STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

In the Matter of Retail Access Business Rules.	Case 98-M-1343
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 07-M-1514
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.	Case 08-G-0078

COMMENTS OF THE NEW YORK STATE CONSUMER PROTECTION BOARD

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On December 20, 2007, the New York State Consumer Protection Board ("CPB") and the New York City Department of Consumer Affairs ("NYCDCA") filed a petition requesting that the Public Service Commission ("PSC" or "Commission") establish enforceable rules governing the marketing practices of energy service companies ("ESCOs"), and incorporate those principles in its Uniform Business Practices ("UBP").[1] In response to comments received concerning that petition, a subsequent tariff filing by National Fuel Gas Distribution Corporation addressing door-to-door marketing practices of ESCOs,[2] and a review of complaints conducted by Staff of the Department of Public

[1] Case 07-M-1514, Marketing Practices of Energy Service Companies by the Consumer Protection Board and New York City Department of Consumer Affairs, CPB/NYCDCA Petition, December 20, 2007 ("CPB/DCA Petition").

[2] Case 08-G-0078, Ordinary Tariff Filing of National Fuel Gas Distribution Corporation, January 28, 2008.

Service ("DPS Staff"), the PSC proposed specific modifications to the UBP and invited further comment.[3]

Overall, we commend the PSC for carefully considering the important issues raised in the CPB/DCA Petition and for commencing a review of the UBP in their entirety. The changes proposed in the Notice would address many of the concerns identified in the CPB/DCA Petition, significantly enhancing the protections afforded to consumers, while furthering the development of competitive retail energy markets. Nevertheless, the CPB recommends a number of modifications to the proposals. In particular, we advocate the application of the UBP to small commercial customers as well as residential customers, and we urge the adoption of a requirement that ESCO representatives affirmatively state that they are not from the distribution utility. Our specific comments on the proposed UBP appear below in Section A. In Section B, we respond to a series of questions identified in the Notice.

Our recommendations are particularly important for the protection of vulnerable consumers, including the elderly, for whom energy costs often consume a disproportionately large portion of their incomes, and non-English speakers who may be confused or misled by sales tactics they do not fully understand. Accordingly, we urge the Commission to adopt our recommendations in their entirety, and to do so expeditiously.

The CPB's comments on the proposed UBP are presented in the following two sections. In the first, we address two important issues that were highlighted

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

in the CPB/DCA Petition, but not reflected in the Notice. The CPB's other concerns regarding the proposed UBP are addressed in Section B.

A. KEY ELEMENTS OF THE CPB/DCA PETITION NOT REFLECTED IN THE PROPOSED UBP.

1. Applicability of Marketing Standards to Small Commercial Customers

The CPB/DCA Petition explicitly recommended that standards be applicable to marketing of retail energy to both residential and small business customers.[4] The principles we proposed were built on a foundation of voluntary guidelines that the ESCO community already deemed applicable to both residential and small business customers, referred to as the "Statement of Principles for Marketing Retail Energy to Residential and Small Business Customers in New York State." Comments filed by the Retail Energy Supply Association ("RESA") on February 5, 2008 regarding the CPB/DCA Petition, confirm that this trade organization continues to support the application of these principles to both residential and small business customers.

Surprisingly, however, the PSC's proposed marketing standards would be applicable only to residential customers. No explanation was provided in the Notice for denying small commercial customers protections that representatives of consumers believe are necessary and the industry is willing to provide. Comments made at the Technical Conference held on April 3, 2008, suggested that perhaps the Commission had previously decided that commercial customers

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[4] CPB/DCA Petition, p. 3.

not be covered by such protections. A review of the Order adopting the latest incarnation of the UBP demonstrates quite emphatically that is not the case.[5]

