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

INITIAL POST-HEARING BRIEF OF THE UTILITY INTERVENTION UNIT AND NEW YORK ATTORNEY GENERAL'S OFFICE (UIU/NYAG)

Carrie Scrufari
Lead Counsel, Utility Intervention Unit
518-486-3744
carrie.scrufari@dos.ny.gov

Kathleen O'Hare
Attorney 1, Utility Intervention Unit
518-486-7758
kathleen.ohare@dos.ny.gov

Eric T. Schneiderman
Attorney General of the State of New York

Jane M. Azia, Bureau Chief
Bureau of Consumer Frauds and Protection
212-416-8727
jane.azia@ag.ny.gov

Kate Matuschak, Assistant Attorney General
212-416-6189
kate.matuschak@ag.ny.gov

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UNIVERSAL TABLE OF CONTENTS[1]

[1] In accordance with the ALJs' instructions, UIU/NYAG are adhering to the parties proposed Universal Table of Contents, but are only including those topics they wish to address in this post-hearing brief. UIU/NYAG reserve the right to address other items in the Universal Table of Contents in their reply brief should the need arise.

I. PRELIMINARY STATEMENT

The New York Department of State's Utility Intervention Unit (UIU) and the Office of the New York State Attorney General (NYAG) respectfully submit this post-hearing brief following the evidentiary hearing in the above-captioned proceedings. UIU/NYAG appreciate the opportunity to augment their earlier filings and testimony with additional information developed at the evidentiary hearing held from November 27 through December 12, 2017.

UIU is an office within the New York Department of State's Division of Consumer Protection statutorily authorized to "represent the interests of consumers of the state before federal, state and local administrative and regulatory agencies engaged in the regulation of energy services."[2] UIU focuses particularly on the interests of New York's residential and small commercial customers.

The NYAG is the chief law enforcement officer in the State and is both obligated and empowered to protect the interests of the people and businesses of New York. The NYAG enforces consumer protection laws, including laws that prohibit fraudulent or deceptive business practices. The NYAG has participated in numerous New York State Public Service Commission (Commission or PSC) proceedings advocating for residential and small business customers.

Based on the evidence adduced during these proceedings, including that submitted by UIU/NYAG in their testimony, UIU/NYAG have a number of proposals for reforming New York's retail energy market. As discussed further below, the evidence in this proceeding shows that energy service companies (ESCOs) repeatedly have engaged in deceptive business practices; overcharged consumers for their energy; and failed to provide evidence of services or products of sufficient value to offset the premium paid by residential and small commercial consumers (mass market consumers). For those reasons, UIU/NYAG make the following proposals.

UIU/NYAG recommend that the Commission place a prohibition on ESCOs' service to mass market customers, effective immediately, unless and until additional consumer protection measures are implemented. UIU/NYAG recommend that the Commission allow an opportunity for ESCOs to petition for a waiver of the prohibition of service to mass market customers if they can offer a guarantee that customers will save money compared to what they would have paid with full default utility service. The history of ESCOs' abuses in the mass market coupled with

[2] N.Y. Exec. L. § 94-a.

their failure to provide value warrant a qualified prohibition. As discussed further below, reliance on law enforcement to solve an industry-wide problem is not the solution.

Such a qualified prohibition would not affect the Reforming the Energy Vision (REV) initiative[3] as the ESCOS contend. The problems that this proceeding seeks to address existed years before the REV initiative commenced. Moreover, the ESCOs have not demonstrated that a prohibition on serving mass market customers would impede the success of REV, especially if the Commission adopts the Department of Public Service (DPS) Staff's proposal to permit ESCOs to continue operating in the retail market if they can provide guaranteed savings or if they can offer a 100% renewable product.

In the event the Commission allows ESCOs to continue selling their products to mass market customers, whether as a general matter or as a result of obtaining a waiver, the Uniform Business Practices (UBP) applicable to ESCOs should be modified in an attempt that customer abuses and overcharging by ESCOs are at least deterred. For example, door-to-door marketing and certain outbound telemarketing practices of ESCOs to mass market customers should be prohibited. The number and nature of customer complaints concerning ESCO practices demonstrate the need for further modification of the UBP in this area.

Finally, if the Commission continues permitting ESCOs to access the residential and small commercial retail market, it should require more transparency on the part of ESCOs to disclose their price premiums compared to the default utility price and to itemize the cost associated with each item included in a bundled product.

II. BACKGROUND

Historically, New York consumers purchased their gas and electric energy from public utilities that were vertically integrated monopolies. These vertically integrated monopolies generated, transmitted, distributed, and sold energy as a commodity to consumers. Beginning in 1910 with the enactment of the Public Service Law (PSL) and through subsequent amendments, the Legislature provided the PSC with broad regulatory power over these vertically integrated monopolies and the State's energy market to protect the public's right to receive safe, reliable, and affordable energy. *See* PSL §§ 4(1), 5, 65, 66, 66-d; *Matter of Energy Ass'n of N.Y. State v.*

[3] *See* Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Order Instituting Proceeding (issued April 25, 2014).

Pub. Serv. Comm'n, 169 Misc. 2d 924, 927, 929-31, 936-37 (Sup. Ct. Albany Cnty. 1996); *see also Matter of Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 47 N.Y.2d 94, 102, 104 (1979) (describing the Commission's "vast power" and discretion to implement that power), *rev'd on other grounds, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

Under this regulated monopoly scheme, the public utilities sent customers a single bill listing the charges associated with a set of comprehensive energy services, including the charges for the generation, transportation, and sale of energy commodities (natural gas and electricity). Through the PSL, the Legislature delegated statutory authority to the Commission to ensure that the prices charged to consumers were "just and reasonable." *See* PSL § 66(5). The Commission fulfilled this statutory duty by establishing rates based on the public utilities' costs to create and transport energy (e.g., building power plants, constructing pipes, erecting power lines), while adding a profit margin to provide the utilities with a reasonable return on their investments. *See generally, e.g.*, *Matter of Abrams v. Pub. Serv. Comm'n*, 136 A.D.2d 187 (3d Dep't 1988).

In the 1980s, utility regulators across the country began requiring public utilities to unbundle the different energy services they provided to allow non-utility suppliers with competitive access to the market to sell energy commodity to consumers. *See, e.g.*, *Associated Gas Distribs. v. Fed. Energy Regulatory Comm'n*, 824 F.2d 981, 997-1001 (D.C. Cir. 1987). By the 1990s, New York was undertaking efforts to restructure its energy market to foster such competition. *See* Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Case 93-G-0932, Opinion No. 94-26, December 20, 1994; Opinion and Order Regarding Competitive Opportunities for Electric Service, Case 94-E-0952, Opinion No. 96-12 (issued and effective May 20, 1996). In endeavoring to restructure New York's industry markets, the Commission sought to "lower rates for all customers." Case 94-E-0952, Opinion No. 96-12 at 1. The Commission's goals throughout the restructuring process included encouraging competition to provide consumers with lower commodity rates and more diverse energy products. *See* Op. 96-12 at 30-32 (May 20, 1996).

As part of the restructuring process, in 1996, the Commission began allowing ESCOs to compete with utilities in selling energy as a commodity. *See* Op. 96-12 at 30-32. As the Commission explained, "[m]arket forces overall are expected to produce, over time, rates that will be lower than they would be under a regulated environment." Op. 96-12 at 28. The

Commission envisioned that ESCOs would offer consumers lower energy prices than utilities because ESCOs would find more efficient and innovative ways to purchase energy and pass a portion of the savings on to consumers. *See* Op. 96-12 at 30-31, 39.

The Commission recognized that market restructuring was an evolving process, requiring oversight and regulation to ensure that consumers received lower prices and other benefits. *See* Op. 96-12 at 30-33. In particular, the Commission acknowledged that "retail access brings with it significant risks and requires considerable caution, and should be provided only if it is in the best interests of all consumers." *See* Op. 96-12 at 13 (quoting recommended decision of the Administrative Law Judge [ALJ]). Accordingly, upon embarking on the restructuring process, the Commission explained that it would "monitor [the] market's development" and "take corrective action should problems arise." Case 94-E-0952, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services, Op. 97-5, at 42 (May 19, 1997).

One such corrective action occurred in 1999 when the Commission implemented the UBP, a set of rules governing, among other things, ESCOs' business and marketing practices. *See* Case 98-M-1343, Op. 99-3, at 2-3 (Feb. 16, 1999); *see generally* N.Y. Public Service Commission, Uniform Business Practices (UBP) (Jan. 2018). The Commission has periodically amended the UBP to enact additional consumer protections. On October 15, 2008, due to various ESCOs' improper marketing practices, the PSC amended the UBP, adding stronger marketing standards to "provide even greater confidence and security to consumers." *See* Oct. 15, 2008 Public Service Commission Press Release; *see* Case 98-M-1343, Order Adopting Amendments to the Uniform Business Practices (Oct. 27, 2008). Following enactment of the Energy Services Company Consumers Bill of Rights at General Business Law § 349-d in 2010, the Commission further amended the UBP to require that ESCOs provide consumers an ESCO Consumer's Bill of Rights notice when offering services. *See* Case 98-M-1343, Order Implementing Chapter 416 of the Laws of 2010 (Dec. 17, 2010). On February 25, 2014, the PSC further amended the UBP, requiring greater transparency of ESCO pricing and other measures to protect residential and small business customers of ESCOs. *See* Case 12-M-0476 *et al.*, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Energy Markets in New York State (Feb. 25, 2014). Many of these amendments were later stayed (*see* Case 12-M-0476 *et al.*, Order Granting Requests for Rehearing and Issuing a Stay (April 25, 2014)), and additional amendments were ultimately made to the UBP in 2016. *See* Case 15-M-0127, et. al.,

Order Resetting Retail Energy Markets and Establishing Further Process (Feb. 23, 2016). On January 19, 2018, the Commission issued an Order Adopting Revised Uniform Business Practices by, among other things, incorporating protections to prevent early termination fees in certain circumstances. *See* Case 98-M-1343; *see also id.*, Notice Extending Deadlines (Feb. 16, 2018) (extending compliance deadline to April 6, 2018); *see also* Notice Further Extending Deadlines (March 28, 2018) (further extending compliance deadline to July 26, 2018).

A. PROCEDURAL HISTORY

Despite the Commission's efforts to implement various protections, ESCO participation in the retail energy market has inflicted financial harm on New York residential consumers. The instant proceeding and related matters arose because ESCOs have regularly harmed consumers by charging more for energy than what the public utilities charge. The United States Energy Information Administration (EIA) data indicates that New York consumers paid an average of "at least 6.7% more to buy their electricity from ESCOs every year going back to 2008, and 5% more in 2007," compared to the amounts they would have paid to buy energy from the utilities. Erik Kriss, *NY's ESCOs Charged Highest Electric Prices in Nation Last Year; AARP Urges Probe* (Dec. 28, 2015), https://states.aarp.org/nys-escos-charged-highest-electric-prices-in-nation-last-year-aarp-urges-probe/.

To convince consumers to switch to ESCOs despite their higher prices, many ESCOs have engaged in aggressive sales tactics or fraudulent and illegal marketing practices. (Tr. at 1548:2-10). The NYAG's investigations have revealed that ESCOs routinely: misrepresent to consumers that they will save money on energy by switching from their public utility to an ESCO, change consumers' energy providers or plans without authorization (a practice called "slamming") (Tr. at 1555, 1565, 1567-1568, 1570, 1574, 1577, 1622, 2365), sell fixed-price contracts but then fail to honor the agreed-upon price (Tr. at 2365), and renew fixed-price contracts without adequate notice (Tr. at 1547, 1679-1680). Because energy purchased from an ESCO is still transported and delivered by the local public utility (which charges its own price for the transportation and delivery service), consumers often have difficulty understanding the monetary impacts of purchasing energy from ESCOs rather than utilities. (*See* Tr. at 4073-4074).

The actions of ESCOs have had an especially adverse effect on low-income consumers. Several state and federal programs seek to protect low-income energy consumers by providing

these financially vulnerable consumers with funds to ease the burden of energy bills. Specifically, the Low Income Home Energy Assistance Program is a federally funded program that provides low-income consumers with credits toward their energy bills. *See* 45 C.F.R. § 96.87. The Commission has also approved low-income[4] payment-assistance programs providing these consumers with utility bill discounts. The programs are administered through the public utilities and are paid for by all rate payers. *See, e.g.*, Case 14-M-0565, *Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility Customers*, Order Adopting Low Income Program Modifications and Directing Utility Filings at 29 (May 20, 2016) (stating that all costs of the low-income program would be borne across all classes of customers because such programs "achieve social policy goals, and society as a whole benefits from their successful implementation."); *see also* Case 14-M-0565, Order Approving Implementation Plans with Modifications at 5 (February 17, 2017) (noting that the costs of the low-income programs "will be borne by all classes of customers; however, the specific mode of cost recovery will be determined in rate cases, where the total impacts of all revenue requirement changes can be considered."). When ESCOs charge higher prices to low-income consumers than the public utility would have charged, their participation in the retail energy market inflicts financial harm on all consumers – but most particularly on households struggling to provide for necessities – while also undermining the financial assistance programs designed to help those consumers pay their energy bills.

1. The Commission Begins a Comprehensive Review of the State's Retail Markets Serving Mass Market Customers in 2012.

The impact of ESCO prices on low-income consumers was one of several factors that led the Commission to commence a comprehensive review of the State's retail markets serving mass market customers in 2012. The Commission explained that such a review was necessary because:

> [C]ustomers participating in utility low-income assistance programs are more likely to obtain their energy commodity from an ESCO than residential customers who do not participate in these programs. Further, [DPS] Staff reports that some ESCOs have substantially more customers participating in the utility's low-income assistance programs, on a percentage basis, than the overall population.

