”<sup>15</sup>

The definitions sections RESA cited are part of PSL Article 1. Article 1 contains the §18-a assessment provision. As a matter of statutory construction, “statutes which relate to the same or to cognate subjects are *in pari materia* and to be construed together unless a contrary intent is clearly expressed by the Legislature.”<sup>16</sup> Nothing in Article 1 reflects a legislative intent to strip Article 1 definitions from its remaining provisions. The definitions and assessment provisions must be accorded analogous and parallel readings because they are part of an integrated statutory scheme and they regulate the same class of entities — utilities.<sup>17</sup> Moreover, as previously argued, PSL §18-a applies

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<sup>14</sup> *Comments of the Retail Energy Supply Association in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at p. 9.*

<sup>15</sup> *Id.*

<sup>16</sup> *Plato’s Cave Corp. v. State Liquor Authority*, 68 NY2d 791, 793 (1986).

<sup>17</sup> *In re Estate of Liberman*, 6 NY2d 525, 533 (1959) (“Statutes *in pari materia* relate to the same subject, the same person or thing, or the same class of persons or things, and are to be read together, for the reason

not only to utilities, but to any “person,” and so the issues exhumed by RESA, whether an ESCO is a “utility” other than under Article 2, need not be decided.

The 2002 HEFPA amendments relieved ESCOs of a duty to serve all who request service under PSL Article 2, but left it open for the Commission to enforce such a duty under other provisions of law, *e.g.*, Article 4.<sup>18</sup> The language of a PSC decision implementing the 2002 HEFPA amendments alludes, with no citation, to prior court decisions that “affirmed” the PSC approach of not enforcing Article 4 for ESCO service.<sup>19</sup> The sole court decisions of which we are aware, however, only held that challenges to the Commission’s deregulation initiatives were premature,<sup>20</sup> or that challenges lacked standing,<sup>21</sup> and thus they never “affirmed” on the merits any of the Commission’s deregulation experiments<sup>22</sup> to relieve new utilities of statutory duties.<sup>23</sup>

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that it is to be implied that a code of statutes relating to one subject is governed by the same spirit, and are intended to be harmonious and consistent.”)

<sup>18</sup> PSL § 31(6): “In the event the service sought in applications submitted pursuant to this section is comprised of the provision of gas or electricity commodity only, nothing in this section shall require the provision of such service to any and all such applicants; provided, however, that ***nothing in this subdivision shall prevent or preclude the commission or a court from ordering the provision of such service to all such applicants if such order is authorized pursuant to or required to implement a provision of law other than this article.***”

<sup>19</sup> *Order Relating to Implementation of Chapter 686 of the Laws of 2003 and Pro-Ration of Consolidated Bills*, In the Matter of Implementation of Chapter 686 of the Laws of 2003, Case 03-M-0017 (Issued and Effective June 20, 2003), p. 36.

<sup>20</sup> *Energy Assn. of New York v. Pub. Serv. Comm’n*, 169 Misc. 2d 924, (Sup. Ct. Albany County 1996). (challenges to PSC “vision order” for electric industry restructuring and relaxation of statutory standards for new industry entrants were held to be premature and nonjusticiable, because the PSC had not actually ordered effectuation of the “vision.” Because the issues were nonjusticiable, statements of the court suggesting the PSC had power to relax statutory standards were merely dicta.

<sup>21</sup> *Energy Assn of New York v. Pub. Serv. Comm’n*, 169 Misc. 2d 924, (Sup. Ct. Albany County 1996), *aff’d* 273 A.D. 2d 708 (3d Dep’t. 2000); *appeal denied* 95 N.Y.2d 765 (2000). (holding that that intervenors lacked standing to challenge PSC lightening of regulation for competitive providers of retail electric service); *PULP, et al. v. Pub. Serv. Comm’n*, 252 A.D.2d 55 (3d Dep’t 1998) (holding that plaintiffs challenging non-HEFPA alternative standards approved by the PSC for gas marketers lacked standing and thus the court did not address the merits).

<sup>22</sup> *PULP, et al. v. Pub. Serv. Comm’n, supra*.

