STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

In the Matter of Eligibility Criteria for Energy Service Companies	**)**	**Case 15-M-0127**
Proceeding on 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**

COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM)[1] hereby submits these Comments pursuant to the Notice Seeking Comments on Revisions to the Uniform Business Practices issued on March 8, 2017, as well as two Notices of Proposed Rulemaking on Amendments to the UBP published in the March 22, 2017, New York State Register pertaining to the above-referenced proceedings. As described in the Commission's March 8th Notice as well as the two March 22nd State Register Notices of Proposed Rulemaking are about: 1) a UBP modification to reflect a change in New York law to prohibit the assessment of early termination fees in the event of an account holder's death; 2) an ESCO petition to modify the UBP requirements pertaining to representative identification requirements; and 3) "other related matters and housekeeping items." However, not

[1] The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies. These Comments are not intended to serve as a waiver of any rights, arguments, claims or remedies, all of which NEM expressly reserves.

included in the Commission's descriptions of its proposed action are multiple significant and substantive changes to the UBP that would materially change ESCO compliance obligations and operations. These changes are only revealed in Attachment 1 to the March 8th Notice entitled "UBP Redline Changes." These changes include:

- extension of third party verification requirements to electronic enrollments,
- increased requirements applied to third party verifications,
- requiring ESCOs to advise customers to compare the utility's price to the ESCO price during enrollment and verification;
- requiring ESCOs to comply with Department requests for "any and all information" or be deemed non-compliant and subject to Commission sanction;
- extension of the customer authorization document retention period;
- requiring ESCOs to offer residential customers a voluntary budget billing or levelized payment plan;
- incorporation of language on the new Clean Energy Standard,
- incorporation of language on Community Choice Aggregation; and
- the addition of a new definition of "ESCO agent."

Any and all of these changes constitute major substantive modifications to the UBP that will entail significant additional ESCO compliance obligations. None of these changes can properly be characterized as being merely "other related matters and housekeeping items."

Accordingly, apart from the specifically identified changes in the March 8th Notice and March 22nd State Register Notices pertaining to the implementation of a new law prohibiting the assessment of early termination fees in the event of account holder death and the change in ESCO

representative identification requirements recommended by ESCO petition, the Notices are substantively and procedurally deficient and should be withdrawn or stayed. No record has been developed or disclosed to support the litany of other major UBP changes. Moreover, a number of the proposed changes are inextricably related to the Commission's on-going Track I proceeding, the resolution of which in the instant case would effectively predetermine the outcome of issues in the Track I proceeding without a supporting record.

At a minimum, NEM requests that the Commission adhere to its prior practice of convening a technical conference of stakeholders to discuss the proposed UBP changes. This will allow ESCOs to be apprised of the purported problems to be solved by the UBP changes and for ESCOs to have an informal opportunity to respond and explain practical and technical compliance problems that the proposed UBP changes will entail. There is a long history of Staff leading stakeholder technical conferences of this nature to formulate well-reasoned UBP changes. NEM suggests that this successful practice should be used once again to thoroughly vet the issues for the benefit of all parties.

Notwithstanding the foregoing, and without waiving any of the objections to the UBP proposals set forth herein, NEM offers its preliminary comments on the proposed UBP changes to the extent comments could be fashioned without the provision of proper notice and without a Commission explication of a rationale for the proposed changes; during the pendency of multiple litigations concerning issues implicated by the proposed changes (including the scope of the Commission's authority, the validity of its low income prohibition order, and the validity of the zero emissions credit program); and during the pendency of the Track I proceeding in which a record is currently being developed with respect to factual underpinning of the proposed changes.

I. The Commission Did Not Provide Proper Notice of the Proposed UBP Changes

The Commission's March 8th Notice sets forth and describes the proposals for consideration as follows:

> (1) incorporate protections to prevent early termination or cancellation fees in the event of energy account holders death before the end of the contract term; (2) to eliminate the appearance of an ESCO representative's full name on the identification badge worn by the marketer while soliciting to potential customers; and (3) other related matters and housekeeping items.

The first March 22, 2017, State Register Notice of Proposed Rulemaking describes the proposed action and substance of the proposed rules as follows:

> Proposed Action: The Commission is considering amendments to Sections 1, 2 and 5 of the Uniform Business Practices (UBP), incorporating protections to prevent early termination or cancellation fees.
>
> Substance of proposed rule: The Public Service Commission is considering amendments to Sections 1, 2 and 5 of the Uniform Business Practices (UBPs). The proposed modifications to the UBPs would incorporate protections to prevent early termination or cancellation fees in the event of energy account holders death before the end of the contract term and address other related matters and housekeeping items. In addition, a Notice Seeking Comments on Revisions to the Uniform Business Practices, issued on March 8, 2017, may be reviewed online at the Department of Public Service web page: www.dps.ny.gov. The Commission may adopt, reject or modify, in whole or in part, the relief requested and may resolve related matters.

