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

REBUTTAL TESTIMONY

OF

UTILITY INTERVENTION UNIT/NEW YORK ATTORNEY GENERAL PANEL

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Albany, New York

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I. INTRODUCTION

Q. Would the Panel please state their names and business addresses?

A. **(Collar)** My name is Gregg C. Collar, and my business address is 99 Washington Avenue, Suite 640, Albany, New York 12231-0001.

(Azia) My name is Jane M. Azia, and my business address is 120 Broadway, 3rd Floor, New York, NY 10271.

(Malaspina) My name is Peter A. Malaspina, and my business address is 120 Broadway, 25th Floor, New York, NY 10271.

Q. Are you the same panel members that filed direct testimony on August 25, 2017?

A. Mr. Collar and Ms. Azia both submitted direct testimony as part of the UIU/NYAG Panel on August 25, 2017. Dr. Malaspina is submitting his testimony solely in rebuttal.

Q. Dr. Malaspina, please summarize your qualifications and employment background.

A. I currently serve as Chief Economist for the Office of the New York State Attorney General (NYAG). Prior to that I was Vice President at an economic consulting firm called Quantitative Economic Solutions L.L.C., where I analyzed a variety of economic issues dealing with competition, economic harm, valuations, and intellectual property. I have also previously spent time working as a consultant in the electricity industry, and have coauthored several reports on behalf of utilities in the state of California. These reports include analysis of the impacts of demand response programs for San Diego Gas and Electric and the impacts of Time of Use Rates for Pacific Gas and Electric. I attended Vassar College in New York where I earned a B.A. in both Mathematics and Economics in 2003. I received my Ph.D. in Economics from the University of North Carolina at Chapel Hill in 2011, where I focused on Microeconomics, Industrial Organization, and Law and Economics, and my minor field was in Econometrics.

Q. What is the scope of the panel's rebuttal testimony?

A. We are responding to portions of Dr. Cicchetti's direct testimony on behalf of the National Energy Marketers Association (NEMA), Mr. Lacey and Mr. Makholm's direct testimony on behalf of the Retail Energy Supply Association (RESA), and Department of Public Service (DPS) Staff Panel's Testimony. Specifically, we address NEMA and RESA's claims that price comparisons between Energy Service Companies (ESCOs) and utilities are invalid, including their criticisms of Mr. Alch's customer pricing analysis.[1] Dr. Cicchetti and Mr. Makholm put forth several reasons why they believe comparisons of prices between utilities and ESCOs are not valid. These reasons underpin their conclusions about the value of services ESCOs provide relative to the utilities. Our testimony demonstrates that their conclusions on this issue are unreliable, as they suffer from each of the following issues:

- Flawed economic intuition and reasoning,
- Flawed analysis of the available data, and

[1] *See* Alch Affidavit ¶ 11 (October 26, 2016) (hereinafter Alch Affidavit), *Nat'l Energy Marketers Assoc. et al. v. New York State PSC*, Index No. 05680-16 (N.Y. Sup. Ct.).

- Unreliable conclusions made without sufficient quantitative data.

Our rebuttal of NEMA and RESA's testimony also demonstrates why the Uniform Business Practices (UBP) should be revised to provide additional consumer protections. Although we are not commenting on other parts of these witnesses' testimony (or that of other witnesses), our silence should not be construed as agreement with that testimony.

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

A. Yes, we are sponsoring one exhibit. Exhibit __(UIU/NYAG-5) is Dr. Malaspina's curriculum vitae.

II. A PROHIBITION ON ESCOS SERVING MASS MARKET CUSTOMERS, WITH A WAIVER PROCESS, IS APPROPRIATE.

Q. Can you briefly explain the first part of Dr. Cicchetti's testimony on which you will be commenting?

A. Yes. Dr. Cicchetti maintains that ESCOs "should not be subject to new and expanded regulation" (Direct Testimony, p. 13). He further comments that banning ESCOs from sectors of the market is "misguided" and therefore he does not support a prohibition in total or in part on ESCOs serving mass market customers, or a requirement that ESCOs offer value-added energy efficiency and energy management services as a condition to offering commodity services (Direct Testimony, p. 55).

Q. What reason does Dr. Cicchetti offer for opposing a prohibition on ESCOs serving mass market customers?

A. Dr. Cicchetti believes the retail energy market is competitive and that ESCOs' behavior of charging higher prices than the default utility prices does not indicate a market problem (*see* Direct Testimony, p. 53).

Q. What is your response to this opinion?

A. We disagree with Dr. Cicchetti. DPS Staff's approach – to prohibit ESCOs from serving mass market consumers unless ESCOs can provide guaranteed savings – is reasonable, with some further modifications discussed herein (*see* DPS Staff Panel Testimony, p. 20-21). For the reasons stated in our direct testimony and herein, we believe the market is not workably competitive, contrary to Dr. Cicchetti's assertions, and is therefore in need of reform.