<sup>23</sup> It is well established that a regulatory agency cannot change a statutory filed rate regulation scheme. *See, MCI v AT&T*, 512 U.S. 218 (1994). (“For better or worse, the Act establishes a rate regulation, filed

The Commission has exercised jurisdiction over ESCOs for purposes other than HEFPA implementation. For example, in the November 2006 Order accompanying the revised UBP, the Commission adopted electric and gas commodity price reporting requirements, stating, “ESCOs shall comply with the mandatory price reporting requirements detailed above.”<sup>24</sup> Under the UBP, price reporting is a condition of ESCO continuing eligibility to operate within the state. ESCOs are subject to plenary Commission jurisdiction because they sell gas and electricity (PSL §5) and are “gas corporations” and “electric corporations” (PSL §§2(10), (12)).<sup>25</sup> The Commission has previously issued orders in connection with non-Article 2 issues, which contain decretal paragraphs with express orders to ESCOs.<sup>26</sup> It is illogical to assert that ESCOs are utilities only for Article 2 purposes when the Commission exercises its jurisdiction regarding non-Article 2 issues.

Finally, in asking the Commission to set ETFs, ESCOs are requesting that the Commission fix their rates and charges, thereby conceding that they are subject to Commission regulation. As was recognized in the recent Technical Conference, assessments on entities other than large public utilities are not unique; even the 23 smallest independent telephone companies operating in New York State have been assessed since their inception, as well as the smaller, competitive telephone companies.

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tariff system . . . and the Commission's desire to ‘increase competition’ cannot provide [it] authority to alter the well-established . . . statutory filed rate requirements. . . .” (citations omitted).

<sup>24</sup> *Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, In the Matter of Energy Service Company Price Reporting Requirements, Case 06-M-0647 (Issued and Effective November 8, 2006), at p. 18.

<sup>25</sup> See footnote 14, *supra*.

<sup>26</sup> *Order Extending Deadlines for Energy Service Companies*, In the Matter of Retail Access Business Rules, Case 98-M-1343 (Issued and Effective February 17, 2004), at p. 3; *Order Modifying Electronic Data Interchange (EDI) Standards and Uniform Business Practices*, In the Matter of Retail Access Business Rules, Case 98-M-1343 (Issued and Effective May 19, 2006), at pp. 23-24.

B. Section 18-a Assessment of ESCOs Will Not Result in “Double Recovery”

The Small Customer Marketer Coalition (“SCMC”), Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc. (collectively, “Constellation”) and RESA argue that §18-a assessments on ESCOs will result in “double recovery” from ESCO customers, because ESCO customers already pay the utility’s §18-a assessment in the utility’s distribution rate.<sup>27</sup> Though beguiling, this argument misinterprets the statute and has no foundation in regulatory assessment practice. Assessments are based on gross retail intrastate operating revenues over \$25,000.<sup>28</sup> The distribution utilities derive no gross revenues from the ESCO retail sales of commodity and therefore should pay no assessment on ESCOs’ gross retail revenues.

Since neither the ESCOs nor the public utilities are being assessed for ESCO commodity sales, the Commission is collecting no assessment on these revenues. This is particularly significant in view of the fact that so many non-residential and large-users have migrated to ESCOs. Commission statistics for January 2008 show that 50.2 percent

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<sup>27</sup> *Comments of Small Customer Marketer Coalition* in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at p. 6; *Comments of Constellation* in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at p. 3; *Comments of Retail Energy Supply Association* in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at p. 8.

<sup>28</sup> PSL §18-a(2)(b)(1). “The PSL § 18-a assessment is applied against gross retail revenues. As long as Noble Chateaugay remains exclusively a wholesaler, there are no retail revenues and no assessment is collected.” *Order Granting A Certificate Of Public Convenience And Necessity And Providing For Lightened Regulation*, Case No. 07-E-0257, Petition of Noble Chateaugay Windpark, LLC for a Certificate of Public Convenience and Necessity and an Order Providing for Lightened Regulation (Issued and Effective November 19, 2007), p. 11, n. 5.

of the total megawatts hours (“MWh”) load for nonresidential small customers and street lighting has migrated to ESCOs, and 77.8 percent of the total MWh load for large time-of-use customers has migrated to ESCOs.<sup>29</sup> A substantial part of the revenue base upon which assessments are made has been so eroded that the Commission has reached the statutory limit on assessments for non-ESCO utilities. This is compromising effective regulation of all utility service in the state.

Despite some parties’ views to the contrary,<sup>30</sup> there is no reason for the Commission to prolong these proceedings to discuss the applicability of the assessments, because the first assessment of ESCOs would be for the 2009-2010 fiscal year. Further delay that would place an assessment into the next decade cannot be justified. An end must be put to this free-ridership for ESCOs, who seek the continued benefit of Commission regulation without bearing their fair portion of the cost.

