STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

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.

PETITION FOR REHEARING AND CLARIFICATION OF THE RETAIL ENERGY SUPPLY ASSOCIATION

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 petitions for rehearing and clarification of 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.[2]

[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] 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, 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

II. PRELIMINARY STATEMENT

On March 19, 2008, the Commission instituted these proceedings by issuance of a *Notice Soliciting Comments on Revisions to the Uniform Business Practices*.[3] In the Notice the Commission identified certain areas of concern related to the oversight provisions of the Uniform Business Practices ("UBP") and their applicability to ESCO marketing practices, the remedies available under the UBP to Staff and the Commission in this area and the sufficiency of the residential consumer protections provided by the UBP.[4] The Commission indicated that it was appropriate to consider modifications to the UBP that incorporate standards for marketing by ESCOs and third party contractors acting on their behalf; improve residential customer protection; strengthen the oversight of and expand the remedies available to Staff and the Commission; and other related matters and housekeeping items.[5]

To address these goals, the Commission in the Notice sought comments on the proposed amendments and modifications to the extant UBP and, in addition, on a number of other issues. Thereafter, initial and reply comments were submitted by numerous parties and Staff convened a series of technical conferences. On October 27, 2008, the Commission issued the Order wherein the Commission responded to the comments and issues raised by the parties and adopted certain amendments to the Uniform Business Practices ("UBP"), including new standards to govern ESCO marketing activities.

---

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").

[3] *Id., Notice Soliciting Comments on Revisions to the Uniform Business Practices* (issued March 19, 2008) ("Notice").

[4] Notice, p. 3.

[5] Notice, p. 3

III. GROUNDS FOR REHEARING AND CLARIFICATION OF THE ORDER

A. The Commission erred by applying the marketing standards and the Customer Disclosure Statement to all ESCO customers regardless of customer class.

B. The Commission should clarify the consequence listed at Section 2.D.5.b.5 does not apply to commercial customers and industrial customers.

C. The Commission should clarify that the provisions of Section 10.C.1 only apply to an "in-person" contact with a customer that is unsolicited by the customer or made without first obtaining an appointment with the customer

D. The Commission should clarify that UBP Section 10.C.3.f provides the ESCO with ten days from receipt of the complaint to investigate customer inquiries and complaints regarding marketing practices.

E. The Commission should clarify that UBP Section 2.D.4.j should read to provide the ESCO with ten days to reply to a complaint referred to the ESCO by the Department.

F. The Commission should clarify that pursuant to UBP Section 2.B.1.b.1.ii, the Sales Agreement shall contain the termination fee or the method of calculating the termination fee.

G. The Commission should clarify that the effective date for sales agreement and photographic identification changes should be at least 90 days after completion of Staff review of ESCO compliance filings.

H. The Commission should clarify that the provisions of Section 10.C.2 do not apply and are not intended to interfere with the usual and customary communication between ESCOs and customers.

I. The Commission should clarify that a technical term may be included in any portion of the sales agreement.

IV. THE COMMISION ERRED BY APPLYING THE MARKETING STANDARDS TO ALL ESCO CUSTOMERS REGARDLESS OF CUSTOMER CLASS.

The Commission ruled that the marketing standards adopted in the Order would be applicable "to all ESCO marketing regardless of customer class."[6] This determination is unreasonable, arbitrary and at odds with the record developed in this proceeding. The Commission should reverse its determination and limit the applicability of the new marketing standards to residential customers.[7]

A. The Commission Failed To Provide A Rational Basis For Applying The New Marketing Standards To Commercial And Industrial Customers

In reaching the determination that the new marketing standards adopted in the Order should be applicable "to all ESCO marketing regardless of customer class," the Commission, after summarizing the position of the various commenting parties, offered the following explanation:

There are administrative difficulties associated with determining where

[6] Order, p. 12.

[7] The Order does not specifically indicate whether the modifications dealing with the Customer Disclosure Statement (Section 2.B.2) are also applicable to all customers. In the event the Commission also intends to apply the requirements of Section 2.B.2 to all customers, RESA seeks rehearing on such determination on the same grounds set forth in the Petition with respect to the applicability of the marketing standards.

> one class of customers ends and another begins, as existing service classifications in distribution utility tariffs differ. In addition, the existing UBP are applicable to all customers and the marketing standards we are approving today mandate reasonable standards of conduct for ESCOs to ensure that any and all customer expectations of fair and accurate information is met. Therefore, we apply the marketing standards to all ESCO marketing regardless of customer class.[8]

This reasoning fails to adequately address the arguments raised in the comments against expansion of the applicable scope of the standards, and does not present a rational and reasonable basis for including all customer classes within the scope of the marketing standards.