[4] Low-income customers in New York are generally defined as those "who are eligible to participate in the Home Energy Assistance Program, i.e., those at or below 60% of the state median income (SMI)." Case 14-M-0565, Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility Customers, Order Instituting Proceeding, at p. 1, n. 2 (Jan. 9, 2015).

> Coupled with the fact . . . that many residential ESCO customers pay more than had they purchased their energy commodity from the utility, this raises a concern that the current operation of the retail energy markets may be in conflict with one of our statutory policy requirements. Specifically, it is this Commission's policy that the continued provision of electric and natural gas service to customers is in the public interest. Residential retail energy markets, as currently operating, may be inconsistent with the Commission's efforts to assist low-income customers in maintaining electricity and natural gas service, such as the authorization of more than $100 million annually for ratepayer-funded financial assistance programs. Changes to the residential retail energy markets may be useful to align their operation with the public's interest in the continued provision of energy service to all customers.

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 at 9 (October 19, 2012).

2. In 2014, the Commission Determined ESCOs Were Not Benefitting Mass Market Customers.

Upon conclusion of its review, the Commission issued an order in February 2014, determining that although many ESCOs had provided large commercial consumers with price savings or other valuable products, ESCOs had failed to provide such benefits to their residential and small commercial consumers. *See* Case 12-M-0476, *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets, at 2-4, 10-11 (February 25, 2014). The Commission further concluded that the retail energy market for residential and small commercial consumers was not functioning as intended; many ESCOs were simply "generating revenues by offering consumers little more than higher prices." *Id.* at 3; *see also id.* at 2-4.

To address these consumer harms, the Commission's February 2014 Order amended the UBP. *See id.* at 56-59. One amendment required ESCOs to provide low-income customers with (1) a guarantee of "savings over what the customer would otherwise pay to the utility" for energy and/or (2) "energy-related value-added services that are designed to reduce customers' overall energy bills." *Id.* at 24. The Commission later stayed implementation of the February 2014 Order to consider petitions for rehearing and allow for additional public comment on the

appropriate terms and conditions for ESCOs' participation in the retail energy market for low-income consumers. *See* case 12-M-0476 *et.al*., *supra*, Order Granting Requests for Rehearing and Issuing a Stay (issued April 25, 2014).

Following receipt and consideration of stakeholder comments, the Commission issued an order in February 2015 reaffirming its February 2014 determination that ESCOs serving low-income consumers must offer either actual price savings on energy or energy-related products that provide real financial value. *See* Case 12-M-0476 *et. al*., *supra*, Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015). In addition, the Commission ordered DPS Staff to hold a series of public meetings with various stakeholders (the Collaborative) to address implementing the conditions contained in the February 2015 Rehearing Order. *See id.* at 7. The Collaborative consisted of several ESCOs and ESCO trade associations, all major New York utilities, and consumer advocacy organizations such as UIU, the Public Utility Law Project (PULP), the American Association of Retired Persons (AARP), and the City of New York (the City). *See* Case 12-M-0476 *et. al*., Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services Companies at 2 (November 5, 2015).

3. Collaborative Proceedings Were Commenced in 2015.

The Collaborative convened five times in 2015, held additional small group meetings and discussions, and eventually issued an extensive report that concluded "few, if any, ESCOs intend to offer a product which guarantees that the customer will pay no more than [what] would have been paid had energy been purchased from the utility." *Id.* at 32. Throughout the Collaborative, the consumer advocacy groups expressed that any "value added service needs to guarantee [low-income] customers either a lower bill or a reduction in energy usage." *Id.* at 33. Those groups also maintained the position that any ESCO fixed-price product that charged low-income consumers more for energy than the utility would have charged did not provide low-income consumers with any real financial savings. *See id.* The consumer advocates further explained in the Collaborative Report how ESCOs had failed to demonstrate that any other energy products, such as advanced thermostats, actually provided financial savings to consumers, including low-income consumers. *See id.* at 41-42.

While the Collaborative was meeting, the Commission also issued a notice on April 21, 2015 to alert interested stakeholders that DPS Staff would convene a technical conference on May 12, 2015 to, among other things, "discuss and develop proposals for new eligibility criteria"

for ESCOs. *See* Case 15-M-0127, *In the Matter of Eligibility Criteria for Energy Services Companies, Notice of Technical Conference* at 1 (April 21, 2015). Meanwhile, throughout the 2015 calendar year when the Collaborative was convening, ESCO prices continued rising, causing ESCO customers to pay 22% more for electricity than utility customers. *See* Erik Kriss, *As PSC Opens Major ESCO Case, AARP Urges Governor to Protect Consumers* (Jan. 26, 2017), https://states.aarp.org/as-psc-opens-major-esco-case-aarp-urges-governor-to-protect-consumers/.

4. The Commission Requires ESCOs Deliver Guaranteed Savings in Several 2016 Orders.

In February 2016, the Commission ordered all ESCOs to provide their mass market customers with either guaranteed savings compared to utility prices or a commodity product consisting of at least thirty percent renewable energy. *See* Case 15-M-0127 *In the Matter of Eligibility Criteria for Energy Service Companies, et al.*, Order Resetting Retail Energy Markets and Establishing Further Process (Reset Order) (February 23, 2016). The same day, the Commission also issued a Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers. *See* Case 15-M0127, *et al*., Notice (issued February 23, 2016). The Commission stated it would consider what long-term conditions should be placed on ESCOs serving mass market customers. *See id.* To that end, the Commission sought comments on a multitude of topics, including, among other things, (1) whether ESCOs should be required to provide guaranteed savings or defined energy-related value-added services, (2) what specific products or categories of products constituted an energy-related value-added service and what restrictions should be placed on the provision of commodity-only products (including fixed-price products), and (3) what sales requirements should be imposed on ESCOs and their marketing agents.

Shortly thereafter, three ESCO representatives brought Article 78 actions challenging the February 2016 Order. The Supreme Court, Albany County held that the Commission had broad statutory authority to regulate ESCOs' pricing practices. *See National Energy Marketers Association et al. v. New York State Public Service Comm'n*, 53 Misc. 3d 641, 649–50, 37 N.Y.S.3d 178 (Sup. Ct. Albany Cnty. July 22, 2016), *Retail Energy Supply Association et al. v. New York State Public Service Commn*., (Albany Cnty. Index No. 870-16); *Family Energy Inc. et al. v. New York State Public Service Commn*., (Albany Cnty. Index No. 874-16), Decision/Order issued July 22, 2016 (Zwack, J). The court did, however, vacate the February 2016 Order

because it found that the ESCOs had received insufficient notice of the market reforms set forth therein. *See National Energy Marketers Association et al. v. New York Pub. Service Comm'n*, 53 Misc. 3d 641, 651, 37 N.Y.S.3d 178 (Sup. Ct. Albany Cnty. July 22, 2016). On appeal, the State of New York Supreme Court, Appellate Division Third Judicial Department affirmed that the PSC had broad statutory authority to regulate ESCOs and upheld the Albany County Supreme Court's finding regarding insufficient notice. *See Matter of National Energy Marketers Assn. v. Pub. Serv. Comm'n*., 152 A.D.3d 1122, 56 N.Y.S.3d 485 (3d Dep't 2017); *lv to appeal granted*, No. 2018-100, 2018 WL 1473660 (N.Y. Mar. 27, 2018) *Matter of Retail Energy Supply Assn. v. Public Serv. Comm'n*, 152 A.D.3d 1133, 1138, 59 N.Y.S.3d 590, 595 (3d Dep't 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.") *lv to appeal granted*, No. 2018-99, 2018 WL 1473675 (N.Y. Mar. 27, 2018).

In July 2016, the Commission issued a moratorium on ESCOs selling products to low-income consumers. *See* Case 12-M-0476, Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies at 1, 17-18 (July 15, 2016). Relying on a voluminous record developed over years of administrative proceedings, the Commission determined that a moratorium was necessary to protect low-income consumers because ESCOs were unable or unwilling to offer products that would provide energy cost savings compared to the utilities' rates. The Commission further concluded the moratorium was "necessary to ensure that the financial benefits provided to [low-income consumers] through utility low-income assistance programs are not absorbed by ESCOs, who in turn, provide gas and electricity at comparatively higher prices, without any corresponding value to" financially vulnerable consumers. *Id.* at 10.

Several stakeholders, including the Retail Energy Supply Association (RESA) and the National Energy Marketers Association (NEMA), petitioned the Commission for a rehearing and sought clarification of the July 2016 Order. Upon rehearing, the Commission affirmed its July 2016 Order in a September 2016 Order, concluding again that a moratorium was required to protect low-income consumers from ESCOs' abusive pricing practices because the Collaborative proceedings had made clear that ESCOs would not provide any price guarantees or valuable

energy products to low-income consumers "anytime in the near future." Case 12-M-0476 *et. al.*, *supra*, Order on Rehearing and Providing Clarification, at 14 (September 19, 2016).

NEMA, BlueRock Energy, Inc., Residents Energy, LLC and Verde Energy USA New York, LCC and RESA then filed lawsuits seeking a temporary restraining order (TRO) and a permanent injunction of the PSC's July 2016 and September 2016 Orders. On September 28, 2016, the Albany County Supreme Court temporarily stayed implementation of the Commission's July and September 2016 Orders. *See Matter of National Energy Marketers Assoc. et al. v New York State Public Service Comm'n* (Albany Cnty. Index No. 5860-16); *Matter of Retail Energy Supply Assoc. et al. v New York State Public Service Comm'n* (Albany Cnty. Index No. 5693-16), Slip Op. at *20 (June 30, 2017).

In October 2016, the Commission published a Notice of Proposed Rulemaking in the State Register, advising that, among other things, it was reconsidering the moratorium arrangements set forth in its July 2016 and September 2016 Orders. *See* 38 N.Y. Reg. 16, 16-17 (Oct. 5, 2016). Following the statutory notice and comment period, in December 2016, the Commission reaffirmed the July 2016 and September 2016 Orders and issued an order converting the moratorium into a permanent prohibition on ESCO service to low-income customers by prohibiting ESCOs from enrolling new low-income consumers or renewing the contracts of existing low-income customers. *See* 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 at 3, 19-23, 26-28 (December 16, 2016). Nevertheless, the December 2016 Order permitted ESCOs willing to guarantee savings to low-income consumers to seek a waiver from the general prohibition. *Id*. at 24-25. NEMA and RESA then amended their petitions to challenge the December 2016 Order, in addition to the July and September 2016 Orders.

5. In June 2017, Albany County Supreme Court Dismissed the ESCOs' Appeals of the Commission's 2016 Orders.

On June 30, 2017, the Albany County Supreme Court dismissed the above-mentioned appeals of the Commission's July, September, and December 2016 Orders. The court observed "it has already determined" that the Commission had authority to regulate ESCOs. *Matter of National Energy Marketers Assoc. et al. v New York State Public Service Comm'n*, (Albany Cnty. Index No. 5860-16); *Matter of Retail Energy Supply Assoc. et al. v New York State Public*

Service Comm'n, (Albany Cnty. Index No. 5693-16), Slip Op. at *10-11 (June 30, 2017). The court held that the Commission's findings regarding low-income energy customers were rational and supported by the record. *Id*. at 20 (finding "(t)he PSC's findings are well written, exceptionally comprehensive, address all of petitioners' arguments, and are well supported by the record."). Notably, the court rejected "as unsupported, the notion that there is value in the different products ESCOs offer." *Id*. at 23. The court further reasoned that "the gift cards ESCOs offer a low-income rate payer are actually paid for by the ratepayer through the HEAP assistance, and hardly meet an energy need. Utilities have always had to offer fixed rate billing — it is the budget programs — and ESCOs cannot claim that this is a unique service." *Id.* RESA and NEMA's appeal of the June 30, 2017 Supreme Court decision is currently pending before the Third Department.

6. Administrative Law Judges Ashley Moreno and Erika Bergen Preside Over Three Weeks of Evidentiary Hearings in November and December 2017.

While RESA and NEMA were preparing their appeal of the Albany County Supreme Court decision, parties to the instant administrative proceeding were conducting discovery prior to filing initial testimony on September 15, 2017 and rebuttal testimony on October 27, 2017. On November 27 through December 12, 2017, ALJs Ashely Moreno and Erika Bergen presided over an evidentiary hearing noticed on December 2, 2016, in Case 15-M-0127, *in the Matter of Eligibility Criteria for Energy Service Companies*; 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*; and Case 98-M-1343, *In the Matter of Retail Access Business Rules* (Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits). The purpose of the evidentiary hearing was to provide testimony relevant to answering the 20 topics that were listed in the Commission's December 2, 2016 Notice, in recognition of the "customer abuses and overcharging" that persist in the retail market, despite efforts to remediate these concerns. *See id.* at p. 3. The fact-finding purpose of the evidentiary hearing was to assist the Commission with examining "measures that must be taken to ensure that these customers receive valuable services and pay just and reasonable rates for commodity and other services." *Id.* Specifically, the Commission sought testimony on whether ESCOs should be "completely prohibited from serving their current products" to residential and small commercial customers. *Id.*

Fourteen parties filed several sets of initial testimony on September 15, 2017 and most parties subsequently filed rebuttal testimony on October 27, 2017. The parties can largely be divided into two groups: the ESCO parties and the non-ESCO parties. The ESCO parties consisted of various ESCOs, including Agway Energy Services (Agway); Direct Energy Services, LLC, Direct Energy Business, LLC, Direct Energy Business Marketing, LLC, and Gateway Energy Services Corporation (collectively Direct Energy); Drift Marketplace, Inc. (Drift); ENGIE North America (ENGIE); Great Eastern Energy (GEE); Infinite Energy; Robison Energy and Robison Energy Commercial (Robison); two ESCO trade associations: NEMA and RESA; and one energy brokerage firm: The O.E. Group. GEE, Drift, and Robison later joined together and re-named themselves the Impacted ESCO Coalition (IEC) and jointly filed rebuttal testimony under that name. Tr. at 3992-4033. RESA's expert, Dr. Makholm, adopted the pre-filed testimony of NEMA's expert, Dr. Cicchetti and testified on behalf of both RESA and NEMA at the evidentiary hearing.[5]

The non-ESCO parties consisted of the City, the New York State Office of General Services (OGS), PULP, DPS Staff, and UIU/NYAG. OGS later withdrew its pre-filed testimony prior to the hearing and that testimony is therefore not part of the evidentiary record.[6]

The above parties presented their expert witnesses for cross-examination at the evidentiary hearing, at which time their pre-filed initial and rebuttal testimony were entered into the transcript record. Given the voluminous and lengthy nature of these proceedings, and the multitude of witnesses reminiscent of the cast of characters in a Charles Dickens novel, an overview of the ESCO and non-ESCO parties' expert witnesses' testimony is provided in the following charts:

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[5] Dr. Cicchetti was unable to appear for cross-examination due to health issues.

