STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Eligibility Criteria for Energy Service Companies.	)	**Case 15-M-0127**
Proceeding on the Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State.	)	**Case 12-M-0476**
In the Matter of Retail Access Business Rules.	)	**Case 98-M-1343**

I. PRELIMINARY STATEMENT

ESCOs have provided, and continue to provide, profound benefits to New York, its energy vision, and its many millions of energy consumers. Choice expands opportunities and encourages innovation.[1]

The predicate of this proceeding was a highly flawed, inaccurate analysis that generated what the hearings showed to be plainly unreliable, false, and almost inscrutable conclusions. ESCOs are not bad for New Yorkers: They provide them with a host of energy products and services that the local utilities cannot and do not provide; they allow consumers to decide ***for themselves*** the pricing plans they prefer, the types of energy they want to purchase, and the types of bundled services that work best for their families. Each and every ESCO customer makes a voluntary decision not to purchase the plain vanilla variable-rate non-renewable electric or gas commodity from their local utility and instead to purchase a product of their choice from an ESCO. ESCO presence in the marketplace also has advanced New York's retail energy market on a broad scale: Since the introduction of ESCOs into New York's retail energy market, energy prices have declined to the tune of billions of dollars in savings over the course of the last twenty years, more clean energy is replacing non-renewable sources, and customers are consuming less energy as conservation services and products are used. This progress has unfolded over the course of two decades, and any effort to upend the market by upsetting the competitive

[1] NEM hereby incorporates by reference the post-hearing briefs of the Retail Energy Supply Association, Constellation Energy Gas Choice, LLC, and Direct Energy with respect to the topics that NEM does not address specifically in this brief. NEM reserves the right to supplement this briefing, including on the basis of developments that post-dated the hearings and arguments presented in other parties' post-hearing briefs. NEM also notes that just this week, on March 30, 2017, the New York State Court of Appeals granted NEM's motion concerning the scope of the Commission's jurisdiction. The Court's resolution of the issues presented bear significantly on these proceedings, and NEM reserves the right to address all related issues once the Court of Appeals has pronounced its rulings.

marketplace on the basis of faulty data analysis from a small subset of that period is plainly ill-advised and improper.

ESCOs have proven that there is a market for greener energy and energy efficiency in New York. Competition to deliver more environmental quality has benefited New York in terms of a cleaner and healthier environment, as well as lowering the amount end users pay. ESCOs provide fixed price hedging alternatives to the local utilities' variable pricing, where the ESCOs take the risk of market fluctuations. ESCOs prove the acceptance of choice, competition, and alternative energy supplies. It is very likely that these successes have helped to pave the way for the REV program that Governor Cuomo supports and leads.

At bottom, these proceedings have exposed the culprit underlying the recent attacks on ESCOs: the unsupportable claims that ESCOs "overcharge" customers. The evidence in the record confirms that there simply is no evidence to support that claim at all. Even Staff conceded the unreliability of its analyses and preliminary conclusions on the issue, offering explanations for why it was unable to provide more reliable analyses or conclusions. The core conclusion that emerged after weeks of cross examination and searching analysis was that New Yorkers can and should be able to choose the energy products that work best for them and their families. The problems Staff identified as primary concerns highlight the core reforms that the Commission and parties should focus on: devising and implementing new tools to improve consumer awareness of the various products and services available to them, including by reforming or replacing the Power to Choose website and increasing transparency of ESCO and utility product offerings. The Commission should direct Staff to work collaboratively with ESCOs and other stakeholders to devise and implement those improvements to best enable New Yorkers to take advantage of the robust marketplace that New York has created through two decades of competition.

II. BACKGROUND[2]

A. PROCEDURAL HISTORY

This Procedural History section is divided into two parts. Part One focuses on the history of the proceedings under common dockets 93-G-0932, 94-M-0229, 94-E-0952, 98-M-1343, 98-M-0667, 00-M-0504, 06-M-0647, 07-M-0458, 12-M-0476, and 15-M-0127. Part Two summarizes other proceedings at the PSC that are related to these, in that they impact retail markets and address issues under review in these proceedings.

Part I: History of These Proceedings

With the issuance of the Commission's Opinions 94-26 and 94-27 in 1994 ("Opinions"), New York became one of the first states to begin the process of deregulating its retail energy market.[3]

While the Commission has voiced concerns regarding certain aspects of the current retail energy market, it also has continued to express support for creating a healthy and competitive marketplace as well as its belief in the benefits such a market offers participants.[4] Indeed, the

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[2] The Parties had agreed to work together to prepare this Joint Statement of Undisputed Facts. Upon receipt of a draft from the ESCO Parties, the non-ESCO Parties declined to engage the process of working together to finalize a draft of the Joint Statement of Undisputed Facts. As a result, the ESCO Parties present this as their Joint Statement of Undisputed Facts.

[3] Case 93-G-0932, *Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Established Regulatory Policies and Guidelines for Natural Gas Distributors, Opinion 94-26* (December 20, 1994); Case 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service, established Proposed Principals to Guide the Transition to Competition for Electric Service, Opinion 94-27* (December 22, 1994).

[4] Case 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Regarding Proposed Principles to Guide the Transition to Competition (December 22, 1994), at 5 ("*The Commission's commitment to encouraging competition in place of regulated monopoly under appropriate circumstances has been established policy for several years*"); Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities*, Statement of Policy on Further Steps Toward

State's Reforming the Energy Vision ("REV") initiative and the emerging distributed energy resources ("DER") market[5] are examples of the Commission's continued commitment to the value of innovation and competition in New York's energy markets.[6]

1993 - 1995: Initial Steps to Deregulate the Wholesale & Retail Energy Markets

Between 1993 and 1995, the Commission issued a series of orders focused on opening the electric and natural gas markets to competition[7] and noted that the first steps were to *"identify*

Competition in Retail Energy Markets (August 25, 2004), at 17 ("*In the best of all worlds, all retail functions (except delivery) now provided by utilities would be competitive*."); Case 07-M-0458, Proceeding on Motion of the Commission to Review Policies and Practices Intended to Foster the Development of Competitive Retail Energy Markets, *Order on Review of Retail Access Policies and Notice Soliciting Comments* (April 24, 2007), at 4 ("*We have long supported the development of viable and sustainable competitive markets, which promote economic efficiency and thereby yield consumer benefits"*); Case 12-M-0476, *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Order Taking Action to Improve Residential and Small Non-Residential Retail Access Markets (February 25, 2014) at 3-4 ("*Retail markets have been and will be an integral part of the regulatory framework" and "Our goal is competitive retail energy markets in which ESCOs and other vendors offer a wide range of innovative products and services…");* Case 15-M-0127, In the Matter of ESCO Track 1 Proceeding, Staff Panel Testimony, p. 28, Lines 4-8 ("Since then, as experience with the retail energy markets has been gained, the Commission has adjusted its rules and policies to both encourage and accommodate competition within the retail energy markets.").

[5] Defined as "*A broad category of resources including end-use energy efficiency, demand response, distributed storage, and distributed generation*" in Section 1 of the of the UBP-DER (Case 15-M-0180, *In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products*).

[6] While REV encompasses many proceedings, the most significant ones with relevant bearing on this procedural history are: Case 14-M-0101 (Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision); Case 15-E-0302 (*Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*); Case 15-M-0180 (*In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Product)*; and Case 15-E-0751 (In the Matter of Distributed Energy Resources).

[7] Including, but not limited to: 93-G-0932 (*In the Matter of Competitive Opportunities Regarding Natural Gas Service*), 94-M-0229 (*Proceeding on Motion of the Commission to Address Competitive Opportunities Available to Customers of Electric and Gas Service and to Develop Criteria for Utility Responses*), and 94-E-0952 (*In the Matter of Competitive Opportunities Regarding Electric Service*).

regulatory and ratemaking practices that will assist in the transition to a more competitive electric industry…."[8] In so doing, the Commission acknowledged that existing realities of the energy market rendered the transition process more complex than that of other regulated monopoly sectors,[9] but that the benefits to consumers – including expanded customer choice, potentially lower prices, and increased technological innovation – outweighed such challenges. As the Commission noted in a December 1994 Opinion: "*where genuine competition has replaced regulated monopoly, customers have had little reason for regret*."[10]

1997 – Mid-2000s: Cost Allocation & Consumer Protection

Once the Commission had taken the necessary steps to create a new regulatory framework for market competition, it turned its attention to the task of incentivizing "genuine competition" while developing a sufficiently robust consumer protection framework.

In its January 1999 "Order Adopting Uniform Business Practices and Requiring Tariff Amendments" ("1999 UBP Order"), the Commission recognized that, in order for the market to operate efficiently and competitively, there was a need to minimize market "inconsistencies" and to create standardized procedures for both utilities and ESCOs.[11] The 1999 UBP Order included the first iteration of the Uniform Business Practices ("UBP"), which outlined ESCO and utility procedures for sharing customer information, switching, billing arrangements, compliance requirements, and additional measures for consumer protections.

[8] Case 93-M-0229, Order Instituting Phase II of Proceeding, pp. 1-2.

[9] Case 94-E-0932, Opinion 94-27, at 6.

[10] Op. No. 94-27

[11] Case 98-M-1343, In the Matter of Retail Access Business Rules, *Order Adopting Uniform Business Practices and Requiring Tariff Amendments* (Jan. 2009), at p. 1-2.

In 2000, the Commission began to publish public monthly consumer statistics including "initial concerns" ("QRS") and escalated ("SRS") complaints.[12] Another key development came in 2002, when Article 2 of the Public Service Law was amended to extend the Home Energy Fair Practices Act ("HEFPA") to ESCOs (where it previously had applied only to public utilities).[13] The UBP was again updated in 2010 to include the "Consumer Bill of Rights," and required ESCOs to provide this information when enrolling a customer.[14]

The Commission also made a series of changes designed to increase ESCO access and competitive position. In February 2000, the Commission issued its "Opinion & Order on Implementation of EDI" to allow for the standardized electronic transfer of customer data between ESCOs and utilities.[15] Further improvements on that front were made in 2004.[16] In November 2003, the Commission revised the UBP to change the application process for ESCOs and reduce the level of security deposits provided by ESCOs to distribution utilities, and in August 2005, the Commission issued a Statement of Policy on Further Steps Toward Competition in Retail Energy Markets, authorizing the utilities to purchase accounts receivable,

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[12] Consumer Complaint Statistics – Office of Consumer Services webpage, *available here*: http://www3.dps.ny.gov/W/PSCWeb.nsf/All/448C499468E952C085257687006F3A82?OpenDocument.

[13] Case 03-M-0117, *In the Matter of the Implementation of Chapter 686 of the Laws of 2002, Proposed Changes to the Requirements Contained in Home Energy Fair Practices Rules, 16 NCYRR Parts 11 and 12, and in Commission Orders in Cases 28080, 91-M-0744, 91-M-0500 and 88-W-187*, Memorandum and Resolution Adopting Amendments to 16 NYCRR Parts 11 and 12, June 6, 2004.

[14] Case 98-M-1343, *Order Implementing Chapter 416 of the Laws of 2010* (issued December 17, 2010). Further updates were made in February 2016 and January 2018, which are discussed in Section II.A.

[15] Case 98-M-0667, *In the Matter of Electronic Data Interchange (EDI*).

[16] Case 98-M-0667, In the Matter of Electronic Data Interchange, *Order Modifying Electronic Data Interchange (EDI) Standards and Directing the Provision of Certain Non-EDI Data* (March 22, 2004).

"*recognizing that it would help to simplify ESCO operations and reduce ESCO overheads.*"[17] Section 5 of the UBP subsequently was modified to recognize utility enrollments associated with ESCO referral programs.[18]

As it oversaw the development of the UBP and additional efforts to standardize procedures, the Commission recognized that a "genuinely competitive" market required the equitable (or at least workable) allocation of market costs between ESCOs and utilities.[19] Critical to developing such a methodology and to market development generally was the need to conduct cost studies, "the ensuing assignment of costs to the utilities' various functions and services, and the establishment of fully unbundled, cost-based rates for electric and gas service."[20] The outcomes of these studies were addressed in the Commission's August 2004 "Unbundling Order"[21] which addressed specific cost issues, including allocation of cost in the Merchant Function Charge (MFC), cost recovery mechanisms, and commodity rates.

Given that the lengthy nature of its review resulted in a significant delay between the data sets analyzed and prevailing market conditions, the Commission directed that future cost studies

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[17] Case 15-M-0127, et al. Staff Policy Panel Testimony, Exh. SP-4.

[18] Case 98-M-0667 et al., *Order Modifying Electronic Data Interchange (EDI) standards and Uniform Business Practices* (issued May 19, 2006).

[19] Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities - Unbundling Track*, Statement of Policy on Unbundling and Order Directing Tariff Filings (August 25, 2004), at 2 ("*The purpose of the Unbundling Track is to study and allocate utility costs between competitive and non-competitive functions and to establish costbased competitive rates that would afford customers accurate price signals as they choose among the providers of services in the competitive market*.")

[20] Case 00-M-0504, Order Directing Expedited Consideration of Rate Unbundling (issued March 20, 2001), at 1.

[21] Case 00-M-0504, Statement of Policy on Unbundling and Order Directing Tariff Filing (August 25, 2004).

be done in individual rate cases.[22] However, it acknowledged both that ongoing calculation "refinements" likely would be necessary,[23] and that a comprehensive review of the overall system may be appropriate in the future, if warranted by ongoing changes in the retail marketplace.[24]

2010 – 2016: Efforts to Enhance Consumer Protections & Emergence of New Markets

In 2012, the Commission instituted one such comprehensive review to examine the functioning of the retail market for residential and small commercial customers.[25] The "2012 Retail Access Order" concluded that the retail market was providing large commercial and industrial customers with tangible benefits and demonstrated cost reductions as compared with the utility, but that the same was not true for residential and small commercial customers.[26] In particular, it found that there were insufficient mechanisms for consumers to accurately compare

[22] *Id*, at 38.

[23] Case 00-M-0504, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities, *Order Instituting Proceeding* (March 21, 2000) at p. 1-2 "*In addition, the development of a robust retail market, especially for small energy users (i.e., small commercial and residential customers), may require some refinement of our market implementation efforts during the transition period*."

[24] Case 00-M-0504, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities, *Order Instituting Proceeding* (March 21, 2000), at 39: "*We have noted a number of areas where the record could be improved in the future or where other approaches might be more reasonable than the alternatives proffered in this record, and we encourage the parties to explore them as the future filings of the utilities are submitted*."

[25] Case 12-M-0476, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State (October 19, 2012).

