

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Retail Access Business Rules)

Case 98-M-1343

**PETITION FOR CLARIFICATION AND/OR REHEARING OF THE
NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Energy Marketers Association (NEM)¹ hereby submits a Petition for Clarification and/or Rehearing of the Order Adopting Revised Uniform Business Practices issued on January 19, 2018, pursuant to the Commission’s regulations at 16 NYCRR 3.7. NEM and its members are committed to ensuring that consumer protections are provided to New York State energy consumers. NEM submits this Petition for Clarification and/or Rehearing in furtherance of this objective – so that ESCOs have an adequate opportunity to understand the scope and detail of the UBP revisions, to maximize the efficient use of stakeholder resources, and to permit the development of ESCO business processes and EDI transactions that are needed to comply with the Commission directives.

NEM specifically requests Commission clarification and/or rehearing of the following revisions to the UBP:

- 1) The changes required under UBP Section 5.L.2. on voluntary ESCO budget billing and levelized payment plans are not warranted, cannot be accommodated under the current utility Rate Ready billing and would require extensive other billing process changes to implement. The current system for ESCO budget billing is working.

¹ The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies. These Comments are not intended to serve as a waiver of any rights, arguments, claims or remedies, all of which NEM expressly reserves.

- 2) The definition of “small non-residential customer” should be reconsidered and clarified. It would prohibit technical implementation of the new TPV requirement under UBP Section 5.B.2. and should be deferred for consideration in the on-going Track I proceeding.
- 3) The TPV script question at UBP Section 5, Attachment 1, A.17, pertaining to a consumer’s participation in a low-income assistance program should not be incorporated into the UBP at this time given pending litigation. If such question is retained, it should be expressly limited to residential enrollments.
- 4) The change in wording to UBP Section 5.J.1. pertaining to ESCO assignment of sales agreements should be withdrawn because of the material change in compliance obligations created thereunder that are contrary to state law and the likely consumer confusion resulting from the change.
- 5) The ESCO representative badge information requirements as set forth in the Order should be expressed consistently with the requirements set forth in UBP Sections 10.C.1.b.1. and 10.C.1.d.
- 6) The inclusion of a compliance standard at UBP Section 2.D.5.o. that incorporates the undefined term “value added services and products” that is the subject of the on-going Track I proceeding should be deferred pending the outcome of that case.

I. The UBP Changes Denominated as “Other Related Matters and Housekeeping Items” Were Not Issued in Conformance with SAPA Requirements

The Notice Seeking Comments on Revisions to the Uniform Business Practices issued on March 8, 2017, as well as two Notices of Proposed Rulemaking on Amendments to the UBP were published in the March 22, 2017, New York State Register referencing two specific proposals: 1) a UBP modification to reflect a change in New York law to prohibit the assessment of early termination fees in the event of an account holder’s death; and 2) an ESCO petition to modify the UBP requirements pertaining to representative identification requirements. It was noted that the Commission was also considering “other related matters and housekeeping items.” No description or rationale supporting the “other related matters and housekeeping items” was given in the Notices. The changes could only be discerned from a redlined attachment of UBP provisions.

NEM noted in its original comments to the instant proceeding and continues to maintain that the Commission did not provide the industry with requisite notice and opportunity to comment on the “other related matters and housekeeping items,” as required under the State Administrative Procedures Act (SAPA). As was recently held in the Decision/Order rendered in the Albany Supreme Court vacating provisions of the Commission’s Reset Order, “the PSC must provide an opportunity to be heard in a meaningful manner and at a meaningful time.” This requirement was not satisfied because the Notices did not adequately apprise stakeholders of the substance, nature or reasoning behind the proposed changes, and therefore hindered stakeholders ability to properly assess and evaluate the impact of those changes on their associated compliance obligations. Indeed, describing something as a “housekeeping item” implies a minor matter of limited importance. However, the nature of the changes proposed and subsequently adopted are significant and material, implicating complicated budget billing processes, extension of TPV requirements to small non-residential customers and associated technical implementation changes and ESCO assignment of contracts. Moreover, the necessity of filing this Petition and NEM’s previously-filed request for extension of time to comply belies any contention that these changes could be considered as mere “housekeeping.”

