S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N S E N A T E

February 18, 2009

Introduced by Sens. PARKER, KRUEGER, MONTGOMERY, PERKINS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Consumer Protection in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee and committed to the Committee on Codes -- reported favorably from said committee and committed to the Committee on Finance -- reported favorably from said committee and committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to establishing an energy service company consumers bill of rights

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The general business law is amended by adding a new section 349-d to read as follows:

S 349-D. ENERGY SERVICES COMPANY CONSUMERS BILL OF RIGHTS. 1. FOR THE PURPOSE OF THIS SECTION:

(A) "ENERGY SERVICES" SHALL MEAN ELECTRICITY AND/OR NATURAL GAS;

(B) "ENERGY SERVICES COMPANY" OR "ESCO" SHALL MEAN AN ENTITY ELIGIBLE TO SELL ENERGY SERVICES TO END-USE CUSTOMERS USING THE TRANSMISSION OR DISTRIBUTION SYSTEM OF A UTILITY;

(C) "CUSTOMER" SHALL MEAN ANY PERSON WHO IS SOLD OR OFFERED AN ENERGY SERVICES CONTRACT BY AN ESCO (I) FOR RESIDENTIAL UTILITY SERVICE, OR (II) THROUGH DOOR-TO-DOOR SALES; AND

(D) "DOOR-TO-DOOR SALES" SHALL MEAN THE SALE OF ENERGY SERVICES IN WHICH THE ESCO OR THE ESCO'S REPRESENTATIVE PERSONALLY SOLICITS THE SALE, AND THE BUYER'S AGREEMENT OR OFFER TO PURCHASE IS MADE AT A PLACE OTHER THAN THE PLACE OF BUSINESS OF THE SELLER; PROVIDED THAT SUCH TERM

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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SHALL NOT INCLUDE ANY SALE WHICH IS CONDUCTED AND CONSUMMATED ENTIRELY BY MAIL, TELEPHONE OR OTHER ELECTRONIC MEANS, OR DURING A SCHEDULED APPOINTMENT AT THE PREMISES OF A BUYER OF NONRESIDENTIAL UTILITY SERVICE, OR THROUGH SOLICITATIONS OF COMMERCIAL ACCOUNTS AT TRADE OR BUSINESS SHOWS, CONVENTIONS OR EXPOSITIONS.

2. ANY PERSON WHO SELLS OR OFFERS FOR SALE ANY ENERGY SERVICES TO A CUSTOMER FOR OR ON BEHALF OF AN ESCO SHALL (A) PROPERLY IDENTIFY HIMSELF OR HERSELF AND THE ENERGY SERVICES COMPANY OR COMPANIES WHICH HE OR SHE REPRESENTS; (B) EXPLAIN THAT HE OR SHE DOES NOT REPRESENT A DISTRIBUTION UTILITY; (C) EXPLAIN THE PURPOSE OF THE SOLICITATION; (D) PROVIDE EACH PROSPECTIVE CUSTOMER WITH A COPY OF THE "ESCO CONSUMERS BILL OF RIGHTS" DEVELOPED BY THE PUBLIC SERVICE COMMISSION, IN CONSULTATION WITH THE LONG ISLAND POWER AUTHORITY, THE STATE CONSUMER PROTECTION BOARD AND THE DEPARTMENT OF LAW; AND (E) PROVIDE ANY WRITTEN MATERIALS, INCLUDING CONTRACTS AND THE "ESCO CONSUMERS BILL OF RIGHTS", IN THE SAME LANGUAGE UTILIZED TO SOLICIT THE PROSPECTIVE CUSTOMER.

3. NO PERSON WHO SELLS OR OFFERS FOR SALE ANY ENERGY SERVICES FOR, OR ON BEHALF OF, AN ESCO SHALL ENGAGE IN ANY DECEPTIVE ACTS OR PRACTICES IN THE MARKETING OF ENERGY SERVICES.

4. NO CONTRACT FOR PROVISION OF ENERGY SERVICES BY AN ESCO SHALL REQUIRE ANY CUSTOMER PREPAYMENT FOR ENERGY SERVICES. HOWEVER, AN ESCO MAY OFFER A CUSTOMER AN OPTION OF PREPAYMENT. ANY CONTRACT PROVIDING FOR PREPAYMENT MAY BE CANCELLED BY THE CUSTOMER, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN NINETY CALENDAR DAYS. ANY UNUSED PORTION OF THE PREPAYMENT SHALL BE RETURNED TO THE CUSTOMER BY THE ESCO WITHIN THIRTY BUSINESS DAYS FOLLOWING RECEIPT OF NOTICE OF CANCELLATION.