DPS Staff's prohibition should be adopted – with a waiver process and additional consumer protections – so that ESCOs are prohibited from serving mass market consumers unless they can provide guaranteed savings.[2] At this time, we reserve judgment on whether other ESCOs should be permitted to seek a waiver from the general prohibition on serving mass market customers, such as ESCOs offering 100% renewably-sourced products. The recently issued Public Service Commission (Commission) Order Establishing Oversight Framework and Uniform

[2] *See* DPS Staff Panel Testimony, p. 16. We also recognize DPS Staff's position that ESCOs' provision of energy to mass market consumers in the context of community choice aggregation can be permitted in appropriate circumstances, i.e., where "participating ESCOs could tailor their products to meet the needs of a community with significantly improved pricing performance" (*id.* at p. 126).

Business Practices for Distributed Energy Resource Suppliers[3] contains ambiguities in terms of whether and how it will apply to ESCOs that are also Distributed Energy Resource (DER) service providers. For example, an ESCO may offer a 100% renewably sourced commodity product, but also offer distributed energy resources in the form of solar panels or community distributed generation (CDG). It is unclear whether such an ESCO providing bundled commodity and DER/CDG service could engage in door-to-door marketing and which UBP provisions would govern customer consent and contract renewals of such bundled services. Until such ambiguities are resolved in assessing how to delineate ESCO services from DER services, we reserve judgment on whether an ESCO offering 100% renewably sourced product should be permitted to seek a waiver from the general prohibition on providing service to mass market customers.

With respect to ESCOs seeking a waiver from the general prohibition on service to mass market customers because they believe they can offer guaranteed price savings, UIU/NYAG recommends that the Commission explicitly develop a written waiver process in a revised version of the UBP for ESCOs wishing to qualify. In Direct Testimony, the DPS Staff Panel suggests that "the mechanics of any guaranteed savings product and associated marketing materials should first be required to be reviewed and "accepted" by Staff or the Commission before they are made available to the public." (p. 125). UIU/NYAG recommend a modification to this approach, including the establishment of a formal waiver application process

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

in the UBP to include: (1) a requirement that ESCOs file their waiver petitions and discovery requests/responses on DPS's Document and Matter Management System; (2) the opportunity for public comments; (3) a Commission review and approval process before any ESCO is deemed eligible for the waiver; and (4) a condition that any waivers granted should be reviewed on an annual basis to ensure the ESCO has complied with all terms of the UBP. The Commission should pursue appropriate enforcement mechanisms if it determines that an ESCO has violated the terms of the UBP.

Q. Would you like to comment on any other aspect of Dr. Cicchetti's testimony?

A. Yes. Contrary to Dr. Cicchetti's claim on page 66 of his Direct Testimony,[4] a primary purpose of allowing ESCOs into the retail energy markets for gas and electricity was to create, through increased competition, lower priced energy or more valuable energy products than utilities were able to provide.[5] Dr. Cicchetti even cited Opinion 96-12 and admitted in another portion of his direct testimony that "the expectation (of competitive choice in the retail electric and gas industries) was that increased efficiencies would reduce costs and prices over time" (p. 16). However, as the data presented in DPS Staff Panel's Direct Testimony indicates, most mass market ESCO customers are not receiving any value, in terms of either

[4] Dr. Cicchetti asserts that, "Any claim that "restructuring" was done solely to lower prices is wrong." Initial Testimony of Dr. Charles J. Cicchetti (Cicchetti Testimony), p. 66.

[5] *See* Case 94-E-0952, Op. No. 96-12 at 30-32; *see also Energy Ass'n of New York State v. Public Serv. Comm'n of the State of New York*, 169 Misc. 2d 924, 936 (Albany County Sup. Ct. 1996) (observing that "the Courts have recognized that to introduce 'competition into a monopolistic marketplace and thus lower prices to consumers' is well within the Commission's jurisdiction") (citing *CNG Transmission Corp. v. New York State Public Serv. Comm'n*, 185 A.D.2d 671-2 (4th Dept. 1992)); *see also* UIU/NYAG Direct Testimony, pp. 7-8.

lower cost service or "value added products" from their ESCO service (*see* DPS Staff Panel Direct Testimony at p. 20).