II. Deferral of Matters That are the Subject of the Track I Proceeding

In its initial comments in the instant matter, NEM noted that a number of the proposed changes were inextricably related to the Commission’s on-going Track I proceeding, the resolution of which in the instant case would effectively predetermine the outcome of issues in the Track I proceeding without a supporting record. Upon consideration, the Order acknowledged that certain proposed UBP changes were the subject of the Track I proceeding and declined acting on those proposals as a result. This included the proposal that the third party verifier direct the customer to

compare the utility rate on its bill with the ESCO rate and the proposal that electronic enrollments include advising the customer to check and compare the utility and ESCO rate. The related proposal to require ESCO sales presentations to include a statement to, “advise the customer to check the utility’s price on customer’s bill as a comparison to the price that ESCO is offering,” was not adopted either. NEM appreciates the Commission’s consideration of its arguments and supports the Commission’s decision to decline acting on those proposals.

However, notwithstanding the decision to decline acting on certain Track I issues, the Commission nonetheless did adopt proposals related to the definition of “small non-residential customer” (attendant with the TPV requirement under UBP Section 5.B.2.) as well as the term “value added services and products” (attendant with the requirement to comply with Department requests for documents under UBP Section 2.D.5.o.). Both of those terms are the subject of the on-going Track I proceeding, with lengthy record evidence having been submitted by multiple parties. However, as the Commission is well-aware, final resolution of these issues has not been made. Because these definitions have not been finalized, the compliance obligations adopted in the Order incorporating the definitions should be deferred pending final Commission action in Track I.

III. ESCO Budget Billing or Levelized Payment Plans to Residential Customers – UBP Section 5.L.2.

Amendments to UBP Section 5.L.2. were adopted regarding voluntary ESCO budget billing and levelized payment plans. The amended language in UBP Section 5.L.2. sets forth two requirements. First, ESCOs must offer voluntary budget billing under which the ESCO “is responsible for determining the budget bill amount and must evaluate each budget billed account on a quarterly basis for conformity with actual billing.” Second, voluntary ESCO budget billing plans must “provide that bills clearly identify consumption and state the amounts that would be

due without levelized or budget billing.” Implementation of the changes required under UBP Section 5.L.2. will require significant stakeholder time and resources to evaluate and accomplish, if it can be achieved at all under current utility billing systems, including development of EDI transactions and billing processes. NEM submits that the current system for ESCO budget billing is working and that these changes are neither justified or warranted.

As an initial matter, it bears noting that when the Commission adopted regulations to implement HEFPA requirements as applicable to ESCOs it acknowledged that technological changes would be necessary to provide a utility consolidated bill to budget bill customers.² Accommodations under existing utility billing systems were made,³ and these systems have been serving ESCOs and their customers for quite some time. This was also consistent with the longstanding Commission policy in favor of consolidated billing.⁴ There is no record that this system has not been working or that changes are necessary.

In addition, PSL § 38 does not include the quarterly evaluation requirement in revised UBP Section 5.L.2. The HEFPA regulations on budget billing at 16 NYCRR 11.11 provide that “bills be subject to regular review for conformity with actual billings,” but do not specify a quarterly evaluation requirement. The Order does not discuss why a quarterly evaluation requirement was adopted, nor did the underlying Notice proposing the change. It is unclear if utilities are or will be subject to a

² “We are not now setting a deadline by which the necessary computer and other changes must be in place to provide a consolidated bill to customers who elect budget billing, but we expect all parties to begin efforts to immediately implement this provision of HEFPA.” Case 03-M-0117, et. al., Order on Petitions for Rehearing and Clarification, issued December 5, 2003, at page 47.

³ The satisfaction of a HEFPA-required budget billing option in this manner is consistent with the Commission’s decision that “under POR programs, the distribution utility provides HEFPA protections for the ESCO and distribution utility accounts.” See Case 03-M-0117, Order on Petitions for Rehearing and Clarification, issued June 22, 2005, page 22.

⁴ The Commission long ago recognized “customers’ expressed preferences for a single bill.” Case 99-M-0631, Order Providing for Customer Choice of Billing Entity, issued March 22, 2000, at page 3.

quarterly evaluation requirement. However, there is no basis for requiring ESCOs to adhere to a stricter standard.