First, there is no evidence or data indicating that ESCOs or utilities experience any material difficulty in distinguishing between residential and commercial customers. Indeed, residential customers are clearly delineated by specific service classifications, usage levels and patterns. ESCOs commonly develop billing models for residential customers and have little, if any, difficulty distinguishing them from commercial and industrial customer classes.

Second, there is no evidence or data indicating that the Commission or the Legislature experienced any material difficulty in distinguishing between residential and commercial customers in a variety of policy areas including consumer protection. Indeed, examination of the relevant provisions of the Public Service Law, Commission regulations, the UBP and the State consumer law reveals that marketing and consumer protection standards are, in fact, differentiated on the basis of customer class.

This is especially true regarding the centerpiece of consumer legislation in the Public Service Law – the Home Energy Fair Practices Act ("HEFPA").[9] This statute and its implementing regulations establish critical steps that must be followed before utility service is terminated, and requires the issuance of appropriate notice, offering of deferred payment

[8] *Id.*
[9] PSL, Section 30, *et. seq.*

agreements, and imposes restrictions on the actual termination of service.[10] Notwithstanding the important consumer protection ramifications of this legislation, it is applicable only to residential customers and not other customer classes.[11]

The Commission regulations dealing with the provision of gas, electric and steam service provide another stark example of its ability to differentiate between residential and commercial customers. Specifically, the Commission regulations impose alternate regulatory obligations and consumer rights depending upon the type of customer class. Thus, 16(A) NYCRR Part 11 addresses the provision of service to residential customers and 16(A) NYCRR Part 13 is limited to the rules governing the provision of service by gas, electric and steam corporations to non-residential customers. Indeed, the Commission has recognized that it will not resolve non-residential disputes associated with ESCO supply service.

The Commission also distinguishes between customer groupings in setting the scope of consumer protections in the UBP itself. For example, pursuant to UBP Section 5, Attachment 1.A.8, only a residential customer may rescind an agreement within three business days of receipt.[12] Further, UBP, Section 10.B.1 obligates the ESCO to include in its training of marketing representatives knowledge and awareness of HEFPA, which is limited solely to residential customers. Moreover, UBP Section 3.B.1.b allows the ESCO to modify its credit obligation to reflect the billing arrangement applicable to the individual customer it serves, which implies that ESCOs have the ability to make distinctions among customers based on a number of factors including size and customer class.

[10] 16(A) NYCRR Part 11.
[11] PSL, Section 30, 31 and 32.
[12] To the same effect see Section 5, Attachment 2.A.10 and Attachment 3.A.6.

In addition, the Legislature has readily made distinctions between residential and commercial customers with respect to door-to-door sales – the very marketing medium that gave rise to the concerns raised to the Commission in establishing this proceeding. Specifically, the Legislature determined that the statutory requirements and restrictions codified in the Door-To-Door Statute[13] are limited to the sale of "consumer goods or services" which are defined as goods or services acquired "primarily for personal, family or household purposes…"[14]

In all of these important areas there is the recognition that consumer regulation should be tailored to particular customer classes, that there may be a need to provide enhanced protection for residential customers, and that it is not necessary to burden commercial customers with all the regulations made applicable to residential customers. It is thus entirely reasonable and rational to limit the applicability of the new marketing standards to residential customers.

B. The Commission Failed To Address Whether There Is A Compelling Need To Apply The New Marketing Standards Established In The Order To Commercial and Industrial Customers.

In applying the new marketing standards to all customers regardless of customer class, the Commission overlooks and fails to address the important question of whether there is any real need to apply the same standard to all customers. As acknowledged by the Commission,[15] the detailed restrictions and prescriptions codified in the new Section 10 arose from the manifest concern on the part of the Commission to address the unique circumstances of marketing to residential consumers, who are potentially less sophisticated and may lack a comprehensive knowledge of the energy market.[16] Such conditions are not generally applicable to commercial

[13] Real Property Law, Section 425, *et. seq.*
[14] Real Property Law, Section 426(1) and 426 (2).
[15] Order, p. 11.
[16] Notice, pp. 23.

customers who by their very nature are used to running a business operation that requires assimilating data concerning all aspects of their business operations and entering into agreements with a variety of counterparties where such agreements are the product of substantial and complex negotiations and bargaining. Therefore, even if commercial customers are not fully conversant in the energy market, they nevertheless have the resources and ability to ask the right questions and secure the requisite information in order to make an economic choice among various alternatives.

