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January 26, 2010

Hon. Jaclyn A. Brillig
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.

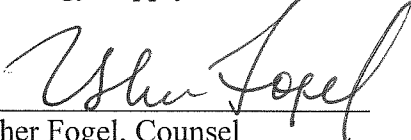
Dear Secretary Brillig:

Enclosed for filing with the Commission in the above-referenced proceedings, please find the original and five (5) copies of the Petition 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.

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

PETITION OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

In accordance with 16(A) NYCRR Section 3.2 of the Commission’s rules and regulations, the Retail Energy Supply Association (“RESA”)¹ hereby petitions the Commission (a) to amend the Uniform Business Practices (UBP)² to allow ESCOs to retain a customer that has previously either 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.

¹ RESA’s members include ConEd Solutions; 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 of RESA.

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 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”).

II. REQUEST FOR RELIEF

A. *The Commission Should Adopt The Proposed Revision To Section 5.H.1 of The UBP*

A customer that receives supply service from an ESCO has the ability to return to full utility service by following the provisions of UBP Section 5.H.1. This section of UBP does not, however, provide explicitly for the customer or the ESCO acting on behalf of the customer to rescind the return to full utility service where the customer desires to remain with the incumbent ESCO.

To address this situation it is respectfully requested that Section 5.H.1 of the UBP be amended to read as follows: (Changes in bold italics)

H. Customers Returning to Full Utility Service

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. An ESCO contacted by the customer shall, within two days, process the customer's request to return to full utility service. A utility contacted by a customer shall remind the customer to contact the ESCO about their returning to full utility service provided, however, that if the customer has already contacted the ESCO or wants to proceed without contacting the ESCO, the utility shall, within two days, process the customer's request to return to full utility service. ***In the event the distribution utility receives notice from the incumbent ESCO or the customer, no later than three business days before the effective date of the scheduled return to full utility service, to cancel the a previous request or scheduled return to the utility, the distribution utility shall cancel the request and maintain service with the incumbent ESCO.*** If a change to full utility service results in restrictions on the customer's right to choose another supplier or application of a rate that is different than the one applicable to other full service customers, the distribution utility shall provide advance notice to the customer .

B. A Utility Should Only Be Allowed To Effect A Customer Return To Full Service That Complies With UBP Section 5.H.1

The utilities have advised ESCOs and Staff that where the customer experiences a name change or other data modification that precipitates a utility account number change under the utility's record keeping system, the ESCO supplier will be dropped from the account. This will occur in an automatic fashion and will not be preceded by any prior notice to the ESCO or the customer. Some utilities will also make the drop retroactive to a prior period. Under this process, the termination of ESCO service will occur even if the customer has not expressed any interest or desire to return to utility commodity service.

It is respectfully requested that in processing a return to full utility service, the utilities in all instances must comply with the provisions of UBP Section 5.H.1, and in addition, adhere to the following procedural requirements relating to changes in customer account data:

1. In the event that an event triggers an "account number change" for a customer served by an ESCO, the utility can proceed with modifying the account for delivery service, but should not terminate or drop the ESCO until the customer has affirmatively indicated a desire to terminate ESCO service.
2. If the customer indicates that he/she desires to terminate ESCO service, the customer should be reminded by the utility to contact the ESCO about returning to utility service.
3. The Drop Notice sent to the ESCO should specify the reason for the drop; incorporate a prospective effective date; and provide the Customer or the ESCO acting on behalf of the Customer with the opportunity to rescind the drop prior to its effective date.

III. BASIS FOR RELIEF

A. Proposed Revision to the UBP

The UBP is intended to provide a comprehensive structure that enables customers to gravitate to and remain on retail access service in an efficient and reasonable manner. To this end, the UBP procedures codify accepted enrollment practices as well as mechanisms by which a customer can migrate back to utility supply service. In this regard, Section 5.H. 1 sets forth the procedures by which the customer can accomplish the return to utility service. However, this section of the UBP fails to directly address an important and fairly common practical and operational situation --- what happens if the customer changes his/her mind and wants to remain with the ESCO.

In this situation, Section 5.H.1 does not contain specific guidance or procedures as it only focuses on how the customer returns to the utility; it does not address the procedures applicable to the circumstance when the customer wants to continue service with the ESCO. To close this operational gap, RESA urges the Commission to incorporate the following language in Section 5.H.1:

In the event the distribution utility receives notice from the incumbent ESCO or the customer, no later than three business days before the effective date of the scheduled return to full utility service, to cancel a previous request or scheduled return to the utility, the distribution utility shall cancel the request and maintain service with the incumbent ESCO.