[6] *See* Case 15-M-0127 *et al*., *supra*, Ruling on Motions to Strike pp. 2-3 (issued January 19, 2018) (when granting the motions to strike portions of Mr. Lacey's rebuttal testimony that discussed Mr. Haff's testimony, the ALJs found that "[t]estimony that is pre-filed is not automatically made part of the evidentiary record in a proceeding. Rather, the Commission's regulations state that pre-filed testimony will be received into the evidentiary record only if "each of the witnesses [who provided pre-filed testimony] is present at the hearing at which his or her prepared written testimony is offered and adopts that testimony under oath." (16 NYCRR 4.5(b)(2)). Here, Mr. Haff did not appear at the hearing and OGS did not offer the testimony for entry into the record. Nor did any other party successfully offer Mr. Haff's testimony into the record."). Available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={68AB7573-C20E-4F4B-AD3E-5448FDE648D7}.

ESCO Parties

Agway

Direct & Rebuttal: Michael Schueler, Managing Director of Product Supply at Agway

Direct Energy

Direct:

1. Guy Sharfman, economist and consultant
2. Michael Kagan economist and consultant
3. John Hanger, attorney, consultant

Rebuttal:

1. Mr. Sharfman
2. Mr. Kagan
3. Mr. Hanger
4. Dr. John Morris, economist
5. Direct Energy Rebuttal Panel: David Draper (Director of Direct Sales & Sales Operations at Direct Energy) and Chris Kallaher (attorney, Senior Director, Gov't & Reg Affairs)

ENGIE:

Direct: Jeffrey Levine, Director for Government & Regulatory Affairs at ENGIE North America

Rebuttal: none submitted

Great Eastern Energy

Direct & Rebuttal: Ronald Lukas, engineer, independent consultant

Impacted ESCO Coalition (IEC)

Direct:

1. Daniel Singer, Co-President of Robinson Energy
2. Alan Tilley, Co-founder and Director of Power Operations at Drift

Rebuttal Testimony: one panel, consisting of:

1. Melissa Massimi – President of M&R Energy Resources Corp.,
2. Michael Palmese – President of Brown's Energy Services,
3. Daniel Singer – Co-President of Robinson Energy, and
3. Alan Tilley – Co-founder and Director of Power Operations at Drift

Infinite Energy

Direct & Rebuttal: Darin Cook, co-CEO of Infinite Energy

NEMA

Direct:

1. Dr. Charles Cicchetti, economist (later adopted by RESA's witness, Dr. Jeff Makholm, economist)

Rebuttal: none submitted

O.E. Group

Direct: Charles Bergman, President of O.E. Group

Rebuttal: none submitted

RESA

Direct:

1. Dr. Makholm
2. Frank Lacey, policy consultant

Rebuttal:

3. Dr. Makholm
4. Mr. Lacey

Non-ESCO Parties

City of NY

Direct: one panel, consisting of Michael Tiger (Deputy General Counsel of NYC Dept of Consumer Affairs), Susanne DesRoches (Deputy Director for Policy, Infrastructure for the NYC Mayor's Office of Recovery and Resiliency), and Daniel Tietz (Chief Special Services Officer of NYC Human Resources Admin/Dept of Social Services).

Rebuttal: none submitted

DPS Staff

Direct:

1. ***Staff Panel Testimony***
    a. Bruce Alch, Chief, Retail Access & Business Advocacy Office of Consumer Services
    b. Craig Carroll, Utility Analyst
    c. Peter Lavery, Utility Analyst
    d. Kristine Prylo, Principal Utility Financial Analyst
    e. David Shahbazian, Utility Auditor
2. ***Joel Andruski***, Associate Economist, Office of Market & Reg Economics

Rebuttal Testimony: two panels

1. ***Staff Economics Panel*** (Mr. Andruski & Dr. Richard Schuler, economist, Chief of Regulatory Economics DPS).
2. ***Staff Rates Panel***: Michael Twergo (Chief, electric rates & tariffs), & Daniel Wheeler (Utility Supervisor).

Public Utility Law Project (PULP)

Direct:

1. William Yates, CPA
2. Barbara Alexander, inactive attorney, consumer advocate
3. Gerald Norlander, retired attorney, former executive director of PULP, consultant

Rebuttal:

1. Mr. Yates
2. Ms. Alexander

OGS

Direct:

1. John Haff, Assistant Director OGS (subsequently withdrawn)

Rebuttal: none submitted

UIU/NYAG Panel

Direct:

1. Gregg Collar, UIU Policy Analyst, Jane Azia, Bureau Chief of the Consumer Frauds and Protection Bureau, NYC Office, NYAG

Rebuttal:

1. Mr. Collar, Ms. Azia, Dr. Peter Malaspina, NYAG economist

In the analysis section that follows in Section III of this post-hearing brief, UIU/NYAG present their arguments arising from the evidentiary hearing for why additional interventions are necessary in today's retail energy market.

B. RETAIL MARKETS TODAY

Multiple NYAG investigations and settlements have revealed that the energy retail market today needs reform. From the late 1990s to present, the NYAG has conducted numerous investigations into individual ESCOs and their deceptive and illegal business practices. (*See* Tr. at 1562). These investigations resulted in seven settlements and the recovery of more than $5,000,000 in restitution, penalties, and costs. (*See id.*). The NYAG continues investigating other ESCOs for deceptive and illegal practices. (*See* Tr. at 1623:3-6; Tr. at 1656:5-10). These settlements and continuing investigations are indicative of a significant industry-wide problem in the retail energy market today. (*See* Tr. at 1622) (discussing the similar types of complaints arising in each investigation, involving the same patterns of slamming, promises of substantial savings, failure to provide contracts, and high-pressure sales).[7]

Most recently, on August 28, 2017, the NYAG settled claims against the ESCOs Energy Plus Holdings LLC and Energy Plus Natural Gas LLC (collectively Energy Plus) following an investigation involving more than 350 consumer complaints,[8] false and misleading savings and price claims, failure to adequately disclose cancellation policies and early termination fees, and failure to clearly and conspicuously disclose the material terms and conditions of energy contracts. (*See* Tr. at 1563-1565). Energy Plus agreed to pay $800,000 in restitution following the settlement. (*See* Tr. at 1565). In 2015, the NYAG arrived at a similar settlement with the

[7] UIU/NYAG observe that the Massachusetts Attorney General's Office (Mass. AG) recently released a report which found Massachusetts ESCO customers were filing similar complaints regarding slamming, promises of substantial savings, and high-pressure sales. The Mass. AG concluded that these unfair and deceptive practices appear to be an issue across numerous jurisdictions. *See* Massachusetts Attorney General's Office Commonwealth of Massachusetts, *Are Consumers Benefiting from Competition? An Analysis of the Individual Residential Electric Supply Market in Massachusetts* p. 39 (accessed March 29, 2018) *available at* https://www.mass.gov/doc/comp-supply-report-final (noting "These allegations are not just common in Massachusetts, but across the fourteen states and jurisdictions in which the electric supply market was deregulated for residential consumers (the "deregulated states"). A perfunctory internet search indicates that in the last five years, thirteen of the fourteen deregulated states have launched investigations regarding unfair or deceptive acts or practices by electric suppliers who also are licensed to do business in Massachusetts. This includes at least 35 investigations or lawsuits by state public utility commissions and state attorneys general and/or consumer advocates. Moreover, suppliers who are licensed to do business in Massachusetts have been the subject of at least 59 class action lawsuits, as well as numerous individual lawsuits—all alleging unfair and deceptive acts and practices consistent with the types of complaints regularly received by the AGO. Unfortunately, the investigations and lawsuits appear to have little deterrent effect—rather, they seem to be borne by the suppliers as a mere cost of doing business.") (citations omitted) (Mass. AG Report).

[8] Notably, the number of complaints received is generally not indicative of the number of consumers affected. The NYAG's restitution programs indicate that there are far more eligible claimants for refunds than there are original complainants. (*See* Tr. at 1794:7-1795:3).

ESCO HIKO Energy, LLC following an investigation involving more than 300 consumer complaints, false and misleading savings and price claims, slamming, and failure to process customers' cancellation attempts. (*See* Tr. at 1567). HIKO agreed to pay $1.25 million in restitution following the settlement. (See Tr. at 1570). Additionally, in 2011, the NYAG entered a settlement agreement with Columbia Utilities, LLC and Columbia Utilities Power, LLC (collectively, Columbia) after finding that it had engaged in multiple types of deceptive and fraudulent marketing and sales, misrepresentation of bill savings, failure to provide customers with copies of the contract terms, failure to disclose the ESCO's required minimum one-year enrollment provision, and slamming. (*See* Tr. at 1570). Columbia ultimately settled with the NYAG for $2 million in restitution for customers. (*See id.*). Some of the many settlement conditions required Columbia to implement a training program for its sales and customer service representatives; to record all telephone communications with customers and prospective customers; and to monitor its customer service and sales representatives, including by reviewing random samples of sales calls. (*See* Tr. at 1571).

These incidents are but a few examples. The NYAG's investigations of ESCOs over the years have revealed a similar pattern of behavior among multiple other ESCOS in the market. (*See, e.g.,* Tr. at 1571-1574 (discussing the NYAG's investigation of U.S. Energy Savings and the 2008 settlement agreement, including a later addendum to the agreement following subsequent settlement negotiations concerning the continuation of consumer complaints); Tr. at 1574-1576 (discussing the investigation and settlement with ECONergy in 2003); Tr. at 1576-1578 (discussing the investigation and settlement with Total Gas & Electric in 2001); Tr. at 1578-1579) (discussing the investigation and settlement in 2000 with Con Edison Solutions).

The persistent problems of the last two decades have led to UIU/NYAG's high level of participation these last two years in Commission proceedings to institute additional consumer protections in today's retail energy market. On January 29, 2016, UIU and the NYAG each filed comments on the Collaborative Report Regarding Protections for Low Income Customers of Energy Services Companies. *See* 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) (both noting that the proposed value-added services would not provide value for low-income

customers). On February 11, 2016, the NYAG submitted comments in support of a bar on ESCOs serving low-income recipients unless they could meet certain criteria. *See* Cases 12-M-0476 *et al.*, Reply Comments of Attorney General Eric T. Schneiderman. On March 18, 2016, UIU and the NYAG each submitted comments on the Commission Order Resetting Retail Energy Markets for Mass Market Customers supporting consumer protections, including strong monitoring of customer consent mechanisms and extending the recession period to at least 45 days. *See* Cases 12-M-0476 *et al.*, Comments of the Utility Intervention Unit on Resetting Retail Energy Markets for Mass Market Customers; Cases 12-M-0476 *et al.*, Comments of Attorney General Eric T. Schneiderman.

On April 8, 2016, UIU/NYAG opposed the ESCOs' petitions for rehearing on an order resetting retail energy markets for mass market customers. *See* 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. On June 6, 2016, UIU/NYAG filed joint initial comments on the State Administrative Procedure Act Notices published on May 4, 2016 and on the Staff Whitepapers on Express Consent, Performance Bonds or other Security Interests, and Benchmark Reference Prices. *See* Cases 12-M-0476 *et al.*, Joint Comments of the Utility Intervention Unit and the Attorney General of the State of New York (discussing the necessity of customer consent prior to billing/service changes and supporting numerous other proposed consumer protection measures). Shortly thereafter, on June 20, 2016, UIU/NYAG filed joint reply comments. *See* Cases 12-M-0476 *et al.*, Joint Reply Comments. On August 30, 2016, UIU/NYAG opposed the ESCOs' petitions for rehearing on an order regarding the provision of service to low-income customers by energy service companies. *See* Cases 12-M-0476 *et al.*, Joint Statement.

Last year, on March 27 and May 22, 2017, UIU and the NYAG each filed initial comments on several ESCOs' petitions for waivers to serve low-income customers arguing, among other things, that the ESCOs must guarantee savings in order to obtain waivers and must provide sufficient information for the Commission to verify that those ESCOs do, in fact, offer guaranteed savings. *See* 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 (March 27, 2017); *see also* Cases 12-M-0476 *et al.*, Comments of NYAG (March 27, 2017); Cases 12-M-0476 *et al.*, UIU Comments on the ESCO Petitions for Waiver to Serve Low Income Customers (May

22, 2017); Cases 12-M-0476 *et al.*, NYAG objections to waiver petitions (May 22, 2017)). Finally, UIU filed initial comments regarding proposed modifications to the UBP on May 15, 2017. *See* Cases 12-M-0476 *et al.*, UIU Comments on Revisions to the Uniform Business Practices (May 15, 2017). Such recent activity indicates UIU/NYAG's continued recognition of the need for additional reforms in today's retail energy market, as further set forth by the arguments that follow.

