



national fuel

January 28, 2008

Hon. Jaclyn A. Brillling
Secretary
Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: Proposed Tariff Amendment

Dear Secretary Brillling:

National Fuel Gas Distribution Corporation ("Distribution" or the "Company") submits the following amendment to its tariff, P.S.C. No. 8 – GAS:

Leaf No. 266.5 Revision 5

The amendment is being filed simultaneously with an amendment to the Company's Gas Transportation Operations Procedure Manual ("GTOP"). The tariff amendment is issued as of today for an effective date of April 25, 2008, or such other time as may be determined reasonable by the Commission. The GTOP amendment, issued under separate cover, shall become effective in the ordinary course. Because the tariff and GTOP changes are designed to work together, for purposes of convenience they are both described in this transmittal letter.

Description of Amendments

The proposed revisions, if approved, would establish a set of commercially reasonable standards for door-to-door sales of natural gas by energy service companies ("ESCOs") doing business in Distribution's service territory. Currently, door-to-door sales are not addressed in Distribution's tariff or in the Commission's Uniform Business Practices ("UBPs"). To Distribution's knowledge, door-to-door sales are regulated at the state level solely by the so-called "door-to-door sales act," NY Personal Property Law §425 *et seq.*, ("Sales Act") and by some municipalities that require "peddlers permits," or a license to conduct door-to-door sales. In Distribution's experience, the very limited protection afforded consumers by the Sales Act and municipal permitting requirement is insufficient to address sales by ESCOs of complicated, and often cryptic retail gas sales contracts.

The enclosed amendments would add a section to Distribution's aggregation tariff (SC 19) requiring ESCOs to comply with Standards Governing Door-to-Door Sales. The "Standards" would be set forth in the GTOP,¹ instead of the tariff, for the reason that GTOP provisions can be modified on shorter notice than tariff revisions, enabling Distribution to more

¹ A copy of the "Standards" included in the GTOP filing is enclosed as Attachment A.

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readily make refinements or corrections to the Standards, with due notice to stakeholders, on an as-needed basis. Of course, any such changes would be subject to the Commission's review, as are changes to the GTOP in the ordinary course of business.² By tying the tariff revision in SC 19 to the Standards, the Company would be able to enforce the Standards through UBP provisions that authorize utilities to commence discontinuance procedures against ESCOs who violate the terms of the utility's tariff. See UBP §2.F.1.f. Also, tariff provisions are generally understood to reflect the Commission's authority, especially where, as here, they address consumer protection issues.

Reason for Amendments

Although ESCOs are generally regarded as "unregulated" sellers of gas (or electricity), they are nonetheless subject to a variety of requirements imposed upon them as a condition of doing business in New York. Some of those "requirements" involve consumer protection issues, such as the requirement that ESCOs obtain the approval of the Department of Public Service prior to commencing business in a utility's service territory. See, UBP Section 2, Eligibility Requirements. In addition, ESCOs are expected to adhere to customer termination procedures under the Home Energy Fair Practices Act, the same consumer protection law whose provisions apply in full to utilities.

Despite these protections, ESCO marketing and contracting activities remain largely unregulated. There are limited protections for customer enrollments, see, e.g., UBP §5, Changes in Service Providers, but these protections address the "switching" process, and not contracts between the ESCO and the customer. Moreover, there are no rules, regulations, guidelines or any standards whatsoever that address door-to-door sales activities, save the Sales Act, which is very limited in scope.

In recent months, Distribution has learned of an increase in customer complaints involving ESCOs conducting door-to-door sales. While there are many responsible door-to-door sales representatives, there are also an occasional few who, given the nature of such activities, can inflict a good deal of financial harm on customers, not to mention the aggravation that customers must endure when they are victimized by unscrupulous practices. Furthermore, policy makers should be concerned because aggressive sales practices by ESCOs also undermine consumer confidence in retail competition generally.

Distribution has received reports of ESCO door-to-door sale representatives misrepresenting that they are utility employees or endorsed by Distribution. The Company also has received reports of customers signing contracts without a full appreciation of the "fine print," especially termination penalties that reportedly are enforced even when the customer elects – as is the customer's right under the UBPs – to cancel the enrollment and stop the switch.³

² Distribution chose to insert the Standards in the GTOP for purposes of administrative convenience. Although the GTOP revisions may go into effect prior to the effective date of the tariff amendment, the Company is not opposed to adoption of the Standards as tariff language, if the Commission should determine such treatment as preferable and in the public interest.

³ The Department of Public Service recently took quick action in response to numerous customer complaints involving door-to-door sales by an ESCO in the City of Hornell, which is located in Distribution's service territory.

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The problem of aggressive door-to-door sales is not limited to Distribution's service territory. On December 20, 2007, the Consumer Protection Board and New York City Division of Consumer Affairs jointly filed a petition requesting the Commission to "establish enforceable rules governing the marketing practices of ESCOs operating in New York State to protect consumers from aggressive marketing tactics." The joint petition was submitted in response to, among other things, complaints involving door-to-door sales by ESCOs.⁴

Other jurisdictions have also been forced to contend with aggressive door-to-door sales activities by ESCOs. For example, in Illinois, the Citizens Utility Board ("CUB") filed a complaint with the Illinois Commerce Commission accusing US Energy Savings of deceptive marketing in the Chicago area. R. Manor, *Gas supplier used trickery, CUB alleges*, Chicago Tribune, April 25, 2006.⁵

Based on Distribution's own experience and the apparent experience of customers served by other utilities, the Company believes that its proposed door-to-door Standards are justified and will advance retail competition by enhancing consumer confidence in ESCO practices and the responsiveness of utilities and regulators to related consumer concerns.