III. THE ESCOS RELY ON INVALID ECONOMIC ANALYSIS AND ANALOGIES.

Q. What is your assessment of Dr. Cicchetti's claim that ESCOs have helped lower industry-wide market prices?

A. In his testimony, Dr. Cicchetti claims that "ESCOs have helped lower market prices more efficiently and more quickly than would have occurred in the absence of ESCO participation in the market."[6] In defense of this claim, Dr. Cicchetti cites to United States Energy Information Administration (EIA) data. Based on this data, Dr. Cicchetti observes that consumer prices in New York declined compared to prior years and when looking at all categories of electric customers—commercial, industrial, and residential ("industry-wide") – ESCO prices were less than utility prices statewide.[7]

However, there are several flaws with Dr. Cicchetti's use of the EIA data. First, the EIA data does not provide customer level data like the dataset used by Mr. Alch. Furthermore, Dr. Cicchetti improperly used industry-wide EIA data to evaluate Mr. Alch's analysis instead of the more relevant EIA data for residential customers. The industry-wide EIA data includes large commercial and industrial customers. However, the residential EIA data is more representative of mass market customers than the industry-wide EIA data. Therefore, if Dr. Cicchetti

[6] Cicchetti Testimony, pp. 11-12.
[7] *See id.*

used the EIA data for residential customers, as he should have, he would have arrived at conclusions that support Mr. Alch's analysis.

Figure 1
New York Residential Electric Prices
(cents per kWh in 2015 $)

Year	Full-Service Providers (Utilities)	Restructured Retail Service Providers (ESCOs)
2000	19.31	16.93
2001	18.72	20.07
2002	17.73	19.91
2003	18.39	19.08
2004	18.32	16.86
2005	19.25	16.54
2006	19.88	19.57
2007	19.45	20.43
2008	19.79	23.00
2009	18.96	21.70
2010	20.11	21.77
2011	19.03	20.31
2012	17.89	19.44
2013	18.78	20.47
2014	19.54	22.31
2015	17.80	21.74
Average of Real Prices 2000-2015	**18.93**	**20.01**
Average of Real Prices 2006-2015	**19.12**	**21.07**
Average of Real Prices 2011-2015	**18.61**	**20.85**

Source: EIA, Average Price (cents per kWh) by State by Provider, 2000-2015, EIA provides these prices in nominal terms. https://www.eia.gov/electricity/data/state/. (Adjusted to real $ using CPI 2015 Base Year)

Consider Figure 1 above, which shows prices for New York residential customers using the EIA data for residential customers. This data demonstrates several key facts, including:

- ESCO residential real prices (adjusting for inflation) have risen over the entire time period of the data,
- Average ESCO residential real prices are greater than utility prices over the entire time period of the data, and
- Average ESCO real residential prices are increasing relative to utility prices over time.

Therefore, the residential analog to Dr. Cicchetti's industry-wide analysis (using the same data source Dr. Cicchetti analyzed) supports Mr. Alch's findings that residential customers are paying more to ESCOs than they would have paid to utilities. Furthermore, this observation persists regardless of whether one examines the most recent five years of EIA data, the most recent ten years, or the entire dataset. Figure 1 also demonstrates that ESCO residential price premiums relative to utilities are growing over time. Over the entire time-period of the data (2000-2015), the average residential price premium of ESCOs over utilities is 1.07 cents per kWh. This figure approximately doubles to 2.24 cents per kWh when examining the most recent five years of data (2011-2015).

Q. What is your assessment of Dr. Cicchetti's claim about all New York prices falling over time?[8]

A. As shown in Figure 1, residential ESCO prices, in real terms (accounting for inflation) are not falling significantly over time. Furthermore, a general trend

[8] *See id.*, pp. 11-22, 69.

exists in New York prices that is similar to the observed price trend for the United States as a whole.