[26] The February 2014 order in the same docket also noted that, in 2012, approximately 72% of large non-residential electric customers and 58% of large non-residential natural gas customers were enrolled with third-party energy suppliers. Case 12-M-0476 et al., Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Market (February 23, 2014) at 5.

products and prices.[27] ESCOs were able to offer products (e.g., fixed rate offerings) and value-added services (e.g., home repair and maintenance services) that the utilities did not and could not provide, but Department of Public Service Staff ("Staff") contended that many customers were also paying more than they would have paid if they had remained with their default utility.[28] Further, Staff expressed concerns that it was difficult for customers to accurately compare prices, in part because ESCOs promoted prices that were currently available, while utilities generally presented only historic prices.[29] In response, the Commission recommended development of timely comparative pricing and billing information to address its price-comparison concern.[30]

The Commission also addressed ESCO marketing practices, some of which appeared to target elderly and low-income customers, as well as those for whom English was not a native language, and which reduced the effectiveness of other measures (such as price comparison calculators). In February 2014, the Commission issued its Order Taking Action to Improve Residential and Small Non-Residential Retail Access Markets ("2014 Retail Access Order") in the 12-M-0476 docket. The 2014 Retail Access Order directed the implementation of several changes to existing marketing practices, including requiring ESCOs to collect historic pricing data on quarterly basis for residential customers; requiring independent third-party verification for all sales resulting from door-to-door marketing/telemarketing; requiring that ESCOs maintain

[27] Case 12-M-0476, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State (October 19, 2012), at 5.

[28] Case 12-M-0476 et al., *Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies* (issued on July 15, 2016).

[29] Case 12-M-0476, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State (October 19, 2012), at 5.

[30] The Power 2 Choose website continues to be updated to reflect timely and accurate price offerings for residential customers.

a record of the territories in which they market door-to-door; requiring a standardized renewal notice; and modifying rules to streamline process for reviewing violations.[31] These changes, the Commission clarified, were informed by the expectation that *"under the proper regulatory conditions, market competition will stimulate innovation and promote the economic investment that will be required to strengthen New York State's energy systems as they become more consumer oriented*."[32]

Although the changes outlined in the 2014 Retail Access Order were significant, Staff and the Commission expressed concerns regarding the viability of achieving customer cost-savings under the then-current system.[33] In February 2016, the Commission issued a "Resetting Order," which directed all ESCOs to limit offerings to guaranteed savings products, or (in the case of electric product offerings) products sourced from a minimum of 30% "green" energy resources.[34]

That Order resulted in an intensive period of litigation as well as concurrent petitions with the Commission. On May 4, 2016, Staff issued Whitepapers offering feedback on three of the seven issues raised in the Resetting Order: (1) performance bonds or other security requirements for energy service companies; (2) benchmarking/reference pricing for ESCOs; and

[31] Case 12-M-0476 et al., Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Market (February 23, 2014).

[32] Case 12-M-0476 et al., Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Market (February 23, 2014) at 11.

[33] Case 15-M-0127 et al. Order Resetting Retail Energy Markets and Establishing Further Process (February 23, 2016) at 12.

[34] Case 15-M-0127 et al. Order Resetting Retail Energy Markets and Establishing Further Process (February 23, 2016) at 15.

(3) express consent from ESCO customers.[35] On May 10, 2016, the Commission issued a Notice Seeking Comments on the Whitepapers, whereby Staff solicited comments from stakeholders on issues related to benchmarking, energy-related value-added services, and other topics (the "Whitepaper Phase").[36]

As noted, at the same time, the Commission's Resetting Order was being reviewed by the state courts. The Supreme Court for the State of New York, Albany County, issued a temporary restraining order on March 8, 2016, staying implementation of the Resetting Order, and the Court subsequently issued a decision invalidating Paragraphs One through Three of the Resetting Order.[37]

The Commission noticed the current "Evidentiary Hearing" track on December 2, 2016.[38]

Part II: Commission Proceedings on Related Matters

This section addresses proceedings on issues related to the Evidentiary Hearing.

Ban on Serving Low Income Customers (Case 12-M-0476 et al). In 2014 the Commission ordered ESCOs to develop lower cost alternatives for low-income customers (also referred to as Assistance Program Participants, or "APP" customers), and required that, to serve an APP customer, an ESCO must provide a product that either (1) offers a "guaranteed savings" compared to when the customer would have paid under full utility service; or (2) include energy related value-added products or services designed to reduce the customer's overall bill.

[35] Case 15-M-0127 et al., *Staff Whitepaper on Benchmark Reference Prices; Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests; Staff Whitepaper on Benchmark Reference Prices* (May 4, 2016).

[36] Case 15-M-0127 et al., *Notice Seeking Comments* (May 10, 2016).

[37] *National Energy Marketers Assn. v New York State Pub. Serv. Comm'n.*, 37 N.Y.S.3d 178, 2016 NY Slip Op 26233 (July 22, 2017).

[38] Case 15-M-0127 et al., *Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits* (issued December 2, 2016).

Subsequently, the Commission directed Staff to lead a collaborative to address implementation issues concerning this requirement. A Report of the Low-Income Collaborative was issued for comment on November 5, 2015 ("Collaborative Report"). The Collaborative Report did not reach a final resolution of the issues identified in the February 2015 Order, but did recognize the merits of ESCOs providing fixed-rate and value-added services to customers.[39]

The Commission issued three successive orders concerning ESCO service to APP customers – first in July 2016, then in September 2016, and finally in December 2016. On July 15, 2016, the Commission entered an order titled: *Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies* (the "July Order"). That Order imposed a "moratorium" on ESCO enrollments and renewals of APP customers, *i.e.*, customers who participate in low-income energy assistance programs.[40] Specifically, the July Order required local utility companies to place a block on low-income customer accounts so that they could no longer enroll with an ESCO.

Following entry of the July Order, three petitions for rehearing were filed with the Commission challenging the validity of the July Order on various bases. On September 15, 2016, the Commission ruled on those petitions for rehearing by issuing an *Order on Rehearing and Providing Clarification* with an effective date of September 19, 2016 (the "September Order"). In the September Order, the Commission recognized the SAPA challenges but issued an order that reenacted the July Order "on an emergency basis pursuant to SAPA §202(6)" to avoid the SAPA requirements.[41] On September 28, 2016, the Supreme Court for the State of New York,

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[39] Case 12-M-0476, et al., *Report of the Collaborative Regarding Protections for Low Income Customers of Energy Service Companies* (November 5, 2015).

[40] *See* Case 12-M-0476, et al., Commission Order. (issued July 15, 2016).

[41] *See* Case 12-M-0476, et al., Commission Order at 6 (issued September 15, 2016).

Albany County, issued a temporary restraining order prohibiting the Commission from taking "any action" in furtherance of its proposed "low-income moratorium."

On October 5, 2016, the Commission published in the State Register a Notice of "Emergency/Proposed Rule Making" (the "Notice"). The Notice states that the "Commission, on September 15, 2016 adopted an order approving a temporary moratorium on new enrollments by energy service companies (ESCOs) of residential electricity and/or natural gas customers who are utility low-income assistance program participants (APPs); and requirements that ESCOs de-enroll all APP customers and move them to utility full service."

The Commission did not conduct or notice any hearing or evidentiary process and provided 45 days for public comment. Parties submitted public comments, including contesting (i) the Commission's compliance with SAPA requirements; (ii) the Commission's improper reliance on a deficient evidentiary record, including its failure to collect verifiable data regarding ESCO rates, utility rates, and the different products each offer; (iii) the Commission's violations of customer privacy rights and considerations; (iv) the arbitrary and capricious nature of the Moratorium; (v) the Commission's authority to implement the Moratorium; and (vi) the constitutionality of the Moratorium.

On December 16, 2016, the Commission issued an "Order Adopting a Prohibition on Service to Low-Income Customers by Energy Service Companies (the "December 2016 APP Order"), prohibiting ESCOs from selling electricity and natural gas to APP customers. In the December 2016 APP Order, the Commission stated that a prohibition on ESCO service to APP customers was necessary to protect customers who receive a subsidy on their energy bill, as well as those taxpayers and ratepayers who fund the programs that provide those subsidies.[42] The

[42] *Id*. at 3-4.

Commission provided for a mechanism to allow ESCOs willing to offer "guaranteed savings" to APP customers to petition the Commission for a "waiver" of the December Order by demonstrating: (a) an ability to calculate what the customer would have paid to the utility; (b) a willingness and ability to ensure that the customer will be paying no more than what they would have been paid to the utility; and (c) appropriate reporting and ability to verify compliance with these assurances.[43] On June 30, 2017, a challenge to the low-income customer ban was denied by the Albany Supreme Court.[44] That decision is currently on appeal to the Appellate Division, Third Department.

In addition, a putative class action was filed in federal court by a low-income consumer on behalf of all New York APP customers, challenging the Commission's prohibition on ESCO service to low-income customers.[45] That action remains pending in the United States District Court, Northern District of New York.

Clean Energy Standard (CES) (Case 15-M-0302). The 2015 New York State Energy Plan outlined an ambitious goal for New York: by 2030, fifty percent (50%) of the State's energy should be generated by renewable resources. DPS Staff then worked to outline the Clean Energy Standard (CES). In January 2015, it issued its Staff Whitepaper,[46] which proposed the establishment of three tiers of renewable energy:

(1) Tier 1: New Renewable Resources
(2) Tier 2: Existing Renewable Resources
(3) Tier 3: Nuclear Resources

[43] *Id*. at 24-25.

[44] *National Energy Marketers Assn. v New York State Pub. Serv. Comm'n.*, 60 N.Y.S.3d 760, 2017 NY Slip Op. 27223 (June 30, 2017).

[45] Doe v. Rhodes et al., Civil Action No.: 17-CV-936 (N.D.N.Y. 2017).

[46] Case 15-E-0302, *Staff White Paper on Clean Energy Standard* (January 25, 2016).

On August 1, 2016, the Commission adopted these suggestions and established a new Renewable Energy Standard, Renewable Energy Credit purchasing requirements, and a brand-new Zero-Emissions Credit Requirement ("ZEC") program, which applies to all load-serving entities.[47] The requirements of the Clean Energy Standard were included in the January 2018 UBP (defined below).[48]

Reforming the Energy Vision (REV) (Case 14-M-0101, et al). As the Commission was working on adjustments to the residential and small commercial aspect of the retail energy markets, it also began to oversee the development of new energy markets. Introduced by Governor Andrew Cuomo's Administration in 2014, "Reforming the Energy Vision" (REV) is an historic, ambitious attempt to remake the ways in which energy is produced, transported, stored, and consumed in New York State.[49] In April 2015, the Commission began review of rules related to distributed energy resources.[50] The Commission was directed to oversee the regulatory implementation, which has since grown from two 'Tracks' to many interrelated proceedings, some of which affect (or are affected by) the Evidentiary Hearing.[51]

Distributed Energy Resources (DER) Oversight (Case 15-M-0180) and Value of DER (Case 15-M-0571). The need to improve the resiliency and flexibility of the current grid infrastructure, as well as incentivize market innovation, are identified as critical parts of the REV process. In December 2015, the Commission issued an Order commencing a proceeding to study

[47] Case 15-E-0302, *Order Adopting a Clean Energy Standard* (issued and Effective August 1, 2016).

[48] Case 98-M-1343, *Order Adopting Revised Uniform Business Practices* (issued January 19, 2018).

[49] *See* www.rev.ny. Case 14-M-0401.

[50] Case 15-M-0180.

[51] Case 15-M-0127 (Dec. 2 Notice).

alternative methods to measure and value energy resource contributions to the grid, including the value of distributed energy resources, and issued its order outlining the transition and the establishment of new tariffs and compensation mechanisms in March 2017.[52] At the same time, Staff and the Commission also began drafting the parameters for a UBP for DER providers.[53] In October 2017, the Commission issued an Order establishing the oversight framework, which went into effect on December 1, 2017.[54] Currently, ESCOs and DER suppliers are regulated by separate UBP documents, although the Commission stated that its goal would be to merge the two into one oversight document as soon as practicable.[55]

B. THE RETAIL MARKETS TODAY

1. Overview of the Retail Energy Markets Serving So-Called "Mass-Market" Customers

As part of the deregulation of New York's generation market in the early 1990s, the Commission began developing competitive retail energy markets in New York State.[56] During the 1990s, the Commission issued a series of orders that provided electricity and natural gas

[52] Case 15-M-0751, *In the Matter of the Value of Distributed Energy Resources*, Order on Net Energy Metering Transition, Phase One of the Value of Distributed Energy Resources, and Related Matters (March 9, 2017).

[53] Case 15-M-0180, *In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products*.

[54] Case 15-M-0180, *In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products*, Order Establishing Oversight Framework and Uniform Business Practices for Distributed Energy Resource Suppliers (October 19, 2017).

[55] *Id*. at 22.

[56] Tr. 2046, lns. 22-24; Opinion 94-26, Case 93-G-0932, *Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market*, (issued December 20, 1994); Opinion 94-27, Case 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service*, (issued December 22, 1994).

customers the opportunity to shop for commodity supply, and provided ESCOs the opportunity to compete to serve these customers.[57]

On June 7, 1995, in Opinion 95-7, the Commission adopted nine Principles to Guide the Transition to Competition for Electric Service, stating: "In accordance with the Commission's mandate that all New Yorkers must have access to reliable and reasonably priced electric service provided safely, cleanly, and efficiently, the principles to guide the transition to a more competitive electric industry. . ."[58] The first principal identified by the Commission was:

> Competition in the electric power industry will further the economic and environmental well-being of New York State. The basic objective of moving to a more competitive structure is to satisfy consumers' interests at minimum resource cost. Prices should therefore accurately reflect resource costs, and consumers should have a reasonable opportunity to realize savings and other benefits from competition.[59]

The Commission recognized the benefit of choice itself, rejecting proposals that the Commission should mandate that all customers be guaranteed to benefit from such choices, the Commission explained that deregulation was not predicated on all customers necessarily benefitting:

> Department of Public Service staff and the Public Utility Law Project, among others, believe the words "all" in the second and third sentences might imply an assurance that benefits would flow to every individual consumer, a result that might not be achievable. Deleting the word "all" in both places avoids the potential to mislead.[60]

In Opinion No. 96-12, the Commission explained that the purpose of allowing ESCOs to participate in the retail-energy market was to allow customers "to choose among providers" on

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[57] Tr. 157, lns. 18-20-Tr. l58, ln. 1.

[58] Opinion 95-7, Case 94-E-0952, *Opinion and Order Adopting Principles to Guide the Transition to Competition*, at Appendix C (issued June 7, 1995).

[59] *Id*.

[60] *Id.*

the understanding that "[c]ustomers acting in their own self-interest, when presented with a variety of market choices, will arrange their consumption to maximize their welfare and save costs."[61] The Commission specifically rejected the notion that for competition to be effective, it would have to result in lower rates all customers – noting that competition offered an array of benefits, and that even with respect to that broader array of benefits, there was no "assurance that benefits would flow to every individual consumer."[62]

In the Commission's Vision Statement expressed in its 2004 Retail Policy Statement, the Commission identified an array of benefits and goals that drove its decision to create the competitive retail energy market:

> The provision of safe, adequate, and reliable gas and electric service at just and reasonable prices is the primary goal. Competitive markets, where feasible, are the preferred means of promoting efficient energy services, and are well suited to deliver just and reasonable prices, while also providing customers with the benefit of greater choice, value and innovation. Regulatory involvement will be tailored to reflect the competitiveness of the market.[63]

Through the competitive market framework that the Commission established, ESCOs provide electricity and natural gas commodity service in the form of various products. ESCO products and services are driven by competition for customers, who are free to choose the products that meet their requirements and desires.[64] Under this framework, utilities play an important role in reliably delivering ESCO-supplied energy to customers.[65] Utilities are

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[61] Tr. 289, lns. 164-174, quoting Op. 96-12 at 40.

