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April 16, 2010

Hon. Jaclyn A. Brilling
Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, New York 12223

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

Case 98-M-0667 – In the Matter of Electronic Data Interchange.

Dear Secretary Brilling:

Enclosed for filing with the Commission in the above-referenced proceedings, please find the original and five (5) copies of the *Reply Comments of the of the Retail Energy Supply Association.*

Thank you for your assistance in this matter.

Respectfully submitted,

Retail Energy Supply Association

By: _____
Usher Fogel, Counsel

Enc.

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

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

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REPLY COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

By Petition dated January 26, 2010 submitted in accordance with 16(A) NYCRR Section 3.2 of the Commission's rules and regulations, the Retail Energy Supply Association ("RESA")[1] requested that the Commission (a) amend the Uniform Business Practices (UBP)[2] to allow ESCOs to retain a customer that has previously either

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[1] RESA's members include ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, 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; 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.

[2] 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, *Order Adopting Amendments to the Uniform Business*

requested or was scheduled to return to full utility service; and (b) prohibit utilities from returning a customer to full utility service unless such a request to full utility service has been made by the customer or the ESCO acting on behalf of the customer. In response thereto comments in opposition were filed by the Joint Utilities[3], Consolidated Edison Company of New York, Inc. ("Con Edison"), and Central Hudson Gas & Electric Corporation ("Central Hudson"). Comments in support of the requested relief were submitted by the New York State Energy Marketers Coalition and the Small Customer Marketer Coalition. These reply comments will respond to the various objections raised by the utility parties.[4]

II. THE PROPOSED AMENDMENTS ARE REASONABLE AND EQUITABLE

The central theme running through the utility comments is that the utility should be allowed to retain full discretion to return a customer to full utility service in the event that any condition precipitates an account number change.[5] The account number status, not the desire of the customer, shall be what determines which entity provides delivery and commodity service to the customer. In reality, the utilities appear to be mired in the world as it existed prior to the advent of deregulation and the unbundling of commodity and delivery service.

Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing (issued October 27, 2008), Appendix B ("2008 UBP Order").

[3] A consortium of local distribution utilities.

[4] Con Edison and Central Hudson generally raise the same arguments presented by the Joint Utilities. Therefore, in these reply comments we will address the contentions raised by the Joint Utilities.

[5] Joint Utilities, pp. 2-5.

In the earlier environment it was appropriate for the utility to effect a change in the provider of delivery and commodity service where there was an account number change or any other factor that modified the identity of the customer vis-à-vis utility service. This was appropriate because both services were being provided by the same entity so that the expression of interest or information provided by the customer with respect to delivery also was applicable to the commodity and vice versa. However, that world no longer exists. In the current environment there are two separate vendors providing two separate and distinct products --- the utility providing delivery and the ESCO providing commodity. Therefore, the utility cannot assume that because of information provided by the customer to the utility which, based upon the utility's practices, engenders a change in account number necessarily implies or in any way supports the proposition that the customer also wants to achieve or effect a change in the provider of commodity service.

What makes the utility position even more egregious is that it essentially argues for full discretion to terminate ESCO service even where the customer has given no indication of a desire to return to full service or has in fact expressly indicated that it wants to remain with the ESCO. In the utility world an account number change trumps everything even the express wishes of the customer. This is inconsistent with logic, equity, a workable competitive market and the just and reasonable application of the utility's monopoly power.

Ironically the examples posited by the utilities underscore the veracity of the position advocated by RESA. It is argued that situations in which utilities close customer accounts and open new accounts may not be recognized by RESA as involving the

cessation of legal responsibility of the former customer for utility service and the initiation of legal responsibility by a new customer. In this regard the utilities reference the situation of spousal death or divorce and a sale of a business.[6] In these situations the utility will automatically make an account number change and terminate ESCO service. But why this should be automatically be done. Though from the utility's perspective they are free to change account numbers, where an ESCO has been providing service to a residence the mere fact of a death or divorce among the couple does not necessarily indicate that the party to the contract wants to terminate service with the ESCO or that the ESCO is free to terminate the provision of service. Similarly, the sale of a business to another entity does not in and of itself create any presumption that either the seller or the new buyer seeks to terminate the existing ESCO service. To the contrary, in many situations existing contracts with vendors will be assumed by the acquiring company as a matter of contract law and common business practice.[7] Nonetheless, the utility says in these situations without question and in every instance ESCO service will be terminated and the customer will return to full utility service. This position is untenable.

The utilities assert that RESA disingenuously "ignores the fact that the ESCO enrolled the customer not by name but by account number."[8] But this is a distinction without meaningful impact. A customer is enrolled by account number as a means of convenience both for the utility and the overall implementation of retail access. Conceivably customers could be enrolled by some other identifying factor such as a Social Security number, name or a host of other types of information that would identify the customer for retail access enrollment purposes. A consensus developed that given the

[6] Joint Utilities, p. 5
[7] *Id.*
[8] Joint Utilities, p. 6.

ubiquitous nature of account numbers and its ease of application this should be the identifying factor by which customers were enrolled. Notwithstanding this determination, it was at no time agreed to that by using account number as the enrollment factor, the ESCOs were agreeing or authorizing the utility to unilaterally terminate ESCO service to such customers due simply to a change in the account number.