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<sup>29</sup> January 2008 Electric Retail Access Migration Reports, *available at* [http://www.dps.state.ny.us/Electric\\_RA\\_Migration.htm](http://www.dps.state.ny.us/Electric_RA_Migration.htm).

<sup>30</sup> *Comments of Energetix and NYSEG Solutions, Inc.* in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at p. 12; *Comments of Retail Energy Supply Association* in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at p. 8; *Comments of Small Customer Marketer Coalition* in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at pp. 4-5; *Comments of the New York State Energy Marketers’ Coalition* in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 17, 2008), at p. 9.

***Only the Customer of Record has Authority to Contract with ESCOs***

Allowing a third party who is not the customer of record to switch from the utility to an ESCO account is fundamentally a “slam,” *i.e.*, an unwanted switch. The Commission must protect consumers from this type of slamming, to prevent their exposure to ETFs occasioned by a switch back to the utility, and to the accrual of account arrears, which can negatively impact credit scores and the ability to obtain utility service in the future.

The Commission’s regulations implementing HEFPA permit utilities to require a written application for service if “the application is made by a third party on behalf of the person(s) who would receive service.”<sup>31</sup> The written application may require “reasonable proof of the applicant’s responsibility for service at the premises to be supplied.”<sup>32</sup> There is no reason to ease these restrictions for applications by third parties to ESCOs. Should the Commission choose to do so, it would effectively sanction the disparate treatment of third party ESCO and third party utility applicants.

PULP further urges the inclusion of a provision in every ESCO contract reciting that the person signing the contract is the customer of record, and that this provision be subject to the third party verification process.

***Other Issues***

A. ESCO Complaints on Commission Webpage

At the April 28, 2008 Technical Conference, the Office of Consumer Services supplied an analysis of complaints against ESCOs that the Commission received, by type

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<sup>31</sup> 16 NYCRR §11.3(4)(d).

<sup>32</sup> *Id.*

of complaint. This aggregated list included a wide variety of complaints, ranging from “Service Disconnect Request Not Done” to “Inaccurate Bill” to “Anti-Competitive Behavior” to “Dissatisfied with Terms and Conditions of Sales Agreement.” For calendar year 2007, by far the largest types of complaints were “Dissatisfied with Competition” and “Alleged ESCO Slamming.”

Although this listing was compiled specifically for the Technical Conference, it is precisely the type of information that should be readily available in the market, and which cannot be provided except by the Commission. Consumers have no reliable information concerning the issues that commonly arise in contractual transactions with ESCOs, and must rely on ESCO marketing sources, news reports, and anecdotal sources. To produce such a list on a monthly basis, alongside the ESCO complaint statistics that the Commission already produces, would add transparency and result in innumerable benefits for the market and to users. This should not be an undue burden upon Commission Staff, because the database categories have already been created and monthly ESCO complaint statistics are already being compiled.

The complaint statistics would also assist the Commission in monitoring the effectiveness of its efforts and would be helpful to consumers to determine what types of problems exist in the ESCO marketplace. PULP strongly supports their inclusion on a monthly basis on the Commission’s webpage.

B. Other Marketing Practices

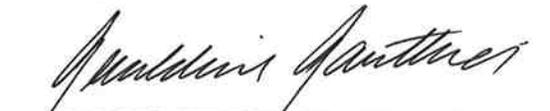
With the exception of setting rates for ETFs, PULP is generally in support of the changes. In addition, PULP is in agreement with the Consumer Protection Board’s position that any notices of violations or marketing statements and rules should be made

public and posted on the Commission's web page as a means to increase "consumer awareness . . . and provide[] a powerful incentive for ESCOs to comply with these requirements."<sup>33</sup>

### ***Conclusion***

For the foregoing reasons, PULP opposes rate-setting for early termination fees without an evidentiary basis to determine their justness and reasonableness; supports PSL §18-a assessment of ESCO retail revenues; generally supports the Consumer Protection Board and New York City petition for establishment of enforceable standards applicable to ESCO marketing practices, and supports publication of complaint report data. PULP appreciates this opportunity to share its views with the Commission.

Respectfully submitted,



**PUBLIC UTILITY LAW PROJECT  
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<sup>33</sup> *Comments of the New York State Consumer Protection Board* in In the Matter of Retail Access Business Rules, 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, 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, Cases 98-M-1343, 07-M-1514, and 08-G-0078 (April 18, 2008), at pp. 10-11.