

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

DIRECT TESTIMONY

OF

UTILITY INTERVENTION UNIT/NEW YORK ATTORNEY GENERAL PANEL

Dated: September 15, 2017
Albany, New York

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1 **I. INTRODUCTION AND OVERVIEW OF TESTIMONY**

2 Q. Please state your name, title, and business address.

3 A. My name is Gregg C. Collar. I am a Utility Program Analyst with the Utility
4 Intervention Unit (UIU) of the New York State Department of State's Division of
5 Consumer Protection. My business address is 99 Washington Avenue, Suite
6 640, Albany, New York 12231-0001.

7
8 My name is Jane M. Azia. I am the Bureau Chief of the Consumer Frauds and
9 Protection Bureau of the New York Office of the Attorney General (NYAG). My
10 business address is 120 Broadway, 3rd Floor, New York, NY 10271.

11
12 Q. Mr. Collar, please briefly summarize your qualifications and employment
13 background.

14 A. I received a Bachelor of Arts in Mathematics from Hartwick College in 1995. Since
15 March 2005, I have been employed as a Utility Program Analyst, initially with the
16 New York State Consumer Protection Board, and, beginning in April 2011, with the
17 New York State Department of State's UIU. In this position, I am primarily
18 responsible for analyzing utility low-income and service quality performance
19 measurement programs currently in place and identifying reforms that would
20 enhance their reach and effectiveness. I research and draft formal documents
21 advocating UIU's position in Public Service Commission (PSC or Commission)
22 proceedings and represent UIU in collaborative proceedings, negotiations and
23 other meetings advocating for low-income programs, service quality performance

1 issues and other matters of interest to UIU. I serve as UIU's representative to the
2 Low-Income Forum on Energy and the Natural Gas Reliability Advisory Group, and
3 UIU's representative and Chairperson on the Board of Directors of the
4 telecommunications Targeted Accessibility Fund, which oversees public benefit
5 programs including Lifeline and E911.

6 I participated as UIU's representative in Case 01-M-0075, which examined
7 Niagara Mohawk Power Corporation's (Niagara Mohawk or Company) low-income
8 assistance program, as well as in a collaborative in Cases 05-E-0934 and 05-G-
9 0935 that addressed Central Hudson Gas & Electric Corporation's (Central
10 Hudson) low-income program. I also conducted research and drafted documents
11 pertinent to UIU's participation in the investigation of the July 2006 electric power
12 outage of Consolidated Edison of New York Inc.'s (Con Edison) Long Island City
13 Electric Network, Case 06-E-0894, and the investigation of the prudence of Con
14 Edison regarding the July 2007 steam pipe rupture in Case 08-S-0153. In Case
15 07-M-0548, the proceeding regarding the Energy Efficiency Portfolio Standard
16 (EEPS), I served as the UIU representative in the working group related to the
17 establishment of natural gas efficiency goals and the working group assigned to
18 help customers overcome barriers to energy efficiency with the potential use of an
19 on-bill financing program. I also served as the UIU participant in the EEPS
20 Evaluation Advisory Group. Additionally, I have been involved in the Reforming
21 the Energy Vision (REV) proceeding, Case 14-M-0101, and in Case 14-M-0565,
22 the proceeding addressing affordability for low-income customers (Affordability
23 Proceeding). Recently, I was a member of the Low and Moderate Income (LMI)

1 Clean Energy Initiatives Working Group established by the Clean Energy Advisory
2 Council that was tasked with investigating and evaluating alternatives to the
3 current delivery of rate payer-funded clean energy services to LMI customers to
4 improve value for the customers served. Currently, I am the primary active
5 participant representing UIU in the LMI Working Group in Phase Two of the Value
6 of DER proceeding.

7

8 Q. Mr. Collar, have you previously testified and/or been involved in negotiations in
9 PSC proceedings?

10 A. Yes, I have submitted testimony in many rate proceedings involving Con Edison,
11 Cases 08-E-0539, 09-G-0795, 09-E-0428, 13-E-0030/13-G-0031 and 16-E-0060
12 and 16-G-0061; Orange and Rockland Utilities, Inc. (Orange & Rockland), Cases
13 08-G-1398, 10-E-0362, 11-E-0408 and 14-E-0493/14-G-0494; Central Hudson,
14 Cases 09-E-0588/09-G-0589, 12-M-0192 and 14-E-0318/14-G-0319; New York
15 State Electric and Gas Corporation (NYSEG) and Rochester Gas and Electric
16 Corporation (RG&E), Cases 09-E-0715 *et. al* and 15-E-0283 *et. al*; Corning Natural
17 Gas Corporation (Corning), Case 11-G-0280; Niagara Mohawk, Cases 10-E-0050
18 and 12-E-0201/12-G-0202; and KeySpan Gas East Corp. dba Brooklyn Union of
19 L.I. (KEDLI) and The Brooklyn Union Gas Company dba National Grid NY
20 (KEDNY), Cases 16-G-0058 and 16-G-0059. Most recently, I submitted testimony
21 in the rate proceedings of the National Fuel Gas Distribution Corporation (National
22 Fuel), Case 16-G-0257. In addition to these electric and gas rate case
23 proceedings, I also submitted direct and rebuttal testimony in Case 09-M-0527, a

1 proceeding that established a State Universal Service Fund, which is intended to
2 ensure local telephone service remains universally available throughout New York
3 State. Additionally, while I did not submit testimony, I represented and advocated
4 the UIU's positions in the applicable rate plan or rate plan extension proceedings
5 for KEDNY in Case 12-G-0544, Corning in Case 11-G-0280, and National Fuel in
6 Case 13-G-0136.

7

8 Q: Ms. Azia, please briefly describe your qualifications and employment background.

9 A: I have a bachelor's degree from Northwestern University and a law degree from
10 New York University School of Law. I have worked in the NYAG Bureau of
11 Consumer Frauds and Protection for more than 30 years, serving as Bureau Chief
12 since 2011. The NYAG is the chief law enforcement officer for the State and is
13 both obligated and empowered to protect the interests of the people and
14 businesses of New York. The NYAG enforces consumer protection laws, including
15 laws that prohibit fraudulent or deceptive business practices. During my tenure,
16 we have completed seven enforcement actions against energy service companies
17 (ESCOs) found to have engaged in fraudulent and illegal business practices. We
18 continue to investigate a number of ESCOs for similar practices.

19

20 Q. Ms. Azia, have you been involved in this PSC proceeding?

21 A. The NYAG and I have participated in numerous PSC proceedings advocating for
22 residential and small business consumers. The NYAG has long advocated for the
23 PSC to remedy flaws in New York's retail energy markets to protect New York

1 consumers. This has included the submission of multiple comments in support of
2 market reforms, including multiple submissions in the present proceeding.

3

4 Q. What is the purpose of the UIU/NYAG Panel's (the Panel) testimony?

5 A. The Panel will discuss — and make recommendations regarding — our position
6 on the following topics that were outlined in the Commission's December 2, 2016
7 Notice:

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

12 **Topic #6** – Whether the Uniform Business Practices (UBP) applicable to ESCOs
13 should be modified to ensure that customer abuses and overcharging by ESCOs
14 are deterred.

15 **Topic #7** – Whether door-to-door and outbound telemarketing practices of ESCOs
16 to mass market customers should be prohibited, and whether other ESCO
17 marketing practices should be prohibited?

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

23

1 **Topic # 16** – The ability of mass market customers to obtain information about
2 relative prices and offerings of ESCOs and regulated utilities and to understand
3 such information, including evidence regarding the transparency of the retail
4 market for mass market customers and the level of knowledge in that market.

5 **Topic #17** – Tools that are available in the public domain that customers can use
6 to do comparison shopping.

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

12

13 Q. Are you sponsoring any exhibits associated with your testimony?

14 A. Yes, we are sponsoring four exhibits. Exhibit __ (UIU/NYAG-1) consists of
15 responses to Information Requests (IRs) that we relied upon in preparing this
16 testimony. Exhibit _ (UIU/NYAG-2) contains the New York State Office of the State
17 Comptroller’s (OSC) *Oversight of Complaint Activity* audit report that examined the
18 handling of the consumer complaints received by the Department of Public Service
19 (DPS). Exhibit __ (UIU/NYAG-3) depicts screen shots from both the New York
20 and Texas Power to Choose websites. Exhibit _ (UIU/NYAG-4) contains six
21 settlement agreements (and a press release regarding a seventh) between the
22 NYAG and ESCOs resulting from the NYAG’s investigations into the ESCOs’
23 business practices.

1 **II. BACKGROUND**

2 Q: Please briefly describe the history of the retail energy market.

3 A: Traditionally, New York consumers purchased their gas and electric energy from
4 public utilities – vertically integrated monopolies – that generated, transmitted,
5 and sold energy as a commodity to consumers. In 1996, the PSC began
6 allowing ESCOs to compete with utilities in selling energy as a commodity.¹ The
7 purpose of allowing ESCOs to participate in the retail-energy market was to
8 create, through increased competition, lower-priced energy or more valuable
9 energy products than utilities were able to provide.² As the PSC explained,
10 “[m]arket forces overall are expected to produce, over time, rates that will be
11 lower than they would be under a regulated environment.”³ The PSC envisioned
12 that ESCOs would offer consumers lower energy prices than utilities in practice
13 because ESCOs would find more efficient and innovative ways to purchase
14 energy and pass a portion of the savings on to consumers.⁴ Allowing ESCOs to
15 operate in the retail energy market was not the PSC’s ultimate goal. Rather,
16 market restructuring is an evolving process that the PSC oversees and regulates
17 to ensure that consumers receive lower prices and other benefits.⁵ The PSC

¹ See Cases 94-E-0952 et. al., *In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Regarding Competitive Opportunities for Electric Service* (issued May 20, 1996) (“Opinion 96-12”) at 30-32.

² See Case 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Regarding Competitive Opportunities for Electric Service* (Op. 96-12), pp. 30-32 (May 20, 1996) (“Op. 96-12”); Stephen P. Sherwin, *Deregulation of Electricity in New York: A Continuing Odyssey 1996-2001*, 12 Alb. L.J. Sci. & Tech. 263 (2001). pp. 268-70.

³ Op. 96-12 at 28. See also *id.* at 30.

⁴ See Op. 96-12, at 30-31, 39.

⁵ See Op. 96-12, at 30-33; see also *id.* at 13 (explaining that retail competition brings “significant risks and requires considerable caution, and should be provided only if it is in the best interests of all consumers” (quoting recommended decision of Administrative Law Judge)).

1 explained at the outset of restructuring that it would “monitor [the] market’s
2 development” and “take corrective action should problems arise.”⁶

3

4 Q: Please briefly describe the Commission’s focus on ensuring customers have safe
5 and reliable energy service.

6 A: New York has a long-standing public policy of enabling all state residents to
7 maintain their electricity and gas service to protect their health, safety, and
8 general welfare. More than thirty years ago, the Legislature declared in enacting
9 the Home Energy Fair Practices Act (HEFPA) that the “continued provision of . . .
10 gas, electric and steam service to all residential customers without unreasonable
11 qualifications or lengthy delays is necessary for the preservation of the health
12 and general welfare and is in the public interest.”⁷ To ensure that the public can
13 purchase and access energy, HEFPA provides residential energy consumers
14 with various protections, such as procedures for customer billing, payment, and
15 complaints.⁸ HEFPA’s consumer-protection provisions have been extended to
16 ESCO consumers when charges for a commodity (natural gas and electricity)
17 and distribution of the commodity appear on a single bill through the Energy
18 Consumer Protection Act of 2002.⁹

19

⁶ Case 94-E-0952, *supra*, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services, (Op. 97-5) p. 42 (May 19, 1997) (“Op. 97-5”).

⁷ PSL § 30.