The second March 22, 2017, State Register Notice of Proposed Rulemaking describes the proposed action and substance of the proposed rules as follows:

> Proposed Action: The Commission is considering a petition filed on October 7, 2016 by Green Mountain Energy Company requesting amendments to the Uniform Business Practices (UBP).
>
> Substance of proposed rule: The Public Service Commission is considering a petition filed on October 7, 2016 by Green Mountain Energy company requesting amendments to Section 10(C)1.(b).1, 10(C)1.(c) and 10(C)1.(d) of the Uniform Business Practices (UBPs). The proposed modifications to the UBP would

> eliminate the appearance of an ESCO representative's full name on the identification badge worn by the marketer while soliciting to potential customers. The full text of the petition may be reviewed online at the Department of Public Service webpage: www.dps.ny.gov. The Commission may adopt, reject or modify, in whole or in part, the relief requested and may resolve related matters.

Upon reading these Notices, a potential commenter would understand that the Commission is considering changes to the UBP to prohibit ESCOs from charging an early termination fee in the event of a customer's death. A potential commenter would also understand that a previously-filed petition on ESCO representative identification requirements in the UBP was being considered. Finally, the Notices disclose that the Commission is considering "other related matters and housekeeping items." However, this casual reference to "other related matters and housekeeping items" would cause a potential commenter to seriously misapprehend the extent of the substantive UBP modifications that the Commission is actually considering. The proposed changes that are only revealed in Attachment 1 to the March 8th Notice entitled "UBP Redline Changes" and cannot possibly be deemed, "other related matters and housekeeping items," include:

- extension of third party verification requirements to electronic enrollments,
- increased requirements applied to third party verifications,
- requiring ESCOs to advise customers to compare the utility's price to the ESCO price during enrollment and verification;
- requiring ESCOs to comply with Department requests for "any and all information" or be deemed non-compliant and subject to Commission sanction;
- extension of the customer authorization document retention period;
- requiring ESCOs to offer residential customers a voluntary budget billing or levelized payment plan;

- incorporation of language on the new Clean Energy Standard,
- incorporation of language on Community Choice Aggregation; and
- the addition of a new definition of "ESCO agent."

As such, the March 8th and March 22nd Notices are wholly insufficient to apprise potential commenters of the sweeping nature of the proposed UBP changes, the potential impacts on ESCO operations, and the underlying reasons or potential problems that the Commission was intending to resolve. Beyond being insufficient, the Notices are practically misleading in purporting to identify the substantive changes, but not identifying a host of serious changes that should be specifically identified for commenting parties.

The State Administrative Procedure Act, Section 202(f)(v) requires that a notice of proposed rulemaking must, "contain the complete text of the proposed rule, provided, however, if such text exceeds two thousand words, the notice shall contain only a description of the subject, purpose and substance of such rule in less than two thousand words and shall identify the address of the website on which the full text has been posted." In the instant case, the Commission has failed to meet the requirement of Section 202(f)(v) that the notice include the "purpose and substance" of the proposed rule. The March 8th and March 22nd Notices identified two discreet UBP changes - language to prohibit deceased account holders from being charged ETFs and changes to ESCO representative identification requirements pursuant to a previously-filed petition. The remainder of the significant proposed UBP changes are not listed or explained in the Notices, and therefore fail to satisfy the SAPA requirement of providing the "purpose and substance" of the proposed rule. Sweeping the proposed changes under the term "other related matters and housekeeping items" is misleading and a gross mischaracterization of the changes under consideration. Indeed, the entire purpose of a Notice of Proposed Rulemaking is to apprise potentially affected parties of

the possibility that their rights and responsibilities will be the subject of Commission determination, and with a potentially adverse outcome, so that they can avail themselves of the opportunity to comment on the record. The March 8th and March 22nd Notices fail to do that.

The recent Decision and Order from New York State Supreme Court, Albany County, vacating provisions of the Commission's Reset Order confirmed that "the PSC must provide an opportunity to be heard in a meaningful manner and at a meaningful time."[2] The Court's Decision and Order makes clear that Commission Notices must enumerate and explain the type of significant UBP changes that are proposed here that will materially increase ESCO compliance burdens; otherwise, parties have not been afforded requisite procedural due process.