By their terms, the UBP apply to all ESCO customers. Section 2.B.1.b, for example, requires ESCOs to submit for DPS Staff review, "a sample standard Sales Agreement for each customer class." (emphasis supplied) In its 2003 UBP Order, the Commission expressly noted that Attachments 1, 2 and 3 to Section 5 "establish requirements for enrollments including descriptions by ESCOs of residential and small commercial customers' rights and responsibilities."[6] (more emphasis supplied)

In the 2003 UBP Order, the Commission distinguished between residential and small commercial customers only in regard to the three-day rescission period, which it decided should apply solely to residential consumers. The decision was unaccompanied by any analysis beyond the apparently unsupported assumption that, "Small business customers are likely to possess the necessary business acumen to make the decision before entering into a sales agreement."[7] Since the purpose of this proceeding is to determine whether changes to the UBP are needed based on circumstances as they exist today, it makes no sense to establish as a ground rule that previous Commission determinations are cast in concrete.

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5 Case 98-M-1343, In the Matter of Retail Access Business Rules, "Order Adopting Revised Uniform Business Practices," Issued November 21, 2003 ("2003 UBP Order").

6 2003 UBP Order, Appendix A, p. 29.

7 Id. at p. 22.

As far as knowledge and experience in contracting for energy commodity service is concerned, there is little practical difference between residential and small commercial customers. There are thousands of businesses in the State whose proprietors, managers or partners have no more knowledge of this subject than the average homeowner, and whose energy consumption is not sufficient to justify paying for professional assistance in purchasing energy. These consumers are exposed to the same door-to-door sales and telemarketing tactics as residential consumers, and are subject to the same risks.

Based on other information in the Notice, it appears that the PSC may be concerned that development of an unambiguous definition of "small commercial customer" could be difficult.[8] Although utility tariffs approved by the PSC contain precise definitions of service classifications, including for "small commercial" customers, those criteria are generally based on usage, which is not readily observable by ESCOs. Therefore, the CPB recommends that the UBP be applicable to <u>all</u> telemarketing and in-person marketing conducted by ESCOs or their representatives without a specific appointment. This provides a reasonable delineation of consumers who are likely to require consumer protections from unsolicited marketing efforts and those who are likely to be well-prepared to engage in an informed discussion of retail energy services. It is also easy for ESCOs and consumers to understand and for the PSC to enforce. We recommend that the draft UBP be revised accordingly.

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[8] Notice, p. 4, question 6, inviting comment on the definition of "small commercial customer."

2. Affirmative Statement by ESCO Representatives That They Are Not Affiliated With the Utility

The CPB and NYCDCA proposed that for both in-person and telephone contacts, an ESCO representative should be required to clearly state that they:

> are not an employee or representative of any distribution utility, referring specifically to the primary distribution utility in the customer's geographic area, and that the representative is not contacting the customer on behalf of, or at the request of, any distribution utility.[9]

Under the proposal in the Notice, ESCO representatives "shall never represent" that they are "an employee, working on behalf of, or affiliated with a distribution utility,"[10] but they are not required to make the declaration recommended by CPB/DCA. The Notice contains no explanation of why the CPB/DCA proposal was rejected.

Barring ESCO marketing representatives from identifying themselves as being affiliated with the distribution utility serving the customer without also requiring an affirmative statement to that effect is simply unacceptable. Too many consumers continue to mistakenly assume, even in the face of conflicting badges and uniforms, that when they are talking about electricity or natural gas, they are dealing with someone connected with their traditional utility.

In Consolidated Edison's service territory, for example, the utility's 2007 Customer Awareness and Understanding Study showed that about 73% of

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[9] CPB/DCA Petition, Exhibit 1, Section 3.1.a.ii and 3.2.c.

[10] Notice, Draft UBP, Section 10.C.1.a.iii and 10.C.2.c.

customers know they have a choice of energy suppliers.[11] That is an impressive outreach and education accomplishment, but it also means that there are more than a half million residential customers in Con Edison's service territory alone who have no reason to expect to be contacted by an ESCO. There are undoubtedly many more who are aware of energy choice, but know nothing about particular ESCOs or their services. The potential for confusion is too great, particularly for the elderly and those with limited English language skills, and it is totally unnecessary.