⁸ See, e.g., *id.* § 32 (termination); *id.* §§ 33-34 (multiple dwelling shut-offs); *id.* § 35 (reconnection); *id.* § 36 (deposits); *id.* § 37 (deferred payments); *id.* § 38 (budget plans); *id.* § 40 (third-party notice before termination).

⁹ See Chapter 686 of the Laws of 2002; PSL § 53.

1 Q: Please briefly describe the Commission action taken to assist low-income
2 customers to afford their electricity bill.

3 A: In January 2015, the Commission initiated Case 14-M-0565, *Proceeding on*
4 *Motion of the Commission to Examine Programs to Address Energy Affordability*
5 *for Low Income Utility Customers*, to examine the low-income programs offered
6 by the major electric and gas utilities in New York State. On June 1, 2015, DPS
7 Staff filed a Report that included a Straw Proposal for a new Statewide approach
8 to low-income programs that addressed numerous elements such as (1)
9 eligibility; (2) enrollment processes; (3) benefit structures; (4) rate discount levels;
10 (5) budgeting; (6) treatment of participant arrears; and (7) reconnection fees.
11 After a technical conference, notice and comment period, and 12 public
12 statement hearings, the Commission adopted a regulatory framework in the May
13 20, 2016 Order Adopting Low Income Program Modifications and Directing Utility
14 Filings. In that Order, the Commission adopted “a policy that an energy burden
15 at or below 6% of household income shall be the target level for all 2.3 million low
16 income households in New York” (2016 Low Income Order at 3). On February
17 17, 2017, the Commission issued an (1) Order Granting in Part and Denying in
18 Part Requests for Reconsideration and Petitions for Rehearing and an (2) Order
19 Approving the Implementation Plans with Modifications. These Orders were
20 meant to bolster the effectiveness of ratepayer funds expended to support low-
21 income customers in their ability to afford electric and gas service.

22

1 Q: Please briefly describe the history of the Commission's Orders that addressed
2 issues in the retail access market.

3 A: Since its creation of the retail-energy market, the PSC has undertaken various
4 measures to regulate the practices of ESCOs to protect consumers. At the
5 outset of restructuring, the PSC instituted "consumer protection requirements and
6 an oversight process for ESCOs" by changing the public utilities' tariff terms,
7 which govern ESCOs' use of the utilities' energy-distribution systems.¹⁰ In 1999,
8 the PSC instituted the Uniform Business Practices (UBP), a set of rules
9 governing, among other things, ESCOs' business and marketing practices.¹¹ The
10 PSC has periodically amended the UBP to institute additional consumer
11 protections.¹² In October 2012, the PSC commenced a comprehensive review of
12 the State's retail markets serving residential and small commercial customers. A
13 driving purpose of this review was to consider and address concerns over
14 ESCOs' provision of energy to low-income consumers. As the PSC observed:
15 "[C]ustomers participating in utility low-income assistance programs are more
16 likely to obtain their energy commodity from an ESCO than residential customers
17 who do not participate in these programs. Further, [Department of Public
18 Service] Staff reports that some ESCOs have substantially more customers
19 participating in the utility's low-income assistance programs, on a percentage
20 basis, than the overall population. Coupled with the fact . . . that many residential

¹⁰ See Op. 97-5, at 3; see *id.* at 41-44.

¹¹ See 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); see *generally* N.Y. Public Service Commission, Uniform Business Practices ("UBP"), at 6-15, 61-64 (Feb. 2016).

¹² See, e.g., 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).

1 ESCO customers pay more than had they purchased their energy commodity
2 from the utility, this raises a concern that the current operation of the retail energy
3 markets may be in conflict with one of our statutory policy requirements.
4 Specifically, it is this Commission’s policy that the continued provision of electric
5 and natural gas service to customers is in the public interest.”¹³

6 Following that review, in February 2014, the PSC issued an Order
7 concluding that, although many ESCOs provided large commercial consumers
8 with price savings or other valuable products, ESCOs had failed to provide such
9 benefits to their residential and small commercial consumers – including low-
10 income consumers.¹⁴ The PSC also determined that the retail-energy market for
11 residential and small commercial consumers was not functioning as intended;
12 many ESCOs were simply “generating revenues by offering consumers little
13 more than higher prices.”¹⁵ The PSC further found that ESCOs were often
14 reaping such profits from low-income consumers. The PSC concluded that
15 burdening consumers with higher ESCO prices not only harmed vulnerable low-
16 income consumers but also undermined the effectiveness of the public-
17 assistance programs, which were designed to lower the overall energy bills of
18 such consumers.¹⁶ To address these consumer harms, the PSC’s February 2014
19 Order amended the UBP.¹⁷

¹³ 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 Instituting Proceeding and Seeking Comments Regarding Operation of the Retail Energy Markets in New York State p. 9 (issued October 19, 2012).

¹⁴ Case 12-M-0476, *supra*, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets pp. 2-4, 10-11 (issued February 25, 2014).

¹⁵ *Id.* at 3; *see also id.* at pp. 2-4.

¹⁶ *Id.* at 22-24.

¹⁷ *Id.* at 56-59.

1 One such amendment required that ESCOs provide low-income
2 consumers (1) a guarantee of “savings over what the customer would otherwise
3 pay to the utility” for energy and/or (2) “energy-related value-added services that
4 are designed to reduce customers’ overall energy bills.”¹⁸ The PSC later stayed
5 implementation of the February 2014 Order to consider petitions for rehearing
6 and allow for additional public comment on the appropriate terms and conditions
7 for ESCOs’ participation in the retail-energy market for low-income consumers.¹⁹

8 After considering extensive input from various stakeholders, the PSC
9 issued an order in February 2015 reaffirming its determination that ESCOs
10 serving low-income consumers must offer either actual price savings on energy
11 or energy-related products that provide real financial value.²⁰ The PSC also
12 ordered DPS to hold a series of public meetings with DPS Staff and various
13 stakeholders (the Collaborative) to address implementing the conditions
14 contained in the February 2015 Rehearing Order.²¹ The Collaborative included
15 several ESCOs and groups representing ESCOs; all major New York utilities;
16 and consumer advocate groups such as UIU, the Public Utility Law Project
17 (PULP), the American Association of Retired Persons, and the City of New
18 York.²²

¹⁸ *Id.* at 24.

¹⁹ Case 12-M-0476 *et.al.*, *supra*, Order Granting Requests for Rehearing and Issuing a Stay (issued April 25, 2014).

²⁰ Case 12-M-0476 *et. al.*, *supra*, Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015).

²¹ *Id.* at 7.

²² See Case 12-M-0476 *et. al.*, Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services Companies p. 2 (filed November 5, 2015).

1 Participants in the Collaborative met five times in 2015, engaged in other
2 small-group discussions, and communicated frequently.²³ Based on these
3 meetings and discussions, the Collaborative issued an extensive report
4 (Collaborative Report) concluding that “few, if any, ESCOs intend to offer a
5 product which guarantees that the customer will pay no more than would have
6 been paid had energy been purchased from the utility.”²⁴ Protections for low-
7 income consumers were a particular focus of the Collaborative. For example, the
8 Collaborative evaluated whether any energy products offered by ESCOs could
9 provide real savings on energy and preserve the effectiveness of financial
10 assistance programs. Ultimately, the Collaborative Report reflected the
11 consumer advocates’ view “that any value added service needs to guarantee
12 [low-income] customers either a lower bill or a reduction in energy usage.”²⁵ The
13 Collaborative Report also noted the consumer advocates’ position that any fixed-
14 price product – meaning a product that sets a fixed price for energy rather than a
15 price that fluctuates with the market – that charged low-income consumers more
16 for energy than the utility would have charged did not provide low-income
17 consumers with any real financial savings.²⁶ As the consumer advocates
18 explained, low-income consumers who are interested in price consistency would
19 be better off enrolling in their utility’s budget billing program – which provides
20 consumers with the utility’s lower energy prices without extracting a premium for

²³ *Id.*

²⁴ *Id.* at 32.

²⁵ *Id.* at 33.

²⁶ *See Id.*

1 a fixed monthly price.²⁷ Consumer advocates also explained that ESCOs had
2 failed to demonstrate that any other energy products, such as advanced
3 thermostats, actually provided financial savings to consumers, including low-
4 income consumers.²⁸

5 In February 2016, the PSC issued an Order requiring that ESCO products
6 offered to all mass market customers either guarantee savings compared to
7 utility prices or obtain at least thirty percent of energy commodity from renewable
8 sources. Three ESCO representatives brought article 78 actions challenging that
9 order. Supreme Court, Albany County held that the PSC had broad statutory
10 authority to regulate ESCOs' pricing practices; on appeal, the State of New York
11 Supreme Court, Appellate Division Third Judicial Department upheld this
12 conclusion.²⁹ However, the Appellate Division vacated certain portions of the
13 order and remitted the matter to the PSC for further proceedings.³⁰

14 In July 2016, the PSC issued an order (July 2016 Order) instituting a
15 moratorium on ESCOs selling energy to low-income consumers going forward.³¹

²⁷ *Id.* at 33-34.

²⁸ *Id.* at 41-42.

²⁹ See *National Energy Marketers Association et al. v. New York State Public Service Commn.*, 2016 N.Y. Slip Op. 26233, at *1 (Sup. Ct. Albany County July 22, 2016); *Retail Energy Supply Association et al. v. New York State Public Service Commn.*, (Albany County Index No. 870-16); *Family Energy Inc. et al. v. New York State Public Service Commn.*, (Albany County Index No. 874-16), Decision/Order issued July 22, 2016 (Zwack, J); *aff'd Matter of National Energy Marketers Assn. v. Pub. Serv. Commn.*, 2017 NY Slip Op 05901 (July 27, 2017) and *Matter of Retail Energy Supply Assn. v. Public Serv. Commn.*, 2017 NY Slip Op 05908, at *7 (July 27, 2017) (stating, "(i)n fact, it is the PSC's broad jurisdiction that enabled it to allow ESCOs access to utility systems in the first place. The PSC essentially maintains that this same authority allows it to impose limitations on ESCO rates as a condition to continued access. We agree.").

³⁰ *National Energy Marketers Association et al. v. New York State Public Service Commn.* at *9; *aff'd in part, Matter of National Energy Marketers Assn. v. Pub. Serv. Commn.*, 2017 NY Slip Op 05901 (July 27, 2017) and *Matter of Retail Energy Supply Assn. v. Public Serv. Commn.*, 2017 NY Slip Op 05908, at * 8-9 (July 27, 2017).

³¹ See Case 12-M-0476, Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies pp. 1, 17-18 (issued July 15, 2016).

1 Based on the extensive record developed over years of administrative
2 proceedings, the PSC determined that this moratorium was necessary to protect
3 low-income consumers because ESCOs were unable or unwilling to offer
4 products to low-income consumers that would actually provide those consumers
5 with any cost savings on energy compared to the rates charged by utilities.³² The
6 PSC also concluded that the moratorium was “necessary to ensure that the
7 financial benefits provided to [low-income consumers] through utility low-income
8 assistance programs are not absorbed by ESCOs, who in turn, provide gas and
9 electricity at comparatively higher prices, without any corresponding value to”
10 financially vulnerable consumers.³³

11 Several stakeholders, including the Retail Energy Supply Association
12 (RESA) and the National Energy Marketers Association, filed petitions with the
13 PSC seeking clarification and/or rehearing regarding the July 2016 Order. In
14 September 2016, the PSC issued an order resolving these petitions. The PSC
15 reaffirmed its determination that a moratorium was required to protect low-
16 income consumers from ESCOs’ abusive pricing practices because the
17 Collaborative proceedings had made clear that ESCOs would not provide any
18 price guarantees or valuable energy products to low-income consumers “anytime
19 in the near future.”³⁴ The National Energy Marketers Association, BlueRock
20 Energy, Inc., Residents Energy, LLC and Verde Energy USA New York, LCC
21 (collectively NEMA) and RESA then filed lawsuits seeking a temporary

³² *Id.* at 17-18.