III. ANALYSIS

A. REGULATORY REGIME

3. Enforcement Powers Over ESCOs

b) Attorney General's Enforcement Mechanisms and Efforts (<u>Topic 19</u>: Actions by state agencies or consumer advocacy groups to protect customers, to monitor the state of the retail market customers, to provide information, or to lodge complaints or impose discipline in the case of improper ESCO practice, including specific concrete steps the group has taken and any results obtained from those actions)

The NYAG is both empowered and obligated to ferret out fraud and illegality in the State of New York and to protect the interests of its people and its businesses. This includes the enforcement of consumer protection laws, including laws that prohibit fraudulent or deceptive business practices. This enforcement power does not, however, obligate the NYAG to tackle an entire industry, nor could it. Industry-wide problems require industry-wide solutions, which cannot be achieved through case-by-case enforcement against individual companies.

Executive Law § 63(12) empowers the NYAG to bring enforcement actions against entities that engage in repeated or persistent fraud or repeated or persistent illegality. Under the statute, the NYAG may investigate the relevant facts and issue subpoenas in accordance with the Civil Practice Law and Rules. The NYAG is further empowered to institute a civil action for an injunction and monetary relief, including restitution and penalties, for violations of the statute. The NYAG may also, in the alternative, accept an assurance of discontinuance of acts or practices that violate Executive Law § 63(12). Executive Law § 63(15).

A claim under Executive Law § 63(12) is brought either for repeated or persistent fraud or repeated or persistent illegality. *See People ex rel. Cuomo v. Greenberg*, 95 A.D.3d 474, 483

(1st Dep't 2012); *People v. Coventry First LLC*, 52 A.D.3d 345, 346 (1st Dep't 2008), *aff'd*, 13 N.Y.3d 108 (2009); *State v. Apple Health and Sports Clubs, Ltd.*, 206 A.D.2d 266, 267 (1st Dep't 1994), *appeal denied*, 84 N.Y.2d 1004 (1994). The test is whether the act "has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *Spitzer v. Gen. Elec.*, 302 A.D.2d 314 (1st Dep't 2003); *People v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 107 (3d Dep't 20015), *aff'd on other grounds*, 11 N.Y.3d 105 (2008). The courts have found that Executive Law § 63(12) protects the credulous and the unthinking as well as the cynical and the intelligent, the trusting as well as the suspicious. *Gen. Elec.*, 302 A.D.2d at 314; *Applied Card*, 27 A.D.3d at 106.

As to the "illegality" prong of the statute, courts have repeatedly found that a violation of state, federal, or local law constitutes illegality within the meaning of Executive Law § 63(12). *State v. Princess Prestige*, 42 N.Y.2d 104, 107 (1977); *People v. Empyre Inground Pools, Inc.*, 227 A.D.2d 731, 733 (3d Dep't 1996); *Lefkowitz v. E.F.G. Baby Products*, 40 A.D.2d 364 (3d Dep't 1973); *State v. Mgmt. Transition Res.*,115 Misc. 2d 489 (Sup. Ct. N.Y. Cnty. 1982).

Many of the practices that the NYAG observes in the ESCO industry include, in addition to deceptive practices that violate Executive Law § 63(12), violations of General Business Law §§ 349, 349-d, and 350. GBL § 349(a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in this state." A representation or omission is deceptive pursuant to GBL § 349 if it is likely to mislead a reasonable consumer acting reasonably under the circumstances. *Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995). GBL § 349-d specifically prohibits deceptive acts and practices by ESCOs. GBL § 350 forbids "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The test for false advertising, like the test for deceptive business practices, is whether the representations or omissions are "likely to mislead the reasonable consumer acting reasonably under the circumstances." *Applied Card*, 27 A.D.3d at 107 (quoting *Oswego*, 85 N.Y.2d at 26). For conduct to be actionable, it need "not necessarily rise to the level of fraud." *Gaidon v. Guardian Life Ins. Co.*, 94 N.Y.2d 330, 343 (1998). A practice with the capacity to mislead or deceive a reasonable person violates GBL § 349, regardless of whether it falls within the scope of common law fraud. *Id*. at 348.

The retail energy market has been a major focus of the NYAG's consumer protection enforcement activities over the years. (Tr. at 1656:15-20). From 2000 to the present, the NYAG has conducted numerous investigations into individual ESCOs with respect to their deceptive and illegal business practices. (Tr. at 1553:17-19). As a result, the NYAG has reached seven settlements with individual ESCOs, obtaining injunctive relief and millions of dollars in restitution and penalties. (Tr. at 1553:19-20). These settlements reflect the NYAG's findings that ESCOs engage in slamming, unfulfilled promises of savings, high-pressure sales tactics, and violations of the UBP. (Tr. at 1622:15-25). The NYAG also has multiple ongoing investigations concerning the same types of deceptive practices. (Tr. at 1623:3-6; Tr. at 1656:5-10). The NYAG's investigations, and the pattern of ESCO complaints that the NYAG sees against ESCOs, indicate that the industry as a whole has problems. (*Id*.; *see also* Tr. at 1687:4-6 (Ms. Azia, on behalf of UIU/NYAG, testifying, "The fact that we had to bring seven enforcement actions in any period of time is already an indication that this is a problem."); Tr. at 1656:15-20 (Ms. Azia noting that the NYAG's office has done "a lot of enforcement" in the ESCO industry over the years)).

The NYAG's seven settlements, combined with ongoing investigations against other ESCOs for similarly engaging in fraudulent and deceptive business practices, show that enforcement is not the solution to the broken ESCO market. (*See* Tr. at 1623:2-3 (Ms. Azia stating, "[The NYAG] cannot bring enforcement actions against every entity that engages in these practices."); Tr. at 1655:8-10 (Ms. Azia stating, "[The NYAG doesn't] think enforcement alone is an answer that will address or weed out all the bad actors in – in this area."); Tr. at 1702:5-15 (Ms. Azia noting that it would be impossible for the NYAG to bring enforcement actions against every company in an industry)). As with any law enforcement agency, the NYAG has limited resources, and it is an inappropriate use of such resources to bring individual enforcement actions against every player in an industry that, as a whole, is riddled with flaws. As Ms. Azia testified on behalf of the UIU/NYAG Panel at the evidentiary hearing:

> All investigations, including these investigations, are time consuming. We have limited resources. The fact that we had to bring seven enforcement actions in any period of time is already an indication that this is a problem. But it takes a significant amount of time to investigate and negotiate with ESCOs to resolve any matter. (Tr. at 1687:2-8).

Moreover, even after the NYAG has taken enforcement action, it not always enough to alter the ESCO's deceptive practices. As an example, the NYAG entered into a settlement agreement with Columbia Utilities, LLC and Columbia Utilities Power, LLC (Columbia), an agreement in which Columbia agreed to refrain from engaging in deceptive practices and to engage in verification procedures designed to protect consumers from possible deception. (Hearing Exhibit 1209). But this agreement was insufficient to stop Columbia from resuming its deceptive practices, necessitating the negotiation of an addendum to the settlement agreement just a year after the company settled with the NYAG. (Tr. at 1786:13-19). In that case, as Ms. Azia testified at the evidentiary hearing, the NYAG "found 70% non-compliance with the verification procedures" that were required under that settlement agreement. (Tr. at 1827:6-8).

As one commentator has observed, rulemaking may have "significant advantages" over enforcement activity in that "[r]ules are likely to be more accessible and more widely disseminated than the results of case by case adjudications" and rulemaking encourages "the more rational development of policy by permitting the enforcing authority to avoid being continually bogged down in the details of individual cases." (J. Sebert, Jr., *Enforcement of State Deceptive Trade Practice Statutes*, 42 TENN. L. REV. 689, 711 (Summer 1975); *see also* M. Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2154 (June 2015) ("Because the rule-making process . . . can bind stakeholders beyond the defendant immediately involved in the enforcement action, it provides administrative agencies the capacity to reach far superior resolutions in restitution actions.")).

As discussed in Part III.C. below, retail choice has failed to provide real value to New York consumers and instead subjected consumers to higher energy bills and a wide range of deceptive practices. The solution to this problem lies in the reforms proposed below – not in enforcement actions against individual ESCOs.

4. Other State and Federal Laws Applicable to ESCOs

Like New York's prohibitions on deceptive acts and practices, the Federal Trade Commission (FTC) Act also prohibits the kinds of activities in which ESCOs are engaged. Specifically, Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices affecting commerce." 15 U.S.C. § 45(a). The FTC, however, has not historically brought enforcement actions against New York ESCOs. Even if it did decide to pursue ESCOs for deceptive acts and

practices, such enforcement would suffer from the same limitations as enforcement by the NYAG. Thus, reliance on enforcement of this law against ESCOs to solve the problems in the ESCO industry would likely be futile.

B. USEFULNESS & ACCURACY OF COMPARING ESCO AND UTILITY RATES

Because the fundamental reason for opening the energy market to ESCOs was to provide value to consumers, it stands to reason that the value consumers receive would be a useful metric of market success. Absent value-added services, the value that ESCOs can provide to consumers is savings over what they would have paid as full-service utility customers. Thus, a comparison between ESCO rates and utility rates is not only useful but essential. The DPS Staff Policy Panel testified that over a 36-month period, residential customers of ESCOs collectively paid almost $1.2 billion more than they would have paid if they purchased energy directly from their utilities. (Tr. at 2278:12-16). As noted in UIU/NYAG's testimony and elsewhere, the ESCOs' desperate attempts to escape this data are unsupported and unsupportable. (*See, e.g.,* Tr. at 1725 (UIU/NYAG Panel testifying to the unreasonableness of ESCO overcharges and the lack of any corresponding value); Tr. at 1939 (UIU/NYAG Panel testifying to a lack of quantitative data that would demonstrate that ESCOs provide products of sufficient value to consumers); *see also* Tr. at 2288:11-12 (DPS Staff Policy Panel testifying to ESCOs' failure to drive utility prices down); Tr. at 2214-2215, 2309, 2371 (DPS Staff Policy Panel testifying to ESCOs' failure to demonstrate incremental value in their product offerings); Tr. at 2323 DPS Staff Policy Panel testifying to ESCOs' failure to demonstrate value or price transparency associated with bundled products)).

Although this topic was not noticed in the December 2, 2016 list of topics on which the Commission sought comments, the ESCOs have repeatedly blamed the utilities' cost structure as the reason for higher ESCO prices in the retail energy market. In an attempt to divert attention away from their overcharging practices, the ESCOs have claimed that "default service is price advantaged in the market" and that "[i]t's the allocation of . . . [the utility's] cost structure to default-service rates that gives utilities . . . a cost advantage over ESCOs." (Tr. at 1403-1404, Mr. Lacey testifying on behalf of RESA). To the extent that ESCOs disagree with the Commission's unbundling of utility rates or the appropriateness of the merchant function charge,

they have an opportunity to be heard regarding cost allocation and rate design during every utility rate case. Most ESCOs, however, have not raised this concern in utility rate cases. In any event, assuming arguendo the veracity of the claim that utility default service has a price advantage, the ESCOs' proposed solution is nevertheless untenable. When asked whether ESCOs should therefore be allowed to charge higher prices than utilities, RESA's expert Mr. Lacey answered affirmatively, stating that ESCOs "should be allowed to charge what the market will bear." (Tr. at 1405:8-19). Mr. Lacey added, "There should not be price regulation. There should not be a limit." (Tr. at 1405:8-19). Allowing ESCOs to charge mass market consumers any price, without limit, is not an acceptable solution. For the reasons discussed below, allowing ESCOs to charge consumers more, without any demonstrable quantitative value justifying that premium, cannot be the public policy of New York State.

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

UIU/NYAG maintain the positions adopted in their panel's direct testimony, and the evidentiary hearing has demonstrated that the recommendations are sound in theory and application. In accordance with the December 2, 2016 Notice seeking comments on the following topics, UIU/NYAG thus make the following recommendations, as further explained in their direct testimony:

- The Commission should prohibit ESCOs from selling products to mass market customers unless and until additional consumer protection measures are implemented. (**Topic Number 1:** Whether ESCOs should be prohibited in total or in part from serving their current products to mass market customers, or whether ESCOs should be required to offer value-added energy efficiency and energy management services as a condition to offering commodity services). (Tr. at 1539-1541).
- The UBP should be further modified to deter ESCOs from engaging in acts of customer abuse and overcharging. (**Topic Number 6:** Whether the UBP applicable to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs are deterred). (Tr. at 1541-1547).
- ESCOs should be prohibited from engaging in door-to-door marketing to residential and small commercial customers, and outbound telemarketing practices should be subject to

appropriate checks. (**Topic Number 7:** Whether door-to-door and outbound telemarketing practices of ESCOs to mass market customers should be prohibited and whether other ESCO marketing practices should be prohibited). (Tr. at 1547-1551).

- The Commission should immediately implement the above recommendations, in light of the number and nature of ESCO complaints. (**Topic Number 14:** The number and nature of customer complaints regarding i) retail prices and bills and ii) sales and marketing practices from a) customers directly to ESCOs, b) from customers to utilities about ESCOs, by ESCO, and c) customers to the Commission about ESCOs, by ESCO during calendar years 2014 and 2015 and as much of 2016 as it is available). (Tr. at 1551-1555).
- The Commission should require additional price transparency in the market, as mass market customers are currently unable to adequately obtain energy pricing information and make knowledgeable decisions regarding their commodity service options. (**Topic Number 16:** The ability of mass market customers to obtain information about relative prices and offerings of ESCOs and regulated utilities and to understand such information, including evidence regarding the transparency of the retail market for mass market customers and the level of knowledge in that market & **Topic Number 17:** Tools that are available in the public domain that customers can use to do comparison shopping). (Tr. at 1555-1562).
- These additional measures are immediately necessary because, despite gains made by state agencies and consumer advocacy groups to protect customers, enforcement efforts alone cannot remain the sole solution to ESCO issues in the retail energy market. (**Topic Number 19:** Actions by state agencies or consumer advocacy groups to protect customers, to monitor the state of the retail market customers, to provide information, or to lodge complaints or impose discipline in the case of improper ESCO practices, including specific concrete steps the group has taken and any results obtained from those actions). (Tr. at 1562-1579).

