

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on September 17, 2009

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
James L. Larocca

CASE 98-M-1343 – In the Matter of Retail Access Business Rules.

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

ORDER GRANTING PETITION

(Issued and Effective September 22, 2009)

BY THE COMMISSION:

INTRODUCTION

U.S. Energy Saving Corp. (US Energy), an energy services company (ESCO), petitioned the Commission for revisions to the Uniform Business Practices (UBP) to establish a “contest period.”¹ Under US Energy’s proposal, the contest period would occur when an ESCO (hereafter, the “pending ESCO”) submits an enrollment (hereafter, the “pending enrollment”) to a distribution utility on behalf of a customer currently receiving service from a different ESCO (hereafter, the “incumbent ESCO”).

¹ The “contest period” would be the period, from when an ESCO’s enrollment of a customer has been accepted by the utility until three business days before the effective date of the change in commodity provider, during which competing ESCOs can effectuate the enrolled customer’s choice of which ESCO the customer intended to do business with.

Under the proposal, during the contest period, the incumbent ESCO, with customer authorization, would be allowed to cancel the pending enrollment with the pending ESCO in order that the customer remains with the incumbent ESCO. In its petition, US Energy also requests that, within two business days of receiving the enrollment request, the distribution utility be required to provide the pending ESCO notice that a customer is already served by an ESCO.

In this Order, we approve, with modifications, US Energy's Petition to establish a contest period. We deny US Energy's request that the distribution utility be required to provide the pending ESCO notice that a customer is already served by an ESCO.

BACKGROUND

On August 17, 2006, US Energy filed a petition with us to establish a contest period. Notice of the US Energy Petition was published in the State Register on September 27, 2006 in conformance with the State Administrative Procedure Act (SAPA) §202(1), with the comment period expiring on November 13, 2006. Comments and reply comments were filed by Consolidated Edison Company of New York, Inc. (Con Edison), Constellation NewEnergy (Constellation), IDT Energy (IDT), Infinite Energy Inc., d/b/a Intelligent Energy (Intelligent), Liberty Power (Liberty), Orange and Rockland Utilities (O&R), collectively Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation, Rochester Gas & Electric Corporation, Central Hudson Gas & Electric Corporation, 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 (Joint Utilities), Retail Energy Supply Association (RESA), Small Customer Marketer Coalition (SCMC), and Universal Energy Corporation (UEC).²

² Con Edison, O&R, Liberty and RESA filed Reply Comments after the expiration of the SAPA comment period. In order to ensure a full and complete record for our determination we shall consider these comments.

US Energy Petition

US Energy requests that we authorize a contest period, during which an incumbent ESCO would be allowed to cancel an enrollment with a pending ESCO using an EDI transaction prior to the effective date of the pending enrollment. Under the program envisioned by US Energy, the incumbent ESCO, after receiving customer consent, would initiate an EDI transaction to cancel that customer's pending enrollment.

According to US Energy, in an active market, customers may be offered energy products from multiple ESCOs. The Company contends that establishing a contest period in this active market environment will ensure that the customer is served by the ESCO of his/her choice, and that all parties are aware of a change in service providers so as to minimize customer confusion and slamming allegations. US Energy claims that the contest period will also help customers avoid early termination fees and minimize ESCO disputes over customers.

US Energy reasons that the authority that would be provided to the incumbent ESCO if its proposal is approved - cancellation of a pending enrollment - is the same authority already provided to the distribution utility and the pending ESCO. US Energy provides specific modifications to the UBP to facilitate the implementation of a contest period and proposes modifications to the EDI transactions standards for the Enrollment and Drop Transactions.

In addition to the contest period proposal, US Energy requests that a pending ESCO be notified by the distribution utility at the time of enrollment that a customer is receiving services from another ESCO. US Energy also speculates that, when a pending ESCO receives notice that a customer is already being served by another ESCO, they may choose not to enroll the customer and thereby bind the customer to another energy contract.

POSITIONS OF THE PARTIES

Con Edison

Con Edison supports US Energy's proposed contest period with modifications.³ According to Con Edison, a customer can be switched from his/her incumbent ESCO without affirmatively ending his/her relationship with the incumbent ESCO. The contest period proposal could provide an additional confirmation that the customer intended to end his/her relationship with the incumbent ESCO. Con Edison claims many ESCOs contact their customers when the ESCOs receive drop notifications for customers. According to Con Edison, if the customer decides to continue to take service from the incumbent ESCO as the result of this contact, the customer must contact the utility to cancel their enrollment with the pending ESCO. The US Energy proposal eliminates the need for the customer to contact the utility should he or she decide to stay with his or her incumbent ESCO.