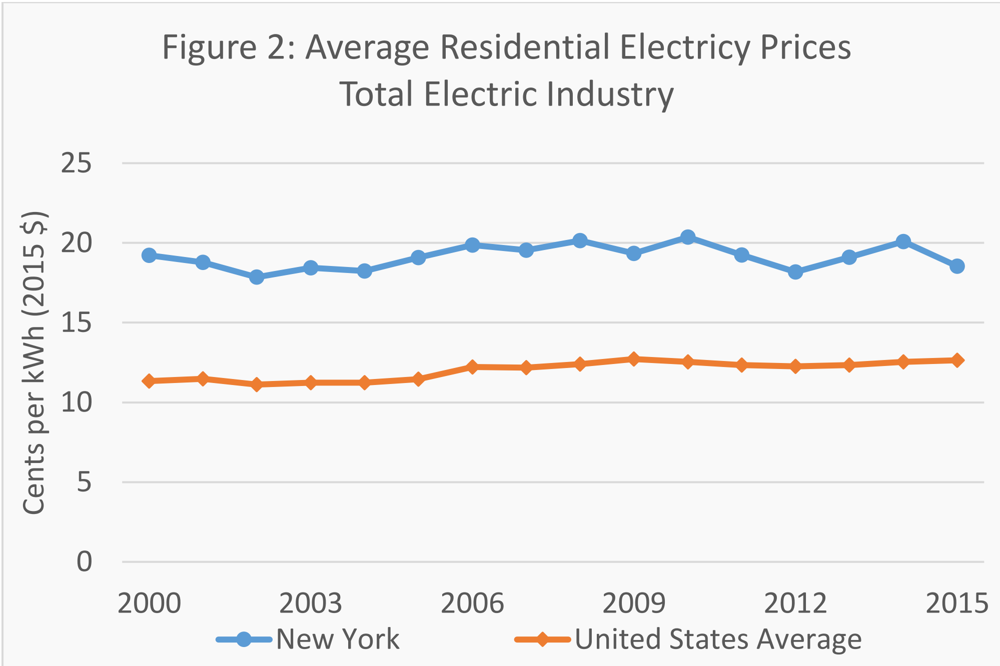

Figure 2: Average Residential Electricy Prices
Total Electric Industry

Figure 2 above illustrates New York and United States Average residential prices (these averages are based on data for both ESCOs and utilities) reported in EIA data. Figure 2 demonstrates a general trend upward for both New York and the United States Average residential prices, with slightly more volatility in New York.

Q. What is your assessment of Dr. Cicchetti's claims about the proper period of the data that must be considered?

A. Dr. Cicchetti criticizes Mr. Alch for limiting his analysis to the 30-month period for which Mr. Alch had sufficient billing data and argues that looking at the broader 16-year period is more informative.[9] However, Mr. Alch's analysis includes the

[9] *See id.*, pp. 35, 43, 55.

entire period for which he had a complete dataset for that particular type of billing data. Thus, any reference to Mr. Alch's analysis as "cherry picked"[10] is inaccurate.

Q. What is your assessment of Dr. Cicchetti's and Mr. Makholm's claims that comparisons between ESCOs and utilities' prices are affected by omitted factors that introduce biases?

A. In their testimonies, Dr. Cicchetti and Mr. Makholm claim there are several factors that would tend to bias customer value estimates when looking at pricing comparisons between ESCOs and utilities.[11] In many cases, Mr. Makholm and Dr. Cicchetti rely only on hypotheticals and intuition to suggest how these factors could possibly affect customers.[12] In this sense, their analyses do not offer sufficient quantitative analysis to demonstrate either: (1) that these factors would tend to cause upward bias in ESCO prices or value relative to utilities, or (2) that the magnitude of these potential biases would be large enough to explain higher ESCO prices relative to utility prices (either collectively or individually). Therefore, Dr. Cicchetti and Mr. Makholm's analyses are incapable of determining the economic impact or magnitude, if any, of the factors that they claim were omitted or could cause bias.

[10] *Id.* at p. 9.
[11] *See id.*, p. 12, 33, 41-44; *see also* Makholm Testimony, pp. 13-19, 22, 29-52.
[12] *See, e.g.* Cicchetti Testimony, p. 24 (making an analogy to car sales).

Q. What is your assessment of Dr. Cicchetti and Mr. Makholm's claims regarding monthly adjustments affecting comparisons of utility and ESCO prices?

A. Dr. Cicchetti and Mr. Makholm unjustifiably criticize Mr. Alch for not accounting for monthly adjustments in his analysis of prices.[13] The National Grid document that Dr. Cicchetti refers to compares individual bills from a single period. Rightfully, Dr. Cicchetti does not imply that this issue would persist if comparisons of bills were made over multiple months or years. Neither Dr. Cicchetti nor Mr. Makholm can articulate why monthly idiosyncrasies, that might affect comparisons in a given month, would not cancel each other out as additional data is considered. Indeed, Mr. Makholm's own examples demonstrate how the cited adjustments will tend to cancel out if many months of data were considered.[14] For example, Mr. Makholm's description of the 2014 Orange and Rockland deferral states that the same amount ($0.02312 per kWh) withheld from customers' bills during January 2014 was then added back into customers' bills in April 2014.[15] Thus, the increase in the April bills would cancel out the decrease in the January bills if the averages or aggregates across the entire period were analyzed. This is precisely what Mr. Alch's analyses involved when he considered the relevant data.[16]

[13] *See id.*, at p. 36; *see also* Makholm Testimony, pp. 29-33.

[14] *See* Makholm Testimony, pp. 28-36. Dr. Cicchetti does not quantitatively explain how this factor could significantly affect Mr. Alch's analysis.

[15] "Similarly, Orange and Rockland deferred the collection of a portion of its kWh sales during the Polar Vortex period. In January 2014, Orange and Rockland deferred $2 million and 86,510,304 kWh of electric sales, which equaled $0.02312 per kWh for each Orange and Rockland customer. The Company recovered these deferred charges during the April 2014 billing period by adding the $0.02312 per kWh to each customer's bill as a retroactive reconciliation charge." (Makholm Testimony, p. 31).

[16] *See* Alch Affidavit, p. 12.

Q. What is your assessment of Dr. Cicchetti's claims about potential regional price differences and how they could impact price comparisons?