UIU/NYAG discuss each of these recommendations more fully below.

1. **<u>Should Retail Choice Continue in New York?</u>** (**<u>Topic 1</u>:** Whether ESCOs should be prohibited in total or in part from serving their current products to mass market customers, or whether ESCOs should be required to offer value-added energy efficiency and energy management services as a condition to offering commodity services).

The ESCO parties have framed the issues in this proceeding as a matter of retail choice. But the real issue, given the abuse and overcharging in the market, is whether this history supports prohibiting ESCOs from selling their products to mass market consumers, absent additional consumer protection measures. From 2014-2016, ESCOs have overcharged mass market customers by $1.2 billion. (Tr. at 2237:3-6 (DPS Staff Policy Panel explaining that "[t]he definition of overcharge is charging more than the default utility . . . customers have been overcharged 1.2 billion dollars.")). ESCOs have consistently failed to demonstrate that they have provided New Yorkers with value commensurate with this $1.2 billion premium that would justify the significant differences in prices they charge customers compared to the default utility. The evidentiary hearing illuminated and amplified this shortcoming by revealing many unsupported assumptions about the "value" that ESCOs are providing. As will be discussed in greater detail, the ESCOs have not provided evidence supporting their assumptions that they have saved New Yorkers money, that their service is different from default utility service, or that their service provides greater value than default utility service. Such unsupported assumptions cannot form the basis of energy retail market policy in New York. Accordingly, UIU/NYAG agree with the perspective adopted by the DPS Staff Policy Panel, which noted that it is not seeking to end retail choice. Specifically, Mr. Alch testified at the evidentiary hearing, on behalf of the DPS Staff Policy Panel, by explaining, "we're not recommending to throw anybody out of the market. We're asking the ESCOs to adhere to a new set of operating guidelines." (Tr. at 2271:8-10).

First, a qualified prohibition[9] is necessary because the ESCOs have not demonstrated a value to their products sufficient to justify their overcharges. During the testimony in this proceeding, the ESCOs revealed that their assertions of "value" were premised on multiple unsupported assumptions. For example, during the cross-examination of Dr. Makholm, adopting the testimony of Dr. Cicchetti and testifying on behalf of NEMA, Dr. Makholm could not provide a citation to any evidence that would support Dr. Cicchetti's conclusion "that even a 25% penetration of renewables in the ESCO supply mix, including renewable energy credits, results in approximately $450 million in climate change benefits for ESCO electric customers

[9] As discussed in UIU/NYAG's testimony and elsewhere herein, they do not propose a prohibition of ESCO service to mass market consumers. Rather, they support service to mass market consumers where ESCOs guarantee savings and adhere to the UIU/NYAG's proposed consumer protection reforms.

per year." (Tr. at 760:17-23; 678 (claiming that "ESCOs provide New Yorkers real value" by providing green energy)). There was no testimony put forth by any party to indicate that the entire New York ESCO market was currently, or could eventually, achieve "a 25% penetration of renewables" in all of their product offerings. (Tr. at 678-679, 714-719). Nor was there any testimony that provided a basis for the assertion that $450 million represents additional value provided by the ESCOs relative to utilities. Thus, there is no basis on which to conclude that ESCOs have produced, could produce, or would produce $450 million in climate change benefits for ESCO customers relative to what they would otherwise receive from utilities. That unsupported claim should therefore be rejected. Moreover, there was no testimony put forth by any party to indicate what actual percentage of renewable penetration the ESCOs have achieved in today's market above and beyond what is already provided by utilities. Accordingly, there is no basis upon which to conclude that ESCOs are providing additional value (relative to utilities) or saving customers money by providing putative "climate change benefits." (Tr. at 760: 17-23).

Second, a qualified prohibition is necessary because the ESCOs failed to substantiate their claims that they provide savings to consumers. Importantly, the ESCOs performed an incomplete analysis of price comparison data riddled with erroneous suppositions. For example, despite the Commission's instructions in these policy proceedings to address only ESCO products available to mass market customers, Dr. Cicchetti specifically refused to isolate his findings to that sector of the market when claiming that ESCOs were useful, competitive, and beneficial for New York consumers. (Tr. at 705, table 2). When pressed on whether those findings would remain true based on an analysis solely of the mass market sector, Dr. Makholm refused to answer the question, claiming that the distinction was "artificial" for the purpose of determining whether ESCOs were "useful and competitive and . . . have salutary benefits for the consumers in New York." (Tr. at 766:10-15). When asked for the basis for his conclusion that "retail choice caused customer prices to decline compared to prior years," Dr. Makholm claimed he did not need to provide a citation to any evidence that supported his conclusion. (Tr. at 767:1-7).

To the extent that the ESCOs have made, and continue to make, factual claims without reference to any verifiable evidence, the Commission should reject those claims as unsupported. Emphatically stating that ESCOs bring prices down and are therefore beneficial for consumers does not make the statement true unless the ESCOs can support those conclusions with

references to data, statistics, and analysis that can then be provided to the other parties, the ALJs, and the Commission for independent evaluation and assessment.[10]

Moreover, the ESCOs' contradictory and misleading statements regarding the value they allegedly provide to consumers are independent grounds for rejecting their arguments. The ESCOs seemed to suggest that they incur higher overhead costs than utilities as a result of providing additional value to consumers, and should therefore be permitted to charge higher prices accordingly. (*See* Tr. 767). When asked if he could provide a citation to any evidence supporting Dr. Cicchetti's conclusion that "ESCOs spend additional money to provide information and counseling, improved metering equipment, and energy saving devices like smart thermostats to their customers," Dr. Makholm could not provide any such citation to any evidence and instead claimed, "that's common knowledge." (Tr. at 767:17-25). Then, when asked whether ESCOs should be able to charge higher prices than utilities given these apparent higher overhead business costs and risks, Dr. Makholm responded, "by hook or crook, they have to get the money back and cover their costs and . . . make a profit that's consistent with the operations in the capital that [they] devote to their enterprises. So they should get a competitive return. And if that includes a margin, that includes the margin." (Tr. at 759:19-24). If the ESCOs must make their money "by hook or by crook" as their expert suggests, then the Commission should exercise its regulatory authority to ensure those means are honest and are in the best interests of consumers, not "by hook or by crook."

Later, Dr. Makholm appeared to equivocate on this point during redirect, when he professed not to believe that ESCOs had higher relative overhead costs compared to utilities' and claimed that in fact, "it may be the reverse." (Tr. at 785-786). It is unclear how ESCOs can spend additional money for counseling, consumer education, improved metering equipment, and the like – as Dr. Makholm suggested – and simultaneously have lower overhead costs than

[10] UIU/NYAG recognize that Direct Energy witness Dr. Morris included an economic consulting firm's conference paper claiming to analyze the impact of retail competition on energy prices as an exhibit to his rebuttal testimony. *See* Ex. 38. However, this conference paper was not published in an academic journal, let alone a peer-reviewed publication, and the author even acknowledged that the results for residential customers were inclusive. *See* Ex. 38 at 10. UIU/NYAG also recognize that at the evidentiary hearing RESA and Constellation each introduced a "report" or "study" (Exhibits 1130 and 1400 respectively) purporting to analyze the effect ESCOs have had on energy commodity prices over a certain period, but neither party provided the underlying data or workpapers used to reach the conclusions set forth in these studies. Thus, these "reports," which were introduced for the first time at the hearing, should be disregarded since parties did not have an opportunity to independently evaluate and assess the claims presented. *See e.g.*, Tr. at 2818:24 – 2819:2 (discussing the lack of supporting analysis provided for Exhibit 1400).

utilities. Setting aside for the moment these incongruous statements, if ESCOs do in fact incur lower overhead than utilities, it should not be an insurmountable hardship for them to be able to charge lower prices than the default utility.

Moreover, Dr. Makholm did not provide any analysis or refer to any company balance sheets to support his revised conclusion on redirect that ESCOs may have higher overhead costs than utilities. (*See id.*) Throughout the evidentiary hearing, Dr. Makholm continuously asserted that he did not need to provide citations or evidence to substantiate his expert conclusions. (*See, e.g.*, Tr. at 767: 2-12). Such statements are antithetical to the fact-finding purpose of an evidentiary hearing and cannot be permitted to form the basis of State policy decisions, which should be grounded in reality (not hypotheticals), facts (not unsupported opinions), and an accurate analysis of relevant data sets (not conflated, aggregated categories of customer classes).

3. Future Product Offerings (**Topic 1**, *supra*)

The evidence in the record supports UIU/NYAG's recommendation that the Commission prohibit ESCOs from selling products to mass market customers unless they can provide consumers with a guarantee that they will save money over the default utility price. The ESCOs have failed to provide adequate quantitative evidence demonstrating their claims that they can, at some point in the future, provide value-added services bundled with commodity service and that these value-added services would justify the differences in ESCO and utility pricing – despite their failure to do so to date.

The ESCOs' experts discussed various hypotheticals and future products that ESCOs might be able to offer to residential consumers (i.e., time of use rates, prepaid energy products, residential demand response programs coupled with fixed-product pricing), but they conceded that ESCOs are not offering these products now. (Tr. at 1395-1396 (Mr. Lacey testifying on behalf of RESA and admitting such ESCO products are only hypothetical possibilities right now); Tr. at 1398 (Mr. Lacey stating ESCOs could offer a combined demand response program with a fixed-price product, but admitting that he did not know whether any ESCOs in New York were actually offering such a product); *see also* Tr. at 1406:16-22 (Mr. Lacey admitting that the 1,200 MW of electricity of demand response programs participating in the NYISO today are "predominantly commercial and industrial"); *see also* Tr. at 4041-4044 (IEC Panel claiming that

demand response programs are valuable ESCO products but admitting that such programs are only available to large commercial and industrial customers)).

The Commission must enact policy based on current reality. The reality is that ESCOs' relationship with mass market consumers is one involving substantially higher prices than default utility service and no corresponding additional value to justify the discrepancy. As Dr. Malaspina testified at the evidentiary hearing on behalf of the UIU/NYAG Panel, the "concept of value implies the ability to assign a monetary value." (Tr. at 1934:17-18; *see also* Tr. at 1939:18-23, on questioning by ALJ Moreno, Ms. Azia's response for the UIU/NYAG Panel, stating that the Panel had not been "presented with any information from ESCOs about the values to show that there were sufficient value to consumers. I don't think we've seen, in the course of our work in this area, any evidence of . . . sufficient value to consumers.")). The UIU/NYAG Panel explained that, to date, the ESCOs have not provided "sufficient quantitative evidence that would explain the observed price disparity between ESCO and Utility products." (Tr. at 1938:11-14). The ESCOs have failed to rebut this contention other than to offer theoretical, abstract, and unsupported assertions. (Tr. at 1939-1940 in response to ALJ Moreno's question on this point, Ms. Azia stated for the UIU/NYAG Panel, "we didn't think that the burden was on us to do independent research on this as to what the value was to consumers, but for ESCOs to demonstrate what the value is. . . . I didn't see that in any way, other than theoretical and abstract and not supported.")).

a) Variable-Rate, Commodity-Only Products

Most ESCO products on the retail market today are variable-rate products. (Tr. at 749:18-19; *see also infra* Part 3.b. Fixed-Products). Variable-rate products change in price in accordance with prices on the spot market and are subject to the same fluctuations that the utilities experience. There is not consensus among the ESCO community that variable-rate products provide any added value to consumers. Mr. Charles Bergman, testifying on behalf of The O.E. Group, an energy brokerage service that works with approximately 30 different ESCOs, explained that he believed fixed-price products were, "the appropriate option for residential and small commercial customers because . . . the variable pricing that I've seen is not

competitive with the utility at this particular time." (Tr. at 1979:18-20). He further opined that "variable prices just don't work for the customer." (Tr. at 1979:24).[11]

At a minimum, if ESCOs are only offering variable-rate products and cannot demonstrate a quantified value-added service offered in conjunction with such a variable-rate commodity service, then they should be prohibited from serving mass market customers unless they can guarantee the customer will save money when compared to the default utility price.

b) Fixed-Price Products

(1) ESCO Savings Claims Are Unsubstantiated.

Throughout the hearing, the ESCOs maintained that their fixed-price products were an example of a unique value-added service that they provided to New York State consumers. Some ESCO witnesses maintained that fixed-price products are valuable because they have saved consumers money. Specifically, Dr. Makholm, testifying for NEMA and adopting Dr. Cicchetti's pre-filed initial testimony, contended that fixed-price products have saved New Yorkers almost $1 billion every year by providing fixed-price programs. (Tr. at 761:10-19). However, the Commission should reject this unsupported contention. On cross-examination regarding the calculations he performed to arrive at that $1 billion figure, Dr. Makholm was unable to provide a single citation to support his conclusion that ESCOs saved New Yorkers that much money. (Tr. at 761:10-19). Dr. Makholm later opined that Dr. Cicchetti had relied on EIA data; however, when pressed on Dr. Cicchetti's conclusions based on his alleged use of the EIA data, Dr. Makholm admitted that he was not sure how Dr. Cicchetti used the EIA data. (Tr. at 765:3-5).

(2) ESCOs Offered Inconsistent Testimony Regarding Enrollment.

Further cross-examination of the ESCOs about fixed-price contracts exposed additional inconsistencies in their claims. Mr. Kagan, testifying on behalf of Direct Energy, proclaimed that he "has observed customers gravitating to a fixed price" product (Tr. at 191:11-13) but then later admitted that a significant amount of customers who initially enroll in the fixed-price product are not re-enrolling in another fixed-price product (Tr. at 214:21-15). If fixed-price products are

[11] The O.E. Group proposed to serve as a broker for residential and small commercial customers by soliciting only fixed-price plans from ESCOs because it believed that variable price plans – the plans that 80% of current ESCO customers in New York are on, are not beneficial for mass market customers. *See* Tr. at 1981-1982; *see infra* Part 17 for a discussion on energy brokers for mass market consumers.

such a valuable consumer service, one would expect to see greater rates of enrollment in such services and greater rates of re-enrollment.