³³ *Id.* at 10.

³⁴ Case 12-M-0476 *et. al., supra*, Order on Rehearing and Providing Clarification p. 14 (issued September 19, 2016).

1 restraining order (TRO) and a permanent injunction of the PSC's July 2016 and
2 September 2016 Orders. On September 28, 2016, the Albany County Supreme
3 Court issued an Order to Show Cause that included a TRO preventing the
4 implementation of the PSC's July and September Orders until further order from
5 the Court.³⁵

6 In October 2016, the PSC published a Notice of Proposed Rulemaking in
7 the State Register, advising that, *inter alia*, the PSC was considering whether to
8 continue, discontinue, or modify the arrangements set forth in the July 2016 and
9 September 2016 Orders, either on a temporary, fixed-term, or permanent basis.³⁶

10 In December 2016, following a full statutory notice and comment period,
11 the PSC issued an Order (the December 2016 Order) that, on a nonemergency
12 basis, reaffirmed the necessity of the protections in the July 2016 and September
13 2016 Orders.³⁷ The December 2016 Order thus converted the moratorium in the
14 July 2016 and September 2016 Orders into a permanent prohibition on ESCO
15 service to low-income consumers by prohibiting ESCOs from enrolling new low-
16 income consumers or renewing the contracts of existing low-income
17 consumers.³⁸ However, the December 2016 Order permitted ESCOs willing to
18 guarantee savings to low-income consumers to seek a waiver from the general
19 prohibition.³⁹ The PSC noted that it would continue pursuing reforms to the retail

³⁵ *Matter of National Energy Marketers Assoc. et al. v New York State Public Service Commn.*, (Albany Co. Index No. 5860-16); *Matter of Retail Energy Supply Assoc. et al. v New York State Public Service Commn.*, (Albany Co. Index No. 5693-16), slip op. at *20 (June 30, 2017).

³⁶ 38 N.Y. Reg. 16, 16-17 (Oct. 5, 2016).

³⁷ Case 12-M-0476 *et. al.*, *supra*, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State p. 3 (issued December 16, 2016).

³⁸ *Id.* at 19-23; 26-28

³⁹ *Id.* at 24-25.

1 market for mass market customers and that a successful resolution of those
2 issues could eventually obviate the need for the measures set forth in the
3 December 2016 Order.⁴⁰ In the meantime, the PSC deemed an immediate
4 prohibition on ESCO service to low-income consumers necessary to protect
5 those consumers from abusive conduct by the ESCOs and to protect the
6 taxpayers and ratepayers who fund the programs that provide subsidies to low-
7 income consumers.⁴¹ NEMA and RESA then amended their petition to challenge
8 the December 2016 Order, in addition to the July and September 2016 Orders.

9 On June 30, 2017, the Albany County Supreme Court issued a decision
10 dismissing the above-mentioned appeals of the Commission's July, September,
11 and December Orders. The Court observed "it has already determined" that the
12 PSC has authority to regulate ESCOs.⁴² The Court held that the PSC findings
13 regarding low-income energy customers were rational and supported by the
14 record.⁴³ Further, the court rejected "as unsupported, the notion that there is
15 value in the different products ESCOs offer."⁴⁴ The court went on to note that
16 "[i]n fact, the gift cards ESCOs offer a low-income rate payer are actually paid for
17 by the ratepayer through the HEAP assistance, and hardly meet an energy
18 need. Utilities have always had to offer fixed rate billing — it is the budget
19 programs — and ESCOs cannot claim that this is a unique service."⁴⁵

⁴⁰ *Id.* at 3-4.

⁴¹ *Id.* at 9.

⁴² *Matter of National Energy Marketers Assoc. et al. v New York State Public Service Commn.*, (Albany Co. Index No. 5860-16); *Matter of Retail Energy Supply Assoc. et al. v New York State Public Service Commn.*, (Albany Co. Index No. 5693-16), slip op. at *10-11 (June 30, 2017).

⁴³ *Id.* at 20 ("(t)he PSC's findings are well written, exceptionally comprehensive, address all of petitioners' arguments, and are well supported by the record.")

⁴⁴ *Id.* at 23.

⁴⁵ *Id.*

1 Q: Please briefly describe the history of the Panel's comments and
2 recommendations regarding issues mass market customers face in the retail
3 energy market.

4 A: UIU, and its predecessor agency the Consumer Protection Board, has actively
5 commented on and provided recommendations for additional consumer
6 protections to ensure mass market customers pay just and reasonable rates in
7 the retail energy market. The NYAG has also actively commented on and
8 provided recommendations for additional consumer protections to ensure that
9 mass market consumers are protected. A timeline is set forth below that includes
10 some of the documents the UIU and the NYAG have both submitted in
11 Commission proceedings regarding the retail energy market.

- 12 • On January 25, 2013, the NYAG submitted comments and
13 recommendations with respect to ESCO business and marketing
14 practices, recommending greater transparency in the marketplace and
15 modifications to the UBP that would increase protections for
16 consumers.⁴⁶ On February 1, 2013, UIU also submitted comments on
17 these issues, noting, among other things, that customers would be better
18 served if they had access to higher quality information and a better
19 Power to Choose website.⁴⁷
- 20 • On June 16, 2014, the NYAG submitted comments in support of ESCO
21 market reforms, including providing guaranteed savings to low-income

⁴⁶ Cases 12-M-0476 *et al.*, Comments of Eric T. Schneiderman, Attorney General of the State of New York (Jan. 25, 2013).

⁴⁷ Cases 12-M-0476 *et al.*, Initial and Reply Comments of the Utility Intervention Unit of the Department of State (Feb. 1, 2013).

- 1 consumers or value-added services designed to reduce customers’
2 energy bills.⁴⁸
- 3 • On November 3, 2015, UIU submitted comments and recommendations
4 for modifying the eligibility requirements that permit ESCOs to sell
5 electricity and natural gas in New York in order to address known
6 shortcomings in the residential ESCO market.⁴⁹
 - 7 • On January 29, 2016, UIU and the NYAG each filed comments on the
8 Collaborative Report Regarding Protections for Low Income Customers
9 of Energy Services Companies.⁵⁰ Both UIU and the NYAG noted that
10 the proposed value-added services would not provide value for low-
11 income customers.
 - 12 • On February 11, 2016, the NYAG submitted comments in support of a
13 bar on ESCOs’ serving low-income recipients unless they could meet
14 certain criteria.⁵¹
 - 15 • On March 18, 2016, UIU⁵² and the NYAG⁵³ each submitted comments on
16 the Commission Order Resetting Retail Energy Markets for Mass Market
17 Customers supporting consumer protections, including strong monitoring

⁴⁸ Cases 12-M-0476 *et al.*, Reply of Attorney General Eric T. Schneiderman in Response to Petitions for Rehearing, Reconsideration, and Clarification (June 16, 2014).

⁴⁹ Cases 15-M-0127 and 98-M-1343, UIU Comments on ESCO Eligibility Criteria (Nov. 3, 2015).

⁵⁰ Cases 12-M-0476 *et al.*, Comments of the Utility Intervention Unit on Collaborative Report Regarding Protections for Low Income Customers of Energy Services Companies (Jan. 29, 2016) (UIU ESCO Low-Income Collaborative Comments); Cases 12-M-0476 *et al.*, Comments of Attorney General Eric T. Schneiderman (Jan. 29, 2016).

⁵¹ Cases 12-M-0476 *et al.*, Reply Comments of Attorney General Eric T. Schneiderman (Feb. 11, 2016).

⁵² Cases 12-M-0476 *et al.*, Comments of the Utility Intervention Unit on Resetting Retail Energy Markets for Mass Market Customers (Mar. 18, 2016).

⁵³ Cases 12-M-0476 *et al.*, Comments of Attorney General Eric T. Schneiderman (Mar. 18, 2016).

- 1 of customer consent mechanisms and extending the recession period to
2 at least 45 days.
- 3 • On April 8, 2016, UIU and the NYAG submitted a joint statement in
4 opposition to petitions for rehearing on an order resetting retail energy
5 markets for mass market customers.⁵⁴
 - 6 • On June 6, 2016, UIU and the NYAG filed joint initial comments on the
7 SAPA Notices published on May 4, 2016 and on the Staff Whitepapers
8 on Express Consent, Performance Bonds or other Security Interests,
9 and Benchmark Reference Prices.⁵⁵ The comments focused on
10 ensuring that customers consent to any billing or service changes, and
11 supported numerous other proposed consumer protection measures.
 - 12 • On June 20, 2016, UIU and the NYAG filed joint reply comments
13 responding to the initial comments stakeholders submitted on these
14 issues.⁵⁶ UIU and the NYAG reiterated support for measures to ensure
15 that customers consent to any changes in service. In addition, UIU and
16 the NYAG supported other consumer protection measures.

⁵⁴ Cases 12-M-0476 *et al.*, Joint Statement of the Utility Intervention Unit and the Attorney General of the State of New York in Opposition to Petitions for Rehearing on Order Resetting Retail Energy Markets for Mass Market Customers (Apr. 8, 2016).

⁵⁵ Cases 12-M-0476 *et al.*, Joint Comments of the Utility Intervention Unit and the Attorney General of the State of New York on the SAPA Notices Published on May 4, 2016 and on the Staff Whitepapers on Express Consent, Performance Bonds or Other Security Interests, and Benchmark Reference Prices (June 6, 2016).

⁵⁶ Cases 12-M-0476 *et al.*, Joint Reply Comments of the Utility Intervention Unit and the Attorney General of the State of New York on the SAPA Notices Published on May 4, 2016 and on the Staff Whitepapers on Express Consent, Performance Bonds or Other Security Interests, and Benchmark Reference Prices (June 20, 2016).

- 1 • On August 30, 2016, UIU and the NYAG submitted a joint statement in
2 opposition to petitions for rehearing on an order regarding the provision
3 of service to low-income customers by energy service companies.⁵⁷
- 4 • On March 27, 2017, UIU⁵⁸ and the NYAG⁵⁹ each filed initial comments on
5 several ESCO petitions for a waiver to serve low income customers that
6 were filed in compliance with the Commission's December 2016 Order.
- 7 • On May 15, 2017, UIU filed initial comments on the proposed
8 modifications to the UBP.⁶⁰
- 9 • On May 22, 2017, UIU⁶¹ and the NYAG⁶² each filed comments on several
10 ESCO petitions for waivers to serve low income customers that were
11 filed in compliance with the Commission's December 2016 Order.
- 12

13 **III. THE PANEL'S RESPONSE TO TOPICS IN DECEMBER 2, 2016 NOTICE**

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

19

20

21 Q: Do you have a recommendation for the PSC regarding whether ESCOs should be

⁵⁷ Cases 12-M-0476 *et al.*, Joint Statement of the Utility Intervention Unit and the Attorney General of the State of New York on Petition for Rehearing on Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies (Aug. 30, 2016).

⁵⁸ Case 12-M-0476, UIU Initial Comments on Ambit New York, LLC and Zone One Energy LLC Petitions for Waiver to Serve Low-Income Customers (Mar. 27, 2017).

⁵⁹ Cases 12-M-0476 *et al.*, Comments of NYAG (Mar. 27, 2017).

⁶⁰ Cases 12-M-0476 *et al.*, UIU Comments on Revisions to the Uniform Business Practices (May 15, 2017).

⁶¹ Cases 12-M-0476 *et al.*, UIU Comments on the ESCO Petitions for Waiver to Serve Low Income Customers (May 22, 2017).