Con Edison states, however, that use of the EDI 814 transaction, as proposed by US Energy, is unnecessarily complex. Con Edison recommends that the incumbent ESCO, when canceling an enrollment, specifically code its drop request to remove the pending ESCO. This would cause the distribution utility to send an EDI drop transaction to the pending ESCO and an 814 reinstatement transaction to the incumbent ESCO. Con Edison's support for the contest period concept is also contingent on adoption of a requirement that proof of customer authorization be retained consistent with the UBP.

Con Edison does not agree with US Energy that a process is needed to inform a pending ESCO that a customer is being served by an ESCO. The Company contends that this information is already provided to the pending ESCO when the ESCO submits its enrollment transaction and sees that the customer is being served under a rate/rate subclass code indicating the customer is a retail access customer.

³ Initial Comments of Con Edison, p. 2.

In response to the comments filed by Joint Utilities, Intelligent, IDT, and SCMC, Con Edison reiterates that the contest period simply automates, through an EDI transaction, the process for fulfilling a customer's desire to remain with the incumbent ESCO as a result of the incumbent ESCO's communications with the customer.

In its Reply Comments, Con Edison further asserts that the contest period is simply an alternative to the customer's contacting the distribution utility to remain with the incumbent ESCO. Furthermore, according to Con Edison, an audit trail will exist to verify that the customer provided authorization to the incumbent ESCO to cancel the pending enrollment, should the customer or pending ESCO challenge the legitimacy of the cancellation.

In response to the Joint Utilities' concern that the contest period proposal does not provide for customer notification should the incumbent ESCO directly notify the distribution utility to cancel the pending enrollment, Con Edison recommends that we amend the appropriate EDI transactions to require distribution utilities to notify customers when a pending enrollment has been cancelled by the incumbent ESCO.

Con Edison opposes SCMC's recommendation that the customer letter required by UBP Section 5.E.1 instruct the customer to contact both the incumbent and pending ESCO should the customer decide to cancel service. According to Con Edison, this requirement would simply serve to confuse the customer. Finally, in response to the Joint Utilities' concern with US Energy's request for pending ESCO notification that a prospective customer is already being served by an ESCO, Con Edison reiterates that such a process is already in place.

Con Edison generally agrees with Intelligent's request for changing the UBP to commence the three-day rescission period after the enrollment. The Company, however, would also extend the rescission period in order to allow the rescission period to run up to three days before the customer is switched to another supplier. According to Con Edison, running the rescission period contemporaneously with the cancellation period would provide customers additional protection because a customer would not be liable to a pending ESCO for termination fees if he/she decided to remain with the incumbent ESCO.

Constellation

Constellation supports US Energy's proposal because it will minimize the burden on customers who have been slammed by a pending ESCO. Constellation also contends the contest period will reduce slamming incidents. However, Constellation expresses concern with respect to the proposal's time-period for customer notification. Consequently, Constellation recommends the creation of a collaborative to examine the proposal.

IDT

According to IDT, US Energy has not provided sufficient evidence to support its request for modifications to the UBP. Moreover, it asserts the existing customer authorization rules are detailed and provide sufficient customer protections.

Intelligent

Intelligent opposes the US Energy proposal and contends US Energy has failed to demonstrate the benefits of a contest period. The contest period, according to Intelligent, allows the incumbent ESCO to switch a customer from the ESCO of their choice. If a customer has been improperly switched from the incumbent ESCO to the pending ESCO, provisions exist for the customer to notify the distribution utility, and, according to Intelligent, if slamming does occur, it is up to the Commission to take appropriate action – not the incumbent ESCO. Further, allowing the incumbent ESCO to switch a customer back to their service may not help the customer avoid termination fees. To the contrary, a switch away from the pending ESCO may constitute a breach of a legally binding contract, which could expose the customer to termination fees associated with that agreement.

