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November 4, 2010

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.**

**SAPA Notice PSC-39-10-00019-P**

Dear Secretary Brillig:

Enclosed for filing with the Commission please find the original of the “Comments of 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.**

**SAPA Notice PSC-39-10-00019-P**

**COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION**

**I. INTRODUCTION**

These comments are submitted on behalf of the Retail Energy Supply Association (“RESA”)<sup>1</sup> in response to the Commission’s solicitation of comments on the proposed modifications of the Uniform Business Practices (“UBP”) implementing the provisions of NY General Business Law Section 349-d, enacted August 31, 2010 to become effective January 11, 2010.<sup>2</sup>

**II. COMMENTS OF RESA**

**A. Proposed UBP Modifications**

The proposed Section 5(1) states that the additional terms are applicable to “residential customers...” It is important to clarify the ambit of the term “residential”. There are various

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<sup>1</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.; Gexa Energy; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; PPL EnergyPlus; Sempra Energy Solutions 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.

<sup>2</sup> This statute implements an ESCO Consumers Bill of Rights (“BOR”); Laws of New York, 2010, Chapter 416.

large commercial customers that receive service through multiple accounts, most of which are commercial in nature. However, a small number of accounts associated with a commercial customer may be classified as residential in nature. In this regard a university would be viewed as a commercial customer with many individual accounts. However, one of the accounts may be for residential service to the President's home. This is also common with respect to management companies and municipalities, or a church diocese in which the religious leader lives on premise in a residence designated residential by the utility. The true commercial nature of this customer is underscored by the fact that the ESCO's contractual counter-party in these "mixed meter" situations is a non-residential entity, either non-profit or business, and the customer payments to the ESCO come from a business account – not a personal checking account that you would expect from a residential customer.

In such circumstances, it is unreasonable to view the customer as a residential customer subject to the BOR. The more rational view is to exempt such a commercial customers from the application of the BOR.

Section 5(1) (d) at page 29 dealing with material changes provides, in part:

Regarding contract renewals, with the exception of a rate change, or an agreement that renews on a monthly basis with a variable rate 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.

GBL Section 349-d (6) requires the express consent of the customer to any material changes in the existing contract. In connection with the renewal of a contract, however, the statute only requires the provision of written timely notice prior to the renewal date of the terms of the renewal offer and of the customer's option not to accept the renewal offer. The statute does not

require that the ESCO obtain the customer's "express consent" for a renewal. Accordingly, the requirement to obtain express consent for a contract renewal should be omitted.

This section also makes reference to a "variable rate which was specified in the initial sales agreement". The common practice with a variable rate offering is to provide a rate methodology explaining how the rate is determined. However, a monthly variable product does not specify a particular as that rate can change on a monthly basis. Therefore, it is inaccurate to refer to a variable rate that is specified in the agreement.

This section deems a variable month to month contract as not reflecting a material change. To provide better guidance it is suggested that the regulations also indicate that where an initial sales agreement states that the agreement renews on a monthly basis with a variable rate, the ESCO does not have to provide the renewal notice set forth in the UBP.

Section 10.C. 1.b directs that for in-person solicitations the ESCO shall provide each prospective customer with a copy of the BOR. In practice, many customers that are initially solicited do not want to take any service. It would make little sense to provide such customers with a copy of the BOR both from a consumer protection perspective as well as the incurrence of unnecessary costs. It is recommended that the ESCO be required to provide a copy of the BOR to the customer prior to the customer's execution of the agreement or acceptance of taking service from the ESCO.

Section 10.C.1.d requires that written materials and the BOR be "provided to customer in the same language utilized to solicit the customer." This is a reasonable requirement; however, the ESCO should be obligated to prepare and provide materials in another language only if the

ESCO does in fact market in another language. In other words, the ESCO should not have a generic obligation to prepare and provide translations of the BOR. This obligation would only arise if the ESCO chose to market in a language other than English

Section 6 of the statute indicates that it will apply to “all energy services sold or offered for sale “on or after the effective date” (January 11, 2011). This language does not clearly indicate whether the BOR is applicable to sales made after the effective date pursuant to a contract executed prior to the effective date. Thus, for example, an ESCO may have entered into a contract with a customer in April 2010 for a 12 month term. Under such a contract the ESCO would be supplying commodity both prior and subsequent to the effective date of the BOR. It is strongly recommended that grandfathering status be applied to contracts that preceded the effective date of the statute. It would be inequitable to impose these new obligations upon contractual relationships that were negotiated prior to the effective date. Moreover, it could be extremely difficult and problematic to modify existing contracts to comply with the new regulations.

#### **B. Proposed ESCO Consumers Bill of Rights**

It would be useful to try and reduce some of the longer sections to plain language bullets that are easier to comprehend by the typical customer. As this is a document that will be used by the typical residential customer it would be helpful to keep it as short as possible.

The first bullet indicates that customer is entitled to a “clear description of the services offered by both the ESCO and the utility...” ESCOs are hesitant about providing broad explanations regarding “utility” service as that encompasses a wide array of subjects beyond retail access. The first sentence in the BOR already notifies the customer that energy can be

purchased from the ESCO or the utility. Therefore, the BOR should only add that that the ESCO will inform the customer that the utility will continue to deliver the energy and respond to emergencies.

**III. CONCLUSION**

RESA 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.

Respectfully submitted,

Retail Energy Supply Association

By:   
Usher Fogel, Counsel

Dated: November 4, 2010  
Cedarhurst, New York