A. In his testimony, Dr. Cicchetti raises the possibility of regional differences in utility and ESCO market share affecting price comparisons.[17] None of the information provided in his Tables 3 and 4 is based on actual occurrences. This information is purely a construct of Dr. Cicchetti's assumptions about made-up prices,[18] market shares,[19] and customer behavior[20] without any evidence.[21] Therefore, Dr. Cicchetti's testimony on this issue amounts to little more than raising the specter of potential bias, without demonstrating that any bias actually exists.

Q. What is your assessment of Dr. Cicchetti's and Mr. Makholm's claims about the additional value ESCOs provide with respect to green energy sources?

A. In his testimony, Dr. Cicchetti raises the possibility that the estimated price premiums of ESCOs over utilities do not account for the additional value of "environmental improvements" inherent in certain ESCOs' services.[22] Whether there are non-pecuniary benefits from reduced greenhouse gas (GHG) emissions in the abstract, as Dr. Cicchetti opines, is not the relevant question to consider on this topic. The relevant question is: are the higher prices paid by ESCO customers explained by any quantitative evidence that demonstrates that ESCO

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[17] *See* Cicchetti Testimony, pp. 39-42.
[18] *See id.* at Table 3.
[19] *See id.* at Table 4.
[20] *See id.* at p. 40.
[21] For example, Dr. Cicchetti states, "I further introduce the reasonable possibility that consumers would be more likely to choose an alternative retailer that was less expensive when their underlying electricity bills were more expensive." *Id.*
[22] I*d.* at pp. 46-51.

customers receive a quantifiable increase in environmental benefits relative to utility customers? Dr. Cicchetti offers no analysis that estimates these relative benefits. Instead, Dr. Cicchetti assumes, based on the current penetration of renewables in New York (approximately 25% overall), that ESCOs sell this same proportion to their customers.[23]

Dr. Cicchetti makes this assumption about the rate at which ESCOs supply renewable energy without any quantitative evidence. Furthermore, in focusing on the purported benefits from this hypothetical figure, Dr. Cicchetti ignores the possibility that utilities deliver renewables at the same rate (he does not attempt to calculate this figure), and therefore the expected relative benefit of ESCOs over utilities (for this factor) for any given customer would be zero. Under this scenario, a comparison of prices between ESCOs and utilities is not affected by the inclusion or consideration of a value associated with reduced GHG emissions. Put differently, Dr. Cicchetti provides no quantitative evidence that ESCOs obtain any green energy supplies beyond those already in the marketplace and those that would be otherwise provided by utilities.

Similarly, Mr. Makholm raises the possibility that estimated price premiums of ESCOs over utilities do not account for the additional value of "green energy."[24] Mr. Makholm does not attempt to quantitatively identify or demonstrate how this factor could affect a comparison of ESCO and utility prices for residential customers.

[23] *See id.* at pp. 10, 51.
[24] Makholm Testimony, pp. 41-42.

Q. What is your assessment of Dr. Cicchetti's and Mr. Makholm's claims about the benefits of ESCOs' "fixed price offerings"?

A. In his testimony, Dr. Cicchetti claims ESCOs' fixed price offerings to their customers "explain[] some of the differences in relative prices, particularly during the months that Mr. Alch selected in his analysis."[25] However, this analysis relies on unsubstantiated assumptions about (1) the value of that fixed price to a given customer who opts for a fixed price, and (2) the percentage of ESCO customers opting for fixed price services.

For his assumption about the value of a fixed price offering to a given customer, Dr. Cicchetti uses a utility hedging cost for this value, without demonstrating why the utility hedging cost is a valid proxy for the benefit the customer receives from an ESCO fixed price offering. The relevant consideration is the value the *customer* sees, not the cost to the provider of that service. Furthermore, to estimate the total value potentially associated with fixed price offerings, Dr. Cicchetti assumes that at least "half of ESCOs' residential sales were fixed-rate products,"[26] an assumption made without any quantitative evidence. Therefore, Dr. Cicchetti's estimate of the total value associated with ESCOs' fixed price offerings is not based on quantitative evidence.

Mr. Makholm also suggests that providing fixed price services benefits ESCO customers. However, he does not attempt to quantitatively identify or demonstrate how fixed price services affect a comparison of ESCO and utility

[25] Cicchetti Testimony, p. 56.
[26] *Id.* at p. 58.

prices for residential customers.[27] Instead he points to a 2 cents per kWh cost estimate but takes "no position on the reasonableness of this figure," noting that he has been unable to ascertain how the figure was determined.[28] Furthermore, Mr. Makholm's own examples demonstrate that utilities can also provide customers a form of insurance (and its related value), by deferring a portion of customer charges in high cost months to lower cost months.[29]

Q. What is your assessment of Dr. Cicchetti's claims about the importance of ESCOs providing energy conservation and demand side services?