That potential is exacerbated in service territories where an ESCO Referral Program is offered. In a number of recent rate case decisions, including KeySpan and National Fuel, the Commission has directed the utilities in conjunction with the active parties to consider adoption or extension of these programs. From our participation in the resulting collaborative proceedings, the CPB has learned that more than 90% of the customers who sign up for the two-month discount offered by the programs are not actually referred by the utility as the original concept envisioned. Instead, they contract directly with ESCOs marketing the discount in parallel with, but outside, the referral program. Because the utilities heavily promote the referral programs through bill inserts, mailings and media advertising, it is very easy for consumers to have the impression that the utilities are backing the marketing offers they receive. Consequently, the affirmative disavowal of that connection by ESCO representatives is all the more important.

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[11] Customer Awareness and Understanding of Con Edison's Energy Choice Program, Spring 2007, Prepared for Con Edison by CRA.

No ESCO can credibly argue that having its representatives say, "I am with XYZ ESCO; I do not represent ABC utility and am not contacting you on their behalf," will drastically inhibit its ability to market effectively. Continued opposition to this simple requirement does nothing but suggest that some marketing companies find consumer confusion to be useful. In the interest of fairness and transparency, the Marketing Standards should be revised to require that ESCO representatives state that they do not represent the utility distributing the commodity they are attempting to sell to the consumer, in a declarative sentence using the name of the utility, as recommended in the CPB/DCA Petition.

B. OTHER CPB CONCERNS WITH THE PROPOSED UBP

1. Definitions – Section 1

a. The acronym "OCS" used in 2.B.1.m. is new to the UBP. It should be defined in this section.

b. Because termination fees can take many different forms, and may not be called "termination fees" in the sales agreement, the concept should be defined in this section. We recommend the following:

> Termination Fee – Any provision in an ESCO Sales Agreement that permits an ESCO to assess a charge to a customer who terminates the agreement prior to the end of its term, regardless of whether the assessment is identified as a fee, a charge, liquidated damages or a methodology for the calculation of damages, and whether it is fixed, scaled or subject to calculation based on market factors.

2. Disclosure Requirements - Section 2.B.1.b.1

ESCO sales agreements are often multi-page documents in relatively small font size containing legal and technical jargon. Although critical information such as the price, duration of the contract and termination fee may be disclosed in the sales agreement, it may not be readily apparent to the vast majority of consumers who do not carefully read the entire document. The proposal in the Notice to require sales agreements to "clearly state the price, term and termination fee, if applicable" on the first page of the agreement (UBP, Section 2.B.1.b.1) is a step in the right direction, but does not go far enough to protect consumers.

The CPB recommends that all ESCO sales agreements prominently display on their first page, or a separate page attached to the front, a chart detailing rates, fees and the term of service, similar to the "Schumer Box" that is now required to accompany all credit card offers.[12] Presentation of this critical information in a single, readily identifiable format has proven to be of considerable assistance to consumers in evaluating credit card solicitations. Accordingly, we recommend that Section 2.B.1.b.1 be revised to delete the proposed language beginning "with the price..." and replace it with the following:

> The price, statement of whether the price is fixed or variable, term, grace period in which the contract can be canceled by the customer without incurring a termination fee, and termination fee, if applicable, shall be prominently displayed and clearly highlighted in a chart on the top of the first page of the agreement.

A sample chart is shown in Exhibit 1.

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[12] Federal Truth in Lending Act, (15 U.S.C. § 1601 et seq.).

The obligation to display this information prominently should not be novel or onerous for New York ESCOs. Most of them already make it available in a very similar form on the EnergyGuide website that is linked to the PSC's Power to Choose site.[13]

In addition to including it with any sales agreement presented during an in-person sales solicitation, ESCOs should be required to display this chart and have it accepted by the consumer in the course of any online enrollment, and to mail it to customers who agree to enrollment over the telephone. The rescission period for telephone enrollments should not begin until the notice is received by the customer.