⁶² Cases 12-M-0476 *et al.*, NYAG objections to waiver petitions (May 22, 2017).

1 prohibited in total or in part from serving their current products to mass market
2 customers?

3 A: Yes. UIU and the NYAG recommend that the PSC place a prohibition on
4 ESCOs' service to mass market customers, effective immediately, unless and
5 until the additional consumer protection measures are put into place that are
6 discussed later in this testimony. The PSC may consider including an
7 opportunity for ESCOs to petition for a waiver of the prohibition and seek
8 permission to continue serving mass market customers if they offer a guaranteed
9 savings program, provided ESCOs meet the assurance criteria set forth in the
10 PSC's December 16, 2016 Order Adopting a Prohibition on Service to Low-
11 Income Customers by Energy Service Companies.⁶³

12 Additionally, as the NYAG has previously noted in this proceeding, ESCOs
13 generally have not devised products that provide a price guarantee or that
14 provide sufficient value to consumers to offset the premium that they are paying
15 as ESCO customers. ESCOs should, therefore, be prohibited from serving mass
16 market consumers unless and until they can provide products that meet these
17 criteria. At a minimum, any premium charged by ESCOs must be subject to a
18 reasonable cap. Otherwise, ESCOs simply are not providing consumers with the
19 benefits that an open retail energy market was intended to promote.

⁶³ Case 12-M-0476 *et. al., supra*, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State p. 24 (issued December 16, 2016). "These assurances should include at a minimum the following: (a) an ability to calculate what the consumer would have paid to the utility; (b) a willingness and ability to ensure that the consumer will be paying no more than what they would have. . . paid to the utility; and (c) appropriate reporting and ability to verify compliance with these assurances." (*Id.* at 25).

1 UIU and the NYAG further note that the promotion of energy efficiency
2 and energy management services is a laudable goal, but should not necessarily
3 be a requirement of ESCO offerings. Such services should not, however, be
4 offered in lieu of price protection, adequate disclosure requirements, and other
5 protections (including those discussed below) for mass market consumers.
6

7 **Topic Number 6: Whether the Uniform Business Practices**
8 **(UBP) applicable to ESCOs should be modified to ensure that**
9 **customer abuses and overcharging by ESCOs are deterred.**
10

11
12 Q. What are the UBP?

13 A. In February 1999, the Commission established the UBP in Case 98-M-1343 to
14 provide consistent business procedures and practices for ESCOs. Since the
15 inception of the UBP, the Commission has revisited and modified the UBP to reflect
16 changes that have occurred in the market while still providing consumer
17 protections, streamlining transactions, and facilitating communications between
18 ESCOs and utilities.
19

20 Q. When was the UBP last modified?

21 A. The UBP was last modified in February 2016. On May 12, 2015, DPS Staff led a
22 Technical Conference with interested parties to discuss ESCO eligibility criteria
23 and potential changes to the UBP. Subsequently, a DPS Staff Proposal was
24 issued for public comment that presented proposed changes to the UBP stemming
25 from the discussion at the May Technical Conference. After a comment period on
26 the DPS Staff Proposal, the Commission issued its Order on February 23, 2016

1 (Reset Order) that revised the UBP by ordering that ESCOs may enroll only mass
2 market customers and renew expiring agreements with mass market customers
3 based on contracts that (1) guarantee savings compared to what the customer
4 would have paid as a full service utility customer, or (2) provide at least 30%
5 renewable electricity. The Order also called upon the Commission with input from
6 parties to consider any long-term conditions that should be implemented for ESCO
7 eligibility and conditions of service to mass market customers. These issues
8 include whether ESCOs should be required to post performance bonds or some
9 other form of demonstrated financial capability.

10
11 Q. Should the UBP be further modified to deter ESCOs from engaging in acts of
12 customer abuse and overcharging?

13 A. Yes. The UBP should be further modified to assist the Commission in identifying
14 bad actors more efficiently in order to better protect mass market consumers in the
15 following ways: (1) require ESCOs to disclose investigations and complaints
16 against them, and any of their subcontractors/marketing agents, in other states,
17 and deny applications that demonstrate poor performance in other jurisdictions;⁶⁴
18 (2) require that ESCOs post performance bonds in order to be eligible to operate
19 in New York; (3) require that all ESCOs utilize a standard contract for energy
20 commodity service to mass market customers so that consumers can easily
21 compare the contractual terms and understand the difference between offerings;

⁶⁴ The UBP currently requires ESCOs to disclose only, “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.” Case 98-M-1343, State of New York Public Service Commission, Uniform Business Practices February 2016, at 6, Section 2 (B) (k).

1 (4) require ESCOs that offer savings to customers to offer substantiation for that
2 claim; (5) require DPS Staff to perform a review of ESCOs' third-party vendors or
3 marketing representatives as a condition of an ESCO's eligibility requirement; and
4 (6) clearly state that the PSC may take appropriate remedial action, including but
5 not limited to, imposing monetary fines, whenever ESCOs violate UBP provisions.
6

7 Q. Could you elaborate on the proposed requirement to disclose investigations and
8 complaints in other states?

9 A. Yes. The Panel recommends modifying the UBP to require that an ESCO seeking
10 eligibility to operate in New York State first disclose any investigations, complaints,
11 or reports of poor performance in jurisdictions outside of New York. Additionally,
12 an ESCO should disclose any investigations, complaints, or reports of poor
13 performance of its subcontractors and/or marketing agents. Such a disclosure
14 requirement is often required for other industries and is in the best interest of
15 consumers. An entity that has a demonstrated history of poor performance or is
16 the subject of multiple complaints and/or investigations in other states is likely to
17 operate in New York in a similar manner. The Commission should scrutinize
18 ESCOs and ESCO marketing agents with a history of poor performance and deny
19 ESCOs eligibility to solicit consumers in New York. Once ESCOs are deemed
20 eligible, they should be subject to a continuing notification requirement to disclose
21 any investigations, complaints, or reports of poor performance.
22

23 Q. Can you elaborate on your proposal to require performance bonds?

1 A. The Panel supports a requirement that ESCOs post performance bonds to be
2 deemed eligible to operate in the State of New York. On May 4, 2016, DPS Staff
3 issued whitepaper titled Regarding ESCO Performance Bonds or Other Security
4 Interests (Performance Bond Whitepaper or Whitepaper). DPS Staff explained “a
5 performance bond is a particular type of surety bond that guarantees to pay the
6 recipient a certain amount of if the principal fails to meet a specified obligation,
7 such as fulfilling the terms of a contract.” (p. 2). In prior comments on this subject,
8 ESCOs have referenced security requirements they must fulfill for utilities, the New
9 York Independent System Operator (NYISO), and gas pipelines. (p. 5). However,
10 as DPS Staff notes, this performance bond, or additional form of security, serves
11 a distinct purpose. (*Id.*).

12 A consumer-focused security is necessary to ensure that ESCOs have the
13 financial resources to make customers whole if they violate the terms of a customer
14 agreement, the UBP, or any other applicable law or regulation. As one potential
15 option, DPS Staff proposed in the Whitepaper that the amount of the performance
16 bond could be set annually, based on (1) “the number of customers served by an
17 ESCO and (2) the average charges in excess of what the utility charged in a prior
18 period.” (p. 5). DPS Staff also noted that “the level of security could be moderated
19 based on an ESCOs’ historic performance as well as complaint levels.” (p. 6).

20 UIU and the NYAG support this proposal with certain modifications.
21 Specifically, in prior comments, UIU and NYAG proposed that: (1) all ESCOs
22 should post a financial security; (2) the amount of the security should be calculated
23 based on the number of the ESCO’s mass market customers and the amount that

1 the ESCO has historically charged those customers above utility prices; and (3)
2 where an ESCO did not charge its mass market customers more than utility prices
3 in the prior historical period, or where such pricing data are unavailable, the
4 amount of the security should instead be based on the number of the ESCO's
5 mass market customers and a pro-rated share of the total amount that all ESCOs
6 have overcharged mass market customers in New York.

7

8 Q. You asserted that, where pricing data is unavailable, or does not indicate an
9 overcharge, the security amount should be based on the number of the ESCO's
10 mass market customers and a pro-rated share of all ESCO overcharges. What is
11 your reasoning for that?

12 A. This proposal is designed to ensure that neither temporary market factors nor
13 ESCOs' refusal to disclose pricing information would obstruct the implementation
14 of a performance bond requirement. As the records in this and prior ESCO-related
15 proceedings have shown, mass market ESCO customers have long suffered
16 significant financial harms. Where an individual ESCO's pricing information is
17 unavailable, either because the ESCO is a new market participant or because the
18 ESCO failed to disclose its historical information, the Commission should base the
19 amount of that ESCO's financial security on (1) the estimated amount all ESCOs
20 have jointly overcharged mass market customers; and (2) adjust this amount on a
21 per capita basis to reflect the number of mass market customers each ESCO
22 serves. This recommendation ensures that the security can make all of an ESCO's
23 customers whole where necessary, while appropriately tailoring the amount of risk

1 the ESCO acquired by serving a certain number of mass market customers.

2

3 Q. Could you elaborate on your proposed requirement that ESCOs substantiate
4 savings claims?

5 A. Yes. UIU and the NYAG propose that, if an ESCO claims to offer customers
6 savings, it must provide at least three years' worth of historic ESCO-utility pricing
7 data to back up that assertion. Providing such information will give customers a
8 better sense of whether the ESCO is likely to deliver the promised savings and
9 deter ESCOs from making misleading marketing claims that they cannot prove.

10

11 Q. Please also elaborate on your suggestion that DPS Staff review ESCOs' third-party
12 vendors or representatives.

13 A. As noted above, we encourage the PSC to review complaints and investigations
14 related to an ESCO's third-party representatives or marketing agents when making
15 ESCO eligibility determinations. Further, UIU and the NYAG urge the Commission
16 to regulate ESCO brokers. As the NYAG previously stated, "[u]nregistered
17 businesses that engage in broker activities should be barred from doing business
18 with New York consumers. Registered brokers should be required to certify that
19 their employees and agents have been trained to comply with the UBP rules."⁶⁵ In
20 addition, the method of the broker's compensation should be disclosed to the
21 consumer. For example, whether the compensation is paid by the ESCO or the
22 customer and whether it is paid by fixed commission or as a surcharge on each

⁶⁵ Case 12-M-0476 *et al.*, Comments of Eric T. Schneiderman, Attorney General of the State of New York (filed January 25, 2013) at 25.

1 unit consumed should be adequately disclosed.

2

3 Q. Has DPS Staff identified any additional modifications to the UBP it believes are
4 warranted?

5 A. Yes. In its response to RESA IR No. 15, DPS Staff identifies five customer abuses
6 that the UBP does not currently address. The abuses DPS Staff identifies are: (1)
7 overcharging; (2) abuses resulting from door-to-door marketing; (3) abuses
8 resulting from telephonic marketing; (4) enrollments without Third Party
9 Verification (TPV) resulting from appointments; and (5) rate changes without notice
10 to the customer.

11

12 Q. Does the Panel support modifications to the current UBP to address the abuses
13 identified by DPS Staff?

14 A. Yes, without question. In addition to prohibiting such practices, the UBP should
15 clearly state that the PSC may take appropriate remedial action, including but not
16 limited to, imposing monetary fines, whenever ESCOs violate these and other
17 provisions of the UBP. Our specific recommendations regarding door-to-door and
18 outbound telemarketing are discussed below.