Intelligent recommends, if the Commission wishes to ensure that customers are served by the ESCO of their choice, to prevent slamming, and to avoid disputes between ESCOs over customers, the rescission period, now specified in the UBP to begin after the customer receives a sales agreement from the pending ESCO, should not begin until after the enrollment is submitted by the ESCO to the distribution utility.

Joint Utilities

The Joint Utilities urge Commission rejection of US Energy's petition. They assert the current UBP provides an orderly process for customer enrollment. Furthermore, adoption of the petition, according to the Joint Utilities, would leave the distribution utilities as the arbiter of disputes between ESCOs competing for the same customer. The Joint Utilities argue the contest period proposal would impose a process that is confusing to customers and presents more administrative costs to all parties. The Joint Utilities also oppose the proposed modification that would require notice to the pending ESCO at the time of enrollment that the new customer receives supply from another ESCO as such a provision would threaten customer privacy.

The Joint Utilities acknowledge that Opinion No. 99-3⁴ allows customers to authorize their incumbent ESCO to act as their agent, and thus, such an ESCO may be authorized to cancel the enrollment of the customer with the pending ESCO. The Joint Utilities recommend the Commission limit the applicability of this provision in Opinion No. 99-3 to non-mass market customers. Noting that a customer may change his or her mind about granting agency authority to the incumbent ESCO or that the pending ESCO may have been granted the same agency authority by the customer, the Joint Utilities contend that a customer retains the right to receive service from a company of his or her choosing, provided that the customer must accept whatever consequences may go along with that selection.

The Joint Utilities also express concern that US Energy's proposal does not entail notification to the customer when the incumbent ESCO, acting under agency authority, cancels the enrollment with the pending ESCO. According to the Joint Utilities, the customer, while receiving the distribution utility's verification letter regarding the switch to the pending ESCO, will not be aware that the switch did not occur because it was reversed by the incumbent ESCO until after receipt of their first bill. A customer in this scenario, according to the Joint Utilities, will complain to the utility

⁴ 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).

about not being switched to the pending ESCO, and this will place the distribution utility in the middle of disputes between the incumbent and pending ESCOs.

The Joint Utilities believe granting US Energy's proposal could result in increased disputes and slamming allegations, and place an ESCO's interest before those of the customers by providing the incumbent ESCO with a tool for customer retention. A customer's decision to switch suppliers, even if the customer's contract with the incumbent ESCO has not expired, must be assumed rational, according to the Joint Utilities.

Liberty

Liberty voices concern that US Energy's proposal will open new opportunities for customer slamming. In its comments, Liberty also complained that customers will be burdened because they will need to provide authorization to the incumbent ESCO in order to cancel the pending enrollment.

Liberty complains that US Energy's proposal would allow customers to cancel pending enrollments in a manner that violates an ESCO's sales agreement. Consequently, Liberty requests we modify US Energy's proposal to allow its contractual right to a written notification from the customer of a switch.

O&R

O&R contends US Energy's contest period is unnecessary and, even if found useful, should only be implemented at the discretion of the utilities. O&R urges rejection of US Energy's requests on the basis that: (1) pending ESCOs are already informed about the presence of an incumbent ESCO through the 814 EDI enrollment transaction, which shows the rate class (e.g., retail choice rate) of the customer; (2) procedures already exist to allow customers to cancel, within a prescribed period of time, a pending enrollment and be reinstated with the incumbent ESCO; (3) the contest period inserts the distribution utility into a potential dispute between ESCOs because they would need to decide which customer authorization is valid -- the first requesting the enrollment with the pending ESCO or the last returning to an enrollment with the incumbent ESCO; and (4) the incumbent ESCO has a financial incentive to cancel the pending enrollment and thereby prevent the migration of its customers to another ESCO.

RESA

RESA supports the US Energy proposal because, it claims, the proposal ensures that customers are served by the ESCO of their choosing. The contest period will also give the incumbent ESCO the same authority that the pending ESCO and the distribution utility have to act on behalf of the customer. RESA also states the contest period will reduce the number of parties the customer must contact to cancel an enrollment and will benefit the call centers of pending ESCOs and distribution utilities by reducing customer calls. RESA recommends the incumbent ESCO be required to retain verifiable authorization from customers when cancelling the enrollment as a means of protecting customers and pending ESCOs from abuse of the authority of incumbent ESCOs to cancel pending enrollments. RESA would also require that the records of the incumbent ESCO be audited by the Commission. Finally, according to RESA, the proposal to notify pending ESCOs if customers are already being served by an ESCO will ensure all parties are aware of customers' status when processing enrollments.