3. Maintaining ESCO Eligibility Status - Section 2. D. 6

This section, which outlines the procedures to be followed by the Commission or DPS Staff in reviewing failures by ESCOs to comply with the UBP, and lists the consequences for such failure, is an excellent addition to the UBP which could significantly enhance protections for consumers without appreciably increasing the risk of sanctions for ethical, competently managed ESCOs. However, three modifications are required.

First, the document by which an ESCO is notified of its failure to comply with the UBP (Section 2.D.6.a.i) should be made public, perhaps by posting it on the PSC's website. This is a small step to help ensure that enforcement of the UBP is conducted in an open and transparent manner. It also increases

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[13] For example, http://www.energyguide.com/finder/showdetail.asp?offerid=2216.

consumer awareness of violations of the UBP and provides a powerful incentive for ESCOs to comply with these requirements.

Second, it should be made clear that the "corrective actions" that may be required by the Commission under Section 2.D.6.a.ii are not limited to the specific incident or complaint generating the PSC's concern, but rather may address the overall marketing conduct of an ESCO. It should not be sufficient for an ESCO to satisfy complaining customers when the complaints are merely a symptom of the real problem. Corrective actions must not only redress the harm caused by improper marketing practices, but also address the practices themselves.

Finally, the section should expressly provide for an expedited process when the Commission Staff has attempted, and failed, to resolve the compliance issues informally with the ESCO. In such cases, the ESCO already has actual notice of the Staff's concerns and has been made aware of the corrective actions needed to resolve them. Repeating the notice process and giving ESCOs another chance to respond only delays the availability of a resolution of the problem for consumers. The formal notice should recite the prior informal efforts to gain compliance, specify the corrective action to be taken with as short a period as possible for it to be completed, and state the consequences that will be imposed for failure to respond.

4. Telephonic Agreement - Section 5 – Attachment 1

Paragraph A.2 requires an ESCO or its agent to record the telephone conversation with potential customers to initiate service. The recording must contain "a description of the prices, terms and conditions of the ESCO's offer, including a statement, where applicable, that the ESCO may assess an early termination fee." The CPB recommends that this paragraph be revised to require ESCO marketing representatives not only to state that a termination fee may be assessed, but also to disclose the amount of the fee or, if the amount is not fixed or scaled, to explain how the fee is calculated and what its potential magnitude may be. The term during which the fee may be applied should also be clearly stated.

In paragraph A.3., the requirement that a customer's acceptance of the terms and conditions of an ESCO offer be "unaided or prompted by the ESCO marketing representative" needs clarification. The representative clearly has to ask the customer for acceptance of the terms, and should be able to say that they must be accepted to convert the offer into an agreement. Some examples of improper aiding or prompting would be helpful.

Paragraph A.6 is apparently intended to ensure that the recording of the telephonic agreement to initiate service with an ESCO include a statement acknowledging the customer's understanding that the service is with the ESCO and not "the local distribution utility." Since the term "distribution utility" may be

meaningless to many consumers, it should be clarified that the statement should identify the specific name of the utility serving that customer.[14]

Paragraph B should also be modified to ensure that the customer receives a copy of all the declarations that took place during the telephonic agreement, including written statements from the ESCO that no savings are guaranteed and that the agreement is not with the utility.[15]

5. Electronic Agreement and Written Agreement - Section 5 – Attachments 2 and 3

Disclosure of key contract terms described in paragraph A.2 of each of these attachments should be presented in the manner we recommended in our comments above, i.e. in a separate chart, prominently displayed and highlighted on the written or electronic agreement.

In addition, customers entering into electronic and written agreements should be required to affirmatively indicate their understanding, perhaps by signing or initialing statements that: (a) no savings is guaranteed, or if savings are guaranteed, a clear description of the conditions under which the savings will be provided, and (b) the agreement for service is with the ESCO and not the utility. These statements are analogous to those that would be required to be made on telephonic agreements under the proposed UBP. Consumers entering

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[14] It appears that Paragraph A.7 of the proposed UBP should be inserted as the last sentence of Paragraph A.4.