19

20

21 **Topic Number 7: Whether door-to-door and outbound**
22 **telemarketing practices of ESCOs to mass market customers**
23 **should be prohibited, and whether other ESCO marketing**
24 **practices should be prohibited?**

25

26

27 Q. Who conducts door-to-door marketing, and has it been a concern of DPS Staff?

1 A. ESCO employees or contactors typically conduct door-to-door marketing. DPS
2 Staff has indicated concerns with customer abuses resulting from door-to-door and
3 telephonic marketing. (Staff Response to RESA IR No. 15). We agree. Such
4 marketing can be associated with what residential customers perceive to be high-
5 pressure sales techniques. Complaints received by the Department show that
6 customers are frequently deceived by high pressure sales tactics into believing
7 they will save money by switching to an ESCO. (March 28, 2016 Affidavit of LuAnn
8 Scherer, p. 6). This Panel concurs that high-pressure techniques prevent
9 customers from making an informed decision concerning their best residential
10 energy supply choice.

11
12 Q. Has UIU or the NYAG received any complaints from consumers related to door-
13 to-door marketing?

14 A. Door-to-door sales abuses have been a major source of complaints by New York
15 consumers for many years. The NYAG has received hundreds of ESCO-related
16 complaints over the years, including many complaints related to deceptive and
17 harassing door-to-door sales tactics, as well as failure to comply with home
18 solicitation laws. NYAG investigations have revealed that these marketers often
19 pretend that they are employees of the utility rather than the ESCO, including by
20 wearing clothing resembling the utilities' uniforms. Others engage in high pressure
21 and intimidating sales practices to persuade vulnerable consumers to switch
22 providers without taking time to research the ESCO's offer or other available
23 options. Some sales are made to children or other family members who are neither

1 the utility customer nor his/her spouse.

2 Although the law requires door-to-door marketers to deliver to prospective
3 customers a written ESCO Consumer's Bill of Rights before enrollment and to
4 hand new customers a notice explaining the right to cancel the contract in three
5 days, these requirements are often ignored by the marketers. In one case, a door-
6 to-door solicitor posed as someone looking to rent an apartment to gain access to
7 a consumer, and then refused to leave until the consumer signed the ESCO's
8 contract. In another, an ESCO representative visiting a consumer's home asked
9 to see her utility bill, then asked for a glass of water, and wrote down her account
10 number in order to switch her service to the ESCO without her consent. In too
11 many instances and for too long, ESCOs have delegated to third-party contractors
12 the task of enrolling new customers and have avoided responsibility for their
13 contractors' improper sales by failing to monitor their activities. In addition, as long
14 as marketers' compensation continues to be based on a commission for each sale
15 they make, the incentive to engage in deceptive solicitation practices will persist.

16

17 Q. Does the Panel support the prohibition of door-to-door and outbound telemarketing
18 practices of ESCOs to mass market customers?

19 A. Yes. Given the demonstrated abuses in door-to-door marketing, we strongly
20 support prohibiting such marketing. We also believe that, as described below,
21 there should be checks on any outbound telemarketing done to acquire new
22 customers.

23

1 Q. If the Commission decides not to ban door-to-door marketing, does the Panel have
2 an alternative recommendation?

3 A. Yes. If the Commission allows door-to-door marketing, it should require ESCOs
4 to closely monitor their marketers' sales activities, whether they are ESCO
5 employees or so-called independent contractors. All door-to-door marketers
6 should be required to carry a portable digital voice recorder to record the entire
7 interaction between the marketer and the consumer. Outward bound
8 telemarketing calls should also be recorded. ESCOs should require that sales
9 recordings be delivered with each marketer's sales reports to the ESCO. Any sale
10 lacking a recording of the entire marketer-consumer conversation at the point of
11 sale should not be processed by the ESCO.

12 ESCOs should also be required to regularly audit each salesperson's
13 recordings in a statistically valid manner to ensure that no misrepresentations or
14 other deceptive practices were used, and the sales recordings should be available
15 to verify compliance. The Commission should require that whenever an ESCO's
16 review uncovers improper sales practices by the marketer, it should cancel the
17 enrollment and not pay any commission to that marketer. In addition, a
18 comprehensive audit of the individual marketer's other sales should be mandated
19 to determine if additional improper enrollments occurred.

20 The Panel also recommends that the Commission require the registration
21 and formal training of ESCO solicitors. The use of standardized contracts, with
22 clearly stated terms and conditions and consumer warnings, would help ensure
23 that consumers understand what they are signing up for. Records relating to new

1 enrollments should be maintained for a reasonable period of time to enable both
2 the ESCOs and the Commission to regularly evaluate their marketing practices.
3 The Commission should review the ESCO's compliance with the marketing audit
4 requirements upon receipt of consumer complaints. Any ESCO that fails to
5 diligently enforce compliance with the UBP standards by their marketing
6 representatives should be disciplined with sanctions, including penalties,
7 restrictions on marketing activities, and where appropriate, be barred from
8 participating in the New York retail energy market.

9
10 **Topic Number 14: The number and nature of customer**
11 **complaints regarding i) retail prices and bills and ii) sales and**
12 **marketing practices from a) customers directly to ESCOs, b)**
13 **from customers to utilities about ESCOs, by ESCO, and c)**
14 **customers to the Commission about ESCOs, by ESCO during**
15 **calendar years 2014 and 2015 and as much of 2016 as it is**
16 **available.**

17
18
19 Q. Is the Panel concerned with the number and nature of the complaints against
20 ESCOs?

21 A. Yes. The information provided in various submissions inside and outside these
22 proceedings show complaints against ESCOs are on the rise and that ESCOs are
23 harming customers in a significant manner. According to the March 28, 2016
24 Affidavit of DPS Staff's LuAnn Scherer in support of the Respondent's Answers
25 and Memorandum of Law in National Energy Marketers Ass'n *et. al.* vs. NYS PSC,
26 Albany County Index No. 868-16, customer complaints have increased each year
27 since at least 2013 with a significant portion of the complaints related to high bills
28 or failure to receive expected savings. (*Id.* p. 5). DPS Staff, in its response to

1 RESA IR No. 16, provides examples of customer complaints it has received,
2 ranging from high bill complaints to door-to-door marketing and telemarketing
3 abuses, to slamming (the unauthorized switching of a customer's utility service to
4 another provider), to rate changes without proper notice. Furthermore, DPS Staff
5 in response to RESA IR No. 17 provides a list of Orders to Show Cause and a
6 "significant number" of Notices of Apparent Failure (NOAF) that were initiated
7 against ESCOs. A majority of these Orders to Show Cause and NOAFs were
8 issued due to the amount and nature (i.e. slamming, deceptive marketing, UBP
9 violations) of the complaints received by the Commission.

10 Furthermore, DPS Staff's response to PULP IR No. 6 provides more detail
11 of the increasing number of complaints, both initial and escalated, from January 1,
12 2014 through December 31, 2016. The response shows almost 14,000 initial
13 complaints filed by residential customers and over 2,500 escalated complaints. No
14 single ESCO or single part of the State is responsible for most of the complaints.
15 Rather, the complaint data shows that these practices are an industry-wide
16 problem.

17
18 Q. Are there more data or reports available related to the number of complaints made
19 against ESCOs in recent years?

20 A. Yes. The New York State OSC audit report titled Oversight of Complaint Activity,
21 issued February 1, 2017, examined DPS Staff's handling of the consumer
22 complaints its Office of Consumer Services receives. (see Exhibit _ (UIU/NYAG
23 2). The audit covered the period from January 1, 2012 through August 19, 2016.

1 Besides detailing the performance of DPS Staff in its handling of customer
2 complaints filed against utilities, the audit report highlights the significant increase
3 in complaints received by DPS related to ESCOs in recent years. The audit report
4 shows the 150% increase from fiscal year 2012-13 (1,956 complaints) to 2015-16
5 (4,922 complaints).

6

7 Q. Is there anything else in the OSC's audit report to which you would like to call
8 attention?

9 A. Yes, on page 8 in the audit report the OSC points out that DPS has, under Sections
10 25 and 25a of the Public Service Law, the power to fine an ESCO in a similar
11 manner to how it has fined electric and gas companies. Yet, DPS officials
12 acknowledge that they have never applied this enforcement mechanism to
13 ESCOs. DPS enforcement is crucial to weeding out bad actors and ensuring a
14 properly functioning market.

15

16 Q. Has UIU or the NYAG's office received customer complaints about ESCOs?

17 A. From at least 2000 to the present, the NYAG has conducted numerous
18 investigations into individual ESCOs with respect to their deceptive and illegal
19 business practices. These investigations have resulted in seven settlements
20 providing for extensive injunctive relief and millions in restitution and penalties.
21 These settlements included the following: an agreement with Con Edison Solutions

1 in 2000,⁶⁶ an Assurance of Discontinuance (AOD) with Total Gas & Electric,
2 Inc.(TG&E) in 2001,⁶⁷ a consent judgment and order against ECONergy Energy
3 Company, Inc. in 2003,⁶⁸ an AOD with New York Energy Corp. doing business as
4 U.S. Energy Savings in 2008,⁶⁹ an AOD with Columbia Utilities, LLC and Columbia
5 Utilities Power, LLC in 2011,⁷⁰ an AOD with HIKO Energy in 2014,⁷¹ and an AOD
6 with Energy Plus Holdings LLC and Energy Plus Natural Gas LLC (collectively
7 Energy Plus) in 2017.⁷² Each of these investigations is discussed in the testimony
8 that follows.

9 In the last three years, the NYAG has directly received more than 600
10 complaints against ESCOs. These complaints demonstrate that the ESCO
11 practices that were the subject of the NYAG's previous settlements with ESCOs

⁶⁶ *Attorney General Reaches Settlement with Con Ed Solutions* (June 8, 2000), available at <https://ag.ny.gov/press-release/attorney-general-reaches-settlement-con-ed-solutions> ("Con Ed Solutions Press Release") (Exhibit __ (UIU/NYAG-4(A))).

⁶⁷ *In the Matter of Total Gas & Electric, Inc.*, Assurance of Discontinuance Pursuant to Executive Law §63 (15) (Mar. 9, 2001) (TG&E AOD) (Exhibit __ (UIU/NYAG-4(B))).

⁶⁸ *People v. ECONergy Energy Co.*, N.Y. Cnty. Sup. Ct. No. 401384/02, Consent Judgment and Order (filed Sept. 23, 2003) (ECON Consent Judgment) (Exhibit __ (UIU/NYAG-4(C))). See also *People v. ECONergy Energy Co.*, N.Y. County Supreme Court Index No. 401384/02, Verified Petition (filed Mar. 26, 2002) (ECON Petition) (Exhibit __ (UIU/NYAG-4(D))).

⁶⁹ *In the Matter of New York Energy Savings Corp. doing business as U.S. Energy Savings*, Assurance of Discontinuance Pursuant to Executive Law § 63(15) (July 14, 2008) (U.S. Energy Savings AOD) (Exhibit __ (UIU/NYAG-4(E))); *In the Matter of New York Energy Savings Corp. doing business as U.S. Energy Savings*, Addendum to the Assurance of Discontinuance Pursuant to Executive Law § 63(15) (Sept. 14, 2009) (U.S. Energy Savings AOD Addendum) (Exhibit __ (UIU/NYAG-4(F))).

⁷⁰ *In the Matter of Columbia Utilities, LLC, and Columbia Utilities Power, LLC*, Assurance of Discontinuance Pursuant to Executive Law § 63 (15) (Apr. 12, 2011) (Columbia AOD) (Exhibit __ (UIU/NYAG-4(G))); see also *In the Matter of Columbia Utilities, LLC, and Columbia Utilities Power, LLC*, Letter from Keith Gordon, Assistant Attorney General, Bureau of Consumer Frauds, New York State Attorney General, to Dietrich Snell, Esq., Counsel for Columbia Utilities, LLC and Columbia Utilities Power, LLC, Proskauer Rose, LLP (Feb. 28, 2014) (Columbia AOD Modification) (Exhibit __ (UIU/NYAG-4(H))).

