

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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 07-M-

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

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Dated: December 19, 2007
New York, New York

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Pursuant to Section 71 of the Public Service Law and the rules and regulations of the Public Service Commission (“PSC” or “Commission”), the New York State Consumer Protection Board (“CPB”) and the New York City Department of Consumer Affairs (“DCA” or “the Department”) hereby petition the PSC to strengthen its regulation over the marketing practices of energy service companies (“ESCOs”) selling electricity and natural gas services to residential and small commercial consumers by incorporating within its Uniform Business Practices (“UBP”), enforceable rules embodying and expanding upon principles comparable to those currently set forth in the industry’s voluntary Statement of Principles. Without accurate information, consumers do not have the information necessary to make an informed decision. As a result, it cannot be assumed that the rates they pay for service from ESCOs are just and reasonable. The CPB and DCA are concerned that the marketing practices of some ESCOs deny consumers the accurate information which is necessary for well-

functioning markets, and may result in consumers paying unreasonable rates. Approval of this petition will help eliminate that problem.

The CPB is an agency in the Executive Department of New York State Government charged with “representing the interests of consumers of the state before federal, state, and local administrative and regulatory agencies.”¹ DCA works to ensure that New York City’s consumers and businesses benefit from a fair and vibrant marketplace by empowering and protecting consumers, while at the same time, facilitating fair business practices. The Department enforces the City’s landmark Consumer Protection Law, which prohibits misleading and deceptive practices and other relevant state and federal laws. To ensure businesses comply with the law and that consumers are protected, the DCA conducts inspections and investigations, mediates consumer complaints, pursues high-impact litigation and educates consumers and businesses.

Based on complaints received by our agencies, media reports and anecdotal information from consumers and the industry, it appears that problems with abusive, misleading and deceptive marketing tactics used by ESCOs in their contacts with residential and small commercial consumers are persistent and disruptive. The CPB and DCA recognize that many ESCOs, including some that have been very successful in expanding their businesses in New York, conduct their marketing activities in an appropriate manner designed to assure the safety of the consumer, provide accurate and unbiased information, and avoid high-pressure sales tactics. Nevertheless, allegations that some ESCOs or their representatives have misrepresented themselves as agents of distribution utilities, have made other false and misleading statements and

¹ New York State Executive Law §554(2)(d).

engage in false and misleading practices continue to surface. This conduct confuses and harms consumers and damages the reputation of utilities and reputable ESCOs.

In recent years, Staff of the Department of Public Service (“DPS”) has worked with ESCOs to develop a “Statement of Principles for Marketing Retail Energy to Residential and Small Business Customers in New York State” (“Statement of Principles”). The guidelines for marketing conduct set forth in that document could prevent most of the problems consumers have experienced, if they were mandated and consistently observed and enforced. But that is not the case. Many of the complaints that have come to our attention have involved companies that are signatories to the Statement of Principles. Significantly, some complaints involve companies offering service in New York that have declined to adopt the Statement at all.² Clearly, an entirely voluntary approach to preventing misleading marketing practices is unworkable.

All ESCOs offering service to residential and small business customers in New York should be required to abide by a minimum set of marketing rules to ensure that consumers are protected from deceptive sales practices, and those rules must be enforced by the PSC with a range of sanctions including termination of a company’s authorization to do business in New York. This can be accomplished by adding a new Section 10 to the UBP setting forth a Statement of Principles for ESCOs marketing to residential and small commercial customers, modeled after the voluntary Statement of Principles, with certain modifications as described below. Violation of the Code would then subject an ESCO to the possibility of sanctions pursuant to Section 2.D.4 of the UBP.

² According to information on the DPS website as of December 4, 2007, 31 ESCOs have adopted the Statement of Principles and approximately one dozen companies identified as currently offering service to residential customers have not signed that Statement.

In citing Section 2.D.4 of the UBP, Petitioners do not mean to suggest that termination of an ESCO's authorization to do business would be a necessary, or even a likely, response to complaints concerning a company's marketing practices. On the contrary, we would expect the PSC to continue its existing practice of working cooperatively with ESCOs and consumers to resolve concerns as they arise. We do, however, feel that it is essential that the Commission have explicit authority to deal harshly with persistent, egregious offenders when the need arises, without having to refer matters to the Office of the Attorney General for assistance and intervention.³

The Existing Complaint Process Is An Inadequate Deterrent

Our agencies receive a significant volume of consumer complaints, whether through online complaint filing, fax, mail, phone calls or in the case of DCA, through 311. Nonetheless, our experience at the CPB and DCA clearly demonstrates that complaints received on a particular issue never reflect more than the tip of the iceberg. The vast majority of consumers who are unhappy with their experience with an ESCO because of the marketing practices or conduct of a sales representative do not complain to us, the PSC or any other consumer agency. We know this because in most cases when complaints received lead to an investigation, the number of "victims" found is invariably far greater than the number of formal complaints filed.