[15] Section 5, Attachment 1, Paragraph A.5 and A.6.

into electronic or written service agreements should be afforded these same protections.

6. Marketing Standards – Section 10

Several aspects of the proposed UBP regarding marketing standards require clarification. As currently drafted, ESCOs and their representatives, when contacting customers, would be required to display identification that shows "the ESCO's or marketing representative's name."[16] To help minimize confusion, the CPB recommends that this be clarified to require that such identification display the name of the ESCO, not the name of the contractor or vendor who is marketing on its behalf.

The organization of Section 10.C.1 of the draft UBP also should be revised. The introduction to that section states that ESCOs and their representatives shall take certain action as soon as possible after in-person contact with customers. Those requirements are detailed only in Section 10.C.1.a. The remainder of Section 10.C.1, paragraphs b through e, contain important requirements, but they are not activities that must be undertaken "as soon as possible" after making contact.

In addition, Section 10.C.1.d should specify exactly what written information the ESCO representative will provide upon request. At a minimum, this should include a description of the products and services that are being

[16] Notice, Draft UBP, Section 10.C.1.a.iii.

offered as well as a toll-free telephone number and/or webpage to enable the consumer to obtain further information.

Finally, Section 10.C.3 requires two additions. In subsection g, a time standard for ESCO response to customer inquiries and complaints should be included. We recommend five business days. In subsection h, cooperation with the CPB should also be required. Consumers often contact us first. ESCO cooperation with our mediation efforts can avoid the need for a complaint to the PSC when the consumer's concerns are unfounded, or define the issues more clearly when the complaint is justified and we refer it to the Commission.

C. RESPONSES TO QUESTIONS POSED IN THE NOTICE

The Notice requested comments on a series of specific questions, to which the CPB responds as follows:

1. Should the ESCOs be subject to the utility assessments provided by Public Service Law ("PSL") § 18-a?

The PSL provides for the recovery of the costs and expenses of the Commission from public utility companies, certain municipalities and corporations, and "persons subject to the commission's regulation." (PSL § 18-a.1) The PSC devotes resources to the oversight of ESCOs, as described in detail by the Public Utility Law Project in its comments regarding the CPB/DCA Petition.[17] It also assesses other "lightly regulated" utilities such as competitive local exchange carriers. Consequently, it would be consistent with the terms of

[17] Case 07-M-1514, Comments of Public Utility Law Project, January 25, 2008, pp. 3 – 4.

the statute and its own practice for the Commission to assess a share of its costs to ESCOs.

The Commission would, however, need to ensure that assessments on ESCOs do not have unintended anticompetitive consequences. Distribution utilities recover their PSC expenses through delivery rates. ESCOs have no such option. All of their costs must be recovered through commodity sales. The Commission has gone to a great deal of trouble to unbundle the commodity-related costs of distribution utilities and incorporate them in a merchant function charge ("MFC") that can be avoided by customers who switch to ESCO service. To maintain pricing comparability between commodity services offered by utilities and ESCOs, if ESCOs are assessed under PSL § 18-a, the commodity-related portion of distribution utility assessments will have to be moved to the MFC.

2. Should the customer of record be the only person qualified to enroll the residential account with an ESCO?

The CPB recommends that the UBP be revised to include a definition of persons who are authorized to enroll a residential account with an ESCO. However, the narrow restriction suggested in the question is unlikely to be helpful. There is no reason to believe that the name on a residential account reflects a conscious decision by the residents at an address to limit authority over the account to the person named. For spouses, partners or roommates, the proposed restriction may be more of a nuisance than a benefit.