The inclusion of Attachment 1 to the March 8th Notice entitled "UBP Redline Changes" does not cure the Commission's failure to comply with SAPA § 202(f)(v). It puts potential commenters in the unfair position of having to decipher from only a redlined document the Commission's "purpose and substance" of the rule. The use of the phrase "other related matters and housekeeping matters" in the Notices does not absolve the Commission of its obligation to adequately describe the nature and extent of its rule proposals. Nor does obfuscating the extent of those changes by revealing them only in a redline version of the UBP. None of the documentation from the Commission sets forth a rationale for adopting the UBP changes other than those changes precipitated by the new General Business Law provision or the petition to change the ESCO representative identification requirements. Nor has the Commission identified what perceived

[2] National Energy Marketers Association et al. v. New York Public Service Commission, Alb. Co. Index No. 868-16, Decision/Order, dated July 22, 2016.

problem it is trying to solve or whether a less burdensome alternative could be employed. As such, the Notices fail to communicate the "purpose and substance" of the proposed rule.

In a document Staff recently filed in the Track I case, it made reference to a "potential 'loophole'" in the UBP that is to be addressed by the proposed changes.[3] No other detail was offered. This "potential loophole" was not identified or explained in any of the Notices in the instant matter. And, of course, Staff's reference in the separate Track I case does not constitute notice in the instant case either.

SAPA § 202(f)(i) also requires that a notice of proposed rulemaking include a citation of the statutory authority for the rule being proposed. The Commission's March 8th Notice does not include any citation of statutory authority for its action. The March 22nd Notices do include a citation of statutory authority. The Commission listed Public Service Law sections 5(1)(b), 65(1), (2), and (3), and 66(1), (2), (3), (5) and (8) as the basis of its statutory authority to make the proposed UBP changes. In response thereto, NEM incorporates herein all prior pleadings submitted in connection with the Commission's proceedings and orders concerning this subject matter as filed in National Energy Marketers Association et al. v. New York Public Service Commission, Alb. Co. Index No. 868-16 and National Energy Marketers Association et al. v. New York Public Service Commission, Alb. Co. Index No. 5680-16.

The Commission failed to cite in any of the three Notices the new provision of General Business Law section 399-zzzz that prohibits early termination fees from being charged to account holders

[3] Cases 15-M-0127, 12-M-0476 and 98-M-1343, Staff Reply to RESA's Motion, dated April 21, 2017, at page 12.

that have died before the end of their contract. The new provision of the General Business Law is one of the subjects prompting the modification of the UBP.

II. The Adoption of the Proposed UBP Changes Would Effectively Determine the Outcome of the Track 1 Proceeding Without an Evidentiary Record

Many of the proposed UBP changes are inextricably related to the Commission's on-going Track I proceeding, such that the resolution of those issues in the instant case would effectively predetermine the outcome of issues in the Track I proceeding without a supporting record. A two-track proceeding was initiated at the Commission at the end of 2016 to examine ESCO service to mass market customers.[4] The measures identified for Commission consideration in that case are:

> (a) whether ESCOs should be completely prohibited from serving their current products to mass-market customers; (b) whether the regulatory regime, rules and Uniform Business Practices (UBP) applicable to ESCOs need to be modified to implement such a prohibition, to provide sufficient additional guidance as to acceptable rates and practices of ESCOs, or to create enforcement mechanisms to deter customer abuses and overcharging, including whether the Commission not to subject ESCOs to Article 4 of the Public Service Law should be revisited; and (c) whether new ESCO rules and products can be developed that would provide sufficient real value to mass-market customers such that new products could be provided to them by ESCOs in the future in a manner that would ensure just and reasonable rates.[5]

Parties in the Track 1 proceeding were requested to address a list of twenty issues, including potential modifications to the UBP[6] as well as the, "the ability of mass-market customers to obtain

[4] Cases 15-M-0127, 12-M-0476, and 98-M-1343, Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits, issued December 2, 2016.
[5] Id. at 3-4.
[6] See, e.g., issues 5 through 7 identified for stakeholder testimony:

> 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 Public Service Law Article 4 and/or other requirements created by Public Service Law Article 6?
> 6. Whether the Uniform Business Practices (UBP) applicable to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs are deterred.
> 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?

information about relative prices and offerings of ESCOs and regulated utilities and to understand such information."[7] The proposed UBP changes in the instant case appear to predetermine the outcome of Track 1 proceeding. The impropriety of requiring ESCOs to advise customers to compare the inapposite bundled utility rate on the utility bill with ESCO rates – one of the changes proposed in the instant case – is an issue that turns on key issues being considered and analyzed in the Track I proceeding. Likewise, proposals to increase third party verification requirements, enrollment requirements and record retention requirements, and to require ESCOs to offer residential customers budget billing or levelized payment plans, fall squarely within the type of UBP changes that could foreseeably turn on the results of the Track I proceeding.