³ Our proposal would not diminish the authority of local enforcement agencies such as DCA to prosecute ESCOs for violations of local consumer protection laws, including those based on conduct that would be proscribed by the proposed UBP. The New York City Consumer Protection Law vests DCA with broad authority to protect consumers against misleading and deceptive practices, authorizing the Department to prosecute wrongdoers in state court and to seek injunctive and remedial relief, as well as fines and restitution. The exercise of this authority does not conflict or interfere with the PSC's regulatory authority.

In the case of ESCO services, there may be many reasons why unhappy customers do not complain. First, they are accustomed to dealing with their distribution utility, for example, Con Edison in New York City. If they have been misled by an ESCO marketing representative, they may continue to believe they are receiving commodity service from the utility. It is the utility, after all, that bills them for the service. Other customers may assume the difference between what they receive and what they expected is just a function of the market. They chalk it up to a bad decision and live with their contractual obligations. Further, consumers with limited English may not realize they may have a legitimate complaint, or may not know that governmental agencies such as DCA or CPB can provide translation services to ensure effective communication. Consumers in immigrant communities may also be reluctant to complain to governmental agencies out of fear or due to cultural differences. Finally, some customers may simply conclude – no matter how unhappy they may be – that complaining is not worth the effort.

As a result, the number of complaints consumers file against ESCOs based on marketing practices is not commensurate with the scope of the problem. As long as that is the case, the ratio of complaints to sales will continue to remain low, and misleading marketing tactics can be profitable. Quickly resolving those complaints that do reach the PSC simply becomes a cost of doing business.

Although the Department and local consumer protection agencies with statutes similar to the Department's can bring actions based on an ESCO's marketing tactics, under existing PSC rules, there does not appear to be any mechanism by which the Commission itself can sanction an ESCO on the basis of its marketing tactics other than

to resort to the general prohibitions against deceptive acts and practices and false advertising incorporated in Sections 349 and 350 of the General Business Law. This is a cumbersome process, requiring the Commission to refer its evidence to the Office of the Attorney General, which is empowered to initiate a civil proceeding on behalf of the people of the State under GBL §349(b). This unnecessarily shifts responsibility to the judicial process from the regulatory arena in which it belongs, and is an inefficient use of State resources. To be able to intervene quickly and decisively to protect consumers and to take action on a statewide basis, the PSC should have clearly defined legal authority for acting directly to sanction ESCOs whose marketing practices it deems to be detrimental to consumers and to prevent further harm.

Statement Of Principles

A proposed Statement of Principles, to be adopted as Section 10 of the UBP, is attached as Exhibit 1. For the most part, it simply sets forth the standards embodied in the current Statement of Principles, while eliminating or modifying language that is applicable only to a voluntarily adopted document. The principal substantive changes are as follows:

- ESCO marketing representatives are required to clearly identify themselves upon contacting a consumer for the purpose of selling a product or service, rather than upon “first entering into negotiations.” The term “negotiations” implies a bilateral give and take on the terms of a transaction that could easily be construed not to apply to a sales pitch followed by acceptance of an offer. A consumer who asks questions about the terms and conditions of an offer is no more negotiating than a diner at a restaurant who asks a waiter about items on the menu. Accordingly, we recommend that ESCOs be required to identify themselves as soon as possible after contacting the consumer.

- ESCO representatives are required to clearly explain to consumers that they do not act on behalf, or at the request, of a distribution utility. Despite years of outreach and education, there is still a powerful tendency for consumers to assume they are dealing with a traditional utility when they are discussing the purchase of natural gas and electricity. This requirement will minimize the possibility of any such misunderstanding, and should have no impact at all on the success of ESCO marketing efforts since it does nothing more than enhance the effectiveness of the identification requirements that most ESCOs have voluntarily accepted. For these reasons, we recommend that the identification requirement in the Statement of Principles be strengthened to explicitly require that ESCO representatives state they are not acting on behalf of the utility or at its request.

The remaining modifications involve changes in wording necessary to reflect the Statement's transformation from a voluntary agreement among ESCOs to an enforceable set of requirements promulgated by the Commission. For example, references to a "voluntary Statement of Principles" are deleted. Additional language preserves the authority of local consumer protection agencies such as DCA to proceed against ESCOs under their consumer protection statutes and explicitly requires ESCOs to cooperate with such agencies. With the changes we recommend, the revised Statement of Principles should be incorporated within the UBP as soon as possible. A draft of the Notice required by the State Administrative Procedures Act is attached as Exhibit 2.

CONCLUSION

The New York State Consumer Protection Board and the New York City Department of Consumer Affairs urge the Public Service Commission to adopt the recommendations identified herein.

Respectfully submitted,

Mindy A. Bockstein
Chairperson and Executive Director
New York State
Consumer Protection Board

Jonathan Mintz
Commissioner
New York City
Department of Consumer Affairs

Dated: New York, New York
December 19, 2007

Exhibit 1

Statement of Principles for Energy Service Companies Marketing Retail Energy to Residential and Small Business Customers in New York State

1. Introduction

This is a Statement of Principles for Energy Services Companies (“ESCOs”) marketing retail energy (natural gas and/or electricity) to residential and small business customers in New York (“Customers”).