Currently, if an ESCO enters into a contract with an individual who has no authority to make decisions about the utility account (a minor, incompetent or

visitor, for example), the contract is unenforceable. Therefore, we believe that ESCOs are already at risk for determining that such authority exists, but if there is any legal basis for doubting that this is the case, the UBP should make it clear. The rules should provide that it is the responsibility of the ESCO to verify that every enrollment is requested by an authorized person. "Authorized person" should, in turn, be defined like the term "subscriber" in the Federal Communications Commission's Rules governing changes of long distance carriers. Using this model, the CPB recommends that the UBP be revised to include the following definition of "authorized person:"

1. The person identified in the account record of the utility as responsible for payment of the utility bill;

2. Any adult specifically authorized by such party to change commodity providers; or

3. Any person lawfully authorized to represent such party generally.[18]

3. Should early termination fees for residential customers be limited to: (a) a flat amount (e.g. $200); (b) an amount based upon a set fee per month multiplied by the number of months remaining on the contract (e.g. $8 x 20 months = $160); or (c) some other variation?

First, the CPB recommends that no termination fee, of any kind, be permitted for contracts in which the obligation to complete the full term of the agreement is not mutual. In reviewing ESCO contracts linked to the Commission's Power to Choose website, we have found unilateral termination rights in favor of the seller even in contracts that were ostensibly for terms of a

[18] See 47 CFR § 64.1100(h).

year or more at a fixed price. We have also found, buried in the standard Force Majeure clauses, so-called "price majeure" provisions. These permit an ESCO to unilaterally terminate the contract based on the very commodity price fluctuations from which it was supposedly protecting the consumer. If the contract allows the ESCO to cancel without penalty, the customer must have the same right to exit without termination fee.

Second, there should be no early termination fees associated with variably priced contracts.[19] Such fees come in two general types. The "true" termination fee, requiring payment of an amount that is either fixed or that declines at a predictable rate, is familiar to most consumers. These fees are generally intended to provide sellers an opportunity to recover the cost of marketing inducements that provide a benefit to the consumer, such as free or subsidized equipment (cell phones, for example) or waiver of installation fees. However, since ESCOs generally do not offer subsidized equipment or charge installation fees, there appears to be little basis for this type of early termination fee in retail electricity and natural gas markets.

The second type of fee is more properly an agreed-upon measure of damages in the event of a breach of contract. Such clauses protect sellers who have hedged their delivery obligations either physically or financially. There is no basis for the inclusion of this type of charge in variably-priced contracts because the seller has no market price risk.

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[19] For purposes of this discussion, we mean fully variable at the discretion of the ESCO. This would not include, for example, a contract priced at an index plus a fixed basis.

For contracts at a fixed price, the CPB has two concerns regarding the size of any early termination fee. First, the fee should be reasonably related to the actual damages an ESCO could be expected to suffer if the contract is ended prematurely. This is a normal legal requirement for the enforceability of a liquidated damages clause, which is the form of contractual provision that these fees most closely resemble. Such a requirement will serve to eliminate arbitrary or intentionally punitive provisions, which should not be permitted.

In addition, consumers should be fully informed of potential termination charges before they sign with an ESCO. This requires that they receive a clear, emphatically highlighted notice explaining in plain language that they are entering into a contract for a defined term and that they may be subject to certain fees if they terminate the agreement prematurely. The method of determination and the magnitude of any potential fees should also be described clearly in terms readily understandable by a layperson, with specific examples if the calculation requires some mathematical effort. This information should be included as part of the chart that we recommend be included at the top of the first page of the sales agreement, in which key information is disclosed, as discussed in Section I.B.2 above.

4. Should there be a grace period for the application of early termination fees to residential customers, and if so, what is the appropriate length of time for the grace period?