5. NO CONTRACT FOR PROVISION OF ENERGY SERVICES BY AN ESCO SHALL REQUIRE THE CUSTOMER TO PAY ANY FEE FOR TERMINATION OR EARLY CANCELLATION OF A CONTRACT IN EXCESS OF EITHER (A) ONE HUNDRED DOLLARS FOR ANY CONTRACT WITH A REMAINING TERM OF LESS THAN TWELVE MONTHS; (B) TWO HUNDRED DOLLARS FOR ANY CONTRACT WITH A REMAINING TERM OF TWELVE MONTHS OR MORE; OR (C) TWICE THE ESTIMATED BILL FOR ENERGY SERVICES FOR AN AVERAGE MONTH. TO CHARGE A FEE BASED ON THE ESTIMATED BILL FOR ENERGY SERVICES FOR AN AVERAGE MONTH, AN ESCO MUST HAVE PROVIDED THE CUSTOMER, AT THE TIME THAT THE CONTRACT IS OFFERED, WITH AN ESTIMATE OF THE AVERAGE MONTHLY BILL THAT CUSTOMER WOULD BE CHARGED FOR ENERGY SERVICES AND THE FEE THAT WOULD BE CHARGED BASED ON SUCH ESTIMATE.

6. NO MATERIAL CHANGE SHALL BE MADE IN THE TERMS OR DURATION OF ANY CONTRACT FOR THE PROVISION OF ENERGY SERVICES BY AN ESCO WITHOUT THE EXPRESS CONSENT OF THE CUSTOMER. THIS SHALL NOT RESTRICT AN ESCO FROM RENEWING A CONTRACT BY CLEARLY INFORMING THE CUSTOMER IN WRITING, NOT LESS THAN THIRTY DAYS NOR MORE THAN SIXTY DAYS PRIOR TO THE RENEWAL DATE, OF THE RENEWAL TERMS AND OF HIS OR HER OPTION NOT TO ACCEPT THE RENEWAL OFFER; PROVIDED, HOWEVER, THAT NO FEE PURSUANT TO SUBDIVISION FIVE OF THIS SECTION SHALL BE CHARGED TO A CUSTOMER WHO OBJECTS TO SUCH RENEWAL NOT LATER THAN THREE BUSINESS DAYS AFTER RECEIVING THE FIRST BILLING STATEMENT FROM THE ESCO UNDER THE TERMS OF THE CONTRACT AS RENEWED. THE PUBLIC SERVICE COMMISSION AND THE LONG ISLAND POWER AUTHORITY MAY ADOPT ADDITIONAL GUIDELINES, PRACTICES, RULES OR REGULATIONS GOVERNING THE RENEWAL PROCESS.

7. IN EVERY CONTRACT FOR ENERGY SERVICES AND IN ALL MARKETING MATERIALS PROVIDED TO PROSPECTIVE PURCHASERS OF SUCH CONTRACTS, ALL VARIABLE CHARGES SHALL BE CLEARLY AND CONSPICUOUSLY IDENTIFIED.

8. ANY CONTRACT FOR ENERGY SERVICES WHICH DOES NOT COMPLY WITH THE APPLICABLE PROVISIONS OF THIS SECTION SHALL BE VOID AND UNENFORCEABLE AS CONTRARY TO PUBLIC POLICY. ANY WAIVER BY A BUYER OF ENERGY SERVICES OF

THE PROVISIONS OF THIS SECTION SHALL BE DEEMED VOID AND UNENFORCEABLE BY THE ESCO AS CONTRARY TO PUBLIC POLICY.