UIU/NYAG's cross-examination of Dr. Makholm revealed that most consumers were not enrolled in ESCO fixed-price plans. Dr. Makholm repeatedly claimed that fixed-price plans were a valuable product that ESCOs offered; yet, when asked what percentage of ESCO customers were on fixed-price plans in New York State, he could not recall. He eventually ventured, "I think it's in the teens." (Tr. at 749:18-19). Rather than showing high rates of enrollment and re-enrollment in ESCOs' fixed-price offerings, the evidence demonstrates the opposite.

(3) The ESCO Claim of "Price Certainty" Is Simply Overcharging.

In addition to arguing that fixed-price products are valuable because they save consumers money and consumers are therefore gravitating toward these products, the ESCOs have also claimed repeatedly that such fixed-price products offer customers the convenience of knowing what their energy costs will be each month. (Tr. at 191:5-13). This "value" is not a value at all.

First, fixed-price customers do not get certainty of the same bill amount every month. Although ESCO fixed-price products are marketed as providing peace of mind to consumers, RESA's expert witness Mr. Lacey admitted that fixed-price contracts do not offer the same bill price every month. Rather, "[p]rice is constant (price per kwh) and the usage would vary as the customer's usage would normally vary." (Tr. at 1416:2-4). Mr. Lacey further explained that the term "price" refers to the price of the commodity, not the overall price of the consumer's bill. (Tr. at 1416: 5-7).

Second, fixed-price products have often resulted in greater charges to the customer than the default utility rate. In some instances, the fixed-price was four to five times higher than the spot market price. (Tr. at 193:3-16). Dr. Makholm claimed that ESCOs' fixed-price products offer true insurance against bill volatility and monthly fluctuations. (Tr. at 787-788). Yet, insurance that costs consumers more than the event that they are trying to insure against (high energy price spikes and bill volatility each month) reflects products of little, if any, value. During the Polar Vortex, when ESCOs claimed their fixed-price products saved consumers money, the data reflected that fixed-price contracts resulted in 10% savings in one month of Polar Vortex temperatures. But these same fixed-price contracts contained rates that were an average of 30% above default utility service every year for over three years. As Mr. Alch noted,

"a continuous 30% premium associated for that one-in-three year event . . . [provided] consumers with a 10% savings in that month [of the Polar Vortex] . . . .[But] a 10% savings in one month does not compare equitably to three years of [a] 30% premium." (Tr. at 2502:7-12). Notably, some ESCOs rescinded their fixed-price contracts during the Polar Vortex time period, thus exposing their customers to the extreme price volatility of that time period. (Tr. 2365:11-15). What ESCOs claim is "price certainty" or insulation from "price volatility" may give consumers certainty, but it is certainty of overcharges.

If customers were seeking stable bill amounts each month, they would be better off with the utilities' budget billing plan, as the DPS Staff Policy Panel noted. (*See* Tr. at 2360 (discussing the customer advantages of enrolling in a utility budget billing plan that would level the total bill amount, as opposed to ESCO fixed-price plans)).[12] Even the ESCOs' own expert Dr. Makholm admitted that utility deferrals carried out in utility budget billing plans lowers customers' bills in certain months. (Tr. at 753:14-16).

(4) ESCO Customers Cannot Discern How Much "Price Certainty" Costs.

UIU/NYAG acknowledge that there may be a legitimate reason for a customer to enroll in an ESCO's fixed-price plan, "[i]f there was a quantifiable, demonstrable value associated with that service that was enough to justify the observed price premiums for that product." (Tr. at 1639: 19-22). However, to date, the ESCOs have been unable to demonstrate that such value regularly exists for customers beyond short-term introductory teaser rates. (Tr. at 1640:19-22). When asked whether his analysis included any quantifiable data to support his assertion that ESCO energy supply products are distinguishable from the utilities' supply products, Direct Energy expert Dr. John R. Morris stated, "that value is largely not quantifiable." (Tr. at 550:8-9).

During the evidentiary hearing, UIU/NYAG cross-examined four ESCO presidents and directors who testified on behalf of the IEC Panel.[13] When asked if the owners could each state

[12] UIU/NYAG acknowledge that budget billing plans are subject to a true up or reconciliation period whereby customers who were not charged the full price of their energy usage under the utilities' budget billing estimations will need to pay the difference, but utilities often allow for this reconciliation to be paid over the course of several months to further smooth out bill costs. On the other hand, customers who have overpaid per their budget billing estimations will receive a credit on a subsequent bill.

[13] *See* IEC Panel Rebuttal Testimony (Ms. Melissa Massimi, President of M&R Energy Resources Corp.; Mr. Michael Palmese, President of Brown's Energy Services, LLC; Mr. Daniel Singer, Co-President of Robison Energy, LLC; Mr. Alan Tilley, Director of Drift Marketplace, Inc.), Tr. at 3992-4033; *see also* UIU/NYAG's cross examination of the same, Tr. at 4034-4125.

for the record how much they charge their customers "for the price certainty associated with the fixed-price" plans they each offered, Ms. Massimi of M&R Energy Resources Corp. stated on behalf of the IEC Panel, "That's almost impossible to answer what that is." (Tr. at 4037). The ESCO presidents were thus unable to articulate during the evidentiary hearing – a fact-finding exercise – what they charge their customers to provide the "insurance" of a fixed-price.

Nevertheless, when pressed on the point that if the price premium was almost impossible to determine, then it must similarly be almost impossible for their customers to know how much they are paying for such an energy "insurance" policy, Ms. Massimi responded, "Not necessarily." (Tr. at 4039). Testifying on behalf of the IEC Panel, Ms. Massimi claimed that customers could comparison shop on the New York State Power to Choose website. (Tr. at 4039:10-15). However, for reasons discussed in greater detail at *infra* Part 11. Transparency (**Topics 16 & 17**), the Power to Choose site does not allow customers to discern any price premium they might pay above the default utility price for a fixed-price product because ESCO offerings are only required to be updated every 30 days and thus prices online may already be stale when a customer seeks to enroll. (Tr. at 1558:12-21). Additionally, the Power to Choose site does not provide adequate historical data over a 12-month period to allow consumers to easily cost compare ESCO rates to default utility rates, or to see which ESCO fixed-price products would have saved consumers money over time after accounting for initial teaser inducement rates. (Tr. at 1559:8-23). Thus, customers are unable to discern which ESCOs have historically provided savings over the default utility price and cannot gauge how much extra they might be willing to pay for the alleged "price certainty" associated with a fixed-price product to calculate whether the additional price is worth paying.

Moreover, the alleged ease with which consumers can discern the price premium associated with fixed-price contracts is belied by Dr. Makholm's testimony. Dr. Makholm admitted that he did not know of any ESCO that included a specific line item in an offer for a fixed-price that delineates the cost of the "insurance" of purchasing a fixed-price from the cost of the commodity price. (Tr. at 1014: 23-1018:8). He also claimed that he has colleagues who have "wanted to work it out with Power to Choose" and their "own projected consumption" but he noted that his colleagues were only able to do so "because they know something about it, themselves," thereby suggesting that the average consumer would likely be unable to engage in this sort of comparative price analysis. (Tr. at 1018:8-17).

c) Renewable Energy Products

The ESCOs have similarly failed to provide a substantive justification for their continued presence in the retail market at the current levels of green energy penetration. Although Dr. Makholm claimed that ESCOs offered valuable services in the form of green energy products that advanced New York's renewable energy goals, he was unable to say what percentage of the 200 ESCOs operating in New York State actually offered green energy. (Tr. at 982:3-8). He further admitted he could not identify any ESCOs that were providing energy commodities generated by renewable sources at a higher rate than utilities. (Tr. at 756:17-25; *see also* Tr. at 4174:23 – 4175:9 (Staff Economics Panel referencing the Panel's direct testimony and further explaining that "a comparison of emissions profiles reveals information on the mix of valued renewable energy in each ESCO's supply portfolio. Our direct testimony notes the similarity of emissions profiles between ESCOs, suggesting little difference in the renewable mix provided by ESCOs. Given the similarity of those profiles, it is unreasonable to assume that, on average, ESCO's provided added value in terms of green energy.")).

Dr. Makholm acknowledged that ESCOs lacked the ability to "bilaterally draw into the state more green energy than utilities do when they buy from the pool . . . in this stage of the evolution of the New York ISO and the New York power market." (Tr. at 757:4-15). He further admitted that ESCOs do not own any baseload generation in the wholesale market and therefore any ESCOs currently offering green products would not be contributing to greater renewable energy sources in New York State. (Tr. at 765:8-12). When asked what the difference was between wholesale electricity in Zone J that the default utility Consolidated Edison buys versus the wholesale electricity in Zone J that an ESCO would buy, Dr. Makholm admitted, "Nothing." (Tr. at 976-977).

During cross-examination of the IEC Panel, Mr. Daniel Singer, Co-President of Robison Energy, LLC, testified that his ESCO offers consumers a green product in excess of the current renewable generation mix offered by default utility service through purchasing Renewable Energy Credits (RECs), but he could not recall the exact percentage of green generation in his product mix. (Tr. at 4053:24-25). His claim to offer more green energy than utilities but his inability to state by how much more seems questionable since he later admitted the green product was "the only product we're selling." (Tr. at 4053:24-25). He was also unable to state the

premium he charged customers for receiving a green energy product containing more renewable energy than the default utility mix. (Tr. at 4054:3-4). Michael Palmese testified that his ESCO, Brown's Fuel Service, LLC and Brown's Energy Services, LLC, offers a 50% green product, but he could not say on average how much more expensive his renewable product was over the default utility service price. (Tr. at 4054:6-11). Given these witnesses' apparent inability to provide the most basic details about a product that they allege offers a value to consumers, their argument that consumers should pay a premium for this alleged "value" should not be credited.

Other ESCO witnesses were similarly unable to identify how much more their renewable energy products cost above the default utility price, or how they set their prices for green products. Direct Energy expert witness Dr. Morris claimed that the value of renewable energy is "very difficult to measure and, for an individual person, likely, immeasurable." (Tr. at 753-754). Such a statement is problematic. It means that consumers have no idea how much more they are paying for a green product and they are unable to assess whether the green energy purchase is worth the premium they would pay above the price charged for default utility service. Without this information, the Commission also cannot evaluate whether such products are providing consumers with sufficient value to offset the premium paid.

d) Value-Added or Bundled Products

The ESCOs have repeatedly claimed that New York possesses a robust competitive retail energy market and that ample evidence exists that "there are 200 competitors [and] they sell different products." (*See, e.g.*, Mr. Lacey's testimony, Tr. at 1383:3-4). Yet, other than thermostats, fixed-price products, and renewable energy/green products, there has not been the sort of product innovation and product variety in the retail energy market that the Commission envisioned when it restructured the market. Even assuming that bundled products (e.g., commodity service plus a smart thermostat), fixed-price products, and green products are evidence of innovation and are beneficial for consumers, the ESCOs have failed to demonstrate that the differences in the prices they charge for these products when compared to default utility prices justifies such price discrepancies.

The evidentiary hearing reinforced UIU/NYAG's critiques of the ESCOs' alleged "value-added services" and product offerings. The ESCOs' witnesses did not provide credible evidence that ESCOs currently offer services with any quantified value. The ESCOs' own experts were

unable to quantify the value associated with bundled ESCO product offerings. For example, Mr. Michael Kagan, testifying as an expert witness on behalf of Direct Energy, offered the example of electric commodity service coupled with an internet-enabled thermostat known as the Nest thermostat. (Tr. at 193:5-7). Yet, when asked whether the Nest thermostat was provided for free or how much the thermostat cost, Mr. Kagen was unable to articulate how Direct Energy priced this product or whether interest was charged on the thermostat. (Tr. at 193:12-19). Nest thermostats are widely available from other providers, such as local hardware stores. It is important for consumers trying to comparison shop to know what exactly their ESCO is charging for the thermostat so they can decide whether they are financially better off buying the thermostat from a store or other online vendor and purchasing separate commodity service from the default utility, or whether the ESCO's bundled product is a better value. (Tr. at 2500-2501 (Mr. Alch, stating "the value-add associated with LED lightbulbs and thermostats, the [ESCO] testimony does explain that those – those products are variously available as a general commodity in hardware stores, Lowes, Home Depot, at a very reasonable price. And therefore, any premium associated for those products offered by the ESCO, that value was not commensurate with the premium that the ESCOs were charging for those products.")). Without price transparency for each item in a bundled ESCO service, consumers cannot make financially informed and economically reasonable decisions.

As another example, Mr. Palmese on the IEC Panel stated that his ESCO offers its customers a package deal – boiler service, LED lightbulbs, and fixed-price commodity service, with all these components billed together as a bundled package. (Tr. at 4046:15-18). He conceded that his "customers wouldn't have any way of knowing how much they were paying for commodity service, versus the LED lightbulbs, versus the boiler maintenance" service. (Tr. at 4046:15-18). Yet, Mr. Palmese claimed that under the current consolidated billing scheme, the utilities do not permit the ESCOs to list separate line item charges for each service provided in a bundled package. (Tr. at 4046:15-18). Nevertheless, Mr. Palmese failed to explain why an ESCO would be unable to separately assign quantitative values to each line item in a bundled package and communicate that information to an ESCO customer through some other means than a consolidated billing statement with the default utility. (Tr. at 4046; 4080-4082). Indeed, it seems that separately charging various line items in a bundled package is not an insurmountable challenge, as Mr. Singer testified that his company separately bills customers for

boiler service and maintenance and that such charges are distinct from commodity energy charges. (Tr. at 4047:19-25). The importance of quantifying the value of various bundled services in a packaged product is underscored by Barbara Alexander's testimony on behalf of PULP:

> When you're offering commodity service . . . accompanied . . . with these other . . . services . . . it is even more important that the customer understand what they're paying for the commodity part of this proposal because that is the only competitive service that allows them to understand the impact it will have on their regulated utility bill. And it's the only part of the service that for which they can be disconnected for nonpayment under the purchase of receivables program. . . . And if that price is higher because they have all these other bundled features attached to it, customers need to understand that, be affirmatively informed of that, and allowed to understand that the selection of this product and paying more for essential utility service carries with it this risk of nonpayment and disconnection. (Tr. at 3683:7-25).