2. Training of Marketing Representatives

ESCOs shall take reasonable steps to ensure that their training of marketing representatives includes:

- awareness of this Statement of Principles;
- awareness of the New York Uniform Business Practices (“UBP”);
- awareness of the Customer’s right to choose a retailer;
- knowledge of the ESCOs’ products and services;
- knowledge of rates, payment options and the Customers’ right to cancellation;
- knowledge of special services or special rates for low income consumers, elderly or individuals with mental or physical disabilities;
- knowledge of the ESCOs’ mechanisms for handling billing questions, disputes, and complaints; and,
- knowledge of requirements concerning providing information to consumers whose primary language is not English.

3. Personal Contact with Customers

3.1 In person contact with Customers

Representatives of ESCOs who contact Customers in person at a location other than the ESCO’s place of business for the purpose of selling any product or service offered by the ESCO will:

- a. As soon as possible after contacting the customer, and before describing any products or services offered for sale by the ESCO:

(i) Produce identification which:

- indicates the full name of the marketing representative;
- shows a photograph of the marketing representative;
- does not depict or resemble the name or logo of a distribution utility;
- states the name of the ESCO represented by the marketing representative;
- includes the business address of the ESCO; and provides the ESCO telephone number for inquiries, verification and complaints.

(ii) Clearly state that the representative is 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.

b. Representatives shall display the identification described in 3.1.a.(i) at any time when requested to do so by the customer.

c. A representative will leave the premises of a customer when requested to do so by the customer or the owner or occupant of the premises.

d. Representatives shall provide the customer with written information or a website at which information can be obtained.

3.2 Telephone Contact With Customers

Representatives of ESCOs who contact customers by telephone for the purpose of selling any product or service offered by the ESCO will:

a. Provide the first name and, on request, the operator identification number of the marketing representative making the telephone call;

b. State the name of the ESCO on whose behalf the call is being made;

c. Explain in plain language that the representative is 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, that or any distribution utility;

- d. State the purpose of the telephone call; and,
- e. Refer the call to a Representative who speaks the consumer's language if the consumer's primary language is not English.

4. **Conduct**

ESCOs will:

- not engage in misleading or deceptive conduct;
- not make false or misleading representations including misrepresenting rates or savings;
- use plain language, including words and images that facilitate customer understanding of ESCO products and services;
- provide the customer with written information or a website at which information can be obtained;
- use reasonable efforts to provide accurate and timely information about services and products. Such information will include information about rates, contract terms and rights of cancellation;
- insure that any product or service offerings that are made by an ESCO contain information that is designed to be understood by the customer. This shall include providing information to customers in the language in which the representative speaks to the customer or in which a contract is negotiated;
- promptly and fairly investigate customer inquiries and complaints concerning marketing practices; and
- cooperate with the PSC, the CPB and local law enforcement in investigations concerning deceptive marketing practices and practices proscribed by the UBPs.

5. **Dispute Resolution**

ESCOs will maintain an internal process for handling customer complaints and resolving disputes arising from marketing activities and shall respond promptly to complaints forwarded by the PSC, the CPB and enforcement agencies.

Exhibit 2

(SAPA No.)

NYS Department of State

Notice of Proposed Rule Making – Public Service Commission

Pursuant to the provisions of the State Administrative Procedures Act (SAPA), notice is hereby given of the following agency action:

Proposed action: The Public Service Commission is considering the petition of the NYS Consumer Protection Board (CPB) and the New York City Department of Consumer Affairs (DCA) to amend its Uniform Business Practices for energy service companies (ESCOs) to incorporate enforceable guidelines for the conduct of ESCO marketing representatives.

Statutory authority under which the rule is proposed: Public Service Law, Sections 65 and 66(12).

Subject of the rule: Uniform Business Practices.

Purpose of the rule: The Uniform Business Practices (UBP) is a compilation of business rules and operating procedures governing the interrelationships among distribution utilities, ESCOs, and consumers participating in retail access programs for natural gas and electricity. While many ESCOs subscribe to voluntary guidelines for the conduct of their door-to-door and telephone marketing representatives, those guidelines are not directly enforceable by the PSC. The petition of the CPB and DCA seeks to have the guidelines incorporated in the UBP. The principal substantive changes that would result from the granting of the petition are: (1) ESCO marketing representatives would be required to clearly identify themselves upon contacting a customer for the purpose of selling a product or service; (2) ESCO representatives would be required to clearly explain to customers that they do not act on behalf, or at the request, of a distribution utility; (3) violation of the guidelines would constitute a failure to comply with the terms and conditions of the UBP.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500.

Data, views or arguments may be submitted to: Jaclyn A. Brillong, Bldg. 3, Empire State Plaza, Plaza, Albany, NY 12223-1350, (518) 474-6530.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement: Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.