9. THE ATTORNEY GENERAL, UPON HIS OR HER OWN MOTION OR UPON REFERRAL FROM THE PUBLIC SERVICE COMMISSION, THE LONG ISLAND POWER AUTHORITY OR THE STATE CONSUMER PROTECTION BOARD, MAY BRING A CIVIL ACTION AGAINST ANY ENERGY SERVICES COMPANY THAT VIOLATES ANY PROVISION OF THIS SECTION AND MAY RECOVER (A) A CIVIL PENALTY NOT TO EXCEED ONE THOUSAND DOLLARS PER VIOLATION; AND (B) COSTS AND REASONABLE ATTORNEY'S FEES. IN ANY SUCH PROCEEDING THE COURT MAY DIRECT RESTITUTION.

10. IN ADDITION TO THE RIGHT OF ACTION GRANTED TO THE ATTORNEY GENERAL PURSUANT TO THIS SECTION, ANY PERSON WHO HAS BEEN INJURED BY REASON OF ANY VIOLATION OF THIS SECTION MAY BRING AN ACTION IN HIS OR HER OWN NAME TO ENJOIN SUCH UNLAWFUL ACT OR PRACTICE, AN ACTION TO RECOVER HIS OR HER ACTUAL DAMAGES OR FIVE HUNDRED DOLLARS, WHICHEVER IS GREATER, OR BOTH SUCH ACTIONS. THE COURT MAY, IN ITS DISCRETION, INCREASE THE AWARD OF DAMAGES TO AN AMOUNT NOT TO EXCEED THREE TIMES THE ACTUAL DAMAGES UP TO TEN THOUSAND DOLLARS, IF THE COURT FINDS THE DEFENDANT WILLFULLY OR KNOWINGLY VIOLATED THIS SECTION. THE COURT MAY AWARD REASONABLE ATTORNEY'S FEES TO A PREVAILING PLAINTIFF.

11. NOTHING IN THIS SECTION SHALL BE DEEMED TO LIMIT ANY AUTHORITY OF THE PUBLIC SERVICE COMMISSION OR THE LONG ISLAND POWER AUTHORITY, WHICH EXISTED BEFORE THE EFFECTIVE DATE OF THIS SECTION, TO LIMIT, SUSPEND OR REVOKE THE ELIGIBILITY OF AN ENERGY SERVICES COMPANY TO SELL OR OFFER FOR SALE ANY ENERGY SERVICES FOR VIOLATION OF ANY PROVISION OF LAW, RULE, REGULATION OR POLICY ENFORCEABLE BY SUCH COMMISSION OR AUTHORITY.

12. NOTHING IN THIS SECTION SHALL BE DEEMED TO LIMIT ANY AUTHORITY OF THE PUBLIC SERVICE COMMISSION OR THE LONG ISLAND POWER AUTHORITY, WHICH EXISTED BEFORE THE EFFECTIVE DATE OF THIS SECTION, TO ADOPT ADDITIONAL GUIDELINES, PRACTICES, POLICIES, RULES OR REGULATIONS RELATING TO THE MARKETING PRACTICES OF ENERGY SERVICES COMPANIES TO RESIDENTIAL AND COMMERCIAL CUSTOMERS, WHETHER IN PERSON (INCLUDING DOOR TO DOOR), OR BY MAIL, TELEPHONE OR OTHER ELECTRONIC MEANS, THAT ARE NOT INCONSISTENT WITH THE PROVISIONS OF THIS SECTION.

S 2. The public service commission shall amend its guidelines, practices, policies, rules or regulations governing energy service to residential customers as may be necessary to implement the provisions of section one of this act.

S 3. The Long Island power authority shall amend its regulations adopted pursuant to section 1020-f of the public authorities law and its guidelines, practices and policies as may be necessary to implement the provisions of section one of this act.

S 4. The public service commission, in consultation with the Long Island power authority, the state consumer protection board and the department of law, shall develop a short, plain language statement of an "ESCO consumers bill of rights" which shall summarize the protections afforded to consumers of energy services pursuant to section 349-d of the general business law and other applicable laws.

S 5. If any clause, sentence, paragraph, section or part of this act be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder hereof but shall be applied in its operation to the clause, sentence, paragraph, section or part hereof directly involved in the controversy in which such judgment shall have been rendered.

S 6. This act shall take effect on the one hundred fiftieth day after it shall have become a law and shall apply to all energy services sold or offered for sale on or after such date; provided, however, that the

public service commission and the Long Island power authority are immediately authorized and directed to take any and all actions, including but not limited to the promulgation of any necessary guidelines, practices, policies, rules and regulations, necessary to implement the provisions of this act on its effective date.