Yet, the ESCOs were repeatedly unable to explain what additional value their energy products provided to mass market consumers that would justify the price discrepancy between the default service utility price and the ESCO price. For example, when asked what percentage of the 200 ESCOs serving New York "offer products that are more than a commodity" their expert, Dr. Makholm, responded, incredibly, "I imagine all of them." (Tr. at 975:7-19). Despite the ESCOs' claims that they offer value-added services or bundled products that justify the difference in their prices versus the default service utility prices, Dr. Makholm admitted that he did not review any rates charged by ESCOs for various products, nor did he review any ESCO customer bill information that describes any particular products. (Tr. at 985-986). Nevertheless, Dr. Makholm still maintained that ESCOs offered competitive energy rates and that they offered value-added bundled services. When asked if he could cite to any sources of evidence or provide a citation that supports such a claim, he replied, "That's the thrust of my expert opinion. It doesn't need a cite." (Tr. at 992:17-19). Thus, it remains unclear how Dr. Makholm concluded that all ESCOs are providing value-added services to consumers when he could not articulate what those services are and did not conduct calculations of how those bundled services saved consumers money on their bills.

Similarly, when asked whether the ESCO experiment has been salutary for New York State utility consumers, and low-income utility consumers in particular, Dr. Makholm refused to

answer the question with respect to low-income customers and instead responded with broad generalizations devoid of any support in the record. He asserted that since the Commission allowed ESCOs access to the retail energy market in the 1990's, there have been "billions of dollars of benefits for the consumers of the state" (Tr. at 995:20-24) and that "everybody in the state has benefitted, compared to what they would have seen had the market not embraced competitive retail service." (Tr. at 996:2-10). Again, Dr. Makholm did not point to any exhibits, data sets, discovery responses, white papers, reports, or actual ESCO bills to justify his conclusions. Multiple times, Dr. Makholm was asked for sources of evidence or citations supporting his opinions and forming the basis for his conclusions, but he could not point to any. Thus, the Commission should reject his conclusions as lacking a substantial basis in the record.

Dr. Makholm further claimed that ESCOs provide a different, more valuable service than utilities merely by having a contractual relationship with customers, as opposed to the relationship default utilities have with their customers. He opined that ESCOs with such contractual customer agreements are "in a different category than a utility and providing different kinds of service with a start and end date and so forth." (Tr. at 975:7-19). Yet, he could not point to any specific data he reviewed on which to base this claim, other than stating "I've examined lots of data in this proceeding" including from EIA and from parties' information request responses. (Tr. at 975:11-14). Without a specific reference to any particular data set, analysis, customer bill, or ESCO contract for support, it seems absurd to claim that simply by having a contract, an ESCO is offering a product that is inherently more valuable than default utility commodity service.

On questioning by the ALJs, after referencing the DPS Staff Policy Panel's analysis and particularly Mr. Alch's rate comparison data, Dr. Makholm admitted that in 2014, Consolidated Edison customers taking service from an ESCO paid $100 million more than Consolidated Edison default utility customers did. (Tr. at 989). Nevertheless, Dr. Makholm maintained that such a price comparison was not valid. When asked what kind of specific information he would need to perform an evaluation of the diverse ESCO services compared to default service, Dr. Makholm claimed that "these things" cannot be valued "in a way that helps in a proceeding like this." (Tr. at 1009:12-17). Such a statement amounts to an admission that he is unwilling or unable to quantify or assign a value for ESCO products. If the ESCOs' own expert cannot perform this quantitative analysis to justify the ESCOs' pricing mechanisms, it is unclear how

the ESCOs justify their prices to New York State consumers in a clear, transparent manner that allows for informed, reasoned, rational, and principled decision-making in the retail energy market. (Tr. at 1014-1018). The admitted difficulty of valuing specific products and services makes it even clearer that there is no way for a consumer to value component parts of a bundled product, much less the price he or she is paying for the certainty of a fixed rate product (*See* Part 3(b): Fixed-Price Products, *supra*; s*ee also* Tr. at 2878:8-15 (Mr. Alch testifying on behalf of the DPS Staff Policy Panel, stating that while there is nothing inherently wrong with bundled products, consumers should be able to see "the specific pricing of each of those components, separately be identified, so the customer can determine the value associated with the bundled product")).

After repeatedly asserting that there was no way to quantify the value associated with ESCOs' products and services, Dr. Makholm admitted that some studies have been conducted using data to assess how customers value the various attributes of their energy service. However, Dr. Makholm claimed that those sorts of econometric analyses were completed "as part of a scholarly study to investigate stuff" and that, as such, that analysis "is a perfectly useful thing to do. It may not be a useful thing in a contested rate proceeding with people who have interests at stake and where the kinds of . . . econometric tools that are useful to get a doctorate fly way over the heads of anybody who sits in a room like this." (Tr. at 1020:1-8). If this subject matter is too complicated for a room full of judges, attorneys, and regulators to understand, then it begs the question of how the average consumer is supposed to knowingly and confidently select his or her energy option and understand the value associated with those different choices.

Finally, ESCO witnesses offered numerous unsupported opinions masquerading as incontrovertible facts in their testimony regarding the added value ESCOs provide to their customers. In one instance, the IEC Panel claimed in their rebuttal testimony, "The fact is, many customers prioritize customer experience, supporting local charities, benefitting from bundled products, among other reasons, over price." (Tr. at 4021:12-14). ALJ Bergen asked the IEC Panel members what data or studies they relied upon to arrive at that factual conclusion. (Tr. at 4112:7-14). When the Panel could not provide any, Mr. Palmese claimed the statement was "more a commonsense point of view." (Tr. at 4112:23). But facts are not opinions, commonsense or otherwise. As Daniel Patrick Moynihan famously said, "Everyone is entitled to

his own opinion, but not to his own facts."[14] To the extent that the ESCOs' witnesses have offered mere opinions not grounded in data or studies, those opinions should be rejected as unsupported by the record.

The problem with the ESCOs' logic is further illustrated by Mr. Singer's attempt to answer ALJ Bergen's question asking for any scientific analysis or data with an anecdote and then claiming his story was "somewhat scientific" while admitting that he could not provide any "exact scientific analysis." (Tr. at 4115:21-23). This anecdote then formed the basis for the circular reasoning he later articulated by claiming, "the scientific data that people do make that choice is the fact that we exist." (Tr. at 4116:6-7). Such a claim relies on Mr. Singer's earlier statement that, "we exist; therefore, we are, right?" (Tr. at 4113:14). Science is not circular reasoning, nor is data a conclusion premised on such ideas. Scientific studies, data, and sound analysis should drive policy decisions in New York State, not anecdotes, unsupported opinions, or circular reasoning. To the extent that the ESCOs have relied on the latter, and not the former, to justify their continued activities in the retail energy market, they should be prohibited from conducting such activities in the future. In other words, unless ESCOs can demonstrate that they provide objective, verifiable real value to consumers (defined by PULP's witness Ms. Alexander as "saving money on their utility bill") (Tr. at 3696:15-19), then they should be prohibited from selling any alleged value-added products to mass market customers.

In sum, the evidence presented at the evidentiary hearing demonstrated that the status quo is no longer appropriate in the retail energy market for residential and small commercial customers in New York. The Commission should adopt DPS Staff's proposal to prohibit ESCOs from serving mass market customers absent a demonstration that the ESCOs could guarantee customers savings on their energy bills when compared to the default utility. As succinctly noted by Mr. Alch, public policy must prioritize the protection of the ratepayers and ensure that they receive "safe and adequate service at a just-and-reasonable rate." (Tr. at 3005:14-23; *see also* Tr. at 3041:9-10).

[14] Steven R. Weisman, Daniel Patrick Moynihan: A Portrait in Letters of an American Visionary, excerpt An American Original, Vanity Fair, https://www.vanityfair.com/news/2010/11/moynihan-letters-201011.

4. ESCOs Role in the Commission's Energy Policies, Including REV

The evidence developed at the hearing confirms UIU/NYAG's contention that the ongoing REV initiative does not justify the continued operation of ESCOs in the mass market. The UIU/NYAG Panel explained in its rebuttal testimony why any ESCOs' claims that additional regulatory action in the ESCO market would be inconsistent with REV were unfounded. (Tr. at 1600-1603; *see also* Tr. at 1601 (noting that concerns regarding the ESCO market pre-dated the REV initiative)). ESCO witnesses were unable to counter this position. For example, the ALJs noted that the IEC Panel had claimed in its rebuttal testimony that, "it is unlikely that there are enough resources in NY to meet 100% of NY's mass market annual consumption." (Tr. at 4018:6-8). ALJ Bergen questioned the IEC Panel on that statement during the evidentiary hearing, asking, "Is that based on data? Did you do an analysis of the availability of RECs [Renewable Energy Credits] in the market?" (Tr. at 4097-4098). The IEC Panel admitted that this statement was not based on "formal research" and ultimately failed to provide a foundation for this claim. (Tr. at 4098:21).

Similarly, when asked by the ALJs to explain or support his contention that prohibiting ESCOs from serving the mass market would hinder progress with REV or interfere with the state's other energy goals, Dr. Makholm could only say, "Competition is something that provides outcomes that we cannot foresee." (Tr. at 975:7-8). Such vague answers to questions seeking a scintilla of scientific analysis or support in data analysis are an insufficient basis from which to make policy decisions affecting the health and wellbeing of New York consumers.

> **7. ESCO Marketing Practices** (**Topic 6**: Whether the Uniform Business Practices (UBP) applicable to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs are deterred; **Topic 7**: Whether door-to-door and outbound telemarketing practices of ESCOs to mass market customers should be prohibited, and whether other ESCO marketing practices should be prohibited).

For the reasons discussed earlier here and in testimony, UIU/NYAG maintain that the UBP applicable to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs are deterred.

First, affirmative consent should be required before re-enrolling customers, at the expiration of their contracts, into contracts that have materially different terms. And as Ms. Azia

testified on behalf of the UIU/NYAG Panel at the evidentiary hearing, "when you go from a fixed-price contract to a variable-price contract, there needs to be consumer consent. We consider that a material change of terms." (Tr. at 1631:23-25). The ESCOs have failed to produce evidence suggesting that consumers are knowingly and voluntarily choosing to leave their fixed-price contracts and instead enroll in a variable-price contract. As the UIU/NYAG Panel stated in its rebuttal testimony, the language of Section 5(B)(5)(d) of the UBP should be revised to eliminate the practice of automatically enrolling an ESCO customer in a variable-price contract at the expiration of their fixed-price contract without that customer's affirmative consent. (Tr. at 1603-1608).

Section 5(B)(5)(d) of the UBP currently reads, "no material changes shall be made in the terms or duration of any contract for the provision of energy by an ESCO without the express consent of the customer . . . with the exception of a rate change . . . ." While it is not clear whether the term "rate change" encompasses the scenario described above (automatically enrolling an ESCO customer in a new variable-price plan at the expiration of the original fixed-price plan), UIU/NYAG nonetheless recommend deleting the "rate change" exemption for contract renewals from the UBP. Eliminating this exemption would make clear that switching a customer from a fixed-price plan to a variable-price plan constitutes a material contract change for which express customer consent is required.

Second, given the long history of deceptive and fraudulent marketing practices and slamming discussed above, UIU/NYAG maintain that the record contains substantial evidence to support DPS Staff's proposed reforms to the UBP prohibiting ESCOs from engaging in any door-to-door solicitation or telemarketing for mass market customers.

In addition, UIU/NYAG maintain that additional revisions could better assist the Commission in identifying bad actors more efficiently, thereby leading to better protection of mass market consumers. To that end, consistent with the UIU/NYAG Panel's Direct Testimony, ESCOs should be required to: (1) disclose all investigations and complaints against them and their agents in New York and other jurisdictions, (2) post performance bonds before being deemed eligible to participate in the New York retail energy market, (3) use standardized contracts for energy commodity service to mass market customers so consumers can easily compare contractual terms and product offerings, (4) substantiate any claims ESCOs make regarding how customers can save money on their utility bills by switching from default utility

service to an ESCO, and (5) pay monetary penalties imposed by the Commission for any instances of violating the UBP.[15] Such modifications are necessary to further deter ESCOs from engaging in acts of customer abuse and overcharging.

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

As discussed in Part III (A) (3) (b) above, the NYAG is empowered to bring enforcement actions against ESCOs for deceptive and illegal practices. To facilitate its representation of the People of the State of New York in this regard, the NYAG regularly accepts complaints from consumers against ESCOs. These complaints not only show that consumers are experiencing higher prices when they purchase energy from ESCOs rather than from their utilities, but also that consumers are subjected to a wide array of fraudulent and deceptive business practices.

a) Historical Complaints

(1) Prices

The NYAG has received hundreds of complaints about a variety of deceptive practices by ESCOs over the years. (Tr. at 1548:14-1549:10). These complaints often reflect consumer dissatisfaction with higher prices that they are paying to ESCOs than they would have paid as utility customers. For example, the NYAG received consumer complaints that U.S. Energy Savings promised them "immediate savings" on their energy bills, and were then "surprised to discover when they received their first bill that they were paying a higher rate for natural gas to U.S. Energy Savings than they paid to the local utility." (Ex. 1207 at 4 ¶ 20). The NYAG also received complaints against Columbia Utilities, LLC, noting that Columbia promised to lower their utility bills by 15% to 20%. (Ex. 1209 at 8 ¶ 12). In reality, Columbia customers paid an average of $272.16 more per year than they would have paid as full-service utility customers. (Ex. 1209 at 10 ¶19).

