



National Energy Marketers Association

STATE OF NEW YORK PUBLIC SERVICE COMMISSION

In the Matter of Customer Billing Arrangements) **Case 99-M-0631**

In the Matter of the Implementation of Chapter 686) **Case 03-M-0117**
of the Laws of 2002)

REPLY OF THE NATIONAL ENERGY MARKETERS ASSOCIATION TO COMMENTS OF NYSEG AND RG&E

The National Energy Marketers Association (NEM) hereby submits its Reply to the Comments of NYSEG and RG&E on the Approval or Rejection of Petitions for Rehearing and Clarification of the June 20, 2003, Order Regarding the Implementation of Amendments to the Home Energy Fair Practices Act and the Pro-Ration of Customer Payments on Consolidated Bills dated October 10, 2003. NYSEG and RG&E's [hereinafter "the Utilities"] Comments were submitted pursuant to an August 27, 2003, SAPA Notice. NEM submits these reply comments to respond to the Utilities claim that the Commission does not possess the requisite authority to require utilities to purchase ESCO receivables. NEM strongly urges that the Commission does have the requisite statutory authority.

I. The Commission's Just and Reasonable Rate Authority and Authority Granted Under HEFPA Permit it Mandate Utility Purchase of ESCO Receivables

The Utilities maintain that, "a mandate that utilities purchase ESCOs' accounts receivables currently exceeds the scope of the Commission's regulatory authority." (Utilities Comments at page 7). As NEM has previously argued in its filings made in this

proceeding, it is well within the Commission's authority to mandate utility purchase of receivables. The Commission's authority in this regard can be drawn from a number of sources, including its just and reasonable rate authority as well as authority explicitly granted to it in the HEFPA law. In this regard, parallels can be drawn to the Commission's previous actions in Case 99-M-0631, the billing proceeding.

A. The Commission Can Require Utility Purchase of ESCO Receivables Pursuant to its Just and Reasonable Rate Authority

NEM submits that the Commission has the requisite statutory authority, by virtue of its Public Service Law Section 66(5) just and reasonable rate authority, to mandate utility purchase of receivables as it would ensure the most "just and reasonable" rates to ratepayers if a duplication of HEFPA infrastructure investments were minimized over both the short and long term. All of the statutory notice, suspension, deferred payment, winter protection and other HEFPA guarantees and obligations can easily be implemented using existing infrastructure and billing systems for those ESCOs who wish to sell their receivables (as well as for those ESCOs who wish to replicate those infrastructure investments). Not only does the statute make it clear that ESCOs do not have an obligation to service, connect or disconnect consumers, but it is also clear that ESCOs have no ability under law to receive a guaranteed return of or on any of these new infrastructure investments nor do they have the legal right to enter premises to check for leaks, disconnect existing service, "initiate" or connect new gas consumers or the ability to know if customers are entitled to protection due to disability. All of these functions reside within the existing utility and can be most effectively implemented using the

utilities existing infrastructure until that infrastructure is outsourced, divested or otherwise duplicated upon the utilities exit from the merchant function.

B. The Commission Can Mandate Purchase of ESCO Receivables Pursuant to its Authority to Adopt Rules and Regulations Necessary and Proper to Implement HEFPA

Section 51 of the Public Service Law, one of the provisions of HEFPA, specifically and explicitly provides that, "[t]he Commission shall adopt such additional rules and regulations as it deems necessary and proper to implement the provisions of this act." Accordingly, if the Commission deems requiring utilities to purchase ESCO receivables as "necessary and proper" to HEFPA implementation, it may do so. NEM has previously submitted arguments that support a Commission determination that such requirement is "necessary and proper." Tantamount among them are the avoidance of duplicative infrastructure investments at this stage of market development (as discussed above) as well as the protection of public health and safety. As noted in NEM's previous submissions in this proceeding, beyond the cost and time associated with programming to accommodate HEFPA, the implementation of these complex rules and the likelihood of human error associated with expedited implementation, impose a higher degree of risk that a special needs customer may not be identified. Even though the utilities have amassed years of experience in identifying special needs customers, the complexities of implementation underscored in the parties petitions for rehearing demonstrate that errors might still take place.¹ The hurried implementation of the new HEFPA changes only increases the chance of such errors. Accordingly, NEM submits that the very important

¹ See e.g. Case 01-G-1223 - Proceeding on Motion of the Commission Investigating the Death of an NFG Customer During the Winter of 2000-2001 and Whether National Fuel Gas Distribution Corporation Violated the Public Service Law and the Home Energy Fair Practices Act.

public health and safety goals underlying HEFPA will also be served if utilities are required to purchase ESCO receivables.

C. Previous Commission Exercise of Statutory Authority in the Billing Proceeding Also Justifies Commission Action in the Instant Case

NEM also notes that the Commission has previously exercised its broad authority in a related matter when it required that consumers be permitted the option of a utility or ESCO consolidated bill in Case 99-M-0631.² In rendering this decision, the Commission based its action upon at least two areas of its authority. The Commission reasoned that,

There is also no statutory bar to enabling customers to choose their billing entity. Our power to set "just and reasonable" rates includes setting delivery charges that do not include a cost for non-existent utility billing, and allows us to preclude utilities from subjecting customers to "any undue or unreasonable prejudice" in the form of a denial of customers' choices of billing providers. (Case 99-M-0631, Order Providing for Customer Choice of Billing Entity, issued March 22, 2000, at pages 3-4).