As proposed, a pending return to utility service whether caused by a specific customer request or other factor will be cancelled where notice of cancellation is provided by the customer or the ESCO on behalf of the customer at least three business

days prior to the scheduled return. This approach is eminently reasonable and equitable to all parties. From the customer's perspective, it offers a convenient process to enable the maintenance of the customer's relationship with the ESCO. Often times, a customer after speaking with the ESCO decides that the prior decision to return to the utility should be modified, or that any return scheduled for another does not serve the customer's best interest. In these circumstances, the customer can effectuate a rescission of the scheduled return and remain with the ESCO by simply providing timely notice to the utility.

This process is also fair to the incumbent ESCO. Once apprised of the pending return to the utility, the ESCO has the opportunity to contact the customer and discuss issues associated with a return to full utility service. The customer may not be aware of potential liability that may occasion the termination of ESCO service or the customer's decision may have been influenced by erroneous information. After speaking with the ESCO, the customer may decide to maintain retail access service. After speaking with the customer and obtaining the customer's assent with methods allowed under the UBP, the ESCO acting on behalf of the customer can then notify the utility to cancel the scheduled return to utility service. In this manner the true desires of the customer are accommodated.

This mechanism is also workable for the utility, as the appropriate notice must be timely made thus avoiding unnecessary changes in the customer's enrollment schedule and EDI processing. It also ensures that the utility is following the express wishes of the customer.

This proposal is also consistent with Commission precedent. In the recent *Order Granting Petition*,³ the Commission authorized use of a contest period where a customer or an incumbent ESCO with the customer's authorization could cancel a pending enrollment with a new ESCO by providing timely notice to the utility. The Commission determined that such a procedure was acceptable because it would "automate the process for fulfilling a customer's desire to remain with the incumbent ESCO."⁴ The same holds true with the process sought in the instant petition. The requested notification procedure would effectively automate the process to fulfill the customer's desire to retain service from the ESCO and not return to utility supply service.

For these reasons, the Commission should adopt the proposed revision to Section 5.H.1 of the UBP.

B. Unilateral Return to Full Utility Service

The utilities have advised ESCOs and Staff that where the customer experiences a name change or other data modification that precipitates a utility account number change under the utility's record keeping system, the ESCO supplier will be dropped from the account. This will occur in an automatic fashion and will not be preceded by any prior notice to the ESCO or the customer. Some utilities will also make the drop retroactive to a prior period. Under this process, the termination of ESCO service will occur even if the customer has not expressed any interest or desire to return to utility commodity service.

It thus appears under this common practice, that ESCO commodity supply service will be unilaterally terminated by utilities where there is a modification in customer data

³ Case 98-M-1342 – In the Matter of Retail Access Business Rules and Case 98-M-0667 – In the Matter of Electronic Data Interchange, *Order Granting Petition*, issued September 22, 2009.

⁴ *Id.*, p. 11.

that engenders a change in the customer's utility account number. It is respectfully submitted that this practice violates the Uniform Business Practices ("UBP"), conflicts with the legal obligations of the utility to act in a just and reasonable manner to the customer and the ESCO, and creates a tortuous interference by the utility with the ongoing contractual relationship between the ESCO and the customer.⁵

Section 5.H.1 of the UBP sets out in specific detail the process by which a customer served by an ESCO effects a return to full utility service. As codified in the UBP, a customer "by contacting either the ESCO or the distribution utility in accordance with this paragraph." Each provider contacted by a customer expressing the desire to return to utility service, must within two days, "process the customer's request to return to full utility service." As is clearly presented in the UBP, the return to full utility service, must first be preceded by the customer contacting the utility or ESCO a requesting such a change in service. The overarching obligation of the utility and the ESCO to comply with the directions and desires of the customer is further emphasized in Section 5. K. 1 of the UBP which states that a "change of a customer to another provider without the customer's authorization ... is not permitted."

The current utility practice of dropping the ESCO where there is a change in customer data that engenders an account number change, is violative of these sections of the UBP. A return to full utility service by an ESCO customer must be preceded by the customer first expressing the desire to terminate ESCO service and return to the utility.

⁵ It is acknowledged that this practice is also under review in one of the Working Groups created by Staff pursuant to the 2008 UBP Order. Nonetheless that Working Group was established approximately one year ago and, to date, no final action or report has evolved from the operations of the Working Group. And concerns regarding this problem were first presented to the Commission in an ESCO complaint filed in January 2008 --- more than two years ago. In the interim, this utility practice has continued unabated to the detriment of customer and ESCOs.