[62] Opinion 95-7, Case 94-E-0952, *Opinion and Order Adopting Principles to Guide the Transition to Competition*, (issued June 7, 1995), at 5-6.

[63] Case 00-M-0504, Statement of Policy on Further Steps Toward Competition in Retail Energy Markets, issued August 25, 2004. at 18.

[64] Tr. 161, lns. 1-3.

[65] Tr. 164, lns. 3-7.

responsible for reading meters, exchanging retail access information (e.g. usage data), generating customer bills, and providing Purchase of Receivables ("POR") service to ESCOs through utility consolidated billing.[66]

These proceedings concern residential and small-commercial customers, which the Commission has termed "mass-market customers."[67] The UBP define a "residential customer" as an individual or occupant of a residential premise which includes "any person who, pursuant to an application for service or an agreement for the provision of commodity supply made by such person or a third party on his or her behalf, is supplied directly with all or any part of the gas, electric or steam service at a premises used in whole or in part as his or her residence…."[68]

Although Staff classified electric accounts that are demand metered for electric or with usage in excess of 750 dekatherms over a calendar year as large commercial and industrial customers in these proceedings,[69] – that classification was created "for purposes of [Staff's] testimony" in these proceedings,[70] and it does not reflect any agreed-upon or other convention that is commonly used in the retail energy markets. Significantly, neither the UBP nor any other Commission document provides any legally operative definition as to which accounts qualify as "small commercial" or "small non-residential."[71] Further, the recent Order Adopting Revised Uniform Business Practices issued in January 2018 does not define the term, but instead refers

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[66] *Id.*

[67] Cases 15-M-0127 et a., *In the Matter of Eligibility Criteria for Energy Service Companies*, Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits (issued December 2, 2016) at 1.

[68] UBP at Section 1, Definitions (citing to definition in 16 N.Y.C.R.R. § 11.2).

[69] Tr. 2043, lns. 1-6.

[70] Tr. 2038, lns. 20-21.

[71] *See, generally*¸ Case 98-M-1343, *In the Matter of Retail Access Business Rules*, Order Adopting Revised Uniform Business Practices (issued January 19, 2018) at Appendix A.

to a prior order for the definition.[72] However, the definition in that order was subject to Petitions for Rehearing or Clarification, and was ultimately withdrawn from the UBP in 2015.[73] Accordingly, there is currently no legally operative definition for "small nonresidential customer," "small electric commercial customer" or " small natural gas commercial customer."

Residential and commercial customers who do not choose to purchase commodity service from an ESCO receive their commodity from their local public utility, generally referred to as "default service."[74] Customers that stay on utility default service pay a regulated rate designed to recover the utility's costs of supplying electricity or natural gas, including the costs incurred by the utilities to hedge some portion of their supply portfolio, generally known as the market supply charge or "MSC."[75] The MSC is established through a mix of forward and spot market purchases.[76] As a result, at any point in time, the MSC rates may be higher or lower than the wholesale market index costs, depending on the hedging activity of the utility and any cost deferrals or prior period adjustments.[77] Utilities also have the ability to seek a deferral of default service costs, with such deferred costs recovered in subsequent months through a rate adder

[72] *Id.* at 9 n. 4 (indicating that small nonresidential is defined in Case 12-M-0476 *et al.*, Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets (issued February 25, 2014) ("2014 Order")).

[73] Case 12-M-0476, Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015), at 2 n. 3.

[74] Tr. 158, lns. 1-3.

[75] Tr. 158, lns. 6-10; *see also* Tr. 822, Table 2; Tr. 823, Table 3; Tr. 2050, lns. 15-24-Tr. 2051, lns. 1-13.

[76] Tr. 158, lns. 19-20.

[77] Tr. 158, lns. 20-21-Tr. 159, ln. 1.

charged to all default service customers.[78] Thus, the actual rates customers pay on utility default service are not directly tied to wholesale costs in the month in which actual costs were incurred.[79]

2. ESCO Registration and Eligibility

The ESCO Registration and Eligibility requirements are set forth in the UBP. An ESCO seeking to sell natural gas or electricity in New York is required to submit an application package to the Department containing the information and attachments listed below. Department Staff reviews the contents of the application package for completeness and consistency with the UBP; applicants are currently not required to submit information with respect to their qualifications or experience.

- a completed Retail Access Eligibility Form;
- a sample standard Sales Agreement for each customer class that meets the UBP' requirements;
- sample forms of the notices sent upon assignment of sales agreements, discontinuance of service, or transfer of customers to other providers;
- a sample ESCO bill used when dual billing is in effect and, if applicable, a sample ESCO consolidated bill, with terms stated in clear, plain language;
- procedures used to obtain customer authorization for ESCO access to a customers' historic usage or credit information;
- sample copies of informational and promotional materials that the ESCO uses for mass marketing purposes;
- proof of registration with the New York State Department of State;
- internal procedures for prevention of slamming and cramming;
- name, postal and e-mail addresses, and telephone and fax numbers for the applicant's main office;

[78] Tr. 159, lns. 4-7.

[79] Tr. 159, lns. 8-10

- names and addresses of any entities that hold ownership interests of 10% or more in the ESCO, including a contact name for corporate entities and partnerships;

- detailed explanation of any criminal or regulatory sanctions imposed during the previous 36 months against any senior officers of the ESCO or any entities holding ownership interests of 10% or more in the ESCO;

- a copy of the ESCO's quality assurance program, which is designed to monitor (a) compliance with Section 10 of the UBP and (b) accuracy of the ESCO marketing materials provided to prospective customers;

- a completed Service Provider Contact Form, which can be found on the Department's website http://www.dps.ny.gov/ocs.html, identifying the ESCO's employee(s) responsible for resolving consumer complaints received by the Department and referred to the ESCO; and

- a list of the entities, including contractors and sub-contractors that will market to customers on behalf of the ESCO. The list must include the entities' names, addresses, phone numbers and owners, managers, and principals. This list must be updated regularly as entities are added or removed.[80]

In addition to these materials, ESCOs must arrange for a utility to test transactions (i.e., EDI), and are required to submit the name of the testing utility to the Department.[81] Once the application package is complete, the Department reviews the application. If deemed eligible, the Department advises the ESCO in writing.[82] The ESCO must begin serving customers within two years of the date of the letter notifying the ESCO of its eligibility status, and, if it does not do business within that period, the ESCO must conduct additional EDI testing with a utility before it can process enrollments.[83]

On or before January 31 of each calendar year, an ESCO must submit a statement to the Department that the information and attachments in its Retail Access Eligibility Form and

[80] UBP as of February 2016, at 6-7.

[81] UBP as of February 2016, at 7.

[82] *Id*.

[83] *Id*.

application package (or most recently filed Triennial) are current, or a description of revisions to the Form and package.[84] The UBP further provides that "[a]n ESCO shall update all the information it submitted in its original application to the Department every three years, starting from the date of its eligibility letter."[85] However, an ESCO must also submit immediate statements advising the Department of changes if there are certain defined changes to the ESCO's Form or application package during the year, including "major change[s]" to customer contract terms, changes to marketing plans, or responsible personnel, among others.[86]

Also, to maintain its eligibility, an ESCO serving residential customers must "[a]t least once every thirty days" "post a price for each product it offers to those customer classes (e.g., fixed-price, variable-price, renewable energy, with each type of value-added service, etc.) on the Power to Choose website."[87] Further, "[e]ach ESCO must guarantee to charge new customers no more than the price of the ESCOs posted offers at the time of the customer's agreement for each product."[88]

Failure to comply with these application and continued-reporting requirements can result in various "consequences", including suspension or revocation of an ESCOs ability to operate in New York.[89] Pursuant to the UBP, "[a]n ESCO's status as an eligible supplier is continuous from the date of the Department eligibility letter, unless revoked or otherwise limited."[90]

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[84] *Id.*

[85] *Id.*

[86] *Id*. at 8.

[87] *Id*.

[88] *Id.*

[89] *Id*. at 8-11.

[90] *Id*.

In addition to these application and reporting requirements, ESCOs must meet certain creditworthiness standards set forth in the UBP.[91] If creditworthiness requirements[92] are not met, the "distribution utility may require an ESCO to provide and maintain security in the full amount of the distribution utility's credit risk," calculated under the UBP.[93] Such security can be in the form of a deposit or prepayment, an irrevocable letter of credit or surety bond, a security interest in collateral, a guarantee by a party meeting the minimum credit rating threshold, or "[o]ther means of providing or establishing adequate security."[94]

3. ESCO Business Practices

For over twenty years, ESCOs in New York State have been providing energy supply and other value-added services to customers. Through the competitive market framework, ESCOs provide electricity and natural gas commodity service through various products. ESCO rates are determined through a competitive market process in which customers shop for products that meet their individual needs.[95] In addition to commodity service, ESCOs provide value-added services such as fixed-rate products, green products, product bundling, brand loyalty program, and customer service conveniences that traditional default service do not, and cannot, offer customers.[96] Such products range from commodity-only products to offerings that provide long-term fixed prices, or additional "bundled" products and services.[97]

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[91] *Id.* at 16-20.

[92] *Id.* at 17.

[93] *Id.*

[94] *Id.* at 19.

[95] Tr. 161, lns. 1-3.

[96] Tr. 1114, Table FL-1.

[97] Tr. 161, lns. 3-5.

As of December 2016, there were approximately 155 eligible and 140 active electric commodity ESCOs in New York, and 150 eligible and 130 active natural gas commodity ESCOs in New York.[98] Approximately 80 percent of the 1.2 million electric residential ESCO participants are served by the 23 largest ESCOs.[99] Approximately 80 percent of the 754,000 residential customers receiving gas supply from ESCOs are served by the 19 largest ESCOs.[100]

Based on utility-provided data for the month of December 2016, the utilities provide delivery service of electricity to approximately 5.9 million residential customers, approximately 927,700 small and medium sized commercial customers, and 5,200 large commercial and industrial customers.[101] Similarly, the utilities provide natural gas service to approximately 4.4 million residential customers, 414,000 small commercial, and 7,290 large commercial and industrial customers.[102] Also as of December 2016, approximately 1.2 million residential customers (i.e., 20 percent of all residential electric customers in the state), 306,000 non-residential small commercial (i.e., 33 percent of all small commercial electric customers in the state), and 3,739 large commercial and industrial customers (i.e., 72.5 percent of all large commercial and industrial electric customers in the state) opt to purchase electric commodity from an ESCO instead of the local utility.[103] Similarly, approximately 754,000 residential customers (i.e., 17 percent of all residential gas customers in the state), 130,000 small commercial (i.e., 31.4 percent of all small commercial gas customers in the state), and 4,155 (i.e.,

[98] Tr. 2045, lns. 8-13.

[99] Tr. 2046, lns.4-9; Hearing Exhibit 713.

[100] Tr. 2046, lns. 9-12; Hearing Exhibit 713.

[101] Tr. 2041, lns. 2-12; Hearing Exhibit 712.

[102] Tr. 2041, lns. 13-17; Hearing Exhibit 712.

[103] Tr. 2041, lns. 17-23; Hearing Exhibit 712.

57 percent of the large commercial and industrial gas customers in the state) opt to purchase natural gas commodity from an ESCO instead of the local utility.[104]

4. Billing and Purchase of Receivables

In its *Statement of Policy on Further Steps Toward Competition in Retail Energy Market*, issued August 25, 2004 in Case 00-M-0504, the Commission authorized the utilities to purchase the ESCO accounts receivable, in order to, among other things: reduce ESCO operating costs; ensure that customers receive the full benefits of HEFPA; minimize the switching of payment troubled customers back to full utility service; and further promote retail access migration.[105] Purchase of Receivables ("POR") was rolled out by each of the utilities.

Under POR, the utility purchases the ESCO receivables when they accrue, at a discount.[106] The discount amount varies by utility, but is generally based on the uncollectable accounts incurred by the ESCOs in that utility's service area.[107] The ESCO receives the full discounted payment from the utility regardless of whether a customer pays its bill.[108]

When it opened the markets to competition, the Commission directed the utilities to provide consolidated utility billing services ("CUB").[109] The vast majority of ESCOs bill their customers through the CUBs.[110] However, some ESCOs bill their commodity offerings separately,[111] and, in the National Fuel Gas Corporation service territory, approximately 23

[104] Tr. 2041, ln. 24-Tr. 2042, lns. 1-4; Hearing Exhibit 712.

[105] Tr. 2053, lns. 4-14.

[106] Tr. 2053, lns. 16-18.

[107] Tr. 2053, lns. 16-21.

[108] Tr. 1197, lns. 3-4.

[109] Tr. 2051, lns. 22-24-Tr. 2052, lns. 1-2.

[110] Tr. 2052, lns. 13-14.

[111] Tr. 2052, lns. 13-17.

ESCOs bill customers directly for both commodity and utility delivery services through a Single Retailer Model arrangement.[112] For the vast majority of ESCOs that bill through CUBs, the ESCO must conform its charges to the utilities' format, which currently provides limited space for the supplier to display ESCO charges.[113] The limited space does not permit ESCOs to furnish additional information regarding value-added services or commodity pricing they are offering.[114]

In other states, ESCOs and utilities bill through a supplier consolidated bill ("SCB"). Under SCBs, the supplier of the commodity – ESCO or Utility – creates and delivers the invoice to the customer.[115] Under this construct, supplier bills allocate sufficient space for the provision of more fullsome information regarding the array of value-added services and commodity costs, with the pass-through utility distribution costs also included.[116]

5. Current Status of the UBP

Interactions between ESCOs and customers are governed primarily by the UBP, which the Commission first adopted in Case 98-M-1343, *In the Matter of Retail Access Business Rules, Order Adopting Uniform Business Practices and Requiring Tariff Amendments* (issued January 22, 1999).[117]

The Commission intended the UBP to set consistent operating practices for retail competition and to afford retail access customers appropriate protections in their dealings with

[112] Tr. 2052, lns. 19-23.

[113] Tr. 1137, lns. 10-13.

[114] Tr. 1199, lns. 14-15.

[115] Tr. 1198, lns. 16-18.

[116] Tr. 1198, lns. 17-20-Tr. 1199, ln. 1.

[117] Tr. 2049, lns. 16-22; *see also* Tr. 1528, lns. 7-9 citing Case 98-M-1343, *In the Matter of Retail Access Business Rules*, Opinion and Order Concerning Uniform Business Practices pp. 2-3 (issued February 16, 1999); UBP at 6-15, 61-64 (Feb. 2016).

ESCOs.[118] The UBP are incorporated in the utilities' tariffs.[119] The Commission has periodically amended the UBP.[120]

Before the hearing commenced, the UBP were most recently modified in February 2016. Several parties sought judicial review of the February Order. On July 22, 2016, the Supreme Court issued a decision invalidating the February Order. The Supreme Court held that (i) the PSC had "simply denied [Appellants'] their procedural due process rights," including because the PSC failed to provide Appellants an opportunity "to be heard in a meaningful manner and at a meaningful time"; (ii) the Reset Order threatened "a major restructuring of the retail energy market – or even its collapse," and concluded that the "Reset Order [wa]s arbitrary and irrational" and therefore invalid because, among other reasons: it bore no rational relationship to its stated goals and the issues the Reset Order sought to address could be addressed through appropriate consumer protection changes, rather than by overhauling the market. The present evidentiary hearings were noticed after the Supreme Court's decision invalidating the Resetting Order.