In reply comments, RESA rejects the argument of the Joint Utilities that customers will be unaware of the cancellation of the pending enrollment. According to RESA, customers will be aware of the cancellation because the incumbent ESCO will be required to obtain the customers verifiable written, telephone or electronic authorization. The Joint Utilities' concern with ESCO's using agency rights is misplaced, according to RESA, because an ESCO acting as a customer's agent will still need to be authorized by the customer to cancel the pending enrollment. RESA reiterates in its reply comments that the contest period will provide efficiency for ESCOs and distribution utilities by decreasing the volume of customer calls and will benefit customers by minimizing the steps necessary to cancel enrollments and ensure customers want to leave their incumbent ESCOs.

SCMC

SCMC supports US Energy's request, which would require distribution utilities to notify pending ESCOs if customers are already being served by an ESCO. Furthermore, SCMC proposes the utilities develop procedures whereby ESCOs could obtain information concerning the customer's status with respect to a commodity

provider through the websites of distribution utilities, before the marketing process has been completed. Providing access to customer's usage profile and status according to SCMC, would inform ESCOs if a customer were already being served by an ESCO before it markets to the customer.

SCMC also supports the contest period proposal so long as the incumbent ESCO is required to obtain customer authorization, consistent with the UBP, for the cancellation of the enrollment. SCMC requests the notice sent to the customer by the distribution utility, pursuant to UBP Section 5.E.1, inform the customer to contact both the incumbent and the pending ESCOs of the cancellation of the enrollment with the pending ESCO.

Universal Energy

Universal Energy supports US Energy's proposal and states that it should be implemented to allow the incumbent ESCO sufficient time to contact the customer to confirm intent. According to Universal Energy, a contest period will help eliminate customer confusion and contract disputes resulting from a pending ESCO "poaching" from an incumbent ESCO.

DISCUSSION AND CONCLUSION

UBP Section 5.D.6 requires that the distribution utility, upon acceptance of an enrollment request from a pending ESCO on behalf of a retail access customer, notify the incumbent ESCO that the customer's service with that ESCO will be terminated. Within three days of the utility's receipt of the pending enrollment request, the incumbent ESCO will receive a drop transaction from the utility that is coded to indicate that the drop is being initiated by the customer, who wants to change suppliers. The incumbent ESCO then has an opportunity to contact the customer to explain the ramifications of canceling his or her contract. If the incumbent ESCO contacts the customer, and if the customer then decides to remain with the incumbent ESCO, UBP Section 5.D.6 requires that the customer call either the distribution utility or the pending ESCO to cancel the pending enrollment. Often the cancellation of the pending enrollment by the customer is facilitated via a three-way call with the incumbent ESCO, customer and distribution utility. However, three way calls in this manner could affect the utilities' call answer

rates and prohibit customer service representatives from serving customers with more pressing problems. As an alternative, the contest period would automate, through an EDI transaction, the process for fulfilling a customer's desire to remain with the incumbent ESCO.

We find, however, that the contest period proposal submitted by US Energy is overly complicated. On December 15, 2006, Con Edison implemented a process with some similarities to the contest period proposed by US Energy. Under the Con Edison process, an incumbent ESCO, having obtained authorization from its customer to cancel a pending enrollment, transmits to the distribution utility a specially coded EDI Drop request that cancels the pending enrollment. Upon receipt of the drop request from the incumbent ESCO, the utility transmits an EDI Drop transaction to the pending ESCO. The customer also receives a letter from Con Edison confirming the request to stay with the incumbent ESCO. We believe that the EDI transactions used by Con Edison provide a less complicated mechanism to implement the contest period than those proposed by US Energy. While Con Edison has implemented a process that works, the amended EDI transactions used by Con Edison have neither been issued for formal comment, nor approved by this Commission. Accordingly, within 30 days of the issuance of this Order, Con Edison is directed to file its proposed modifications to the current New York EDI transaction standards and any other related documents necessary to implement its variant of the contest period. Staff is directed to issue revised EDI transaction standards for formal comment.

