

VIA EXPRESS MAIL

November 9, 2006

Hon. Jaclyn A. Brillling,
Secretary
State of New York
Public Service Commission
Three Empire State Plaza, 19th Floor
Albany, NY 12223-1350

RE: Case No. 98-M-1343 – In the Matter of Retail Access Business Rules;
Case No. 98-M-0667 – In the Matter of Electronic Data Interchange; NYS Register
Notice I.D. Nos. PSC-39-06-00021-P and PSC-39-06-00023-P (September 27, 2006)

**JOINT UTILITY COMMENTS IN RESPONSE TO PROPOSED
ESCO CONTEST PERIOD AND RELATED CHANGES TO
EDI TRANSACTION SET STANDARDS**

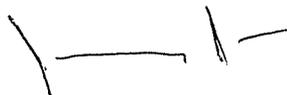
Dear Secretary Brillling,

Niagara Mohawk Power Corporation, d/b/a National Grid, for itself and on behalf of National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, Rochester Gas & Electric Corporation, Central Hudson Gas & Electric Corporation, The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York, and KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island, hereby submits an original and five copies of joint utility comments in connection with the above-referenced notices in Case Nos. 98-M-1343 and 98-M-0667.

Copies of the filing are also being served via regular and/or electronic mail upon parties identified on the Active Parties lists provided by the Commission in these proceedings. Kindly acknowledge receipt of this filing by date stamping the enclosed duplicate copy of this letter and returning it in the self-addressed envelope provided.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,



Jeremy J. Euto

cc: Robert Visalli
Active Parties

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Electronic Data Interchange
In the Matter of Retail Access Business Rules

Case No. 98-M-0667
Case No. 98-M-1343

**JOINT UTILITY COMMENTS ON
PROPOSED ESCO CONTEST PERIOD AND
RELATED CHANGES TO EDI TRANSACTION SET STANDARDS**

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Dated: November 9, 2006

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**In the Matter of Electronic Data Interchange
In the Matter of Retail Access Business Rules**

Case No. 98-M-0667

Case No. 98-M-1343

**JOINT UTILITY COMMENTS ON
PROPOSED ESCO CONTEST PERIOD AND
RELATED CHANGES TO EDI TRANSACTION SET STANDARDS**

National Fuel Gas Distribution Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, New York State Electric & Gas Corporation, Rochester Gas & Electric Corporation, Central Hudson Gas & Electric Corporation, The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York, and KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (collectively, the "Utilities") hereby submit comments in response to notice I.D. Nos. PSC-39-06-00021-P and PSC-39-06-00023-P published in the September 27, 2006 edition of the New York State Register (the "Notices").

In the Notices, the New York State Public Service Commission (the "Commission") seeks comments on the August 17, 2006 petition (the "Petition") of US Energy Savings Corp. ("US Energy" or "Petitioner") requesting certain modifications to New York's Uniform Business Practices¹ ("UBP") and various electronic data interchange ("EDI")

¹ See, Case No. 98-M-1343 – In the Matter of Retail Access Business Rules, *Order Adopting Uniform Business Practices and Requiring Tariff Amendments* (January 22, 1999).

transaction set standards.² In its Petition, US Energy proposes to require utilities, upon receipt of an enrollment request, to notify the pending ESCO whether the customer is already being served by an ESCO, and to establish a contest period (“Contest Period”) during which an incumbent ESCO could cancel a pending enrollment request if the customer has authorized the incumbent ESCO to do so.

GENERALLY

The Utilities urge the Commission to reject the relief requested in the Petition. As more particularly set forth below, the Commission should reject US Energy's Contest Period proposal because the current UBPs already provide an orderly process for customer enrollment. US Energy's proposed modifications would permit an ESCO currently serving a customer (“Incumbent ESCO”) to reject a customer's pending enrollment or switch to another ESCO (“Pending ESCO”).³ The Utilities oppose such a modification as it interjects the utility in what is essentially a dispute between the Incumbent ESCO and the customer. Further, US Energy's Contest Period proposal would impose a process that is confusing to customers, less efficient and presents more administrative costs to all parties involved. In addition, US Energy's proposal calls for the Pending ESCO to receive notice at the time of enrollment that a customer receives supply from another ESCO. The Utilities oppose such a modification as it would threaten customer privacy.

² See, Case No. 98-M-0667 – In the Matter of Electronic Data Interchange, Opinion 01-03, Opinion and Order Approving EDI Data Standards and Data Protocols and Modifying the New York Uniform Business Practices for EDI Implementation (July 23, 2001).

³ New York State Register, I.D. No. PSC-39-06-00022-P, Substance of Proposed Rule (September 27, 2006).

In an effort to justify the relief requested in the Petition, US Energy asserts that its ESCO Contest Period proposal “ensures customers are served by the ESCO they choose.”⁴ However, if US Energy’s Petition is granted just the opposite would occur – a customer having affirmatively chosen to switch to a new ESCO could, without their actual knowledge, find that they have been switched back to the Incumbent ESCO, in direct contravention of the customer’s choice to switch to the new ESCO.

With regard to customer choice, Utilities have not had an opportunity to conduct an analysis of the possible anti-trust implications of US Energy’s Contest Period proposal; however, given that the proposal permits the Incumbent ESCO to interfere with the customer’s ability to switch to a new ESCO (i.e., a competitor to the Incumbent ESCO), such a review would certainly seem appropriate.

US Energy further asserts that its Contest Period proposal “prevents slamming allegations.”⁵ However, the Utilities believe that the Contest Period could actually introduce a new variant of slamming – whereby the Incumbent ESCO, without the customer’s actual knowledge, interjects a reversal of the customer’s decision to switch to a new ESCO. Slamming is defined as “[e]nrollment of a customer by an ESCO without authorization.”⁶ If a customer has affirmatively decided to switch from the Incumbent ESCO to a new ESCO – and the Incumbent ESCO is able (i.e., via US Energy’s Contest Period proposal) to reverse the customer’s choice, without the customer’s actual knowledge, such reversal is certainly inconsistent with, if not direct contravention with, the customer’s ability and choice to switch to the new ESCO.

⁴ Petition at p. 1.

⁵ *Id.*

⁶ UBP at p. 4.

US Energy asserts that the Contest Period proposal “helps customers avoid early termination fees.”⁷ The Utilities are not privy to contracts between customers and the ESCOs and would not be in a position to know whether this would be true. In any event, assuming the terms of the agreement are clear and presented to the customer in a manner likely to be understood, the customer would be well aware of the consequences of terminating their arrangement with the Incumbent ESCO. Utilities, and for that matter the Commission, should not be put in the position of having to police customer compliance with an ESCO’s contract.

US Energy asserts that the Contest Period proposal “avoids disputes between ESCOs over customers.”⁸ However, the operation of the Contest Period proposal creates the very dispute it purports to resolve. If US Energy’s proposed modifications are granted, and the Incumbent ESCO is permitted to reverse the customer’s decision to switch providers – this scenario could actually create a breach of the customer’s choice (and likely contractual commitment) to switch to the new ESCO - a breach brought about by the Incumbent ESCO’s action to reverse the customer’s choice. Under US Energy’s Contest Period proposal, utilities could be required to provide the instrumentality by which the incumbent ESCO actually interferes with the customer’s effort to switch to a new provider.

The modifications proposed by US Energy would impermissibly place the utilities in the role of enforcing the terms of the Incumbent ESCO's contract with its customer or imposing a new contract from the new ESCO upon a customer. Moreover, both the Incumbent ESCO and the potential new ESCO already have adequate contractual remedies to address the concerns raised by US Energy and, therefore, no additional regulatory

⁷ Petition at p. 1.

⁸ *Id.*

protection for the ESCO is needed. The current UBP notice provisions already provide sufficient notice to the customer and the Incumbent ESCO to protect their respective rights – whereas, the additional notification requirements US Energy advocates could actually threaten customer privacy. Finally, and perhaps most importantly, adoption of US Energy's proposal would undermine the customer's ability to freely choose its supplier – the very standard the Commission seeks to promote.

COMMENTS

A. *US Energy's proposed modifications should be rejected because the current UBPs adequately address the cancellation of pending enrollments.*

The issues presented in the Petition have not been an issue for the Utilities. While Incumbent ESCOs have had cause to contact Pending ESCOs concerning current customer contractual obligations, the Utilities believe that the current UBPs properly addressed this matter. From the customer's perspective, the following two situations exist:

- 1) The customer initially agrees to be served by the Pending ESCO and changes their mind (i.e., seeks to cancel the enrollment and remain with the Incumbent ESCO).
- 2) The customer initially agrees to be served by the Pending ESCO and still wishes to be served by the Pending ESCO.

The UBPs currently address the first situation by requiring the customer to contact both the Pending ESCO and the utility to cancel the pending enrollment.⁹ The UBP requires that if a customer notifies the pending ESCO of such cancellation, the pending ESCO will send a customer's drop request to the distribution utility at least three business

⁹ UBP Section 5 (E)(1).

days prior to the effective date for the pending enrollment.¹⁰ It is important to note, that while the UBP requires the customer to notify the Pending ESCO, this step is not an absolute necessity to cancel a pending enrollment. Customer notification to the Pending ESCO is the obligation of the customer.¹¹ In practice, however, customer notification to the utility will set an enrollment or cancellation of an enrollment in motion. Under the UBP if the customer solely contacts the utility and requests the pending enrollment be cancelled, the utility will cancel the enrollment, thereby reinstating the customer with the Incumbent ESCO and also notify the Pending ESCO of the enrollment cancellation.

The second situation, where the customer wishes to be served by the Pending ESCO even though they are under a contractual obligation to the Incumbent ESCO, requires no action on the customer's part. To permit the Incumbent ESCO to reverse the customer's decision to switch, would result in customer confusion - if upon deciding to switch, customers subsequently find (perhaps one or as many as two billing cycles later) that they have not, in fact, been switched to the new ESCO.

ESCOs will from time to time either be an Incumbent ESCO asserting a customer obligation or a Pending ESCO enrolling a customer served by another ESCO. While there have been a few rare instances in which the Utilities have had to broker disputes between two ESCOs over a customer, this has not proven unmanageable for the Utilities. In most cases, the ESCOs and the customer resolve the dispute and the utility, unaware of any dispute, merely processes the pending transaction or performs a reinstatement.

The applicable UBPs have been in place for several years and here-to-fore, no ESCOs have raised the issue purportedly addressed by the Contest Period proposal.

¹⁰ UBP Section 5 (E)(3)

¹¹ *See*, UBP Section 5 (E)

Since there is no evidence of harm provided in the Petition, US Energy's Contest Period proposal looks like a solution in search of a problem. For that reason alone, it deserves rejection. The effect of granting US Energy's request, however, would be to convert an Incumbent ESCO's unregulated contractual rights into a quasi-regulated monopoly power enforced by the utility. This result would fly in the face of customer "choice."

B. *US Energy's proposed modification pertains to an ESCO-Customer dispute and would place utilities in a contract enforcement role.*

Opinion No. 99-3 acknowledges that an Incumbent ESCO with agency rights could contact a utility to cancel a pending switch before the effective date.¹² As a practical matter, the Utilities question whether Opinion No. 99-3 should pertain to the residential mass market. A verification process, particularly if the customer objects to the Incumbent ESCOs assertion of agency, or subsequently decides to revoke such authority, would be cumbersome. Additionally, the Pending ESCO may believe (e.g., based on a customer's contractual commitment) that they are the customer's agent and have agency rights. Certainly the customer retains some consumer protections providing their right to receive service with whomever they prefer provided they accept the consequences of that action.