We assume the effect of such a provision, as proposed in Section 5.B.3 of the revised UBP attached to the Notice, would be to make contracts that include an early termination fee subject to rescission by the residential customer for a

period that is longer than the three days currently provided for all contracts under the UBP. Proposals along these lines have been made by various parties out of concern that consumers are not yet comfortable with the concepts of therms and kilowatt-hours (as opposed to gallons), and have only a vague understanding of what goes into the price of electric and natural gas commodities. By extending the grace period, customers can receive and review an actual bill and get some idea of the effect of an ESCO's pricing before they are finally committed to the contract. This would require an extension for a reasonable period beyond the delivery of the first bill that includes the ESCO's charges, such as the 30 days proposed in UBP Section 5.B.3.

Such a provision would clearly be beneficial for consumers in affording them some additional protection against a misunderstanding of the pricing terms they are being offered, but it might also inhibit ESCOs from offering the kinds of fixed price options that consumers often prefer. Therefore, for now, we recommend that the enhanced disclosure provisions described above be tried for a reasonable period. If evidence accumulates to indicate that such requirements are insufficient to protect consumers, more stringent measures, such as an extended rescission period, should be reconsidered later.

5. Is the number of Customers served by an ESCO proprietary trade secret information, under the standards set forth in the State Freedom of Information Law?

Under the Freedom of Information Law ("FOIL"), all information in the possession of a State agency must be made available for inspection by the public unless it falls under one of the five exceptions specified in the Public

Officers Law § 87(2). Four of those are clearly not applicable to information concerning the number of customers served by an ESCO. Only the trade secret exception of Public Officers Law § 87(2)(d) is potentially applicable.

To be exempt from disclosure under § 87(2)(d), information must satisfy a two-part test. It must both constitute a trade secret and be of such a nature that its disclosure "would cause substantial injury to the competitive position" of the enterprise that submitted it. The Commission defines a trade secret in 16 NYCRR § 6-1.3(a) as "information used in one's business ... which provides an opportunity to obtain an advantage over competitors who do not know or use it."

It is extremely difficult to imagine how an ESCO's knowing the total number of customers it serves in New York State could provide it "an opportunity to obtain an advantage over competitors." Indeed, it is hard to imagine how an ESCO that does not know how many customers it serves could even be in business. It is patently absurd to consider this information a trade secret under the Commission's definition, which means that it fails the first prong of the FOIL test for exemption from disclosure.

Furthermore, even if the information could be deemed a trade secret, it would fail the second prong of the FOIL test unless it could be shown that its disclosure would "cause substantial injury" to the ESCO's competitive position. Again, it is hard to imagine how this showing could ever be made for information concerning the number of customers an ESCO serves throughout the State. Every competent ESCO has a pretty good idea of which competitors have the

most customers, which have few, which are growing and which are declining. If a particular ESCO were to find out precisely how many customers each of its competitors had, how exactly would that additional knowledge enable it to gain a competitive advantage? Unlike the names or locations of customers, the total number of customers in New York State is not a trade secret, has no competitive significance, and should not be exempt from disclosure.

Although the Notice does not indicate why the Commission is interested in obtaining parties' views on this matter, the CPB recommends that the Commission use data on the number of customers served by each ESCO to calculate the complaint rate of ESCOs, defined as the number of complaints for an ESCO received by the DPS divided by the number of customers served by that ESCO. This information should be readily available on the PSC's website in a user-friendly format. Consumers shopping for an energy services provider will likely find that data to be very helpful.

6. Should the UBP provisions with respect to Marketing Standards be applicable to small commercial customers? If so, how should small commercial customers be defined?

Yes, as thoroughly explained in Section I.A.1. Indeed, all UBP provisions should be applicable to small commercial customers except where specifically noted.

7. Should ESCOs that include early termination fees in residential sales agreements be required to obtain a "wet" signature on the sales agreement?

For now, we believe the disclosure requirements we describe in 3, above, should be given a fair trial. If experience demonstrates that they are inadequate, more stringent measures, such as the wet signature, should be reconsidered.

8. How often do ESCOs enforce early termination fees for residential contracts?

This is a very important question because in a fully competitive environment, the assessment of fees that consumers do not consider acceptable or reasonable can be expected to disappear. Companies that are at risk of losing their customers to competitors cannot afford to appear unfriendly or uncooperative.