Impact of Proposed Changes

The Company believes that the proposed standards will not cause a significant change in responsible door-to-door sales activities. Obviously the Standards are intentionally designed to constrain undesirable sales practices, so the number of door-to-door sales that violate the Standards will presumably fall.

The most significant effect of the proposed Standards, if adopted, would be the utility's ability to suspend or discontinue ESCO enrollments if the utility reasonably determines that an ESCO is violating a Standard. The ESCO would be entitled to all of the process and other protections under the UBPs, including dispute resolution procedures, thus protecting the ESCO from unreasonable or arbitrary enforcement of the Standards.

Proposed Standard No. 5 would require ESCOs (or ESCO contractors) to secure permits, often called "peddlers' permits," from municipalities that regulate door-to-door sales. To the extent that ESCOs are currently conducting door-to-door sales without permits, the change would cause the non-conforming ESCOs to incur permit fees.

See, Carpenter J., *PSC in Hornell Friday to hear US Energy complaints*, Hornell Evening Tribune, January 21, 2008. Distribution, itself, recently commenced an action in federal court against US Energy Savings, LLC, an ESCO engaged in extensive door-to-door sales activity, alleging violations of federal trademark statutes and unfair competition, among other things.

⁴ See <http://www.consumer.state.ny.us/pressreleases/2007/dec212007.htm>.

⁵ On December 6, 2006, the CUB and US Energy reached a settlement resolving CUB's complaint. US Energy agreed to "cancel certain contracts and provide a refund for customers who believe they were misled into signing a fixed-price gas contract." *Energy firm settles complaint by CUB*, Chicago Tribune, December 7, 2006 (Final ed.).

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Proposed Standard No. 6 would cause ESCOs (or the ESCO's contractor) to incur the cost of background checks on job applicants.

Proposed Standard No. 8 would extend the current three-day contract rescission period provided under the Sales Act to a period that coincides with the customer's right to cancel a switch request, as provided in the UBPs. ESCOs offering fixed price contracts may argue that an extended rescission period increases its risk, but in fact it would merely transfer contracting risk from the customer-applicant to the ESCO. This change, in Distribution's opinion, would provide the ESCO with an incentive to engage in more responsible door-to-door sales practices in order to reduce the risk of contract rescission.

Adoption of the proposed Standards would be cost- and revenue-neutral for Distribution, excluding relatively minor legal fees and administrative costs associated with the Company's current efforts to address door-to-door sales complaints. For customers, however, the Company believes that the Standards would be beneficial primarily because they would lengthen the contract rescission period to coincide with the switching confirmation process in the UBPs. This change would have little effect on ESCOs who engage in responsible sales promotions, insofar as those ESCOs experience fewer rescissions. Whether ESCOs with a higher rate of rescission would incur additional costs depends on factors outside of Distribution's knowledge.

The proposed Standards would also enhance customer confidence in retail choice generally by demonstrating to customers that unfair or deceptive sales practices, whether frequently practiced or not, will not be tolerated. The Standards' longer rescission period, too, would improve customer confidence because it would provide ESCOs with an incentive to improve their sales practices by, e.g., designing better, fairer contracts and enhancing disclosure.

Newspaper Publication

The Company will publish notice of the proposed Standards in newspapers throughout its service territory in accordance with Public Service Law §66(12).

Conclusion

For all of the foregoing reasons, Distribution requests that its proposed tariff amendment, be approved for an effective date of April 25, 2008.

Respectfully submitted,

Michael W. Reville, Esq.

Attachment

Standards Governing Door-to-Door Sales Practices by ESCOs

The following standards shall govern door-to-door sales practices by ESCOs.

1. At a minimum, ESCO's door-to-door sales practices shall conform to the New York door-to-door sales act, Section 425 et. seq. of the NY Personal Property Law.
2. ESCO representative shall not engage in deceptive sales practices.
3. ESCO representative shall clearly identify him or herself as an agent or employee of ESCO, and shall further state explicitly to the customer that he or she is not an employee or agent of Distribution. Toward that end, ESCO representative shall on every door-to-door sales call, recite the following statement:

"I am not an employee or agent of National Fuel, your gas utility. I am a representative of [ESCO] which like other ESCOs has been authorized by the Public Service Commission to sell gas in this area. You are not required to change your natural gas supplier."

ESCO representative shall not refer to ESCO as "the utility" or as "the gas company" and shall identify ESCO by its full name.

ESCO's name and distinctive logo or service mark shall be prominently displayed on ESCO representative's attire (e.g. jacket, hat) and written material on ESCO representative's person for distribution to customers.

4. ESCO representatives shall not conduct door-to-door sales before 9:00 a.m. or after 8:00 p.m.
5. ESCO representatives should be able to demonstrate that they have received all necessary permits, licenses and other authorization to conduct door-to-door sales in municipalities that regulate such activities.
6. No ESCO representative shall be authorized to conduct door-to-door sales if such representative has been convicted of theft, a violent crime or physical offense in any jurisdiction.
7. ESCO shall abide by "No Soliciting" signs posted by prospective customers.
8. Notwithstanding the provision of Section 427 of the NY Personal Property Law for a three-day rescission period, ESCO shall allow customers to cancel their ESCO contract without penalty if the customer notifies ESCO or Distribution at any time prior to customer's enrollment date (i.e. the cycle billing date upon which the customer's account would be switched to ESCO).