Numerous stakeholders are involved in the Track 1 proceeding and are expending significant time and resources to develop a thorough record in that case. The proposed UBP changes here appear to be an end-run around the evidentiary proceeding in the Track 1 proceeding, to the detriment of all of the parties involved in that case. That perception is amplified by the Commission's failure to provide any record, data, analysis, or rationale for making the proposed UBP changes here (other than the change precipitated by the new General Business Law provision and the petition to change the ESCO representative identification requirements). For that reason, the proposed UBP changes, aside from the changes prompted by the new General Business Law provision on early termination fees and the petition to change the ESCO representative identification requirements, should be stayed or withdrawn pending the resolution of Track 1.

Id. at 6.

[7] Id. at 8, issue 16.

III. Preliminary Comments on Proposed UBP Revisions

Subject to the foregoing objections, and without waiving any rights, arguments, claims or remedies, NEM offers the following preliminary comments on the proposed revisions to the UBP. The lack of proper notice of the proposed UBP changes coupled with the lack of any supporting record, rationale, data, or analysis for making the revisions inhibits stakeholders from offering more than preliminary comments at this time. If Commission consideration of the proposed UBP revisions is not stayed or withdrawn, then NEM reiterates its suggestion that a Staff-led technical conference to explain the proposed UBP revisions should be convened to facilitate stakeholder understanding and dialogue in order to develop an informed record. After a technical conference is convened, the Staff should issue an updated proposal reflecting industry input received, and the Commission should accept additional comments from the industry.

A. Independent Third Party Verification Requirements - Proposed Section 5.B.2., UBP Section 5, Attachment 1.A.

The Commission proposes to revise existing UBP Section 5.B.2., which currently requires independent third party verification of door-to-door and telephonic enrollments, so as to extend the verification requirement to electronic enrollments, scheduled appointments and direct mail sales as well. NEM opposes this proposal for a number of reasons. The Commission adopted the third party verification requirement for door-to-door and telephonic enrollments in February 2014.[8] At that time the Commission noted, "[b]ecause we receive few complaints about enrollments resulting from direct mail campaigns or electronic authorizations, we will not extend a requirement for independent TPV to those marketing modes at this time."[9] There is absolutely

[8] Cases 12-M-0476, 98-M-1343, 06-M-0647 and 98-M-0667, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets, issued February 25, 2014.
[9] Id. at 28-29.

no evidence in the record to support a different conclusion now. A consumer's decision to enroll electronically with an ESCO or to respond to a direct mailer does not implicate concerns about high-pressure sales tactics because those types of enrollments are independently initiated by the consumer.

The Commission explained in its 2015 Rehearing Order that "[t]he independent TPV requirement is intended to protect customers from high-pressure sales channels."[10] It declined to impose the TPV requirement in the case of ESCOs conducting business at public locations such as trade shows or mall kiosks because in those cases, "consumers can easily extricate themselves from unwanted marketing by walking away. Therefore, the independent TPV requirement will not be extended to these situations."[11] This same logic clearly applies to electronic enrollments, direct mailers and scheduled appointments because in all of these cases the consumer has the ability to "easily extricate themselves from unwanted marketing" – by closing the webpage, discarding the mailer or cancelling the appointment.

With particular regard to electronic enrollments, requiring an independent TPV undermines and is contrary to the federal and state electronic signature laws that expressly recognize the validity of electronic signatures for the purposes of engaging in commerce.[12] Internet commerce is a widely accepted form of business commerce today. The UBP already includes at Section 5, Attachment 2, an extensive process with which ESCOs must comply to substantiate a consumer's electronic enrollment. There is no record showing that this process is deficient in any way. Adding an

[10] Cases 12-M-0476, 98-M-1343, 06-M-0647 and 98-M-0667, Order Granting and Denying Petitions for Rehearing in Part, issued February 6, 2015, at page 13.
[11] Id.
[12] Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et. seq.; New York State Electronic Signatures and Records Act, New York State Technology Law, Article 3.

unnecessary TPV requirement will cause website enrollments to become very expensive and difficult to maintain, and without any justification for the change.

B. Third Party Verification Calls To be Terminated if Customer Asks Any Questions – Proposed UBP Section 5, Attachment 1.A.