[15] For greater detail on these recommendations and their underlying justifications, *see* Tr. at 1542-1551.

(2) Sales and Marketing

The basis for the NYAG's investigations into ESCOs has focused on the sales and marketing tactics the NYAG has repeatedly observed over the years. These include:

- Misrepresenting energy savings;[16]
- Impersonating utility and government employees;[17]
- Switching consumers' providers without authorization;[18]
- Failing to provide consumers notice of their three-day right to cancel;[19]
- Falsely assuring prospective customers they can cancel at any time while concealing a minimum contract term and later refusing customers' cancellation requests;[20]
- Misrepresenting early termination provisions;[21]
- Failing to provide customers with a copy of their contract;[22]
- Misrepresenting that consumers would receive fixed monthly bills;[23]
- Failing to provide Commission-mandated contract disclosures to customers;[24]
- Failing to ensure that telemarketers comply with Do Not Call laws;[25]
- Failing to ensure that door-to-door marketers comply with home solicitation laws;[26]
- Improperly renewing fixed-price contracts without providing adequate advance notice;[27] and
- Providing false and misleading responses to Commission Consumer Services Division complaint investigators.[28]

These types of complaints, and the fact that they are lodged against so many different ESCOs in the industry, show that ESCOs should not be permitted to target mass market consumers unless

[16] Exs. 1204-1212.
[17] Exs. 1204-1209, 1211.
[18] Exs. 1204-1206, 1209, 1211.
[19] Exs. 1204-1206.
[20] Ex. 1209.
[21] Exs. 1207-1209.
[22] Exs. 1205-1206.
[23] Exs. 1207-1208.
[24] Ex. 1209.
[25] Exs. 1209, 1211.
[26] Exs. 1209, 1211.
[27] Ex. 1203.
[28] Ex. 1209.

they can provide sufficient value and that, in any event, the sales and marketing practices that take place in the ESCO market are in dire need of further regulation.

b) ESCO Complaint Rates v. Utility Complaint Rates

UIU/NYAG note that a comparison of ESCO complaint rates to utility complaint rates would be misleading in this context, for a variety of reasons. First, the NYAG has observed that complaints against utilities are often actually about overcharges by ESCOs, fraudulent or deceptive practices by ESCOs, or – more commonly – both. (Tr. at 1554:9-1555:2). Because consumers receive their bills from utilities, it stands to reason that many consumer complaints to utilities would actually concern ESCOs. In addition, because utilities provide delivery in addition to the sale of a commodity, it further stands to reason that complaints about utilities would encompass a wide range of delivery-related issues that are not applicable to ESCOs.

c) Impact of Enforcement on Complaint Rates

Enforcement alone has not been sufficient to resolve ESCO complaints in the market place. In the last three years, the NYAG has directly received more than 600 complaints against ESCOs, despite having settled with several individual ESCOs over the years. (Tr. at 1554:9-1555:1). Continued complaints about misrepresenting savings, slamming and failure to process cancellation requests show that these actions continue to be a problem in the market. (Tr. at 1555:1-2).

d) Complaint-Rate Trends and Implications

While complaints are certainly indicative of a problem in an industry, they do not tell the whole story:

> [T]he number of complaints [the NYAG] receive[s] is typically the tip of the iceberg . . . . [M]ost consumers do not file a complaint . . . . [and in] any settlements that we receive that provide for restitution where there's a claim process, significantly more consumers will receive restitution than those who file complaints."

(Tr. at 1794:7-13.) As one example, when the NYAG settled with HIKO Energy, LLC, the NYAG had received "about 300 complaints over three years . . . but refunds were made to approximately 2,500 people who were found to be eligible." (Tr. at 1794:23-1795:3.)

11. Transparency (**Topic 16**: The ability of mass market customers to obtain information about relative prices and offerings of ESCOs and regulated utilities and to understand such information, including evidence regarding the transparency of the retail market for mass market customers and the level of knowledge in that market; **Topic 17**: Tools that are available in the public domain that customers can use to do comparison shopping).

The evidentiary hearing reaffirmed UIU/NYAG's recommendations concerning the need for increased price transparency in the market. Despite ESCOs' claims that mass market customers are making fully informed energy choices and understand energy pricing differences between ESCO service and default utility service, the ESCOs expert witnesses' testimony suggests otherwise. For example, Direct Energy's expert witness, Mr. Kagen, testified about the consolidated billing process and how customers will receive a bill from the utility with the ESCO charges on it, and, even though the ESCO's information appears at the bottom of the consolidated bill, "everybody thinks that they're still getting their energy from the utility." (Tr. at 225:16-17). IEC Panel witness Mr. Palmese testified in a similar fashion on the subject of consolidated billing: "no matter how much you educate the customer, in their mind they are now getting two separate bills . . . ." (Tr. at 4074:3-5). That it is so hard for consumers to understand the consolidated billing structure indicates that retail energy consumers are either confused at best or deliberately misled at worst, thereby underscoring the need for enhanced regulation in this space.

As described in greater detail in the UIU/NYAG Panel's Direct Testimony, the Commission should consider taking additional steps to increase price transparency in the market place. (Tr. at 1557-1562). Such steps would include further enhancements to the New York Power to Choose website. (*See id.*). In addition, the Commission should require any ESCOs employing introductory, discounted "teaser" rates as an inducement to enroll in a variable price program to disclose on the Power to Choose site the non-discounted price they currently charge similar customers who have remained on ESCO service beyond the introductory period. (Tr. at 1558-1559).

Finally, UIU/NYAG urge the Commission to adopt DPS Staff's proposed requirement in the UBP for independent third party verification (TPV) to confirm a mass market customer's decision to take service from an ESCO in all instances. ESCOs' claims during the evidentiary

hearing that such TPV requirements pose a "nearly insurmountable burden" are unfounded. (Tr. at 4014:17-18). The IEC Panel described multiple potential scenarios wherein the verification call could end accidentally and void the contract agreement. (Tr. at 4084:14-18) (Mr. Singer suggesting that a consumer may refuse to take the TPV call if he or she is busy); *see also* Tr. at 4087 (Mr. Palmese claiming that customers complain the verification process takes too long, while admitting such claims were not based on any data or tracking mechanisms); Tr. at 4088-4089 (Mr. Palmese claiming customers complain that they pushed the wrong button in a TPV call "at least 25 to 30 times a day" but later equivocating on this point and being unable to substantiate it with any new enrollment percentages or tracking data)).

When ALJ Bergen asked the IEC Panel whether they had "any data to show that these hypothetical problems happen with any sort of frequency," (Tr. at 4086:13-22) no one could answer this question affirmatively or provide the ALJs with any data or references to any company tracking mechanisms or company reports. (Tr. 4086-4091). Moreover, as the ALJs aptly noted in their questioning of the IEC Panel, if customers are in fact so confused about "the relatively simple" (Tr. at 4091:20-24) concept of getting two bills (one for delivery service from the utility and one for commodity service from the ESCO), then ensuring via TPV that potential customers fully understand a complicated and technical contract they may be entering into would "be beneficial for all parties to ensure that there is absolutely no confusion" (Tr. at 4092:2-8). At that point, the IEC Panel witnesses conceded that a TPV process would be necessary, but stated that perhaps the Commission should "streamline it a little bit." (Tr. at 4092:9-15, Mr. Palmese, testifying on behalf of the IEC Panel). Given the lack of data provided to demonstrate that the TPV requirements would pose a "nearly insurmountable burden" and the witnesses' own admission that customers are regularly confused regarding their billing and energy service, a thorough and complete TPV process is necessary to ensure consumer decisions opting for ESCO service are made with clarity and transparency. Accordingly, the facts demonstrate that adopting DPS Staff's revisions to the UBP regarding TPV is appropriate and adopting some other "streamlined" TPV process is not warranted at this time.

17. Energy Brokers

The evidence developed at the hearing regarding energy brokers further bolstered UIU/NYAG's recommendations for increasing price transparency in the market place. While the ESCOs have attempted to frame this matter around consumer choice and consumers' ability to make their own energy choices as they would in any other industry,[29] Mr. Bergman's testimony on behalf of The O.E. Group casts doubt upon such a position. The O.E. Group, an energy brokerage service that works with approximately 30 different ESCOs, proposed that every residential and small commercial customer enlist the services of an energy broker to solicit quotes from ESCOs to find the best price, presumably because it is either too difficult or too cumbersome for the average lay person to discern the best prices on his or her own. (Tr. at 1980-1981, 1984).

Hiring energy brokers to help small businesses and consumers determine how to save money on energy bills is not an answer to the problems that pervade the retail energy market. Although The O.E. Group proposed that groups of mass market customers could collectively contract and pay for the services of an energy broker to solicit the lowest quotes available from ESCOs (*see* Tr. at 1977-1978, 1980, 1981), low-income and some moderate income residential consumers have trouble affording their energy bills at present without the added expense of hiring a broker for assistance. Small businesses often operate on thin profit margins and would not likely be able to incur the added expense associated with using an energy broker. Even the ESCOs' testimony suggested that most consumers choose to enroll in ESCO service because

[29] RESA failed to undermine UIU/NYAG's proposal of a qualified prohibition during its cross-examination of the UIU/NYAG Panel. (*See* Tr. at 1822:12-16 (suggesting that if UIU/NYAG's proposal were implemented and mass market customers were returned to default utility service, those customers "would not have any choices remaining to . . . purchase from ESCOs)). Such an argument neglects the logical conclusion that there would not be a rational reason to choose higher-priced commodity service from an ESCO if that ESCO were not also offering some additional benefit. Absent compelling reasons (e.g. quantitative realized savings through bundling, significantly higher percentage of green power mix products) and absent fraud and deception, there is no rational reason for a consumer to "chose" to pay higher prices for the same goods. As the UIU/NYAG Panel testified during the evidentiary hearing, any overcharge (that is, any amount an ESCO charges above the default utility price for commodity service) is unreasonable "unless an ESCO can demonstrate quantifiable value that would account for any overcharge." (*See* Tr. at 1725:17-21). The ESCOs have also consistently failed to refute DPS Staff's testimony, based on its review of the data the ESCOs provided, that any incremental value associated with various value-added products was not worth the premium price charged above and beyond the incumbent utility's prices. (*See* DPS Staff Policy Panel testimony, Tr. at 2371:20-25 – 2372:1-3).

they believe they will save money on their energy bill.[30] Requiring consumers to pay for the services of a broker to make fully informed and transparent energy choices could undercut any potential savings. Thus, increasing price transparency and ESCO regulation in the market place, rather than encouraging consumers to pay more money for a broker to potentially save money on subsequent energy bills, is the proper solution.

a) Proposed Energy Broker Role in the Mass Market

UIU/NYAG do not propose any role for energy brokers in the mass market. Nevertheless, to the extent that they play a role in soliciting consumers to become customers of ESCOs, brokers should be subject to the same laws and regulations as ESCOs. The NYAG has found, in its investigations and through the complaints it receives, that ESCOs sometimes engage third parties to solicit new customers on their behalf, and use this arrangement to absolve themselves of responsibility for any deceptive practices in which those contractors engage. For example, HIKO Energy, LLC employed marketing contractors to conduct in-person solicitations and telemarketing on its behalf. (Hearing Exhibit 1211). These contractors, acting on HIKO's behalf, engaged in many deceptive practices, including misrepresenting that consumers would save money, slamming, claiming they represented the utilities, and corrupting the third-party verification process. (Hearing Exhibit 1211). Accordingly, ESCOs and their agents – including brokers – must adhere to the UBP and applicable state and federal laws.

b) Registration of Energy Brokers in the Mass Market

The NYAG has always advocated that unregistered businesses that engage in broker activities should be barred from doing business with New York consumers. ESCO brokers are soliciting customers just as ESCOs are soliciting customers, and ESCOs should not be permitted to engage in an end-run around Commission regulations by soliciting customers via a broker. To the extent that brokers are registered, they should be required to certify that their employees and agents have been trained to comply with UBP rules. Deceptive practices should be prohibited, and the nature of brokers' compensation should be disclosed to prospective customers before any ESCO contract can be deemed valid. DPS Staff should be authorized, where appropriate, to investigate an ESCO broker's activities to verify that the claims made in its solicitations are true.

[30] *See* Tr. at 132:9-20 (testimony of Ronald G. Lucas, testifying on behalf of ESCO Great Eastern Energy (GEE), stating that GEE has difficulty selling green products because, "There's a large group of people who are reluctant to pay a premium for environmental products at the current time . . . They just look at it from a pocketbook basis.").

CONCLUSION

The ESCOs have failed to prove that their continued participation in the residential and small commercial retail market under the current regulatory structure is in the public interest. Even the ESCOs' own experts have agreed that regulating in the public interest involves "maximizing the common good."[31] Yet, as described herein, the facts developed in this proceeding demonstrate that maintaining the status quo in the retail energy market is not in the mass market's common good. The record developed supports UIU/NYAG's recommendations concerning ESCOs' participation in the market. Therefore, UIU/NYAG respectfully urge the Commission to prohibit ESCOs from continuing to offer overpriced products to mass market consumers and to modify the UBP to offer enhanced consumer protection measures in accordance with UIU/NYAG's recommendations presented in its testimony and other filings in this proceeding.

Respectfully submitted,

/s/ Carrie A. Scrufari, Esq.
Carrie A. Scrufari Esq.

/s/ Kathleen O'Hare
Kathleen O'Hare

/s/ Kate Matuschak
Kate Matuschak

[31] *See* Tr. at 319:13-14 (testimony of John Hanger, testifying on behalf of Direct Energy).