In addition, there is no persuasive evidence in the record or cited by the Commission demonstrating that commercial customers are unable to assimilate and understand information regarding the purchase of natural gas or electricity from an ESCO or competitive energy supplier. Just as they are able to acquire various resources and assets to manage the many aspects of the business operation for which they do not have detailed knowledge (e.g., commercial real estate property, equipment, inventory, etc.), commercial customers can apply the same skills and capabilities to the purchase of energy commodity service. Moreover, such customers are on a continuous and frequent basis exposed to sales professionals offering numerous different products and services, and are knowledgeable as to what questions should be asked and the need to confirm all information that is provided during the sales process.

Furthermore, by conflating all customer classes the Commission overlooks that there are sufficient protections under the UBP and general common and statutory law to ensure that ESCOs act in a reasonable manner when marketing to commercial customers. For instance, under the UBP, an ESCO will be subject to severe disciplinary actions as well as revocation of eligibility to operate in New York for failure to comply with required customer protections[17] and

[17] UBP Section 2.D.4.c.

the failure to adhere to policies and procedures described in its sales agreements.[18] In addition, during the marketing process, the ESCO must under the prior and new UBP requirements provide accurate information to all consumers regarding the prices and terms and conditions associated with taking service from the ESCO.[19] The ESCO's marketing activities are also subject to numerous state laws governing fraudulent and misleading behavior.[20]

In terms of reasonable public policy there is also little need to protect commercial customers with the same standards applicable to residential customers. Customers operating commercial establishments are familiar with the operations of the market and have the opportunity to review all energy offerings and use another ESCO if they are dissatisfied with the service provided by any particular ESCO. Thus, differentiation between residential and commercial customers is entirely appropriate.

C. The Commission Ignored Significant Practical Problems Inherent In Applying The New Marketing Standards To Commercial And Industrial Customers That If Not Adequately Addressed Will Cause Harm Rather Than Benefit.

In applying the new marketing standards to all customer classes, the Commission ignores the significant practical problems related to application of the standards to commercial customers, especially large customers in this class.

The nature of the relationship between the ESCO and such customers would make compliance with the Customer Disclosure Statement exceedingly difficult. ESCOs tend to have a more consultative relationship with larger customers than with residential and smaller customers. This consultative relationship typically includes frequent communications that can be

[18] UBP, Section 2.D.4.b.
[19] UBP Section 5, Attachments 1, 2 and 3.
[20] See, General Business Law, Sections 349 (a) and 350, and Executive Law, Section 63(12).

electronic, telephonic and in person both at the customer's facilities and at public functions – it thus extends beyond the marketing channels addressed in the UBP. Contracts for larger customers tend to be more complicated, are often the products of long and intense negotiations and bargaining, and as a result the agreement will contain sophisticated and nuanced customized terms that can vary from month to month. From a practical perspective, inclusion of such complex terms on the Customer Disclosure Statement would not work as all the required information would not fit on a single page.

For ESCOs serving larger commercial customers, the sales agreements are generated through internal data systems. To now require that certain material terms be incorporated in a ~~CDI,~~CDI would entail costly and material modifications to these systems. Until such modifications are completed, the data will need to be incorporated manually for every sales agreement --- a process that is inefficient, costly and time consuming.

In the case of renewals, the usual practice with large commercial customers is to use a one page letter or document that renews the underlying sales agreement rather than changing the underlying sales agreement, which would now be required as the requirements are applicable to new customers and renewals.[21] Requiring the CDI on renewals would create difficulties for the ESCO and the customer for they would be subject to additional internal review by both parties, which, in turn, will delay the execution process, and potentially impair the economics of the transaction.

Moreover, applying the Marketing Standards to these interactions would be inappropriate for larger customers that would prefer to receive concise and timely information about the market and would be annoyed if each communication was burdened with the mandatory

[21] Order, p. 3.

elements that are prescribed in the new standards which may be appropriate for small customers but are not for larger customers.

RESA fears that the net result of this extension of a new regulatory regime to commercial customers would be a significant reduction in competitive options available to these customers and a concomitant decrease in consumer value that would far outweigh the purely speculative benefits to commercial customers that might come from imposing a heavier regulatory burden on their energy suppliers. In RESA's experience, commercial customers rarely support additional regulatory burdens on themselves or the firms with whom they do business and there is no evidence in the record that such customers take a different view with respect to energy services.