Implementation of this contest period proposal will require modifications to UBP Section 5.D.6 to allow the incumbent ESCO to cancel an enrollment. Therefore, UBP Section 5.D.6 is modified to state: "Upon acceptance of an enrollment request, the distribution utility shall send a notice to any incumbent ESCO that the customer's service with that ESCO will be terminated on the effective date of the new enrollment. In the event that the distribution utility receives notice from the pending ESCO, the incumbent ESCO or the customer, no later than three business days before the effective date that a pending enrollment is cancelled, the distribution utility shall transmit a request to

reinstate service to any incumbent ESCO, unless the ESCO previously terminated service to the customer or the customer requests a return to full utility service.”⁵

We are approving this modified contest period process because it eliminates the need for a customer to contact the utility if the customer decides to remain with the incumbent ESCO; however, we remain concerned that implementation of the contest period could lead to increased allegations of slamming. The incumbent ESCO is prohibited from canceling a customer’s enrollment with a pending ESCO unless it has specific authorization from the customer to cancel the pending enrollment. The incumbent ESCO must retain verifiable authorization from the customer in a manner consistent with UBP Section 5.K.3. If an incumbent ESCO cancels a pending enrollment, and the customer did not authorize the cancellation, it will be considered a slam. In that case, the ESCO’s records could be subject to audit by Staff and the ESCO could be subjected to the consequences identified in UBP Section 2.D.5.b.

In response to the Joint Utilities’ concern that the US Energy contest period proposal did not provide for customer notification should the incumbent ESCO directly notify the distribution utility to cancel the pending enrollment, we will require, consistent with the Con Edison process, that distribution utilities notify customers in writing when a pending enrollment has been cancelled by the incumbent ESCO.

The US Energy petition also urges that the pending ESCO should receive specific notification upon enrollment that the customer is being served by another ESCO. O&R and Con Edison state, however, that a pending ESCO is informed about the presence of an incumbent ESCO through the 814 EDI enrollment transaction, which shows the rate class (e.g., retail choice rate) of the customer. Accordingly, we deny this aspect of the US Energy petition. If properly used, the 814 EDI transaction should already be providing this information to the pending ESCO.

⁵ Added language is underlined. The entire UBP, including these revisions, has been posted to the Web site and may be obtained at the following electronic link: <http://www.dps.state.ny.us/ubr.htm>.

In response to the comments of Liberty, contracts that allow an incumbent ESCO to “re-enroll” a customer upon receipt of a drop notice from a distribution utility without specific customer authorization for the re-enrollment are inconsistent with the UBP. In this instance, the re-enrollment without customer authorization could be slamming, and customer complaints regarding such re-enrollments by an incumbent ESCO would be considered slamming complaints. Additionally, the UBP does not require customers to submit written notice to the incumbent ESCO to cancel service with that ESCO before enrolling with another ESCO or returning to the distribution utility. We see no reason to change the status quo. It is not the role of distribution utilities to enforce specific ESCO service contract provisions, thus a customer need only contact his or her distribution utility to change service providers.

In response to US Energy’s contest period proposal, Intelligent suggests modifications to the rescission period so that this period would only begin after the enrollment is submitted to the distribution utility. Currently the rescission period for residential customers begins after the customer has agreed to take service from the supplier and before the enrollment is submitted to the distribution utility. Intelligent believes its modification would better enable the incumbent ESCO to confirm whether the customer actually intends to switch suppliers at a time when the customer, if he or she wished to return to the incumbent, could take advantage of the rescission period to do so. This would help ensure that customers are served by the ESCO of their choice, prevent slamming, and avoid disputes between ESCOs over customers. Con Edison generally agrees with modifying when the three-day rescission period commences. However, Con Edison also proposes that the rescission period extend to three days before the customer is switched to another supplier. Based on the record before us, we are not approving a change to the rescission period, however we are willing to entertain future proposals for modifications to the rescission period. Similarly, we decline to act on the agency issues raised by the Joint Utilities at this time.

The Commission orders:

1. U.S. Energy Savings Corp.'s petition for establishment of a contest period is approved as modified in the body of this Order.
2. Consolidated Edison is directed to file with the Secretary, within 30 days of the issuance of this Order, proposed revisions to the New York EDI standards and any other related documents necessary to implement a contest period.
3. Revisions to Section 5.D.6 of the Uniform Business Practices, as set forth in the body of this Order, are approved.
4. The Secretary in her sole discretion may extend the deadlines set forth in this order.
5. These proceedings are continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary