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By Electronic Mail

Hon. Jaclyn A. Brillig

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.**

Dear Secretary Brillig:

Enclosed for filing with the Commission please find the *Comments of the Retail Energy Supply Association* in the above-captioned matter.

Thank you for your assistance in this matter.

Respectfully submitted,

Retail Energy Supply Association

By:   
Usher Fogel, Counsel

Cc: Luann Scherer (by electronic mail)  
Brandon Goodrich (by electronic mail)

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

**Case 98-M-1343 – In the Matter of Retail Access Business Rules.**

**COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION**

**I. INTRODUCTION**

In the Order Implementing Chapter 416 of the Laws of 2010 issued in this proceeding on December 17, 2010,<sup>1</sup> the Commission requested that parties submit comments “on the treatment of a fixed rate contract that renews as a fixed rate contract with a new rate.”<sup>2</sup> These comments are submitted on behalf of the Retail Energy Supply Association (“RESA”)<sup>3</sup> in response to the Commission’s solicitation of comments on this issue. RESA respectfully recommends that the Commission maintain the policy codified in the Order which exempts a contract renewal that involves a rate change, including a change in a fixed rate, from the obligation of obtaining the customer’s express consent to the renewal.

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<sup>1</sup> Case 98-M-1343 – In The Matter Of Retail Access Business Rules, *Order Implementing Chapter 416 Of The Laws of 2010* (Issued December 17, 2010) (“Order”). This statute implements an ESCO Consumers Bill of Rights (“BOR”), by adding a new Section 349-d to the General Business Law.

<sup>2</sup> Order, p. 18 and 9 FN 4.

<sup>3</sup> RESA’s members include ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus; Reliant Energy Northeast LLC. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

## II. COMMENTS OF RESA

### A. A Contract Renewal That Involves A Rate Change To A Fixed Rate Contract Should Not Require The Express Consent Of The Customer

In connection with the renewal of existing contracts the Commission determined that a rate change would not be categorized as a material change requiring the customer's express consent. This position was codified in the new Uniform Business Practices ("UBP") Section 5.B.4.d, which provides, in part:

"Regarding contract renewals, with the exception of a rate change, or an initial sales agreement that specifies that the agreement renews on a monthly basis with a variable rate methodology which was specified in the initial sales agreement, all other changes will be considered material and will require that the ESCO obtain the customer's express consent for renewal."

This approach reflects a reasonable balancing of consumer interests, business realities and the maintenance of an efficient and cost effective enrollment process.

The Commission indicated that while the UBP language cited above "exempts a contract renewal including a change in rate from requiring the express consent from a customer",<sup>4</sup> it was nonetheless concerned that a "contract that renews as a fixed rate contract with a new rate could bind a customer to a contract with significant change in rates through inaction." This concern is more than adequately assuaged by the panoply of fulsome protections afforded the applicable customer classes under the BOR and the UBP where a renewal of a fixed contract merely involves a change in the rate.

In the first instance, the renewal cannot be unilaterally imposed by the ESCO. Instead, the ESCO has the obligation of "clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and the customer's option to reject the renewal terms." Under this notification process, the customer will be apprised of the

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<sup>4</sup> Order, p. 9 FN 4

specific rate change associated with the renewal process as well as the customer's uninhibited right to reject the proposed renewal contract in its entirety.

Moreover, in addition to the initial timely notice requirement combined with the power of rejection, the UBP further states that a customer may not be charged an early termination fee for a renewal contract "if the customer objects to renewal within three business days of receipt of the first billing statement under the agreement as renewed."<sup>5</sup> In other words, after receiving timely notice, the customer may avoid imposition of an early termination fee, if the customer objects to the renewal of the contract within 3 business days after receiving the first billing statement. This significantly exceeds the standard 3 day right of rescission for residential customers under which the residential customer must object to the agreement within 3 days of its signing or receipt.<sup>6</sup> Following the BOR, the ESCO will have to provide the renewal notice no later than 30 days before the expiration of the contract and the customer can avoid an early termination fee by objecting within 3 days after receiving the first bill, which can be a number of months later depending on the speed of the enrollment and the utility billing cycle. There is to our knowledge no other consumer standard that enables a customer to avoid contract liability by objecting to the contract months after it was agreed to by the parties.

The customer's exposure is further mitigated by the imposition of limits or caps on the size of any early termination fees. As set forth in UBP Section 5.B.4.b:

Termination fees – no agreement for the provision of energy by an ESCO shall require a termination or early cancellation fee in excess of either a) \$100 for any contract with a remaining term of less than 12 months; or b) \$200 for any contract with a remaining term of more than 12 months or; c) twice the estimated bill for energy services for an average month, provided that an estimate of an average monthly bill was provided to the customer when the offer was made by the ESCO along with the amount of any early termination fee.

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<sup>5</sup> This is also incorporated in the BOR, GBL Section 349-d(6).

<sup>6</sup> UBP Section 5 Attachment 3.A.6.

With this limitation, the customer's exposure in the event of renewal is not open ended but is financially limited and significantly prescribed ---- more so than other consumer contracts.

Following this rubric, in the case of renewals, the customer will receive timely notice, have the right to reject any renewal, have the opportunity to avoid liability by objecting to the renewal with 3 business days of receiving the first bill, and even if no objection is raised the customer's liability will be restricted to the limitation on early termination fees. The combination of these factors more than adequately protects the consumer.

The Commission has recognized that allowing the customer to cancel a renewal contract 3 business days after receiving the first bill exacerbates the ESCO's "financial exposure"<sup>7</sup> To also impose the obligation to obtain express consent would only serve to further worsen the ESCO's financial exposure.

It is also unreasonable to selectively impose the express consent requirement for a fixed contract rate change as the BOR does not even impose such a requirement in the first instance on contract renewals. In the Order, the Commission acknowledged that the language of GBL Section 349-d(6) "does not specifically require that an ESCO obtain a customer's express consent for any contract renewal..."<sup>8</sup> In light of the more lenient approach codified in the underlying legislation, the compromise approach adopted by the Commission that does not impose the express requirement obligation for a renewal contract rate change is equitable and, in fact, more consistent with the BOR.

It is also important to emphasize that in the renewal situation, the customer already has an on-going commercial relationship with the ESCO that has been in place for the term of the agreement. In an existing commercial framework it is a common practice to renew the contract where

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<sup>7</sup> Order, p. 7.

<sup>8</sup> Order, p. 8.

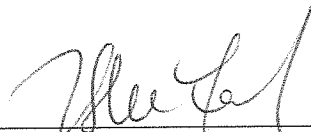
there is only a change in the price by providing adequate notice without necessarily obtaining express consent from the customer. There is no logical reason why a different more onerous practice should be imposed in the UBP.

**III. CONCLUSION**

RESA appreciates the opportunity to address this matter and respectfully requests that the Commission adopt policies consistent with the comments presented herein.

Respectfully submitted,

Retail Energy Supply Association

By:   
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Usher Fogel, Counsel

Dated: January 18, 2011  
Cedarhurst, New York