However, on January 19, 2018, after the conclusion of the evidentiary hearings in these proceedings, the Commission issued revisions to the UBP. Those revisions were the culmination of a process beginning on March 8, 2017, when the Commission Secretary issued a Notice Seeking Comments on Revisions to the Uniform Business Practices, requesting comments on proposed changes to the UBP that: (a) recognized the requirements of a new law preventing an ESCO from charging a contract termination or early cancellation fee in the event of a customer's

[118] Tr. 2050, lns. 1-5.

[119] Tr. 2050, lns. 5-7.

[120] Tr. 1528, lns. 10-11 citing Case 98-M-1343 et al., *supra,* Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing (issued October 27, 2008).

death ("ETF Revisions"); (b) included amendments requested by Green Mountain in a petition filed October 7, 2016, to eliminate the appearance of an ESCO representative's full name on the identification badge ("Identification Revisions"); and (c) purportedly addressed "other related matters and housekeeping items." [121]

Interested parties were invited to submit comments on the proposed UBP modifications by May 8, 2017.[122] Several of issues under deliberation in the Evidentiary Hearing overlap with the scope of the proposed changes including "whether the Uniform Business Practices (UBP) applicable to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs are deterred."[123]

On January 19, 2018, the Commission issued the Order Adopting Revised Uniform Business Practices. The January 19, 2018 Order sets forth the following changes to the UBP: (1) incorporate a new law preventing ESCOs from charging a contract termination or early cancellation fee in the event of a customer's death; (2) eliminating the requirement for an ESCO representative to display their full name on the UBP-required identification badge, such that only a first name and unique identification number need be displayed; (3) defines the terms "ESCO Agent," and modifies the definitions of "door-to-door sales," "Marketing," and "Termination Fee;" (4) adds the ability to terminate an ESCO's eligibility to operate for "failure to comply with Department requests for any and all information related to an ESCOs (sic) marketing and sale of energy and/or value added services and products in New York State;" (5) adds provisions

[121] Case 98-M-1343, *Notice Seeking Comments on Revisions to the Uniform Business Practices* (issued March 8, 2017) (the "Notice"). On March 22, 2017, Notices of Proposed Rulemaking were published in the State Register.

[122] Notice, at 2.

[123] December 2016 Notice, at 6.

to address compliance with the Clean Energy Standard, specifically referencing Renewable Energy Credits and Zero Emissions Credits; (6) adds certain provisions to except customers enrolling in Community Choice Aggregation programs from the UBP; (7) allows customer's signature to be provided on an email version of a sales agreement; (8) adds requirement of third party verification of a residential or small non-residential customer's enrollment when the marketing is conducted pursuant to a scheduled appointment, direct mail or electronically; (9) requires that a sales agreement be written in a font size 10 or larger; (10) removes language relating to random assignments of customers to ESCOs by the distribution utility; (11) clarifies the scope of an ESCO's ability to act as a customer's agent; (12) allows an ESCO to assign its customers' sales agreements to another ESCO provided the ESCO gives proper notice to its customers prior to the assignments; (13) includes an exception to the definition of "slamming" for customer enrollment in a Community Choice Aggregation program; (14) modifies record keeping requirements for documentation of a customer's authorization to change providers; (15) includes requirement for an ESCO to provide a budget or levelized billing option upon request; and (16) provides for third-party verification to terminate if the customer asks any questions.[124]

The Commission subsequently granted an additional forty-five (45) day extension (until April 6, 2018) for ESCOs to comply with the Order Adopting Revised Uniform Business Practices.[125] On March 28, 2018, the Commission further delayed implementation of the January

[124] Case 98-M-1343 et al., *supra*, Order Adopting Revised Uniform Business Practices (issued January 19, 2018).

[125] Case 98-M-1343, *Notice Extending Deadlines*, (issued February 16, 2018).

19, 2018 Order until July 26, 2018, pending review of requests for rehearing on several portions of the proposed UBP, including matters related to the Evidentiary Hearing.[126]

6. Monitoring and Enforcement

The Department of Public Service maintains a customer complaint process.[127] The process consists of three individual and progressive steps.[128] The Department directs customer concerns regarding service to the Department's Call Center.[129] If the Department decides that the details of the concern being expressed by the customer fall within the Commission's jurisdiction, a case is opened.[130] The case is then forwarded to the provider (the utility or ESCO that is the subject of the expressed concern) for its review and response.[131] If the customer is not satisfied with the provider's response, the customer may contact the Department again, and, Staff will escalate the case the status of a complaint under the Department's Standard Resolution System ("SRS") if Staff determines that such escalation is appropriate.[132] All such "escalated complaints" require a written response from the provider detailing its response to the concerns including what resolution will be offered, if any.[133] All escalated complaints are assigned to a Staff analyst who reviews the case details, including the provider's response, and issues a formal determination.[134] If either the customer or the provider disagrees with the determination, then

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[126] Case 98-M-1343 Notice Concerning Petitions for Rehearing, Reconsideration, and/or Clarification(issued March 28, 2018).

[127] Tr. 2098, lns. 21-22.

[128] Tr. 2098, lns. 21-22.

[129] Tr. 2098, lns. 22-24-Tr. 2099, lns. 1-3.

[130] Tr. 2099, lns. 2-8.

[131] Tr. 2099, lns. 8-10.

[132] Tr. 2099, lns. 10-16.

[133] Tr. 2099, lns. 17-20.

[134] Tr. 2099, lns. 21-23.

the party can request an Informal Hearing.[135] An Informal Hearing Officer is assigned to the complaint, and will attempt to negotiate a settlement, or will issue a determination, which is appealable by either party.[136] The Commission hears and decides such appeals.[137]

The Department tracks and reports "Consumer Complaint Statistics."[138] In the eight years between 2009 and 2016, approximately 20,500 initial complaints were lodged with the Commission against ESCOs. This equates to roughly 2,500 initial complaints per year and a complaint rate of roughly 0.1 percent (i.e., one initial complaint per 1,000 ESCO customers).[139] Complaints escalated in 2014 and 2015, likely due to increased market volatility caused by the Polar Vortex and other unusual weather events during that period. In fact, roughly 9,700 of the 20,500 initial complaints from the foregoing eight-year period were filed in 2014 and 2015 alone.[140] By 2016, consumer initial complaints to the Commission regarding ESCOs had subsided to 2,995[141] - representing a 40 percent decline between 2015 (5,044) and 2016 (2,995).[142] Initial complaints filed against ESCOs are on pace for further improvement in 2017.[143]

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[135] Tr. 2099, ln. 24-Tr. 2100, lns. 1-2.

[136] Tr. 2100, lns. 4-12.

[137] Tr. 2100, lns. 12-22.

[138] Tr. 2101, lns. 1-6.

[139] Tr. 1118, lns. 2-12.

[140] *Id.*

[141] Tr. 1122, lns. 11-12.

[142] Tr. 1245, lns. 2-5.

[143] Tr. 1215, lns. 16-20.

In 2016, New York customers had filed 12,890 initial complaints against utilities[144] – or more than four times the number of initial complaints (2,995) filed against ESCOs during that same period.[145] When these numbers are adjusted to account for the number of residential customers serviced by the different providers, the complaint rates are nearly identical, with utilities having slightly more complaints *per customer* (0.247 percent for ESCOs as compared with 0.274 percent for utilities).[146] Additionally, accounting for all customer accounts, ESCO complaint rates outperform default utility performance (0.197 percent for ESCOs, and 0.242 percent for utilities).[147]

The Department also has the enforcement power to issue Notices of Apparent Failure ("NOAFs").[148] NOAFs are issued after Staff observes a trend in repeated customer complaints related to UBP violations.[149] Since January 2013, the Department of Public Service, Office of Consumer Service has issued 79 NOAFs to ESCOs – 12 in 2013, 2 in 2014, 45 in 2015, 12 in 2016, and 8 as of December 2017.[150]

A "large percentage of complaints" the Department receives "from mass market customers concern variable product pricing performance such that bills were 'as advertised' for the first few months during which the ESCO offered teaser rates, but after that low teaser rate expires, the ESCO substantially increases the price without further notice or explanation as to

[144] Tr. 1122, lns. 8-9.

[145] Tr. 1122, lns. 11-12.

[146] Tr. 1124, Table FL-2.

[147] Tr. 1124, Table FL-3.

[148] Tr. 2103, lns. 6-12.

[149] Tr. 2103, lns. 15-21.

[150] Tr. 2103, lns. 10-14.

how the new rate is determined."[151] In such cases, the Department has found that "initial variable rate pricing may be identified in the contract but it is more likely that the contract merely states that the rate will be variable or 'market based rates' without any actual link to any specific energy or gas related indices or explanation on how the rate is calculated."[152]

The NOAF process often results in the subject ESCO instituting improved training or procedural processes to address and resolve the immediate UBP violation concerns.[153] In those instances when NOAFs do not result in correction of UBP violations, the Commission issues an Order to Show Cause ("OTSC"), requiring the ESCO in question to explain why it should be allowed to continue to operate in New York or otherwise not be subject to penalties or sanctions as provided for in the UBP.[154] In 2013, the Commission issued three OTSCs against an ESCO; none in 2014; six in 2015; six issued in 2016; and three in 2017 (through December).[155]

The Department also has, under Sections 25 and 25a of the Public Service Law, the power to fine an ESCO for certain malfeasance.[156] To date, the Department has never applied this enforcement mechanism to ESCOs.[157]

The Office of the Attorney General for the State of New York (the "AG") has general jurisdiction over deceptive and fraudulent business practices as well as specific jurisdiction over

[151] Tr. 2106, lns. 16-24-Tr. 2107, lns. 1-7.

[152] *Id.*

[153] Tr. 2108, lns. 10-13.

[154] Tr. 2108, lns. 20-24-Tr. 2109, lns. 1-4.

[155] Tr. 2109, lns. 5-10.

[156] Tr. 1553, lns. 7-14.

[157] *Id.*

consumer statutes relating to ESCOs,[158] and it has applied this jurisdiction to ESCOs.[159] In total, the AG has undertaken only one lawsuit and six enforcement actions against ESCOs pursuant to that oversight jurisdiction since 2000 (one in 2000, 2001, 2003, 2008, 2011, 2015, and 2017).[160]

III. ANALYSIS

A. REGULATORY REGIME

1. The Commission's View in Opening the Competitive Markets

The Commission has expressed its "commitment to encouraging competition in place of regulated monopoly."[161] The PSC has touted the value of a competitive market and emphasized, in particular, the value that market-based (rather than government-fixed) pricing presents:

> An effective market requires many buyers and sellers…. **Consumers should be able to choose not only their suppliers, but also the terms of their service through various contract options, including the design of their rates and the length of their contracts for service**.[162]

The record developed in these proceedings confirms that a competitive market is valuable in and of itself, independent from any single individual objective such a market may bring consumers, like expanded product offerings and expanded rate options. Competition and choice themselves constitute independent values to which the Commission repeatedly has demonstrated a strong commitment, that jurisdictions across the United States have emphasized

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[158] *See e.g.*, Tr. 1664-1666.

[159] Tr. 1553, lns. 16-20.

[160] Tr. 1554, lns. 1-7.

[161] Case 94-E-0952, *Opinion and Order Regarding Proposed Principles to Guide the Transition to Competition*, Opinion 94-27, Dec. 22, 1994, at 5 (goo.gl/3GrXBM).

[162] *Id.* at 26.

in deregulating their respective retail energy markets, and that apply more broadly across industries beyond retail energy. Reversing course and returning New York, even in part, to an antiquated state of monopoly would constitute an extraordinary step backwards that cannot be squared with these facts or this contextual backdrop.

To be sure, the Commission in various contexts has identified multiple individual objectives it believed to be associated with retail choice and competition, including better product choices and better pricing options for consumers. And the evidence developed in these proceedings confirms that those contemplated objectives largely have come to fruition.[163] But focusing on those accomplishments misses the point: The Commission did not restrict its vision to a single objective, and never even stated that individual ESCO products themselves would correspond to a particular price point. Instead, the Commission recognized the obvious: Competition creates a market of options and choices, and fundamental principles of markets and competition dictate that New Yorkers benefit from shopping in such an improved market. The ability to shop – whether an individual consumer is looking for the best price, the greatest clean energy footprint, the greatest fixed price certainty, or the best customer service – can only be accomplished in a marketplace that includes retail choice.

Indeed, the Commission's commitment to the value of avoiding a monopoly market and ensuring robust consumer choice is even more relevant and pronounced in the context of some of the core initiatives the Commission has pursued in recent years, including the Reforming Energy Vision (REV) – something that ESCOs uniquely advance by offering a variety of renewable product options.[164]

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[163] *See, e.g.*, Part III.B, below.

[164] *See, e.g.*, Tr. 2313:7-20; 2315:10-2316:15.

Even with respect to pricing, moreover, Staff testified that they "have not done such a study and [] have not seen any credible studies" to address how the introduction of retail choice in the form of competitive markets has resulted in lower prices, including by driving lower utility pricing in a non-monopoly market.[165] Staff acknowledged that "[t]he Commission hoped that you [ESCOs] would be helpful in driving down prices in New York. That that has come to fruition, I have not done any studies myself."[166] Staff further acknowledged that prices have come down considerably over the last decade, speculating that such data might be attributable to other causes, but conceding that it did not conduct any conclusive analysis on the issue.[167] Competition and consumers' choices also provide price signals that reflect marginal costs of energy supply in markets with future price uncertainty. Competition is about achieving economic efficiency, which is not the same thing as "lower prices."[168]

Against this backdrop, it is critical to note that Staff conceded that it does not "know that a single ESCO would continue to operate in New York" if any form of guaranteed savings requirements were to be imposed by the Commission.[169] Staff indicated its hope that the handful of ESCOS who have offered to provide guaranteed savings products to low-income consumers in New York would offer such products even if required to do so for the rest of the market, but acknowledged that there is no basis for assuming that any ESCO would continue

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[165] Tr. 2289:10-18.

[166] Tr. 2290:11-16.

[167] Tr. 2289:3-18.

[168] Tr. 721.