The use of the UBPs as a vehicle for regulating ESCO interactions with commercial customers of any size is problematical. To date, the UBPs have primarily defined the business relationships among utilities and ESCOs, not among ESCOs and their existing or potential customers. Including direct regulation of interactions among ESCOs and residential customers within the UBPs is a major expansion of scope, but this expanded regulation at least relates to a customer class that is already within the purview of the DPS's Consumer Division and for which a regulatory structure already exists within the Department and can accommodate these new requirements as they apply to residential customers.[22]

The same cannot be said of commercial customers and questions regarding how the Department would take on and execute this new responsibility and the impact that expansion of the Department's regulatory reach into previously uncharted territory would have on customers and ESCOs alike remain unanswered on this record. RESA respectfully suggests that the absence of certainty as to how the Department will address its new responsibilities with respect

[22] See, Public Service Law, Section 30, *et. seq;* 16(A) NYCRR Part 11.

to commercial and industrial customers marketing is particularly dangerous for an industry that relies on regulatory certainty in operating in New York's energy markets, and that clarification of the Department's precise role is an essential element that needs to be addressed before any implementation of these new standards.

In view of the foregoing, RESA urges the Commission to reconsider its determination and limit the applicability of the marketing standards to residential customers.

V. THE COMMISSION SHOULD CLARIFY THAT UBP SECTION 10.C.3.f AND 2.D.4.j EACH PROVIDES THE ESCO WITH TEN DAYS FROM RECEIPT OF THE COMPLAINT TO INVESTIGATE AND REPLY TO CUSTOMER INQUIRIES AND COMPLAINTS REGARDING MARKETING PRACTICES.

In its discussion of the period in which an ESCO must respond to complaints regarding marketing practices as codified in UBP Section 10.C.3.f, the Commission concluded as follows:

> Current Department complaint practices require that an ESCO resolve a complaint, which comes into the PSC call center, within two weeks. In addition, we recognize that, in order to resolve a complaint, an ESCO may need to obtain information from the distribution utility. Accordingly, a ten-day turnaround, as proposed by the ESCOs, is reasonable.[23]

The Commission clearly determined that an ESCO would have 10 days to respond to a marketing complaint. However, this ruling is not reflected in the revised UBP annexed as Attachment B to the Order. In the UBP, Section 10.C.3.f states:

> f. Investigate customer inquiries and complaints concerning marketing practices within five days of receipt of the complaint;

[23] Order, pp. 14-15.

This language erroneously limits the turnaround period to 5 rather than 10 days as stated in the body of the Order.

It is therefore requested that the Commission clarify that under Section 10.C.3.f an ESCO has 10 days to from receipt of the complaint to investigate and reply to customer inquiries and complaints regarding marketing practices.

As noted, the Commission at pages 14-15 of the Order determined that an ESCO should have 10 days to respond to a marketing complaint. However, in its discussion of the applicable time period under UBP Section 2.D.4.j, the Commission states that the period within which a complaint must receive a response is "not less than five days."[24] This appears to conflict with the Commission's ruling on pages 14-15 of the Order wherein the Commission concluded that a10 day period was acceptable. To rectify this conflict, it is requested that the Commission clarify that under Section 2.D.4.j, the ESCO has 10 days from receipt of the complaint to investigate and reply to customer inquiries and complaints regarding marketing practice

VI. THE COMMISSION SHOULD CLARIFY THAT PURSUANT TO UBP SECTION 2.B.1.b.1.ii, THE SALES AGREEMENT SHALL CONTAIN THE TERMINATION FEE OR THE METHOD OF CALCULATING THE TERMINATION FEE.

In connection with the information related to termination fees to be included in the Sales Agreement, Section 2.B.1.b.1.ii provides that the ESCO must provide "… the amount of the termination fee and the method of calculating the termination fee, if any…" In practice, however, the amount of the termination fee is not known at the inception of the agreement as it will depend upon conditions at the time the fee becomes payable. What is usually agreed to up front is the method for calculating the termination fee. Under these circumstances, it is requested

[24] Order, p. 29.

that the language dealing with termination fees in Section 2. B. 1.b. ii be modified to read as follows:

> "…. the amount of the termination fee ***or*** the method of calculating the termination fee, if any…

With this change, the ESCO would include the termination fee if known or at least the method by which it is calculated. This is also consistent with the treatment of "price" in the same section, which allows the ESCO to include the price or the manner by which it is determined.