A. In his testimony, Dr. Cicchetti states "there are two primary types of benefits that result from programs, investments, and choices that reduce electricity and natural gas use: (i) consumer savings and (ii) societal benefits."[30] However, none of the numbers he associates with these values is linked to quantifiable conservation benefits provided by ESCOs relative to the benefits provided by utilities.

For example, Dr. Cicchetti states:

> Residential users purchase about 10 billion kWh from ESCOs each year. If as a result of ESCO conservation services and programs, these customers conserve only 20% of the electricity they use, this would be annual saving of 2 billion kWhs. If these customers pay $0.20 per kWh and the cost per kWh saved was $0.05 regardless of who pays, the residential benefits would be $300 million annually ($0.15 per kWh times 2 billion kWhs). ESCO customers across all rate categories use about 75 billion kWhs per year. If they save a similar 20%, and using a full service price of

[27] Makholm Testimony, p. 58
[28] *Id.* at p. 46; *see id.* at FN 48.
[29] *See id.* pp. 30-31.
[30] Cicchetti Testimony, p. 58.

about $0.14 per kWh, the annual savings would be about $1,350,000,000 ($0.09 per kWh times 15 billion kWhs).

There are two fundamental flaws with this analysis as it relates to these proceedings: (1) the 20% conservation number Dr. Cicchetti references is not based on quantitative evidence; it is a pure hypothetical, and (2) Dr. Cicchetti does not put conservation numbers in terms of the relative advantage that ESCOs would provide above and beyond utilities. Therefore, the absolute conservation savings stated by Dr. Cicchetti are not founded in quantitative evidence or analysis. Furthermore, because Dr. Cicchetti does not quantify this potential benefit of ESCOs relative to utilities, this analysis does not offer any valid explanation for the estimated residential price premiums of ESCOs relative to utilities.

Q. What is your assessment of Dr. Cicchetti's claims about the value of loyalty programs, discounts, gifts, debit cards, and similar rewards?

A. Dr. Cicchetti provides examples of supposed value added through discounts and reward programs.[31] However, Dr. Cicchetti's analysis here is insufficient because he fails to disclose the underlying data. Without the underlying data, there is no way to assess the relevancy of this analysis for a comparison to Mr. Alch's analysis. For example, the data could include one-time credits offered by ESCOs that may be concentrated in one year versus another, which would overstate the value of discounts in a given year. Furthermore, without the underlying data, there is no way to assess the degree to which the sample of

[31] *See id.* pp. 62-64.

ESCOs in Dr. Cicchetti's analysis is representative of the ESCOs included in Mr. Alch's analysis.

Moreover, as the NYAG's investigation of Energy Plus revealed, the value of rewards such as airline miles, travel points, retailer rewards, and cash back payments is not typically sufficient to offset the premium that ESCO customers pay over what they would have paid as full service utility customers.[32] The NYAG's investigation found that many consumers had switched to Energy Plus because they were promised that they would save money – and not because they would obtain benefits such as travel rewards.[33]

IV. THE ONGOING REFORMING THE ENERGY (REV) INITIATIVE DOES NOT JUSTIFY THE CONTINUED OPERATION OF ESCOS IN THE MASS MARKET.

Q. Can the panel briefly explain the part of Mr. Makholm's testimony on which you will be commenting with respect to the ongoing REV initiative?

A. Yes. Mr. Makholm expressed some general concerns about the effect this proceeding could have on the REV initiative. Specifically, Mr. Makholm opined that:

> regulating ESCOs out of . . . New York's mass-market would eliminate an entire group of intermediaries and extend monopoly energy services back to the transmission grid (in the case of electricity) – which should not be seen as anything other than a retrograde movement back from energy delivery innovation targeting climate change in the United States (Direct Testimony, p. 60).

Mr. Makholm further stated that "[t]he policy proposed in this proceeding is not

[32] *See* Energy Plus AOD at 7-8 ¶¶ 10-11.
[33] *See id.*

consistent with REV" and that prohibiting ESCOs from serving mass market customers "would undermine the role imagined for ESCOs in the REV proceeding and thereby upend the REV proceeding as a whole" (*id.* at p. 63).

Q. What is your response to Mr. Makholm's assertions?

A. Mr. Makholm's claims are unfounded. As a preliminary matter, his claims seem like a retroactive pretext to justify the continued operation of ESCOs in the mass market. As was discussed at length in our direct testimony, the NYAG has been investigating ESCOs' marketing and business practices for more than two decades, long before the proposals considered in the REV proceeding were at issue before the Commission. Second, this proceeding was commenced in 2012, years before REV even existed.[34] To now claim that "REV identified a number of goals that can only be achieved efficiently by ESCOs" is disingenuous, inaccurate, and distracts from the real issues in these proceedings (*id.* at 64). DPS Staff's proposal has merit because it would protect consumers from paying higher prices than they otherwise would if they were obtaining commodity service from the default utility. The proposal also preserves ESCOs' ability to participate in REV if they so choose. If DPS Staff's proposal were adopted, it would encourage ESCOs to innovate to provide renewable products that would further the goals of REV and the State's Clean Energy Standard.