⁷¹ *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of New York, of HIKO Energy, LLC*, Assurance of Discontinuance Pursuant to Executive Law § 63 (15) (Oct. 1, 2014) (HIKO AOD) (Exhibit __ (UIU/NYAG-4(I))).

⁷² *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of New York, of Energy Plus Holdings LLC and Energy Plus Natural Gas LLC*, Assurance of Discontinuance Pursuant to Executive Law § 63(15) (Aug. 28, 2017) (Energy Plus AOD) (Exhibit __ (UIU/NYAG-4(J))).

1 continue. Complaints about misrepresenting savings, slamming, and failure to
2 process cancellation requests remain a problem in the market. Indeed, the NYAG
3 is engaged in multiple current investigations against other actors in the ESCO
4 market for engaging in deceptive business practices.

5

6 Q. Given the nature of the complaint data you have reviewed, what is the Panel's
7 recommendation?

8 A. As discussed with respect to Topic Number 1 above, we believe that, unless and
9 until the reforms recommended in this testimony are implemented, ESCOs should
10 be prohibited from offering products to mass market consumers that do not either
11 guarantee savings or guarantee a value added that is sufficient to offset the
12 premium paid to the ESCOs. The continued rise in customer complaints since
13 2013 is further demonstration of the retail energy market failure, and the Panel
14 supports any regulatory response targeted to remedying the causes of such
15 complaints.

16

17 **Topic Number 16 – The ability of mass market customers to**
18 **obtain information about relative prices and offerings of ESCOs**
19 **and regulated utilities and to understand such information,**
20 **including evidence regarding the transparency of the retail**
21 **market for mass market customers and the level of knowledge**
22 **in that market.**

23

AND

24

25 **Topic Number 17 - Tools that are available in the public domain that**
26 **customers can use to do comparison shopping.**

27

28

29 Q. What tools are available to consumers to obtain information on comparative prices

1 and product offerings?

2 A. The Power to Choose website (<http://www.newyorkpowertochoose.com>) is a
3 starting point for residential customers to learn more about retail access and
4 energy supply options. The Power to Choose website provided by the Commission
5 is a “directory [that] contains contact information on energy services companies
6 (ESCOs) that have met the Commission's and utility requirements to provide
7 energy supply for residential electricity or natural gas, and other services in New
8 York” and provides tools for consumers to compare offers and products provided
9 by ESCOs based on zip code, service type, and service class. ESCOs that serve
10 residential customers must update their rates on the Power to Choose website at
11 least once every thirty days for each product they offer; however, they can update
12 them as often as they like. Per Section 2 (D)(4)(d) of the UBP: “Each ESCO must
13 guarantee to charge new customers no more than the price of the ESCO[']s posted
14 offers at the time of the customer’s agreement for each product.”

15

16 Q. What else is available?

17 A. The Commission directed the utilities to develop a historical bill calculator to
18 compare the total bills for each utility’s residential, small commercial, and small
19 industrial customer by rate class to the rate offerings of ESCOs operating within
20 their service areas. Utilities have consequently implemented such historical bill
21 calculators on their respective websites where customers taking service from an
22 ESCO can compare what they have paid over a period of 12 months with their
23 ESCO to what they would have paid if they had remained a full service utility

1 customer. However, this is just a first step towards price transparency because
2 these “calculators” provide only a historical bill comparison for current ESCO
3 customers to compare their ESCO bill to what they would have paid had they
4 remained with full (bundled) utility service.

5

6 Q. Does the Panel have any recommendations on ways to improve a consumer’s
7 ability to comparison shop between ESCO offerings and a utility’s regulated price?

8 A. Yes, the Panel has recommendations on how to improve the Power to Choose
9 website to make it a better resource for consumers when deciding whether to take
10 service from an ESCO rather than from their utility. As a preliminary matter, the
11 Panel acknowledges and commends the recent improvements New York has
12 made to its Power to Choose website. Nevertheless, the Panel recommends that
13 the Commission look at the Texas Power to Choose website
14 (<http://www.powertochoose.org>) for ways to further enhance New York’s Power to
15 Choose website. When consumers shop for available plans in different zip codes
16 on the Texas Power to Choose website, they see more useful information than
17 what is available when they research various plans on the New York Power to
18 Choose website. The Texas website is more user friendly and provides more
19 information than the New York website. Screen shots of available plans in Texas
20 compared to those on the old and recently revised New York site are provided in
21 Exhibit _ (UIU/NYAG-3). At Texas’ Power to Choose website, a plethora of
22 information is available to consumers after they enter their zip code on the main
23 screen. After entering their zip code, consumers can view pricing information, plan

1 details, pricing details including amount of termination fees, quick hyperlinks to fact
2 sheets, terms of service, contact information, and - most importantly - company
3 ratings based on complaint history and hyperlinks to the number of complaints
4 received per category for the last six months. The Panel strongly recommends
5 that New York further enhance its Power to Choose website to make the same
6 information Texas provides readily available for New York consumers, especially
7 the complaint history and the nature of such complaints filed against each ESCO.

8 In addition to looking at Texas' website as a model, the Commission should
9 implement additional measures to improve transparency and increase the level of
10 knowledge available in the retail energy market:

11
12 (1) Require That Prices Be Readily Obtainable by Customers – the PSC should
13 take steps to minimize the staleness of energy supply prices displayed on the
14 Power to Choose website. The Commission should require ESCOs to update
15 their prices on the Power to Choose website each time they change their prices
16 as opposed to once every thirty days as currently required. Under the present
17 system, the price quoted by any ESCO can become obsolete an hour after it
18 is posted. This means that ESCOs that change their rates frequently (as may
19 be necessary during periods of wholesale price volatility) may not be giving
20 consumers who access the Power To Choose website current and accurate
21 price quotes.

22
23 (2) To ensure adequate transparency and to foster genuine competition, the PSC

1 should require ESCOs that offer variable rate contracts with an introductory,
2 discounted “teaser” rate available only for a month or two to disclose on the
3 Power To Choose website the non-discounted price they currently charge
4 similar customers who have remained beyond the ESCO’s introductory period.
5 Such mandated disclosure will prevent dishonest ESCOs from deceiving
6 consumers with short-term low-ball pricing gimmicks.

7
8 (3) The Power To Choose website should also include data adequate for
9 consumers to compare each ESCO’s rates over time with those offered by the
10 utilities. Because seasonal variations in wholesale supply may cause some
11 ESCOs to be competitive with the utility in some months but not in others, to
12 make informed market choices, consumers need access to apples-to-apples
13 price data for an extended time. The website should display the most recent
14 utility monthly average rate for residential and small business customers and
15 a 12-month history of prices by both utilities and ESCOs. Thus, consumers
16 wishing to find an ESCO most likely to save them money will be able to see
17 which ESCOs have under-sold the local utility the most during the prior year.
18 Only when armed with this data will consumers be able to determine which
19 ESCO has been competitive over the long term. As for those consumers who
20 elect to hedge their energy budget with a fixed-price contract, making this
21 historical price comparison data available will enable a more meaningful
22 assessment of the rates offered by ESCOs and the true value of such hedging
23 options. Once the PSC mandates full price transparency, New York’s retail

1 choice market will begin to finally deliver the benefits of genuine competition.

2

3 (4) The Commission should require a standardized format for price reporting. To
4 enhance the ability of residential and small commercial customers to compare
5 energy supply prices, the PSC should standardize the format for representing
6 pricing options to customers.

7

8 (5) Implement Website enhancements – for example, some helpful enhancements
9 would include providing clear information on the website on the handling of
10 ESCO disputes, how to reach the ESCO's customer service call center, and
11 cancellation policies.

12

13 Q. Does the Panel have any other recommendations on any tools that could be made
14 available to consumers for comparison shopping?

15 A. Yes, price comparison measures should be developed to assist current ESCO
16 customers in determining whether it was beneficial to have switched to an ESCO.
17 It is extremely challenging for residential and small non-residential customers to
18 fully understand, compare and contrast energy supply prices between the full
19 service utility and ESCOs. Placing comparable prices on a customer's bill would
20 afford customers the ability to assess risk and make an informed decision when
21 selecting an ESCO or remaining with their full service utility for energy supply.
22 Therefore, the Panel recommends a comparison tool on a customer's monthly
23 utility bill where ESCO customers would be able to see on a separate line item

1 whether they paid more or less than what they would have paid if they had
2 remained a full service utility customer. The benefit of providing price comparisons
3 and the financial consequences when choosing an energy supplier enables
4 customers to see their benefits, including potential savings, when participating in
5 the program.

6 The comparable pricing information should include, at a minimum: 1) the
7 amount of the previous month's total bill, including delivery, supply, gross receipts
8 tax (GRT), and sales tax; 2) the amount of the previous month's bill had the
9 customer purchased energy supply from the full service utility; and 3) the
10 calculated difference in monthly cost (ESCO v. full service utility), plus cumulative
11 costs or savings amounts for the customer. In other words, generally, any
12 comparison should ensure customers can compare their total bill charges and not
13 only utility delivery charges. To that end, the comparable pricing information
14 should also be displayed in an easy-to-read graph displaying total bill information
15 (utility vs. ESCO pricing). The comparable pricing information should appear in
16 each month's bill and at the end of the term of the agreement in a letter to the
17 customer outlining the benefits, including savings, received by participating in the
18 program and contracting with the ESCO. Utilities should present the comparable
19 data to customers in a fair and transparent form on their bills.

20
21 Q. Would there be a cost to utilities to implement this on-bill comparison tool?

22 A. Yes, but an on-bill comparison tool is critical for consumers to understand
23 purchasing commodities from ESCOs costs more per month than they would have

1 paid had they remained full service utility customers. The costs to implement the
2 on-bill comparison tool could be handled in each of the utilities' next filed rate
3 cases.

4

5 **Topic Number 19: Actions by state agencies or consumer**
6 **advocacy groups to protect customers, to monitor the state of**
7 **the retail market customers, to provide information, or to lodge**
8 **complaints or impose discipline in the case of improper ESCO**
9 **practices, including specific concrete steps the group has taken**
10 **and any results obtained from those actions:**

11

12

13 Q. Are you aware of any actions that a state agency has taken to monitor the state of
14 the retail market customers, or actions that have been taken in response to lodged
15 complaints regarding improper ESCO practices?

16 A. Yes, from the late 1990s to the present, the NYAG had conducted numerous
17 investigations into individual ESCOs with respect to their deceptive and illegal
18 business practices. These investigations have resulted in seven settlements. The
19 settlements provided for extensive prospective relief, including requirements and
20 prohibitions with respect to the ESCOs' conduct that go well beyond the UBP's
21 current requirements. As a result of its investigations, the NYAG has obtained
22 more than \$5,000,000 in restitution, penalties, and costs. Additionally, the NYAG
23 is conducting a number of ongoing investigations of ESCOs that are currently
24 engaged in deceptive practices.

25

26 Q. Can you discuss the specific details of the NYAG's investigations into ESCOs,
27 including a description of the circumstances and behavior the NYAG was

1 investigating in these matters and what the end results were, starting with Energy
2 Plus?

3 A. Yes. Energy Plus is a Delaware company with principal offices in Philadelphia,
4 Pennsylvania.⁷³ The PSC authorized Energy Plus to sell electricity and natural gas
5 to residential and commercial customers throughout various areas of New York
6 State.⁷⁴ Energy Plus solicits new customers primarily through direct mail, but also
7 through its website.⁷⁵

8
9 Q. Why did the NYAG start investigating the sales practices of Energy Plus?