The CPB's work with representatives of the heating oil and propane industries, which have decades of experience with fixed price residential contracts, suggests that although distributors of these fuels may include termination fees in their sales agreements, they are nearly always willing to negotiate those fees rather than blindly enforce them. They realize that any short-term gain is rarely worth the long-term damage resulting from a reputation of being unfair or difficult to deal with.

The CPB awaits information from ESCOs regarding their practices concerning termination fees, and will address the impact of that data in our reply comments.

9. How should the term "plain language" as used in Section 2.B.1.b of the UBP be defined?

Plain language does not incorporate legal or energy industry terms, acronyms or abbreviations that a person of ordinary intelligence would not be expected to recognize and understand.[20] When plain language is required for residential and small commercial customers, any term that the average homeowner, tenant or small businessperson would not be likely to recognize should be clearly defined before it is used.

For residential customers, §5-702 of the General Obligations Law includes requirements that apply to any written agreements with ESCOs. These provisions specify that such documents be "written in a clear and coherent manner using words with common and every day meaning." We urge the PSC to carefully consider this requirement in reviewing and approving standard ESCO sales agreements pursuant to UBP Section 2.B.1.b.

10. Are there additional modifications to the UBP that should be considered?

As noted above, there are a number of ongoing proceedings in which the parties are considering the adoption or renewal of ESCO Referral Programs. It is, therefore, important that rules of the UBP work as intended in the context of such programs. If the Commission decides to examine the design of ESCO Referral Programs within the context of this proceeding, the CPB has two major concerns that should be addressed.

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[20] For example, an otherwise well-written ESCO sales agreement we reviewed recently describes its pricing in relation to the utility's "gas cost recovery rate" and the "final closing NYMEX settlement price." These terms, which are not further defined, are unlikely to be familiar to 99% of small commercial and residential consumers.

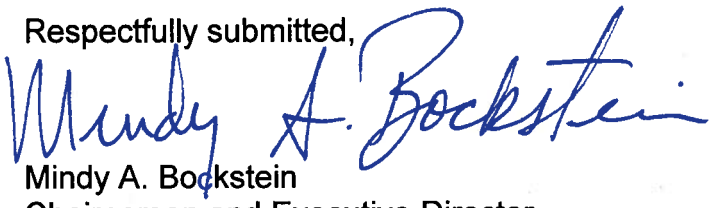
First, all incremental costs associated with implementation and operation of the programs should be borne by ESCOs, including outreach and education expenses. After more than ten years of promoting retail access, and with dozens of ESCOs actively participating in the market, there is no reason for ratepayers to continue to subsidize competitive businesses.

Second, random assignment should not be used for customers who contact the utility for enrollment. Instead, customers who know the ESCO they want should be assigned to that company, while those who do not should be asked if they would be interested in being contacted by ESCOs by phone or e-mail. If the answer is "yes," the customer's information would be sent to participating ESCOs by e-mail. If the answer is "no," the customer could be referred to the Power to Choose website to get more information. This gives all ESCOs a greater incentive to build positive name recognition, and it creates a better opportunity for customers to make an informed decision among competing alternatives.

CONCLUSION

The New York State Consumer Protection Board urges the Public Service Commission to adopt the recommendations identified herein, as soon as practical.

Respectfully submitted,



Mindy A. Bockstein
Chairperson and Executive Director

Douglas W. Elfner
Director of Utility Intervention

David Prestemon
Intervenor Attorney

Dated: Albany, New York
April 18, 2008

Exhibit 1

Sample Schumer Box for ESCO Sales

ABC Energy Services	
Price	$0.155 per kilowatt-hour
Fixed or Variable	Fixed
Minimum Term	12 months
Grace Period for cancellation without early termination fee	30 days from date of customer authorization
Early Termination Fee	$100 for residential customers; $250 for commercial customers
Late Payment Fee	1.5% of overdue balance per month