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December 10, 2008

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 07-M-1514 – Petition of the 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 Brilling:

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

A copy has been served on all parties on the service list by electronic mail.

Thank you for your assistance in this matter.

Respectfully submitted,

Retail Energy Supply Association

By: *Usher Fogel, Counsel*
Usher Fogel, Counsel

Cc: Service List (by electronic mail)

STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

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

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# REPLY OF THE RETAIL ENERGY SUPPLY ASSOCIATION TO PETITION FOR REHEARING AND CLARIFICATION

## I. INTRODUCTION

In accordance with Section 22 of the Public Service Law and 16(A) NYCRR Section 3.7, the Retail Energy Supply Association ("RESA")[1] hereby replies to the Petition for Rehearing and Clarification by the Public Utility Law Project, Inc. [2] submitted with respect to the *Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Company's Tariff Filing,* issued in the above-captioned proceedings on October 27, 2008.[3]

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[1] RESA's members include Commerce Energy, Inc; Consolidated Edison Solutions, Inc; Direct Energy Services, LLC; Gexa Energy; Hess Corporation; Integrys Energy Services, Inc.; Liberty Power Corp.; Reliant Energy Retail Services, LLC; RBS Sempra Energy Solutions, LLC; SUEZ Energy Resources NA, Inc. and US Energy Savings Corp. 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.

[2] Hereafter referred to as "Petition",

[3] Case 98-M-1343 – In the Matter of Retail Access Business Rules, Case 07-M-1514 – Petition of the New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing

## II. PRELIMINARY STATEMENT

The Public Utility Law Project, Inc. ("PULP") seeks rehearing on the following three issues: enforcement, early termination fees, and release of ESCO data. As set forth in 16(A) NYCRR Section 3.7 (b), rehearing may only be sought where the Commission has committed an error of law or fact, or that new circumstances warrant a different determination. As will be demonstrated below, the Commission's determinations with respect to the matters raised by PULP were in all respects just and reasonable, and untainted by any error of law or fact.

## III. Enforcement

PULP contends the Commission erred by rejecting its proposal to establish statewide guidelines rather than implementing the revised marketing practices through the amendment process of the Uniform Business Practices ("UBP"). The contentions by PULP are without merit and should be rejected by the Commission.

In essence, PULP seeks the enactment of a new set of standards now labeled guidelines that would replace the UBPs. In their view substitution of the UBP wit guidelines would establish a uniform statewide regulatory scheme enforceable with specific penalties by the Commission and would somehow better serve the public interest. But there is simply no merit to this proposal.

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Practices of Energy Service Companies, and .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 Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Company's Tariff Filing* (issued October 27, 2008) ("Order").

The UBPs developed by the Commission have represented the input and collaboration of all affected parties representing all interest groups including consumers, and constitute an effective statewide regulatory frame work directly enforceable by the Commission. Over time, the standards codified in the UBPs have been modified in response to changing market developments. There is therefore no logical or public policy need to replace the UBPs by a new set of standards or attaching a new label. Such a move would be wasteful, duplicative and serve no useful public policy purpose.

The repeated assertion by PULP that the Commission does not enforce the UBPs is erroneous as a matter of fact and law. The original and all subsequent amendments of the UBPs have been adopted by an order of the Commission. Such orders are directly enforceable against an ESCO, and the Commission has a plethora of enforcement remedies that can be applied in response to any violation by the ESCO. It is therefore incorrect to assert as PULP repeatedly does, that the Commission will not enforce the new marketing standards codified in the UBP. To the contrary, the Commission has made it amply clear that it will review ESCO sales agreements and monitor and enforce the new marketing standards codified in the Order. [4]

PULP's assertion that the matter of whether an ESCO is a subject to all the provisions of the Public Service Law is still open to dispute, was specifically rejected by the Commission in the Order wherein it noted that ESCOs are exempt from PSL Article 4 regulation.[5]

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[4] PULP's suggestion that an ESCO contract should be replaced by tariffs is a contention that has been repeatedly rejected by the Commission (Petition, p. 4). See, e.g., Case 94-E-0932, Competitive Opportunities For Electric Service, Opinion No. 97-17 (issued November 18 1997); Case 04-E-0572, Consolidated Edison Company of New York, Inc., *Order Adopting the Terms of Three-Year Joint Proposal* (issued March 24, 2005); Case 07-M-0458, Proceeding On Motion Of The Commission To Review Policies And Practices Intended To Foster The Development Of Competitive Retail Energy Markets, *Order Determining Future Of Retail Access Programs* (issued October 27, 2008) at 18.

[5] Order, p. 10.

For all of these reasons PULP's efforts on rehearing to replace the UBPs with a new regulatory structure should be rejected.

## IV. Early Termination Fees

In connection with the treatment of early termination fees the Commission rendered the following reasonable determination:

> As noted above, we are adopting in this order a proposal which should materially improve the disclosures ESCOs make to consumers in ESCO sales agreements, including any provisions for the imposition of early termination fees. With the improved disclosure of this information, we expect that the customer's ability to understand in advance the amount of such charges and when these charges may be imposed is greatly enhanced. As a result, we expect that customer problems with this aspect of the ESCO sales agreements will be greatly reduced. If experience in the future suggests that consumer complaints have not been significantly reduced, we may revisit this issue to reassess the value of early termination fees to customers and ESCOs and the limitations, if any, which might be appropriately imposed on the use of such fees. [6]

In the Petition, PULP initially argues that a termination fee assessed to a gas customer violates the ban on service charges codified in Public Service Law § 65(6) (Petition, pp. 4-5), and that it represents a charge that the ESCO requires in order to provide service. This argument is also unpersuasive. The Commission specifically considered and rejected this claim. As the Commission noted:

> We disagree with PULP. Early termination fees are not a "service charge" within the meaning of Public Service Law §65(6). Foremost, they are not a requirement imposed by ESCOs to provide service. In the same case cited by PULP, Kovarsky v. Brooklyn Union Gas Co., supra, the court defined a service charge as "a charge made to meet

[6] Order, p. 21.