The Commission further reasoned that, "[c]ompetition for billing services will increase customer options and may drive down costs. Providing for that competition is thus consistent with our duty of 'long range planning for the public benefit.'" (citing *Energy Ass'n v. Public Serv. Commn.* 169 Misc. 2d 924, 929 (1997)) (Case 99-M-0631, Order Providing for Customer Choice of Billing Entity, issued March 22, 2000, at page 4). The Commission's analysis underscores the breadth of its authority related to ensuring just and reasonable rates as well as to safeguarding the public benefit. NEM submits that this same line of reasoning can be applied in the instant case and supports the argument that the Commission does have the statutory authority to mandate purchase of ESCO receivables. In the instant matter, it is perhaps more compelling for the Commission to

² Case 99-M-0631, Order Providing for Customer Choice of Billing Entity, issued March 22, 2000.

exercise its authority to support further development of the retail market in a cost-effective, efficient manner that will ensure public health and safety to the greatest extent possible.

II. HEFPA, the Billing Proceeding and the Interim UBP Do Not Bar the Commission from Requiring Utilities to Purchase ESCO Receivables

The Utilities also attempt to argue that HEFPA and precedent from the billing case (Case 99-M-0631) and the Interim UBP would bar a mandate of utility purchase of ESCO receivables. The Utilities argue that, "Section 32 may not allow a Distribution Utility to terminate a customer for failure to pay for the commodity portion of a bill, since the utility did not provide the commodity service. . . . the amendment merely authorizes utilities to suspend for a limited time, not terminate, non-paying customers - and then only upon the request of and notification from an ESCO." (Utilities Comments at pages 10-11). NEM submits that such a reading of Section 32 would subvert the intention of the HEFPA amendments that permit ESCO termination of customers for nonpayment. Clearly, when a customer that was receiving ESCO commodity service is terminated, the entity that in fact affects the termination is the distribution utility. This is the only practical and logical reading of the statute. Furthermore, when the utility and ESCO enter into a purchase of receivables agreement they would be agreeing to terms by which ESCO commodity customers would be subject to termination for nonpayment. As such, when the utility that purchased the ESCO receivable does terminate an ESCO commodity customer, the utility would be effectuating the request of the ESCO to terminate as embodied in the ESCO-utility agreement.

The Utilities further cite to the Commission's decision in the billing proceeding and the Interim UBP³ as a bar to mandating utility purchase of ESCO receivables. The Utilities argue that, "[t]he PSC appears to have recognized that a utility purchasing an ESCO's accounts receivables may not terminate a customer for failure to pay for commodity service provided by an ESCO." (Utilities Comments at page 10). As the basis for this claim the Utilities cite to Section C.4 of the Billing Practices Procedures of the UBP. In particular, they cite a footnote to the UBP providing that, "Utilities may not disconnect, or threaten to disconnect, customers for failure to pay charges assessed as a result of purchasing receivables from ESCOs." (Utilities Comments at page 11). What the Utilities fail to acknowledge is that the UBP provisions they are referring to were approved in May of 2001, well before the HEFPA amendments were enacted and reflect the state of the law at that time which only permitted termination of utility service for nonpayment, not ESCO commodity service. As such, the footnote they cite to is no longer apposite. This becomes clearer when the provision to which the footnote is appended is examined. That provision provides that,

Only a customer's failure to pay for regulated services provided by a regulated utility can be the basis for a regulated utility to disconnect service for nonpayment of charges or for the utility to send a disconnection notice (or a threat to disconnect) to a customer. (footnote) Only regulated utilities may provide disconnection notices and/or disconnect customers. When an account is shut off by a utility, the utility shall notify the ESCOs (and the Meter Data Management Agent, if any) of the effective date of the disconnection. An ESCO may terminate service to customers in accordance with the Discontinuance Provisions of the Commission's Uniform Business Practices. (Uniform Business Practices, Billing and Payment Processing, Section C.4.e).

³ The Commission approved the Billing and Payment Processing Provisions of the Interim UBP on May 18, 2001. Cases 99-M-0631 and 98-M-1343, Order Establishing Uniform Retail Access Billing and Payment Processing Practices, issued May 18, 2001.

The above quoted passage is clearly a reflection of previous law and precedent that only permitted the utility to terminate a customer for nonpayment. Now that the HEFPA provisions have been amended, and ESCOs are permitted to terminate for nonpayment, any perceived bar to utility disconnection premised upon the purchase of ESCO receivables does not exist.

III. Conclusion

The Commission possesses the requisite statutory authority, under both Sections 66(5) and 51 of the Public Service Law to mandate utility purchase of ESCO receivables. The Commission has previously exercised this authority in the billing proceeding to require a choice of consolidated billing entities and the circumstances at bar present an even more compelling reason for the exercise of Commission authority. HEFPA provisions and the Interim UBP do not prevent the Commission from acting in this regard.

Sincerely,

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