The Petition proposes that the UBP Section 5 (E) (1) be modified as follows:

The distribution utility shall send no later than one calendar day after acceptance of an enrollment request a verification letter to the customer notifying the customer of the acceptance. The notice shall inform the customer that if the enrollment is unauthorized or the customer decides to cancel it, the customer is required immediately to so notify the distribution utility, incumbent ESCO and or pending ESCO. Upon verifiable written, telephonic, or electronic authorization of the customer, the incumbent ESCO may cancel the pending enrollment by notifying the distribution utility.

¹² Case 98-M-1343 - In the Matter of Retail Access Business Rules, Opinion 99-03, *Opinion and Order Concerning Uniform Business Practices* (February 16, 1999) at p. 69.

US Energy's modification proposes that the Incumbent ESCO be permitted to rely upon its assertion of agency rights to directly notify the utility of the cancelled pending enrollment. US Energy, however, does not propose a contemporaneous notification to the customer. Meanwhile, a customer who agreed to a transfer of service to a Pending ESCO has received the utility's verification letter informing them no additional action is required to complete the transfer. As a result, the customer will not be aware that their intentions were not honored until they receive their bill for the billing cycle for which the enrollment should have been effected.

Such a customer will likely contact the utility to complain that their intentions were not honored, placing the utilities squarely in a three-way dispute between the ESCOs and the customer. Utilities should not be placed in situations where they might be seen as being obligated to resolve contract disputes between ESCOs and their customers. Moreover, getting involved in such matters may lead to allegations of tortious interference with contract claims. In addition, because the utility is not a party to the contract between the ESCO and the customer, it is unclear what right, if any, the utility would have to make/undo a switch absent the customer's consent.

C. *US Energy's proposed modification could increase ESCO-Customer Disputes and would introduce a new form of Slamming.*

As discussed herein, the Utilities believe that granting US Energy's modification could actually increase disputes. The current UBPs are customer-centric and designed, in part, to prevent slamming. US Energy's proposal has the unfortunate consequence of placing ESCOs' interests above those of the customers. US Energy's objective seems to be

to provide a tool for customer retention and to protect the Incumbent ESCO's interests over those of customers.¹³

Slamming occurs when a customer is switched to an ESCO without authorization or knowledge.¹⁴ If the customer is forced to stay with the Incumbent ESCO in conflict with the customer's expectation, the same harm occurs. Giving ESCOs the capability to rescind an enrollment will, instead of reducing the opportunities for slamming, provide one more way to accomplish slamming because it could interfere with the customer's choice to be served by the new ESCO. In any event, the customer may wish to exit its contract with the Incumbent ESCO and be willing to pay any applicable termination fees.¹⁵ When the customer is informed by the utility that the terms of its agreement with the Incumbent ESCO have the effect of disenfranchising the customer in terms of their choice of supplier, it is unlikely the a utility could distance itself from any contract dispute.

D. *Sufficient remedy for the Incumbent ESCO exists under contract law.*

If the Incumbent ESCO is harmed, it has an adequate remedy at law. US Energy's proposal, if adopted, would enforce specific performance of its contract on the customer, a remedy that is both unnecessary and under these circumstances, not available for breach of

¹³ In a recent story in the industry trade press, it was noted that US Energy or "ESIF", "sells gas and power on five-year, fixed-price deals to residential and small C&I customers. The business plan -- selling in effect insurance -- has yielded growing returns for fund investors for 23 quarters." and "ESIF has seen problems in New York where some customers have been signed up by other marketers -- a problem it's working on with Consolidated Edison and PSC.", *Restructuring Today*, August 11, 2006, pp. 1, 3.

¹⁴ UBP at p. 4.