Q. Would you like to comment on any other aspect of Mr. Makholm's direct testimony?

[34] *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).

A. Yes. Mr. Makholm asserts that because the utilities are not permitted to own DERs under REV, if ESCOs were prohibited from serving mass market customers, such a prohibition "would effectively leave very few, if any, market participants who have the ability to provide products, such as DER, across the [Distributed System Platform] DSP, inhibiting the goals of the REV initiative (*id.*, p. 66). However, the Commission's REV proceedings have expressed that DERs include "a wide variety of distributed energy resources, including end-use energy efficiency, demand response, distributed storage, and distributed generation. DERs will principally be located on customer premises, but may also be located on distribution system facilities."[35] Thus, ESCOs are not the only entities capable of providing distributed energy resources under REV.

Moreover, in limited instances, the Commission does allow utilities to own DERs. For example, the Commission approved Consolidated Edison's (Con Edison's) Shared Solar Pilot program providing CDG to the utility's low income customers.[36] The Commission's August 2, 2016 Order approved the first phase of the program, allowing Con Edison to procure and install 3 megawatts (MW) of solar generation on its utility-owned property as a potential new model to provide low income customers with access to DERs.[37] Furthermore, while the Commission

[35] Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Order Adopting Regulatory Policy Framework and Implementation Plan, at 3 n. 3 (February 26, 2015), (hereinafter February 2015 Framework Order); *see also* Case 14-M-0101, Reforming the Energy Vision (REV) Working Group 1: DSPP Markets, Final Report & Attachments, at Appdx 4, July 8, 2014.
[36] Case 16-E-0622*, Petition of Consolidated Edison Company of New York, Inc. for Approval of a Pilot Program for Providing Shared Solar to Low-Income Customers*, Order Approving Shared Solar Pilot Program With Modification (August 2, 2017) (Shared Solar Pilot) at 2.
[37] *See id.* (quoting "utility ownership of DER will only be allowed under the following circumstances: (1) procurement of DER has been solicited to meet a system need, and a utility has demonstrated that competitive alternatives proposed by non-utility parties are clearly inadequate or more costly than a traditional utility infrastructure alternative; (2) a project consists of energy storage integrated into

envisioned that ESCOs would innovate and develop DER products and services, it also envisioned that other retail suppliers and demand management companies would as well, including third party vendors, equipment manufacturers, and utility customers.[38]

Q. Do you have any other comments you would like to make regarding ESCOs that wish to provide DER services to mass market customers if the Commission accepts DPS Staff's proposal?

A. Yes. Insofar as ESCOs wish to serve mass market customers by providing DER services, we recommend further revisions to the UBP applicable to ESCOs, as detailed below.

V. THE UBP REQUIRES REVISION.

Q. Can you briefly identify the positions of Dr. Cicchetti with respect to revising the UBP provisions to better regulate ESCOs that you wish to respond to?

A. Yes. Dr. Cicchetti opined that ESCOs should not be subject to any new or expanded regulations (*see* Direct Testimony, p. 13). Dr. Cicchetti stated that ESCOs are "already subject to the discipline and regulation of competition" and should therefore "not be managed like comprehensively regulated utilities" (*id.*).

distribution system architecture; (3) a project will enable low or moderate income residential customers to benefit from DERs where markets are not likely to satisfy the need; or, (4) a project is being sponsored for demonstration purposes." Case 14-M-0101, Reforming the Energy Vision, Order Adopting Regulatory Policy Framework (issued February 26, 2015) (REV Track One Order), at 70. Among other things, the Commission reasoned that utility ownership of DERs was warranted in Con Edison's case because it would respond to the lack of opportunity for low income participation that otherwise existed and that the pilot could experiment with a new model to support the future development of the DER market. *See* Shared Solar Pilot at 15-16.

[38] *See* February 2015 Framework Order at 15.

Q. What is your response to Dr. Cicchetti's opinion?

A. We disagree. ESCOs are not adequately "subject to the discipline and regulation of competition" insofar as market abuses persist, as demonstrated by the decades of NYAG investigations discussed in our initial testimony.

Q. Would you like to respond to any other parties' proposal for revisions to the UBP or their positions on the Commission asserting more regulatory oversight of ESCOs?