The Commission proposes to revise UBP Section 5, Attachment 1.A. to require that a TPV be terminated, "if the customer asks any questions with respect to the agreement during the process." NEM opposes this restrictive, no-tolerance policy toward consumer questions because it is contrary to the underlying consumer protection goals of the UBP. If a consumer realizes he or she has a question during the TPV, the consumer should be entitled to ask and receive an answer. The Commission is assuming by this proposal that ANY question a consumer may have would call into question the underlying validity of the enrollment. That is an unsubstantiated presumption. A consumer may ask questions as a way to *confirm* its own understanding of the transaction, rather than due to a lack of disclosures, for example. The consumer may need to ask a question because the verbiage required to be employed during the verification is somehow unclear without respect to the substance of the transaction underlying the enrollment; or perhaps the representative garbled his words; or perhaps the consumer was momentarily distracted and needed to ask a question to ensure they heard the verification question correctly. A strict "no questions" policy would unjustifiably end the verification in these instances. In operation and effect, the proposal will place ESCOs in an untenable position of having to terminate TPVs based on legitimate enrollments, while casting a false negative impression with the consumer that unnecessarily casts the transaction in a damaging light. Given the foregoing, the proposal to require a TPV to be terminated whenever a consumer asks a question is unnecessarily restrictive and burdensome and should not be adopted.

C. Requiring That A Customer Be Asked About its Low Income Assistance Program Status in a Third Party Verification – Proposed UBP Section 5, Attachment 1.A.

The Commission is proposing to require that TPV scripts be extended to include asking the consumer, "Do you participate in your utility's low-income assistance program?" Given the current status of the Low Income Moratorium Orders, it is inappropriate to memorialize this requirement into the UBP. The Albany Supreme Court's September 28, 2016, Order to Show Cause[13] prohibited the Commission from "acting on or implementing the Moratorium Orders in any way." The instant proposal clearly falls within that prohibition.

Notwithstanding the foregoing, and without waiving any rights, claims, arguments or remedies, NEM notes that if a moratorium on ESCO service to low income customers were to be implemented in the manner the Commission previously outlined, there would be no practical reason to ask a consumer this question in the TPV anyway. Under the Commission's scheme, if a low-income customer were to be enrolled by an ESCO, that enrollment would be rejected by the utility. There is no need to gratuitously cause the consumer any embarrassment or violate any privacy rights by asking the customer whether he or she participates in a low-income assistance program.

D. Requiring the Third Party Verification to be Performed No Less Than Thirty Minutes After the Marketer Has Left the Premises – Proposed UBP Section 5, Attachment 1.A.

The Commission proposed to additionally change the TPV requirements such that TPVs, "for door-to-door marketing and appointments, should be conducted no less than 30 minutes after the marketer has left the premises." The required TPV questions are proposed to be expanded to

[13] National Energy Marketers Association et al. v. New York Public Service Commission, Alb. Co. Index No. 5680-16.

include asking whether the marketer left the premises, "more than 30 minutes prior to this call?" NEM notes that the Commission's February 2014 Order[14] adopted the requirement that sales resulting from door-to-door or telephonic marketing be subject to a TPV after the sales agent leaves the customer's premises or the marketing call ends. Neither the February 2014 Order or the February 2015 Order on Rehearing[15] adopted a time period for when the TPV must occur. No analysis or evidence has been adduced to demonstrate that the current requirement for performing a TPV after the departure of the door-to-door agent, without adherence to a strict, arbitrary timing requirement, has been deficient. Indeed, requiring a thirty-minute delay to the TPV injects inefficiency into the enrollment process without justification – if a TPV agent is available to perform the verification 26 minutes after the door-to-door sales representative has left the customer premises it is entirely arbitrary to delay the process. Moreover, requiring a customer to verify that at least thirty minutes has elapsed since the representative has left is unnecessary, needlessly injects an element of distrust into the transaction and does not contribute to the overall substantiation that the consumer understands the product and/or service for which they contracted. Confirmation that the door-to-door representative has left the premises, as is currently required, is more than sufficient.

Although no reason for the proposal to require the thirty-minute delay of the TPV was offered by the Commission, the proposal may have been in response to a perceived issue of door-to-door representatives returning when verification calls fail after they have already left. In that case, a more appropriate solution for consideration would be to revise the UBP to require that the sales

[14] Cases 12-M-0476, 98-M-1343, 06-M-0647 and 98-M-0667, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets, issued February 25, 2014.
[15] Cases 12-M-0476, 98-M-1343, 06-M-0647 and 98-M-0667, Order Granting and Denying Petitions for Rehearing in Part, issued February 6, 2015.

representative cannot be present, and also cannot return, after the verification call has been completed.[16]

E. Requiring the ESCO Sales Presentation and Third Party Verification to Direct the Customer to Compare the Utility Rate on its Bill with the ESCO Rate – Proposed UBP Section 5, Attachment 1.A. and 2.A., Proposed UBP Section 10.C.1.c.