Absent satisfaction of this UBP codified precondition, the utility has no authorization to effectuate a change in providers or transfer the customer to utility service. Under the current practice the change in provider is being instituted by the utility solely on the basis of a change in the customer's data without first determining whether the customer wants to return to full utility service. Moreover, even if the customer wants to remain with the ESCO the utility in a unilateral manner will still drop the ESCO as the supplier --- thereby directly thwarting the will of the customer.

The provisions of the UBP were promulgated by the Commission and are codified in utility tariffs. As such, each utility is obligated to implement and apply the provisions of the UBP in a just and reasonable manner -- the standard governing all actions of a utility. Thus, pursuant to Public Service Law, Section 65(1) every utility must furnish and provide service which is in "all respects just and reasonable and all charges made or demanded for any service rendered must also be "just and reasonable."

As interpreted by the Courts, pursuant to this statutory standard, the Commission is required to ensure that the actions of each jurisdictional utility achieve a "just and reasonable" result. *General Motors Corp. v. Public Service Comm. of State of N.Y.*, 95 A.D. 2d 876 (3d Dept 1983) *app den* 60 NY 2d 557; *Consolidated Edison Co. of New York, Inc. v. New York State Public Service Commission*, 53 A.D. 2d 131 (3d Dept 1976) *app den* 40 NY 2d 803. Here it is unquestioned that the utilities are failing to act in a just and reasonable manner. By their unilateral actions they are denying consumers the right to retain their supplier of choice in direct contravention of the Commission's policy favoring the provision of competitive choice and the development of a robust competitive

market.⁶ Moreover they are acting in direct opposition to the express provisions of the UBP, and the express desire of the customer as reflected by the customer's affirmative selection of an ESCO.

The provision of commodity supply service between the ESCO and the customer is governed by the Sales Agreement which, in addition to incorporating various terms mandated by the UBP, also binds the ESCO to sell and the customer to accept and pay for the commodity supplied by the ESCO. This contractual relationship is binding upon each party as well as their successors and assigns, and absent an express provision, cannot be unilaterally altered due to a change in the status or ownership by any party to the contract. Thus, for example, if the customer changes its business name or is acquired by another entity, the terms of the Sales Agreement are still binding and the customer is still obligated to abide by the Sales Agreement for its remaining term. Similarly, if the ESCO changes its corporate name or is acquired by another entity, the ESCO is still contractually obligated to fulfill the terms of the Sales Agreement. The contractual relationship is thus binding on both parties.

However, with application of the utility practice of dropping the ESCO if the customer changes its name or otherwise engenders a change in the utility account number, the contractual relationship in effect between the customer and the ESCO is effectively undermined. Due entirely to the unilateral action of the utility, the ESCO is precluded from supplying commodity service, and the customer is barred from accepting and paying for commodity service from the ESCO. In essence, the utility has improperly

⁶ See, e. g., Case 07-E-1507 and 06-M-1017 – *Order Initiating Electricity Reliability and Infrastructure Planning* (issued December 24, 2007), p. 4 and p. 7 FN 17 citing Case 07-M-0458, *Order on Review of Retail Access Policies and Notice Soliciting Comments* (issued April 24, 2007), pp. 4-5.

interfered in a tortuous manner with the good faith contractual relationship that existed between the customer and the ESCO.

The adverse impact of this utility action is further exacerbated by the practice of some utilities to back date or make the return to utility service retroactive to a previous date. When this occurs, not only is the switch being made without the request or consent of the customer, but the drop from the ESCO is made retroactive to a date that precedes the actual drop. Thus, the customer receives no actual notice and there is no period within which the Customer or the ESCO acting on the Customer's behalf can rescind the return to utility service.

In summary, the practice of the utilities directly contravenes the UBP, is clearly unjust and unreasonable under well-settled precedent, and unlawfully impairs the contractual relationship existing between the ESCO and the customer.

In view of these concerns, it is respectfully requested that in processing a return to full utility service, the utilities in all instances must comply with the provisions of UBP Section 5.H.1, and in addition, adhere to the following procedural requirements relating to changes in customer account data:

1. In the event that an event triggers an "account number change" for a customer served by an ESCO, the utility can proceed with modifying the account for delivery service, but should not terminate or drop the ESCO until the customer has affirmatively indicated a desire to terminate ESCO service.
2. If the customer indicates that he/she desires to terminate ESCO service, the customer should be reminded by the utility to contact the ESCO about returning to utility service.
3. The Drop Notice sent to the ESCO should specify the reason for the drop; incorporate a prospective effective date; and provide the Customer or the ESCO

acting on behalf of the Customer with the opportunity to rescind the drop prior to its effective date.⁷

IV. 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: January 26, 2010
Cedarhurst, New York

⁷ See, *supra*, p. 3.