> the expense of putting (gas or electric) meters in usable condition" Id. at 638; see also Public Service Law §65(6)[a service charge is an "additional fee for service"]. Termination fees, while a charge to customers, are only imposed when a customer terminates service from an ESCO and only then, after a customer has failed to abide by the minimum commitment made to the ESCO to receive service. Thus, termination fees are not a requirement to receive electric service and, therefore, are not prohibited by Public Service Law §65(6).[7]

Moreover, the Commission has previously determined that ESCOs are exempt from regulation under Article 4 of the PSL, which contains Section 65, and an ESCO is only considered to be utility for purposes of Article 2 of the PSL.[8]

PULP next argues that there is no commercial justification for the imposition of termination fees, and such fees should be prohibited (Petition, pp. 5-7). These claims are without merit. As discussed in detail in the record below, it is entirely appropriate and reasonable for ESCOs to seek and obtain damages arising from a customer's unauthorized breach of the contract prior to the expiration of its legal term. The very nature of a contractual relationship is to bind the parties once a meeting of the minds has occurred and to restrict the ability of either party to walk away from the contract should other opportunities subsequently arise. The notion that a customer should not be obligated to meet the terms of an agreement because the customer may subsequently want to change a provider during the term of the contract, is simply absurd, and would impose significant financial hardship on ESCOs. Moreover, the PULP position would necessitate the imposition of a business risk premium by the ESCO to account for potential early termination, thus increasing the price to the end-use customer.

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[7] Order, p. 22.

[8] Case 06-M-0647 – In the Matter of Energy Service Company Price Reporting Requirements, Case 98-M-1343 – In the Matter of Retail Access Business Rules, *Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms* (issued November 8, 2006) p. 10; Case 94-E-0952 – In the Matter of Competitive Opportunities Regarding Electric Service, *Opinion No. 97-17* (issued November 18, 1997) pp. 34-5; and Case 98-M-1343, 99-M-0631, and 03-M-0117, In the Matter of Retail Access Business Rules, et. al, *Order on Petitions for Rehearing and Clarification* (issued December 5, 2003) p. 44.

As indicated at the Technical Conferences, an ESCO's risk associated with a fixed priced contract is directly related to the market movement since the contract was executed. Any limitation on termination fees would impose additional business risks on ESCOs in a falling market. For example, there were two distinct periods in 2006 where market prices dropped by 15% in a one -month period[9] where, without the ability to impose termination fees, ESCOs could have been exposed to significant financial harm. Thus, restricting termination fees places the ESCO at considerable financial risk.

Absent the ability to impose termination fees (or the opportunity to recover real damages) for a breach of contract, the entire basis for entering into a contract and commercial relationships would become a nullity. It effectively converts the term length of all contracts to month-to-month basis or less since customers could leave at any time without financial responsibility for costs they have required their ESCO to incur. There is no reason why a consumer of energy commodity service should be able to ignore legitimate contractual obligations and walk away from lawful and existing contracts.

PULP raises other alarmist concerns regarding the potential negative impacts of termination fees, and urges that consideration of termination fees be referred to Phase II of this proceeding. However, as the Commission noted, with the new rules in effect, disclosure concerning termination fees will be enhanced and Staff will monitor the progress in this area.

Finally, PULP requests that the Commission undertake a survey to ascertain why customers break their contract with an ESCO (Petition, p. 7). This action is unnecessary and wasteful. Ultimately, competitors in a robust market will ascertain what is needed to attract and maintain customers; this is not the direct task of the Commission. Further, as already noted, the

[9] Between February and March and September and October.

Staff will continue to monitor implementation of the new standards to assure and maintain best practices.

## V. ESCO Data

In connection with the disclosure of ESCO data, the Commission noted as follows:

> In response to the Commission's March 19, 2008 Notice, CPB and PULP believe that information on the number and type of customers that an ESCO serves, and the number of complaints filed against an ESCO should be made public. The ESCOs disagree, and in support of their argument cite an October 20, 2006 letter, in which Secretary Brilling stated that the disclosure of such customer information could cause substantial injury to the competitive positions of ESCOs, especially new market entrants and those with specific geographic marketing campaigns. We see no reason to adopt a different reasoning in this case. Accordingly, we will continue to maintain the confidentiality of the information which describes the numbers of customers served by each ESCO.[10]

In the Petition, PULP merely reiterates the claims it made below which were reviewed and rejected by the Commission. It offers no cogent analysis demonstrating that this information is not commercially sensitive and that its disclosure would not cause substantial injury to the competitive position of individual ESCOs. This matter has now been reviewed by the Secretary and the Commission, and in both instances the finding was established that this data should be shielded from public disclosure. Accordingly, PULP's arguments should be rejected.

[10] Order, p. 26.

## VI. CONCLUSION

For the reasons set forth herein, RESA respectfully urges the Commission to reject the Petition of PULP in its entirety.

Respectfully submitted,

Retail Energy Supply Association

By: *Usher Fogel, Counsel*
Usher Fogel, Counsel

Dated: December 10, 2008
Cedarhurst, New York