[169] Tr. 2257:24-2258:12, Tr. 2259:24-2260:7; *see also* Tr. 2250:2-2255:9. In seeking to defend their unfounded speculation that ESCOs would remain in the market even if the Commission were to impose Staff noted that Ambit Energy had offered a guaranteed product in the past, but that they were unaware whether Ambit would continue to operate in New York or offer that product. As it turns out, Ambit has since announced that it is exiting the New York market.

operating in New York if price controls like guaranteed savings were imposed, and that there is a big difference between offering such products to a small percentage of an ESCO's customer base rather than its entire base.[170] Remarkably, Staff further testified that it did not even undertake to determine whether its recommendations would effectively result in returning New York to the antiquated monopoly state where "consumers in New York will not have any option whatsoever with respect to their retail energy purchases."[171] Confronted with that obvious concern and the many benefits of competition that would be lost if Staff were to persist in recommending price controls that drive competitors out of the market, Staff was forced to concede that, for purposes of these proceedings, they were "redefining" competition to mean only guaranteed savings over utility prices: "So our definition of competitive is to beat the incumbent utility. That is competitive."[172] Staff later admitted that there are obvious differences between competition and a guarantee that a competitor will win that competition, every time, and that there is no basis for defining competition as a guarantee to beat the utilities.[173]

2. Application of Public Service Law to ESCOs

a. Scope of Commission Jurisdiction Under the PSL

Historical Context

With respect to the operation of the Public Service Law (the "PSL"), the opening of the markets sparked various proposals. Public utilities asserted that the PSL's provisions governing "electric corporations" and "gas corporations" (as defined terms in the PSL) applied

[170] Tr. 2248:5-2249:18.

[171] *Id.*

[172] Tr. 2242:13-23.

[173] *Id.*

to ESCOs, thereby requiring the Commission to regulate ESCOs consistent with the PSL (and consistent with how the public utilities had been regulated). The utilities complained, for instance, that the Home Energy Fairness Practices Act ("HEFPA"), codified in Article 2 of the PSL, needed to be applied to ESCOs.[174] (That Article sets forth discrete consumer-protection provisions, such as complaint handling procedures, meter reading mechanics, and billing transparency. It does not include any ratemaking provisions.)

At that time, like the PSL's other relevant articles, Article 2 applied to "electric corporations" and "gas corporations" as defined in PSL Article 1.[175] In November 1997, public utilities and their representatives argued, accordingly, that the Commission had jurisdiction over ESCOs and an obligation to regulate them because ESCOs were "'electric corporations" under the PSL and therefore subject to HEFPA under Article 2.[176] The Commission emphatically rejected that argument, and confirmed multiple times that ESCOs were not "electric corporations" as required for HEFPA or the PSL generally to apply to them.[177] The Commission reasoned that the PSL was "enacted to protect consumers against the abuse of monopoly power," which public utilities have and ESCOs do not.[178] The PSC made clear that

[174] *See* Case 94-E-0952, *Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services*, Opinion 97-5, May 19, 1997, at 29 (goo.gl/3GrXBM).

[175] *See* Former PSL Art. 2 § 30 ("This article shall apply to the provision of residential service by gas, electric and steam corporations and municipalities"); PSL Art. 1 § 2(11), (13) (defining "electric corporation" and "gas corporation" to include only entities that controlled the gas and electric physical infrastructure).

[176] Case 94-E-0952, *Opinion and Order Regarding Proposed Principles to Guide the Transition to Competition*, Opinion 94-27, Dec. 22, 1994, at 31-33.

[177] *Id.*; Case 94-E-0952, et al. *In the Matter of Competitive Opportunities Regarding Electric Service.*, Opinion 96-12, at 5-7.

[178] *Id.*

interpreting Article 2 of the PSL to apply to ESCOs would be inconsistent with the Legislature's intent.[179]

Again confirming the Commission's position that the PSL did not give the PSC authority over ESCOs, since ESCOs were neither "electric corporation[s]" or "gas corporation[s]" as defined therein, the Legislature decided to enact an amendment in 2002. The Legislature wished to extend HEFPA's consumer protections to ESCOs in addition to utilities, and it accordingly voted to amend Article 2 to give it a unique expanded jurisdictional scope – in contrast to Article 3 that continued to apply only to public utilities. Specifically, the Legislature added Section 53 to Article 2 of the PSL, which section changed the definitions of "electric corporation" and "gas corporation" to include ESCOs "for purposes of this Article" 2 only. See PSL Art. 2 § 53; N.Y. Bill Jacket, 2002 S.B. 6778, Ch. 686. For the first time, accordingly, the Legislature gave the PSC limited jurisdiction over ESCOs – and limited that jurisdiction to Article 2 powers. That Article does not include any provision authorizing the PSC to set rates – which power is covered by Article 4 – and which statute the Legislature specifically chose not to amend to include ESCOs. See PSL Art. 2 §§ 30-53. Since amending Article 2 to provide the PSC with limited jurisdiction over ESCOs, the Legislature has not since expanded the jurisdictional scope of any other article of the PSL and, accordingly, ESCOs have been subject only to Article 2's unique jurisdictional scope.

After the Legislature amended Article 2 and expressly stated that the amendment was limited to that article alone, the Commission's authority under the rest of the PSL (as relevant here) remained restricted to "electric corporations" and "gas corporations" as defined under

[179] *Id.*

Article 1 (i.e., public utilities).[180] This included Article 4—which provides the PSC ratemaking authority over public utilities—as the PSC confirmed multiple times over several years.

For example, in 1997, the Public Utility Law Project argued (on behalf of utilities) that ESCOs were "electric corporations" under Article 4 and therefore subject to the PSC's ratemaking authority.[181] The PSC flatly rejected that argument, correctly stating that "**PULP's assertion that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect**."[182] Nearly a decade later, and after the Legislature amended Article 2 to apply to ESCOs, the PSC maintained the same position, explaining that ESCOs "are exempt from Article 4 regulation."[183]

Accordingly, ESCOs historically have never been required to submit proposed or current rates to the PSC for approval. (A 57, R. 202.) Nor has the PSC previously undertaken to set rates that ESCOs could charge or to prescribe a maximum rate that ESCOs could charge. (Id.) ESCOs are private companies, whose rates are subject to free market competition and whose ability to attract customers depends entirely on the customers' interest in voluntarily electing to purchase energy from a given ESCO.

Article 4 Does Not Authorize the PSC To Set ESCOs' Rates

Article 4 § 66(5) of the PSL sets out the PSC's limited ratemaking authority:

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[180] As discussed above, both the Legislature and the PSC already had recognized that ESCOs did not meet either of these Article 1 definitions.

[181] Case 94-E-0952, *Opinion and Order Regarding Proposed Principles to Guide the Transition to Competition,* Opinion No. 94-27, at 34-35.

[182] *Id.; see also* Case 94-E-0952, et al. *In the Matter of Competitive Opportunities Regarding Electric Service.*, Opinion 96-12, at 16, n.1. (Commission stating that "ESCOs are not Article 4 corporations").

[183] Case 06-M-0647, et al. *Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, November 8, 2006 at 10.

> The commission shall: Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, charges or classifications or the acts or regulations of any such person, corporation or municipality are unjust, unreasonably, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe…. the just and reasonable rates, charges and classifications thereafter to be in force for the service to be furnished.

PSL Art. 4 § 66(5) (emphasis added). The same section (at subsection 1) provides that the corporations "under [the PSC's] supervision" (and thus those that are subject to the PSC's ratemaking authority) are only those corporations that have authority "to lay down, erect or maintain wires, pipes conduits, ducts or other fixtures in, over or under the streets, highways and public place of any municipality for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors." PSL § 66(1). As discussed above, only public utilities are corporations that have that authority; ESCOs are not, and are therefore not subject to the PSC's ratemaking authority under § 66(5), as the PSC repeatedly has recognized.[184] The same limitations apply to Article 4 § 65(1) ("[e]very gas corporation, every electric corporation and every municipality shall furnish and provide such service, instrumentalities, and facilities as shall be safe and adequate and in all respects just and reasonable").

In Matter of National Energy Marketers Assn. v New York State Public Service

[184] See, e.g., Case No. 94-E-0952, Opinion No. 97-17, Nov. 18, 1997, at 34-35 (PULP's assertion that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect") (goo.gl/YsGHsu); Case 06-M-0647, *Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, Nov. 8, 2006 (holding that ESCOs "are exempt from PSL Article 4 regulation") (goo.gl/QTaFbt).

Commission. Slip Op. 05901 (3d Dep't July 27, 2017) and Matter of Retail Energy Supply v. New York State Public Service Commission, Slip Op. 05908 (3d Dep't July 27, 2017) (together the "NEM/RESA Decision"), the Appellate Division considered the question of the scope of the Commission's jurisdiction over ESCOs and confirmed that Article 4 § 66(5) of the PSL does not apply to ESCOs:

> We reject the PSC's contention that ESCOs constitute "gas corporations" subject to rate setting under Public Service Law article 4 (see Public Service Law § 55 [5]). By the same analysis, ESCOs are not "electric corporations" under article 4 (see Public Service Law § 2 [12], [13]).

The precise implications of that conclusion are unclear, including because of other conclusions in the same opinion, as discussed below. To the extent the Commission is inclined to impose pricing restrictions on ESCOs rather than address the market through other reforms consistent with the record developed during these proceedings, the Commission would need to consider the scope of its jurisdiction under the NEM/RESA Decision and other precedent, and depending on the conclusions the Commission reached, the courts may need to revisit the issue.

Staff testified that "it is the Commission's responsibility to ensure that all customers have the opportunity to purchase and receive electric, full commodity service, at just and reasonable rates" citing the language of Article 4 of the PSL. [185] Staff also conceded that, under the status quo – without ESCO price regulation – all New Yorkers already have such an opportunity.[186]

[185] Tr. 2291:23-2296:12.

[186] *Id.*

Article 1

In the NEM/RESA Decision, the Appellate Division also concluded that although Article 4 does not extend to ESCOs, Article 1 does impart to the Commission some plenary authority to impose certain restrictions on ESCO pricing as a function of the Commission's general jurisdictional statute.

> Pursuant to Public Service Law § 5, '[t]he jurisdiction, supervision, powers and duties of the [PSC] shall extend . . . *[t]o the* manufacture, conveying, transportation, sale or distribution *of gas . . . and electricity* . . . to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same.' The emphasized language speaks to general authority over the sale of gas and electricity, followed by the specific extension of the PSC's jurisdiction over gas and electric plants.

(Decision, at *4 (emphasis in original) (citing Public Service Law § 5(1)(b) of Article 1.) As noted above, the Third Department did not address how its two conclusions – that the Commission does not have Article 4 jurisdiction over ESCOs but does have Article 1 jurisdiction over ESCOs and pricing interact with each other. This week, the Court of Appeals granted NEM's and RESA's motions for leave to appeal the Appellate Division's decision to the Court of Appeals.[187] That appeal will thus resolve the question of whether the Commission has any jurisdiction to regulate ESCO prices.

b. Should ESCOs Be Required To File Tariffs?

As detailed above, the Commission's ratemaking jurisdiction over utilities, pursuant to which the Commission requires utilities to file tariffs, does not extend to ESCOs. Furthermore, to the extent the Commission decided to impose new transparency requirements on ESCOs,

[187] *Matter of National Energy Marketers v. PSC*.

Staff testified that "the general population would likely not find the utility tariffs as transparent."[188]

3. Enforcement Powers Over ESCOs

Both the Commission and NYAG have legislatively approved enforcement powers over ESCOs and a well-developed, specifically tailored arsenal of tools to take meaningful action against ESCO bad-actors, if and when that may be necessary.[189] The record developed during these proceedings makes clear that when appropriate enforcement is taken against bad-actors, it is successful, yet to date both the Commission and NYAG have chosen not to meaningfully exercise their enforcement powers. The NYAG recognizes that it "is both obligated and empowered to protect the interests of the people and business of New York," but instead of using its broad enforcement powers to address bad actors it chooses a baby-with-the-bath-water approach in recommending an immediate "prohibition on ESCOs' service to mass market customers."[190]

The UBP vests the Commission with broad regulatory and enforcement powers over ESCOs. Section 2.D.6.b. of the UBP allows the Commission to suspend or revoke an ESCO's eligibility to operate in New York.[191] It also give the Commission authority to review telephonic marketing presentations made by ESCOs, require reimbursements to customers who did not receive savings promised by ESCOs and release of customers from sales agreements

[188] Tr. 2227:20-2228:12.

[189] Tr. 1651 ln. 3 through ln. 13.

[190] Tr. 1522 ln. 12 through ln. 14; TR. 1540 ln. 3 through ln. 5.

[191] UBP Section 2.D.6.b.1-2 and 6. *See also:* *http://www3.dps.ny.gov/W/PSCWeb.nsf/All/52770E53410005A185257687006F39D2?OpenDocument* ("The PSC has the authority to revoke an ESCO's eligibility to do business if an excessive number of legitimate complaints against the ESCO are received.").

without imposition of early termination fees.[192] Finally, that same section of the UBP vests the Commission with the authority to impose "[a]ny other measures that the Commission may deem appropriate."[193] In addition to the enforcement powers under the UBP, the Commission also has investigatory and subpoena powers under Public Service Law § 19, which provides that: "The commission shall have power to issue subpoenas and subpoena duces tecum."[194]

Despite the Commission's board enforcement powers there is no evidence in the Record that the Commission has ever meaningfully exercised its enforcement powers or performed any analysis of how increased enforcement could mitigate the purported concerns raised by the Commission. The Commission's failure to effectively use its enforcement powers is confirmed by the NYAG, who testified that the Commission "could take enforcement action" but the Commission "has not exercised their enforcement authority as it relates to ESCOs."[195] Whatever enforcement the Commission may do, is clearly not meaningful if the NYAG believes it has not exercised its enforcement authority in connection with ESCOs.

The NYAG has even broader enforcement powers than the Commission. Indeed, the Record is clear that the NYAG has enforcement authority against ESCOs for all of the conduct complained about in these proceedings.[196] The NYAG is empowered by "Executive Law 63-12 which authorizes the New York Attorney General to investigate and take action against any entity engaged in repeated or persistent fraudulent or illegal conduct," which is "broadly

[192] UBP Section 2.D.6.b.3-5.

[193] UBP Section 2.D.6.b.7.

[194] PSL § 19(1).

[195] Tr. 1651:7-10; Tr. 1652:14-18.

[196] Tr. 1673:18-1674:8; *see also* Tr. 1671:21-1672:7.

defined to include any federal, state or local law."[197] The NYAG is also provided enforcement powers under GBL §§ 349 and 350 "which authorizes the Attorney General to investigate and take action against any business operating in New York that engages in deceptive business practices or false advertising."[198]

In addition to these broad enforcement powers, the NYAG also has specifically tailored enforcement powers against ESCOs under GBL §349-d.[199] That section of the GBL vests the NYAG with the authority to bring civil actions against ESCOs and marketers and to impose civil penalties, costs and attorney's fees.[200] Separately, the NYAG also has enforcement powers under GBL §399-pp the Telemarketing Consumer Fraud and Abuse Prevention Act as well as PPL § 428, which applies to door-to-door sales.[201] These enforcement powers give the NYAG investigatory and subpoena authority as well as the right to seek significant penalties.[202]

Despite these broad enforcement powers, the NYAG has over the last two decades commences only one civil action against an ESCO, back in 2002.[203] The NYAG also entered into six additional settlements with ESCOs for a total of seven enforcement actions over more than twenty years.[204] The NYAG has not commenced any actions (litigation or settlements) with the actual marketers of energy services.[205] The Record indicates that when the NYAG

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[197] Tr. 1665:19-24; *see also* Hearing Exhibit 610.

[198] Tr. 1666:2-6; see also Hearing Exhibit 607.

[199] Tr. 1684:19-1685:4.

[200] Hearing Exhibit 608.