From a practical perspective, both of the new requirements in Section 5.L.2. cannot be performed under utility consolidated billing in a Rate Ready billing environment. In a Rate Ready environment ESCOs communicate the rate, not a billable amount, to the utility. The utility does not provide the ESCO with the usage amount. This fundamentally prohibits ESCOs from providing budget billing in a Rate Ready environment and has necessitated the accommodation of relying on utilities existing budget billing protocols to satisfy ESCO and ESCO customer requests for budget billing. In order to accomplish the changes under Section 5.L.2., the Rate Ready utilities would need to develop and implement something more akin to Bill Ready-type processes in order for ESCOs to provide the budget billing data to the utilities, and the utilities' systems would need to change to allow ESCOs to control the customers' budget billing amounts for the supply portion of the bill.

Because of the manner in which Rate Ready billing works, there are no EDI transaction sets for Rate Ready billing that would support the quarterly evaluation requirement. There also aren't any EDI transaction sets with the Rate Ready utilities that would allow ESCOs to "provide that bills clearly identify consumption and state the amounts that would be due without levelized or budget billing." The Rate Ready utilities do not have the systems in place to support ESCOs intervention into the budget billing process that would be needed to effectuate these changes.

Another practical consideration associated with this change is the need for additional space to communicate the new information on the utility consolidated bill. The space on the utility consolidated bill is limited. It is unclear whether utilities have the space available on the

consolidated bill to include this additional information. Even if it can be accommodated on the utility consolidated bill, it is not clear how long it will take for that change to be implemented.

Finally, the impact on the payment hierarchy between delivery service and commodity service under Purchase of Receivables with the budget billing modifications should be clarified.

IV. Definition of Small Non-Residential Customer and TPV Requirements – UBP Section 5.B.2.

The Order and corresponding UBP Section 5.B.2. apply a new third-party verification (TPV) requirement to sales to small non-residential customers resulting from door-to-door solicitations, telephonic marketing or scheduled appointments. Essential to ESCO compliance with this TPV requirement is the definition of “small non-residential customer.” The Order, in footnote 4, references the definition of “small non-residential customer” that was included in a 2014 Order.⁵ The 2014 Order provided in relevant part that “a ‘small non-residential customer’ means an electricity customer in a utility service classification that does not have a demand rate element, and/or a natural gas customer in a service classification that provides firm service.” NEM and others filed Petitions for Rehearing or Clarification⁶ of certain elements of the 2014 Order, including the definition of “small non-residential customer.” The definition in the 2014 Order was later stayed by the Commission⁷ and then ultimately withdrawn from the UBP in 2015,⁸ reflecting industry concerns that had been expressed. The 2016 Reset Order⁹ then adopted a definition of

⁵ Case 12-M-0476, et.al., Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets, issued February 25, 2014, note 1.

⁶ Case 12-M-0476, et.al., Petition for Clarification and/or Rehearing of National Energy Marketers Association, dated March 27, 2014, at pages 6-8. NEM incorporates by reference its arguments asserted therein.

⁷ Case 12-M-0476, et. al., Order Granting Requests for Rehearing and Issuing a Stay, issued April 25, 2014, at page 6.

⁸ Case 12-M-0476, et. al., Order Granting and Denying Petitions for Rehearing in Part, issued February 6, 2014, note 3.

⁹ Case 15-M-0127, et. al., Order Resetting Retail Energy Markets and Establishing Further Process, issued February 23, 2016.

“small non-residential customer.”¹⁰ The 2016 Reset Order definition differed from the 2014 Order with respect to natural gas customers, choosing to rely on usage as the threshold indicator of whether a customer should be deemed to be a small non-residential gas customer. The 2016 Reset Order definition specifically provided that “small non-residential customers are defined as either a non-demand metered electric customer or a non-residential gas customer with annual gas consumption that does not exceed 750 dekatherms per year or the equivalent.” The 2016 Reset Order addressed small non-residential electric customers in a similar fashion to the 2014 Order, with reference to the customer’s non-demand status. The 2016 Order was subsequently vacated and remitted to the Commission for further proceedings.¹¹ The definition of small non-residential customer, and associated ESCO compliance obligations with serving such customers, is one of the central issues for resolution in the on-going Track I proceeding.¹²

The reference in footnote 4 in the instant Order to the previously withdrawn definition of small non-residential customer from the 2014 Order was not re-noticed for comment and unexpected. Indeed, the Commission’s decision to withdraw the definition from the UBP in 2015 appeared to evince its judgment, upon evaluation of stakeholder concerns, that the 2014 Order definition was problematic and should not be used. The Commission’s decision to revert to the 2014 Order definition of small non-residential customer at this time is not supported by the record or prior Commission precedent. The issue is also interwoven into the on-going Track I ESCO proceeding.