The Commission is proposing to require in Section 10.C.1.c. that ESCO sales presentations include a statement to, "advise the customer to check the utility's price on customer's bill as a comparison to the price that ESCO is offering." The third party verification script in Section 5, Attachment 1.A. is proposed to be expanded to include asking, "Did the marketer advise you to check your utility bill for the utility's rate as a comparison to the price that you were offered?" The electronic enrollment information requirements in Section 5, Attachment 2.A. are also proposed to be expanded to include, "[a] statement advising customer to check their utility's rate to compare the rate offered by ESCO." NEM strongly opposes the institutionalization of this false metric into the UBP. As an initial matter, proposing this change to the UBP is improper because the illegitimacy of comparing the bundled utility rate to ESCO rates is one of the chief issues underlying the Commission's Market Reset Order and related Track I proceeding. Attempting to incorporate this standard into the UBP prior to the conclusion of the Track 1 case would be a premature prejudgment of the outcome of Track I.

From a consumer protection perspective, as NEM has oft-repeated in its comments to the Commission, the utility's claimed price to compare is not a valid comparison to ESCO pricing. Among other things, and as a threshold matter, the persistent failure to fully unbundle utility

[16] See e.g. Ohio Administrative Code 4901:1-21-06(D)(1)(h)(ii) which provides that, "The independent third-party verifier must confirm with the customer that the sales agent has left the property of the customer. The sales agent is not to return before, during, or after the TPV process."

delivery rates to capture the fully embedded costs to the utility of providing no notice, last resort commodity service since the initial effort in the Unbundling Case[17] undertaken over a decade ago precludes a proper comparison. Utility prices do not reflect current, market based conditions. They are subject to after-the-fact reconciliations and prior period adjustments that distort prices, particularly when utilities are allowed to apply credits to their pricing during peak months to undermine the value of competitive commodity offerings.[18] Moreover, the utility price is adjusted on a monthly basis. It would be inappropriate to compare an ESCO product offered for a different term, akin to comparing variable and fixed rate mortgages. In addition, ESCO pricing may include renewable energy components and other value-added services and products that the utilities do not provide.

Finally, requiring the ESCO to ask this question would effectively require the ESCO to give the false impression that it somehow endorses, or at least legitimizes, the utility price as a valid comparison. ESCOs should not be required to promote the products of utilities, their direct competitors, or to endorse a comparison that is improper or misleading.

Moreover, the TPV requirement, and corresponding verification questions, were only intended to be applicable to mass market customers. The proposed additional language in Section 10.C.1.c. would include the requirement to direct customers to check the utility price in comparison to the ESCO price even though this section is not limited to service to mass market customers. This

[17] Case 00-M-0504, Order Directing Expedited Consideration of Rate Unbundling, issued March 20, 2001, finding that, "one prerequisite to fostering market development is the conduct of 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," at page 1.

[18] See Cases 16-G-0431 and 16-G-0554, Comments of NEM, dated December 5, 2016, recommending that the Commission reevaluate and revise its regulations pertaining to the utilities' gas cost reconciliation processes and procedures because of the serious longstanding negative impact that the utilities' gas cost estimates coupled with corresponding retroactive adjustments to utility commodity rates have had on the competitive retail gas market in the State of New York.

proposed language is therefore not properly included Section 10.C.1.c. Customized sales and marketing to sophisticated commercial customers of individually tailored commodity offerings does not require the imposition of a general requirement to "check the utility rate."

For these reasons, the proposal to modify the UBP to require the ESCO sales presentation and third party verification to direct the customer to compare the utility rate on its bill with the ESCO rate should not be adopted.

F. New Definition of "ESCO Agent" – Proposed UBP Section 1 and UBP Section 5.I.

A new term, "ESCO Agent," is proposed to be added to the UBP Definitions Section 1. ESCO Agent is proposed to be defined as:

> A customer may authorize an ESCO to act as the customer's agent (ESCO agent) in establishing a new delivery account for distribution utility service. The ESCO agent shall retain, and produce upon request, documentation that the customer authorized the ESCO to act as the customer's agent for this purpose only.

This new definition is coupled with modifications to the language in UBP Section 5.I. This section pertains to ESCOs acting as a customer's agent for the purpose of establishing a new delivery account. The Section is proposed to be modified to explicitly include language about the agency being limited, "for this purpose only." It would also be modified to state that, "[t]he customer's Agent is not authorized to cancel a pending enrollment, an enrollment with a different ESCO or utility, or place and/or lift utility account blocks where a customer has authorized a change in provider." The Commission has not offered a rationale or explanation for this change, let alone developed a record supporting it. Without having been provided the benefit of that understanding of the proposal, it appears that the proposed definition of "ESCO Agent" is overly restrictive and not accurately reflective of the full range of ESCO

responsibilities associated with serving their customers. NEM requests clarification of the basis for this proposed change before considering it and submitting additional comments.