[201] Tr. 1693:12-1694:17; see also Hearing Exhibit 609.

[202] Tr. 1668:23-1669:11; Tr. 1698:5-11; Tr. 1707:5-25.

[203] Tr. 1681:17-21.

[204] Tr. 1682:10-13.

[205] Tr. 1686:3-10.

decides to take an action it is usually able to obtain a settlement with injunctive relief and restitution without the need to file suit and that such actions are very effective at reducing customer complaints.[206]

Logic dictates that the Commission and NYAG should first enforce the laws and regulations currently in place before it seeks to prohibit ESCOs from operating in New York. Just as a doctor should not amputate a limb when a bit of medicine can cure the patient, the Commission and NYAG should, at a minimum, first enforce the numerous laws currently in place. In this regard, it is telling that that the NYAG believes "It's not government's job to make sure that business – all businesses operate properly."[207] Respectfully, that is just wrong. The Commission and NYAG have an obligation to enforce the laws in place and "protect the interests of the people and business of New York." If the Commission and NYAG need additional funding or resources they should seek that from the legislature instead of seeking to prohibit ESCOs from operating in New York.[208]

B. USEFULNESS & ACCURACY OF COMPARING ESCO AND UTILITY RATES

1. Utility Bill Comparison Methodologies

At the core of these proceedings was a claim that that ESCOs "overcharge" their customers. The proceedings analyzed that claim in great detail, and the record that emerged confirmed that the claim is based on a cocktail of misleading data, inaccurate comparisons, and incorrect or severely limited data.

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[206] Tr. 1683:19-1684:13; Tr. 1792:5-22.

[207] Tr. 1702:7-9.

[208] Tr. 1522:12-14.

First, as a threshold matter, Staff conceded that there is no evidence that ESCOs "overcharge" customers in the conventional sense of that term – and that its claims regarding ESCO "overcharges" were not intended to be understood in the traditional sense at all. Instead, the "overcharge" claim means only that the amount paid by an ESCO customer – for regular, premier, or bundled products is a higher number than the amount the local utility lists as its supply charge for a plain vanilla variable-rate product:

> The term overcharging is – it's just a relative – because that's what we were asked to do. We were asked to evaluate the – the relative price performance of the SCOs versus the utilities [without accounting for product differences]. So I believe in the testimony the first use of overcharging I – I think it might have been in quotes was that they're charging more than the utility. . . . just because you're 'overcharging' more than a utility does not mean you're doing anything nefarious.[209]

Bruce Alch in fact noted that Staff's use of the term "overcharge" in referring to the data concerning ESCO pricing was a specifically defined term for purposes of these proceedings, and that given that definition, an overcharge did not even imply that there was anything negative about the ESCO price: "that definition of overcharge is charging more than the default utility [without accounting for product differences]. If you want to infer that is a negative that's your prerogative."[210]

Stated differently, Staff confirmed that the record is devoid of any real evidence that ESCOs "overcharge" as that term is traditionally understood – that is, that they charge more than they should charge given the product they are providing. In fact, Staff testified that the goal of these proceedings is to "weed out the bad actors," which they define as "those that price

[209] Tr. 2268:12-2269:8.

[210] Tr. 2278:8-14.

gouge the customers," and thus to "provide the customers with smarter choices."[211] There is no evidence that ESCOs (let alone most or all of them) engage in any form of price gouging.[212] Staff further testified that they have not seen proof that any ESCO is a "bad actor" that charges more than it should for the product that it offers, and that Staff did not even collect the data it would need to assess whether any ESCO was engaging in the negative practice of "significant overcharges."[213] These are critical facts that cross-examination revealed are not even in dispute.

Critically, Staff conceded that using the definition of "overcharge" that Staff used in these proceedings, a luxury automobile producer like Mercedes Benz would be considered to be "overcharging" every one of its customers relative to a less expensive company like Toyota – because the overcharge analysis does not permit Staff to account for the additional value that a luxury car like Mercedes provides its consumers.[214] Again excusing the obvious inadequacy of such a comparison, Mr. Alch testified that "[t]hat's the price difference that we were asked to identify" and, to be clear, "there is no connotation that the overcharge, as we labeled it, an overcharge was – that there's anything illegal with it."[215] These critical concessions reframe the core allegations that gave rise to these proceedings in the first place.

Second, there is no meaningful mechanism for comparing bill prices using the data that Staff used in these proceedings because ESCOs sell different products than the local utility.

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[211] Tr. 2239:6-25.

[212] In fact, Staff witnesses confirmed that laws against price gouging currently restrict ESCOs (like all other businesses operating in New York), and that any ESCO engages in price gouging would be doing so in violation of the General Business Law.

[213] Tr. 2269:10-2270:6; Tr. 2279:16-2280:5.

[214] Tr. 2513:11-2514:18.

[215] Tr. 2514:9-18.

ESCO products and services include a wide variety of value propositions beyond the plain vanilla commodity that the local utility product provides – from renewable energy to improved customer service to bundled offerings that include energy conservation services and tools. Staff conceded that each consumer is free to determine for himself the value that each of these additional benefits provides, and that consumers are entitled to, and do, pay for these benefits. Staff further testified that apart from potential financial savings in the form of better prices, some customers may choose to purchase ESCO products that cost more than the local utility product because that consumer prefers the ESCO product – whether the product is renewable, affords protection against price volatility for a set period of time, is bundled with energy conservation services, or managed by a better customer support and service staff.[216] Staff also testified that it did not undertake any independent analysis in these proceedings or otherwise to discern what customers are paying for or what value they have ascribed to individual ESCO products: "I don't know what is in the mind of the consumers,"[217] and "I frankly have no idea why customers switched from the utility to an ESCO. . . . I don't know why customers switch."[218]

With respect to ESCO products that facilitate consumers' energy conservation efforts, for example, Staff acknowledged that "[t]he analysis we did does not reflect the consumption savings" that consumers realize in the form of both reduced supply and delivery costs where

[216] Tr. 2207:17-2208:11 (customers might prefer to pay more for green energy products); Tr. 2212:15-22 (customer might prefer to pay for fixed-rate product); Tr. 2213: 13-20 (customers might have switched to ESCOs because the customer wanted to take advantage of energy consumption, conservation services; Tr. 2213:10-12 (customers might prefer to pay for improved customer service that an ESCO offers).

[217] Tr. 2213:5-12.

[218] Tr. 2212:4-14.

the ESCO product they purchased was bundled with energy conservation services, like smart thermostats, LED bulbs, or energy consumption consulting services.[219] Staff acknowledged repeatedly that it was likely that consumers who chose to purchase such ESCO products experienced reduced consumption,[220] but that "[t]here was no way for us [DPS Staff] to account for that" in "the tally of overcharges" because Staff did not have the proper data to preform that analysis.[221] Staff also conceded that had they obtained the data they needed to show the volume of consumption reduction such consumers experienced as a result of the ESCO products, then Staff would have adjusted their analysis accordingly to make it more accurate.[222] At bottom, Staff expected that there was an "energy consumption adjustment" that needed to be made but was not made in Staff's data analysis and conclusions.[223]

Staff thus conceded, as they had to, that the data on which they relied "that data is not a complete apples-to-apples comparison."[224] Staff conceded that their analysis "does not reflect any value for value-added products" and actually, contrary to fact, ascribes "no value to value-added products."[225] Staff testified that given the limited data on which they chose to rely in formulating their data analysis and conclusions, they would have had to "speculate" about the value of the value-added products, and rather than do that, they "devolved" into simply writing all of that value down to zero.[226] Staff further conceded that "it just doesn't know the value to

[219] Tr. 2483:3-25.

[220] Tr. 2484:2-14.

[221] *Id.*

[222] Tr. 2485:6-7.

[223] Tr. 2486:22-2487:12.

[224] Tr. 2486:7-10.

[225] Tr. 2491:15-16; 23-24.

[226] Tr. 2488:14-2490:21.

value-added products" and – seeking to justify its consequently deficient analysis – it claimed that it "tried to figure that out, but couldn't, given the data that it was provided."[227] Although Staff took solace in testifying that they had accurately "disclosed" these limitations on the accuracy and usefulness of their analysis, such a disclosure does not transform inaccurate analysis into something that is useful. Any effort to compare utility and ESCO prices on the basis of the deficient data Staff used is ultimately inaccurate and not useful: as the saying goes, garbage in, garbage out.

Staff testified that consumers should be permitted to purchase the value-added products and services that ESCOs offer, and to pay more for them relative to utility products that do not include such benefits, provided that consumers know what they are purchasing. Accordingly, the real issue at the heart of these proceedings is not retrospective apples-to-oranges bill comparisons but instead ensuring transparency so that consumers can continue to make their own decisions about value and preference.[228] (That transparency issue is addressed below in detail.)

Third, Staff used ESCO data that included millions of fixed-rate agreements. Fixed-rate products offer customers significant price protection against the volatility of the energy market. Local utilities cannot offer such long-term fixed-rate products. With respect to that portion of the data, which Staff did not separate out, Staff's analysis compared agreed-upon fixed rates that consumers elected to pay for a designated period of time to the variable rates that the utility charged and changed on a monthly basis. This obviously useless comparison purported

[227] Tr. 2492:3-8.

[228] *See, e.g.*, Tr. 2214:5-8 ("I do believe that the full transparency of the price and product would greatly enhance the ability of consumers to make solid economic decisions for themselves.").

to show "overcharges" where energy prices happened to have decreased in the ensuing months, but in reality these were not overcharges in any sense of that term:

> If a customer enrolled in a fixed rate product at the price of say 10 cents per kilowatt hour, and the customer did so in order to achieve the -- the price certainty and the peace of mind . . . and the variable rate product that the utility was offering was less than that because it didn't include the price [] certainty . . . so let's say the variable rate product was . . . 8 cents per kilowatt hour…In your analysis that would reflect "overcharge" . . of 2 cents per kilowatt hour for that particular month for the ESCO customer.[229]

Staff further conceded the obvious: that in a "market construct, the ESCO did nothing wrong by 'overcharging' 2 cents" in such a case.[230] Staff testified that "the Panel acknowledged that the fixed price product may bias the relative price performance of those ESCOs offering fixed electric price products embedded within a fixed price product."[231]

The record thus confirms that Staff's purported price comparisons between ESCO prices and utility prices are entirely unreliable.

- The comparison amounts to an apples-to-oranges comparison because that data compares the prices of totally <u>different</u> <u>products</u>, including fixed-rate products and bundled products;
- The comparison does not include actual ESCO pricing, including because it does not reflect pricing net of discounts, rebates, and promotions that ESCOs offer – millions of dollars that are simply missing from Staff's analysis; and
- The comparison does not include actual final utility pricing, which is adjusted after the fact (as detailed below).

[229] Tr. 2495:2-16.

[230] *Id.* 14-15. The "overcharge" in this sense was akin to the mortgage company that continued to collect a fixed-rate APR of 4 percent from a borrower who chose such a product, even where the variable rates later decreased to 3.5 percent. Tr. 2389:24-2400:2.

[231] Tr. 2511:23-2512:5.

The Commission itself has long recognized that fixed-rate products and "green" energy options are value-added products for consumers.[232] The Commission states on its website:

> Competition sometimes produces products that promote new services. For example, some ESCOs may offer value added services, such as fixed rates (the rate per kwh, ccf or therm is the same each month), green power (electricity generated from renewable resources such as wind, solar or hydro), furnace repair or maintenance service, frequent flier miles or telephone service bundled with your energy bill.[233]

The data on which Staff relied in their testimony at the hearing was also self-selected by using a limited, unrepresentative period of three years (which included the self-described aberration period of the Polar Vortex) for which it requested pricing data from the utilities, comprising less than 15% of the available historical pricing data.[234] A review of ESCO pricing for its two decades of existence provides a far more complete basis for analyzing the core issues that the Commission purports to want to address, and reveals more than $10 billion in savings.[235]

2. Utility Delivery and Supply Cost Allocations

Retrospective bill comparisons are also inaccurate because of the multiple deficiencies on the utility side of the ledger. First, the utility prices used in Staff's comparison analysis are moving targets: utilities can and do retroactively change their rates by applying to the Commission for deferred rate increases.[236] The practice of utility rate deferrals effectively

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[232] *See, e.g.*, Hearing Exhibits 611, 614; October 19, 2012 Commission Notice at 4-5 (discussing "value-added services offered by ESCOs, such as fixed prices and electricity from renewable sources").

[233] PSC website, available at http://www3.dps.ny.gov/W/PSCWeb.nsf/All/52770E53410005A185257687006F39D2?OpenDocument.

[234] Tr. 573.

[235] Tr. 676, 683

[236] Tr. 785-90.

means that the price comparisons using the data on which Staff relied are really comparisons between ESCO prices and placeholder utility prices that can change in ways that will entirely change, and even reverse, the results of that analysis. Second, utility supply prices have not been unbundled properly in a manner that achieves economic efficiency and fair competition. Thus, the incomplete ESCO pricing data is being compared with local utility price data that is artificially depressed because monopoly "delivery charges" to ESCO customers include payment to the local utility for supply-side costs the utilities incur in servicing non-ESCO customers.[237] Local utilities add approximately 4% of their energy-supply costs to the distribution charges they collect from ESCO customers, which accounts for approximately $300 million over the 16-year EIA data period.[238] These facts demonstrate why purported comparisons between the improperly unbundled utility rate and ESCO supply prices are simply not valid. Like any business, ESCOs must account for the costs they incur (including overhead, rent, utilities, customer service, and labor) in running their businesses in their supply charges. Utilities incur similar costs to run their energy supply business, but collect those costs through delivery charges paid by all customers (as utilities have a monopoly on such services) – allowing them to pretend that their supply charges are less than what they truly are. To state the obvious, Staff conceded that "the general population would likely not find the utility tariffs as transparent."[239]

B. RESPONSE TO COMMISSION'S INQUIRIES ON THE FUTURE OF ESCOs IN THE MASS MARKET

[237] The testimony demonstrated that "This additional charge or tariff is anti-competitive, subsidizes the utilities, and impedes customers from benefitting from the even greater savings that ESCO customers would otherwise be able to realize." Tr. 677-78.

[238] Tr. 679.

[239] Tr. 2227:20-2228:12.

1. Should Retail Choice Continue In New York?

Yes. The record is devoid of evidence that returning New York to an antiquated state of monopoly will somehow benefit consumers. In fact, Staff recognized that the goal of these proceedings is "enhanced consumer choice."[240] To the contrary, the record is replete with evidence that the competitive market provides a host of benefits to consumers that mirror the benefits that competition provides across industries. Taking away New Yorkers' choices does not and cannot help them. Such an ill-advised leap backward certainly eliminates consumers' ability to value for themselves and select the many value-added products or services that only ESCOs offer – from partially or fully renewable energy plans that move the state closet to the REV vision, to fixed-rate products that provide price certainty to those who value it. And even from the standpoint of pricing, moreover, Staff admitted that there is no evidence that eliminating choice and competition will somehow result in better pricing options for consumers. To the contrary, Staff testified that the impact that competition has had even on utility pricing alone remains undetermined. Moreover, Staff conceded that in the current environment of retail choice, every New Yorker has just and reasonable rates available to them.[241]

In addition, even Staff testified that "the utility doesn't always charge the lowest rate . . . [as] several ESCOs are able to do sometimes significantly better than the incumbent utility."[242] In describing the status quo, Staff testified: "It's the – the customer's choice whether they want to stick with the utility or perhaps benefit by an ESCO that can provide a

[240] Tr. 2238:4-12.