¹⁰ Id. at note 2.

¹¹ National Energy Marketers Association et al. v. New York Public Service Commission, Alb. Co. Index No. 868-16, Decision/Order, dated July 22, 2016.

¹² Case 15-M-0127, et. al., Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits, issued December 2, 2016.

The definition of small non-residential natural gas customer should be reconsidered and clarified to incorporate a reasonable usage standard for natural gas customers. In this regard, NEM recommends reliance on a standard of annual consumption of 500 dekatherms per year as reasonably reflecting the distinction between a “mass market” customer versus a sophisticated business customer. The application of the TPV requirement for enrollment of a sophisticated business customer, after a contract has been negotiated, reviewed and executed, would be unnecessarily burdensome. The performance of a TPV is excessive and unnecessary for sophisticated business customers, for whom evaluating and entering into contracts for products and services is a standard facet of conducting their business.

The definition of small non-residential electric customer should also be reconsidered and clarified. Regarding the 2014 Order definition of small non-residential electric customers as “an electricity customer in a utility service classification that does not have a demand rate element,” NEM reiterates its previously stated concern that the utilities have not uniformly provided demand meters to small business consumers. As such, this consumer protection rule would have arbitrary application to otherwise similarly situated customers. A standard should be utilized that is more closely tailored toward achieving the goal of protecting consumers that are in need of the extra element of protection.

From a practical implementation perspective, the 2014 Order definition of small non-residential natural gas customers would present a specific problem for ESCO compliance because of its broad reference to “a natural gas customer in a service classification that provides firm service.” In practice, the ESCO is not able to ascertain by EDI transaction whether a customer is firm or non-

firm, and therefore subject to the TPV requirement, prior to submitting an enrollment.¹³ A clarification of the Order to incorporate a reasonable usage standard to define a small non-residential natural gas customer of annual consumption of 500 dekatherms per year would resolve that problem because the usage information is obtainable by the ESCO via EDI prior to when the TPV would be required to be performed.

V. TPV Script Question on Consumer Low Income Assistance Program Status – UBP Section 5, Attachment 1, A.17

The Commission added to the required questions to be asked in a third party verification at UBP Section 5, Attachment 1, A.17 to include the query “Do you participate in your utility’s low-income assistance program?” Given the on-going state¹⁴ and federal litigation¹⁵ regarding the Commission’s moratorium on ESCO service to low income consumers, NEM continues to believe that it is inappropriate to incorporate this question into the UBP. As a repository of consumer protection and marketing standards, the matters set forth in the UBP for ESCO compliance should not include issues of an open, on-going and unfinalized nature.

Additionally, the Commission extended the TPV requirements to ESCO enrollments of small non-residential customers resulting from door-to-door solicitations, telephonic marketing or scheduled appointments. However, the new TPV question about a customer’s participation in a low income assistance program should be limited to residential customers. If this question is retained as a requirement for TPV scripts, despite NEM’s objections set forth herein, it should be expressly limited to residential enrollments only.

¹³ Historical usage reports do contain a field for service class, but that field is not always populated.

¹⁴ National Energy Marketers Association v. New York Public Service Commission, AD Docket No. 525360, Albany County Index No. 5680-16.

¹⁵ Doe v. Rhodes, U.S. Ct. of Appeals, 2d Cir., Docket No. 17-3361.

VI. Multiple Assignments of Sales Agreements – UBP Section 5.J.1.

The Commission adopted a change to UBP Section 5.J.1. pertaining to ESCO assignments of sales agreements. The language was modified to remove the word “or” and insert the word “and” resulting in a material difference to ESCO obligations. Specifically, Section 5.J.1. now provides that “An ESCO may assign all or a portion of its sales agreements to other ESCOs provided that the assigned sales agreements clearly authorize such assignment AND the ESCO provides notice to its customers prior to the assignments and an opportunity for each customer to choose another ESCO or return to full utility service.” (emphasis added). The change in the operative word “or” to “and” is a material change. The Commission states that the “proposed modifications would not affect a customer’s current ability to terminate a contract nor will it affect the ability to make an assignment from one ESCO to another.” However, by changing Section 5.J.1. to use the word “and” it has made the provisions preceding and following that term requirements, rather than options, leading to a significantly different meaning and compliance obligation. NEM requests that the modification to the language in UBP Section 5.J.1. be withdrawn.