10 A. Our office and the PSC received numerous complaints regarding Energy Plus's
11 marketing practices.

12

13 Q. How many complaints were made?

14 A. More than 350 consumers lodged complaints with the PSC about Energy Plus's
15 marketing practices.⁷⁶

16

17 Q. And what did the NYAG conclude as a result of its investigation?

18 A. The NYAG concluded that Energy Plus made false and misleading savings and
19 price claims; failed to adequately disclose that cancellations would not be effected
20 immediately; failed to adequately disclose early termination fees; and did not
21 clearly and conspicuously disclose other material terms and conditions of its

⁷³ Energy Plus AOD ¶ 8 (Exhibit __ (UIU/NYAG-4(J))).

⁷⁴ *Id.* ¶ 8.

⁷⁵ *Id.* ¶ 10.

⁷⁶ *Id.* ¶ 12.

1 contracts. These practices constituted violations of the UBP as well as the New
2 York General Business Law and Executive Law § 63(12).⁷⁷

3

4 Q. What was the basis for concluding that Energy Plus's marketing was
5 misrepresenting information to consumers?

6 A. Energy Plus's website, as well as its written advertisements, emphasized that its
7 energy prices were lower than, or at least competitive with, the prices consumers
8 were paying their current suppliers. For example, numerous direct mail offers
9 claimed that Energy Plus's energy rates were "market based," "competitive," and
10 "risk-free."⁷⁸ Energy Plus's customer service representatives also stressed, in
11 response to inquiries about whether consumers would save money, that its rates
12 were "market-driven" and that "when the market goes down, so will your rates."⁷⁹
13 In fact, according to data obtained by the PSC, many of Energy Plus's customers
14 paid as much as \$440 more over the course of a year than they would have paid
15 as full service utility customers.⁸⁰

16

17 Q. Were there any other concerns with Energy Plus's practices?

18 A. Yes. Consumers were given the impression that they could cancel their contracts
19 at any time, when in fact it could take up to two months to process a cancellation
20 – thus forcing customers to continue to pay Energy Plus's higher rates for an

⁷⁷ *Id.* ¶¶ 13-29.

⁷⁸ *Id.* ¶ 14.

⁷⁹ *Id.* ¶ 27.

⁸⁰ *Id.* ¶ 15.

1 additional two months.⁸¹ Energy Plus also offered cash back, enrollment bonuses
2 and rewards for enrolling with Energy Plus, but failed to adequately disclose that
3 customers would not receive the rewards until after they paid Energy Plus for two
4 months or, in some cases, a full year.⁸²

5

6 Q. What was the result of the NYAG's investigation?

7 A: The NYAG and Energy Plus agreed to an AOD on August 28, 2017. The AOD
8 provided, among other things, that Energy Plus would not, among other things,
9 make false or misleading representations to induce consumers to sign contracts,
10 or make any representations about savings consumers might realize from
11 switching their commodity service provider unless the claims were fully
12 substantiated by 12 consecutive months of rate comparisons between Energy
13 Plus's pricing and that of the local distribution utility.⁸³ In addition, Energy Plus
14 agreed to undertake certain training and monitoring responsibilities regarding its
15 customer service representatives, including warnings that deceptive sales
16 practices would not be tolerated; the implementation of quality assurance,
17 monitoring, and auditing practices; and prompt good faith investigations in the
18 event any customer complained about an interaction with a sales representative.⁸⁴

19

20 Q: Were there any other conditions of the settlement agreement?

21 A: Yes, Energy Plus agreed to pay \$800,000 to be used by the NYAG for restitution

⁸¹ *Id.* ¶ 18.

⁸² *Id.* ¶¶ 22-24.

⁸³ *Id.* Part II ¶ 4(b).

⁸⁴ *Id.* Part II ¶¶ 7-14.

1 to current and former Energy Plus customers and the administrative costs of
2 running the restitution program.⁸⁵ Any funds remaining after restitution was
3 administered were to be retained by the NYAG as penalties and costs.⁸⁶

4

5 Q. Can you discuss the NYAG's recent settlement with HIKO Energy LLC, starting
6 with a description of HIKO's business operations and practices?

7 A. Yes. HIKO is a New York corporation with principal offices located in Monsey,
8 New York.⁸⁷ The PSC authorized HIKO to sell electricity and natural gas to
9 residential and commercial customers throughout various areas of New York State
10 that were serviced by Central Hudson, Con Edison, NYSEG, Niagara Mohawk
11 Power Corporation (Niagara Mohawk), Orange and Rockland, RG&E, National
12 Grid (formerly known as Keyspan NY and LI), and NFG.⁸⁸ Beginning as early as
13 June 2011, HIKO solicited new customers through door-to-door and telemarketing
14 practices.⁸⁹

15

16 Q. How did HIKO conduct its marketing?

17 A. HIKO hired third-party marketers to send sales representatives door-to-door to
18 enroll customers and to pitch HIKO's services via telemarketing.⁹⁰

19

20 Q. Why did the NYAG start investigating the sales practices of HIKO and its sales

⁸⁵ *Id.* Part II ¶ 15.

⁸⁶ *Id.*

⁸⁷ HIKO AOD ¶ 8 (Exhibit __ (UIU/NYAG-4(I))).

⁸⁸ *Id.* ¶ 8.

⁸⁹ *Id.* ¶ 11.

⁹⁰ *Id.* ¶ 11.

1 representatives?

2 A. The NYAG and the PSC received numerous complaints regarding HIKO's
3 marketing practices.

4

5 Q. How many complaints were made?

6 A. More than 300 consumers lodged complaints with the PSC about HIKO's
7 marketing practices over a three-year period.⁹¹

8

9 Q. And what did the NYAG conclude as a result of its investigation?

10 A. The NYAG concluded that HIKO made false and misleading savings and price
11 claims, engaged in slamming (signing up customers without their knowledge or
12 permission), and failed to process cancellation attempts by customers. These
13 practices constituted violations of the UBP as well as the New York General
14 Business Law and Executive Law § 63(12).⁹²

15

16 Q. What was the basis for concluding that HIKO sales representatives were
17 misrepresenting information to consumers?

18 A. HIKO's website, as well as its sales and third-party verification scripts, emphasized
19 savings that consumers would achieve. For example, one script directed sales
20 representatives to tell consumers that they would save up to 7% over the course
21 of a year on HIKO's variable rate product.⁹³ HIKO's website advertised its products

⁹¹ *Id.* ¶ 12.

⁹² *Id.* ¶¶ 13-30.

⁹³ *Id.* ¶ 16.

1 as plans to lower consumers' utility bills.⁹⁴ In fact, according data obtained by the
2 PSC, HIKO's customers in certain utility territories paid \$86 to \$300 more over the
3 course of a year than they would have paid as full service utility customers.⁹⁵

4

5 Q. Was the NYAG investigating other business practices of HIKO?

6 A. Yes, the NYAG found that HIKO sales representatives had engaged in "slamming,"
7 that is, failing to secure a customer's authorization to switch to HIKO as a
8 supplier.⁹⁶ Telemarketers used deceptive tactics in order to obtain consumers'
9 utility account numbers, which they then used to switch consumers to HIKO without
10 their knowledge or permission.⁹⁷ For example, telemarketers created the
11 impression that they represented distribution utilities, telling consumers that they
12 were entitled to a "rebate" and asking for the account information in order to
13 "process the rebate." They then used that information to switch the consumers to
14 HIKO.⁹⁸ HIKO's door-to-door sales representatives also used deceptive and
15 harassing tactics to get customers to switch to HIKO.⁹⁹

16

17 Q. Were there any other concerns with HIKO's practices?

18 A. Yes. Consumers who attempted to cancel their contracts by calling HIKO's
19 customer service center were unable to reach anyone, nor were they able to leave
20 messages because the mailbox was full.¹⁰⁰ Customers' cancellations were

⁹⁴ *Id.* ¶ 14.

⁹⁵ *Id.* ¶ 14.

⁹⁶ *Id.* ¶¶ 19-26.

⁹⁷ *Id.* ¶¶ 20-21.

⁹⁸ *Id.* ¶ 20.

⁹⁹ *Id.* ¶ 26.

¹⁰⁰ *Id.* ¶ 27.

1 therefore delayed, and HIKO was able to bill the consumers for additional
2 months.¹⁰¹

3

4 Q. What was the result of the NYAG's investigation?

5 A: HIKO ultimately agreed to the terms of the AOD. The AOD provided, among other
6 things, that HIKO and its representatives would not: (1) make false or misleading
7 representations to induce consumers to sign contracts, (2) make any
8 representations about savings consumers might realize from switching their
9 commodity service provider unless the claims were fully substantiated by 12
10 consecutive months of rate comparisons between HIKO's pricing and that of the
11 local distribution utility, (3) make any representation that HIKO was working on
12 behalf of the local distribution utility, and (4) permit any contracts not signed by the
13 customer of record.¹⁰² HIKO was also required to use its branding information on
14 all advertising materials and refrain from using the local distribution utility's
15 name.¹⁰³ HIKO was also required to clearly and conspicuously disclose any early
16 termination fees on its contracts and to notify the local distribution utility within two
17 days of any customer's cancellation of a contract in order to switch the customer's
18 service back to the utility.¹⁰⁴ In addition, HIKO agreed to undertake certain training
19 and monitoring responsibilities regarding its sales representatives, including
20 warnings that deceptive sales practices would not be tolerated; the implementation
21 of quality assurance, monitoring, and auditing practices; and prompt good faith

¹⁰¹ *Id.* ¶ 28.

¹⁰² *Id.* ¶¶ 3-5.

¹⁰³ *Id.* ¶ 7.

¹⁰⁴ *Id.* ¶¶ 8-10.

1 investigations in the event any customer complained about an interaction with a
2 sales representative.¹⁰⁵

3

4 Q: Were there any other conditions of the settlement agreement?

5 A: Yes, HIKO agreed to pay \$1.25 million to be used by the NYAG for restitution to
6 current and former HIKO customers and the administrative costs of running the
7 restitution program.¹⁰⁶ Any funds remaining after restitution was administered were
8 to be retained by the NYAG as penalties and costs.¹⁰⁷

9

10 Q: Could you describe the NYAG's investigation involving Columbia Utilities?

11 A: Yes, the NYAG entered an agreement in 2011 with Columbia Utilities, LLC and
12 Columbia Utilities Power, LLC (collectively, Columbia). In 2007 and 2008, the PSC
13 received more consumer complaints regarding Columbia than any other ESCO
14 operating in the State of New York.¹⁰⁸ The complaints involved multiple types of
15 deceptive and fraudulent marketing and sales, including misrepresentation of bills
16 savings, failure to provide customers with copies for the contract terms, failure to
17 disclose the ESCO's required minimum one-year enrollment provision, and
18 slamming.¹⁰⁹ Columbia agreed, among other things, to refrain from the above-
19 mentioned behaviors and to pay the State of New York \$2 million dollars, which
20 the NYAG would use to provide restitution to certain customers.¹¹⁰ Columbia also

¹⁰⁵ *Id.* ¶¶ 11-20.

¹⁰⁶ *Id.* ¶ 21.

¹⁰⁷ *Id.* ¶ 23.

¹⁰⁸ Columbia AOD ¶ 31 (Exhibit __ (UIU/NYAG-4(G))).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* ¶ 55.

1 agreed to implement a training program for its sales and customer service
2 representatives; to record all telephone communications with customers and
3 prospective customers; and to monitor its customer service and sales
4 representatives, including by reviewing random samples of sales calls.¹¹¹ In 2014,
5 due to concerns about the effectiveness of Columbia's monitoring of its door-to-
6 door sales agents, the NYAG and Columbia agreed to modify the AOD to, among
7 other things, recognize that Columbia had ceased door-to-door sales and require
8 it to obtain NYAG approval before resuming such sales.¹¹²

9

10 Q. Can you discuss the investigation of, and settlement with, New York Energy Corp.?

11 A: The NYAG and New York Energy Corp., doing business as U.S. Energy Savings
12 ("U.S. Energy Savings"), executed an AOD in 2008 following a NYAG investigation
13 of U.S. Energy Savings' business practices,¹¹³ and those parties further executed
14 an Addendum to the Assurance of Discontinuance following subsequent
15 settlement negotiations after consumers continued submitting complaints

16

17 Q: What practices was the NYAG investigating with respect to U.S. Energy Savings?

18 A. The NYAG reviewed numerous consumer complaints that independent contractors
19 of U.S. Energy Savings were promising consumers savings that were not realized
20 when they received their bills; representing that they were affiliated with the local
21 utilities; and failing to disclose the amount of fees that would be charged if they

¹¹¹ *Id.* ¶¶ 46-54.