[241] Tr. 2291:19-2292:19.

[242] Tr. 2222:12-16; *see also* Tr. 2235:16-19 ("Certain as SP-8 indicates an aggregate there are certain ESCOs that are able to provide commodity service at a lower cost than the default utility."

lower cost supply."[243] Those concessions underscore the dangers associated with forcibly returning all New Yorkers to default utility service.

2. Future Product Offerings

a) Variable-Rate, Commodity-Only Products

The record exposed the fallacy underlying claims that ESCO prices for variable rate products are necessarily more than the final prices utilities charge for such products.

b) Fixed-Price Products

By providing fixed-price product offerings, ESCOs uniquely provide New Yorkers with the ability to protect themselves against volatility in the energy market. The Commission consistently has recognized the value of such offerings. Although Staff conceded that such value need not be quantified in order to qualify as value to a consumer, experts in these proceedings measured the value of such price certainty at approximately 2.5 cents per kWh of the supply-side charge, which would translate to a value of approximately $125 million in 2015 alone if only half of ESCO the residential sales are fixed-rate products.[244]

The Staff Panel conceded that some customers do prefer to pay a premium for price certainty.[245] Customers perceive value in the price insurance provided by a fixed-rate product.[246] Staff further recognized that a customer who knowingly purchases a fixed-price product to protect against the prospect of variable rates rising, Staff "applaud[s] him for that because that was a good, rational decision to make and if – and if he achieves that, then he got

[243] Tr. 2236:17-20.

[244] Applying similar analysis and assumptions to all ESCO customers, the value realized would be almost $1 billion every year. Tr. 679.

[245] Tr. 2212:15-22.

[246] Tr. 2311:7-13; 2359:19-2360:4.

real value for that value-added service."[247] Staff noted that, even if the customer's projection was wrong, he still achieves the value of "avoid[ing[commodity market volatility" by electing to purchase the fixed-price products that only ESCO offer.[248] Indeed, such a consumer still "got what he paid for."[249]

Indeed, such products bear striking similarities to life insurance policies and fixed-rate mortgage products – both of which carry premiums that customers elect to pay for the price certainty those products provide.[250] In fact, Staff testified that it is recommending to the Commission "that ESCOs should be permitted to offer fixed-rate products provided to customers in New York – mass-market customers in New York provided that they are offered in a way where customers can compare the price of the fixed-rate offering to other prices of other fixed-rate offerings."[251] Mr. Alch conceded that by making a payment for a premium service or product (like life insurance), the payment itself determined the value to him.[252] Similarly, Staff confirmed the value of price certainty in the mortgage space, recognizing that hundreds of millions of consumers elect to pay the premium for such products relative to the variable rates available at the time they are being offered; Staff further confirmed that the value

[247] Tr. 2363:8-24.

[248] Fr. 2363:25-2365:3.

[249] Tr. 2366:2-4.

[250] The only substantive difference Staff could identify between the value proposition of price certainty in the retail energy and life insurance contexts was the level of "transparency" associated with the two products. (Tr.2368:7-21.) That issue is addressed below in Section III.C.11.

[251] Tr. 2370:15-25. Mr. Alch added that Staff is also seeking to limit such offerings to ones that end up being below the default utility's rate, but could not explain why such a requirement would be necessary or even helpful in light of his confirmation that each individual can and does value the benefit of the price certainty for himself.

[252] Tr. 2385:17-2386:13.

of price certainty is a function of the volatility of the commodity at issue.[253] Given the volatility of the electric and gas markets, "the ability to email calm and not worry about spikes in prices may be extremely valuable" for many consumers.[254]

Taking away from New Yorkers the ability to choose price certainty – whether they do so for risk tolerance, budgetary, or substantive reasons – simply harms New Yorkers and impairs the functionality of the state's retail energy markets.

c) Renewable Energy Products

By providing green or renewable energy product offerings, ESCOs provide New Yorkers real value and advance New York's related energy policies as detailed in REV. With respect to value, Dr. Charles Cichetti, in testimony adopted by Dr. Jeff Makholm, applied the Commission's valuation of renewable energy products and their attributes, as described in the recent Order Adopting a Clean Energy Standard,[255] calculated the value that ESCO renewable energy products carried.[256] By applying the Commission's social cost of carbon to the renewable offerings, Dr. Cicchetti calculated millions of dollars in value Staff agreed with the principle of importing the Commission's valuation of the social cost of carbon to determine the value-added benefits of ESCO renewable products.[257] He concluded that even a 25%

[253] Tr. 2389:24-2393:18.

[254] Tr. 2392:25-2393:18.

[255] New York Public Service Commission, Order Adopting a Clean Energy Standard, Case 15-E-0302 and Case 16-E-0270, pages 130-134 (August 1, 2016).

[256] The Commission has already quantified the social cost of carbon (SCC) in connection with its setting a Zero Emissions Credit (ZEC) in New York. The Commission adopted Staff's proposal to use the SCC established by the U.S. Interagency Working Group (USIWG) for the period April 2017 through March 2019 of $42.87/short ton less a fixed baseline portion of that cost already captured in the market revenues received by eligible facilities due to the RGGI program. That would reduce the net cost of carbon to $32.47 (nominal $/short ton).

[257] Tr. 2475:14-20;

penetration of renewables in the ESCOs' supply mix, including renewable energy credits, results in approximately $450 million in climate change benefits for ESCO electric customers every year. ESCOs provide an additional $55 million annually in climate change benefits that relate to residential natural gas products that they serve assuming a similar penetration of carbon offsets for the natural gas that ESCOs supply

Staff testified that apart from the desire to save money, many customers switch to an ESCO product and pay more where the customer prefers the product the ESCO offers.[258] Although Staff expressed preferences in the form of their recommendations for 100% renewable energy product offerings, they conceded that different blends offered by ESCOs under the renewable energy category "also could get us to where we need to get for REV."[259]

d) Value-Added or Bundled Products

Staff confirmed that value-added products include the incremental value of the "price insurance, renewable component, energy conservation price, customer service piece of any of the bundled products."[260] Staff did not undertake to quantify the value of the many value-added products that ESCOs offer. Dr. Charles Cichcetti did lay out his methodology for calculating the value of multiple value-added products, along with his conclusions that such products provide hundreds of millions of dollars in value to New York consumers.[261] By providing energy conservation benefits in bundled products, for example, "ESCOs provide New Yorkers value in the form of both monetary savings as well as environmental benefits. If

[258] Tr. 2207:17-2208:11.

[259] Tr. 2313:7-20; 2315:10-2316:15.

[260] Tr. 2337:11-24; Tr. 2478:3-7..

[261] Tr. 345-62.

ESCO customers are able to reduce their usage by 20%, this would result in savings of over $550 million – (about $300 million per year for residential electricity customers and $270 million for residential natural gas customers)."[262]

It was undisputed, moreover, that value is a determination that is made by the individual who chooses the product, and that one effective way of quantifying the value of a product is "to figure out what customers are willing to pay for it."[263] Staff even cited Richard Thaler's "psychology of an economic decision" as evidence that consumers determine value for themselves.[264]

Staff agreed that " a customer could perceive value in smart thermostats, furnace maintenance contracts, consulting – energy consulting services or LED lightbulbs, which are bundled with a commodity product if they are purchasing that from an ESCO."[265] Staff also conceded that the value exists notwithstanding that the bundled components are not listed out as separate line items on a bill, and that a customer could be attributing his or her own value to the individual components that comprise the bundled offering.[266]

On cross examination, Staff ultimately conceded that consumers may also be attributing particular values to the improved customer service experience ESCOs offer relative to utilities, and that the actual value is "unknown to me [Staff] . . . I have no way of determining what they [consumers] value your [ESCO] services at" and that Staff has not conducted any analysis or

[262] *Id.*

[263] Tr. 2478:3-7.

[264] Tr. 2308:19-2310:19.

[265] Tr. 2325:23-2326:10.

[266] Tr. 2323:5-2326:19.

surveys to determine that.[267] At bottom, after conceding that Staff has extremely limited contact with real consumers and their actual thought processes and valuations, Staff summed up the facts:

> Q. [I]s it fair to say you have no idea what customers perceive to be valuable when they purchase an ESCO – particular ESCO product?
>
> A. Frankly no, I do not understand what the – is going through the consumer's mind when they choose an ESCO product.[268]

Exhibit 613 listed a host of value-added products and services that Staff historically has recognized to be value-added products and services. Confronted with that document on cross, Staff conceded that the many offerings listed provided value to consumers.[269] Again underscoring Staff's failure to quantify the value of these products, Mr. Alch conceded that all of the products listed may have additional value, but "whether that value is commensurate with the product that is actually provided is another question."[270] Exhibit 614 confirmed that current staff website lists such products as value-added services as well, and that that reflects the official Staff position as of the date of the hearing.[271]

In response to questioning from the ALJs, Staff testified that to determine whether a bundled product provided value to a consumer, Staff would have to "evaluate the value of the

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[267] Tr. 2333:12-2334:3.

[268] Tr. 2335:14-20.

[269] Tr. 2339:11-2346:25; 2347:22-2349:10; 2351:5-18. Without explanation, Mr. Alch stated that he would not have listed all of these products if he has been at the Commission drafting this document; he later retracted the testimony that he was disagreeing with Staff from 2007 and attributed his views to potential changes in the world. Id.

[270] Tr. 2350:12-21.

[271] Tr. 2355:22-2357:11.

service provided by that incremental charge that was added."[272] Staff did not perform those analyses in these proceedings.

Energy management tools bundled with commodity provide significant value in reducing consumers' bottom line expenses and consumption. Staff testified that, with such products, "it is hoped that the actual consumption of that customer would trend down" – which would reduce amounts that customer pays in the form of both commodity and delivery rates for the now-eliminated consumption amounts.[273] "If the consumption of the customer trends down then the customer saves not only the incremental kilowatt hours that he is not – no longer has to pay for the commodity for, but in addition he saves on delivery of those – of those kilowatt hours."[274] These products are as essential for New York's energy future as they are for the consumers who value the savings associated with reduced consumption.

7. Transparency

a. Transparency in Utility Pricing

Staff testified that "the general population would likely not find the utility tariffs as transparent."[275]

Utility supply pricing is particularly opaque for two main reasons. First, "the Commission often allows utilities to increase rates at a later date to make-up for any short-term losses."[276] This is, in effect, what happened in the case of Niagara Mohawk. Due to cold weather and the resulting high wholesale market prices, Niagara Mohawk was faced with the

[272] Tr. 2349:2-20.

[273] Tr. 2482:11-2483:2.

[274] *Id.*

[275] Tr. 2227:20-2228:12.

[276] Tr. 732.

prospect of raising prices for its mass-market customers in February 2014, which it asserted would cause a financial hardship for its customers. The Commission issued an Order granting Niagara Mohawk's request for a waiver of Rule 46.3.2 of its tariff and froze Niagara Mohawk's mass market price for February 2014 at January 2014 price levels.[277] In a subsequent Order, the Commission adopted its Emergency Rule as a Permanent Rule and allowed Niagara Mohawk to recover the $33.258 million of deferred costs, plus carrying charges, over a six-month period commencing in June 2014.[278] The Commission does not provide ESCOs with the same consideration. Indeed, ESCOs have no recourse through the Commission when they provide Fixed-Rate services that are subject to the vagaries of wholesale energy markets.

Second, utilities include portions of their supply costs and margins in their monopoly delivery charges. There is no transparency to consumers with respect to the utilities' effort to allocate their costs and margins between the supply side of the bill with respect to which they must compete against ESCOs, and the delivery portion of the bill where they enjoy a monopoly. Dr. Cicchetti testified that "IOUs would need to add at least 4% to their electricity and natural gas supply costs. In New York the margins or returns related to the IOUs' energy supply costs are added to the amount ESCOs pay for delivery."[279]

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[277] State of New York Public Service Commission, Order Granting Request for Waiver, Case 14-E-0026, January 28, 2014.

[278] State of New York Public Service Commission, Order Adopting Emergency Rule as a Permanent Rule and Allowing Recovery of Deferral Costs, Case 14-E-0026, April 25, 2014.

[279] Over the 16-year period analyzed in Appendix A, the average utility price for residential users was $0.1656 per kWh. Delivery charges were approximately half the full-service price over this time period. I apply a 4% margin for the utilities' energy supply (.04 * $0.1656 /2) and determine the per kWh amount that ESCOs pay to provide an energy supply margin to IOUs. This is $0.0033 per kWh, which I multiply by the approximate 90.425 billion kWhs that ESCOs sold to residential customers over the 16-year period. This would amount to $299.5

b. Transparency in ESCO Pricing & Products

The record clearly demonstrated that the core concern at the heart of Staff's critique of the ESCO industry reduced to its concerns that there was insufficient transparency concerning ESCO product offerings to facilitate consumers' efforts to make their own decisions about the products they wanted to purchase. Both the UIU/AG and Staff Panels "believe in the right to choose" an agree that "if given full information customers should be permitted to sign up for any service they choose."[280] Mr. Alch testified, however, that to make their decisions, consumers "should have full product and price transparency and then the choice – they will be making a – have better information upon which to make a good decision."[281]
Staff testified that "I do believe that the full transparency of the price and product would greatly enhance the ability of consumers to make solid economic decisions for themselves."[282]

Furthermore, Staff recognized that price and product transparency could be accomplished, and he challenged the ESCOs to do just that: "I don't understand why you guys can't be fully price transparent with both the product and the benefit that you're claiming to provide."[283]

Staff recognized that many industries include premier options for which customers, including Mr. Alch himself, pay more for a perceived value that other consumers do not want, and that there was valuable in presenting those opportunities to consumers.[284]

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million in utility energy-supply margins that were transferred to ESCOs in their distribution charges for residential customers.

[280] Tr. 1640:4-1642:16; Tr. 2303:7-2304:9.

[281] Tr. 2303:21-2304:9.

[282] Tr. 2214:5-8.

[283] Tr. 2215:3-5.

[284] Tr. 2215:6-2216:21.

In fact, Staff consistently retreated to their view that ESCO products sometimes lack "transparency" as their only way of explaining why empowering consumers to choose to purchase price certainty or protection against price volatility in the context of retail energy, even at a premium, was different from the choices New Yorkers enjoy every day across industries, including in the context of insurance policy value or grocery purchases.[285] Staff ultimately testified that it is recommending to the Commission "that **ESCOs should be permitted to offer fixed-rate products** provided to customers in New York – mass-market customers in New York provided that they are offered in a way where customers can compare the price of the fixed-rate offering to other prices of other fixed-rate offerings."[286] With respect to the value of such products, Staff conceded that the premium a customer elects to pay for a product (like life insurance) often serves as the best way of determining the value of that product or service to the customer.[287] Similarly, Staff confirmed that fixed-rate products in the mortgage space have independent value even where they cost more than variable-rate products available at the time they are being offered, explaining that the value would be a function of the volatility of the commodity.[288] Given the volatility of the electric and gas markets, "the ability to email calm and not worry about spikes in prices may be extremely valuable" for many consumers.[289]

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[285] Tr.2368:7-21.