G. Staff Requests for "Any and All Information" as Additional Ground for Commission Sanctions – Proposed UBP Section 2.D.5

UBP Section 2.D.5. is proposed to be modified to add the grounds of "failure to comply to [sic] Department requests for any and all information," as a basis for finding an ESCO to be non-compliant and subject to Commission sanctions. NEM submits that the "any and all" language is far too broad and exceeds the scope of Commission authority over ESCOs. In this regard, it is important to distinguish the Commission's statutorily-authorized oversight of utilities and utility books and records as a tool to prevent the exercise and abuse of utility monopoly market power and to ensure utility rates are just and reasonable. The Commission was not granted the statutory authority to exercise such oversight with respect to competitive ESCO entities, which do not have the ability to exercise utility monopoly market power and whose prices are subject to the discipline of the market rather than a regulatorily-determined process.

Moreover, an ESCO's participation in the New York market cannot form the basis of virtually limitless requests by Staff for "any and all information." Any such requests must be reasonable and germane to the ESCO's energy-related business in New York State. An ESCO's failure to respond to a Staff request for information that is not reasonably related to its New York State energy business should not constitute a sanctionable action.

H. ESCO Compliance with the Clean Energy Standard – Proposed UBP Section 2.G.

ESCO compliance with the Clean Energy Standard (CES) is proposed to be included as UBP Section 2.G. pertaining to ESCO eligibility requirements. This includes both the renewable energy standard and zero emissions credits (ZECs). NEM submits that it is premature to include zero emissions credits provisions in the UBP while there is outstanding federal and state litigation pertaining to the validity of the ZEC program. The inclusion of the ZEC program in the UBP should be held pending the ultimate resolution of those cases.

Notwithstanding the pending ZEC litigation, if language is included in the UBP regarding ESCO compliance with the Clean Energy Standard, NEM recommends that the language used in UBP provisions more closely match the language included in the Commission's Clean Energy Standard Order.[19] This is necessary in order to avoid the inadvertent creation of conflicting or disparate compliance obligations for ESCOs. In this regard, NEM suggests that the language used in Ordering Paragraphs 3 and 10 of the CES Order[20] should be used as a guide.

Additionally, prior to incorporating the ZEC obligation into the UBP, NEM urges the Commission to resolve the outstanding petition filed with the Commission pertaining to the timing mismatch between when ESCO payments are calculated and billed and the actual load served by the ESCO.[21] The Petition requests that the Commission require NYSERDA to use an estimation method, "that reduces the variance between the payment estimate and actual payment obligations by utilizing

[19] Cases 15-E-0302 and 16-E-0270, Order Adopting A Clean Energy Standard, issued August 1, 2016.
[20] Id. at pages 154-156.
[21] Case 15-E-0302, Request of Liberty Power Holdings LLC for Clarification and Alternate Request for Rehearing, dated December 19, 2016.

less-dated usage data."[22] Guidance on this issue is critical to ESCO compliance and should be a Commission priority.

I. Extension of Document Retention Requirements - Proposed UBP Section 5.K.3. and UBP Section 5, Attachment 1.D., Attachment 2.E. and Attachment 3.B.

The Commission is proposing to modify the existing ESCO document retention requirements pertaining to customer authorizations to switch at UBP Section 5.K.3. as well as UBP Section 5, Attachment 1.D., Attachment 2.E. and Attachment 3.B. to change from the current requirement to retain documentation of a customer's authorization to switch for the longer of two years or the length of the sales agreement. Under the proposed language, ESCOs would be required to retain "from the effective date of the agreement and/or authorization for as long as the customer remains with the ESCO, and for two years thereafter, documentation of a customer's authorization to switch." The Commission has not provided any rationale for the increased duration of the document retention requirement.

From a practical perspective, if a customer enters into a subsequent contract with an ESCO, the most relevant document for the ESCO to retain is the most recent contract. The proposed language, however, appears to focus on the documentation from the initiation of the relationship. In addition, the inclusion of the phrase "agreement and/or authorization," makes it unclear as to exactly which documents are required to be retained. This should be clarified to ensure ESCO compliance.

Finally, the Commission should also bear in mind, whether a customer should reasonably be permitted to question the underlying validity of the enrollment after prolonged periods of service with an ESCO. After many years of service with an ESCO, it does strain credulity for a customer

[22] Id. at 3.

to claim that there was a problem with an enrollment. The Commission is requested to keep this in mind when crafting extended document retention requirements. Lengthy document retention periods drive up ESCO information technology storage costs and impact the competitiveness of ESCO pricing.