The utilities further argue that the nature of any existing contractual relationship between ESCO and a customer is irrelevant because while it may be binding on the ESCO and the customer, "it is not binding on the utilities",[9] and they do not know the terms of the ESCO contract with the former customer or the new customer and should not be presumed to know such terms.[10] However, these factors argue *against* the utility interfering with the contractual relationship between the ESCO and the customer. As the utility is not a party to the ESCO contract, and is ignorant of the terms thereof, it would behoove the utility to *refrain* from terminating the provision of commodity supply service and effectively vitiating the contract without any agreement from the parties to the contract. Remarkably, the utility argues that its ignorance of the relationship between the ESCO and the customer provides it with authority to terminate the underlying contract. This is a ridiculous argument.

To muddy the waters and divert attention from their practices, the utilities emphasize that it is imperative that the ESCO obtain proper authorization from the customer to remain on retail access service and that through the various EDI transactions the ESCO receives all the information needed to take any subsequent action.[11] These assertions ignore entirely the utility's initial and unilateral determination to terminate

[9] Joint Utilities, p. 7.
[10] *Id.*
[11] Joint Utilities, pp. 8-9.

ESCO service without any indication that the customer wants to terminate said service. Therefore any drop in the view of the ESCOs is illegal and inappropriate. In addition the utilities without initially informing the ESCO or customer many times retroactively backdate the drop and then charge-back under the purchase of receivables program. In other words the process is not clear and as simple as expressed by the utilities. Further, often times by the time the information is provided to the ESCO it is too late to rectify the situation. Also, the basis for the drop is not identified. Normally a drop occurs where either the customer requested it or the utility requested it. Here we are talking about a situation where neither the customer nor the ESCO requested the drop and therefore the ESCO has absolutely no understanding of why a drop occurred or that in fact it was done unilaterally by the utility.

The utilities gratuitously assert that if an incumbent ESCO cancels a pending return to utility service and the customer did not authorize the cancellation it would be considered a slam and the ESCO would be subject to the consequences identified in the UBP.[12] This argument is pure chutzpah. We are talking about a situation where the return to full utility service was never requested by the ESCO or the customer but was unilaterally imposed by the utility. In other words, it is the utility that is engaging in slamming and should be subject to the consequences identified in the UBP!

It is also argued that the unilateral termination of the ESCO contract should not be considered a tortuous interference with the ESCO's contract because the ESCO sales agreement does not have priority over the utility's relationship with the customer, and the utility's actions are merely changing service from one customer to another customer.[13]

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[12] *Id.*
[13] Joint Utilities, p. 9-10.

Once again the utility's arguments are unpersuasive. At no time has RESA argued that the ESCO sales agreement has priority over the utility's relationship with its customers. The utility is free to do what it wants with its customer with respect to delivery service, and RESA does not propose to in any way interfere with that relationship. It is however, unquestioned, that the governing document with respect to commodity service between the ESCO and the customer is the sales agreement between the ESCO and the customer not the utility's provision of distribution service under the tariff. Therefore there are different procedures and rules, such as the UBP, governing the provision of ESCO service as compared to the provision of delivery service.

The assertion that tortuous interference does not occur because there are in fact two customers rather than one customer, is unpersuasive. The fact remains that the ESCO has a binding contract with a particular customer and that the utility interferes with that contract by terminating the provision of service under that contract and unilaterally returning the customer utility to utility commodity service. That is clear and distinct tortuous interference. By way of example it would be no different than a situation where ESCO A has a binding 12-month contract with a customer and another ESCO B without any agreement of ESCO A or the customer switches that customer to take commodity service from ESCO B. In such a situation it is clear that a tortuous interference with an existing business relationship has occurred. The same applies to the utility's behavior in this regard.

Not surprisingly, the utilities gloss over entirely the clear finding that their behavior violates and stands in direct conflict with the express provisions of the Uniform Business Practices governing the return of a customer to full utility service. Under UBP

§ 5H.1, a customer arranges for a return to full utility service "by contacting either the ESCO or the distribution utility in accordance with this paragraph." There is nothing in this provision of the UBP or any other provision of the UBP which says that a return to full utility service can be accomplished without the express indication of the customer or by unilateral action by the utility. We understand why the utilities have gone through these contortionist arguments to protect their its operating practices, but the plain fact remains that they stand in obvious conflict with the existing and effective provisions of the UBP.

It is also argued that RESA should be directed to show that the economic value of customer benefits warrants implementation of the proposed UBP amendments.[14] In this regard it is worthwhile noting that both in the Working Group dealing with this issue as well as in the complaints filed with the Commission, many ESCOs have expressed significant concern over the impact of this utility practice which obviously is of a ubiquitous nature. Moreover, the plain fact remains that an underlying premise of retail access is that the customer's desire and intent is the paramount factor. ESCOs follow this standard and so should the utilities.[15]

[14] Joint Utilities, p. 11.

[15] The Joint Utilities' proposed modifications to Section 5.D.6 of the UBP (Joint Utilities, p. 11) are not helpful as they gloss over entirely the major problem associated with the utility practice of terminating ESCO service due to an account number change.

III. CONCLUSION

For the reasons set forth herein, RESA respectfully urges the Commission to grant the relief sought in this petition in its entirety.

Respectfully Submitted,

Retail Energy Supply Association

By _____
Usher Fogel, Counsel

Dated: April 16, 2010
Cedarhurst, New York