¹⁵ Utilities have seen the situation where an ESCO keeps claiming that other ESCO's are "slamming" their customers. Upon investigation, this is not the case. Rather, customers are choosing to switch. This proposal would allow the incumbent ESCO to cancel the enrollments to the pending ESCOs; thereby requiring manual effort to "re-enroll" customers, which were their original intentions, back with the pending ESCOs. There is nothing to stop the Incumbent ESCO from attempting another cancellation which would restart the dispute cycle.

contract. Thus, US Energy seeks to enhance its rights beyond that which would ordinarily be provided by law, at the expense of the customer's existing contractual rights. The Utilities fail to see how a proposal such as this advances customers' interest or the Commission's interest in responsibly promoting retail competition.

- E. *The proposed notification to the Incumbent ESCO is sufficient and additional changes would threaten customer privacy.*

The Petition proposes the following changes to the UBP § 5(D) (4):

After receipt of an enrollment request, the distribution utility shall, within one business day, acknowledge its receipt, and, within two business days, provide a response indicating rejection and the reason, or acceptance and the effective date for the change of provider. The distribution utility shall indicate whether the customer is being served by another ESCO.

The Utilities believe that Pending ESCOs should not receive notice at the time of enrollment that the customer receives supply from another ESCO. The Utilities are concerned that this disclosure would raise a privacy issue because a utility may not disclose customer information to a third party without customer consent. With the exception of a new customer in a service territory, all customers receive service from another provider and therefore it is not necessary for a pending ESCO to know that a customer receives service from another ESCO. If there is no privacy issue, the Commission should clarify so.

- F. *The customer should retain the final word on choosing a service provider.*

Even after a communication from the Incumbent ESCO reminding the customer of their contractual obligation and consequences of termination, the customer may still wish to be served by the Pending ESCO. The trigger for this entire debate, a customer's decision to switch suppliers, must be assumed to be rational, even if the customer's contract with the Incumbent ESCO has not expired. Under the Contest Period proposal, even where a

customer is fully aware of any termination fees, but nevertheless seeks to switch suppliers, the Incumbent ESCO could be empowered to reverse the customer's decision to switch. This, again, is contrary to the very meaning of customer choice, and should be rejected.¹⁶

G. *Corresponding changes to EDI Transaction Set Standards would reduce rather than enhance efficiency.*

US Energy proposes that EDI standards be modified to allow an Incumbent ESCO to send an EDI transaction canceling the pending enrollment. While US Energy implies such changes may promote efficiency, the Contest Period proposal would add an unnecessary layer to what is generally viewed as a complex, but workable process. Further, any gain in transactional efficiency would be outweighed by efficiency losses arising from the disputes that will undoubtedly result from the stealth cancellations sought by US Energy.

EDI transactions are more aptly suited for high volume and automated transactions, and US Energy has not demonstrated that Contest Period transactions are frequent enough to equate to high volume. The current UBP enrollment process is at the core of customer choice functionality, and was the product of a collaborative process that specifically chose to limit the number of enrollment (i.e., including re-enrollment) transactions that could occur for a given customer during a billing cycle.¹⁷ US Energy has utterly failed to demonstrate the level of need that should be required to adopt a change as radical as US Energy proposes.

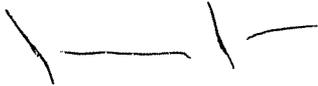
¹⁶ Contract superiority, including the revocation of agency authority in the Incumbent ESCO, should be determined by the customer.

¹⁷ See, e.g., UBP Section 5 (F)(5)

CONCLUSION

For all the above reasons, the Utilities respectfully request that the Commission reject US Energy's Contest Period proposal and related modifications to the UBP and EDI standards. The Utilities believe the current UBPs adequately address the enrollment process and therefore, no changes are necessary or appropriate. The choice of canceling a pending switch as well as choosing a service provider should remain with the customer.

Respectfully submitted,



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Dated: November 9, 2006