J. Requiring ESCOs to Offer Budget Billing or Levelized Payment Plans to Residential Customers – Proposed UBP Section 5.L.2.

Section 5.L.2. is proposed to be modified to require ESCOs to offer residential customers a voluntary budget billing or levelized payment plan. Specifically, "[t]he ESCO is responsible for determining the budget bill amount and must evaluate each budget billed account on a quarterly basis for conformity with actual billings. Each such plan shall provide that bills clearly identify consumption and state the amounts that would be due without levelized or budget billing." The Commission has not offered any rationale or purported benefit to be derived in imposing such a requirement. NEM opposes this proposal for a number of reasons.

First, it is not feasible under the billing systems of many of the New York utilities for ESCOs to offer budget billing. Many utilities use rate ready billing under which the ESCO sends the utility the price to be billed, not the amount to be billed. The ESCO doesn't know the amount to be billed without reference to the volume, but this information is not provided by these utilities. This precludes ESCOs from offering budget billing to customers in those service territories. Absent utility agreements to change their billing systems, ESCOs cannot comply with this requirement in utility rate ready billing service territories. However, it bears noting that if a utility offers its commodity sales customers the option of budget billing, then the utility should also be able to accommodate ESCOs providing the option of budget billing to their customers.

Budget billing is also not the panacea for customers that some perceive it to be. Indeed, budget billing has the potential to confuse consumers when they receive their true-up bill. Under general industry practice, when an ESCO customer is on budget billing, the utility consolidated bill does not reflect the overage of the ESCO customer's usage. By comparison, if a customer takes utility commodity service and is on budget billing, the overage of the customer's usage will be shown on the bill. ESCO customers need this information to make better energy usage decisions. ESCO customers cannot take steps to reduce energy usage unless they are informed of what their usage is. Without this information, ESCO budget billed customers may experience "sticker shock" when their usage is reconciled. In some cases, this can result in a large amount due from the unbilled charges.

K. Community Choice Aggregation – Proposed UBP Section 5.A. and 5.K.1

Implementation of the Community Choice Aggregation (CCA) program is proposed to be reflected in UBP Section 5.A. and 5.K.1. The proposed modification to Section 5.A. would exclude customer enrollments performed under CCA programs from the generally applicable two-step process of obtaining customer agreement to an offer followed by the execution of the enrollment by the ESCO at the utility. The proposed modification to Section 5.K.1. would read as follows: "A change of a customer to another energy provider, without the customer's authorization, commonly known as slamming, is not permitted, *except when the customer is enrolled in a Community Choice Aggregation (CCA) program, in which case this does not apply*." (proposed new language in italics). Without commenting on the merits of the Commission's decision to approve CCA programs, NEM submits that the proposed wording can potentially be read as an approval of customer slamming. This is not an appropriate or accurate expression of Commission

policy. NEM recommends that this language be dropped or reformatted to better reflect the details of the Commission's CCA Order.

L. Prohibition on Charging Early Termination Fee in Case of Death of Consumer Before the End of a Contract – Proposed UBP Section 1

The Commission proposed to add language to the existing definition of "Termination Fee" included in Section 1 of the UBP to include the following phrase: "In the event the customer is deceased before the end of such contract term, no fee for termination or early cancellation shall be assessed." Although not stated in the Commission's Notices, this language change is intended to implement the newly passed Section 399-zzzz of the General Business Law that prohibits energy providers, amongst other entities, from charging an early termination fee when a customer dies before the end of a contract. NEM's comment on this proposal is limited to a request for clarification that an ESCO should be entitled to verify the customer's death, by for example, requesting a copy of the death certificate.

M. Modification of ESCO Representative Badge Information – Proposed UBP Sections 10.C.1.b.1. and 10.C.1.d.

The Commission proposes to modify the information currently required to be displayed on the badges of ESCO marketing representatives as set forth in UBP Sections 10.C.1.b.1. and 10.C.1.d. Specifically, rather than include the representative's full name on the badge, it would include the representative's first name and employee identification number. This change was suggested in a petition to the Commission in response to concerns about the safety of representatives. NEM supports the proposal as a well-reasoned approach to ensuring the safety of ESCO marketing representatives while also providing a means for consumers to accurately identify a representative and maintain a chain of accountability for a representative's actions.

IV. Conclusion

For the reasons set forth above, NEM recommends that the UBP proposals be withdrawn or stayed. At a minimum, prior to any further Commission action, Staff should be directed to convene a stakeholder collaborative to review the proposals and explain the basis for the changes.

Sincerely,

s/Craig G. Goodman

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