[286] Tr. 2370:15-25. Mr. Alch added that Staff is also seeking to limit such offerings to ones that end up being below the default utility's rate, but could not explain why such a requirement would be necessary or even helpful in light of his confirmation that each individual can and does value the benefit of the price certainty for himself.

[287] Tr. 2385:17-2386:13.

[288] Tr. 2389:24-2393:18.

[289] Tr. 2392:25-2393:18.

During the hearing, the Staff Panel clarified that the real concern driving its recommendations was not the need for price guarantees. In fact, the Panel conceded that many industries include different priced products, and the free market ensures that customers will choose the ones they want. There is a value to having choice. The real concern the Staff Panel expressed was that customers in the energy commodity space may not fully understand what they are paying, or what products they are purchasing. At bottom, then the concern was transparency, as Mr. Alch testified on cross.

The appropriate solution to Staff's perceived transparency problem is not imposition of a price-fixing regime. It consists of two parts: improving transparency for ESCO pricing and enabling consumer comparisons to utility pricing by eliminating black-box "summary" figures that are essentially a black box that raise more questions than it answers.

c. Mechanisms for Creating or Improving Transparency

The Department has deployed a Power to Choose website to facilitate consumers' understanding of the retail energy supply options they enjoy. After identifying the shortcoming in the existing Power to Choose Website that the Department maintains, Mr. Alch conceded that, in their initial recommendations in these proceedings, Staff did not propose resolving this core issue by proposing improvements to the transparency requirements and implementation – and in fact failed to include any such recommendations entirely. [290] He also testified that there was significant ongoing work to the website that when completed (and he did not have a timetable available) will result in improved transparency, and that those revisions were in the Department's hands – as ESCOs were complying with the Power to Choose requirements.[291]

[290] Tr. 2227:4-19.

[291] Tr. 2221:12-2222:9.

Marked and meaningful improvements to the Department's Power to Choose website – its functionality and penetration – would constitute a properly tailored and effective mechanism for addressing Staff's concerns about consumer choice in New York.[292]

Staff recognized the shortcomings in the status quo with respect to the Department-maintained Power-to-Choose website, and that auditing the data posted there would be a positive step toward improving the functionality of that shopping tool.[293] Mr. Alch specifically called out existing limitations on the system that the Department designed, and a clear mechanism for improving it by facilitating the data presentation that would be most useful to consumers.[294] Staff confirmed that the ESCOs are complying with the order requiring ESCOs to list all current offerings on the Power to Choose shopping tool website, and that the Department is actively "in the process of updating our Power to Choose website as we speak," and that when that is completed, "there will be improved transparency."[295]

As transparency concerns fixed-rate offerings, Staff conceded that there is no way to calculate a premium going forward because utility prices are not set for the ensuing months, but that one way to accomplish transparency is to disclose the difference between the fixed rate and the last month's utility price. We submit that fully disclosing the term and rate for a fixed-price product accomplishes transparency by itself.

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[292] Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n, 53 Misc. 3d 641, 651, 37 N.Y.S.3d 178, 186 (N.Y. Sup. Ct. 2016), aff'd, 152 A.D.3d 1122, 56 N.Y.S.3d 485 (N.Y. App. Div. 2017), leave to appeal granted, No. 2018-100, 2018 WL 1473660 (N.Y. Mar. 27, 2018), and aff'd sub nom. Retail Energy Supply Ass'n v. Pub. Serv. Comm'n of State, 152 A.D.3d 1133, 59 N.Y.S.3d 590 (N.Y. App. Div. 2017), leave to appeal granted, No. 2018-99, 2018 WL 1473675 (N.Y. Mar. 27, 2018).

[293] Tr. 2217:14-2219:6.

[294] Tr.2220:5-2222:9.

[295] Tr. 2221:12-2222:6.

II. CONCLUSION: SPECIFIC RECOMMENDATIONS TO THE COMMISSION

ESCOs should not be prohibited from serving their current products to so-called "mass-market" customers. To the extent additional transparency is necessary for customers to properly assess the value proposition between ESCOs and the local utility, such measures can be implemented under the current framework. The Commission should direct Staff, ESCOs, and other stakeholders to create a template for transparency that can be implemented through the existing Power to Choose platform. New Yorkers who elect to purchase energy from an ESCO should be afforded an opportunity to review the product offering through that Power to Choose website or an alternative platform that enables the consumer to confirm for himself the specific terms of the products or services he is purchasing and compare it with other options before making a decision about their energy provider.

APPENDIX: SPECIFIC POSITIONS ON THE TWENTY QUESTIONS IN THE DECEMBER NOTICE

1. Whether ESCOs should be prohibited in total or in part from serving their current products to mass-market customers, or whether ESCOs should be required to offer value-added energy efficiency and energy management services as a condition to offering commodity services.

   ESCOs should not be prohibited from serving their current products to mass-market customers. To the extent additional transparency is necessary for customers to properly assess the value proposition between ESCOs and the local utility, such measures can be implemented under the current framework.

2. Whether the regulatory regime of how the Commission applies the Public Service Law to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs is deterred. In particular, the Commission has not applied Article 4 to ESCOs, based on a construction that Public Service Law §66(1) only applies to utilities with plant in public streets. Is that construction justified today? Would it be appropriate to revisit that construction in light of subsequent events, such as the adoption of the 2002

amendments to the Home Energy Fair Practices Act? If the construction is revisited, would it be appropriate and beneficial to customers and in the public interest to apply the restrictions of Public Service Law §65 to ESCOs?

Without legislative action, the Commission has no authority regulate ESCOs under Article 4 nor is there any policy reason for the Commission to interfere with the operation of a competitive market. Any transparency or marketing can and should be addresses through proper enforcement of the UBP and other statutes.

3. Whether the regulatory regime of how the Commission applies the Public Service Law to ESCOs should be modified to ensure adequate enforcement mechanisms, including penalties, to deter customer abuses and overcharging. In this regard, please comment on whether it is possible for the Commission to seek penalties against ESCOs under the current regime, pursuant to which they are only regarded as "gas" and/or "electric" corporations under PSL Article 1, or if it is necessary to also regulate ESCOs under Article 4 to seek penalties against ESCOs? If Article 4 regulation is deemed necessary, then what burdens would such regulation impose? For instance, would it be possible for ESCOs to obtain "incidental" regulation under Public Service Law §66(13) and would such "incidental" regulation serve the public interest? Would ESCOs also be subject to undue burdens if they needed to obtain approval for stock issuances under Public Service Law §69 or the transfer of stocks, plant or franchises under Public Service Law §70? Should ESCOs be further regulated as to credit worthiness?

The current regulatory regime under the UBP and other statutes, properly enforced by the Commission and New York Attorney General, is adequate to deter perceived customer abuses and overcharges. The extent of the Commission's jurisdiction under the PSL is currently subject to a pending appeal before the New York State Court of Appeals.

4. Whether the regulatory regime of how the Commission applies the Public Service Law to ESCOs should be modified to guide ESCOs toward acceptable rates and practices and deter customer abuses and overcharging. In particular, if the Commission decides that Public Service Law Article 4 applies to ESCOs, should the Commission use the discretionary authority of Public Service Law §66(12)(a) to require filing of tariffs by ESCOs in order to ensure that ESCO bills be no greater than utility bills? If so, should

the Commission require filing of tariffs by all ESCOs, just ESCOs offering commodity-only service, or just ESCOs that have been determined to charge prices in excess of utility bills? Should the Commission take steps to void existing ESCO contracts if it tariffs ESCO services?

The current regulatory regime under the UBP and other statutes, properly enforced by the Commission and New York Attorney General, is adequate to deter perceived customer abuses and overcharges. The extent of the Commission's jurisdiction under the PSL is currently subject to a pending appeal before the New York State Court of Appeals.

5. Whether the rules applicable to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs are deterred. If so, then should the authority be imposition of Public Service Law Article 4 and/or other requirements created by Public Service Law Article 6?

The current regulatory regime under the UBP and other statutes, properly enforced by the Commission and New York Attorney General, is adequate to deter perceived customer abuses and overcharges. The extent of the Commission's jurisdiction under the PSL is currently subject to a pending appeal before the New York State Court of Appeals.

6. Whether the Uniform Business Practices (UBP) applicable to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs are deterred.

The current regulatory regime under the UBP and other statutes, properly enforced by the Commission and New York Attorney General, is adequate to deter perceived customer abuses and overcharges. The extent of the Commission's jurisdiction under the PSL is currently subject to a pending appeal before the New York State Court of Appeals.

7. Whether door-to-door and outbound telemarketing practices of ESCOs to mass market customers should be prohibited, and whether other ESCO marketing practices should be prohibited?

The current regulatory regime under the UBP and other statutes, properly enforced by the Commission and New York Attorney General, is adequate to deter perceived customer abuses and overcharges. The extent of the Commission's jurisdiction under the PSL is currently subject to a pending appeal before the New York State Court of Appeals.

8. Whether the purchases of receivables system regarding mass market customers should be modified in any way, including but not limited to imposing "purchase with recourse" provisions or tiered discount rates so that ESCOs with abusive practices bear more financial risk from such practices?

There is no evidence that the purchase of receivable systems has any connection with the perceived abuses.

9. The prices for retail gas and/or electric service charged to and paid by mass-market customers of ESCOs in the recent past, including, at a minimum, calendar years 2014 and 2015 and as much of 2016 as may be available, and the prices those customers would have paid for comparable utility service. If different products are offered (e.g., fixed vs. variable), the prices by product offering. In addition to annual data, seasonal (summer and winter) and monthly data should be provided where possible and relevant. Data for residential and small commercial customers should be provided separately. Data for electric and natural gas products should be provided separately. Where an ESCO product has been offered for more than five years, the last five years of historical data should be provided. Parties providing significant quantities of data should consult with Staff as to providing the data in a useful electronic format.

As Staff has recognized, the Record has not provided any basis to make an apples-to-apples comparison between ESCO charges for gas and electric products and the supply price charged by the local utility. Moreover, as Staff recognized, it would be improper to draw any meaningful conclusion from price differential without factoring in the value of the many different offerings of ESCOs including but not limited to green

energy, fixed rate products, energy consumption management and products as well as customer service and other ESCO specific offerings and bundled products.

10. Data setting forth the number of customers served by ESCOs, by ESCO, for 2014, 2015, and so much of 2016 as is available.

NEM disputes that the time period of 2014-16 is indicative of the market as a whole or an adequate time period from which to draw conclusions about the ESCO market.

11. Data setting forth the volume of sales in total dollars and in kWh, by ESCO, for 2014, 2015, and so much of 2016 as is available.

NEM disputes that the time period of 2014-16 is indicative of the market as a whole or an adequate time period from which to draw conclusions about the ESCO market.

12. Evidence that an ESCO has, in fact, in recent years offered or is currently offering lower prices on an annual basis compared to the incumbent utility consistently, including number of customers served and total volume of sales in both dollars and kWh. Such evidence should also include an analysis of whether that price offering has been profitable or resulted in a loss to the ESCO.

As Staff has recognized, the Record has not provided any basis to make an apples-to-apples comparison between ESCO charges for gas and electric products and the supply price charged by the local utility. Moreover, as Staff recognized, it would be improper to draw any meaningful conclusion from price differential without factoring in the value of the many different offerings of ESCOs including but not limited to green energy, fixed rate products, energy consumption management and products as well as customer service and other ESCO specific offerings and bundled products.

13. Whether, given the current retail market structure, it is possible for an ESCO to profitably offer lower prices on an annual basis compared to the incumbent utility consistently and, if possible, how it can be done.

As Staff has recognized, the Record has not provided any basis to make an apples-to-apples comparison between ESCO charges for gas and electric products and the supply price charged by the local utility. Moreover, as Staff recognized, it would be improper to draw any meaningful conclusion from price differential without factoring in the value of the many different offerings of ESCOs including but not limited to green energy, fixed rate products, energy consumption management and products as well as customer service and other ESCO specific offerings and bundled products. Moreover, to the extent a true apples-to-apples comparison is conducted it would require the local utility to disclose and provide their true supply cost including all overhead associated with the supply of gas and electricity.

14. The number and nature of customer complaints regarding i) retail prices and bills and ii) sales and marketing practices from a) customers directly to ESCOs, b) from customers to utilities about ESCOs, by ESCO, and c) customers to the Commission about ESCOs, by ESCO during calendar years 2014 and 2015 and as much of 2016 as it is available.

NEM disputes that the time period of 2014-16 is indicative of the market as a whole or an adequate time period from which to draw conclusions about the number and nature of ESCO complaints. Moreover, the data in the Record shows that ESCO complaint rates are lower than those of the local utility.

15. ESCO marketing and sales practices, including printed materials, customer contracts, scripts for telephone or door-to-door solicitations, and other training materials for ESCO sales people for practices in effect during calendar years 2014, 2015, and 2016. Such evidence should include all efforts by ESCOs to ensure that they and their personnel comply with the Uniform Business Practices (UBP) and that they otherwise avoid any deceptive marketing practices.

NEM disputes that the time period of 2014-16 is indicative of the market as a whole or an adequate time period from which to draw conclusions about the number and nature of ESCO complaints.

16. The ability of mass-market customers to obtain information about relative prices and offerings of ESCOs and regulated utilities and to understand such information, including evidence regarding the transparency of the retail market for mass-market customers and the level of knowledge in that market.

The current regulatory regime under the UBP and other statutes, properly enforced by the Commission and New York Attorney General, is adequate provide mass-market customers sufficient information to make informed decisions regarding their energy supply. To the extent additional disclosures are necessary they can be easily required by modification of the UBP.

17. Tools that are available in the public domain that customers can use to do comparison shopping.

N/A

18. Specific customer surveys that shed light on customers' understanding about retail choices available and how to make informed choices.

N/A

19. Actions by state agencies or consumer advocacy groups to protect customers, to monitor the state of the retail market customers, to provide information, or to lodge complaints or impose discipline in the case of improper ESCO practices, including specific concrete steps the group has taken and any results obtained from those actions.

The current regulatory regime under the UBP and other statutes, properly enforced by the Commission and New York Attorney General, is adequate to deter perceived customer abuses and overcharges.

20. Actions that have been taken or that could be taken to strengthen the retail market or otherwise to provide consumer protections sufficient to protect mass-market customers from overcharges or deceptive marketing practices. For instance, if the Commission decided to subject ESCOs to Article 4 of the Public Service Law would it be appropriate to require ESCOs to obtain Certificates of Public Convenience and Necessity under Public Service Law §68 in order to provide commodity service?

The current regulatory regime under the UBP and other statutes, properly enforced by the Commission and New York Attorney General, is adequate to deter perceived customer abuses and overcharges. To the extent additional disclosures or transparency is necessary of the ESCOs and local utilities, those can be required under the current regulatory regime. The extent of the Commission's jurisdiction under the PSL is currently subject to a pending appeal before the New York State Court of Appeals.

Respectfully submitted,

/s/ Jason Cyrulnik

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