¹¹² Columbia AOD Modification (Exhibit __ (UIU/NYAG-4(H))).

¹¹³ U.S. Energy Savings AOD (Exhibit __ (UIU/NYAG-4(E))).

1 terminated their contracts outside of the cancellation period. Additionally,
2 consumers reported that they experienced difficulty cancelling their contracts,
3 being unable to get through on the telephone number provided by U.S. Energy
4 Savings.

5

6 Q. What was the nature of the settlement agreement regarding U.S. Energy Savings'
7 business practices?

8 A: As a result of the settlement agreement with the NYAG, U.S. Energy Savings
9 agreed to a number of different conditions, one of which included verifying either
10 in a recorded phone call or in writing all of its sales contracts with consumers such
11 that consumers demonstrated a request to use U.S. Energy Savings as their
12 commodity supplier, that U.S. Energy Savings was not affiliated with the local
13 utility, that they may have to pay early termination fees if they wished to cancel
14 their contracts after the cancellation period, and that they had not been promised
15 rates less expensive than the local utilities' rates (except in such instances where
16 actual savings were demonstrated).¹¹⁴

17

18 Q: Did U.S. Energy Savings agree to any other conditions, other than the verification
19 conditions described above?

20 A: Yes, U.S. Energy Savings was required to engage in a variety of vetting and
21 monitoring practices for its independent sales contractors, including: (1) requiring
22 an application process that elicited the disclosure of any misdemeanors and

¹¹⁴ *Id.* at 7 ¶ 34.

1 felonies; (2) checking references or conducting background checks; (3)
2 terminating contracts with those independent contractors who repeatedly failed to
3 state they are not affiliated with the local utility, promised consumers immediate
4 savings unless such savings were actually demonstrated, or failed to accurately
5 state the terms of the sales agreement for the price of natural gas.¹¹⁵ U.S. Energy
6 Savings was also required to provide consumers with clear and conspicuous
7 written notice of a 30-day cancellation period on all sales contracts and to allow
8 customers to cancel within 60 days without being assessed any termination fees.¹¹⁶

9

10 Q: Why was an Addendum to the Assurance of Discontinuance issued in 2009 with
11 respect to U.S. Energy Savings?

12 A: Because the NYAG's office continued receiving consumer complaints about
13 confusion regarding U.S. Energy Savings' contract terms.¹¹⁷

14

15 Q: What was the result of the addendum?

16 A: The 2009 Addendum amended the portion of the 2008 Assurance of
17 Discontinuance by providing that, "beginning on October 1, 2009, any termination
18 fee assessed by U.S. Energy Savings when a consumer cancels an Agreement
19 outside of the 30-day cancellation period, shall not exceed its liquidated damages,
20 but such termination fee may not exceed a total of \$50.00 or \$5.50 per month
21 remaining on the agreement, whichever is lower, provided however that the

¹¹⁵ *Id.* at 8-9.

¹¹⁶ *Id.* at 9-10.

¹¹⁷ U.S. Energy Savings AOD Addendum (Exhibit __ (UIU/NYAG-4(F))).

1 limitation contained herein shall expire three years after the date the Assurance
2 was fully executed.”¹¹⁸

3

4 Q: Could you describe the resolution the NYAG reached with ECONergy?

5 A: In 2002, the NYAG filed a petition under Executive Law § 63(12) for injunctive and
6 monetary relief against ECONergy Energy Company, Inc.¹¹⁹ A Consent
7 Judgment and Order was issued September 23, 2003.¹²⁰

8

9 Q: What did the NYAG allege in its 2002 petition against ECONergy?

10 A: The NYAG alleged that ECONergy engaged in a variety of repeated and
11 persistent deceptive and illegal business practices while marketing and selling its
12 electricity and natural gas services. For example, the NYAG alleged that
13 ECONergy switched the providers of electric and gas services of New York
14 residents without their authorization (slamming), misrepresented the identity of its
15 door-to-door sales agents, and misrepresented the potential savings customers
16 could obtain by switching to ECONergy’s service.¹²¹

17

18 Q: What led the NYAG to file a petition against ECONergy?

19 A: The NYAG commenced an investigation after reviewing more than 70 complaints
20 related to ECONergy’s door-to-door marketing practices and its distribution of

¹¹⁸ *Id.* at 2 ¶ 8.

¹¹⁹ ECON Petition (Exhibit __ (UIU/NYAG-4(D))).

¹²⁰ ECON Consent Judgment (Exhibit __ (UIU/NYAG-4(C))).

¹²¹ ECON Petition 1 ¶ 2.

1 printed sales materials.¹²² The NYAG sought to permanently enjoin ECONergy
2 from engaging in the fraudulent, deceptive, and illegal acts that led to the consumer
3 complaints.¹²³ The NYAG also sought an order directing ECONergy to, among
4 other things, pay restitution to New York residents who had been induced to switch
5 their service as a result of ECONergy's fraudulent practices or who had been
6 switched without proper authorization.¹²⁴

7
8 Q: What was the result of the NYAG investigation into ECONergy?

9 A: A Consent Order and Judgement was filed on September 30, 2003 in the New
10 York County Supreme Court.¹²⁵ The order, among other things, enjoined
11 ECONergy from: (1) failing to secure proper consumer authorization to switch
12 residential customers to its service; (2) misrepresenting the amount, character, and
13 duration of savings residential consumers could receive by switching service; (3)
14 misrepresenting the identity of its sales agents or employees (i.e. pretending to be
15 employees of the incumbent utility); (4) failing to advise customers of their right to
16 cancel door-to-door sales contracts within three business days.¹²⁶ The order also
17 required ECONergy to pay restitution to various eligible customers in the amount
18 of \$75 plus 15% of the first three months of the residential customer's gas/electric
19 bill (i.e. customers whose service was switched without authorization or customers
20 who received misrepresentations regarding prices or savings).¹²⁷ Finally,

¹²² *Id.* at 5 ¶ 17.

¹²³ *Id.* at 8 ¶ 32(a).

¹²⁴ *Id.* at 8 ¶ 32(b).

¹²⁵ ECON Consent Judgment.

¹²⁶ *Id.* at 2-3.

¹²⁷ *Id.* at 3-5.

1 ECONenergy was ordered to pay \$300,000 in costs and penalties to the NYAG.¹²⁸

2

3 Q: Could you discuss the settlement agreement reached with Total Gas & Electric?

4 A: Yes. The NYAG entered into an AOD with TG&E, an ESCO selling electricity and
5 natural gas to residential and small commercial customers throughout various
6 areas of New York State that were serviced by KEDNY, Con Edison, O&R, Central
7 Hudson, NYSEG, Niagara Mohawk, NFG, and RG&E, in 2001.¹²⁹

8

9 Q. Why did the NYAG start investigating the sales practices of TG&E and its sales
10 representatives?

11 A. The NYAG received and reviewed approximately 120 customer complaints made
12 to the NYAG, the PSC, and the Better Business Bureau regarding TG&E's door-
13 to-door marketing practices.

14

15 Q. What did the NYAG find during its investigation?

16 A. Following its investigation, the NYAG concluded that TG&E's sales
17 representatives had misrepresented the potential savings customers could
18 experience if they switched from being a full service utility customer to purchasing
19 their gas or electric from TG&E.¹³⁰ For example, some sales representatives
20 claimed that customers could save as much as 18% by switching.¹³¹ The NYAG

¹²⁸ *Id.* at 6.

¹²⁹ TG&E Assurance at 1-2 ¶ 3 (Exhibit __ (UIU/NYAG-4(B))).

¹³⁰ *Id.* at 3 ¶ 10.

¹³¹ *Id.*

1 also found that TG&E sales representatives had engaged in slamming.¹³² For
2 example, sales representatives forged customer signatures or simply switched the
3 customers without their signatures.¹³³ Additionally, sales representatives failed to
4 leave copies of the signed contracts with customers who enrolled, and the
5 contracts did not comply with New York's three-day right to cancel provisions for
6 door-to-door sales by failing to note this language conspicuously on the contract.¹³⁴

7
8 Q. What was the result of the NYAG's investigation?

9 A. In accordance with the AOD signed by TG&E, it was permanently enjoined from
10 engaging in any fraudulent, deceptive, or illegal acts in violation of New York's
11 General Business Law §§ 349-350, including, among other things: (1)
12 misrepresentations of any kind (direct or implicit, orally or in writing, through any
13 medium), of savings consumers could expect by switching to TG&E, (2)
14 misrepresentations by TG&E sales representatives that they were employees or
15 agents of the incumbent utility, (3) misrepresentations that forged customer
16 signatures are actually validly executed contracts, (4) failure to disclose in writing
17 any contract cancellation fees, (5) misrepresenting any guarantee of savings, and
18 (6) failing to provide customers with executed copies of their contracts.¹³⁵ In
19 addition, TG&E agreed to provide restitution to all eligible customers by refunding
20 or crediting to each customer (1) 18% of the total cost of services charged to a
21 customer over the term of the contract, (2) all switch fees customers paid to TG&E,

¹³² *Id.* at 4 ¶ 12.

¹³³ *Id.*

¹³⁴ *Id.* at 4 ¶ 14.

¹³⁵ *Id.* at 9-10 ¶ 31.

1 (3) all cancellation fees customers paid to TG&E to discontinue service.¹³⁶ TG&E
2 also agreed to return customer accounts to the incumbent utilities at no cost to the
3 customer upon request.¹³⁷

4

5 Q: Were there any other conditions of the settlement agreement?

6 A: Yes, TG&E agreed to pay the NYAG penalties in the amount of \$125,000¹³⁸ and
7 costs in the amount of \$75,000.¹³⁹

8

9 Q: Finally, please describe the settlement agreement the NYAG reached with Con
10 Edison Solutions.

11 A: The NYAG entered into a settlement with Con Edison Solutions, an ESCO formed
12 by the utility Con Edison.¹⁴⁰

13

14 Q. Why did the NYAG start investigating the practices of Con Edison Solutions?

15 A. The NYAG received complaints regarding Con Edison Solutions' contract renewal
16 practices. Its customers had entered into fixed price contracts that were due to
17 expire. Prior to the expiration, Con Edison Solutions sent letters to customers
18 automatically renewing their contracts for a year, with new terms, unless those
19 customers contacted the company.¹⁴¹

20

¹³⁶ *Id.* at 12 ¶ 35.

¹³⁷ *Id.*

¹³⁸ *Id.* at 14 ¶ 39.

¹³⁹ *Id.* at 14 ¶ 40.

¹⁴⁰ Con Ed Solutions Press Release (Exhibit __ (UIU/NYAG-4(A))).

¹⁴¹ *See id.*

1 Q. What did the NYAG find during its investigation?

2 A. The NYAG concluded that Con Edison Solutions' renewal letter did not clearly
3 state the terms of contract renewal.

4

5 Q. What was the result of the NYAG's investigation?

6 A. In accordance with the agreement reached with Con Edison Solutions in 2000, the
7 company sent out another letter clearly spelling out the terms of its automatic
8 renewal policy, and extended the date by which customers could cancel their
9 contracts.

10

11 Q. Does this conclude your testimony?

12 A. Yes, at this time.