VII. THE COMMISSION SHOULD CLARIFY THAT THE EFFECTIVE DATE FOR SALES AGREEMENT AND PHOTOGRAPHIC IDENTIFICATION CHANGES SHOULD BE AT LEAST 90 DAYS AFTER COMPLETION OF STAFF REVIEW OF ESCO COMPLIANCE FILINGS.

ESCOs are directed to file with Staff within 30 days of the date of the Order revised sales agreements and samples of the badges ESCO employees will wear when marketing ESCO services, which reflect the modified requirements of the UBP.[25] Based upon prior practice, Staff will then review the filings and inform each ESCO whether they are in compliance or if additional modifications are necessary. Under these circumstances, the most efficient and prudent procedure, is for ESCOs to withhold use of these items until Staff's review is completed, the results communicated to the ESCO, and the requisite internal infrastructure has been set up. Thus, after informed of Staff's review ESCOs will require additional time to comply with any Staff changes, update electronic systems (e.g. web interfaces and contract document control systems) as well as to train call center reps. Consequently, it is requested that the effective date for sales agreement and photographic identification changes should be at least 90 days after completion of the Staff review of ESCO compliance filings

[25] Order, p. 38.

VIII. THE COMMISSION SHOULD CLARIFY THAT THE CONSEQUENCE LISTED AT SECTION 2.D.5.B.5 DOES NOT APPLY TO COMMERCIAL CUSTOMERS AND INDUSTRIAL CUSTOMERS.

In the event of non-compliance by an ESCO with the categories set forth in Section 2.D.4, the Commission is authorized under Section 2.D.5.B.5 to release customers "from sales agreements without imposition of early termination fees." This provision should not be applicable to commercial and industrial customers.

It is acknowledged that small residential customers require a greater level of protection due to their lack of sophistication and knowledge concerning the details of energy pricing and commercial negotiations. Moreover, pursuant to HEFPA and the regulations codified there under, the Commission is statutorily empowered to investigate and resolve billing complaints filed by a residential customer against an ESCO. Under these circumstances it is rational to provide the Commission with the ability, as one of the remedies it may impose, to release a residential customer from the obligations of an otherwise fully binding sales agreement.

However, the applicable conditions are materially different in the case of commercial and industrial customers. These customers are attuned to the art of commercial negotiations and are fully aware of the consequences associated with executing a binding agreement. In the event of a disagreement with a vendor they are also able to fully protect their interests by securing the services of a lawyer or taking other steps they deem necessary to protect their interests. More to the point, such customers will leave no stone unturned in the event they want to unwind a binding contract after market conditions change and more favorable terms become available. Under these conditions, the Commission should not apply the extraordinary remedy of severing a fully binding contractual relationship that exists between the ESCO and the sophisticated customer. This extraordinary remedy is not only unnecessary, but it would only encourage such

customers to file complaints with the aim of having the Commission terminate an existing sales agreement that the customer wants to get out of without penalty or damages.

Accepting this clarification is also fully consistent with the Commission's position that it will not resolve non-residential disputes associated with the services provided under a sales agreement. This stated policy reflects the Commission's determination that its jurisdiction over the contractual relationship between a commercial customer and an ESCO is highly limited and does not extend to interpreting, interfering with or impairing the obligations undertaken by the parties in a fully binding contractual arrangement. Given this precedent, it would be highly inconsistent for the Commission to clothe itself with the power to release a commercial customer from a sales agreement without penalty.[26]

IX. THE COMMISSION SHOULD CLARIFY THAT THE PROVISIONS OF SECTION 10.C.1 ONLY APPLY TO AN "IN-PERSON" CONTACT WITH A CUSTOMER THAT IS UNSOLICITED BY THE ESCO OR MADE WITHOUT FIRST OBTAINING AN APPOINTMENT WITH THE CUSTOMER

A major concern of the Commission that precipitated the institution of this phase of the UBP proceeding, related to the activities of door-to-door ("DTD") marketers in various utility service territories.[27] In the ensuing comment and discussion phase the parties focused on developing adequate safeguards to protect consumers from the vagaries of DTD marketing. However, Section 10.C.1, which in the original draft applied only to residential marketing[28], is now made broadly applicable to all "In-Person contact with Customers". This expansion of the