The Commission affirmed in the Order, and NEM supports, that the proposed modifications “would not affect a customer’s current ability to terminate a contract.” In other words, the customer can elect to choose another provider, but still be subject to any applicable termination fee, if the customer decides to switch after receiving notice of an assignment. The issue is the impact on the value of the assignment should fixed rate customers elect to choose service with another provider, and the notice as contemplated under Section 5.J.1. may inadvertently encourage customers to do so through the use of the wording “an opportunity to choose another ESCO or return to full utility service” without qualification or context. The phraseology “an opportunity to choose another ESCO or return to full utility service” in an assignment notice may cause consumer

confusion related to the pre-existing terms the customer agreed to, including any applicable early termination fee, and whether the assignment notice supplants those terms (which it does not). While the Order states that it does not, the UBP provision could create a misimpression otherwise.

Additionally, the Commission states of the change to Section 5.J.1. - “nor will it affect the ability to make an assignment from one ESCO to another” - despite the fact that by changing the language to the term “and” it is now *requiring* that assignments be authorized in the customer sales agreements. Such a requirement is contrary to New York law providing that generally, contracts are freely assignable. New York law provides that “any claim or demand can be transferred” except in certain enumerated circumstances not relevant here, when such transfer is “expressly prohibited” by statute or “would contravene public policy.”¹⁶ None of the exceptions are applicable here. The language revision to the UBP that effectively requires that “the assigned sales agreements clearly authorize such assignment” is therefore contrary to New York state law and should be withdrawn.

VII. ESCO Representative Badge Information –UBP Sections 10.C.1.b.1. and 10.C.1.d.

The Commission adopted a modification to the information required to be displayed on the badges of ESCO marketing representatives as set forth in UBP Sections 10.C.1.b.1. and 10.C.1.d. As originally proposed in a petition to the Commission and subsequently described in the Commission Notice, the UBP would be changed so that rather than include the representative’s full name on the badge, it would include the representative’s first name and employee identification number. NEM supported the proposal and continues to do so.

¹⁶ Gen. Obligs. Law § 13-101.

NEM requests that the Commission clarify the language on page 16 of the Order so as to conform with the language adopted in UBP Sections 10.C.1.b.1. and 10.C.1.d. The Order at page 16 incorrectly characterizes the original proposal saying it would “eliminate the marketing representative’s *first* name” (emphasis added) and then states the Commission adopts the recommendation. The Order should be clarified to state that the Commission is adopting the original proposal to “eliminate the marketing representative’s last name.” The language in UBP Sections 10.C.1.b.1. and 10.C.1.d. correctly reflects the proposal to display only the representative’s first name. NEM requests this clarification to prevent confusion and to ensure appropriate ESCO compliance with the standard.

VIII. Maintaining ESCO Eligibility Status – UBP Section 2.D.5.o.

The Commission originally proposed to permit consequences against an ESCO for “failure to comply to Department requests for any and all information.” Upon consideration of comments received about the overly broad language and exceeding the scope of Commission authority, the Commission modified the proposed language in the Order and UBP Section 2.D.5.o. to permit consequences for “failure to comply with Department requests for any and all information related to an ESCOs marketing and sale of energy and/or value added services and products in New York State.” NEM submits that it is premature to incorporate a standard for ESCO compliance into the UBP that uses the as-of-yet undefined term “value added services and products.” A central issue in the on-going Track I proceeding is ESCO provision of “value added services and products” and what may be considered within the scope of that term. The UBP functions as a repository of well-established and fully-vetted consumer protection and marketing standards. Accordingly, the inclusion of a compliance standard that incorporates an undefined term that is the subject of the on-going Track I proceeding should be deferred pending the outcome of that case.

IX. Conclusion

NEM requests the Commission issue an Order clarifying and/or rehearing the issues consistent with the arguments set forth herein.

Sincerely,

Craig G. Goodman, Esq.
President
Stacey L. Rantala
Director, Regulatory Services
National Energy Marketers Association
3333 K Street, NW, Suite 110
Washington, DC 20007
Tel: (202) 333-3288
Email: cgoodman@energymarketers.com;
srantala@energymarketers.com
Website-www.energymarketers.com

Dated: February 16, 2018.