[26] It is worth noting that commercial and industrial customers would still be subject to the other remedies listed in Section 2.D.5.B, and Section 5, Attachment 3.
[27] Notice, pp. 2-3.
[28] The original proposed Section 10. A read: "This section describes the standards that ESCOs and ESCO marketing representatives must follow when marketing to *residential customers* in New York." (Notice, UBP Section 10.A, emphasis added). The new Section 10.A codified in the Order reads: "This Section describes the standards that ESCOs and ESCO marketing representatives must follow when marketing to *customers in* New York." (Order, Appendix A, Section 10.A, emphasis added).

applicable class should be modified in a manner consistent with the original focus of the Commission and the parties in connection with this issue. Specifically, the Commission should clarify that this section is only applicable to an "in-person" contact with a customer that is unsolicited by the customer or made without first obtaining an appointment with the customer.

The unique characteristic of DTD marketing is that it involves unannounced visits by marketing representatives to residential dwellings.[29] It is essentially a cold-call for which the customer has no preparation and has not expressed any interest in receiving a solicitation from the marketing representative. However, in a situation where a residential or commercial customer has affirmatively agreed to receive a marketing solicitation or has agreed to meet with a marketing representative, it is unnecessary and unduly burdensome to then impose the strictures codified in Section 10.C on this in-person contact. In other words, with respect to Section 10.C.1, it is only necessary to apply the requirements codified therein to an in-person contact with a customer that is unsolicited by the customer or made without first obtaining an appointment with the customer.

By way of example, as discussed at the Technical Conference, for commercial customers ESCOs use the services of agents or brokers who may market on behalf of multiple ESCOs when meeting with consumers. A strict and unrealistic application of Section 10.C.1 might read to require the agent or broker to festoon his body with numerous badges, making the agent or broker look somewhat foolish and clearly confusing the customer. The logical and workable solution to avoid such problems is to recognize that these UBP provisions should only be applicable to unannounced marketing calls.

[29] Real Property Law, Section 426 (d).

This approach fully protects the customer, as the customer has already demonstrated an interest in speaking with the ESCO's representative, and the ESCO is still subject to the standards codified in Section 10.D and Section 5 Attachment 3.

X. THE COMMISSION SHOULD CLARIFY THAT THE PROVISIONS OF SECTION 10.C.2 DO NOT APPLY AND ARE NOT INTENDED TO INTERFERE WITH THE USUAL AND CUSTOMARY COMMUNICATION BETWEEN ESCOS AND CUSTOMERS.

Section 10.C.2 dealing with telephone contact with customers indicates that the provisions thereof are applicable in the following circumstances:

> "ESCO marketing representatives who contact customers by telephone for the purpose of selling any product or service offered by the ESCO shall:"

This broad language might be interpreted to apply to various forms of communication between the ESCO and the customer other than a direct sales pitch or cold telemarketing, as the ESCO may be viewed as attempting on a continuous basis to sell products and services to the customer. However, such a restrictive view would erroneously overlook and inhibit the on-going communication between an ESCO and their existing customers, as well as efforts by ESCOs, especially with commercial customers to set up appointments for subsequent meetings or calls from the customer to the ESCO.

In order that this section of the UBP be directed to protect customers from the vagaries of mass market cold telemarketing and not be used to stifle the on-going relationship between the ESCO and the customer, the Commission should clarify that the provisions of the section do not apply to telephone calls between an ESCO and an existing customer, calls initiated by a

customer, or a call where the ESCO does not attempt to specifically sell a particular product or service.

XI. THE COMMISSION SHOULD CLARIFY THAT THE DEFINITION OF A TECHNICAL TERM MAY BE INCLUDED IN ANY PORTION OF THE SALES AGREEMENT

In the definition of "Plain Language" (UBP, section 1, p. 4), the Commission includes the following directive:

> "If use of a technical term is necessary, the term is clearly defined in the portion of the text where it is used."

As codified, the definition of a technical term must be included in the contract text portion where it is used. This is too restrictive. The structure of agreements, especially for commercial customers, contains a section that provides definitions of key terms that are used repeatedly throughout the agreement. It is most inefficient and cumbersome to also require the ESCO to include a definition in every part of the contract where a particular technical term is used. Accordingly, the ESCO should only be required to include the definition of a technical term in the body of the agreement.

XII. CONCLUSION

For the reasons set forth herein, RESA respectfully urges the Commission to grant the rehearing and clarifications requested herein in their entirety.

Respectfully submitted,

Retail Energy Supply Association

By: Usher Fogel, Counsel
Usher Fogel, Counsel

Dated: November 24, 2008
Cedarhurst, New York