A. Yes. Mr. Lacey expresses concern that DPS Staff's proposed UBP changes for ESCOs and new UBP provisions for DERs "may not align with the goal of innovation in the delivery of value-added energy products and services" (Direct Testimony, p. 89).[39] He further recommends that the Commission determine the market results it desires and "then convene stakeholders to develop a comprehensive set of rules governing the energy markets." Mr. Lacey suggests that one of these rule changes could be an update to the UBP sections on contract renewal and price change rules. Mr. Lacey states:

> [R]ather than continuing the current UBP construct of defining what constitutes and does not constitute a "material change," the Commission should implement a more direct approach that requires 30-days <u>*notice*</u> to the customer of any of the following:
>
> - Renewal of a fixed-price agreement to a new fixed-price agreement
> - Renewal of a fixed-price agreement to a variable-price agreement
> - Expiration of any introductory price period that is

[39] *See* Case 15-M-0127 et al., *In the Matter of Eligibility Criteria for Energy Service Companies*, Notice Seeking Comments on Revisions to the Uniform Business Practices (issued March 8, 2017); *see also* 15-M-0180, *In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products*, Notice Seeking Comments on Proposed Standards (issued April 12, 2017).

greater than one month
- Any price increase exceeding 30 percent, including for month-to-month variable products (Direct Testimony, p. 91-92).

Q. What is your response?

A. While we agree that revisions to the UBP must be made, specifically with respect to the definition of a material change and contact renewals, we are concerned that Mr. Lacey's proposal is insufficient insofar as he focuses on customer "notice" without addressing the need for express customer consent to material contract changes. We maintain that the only way ESCOs can ensure customers receive adequate "notice" of a material change is if ESCOs are required to obtain the customer's affirmative consent prior to any such change in their contract terms or prior to a contract renewal that would implement such a change, including a change from a fixed rate program to a variable rate program.

Q. Do you wish to comment on Mr. Lacey's recommendation that the Commission convene "a collaborative stakeholder process to develop and iterate specific UBP revisions" (Direct Testimony, p. 95) with respect to the issues of material changes, contract renewals, fixed and variable rate offerings, notice, and disclosure?

A. Yes. UIU notes that it has participated in multiple collaborative processes in the past, resulting in delays that hurt consumers. Here, all parties have had many written opportunities to provide suggested revisions to the UBP. UIU/NYAG believe it is appropriate at this point in the process for the Administrative Law Judges to consider all proposed revisions to the UBP for ESCOs and render a decision on the proposed edits without convening another collaborative.

Q. Do you wish to respond to DPS Staff's recommendations for how to revise the portion of the UBP that addresses price reporting and posting measures?

A. Yes. DPS Staff's edits should additionally include revisions to Section 5(B)(5)(d) of the UBP dealing with material changes and contract renewals. As the Public Utility Law Project's expert witness Barbara Alexander expressed in her testimony, "the negative option renewal process results in a significant number of customers who are charged high month to month variable prices and there is evidence that consumers simply do not understand why their prices have changed or why the ESCO can make such a change."[40]

Q. What is your opinion regarding the necessity of revising Section 5(B)(5)(d) of the UBP?

A. We find the statutory language of Section 5(B)(5)(d) of the UBP ambiguous and in need of revision, and we assert that this section should have been among the sections DPS Staff identified as needing revision in its redlined exhibit.

Section 5(B)(5)(d) of the UBP maintains that "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 . . . ." The language is ambiguous because it is unclear whether

[40] Barbara Alexander Redacted Testimony (September 21, 2017), p. 62.

switching a customer from a fixed rate contract to a variable rate contract at the time of renewal is a material contract change that would require express customer consent, or whether this switching constitutes a "rate change" that is exempt from the express consent requirement. "Rate change" is not defined within the definitions section of the UBP. Thus, UIU/NYAG recommend deleting the "rate change" exemption for contract renewals from the UBP. Switching a customer from a fixed price plan to a variable rate plan constitutes a material contract change (and not a rate change) such that express customer consent is required, and the UBP should make this abundantly clear.

Accordingly, UIU/NYAG disagree with Mr. Lacey's recommendation to update the contract renewal provisions of the UBP to require that ESCOs only need to provide customers with 30 days advance notice of the renewal of a fixed-price agreement to a variable-price agreement (*See* Lacey, Direct Testimony, p. 91-92). UIU/NYAG further disagree with Mr. Lacey's similar recommendations regarding only 30 days advance customer notice for the renewal of a fixed-price agreement to a new fixed-price agreement or any price increase exceeding 30%, including for month-to-month variable products (*see id.*). We assert that such changes to the price of the product/service constitute material changes for which express customer consent should be required.

Q. Do you wish to comment on DPS Staff's proposed reforms to the UBP regarding door-to-door marketing?

A. Yes, only to the extent that DPS Staff inadvertently failed to remove all references to door-to-door marketing that now appear inconsistent with the new recommended prohibition (*see e.g.*, the footnote on p. 61 of the UBP). UIU/NYAG recommend deleting all such prior references to "door-to-door." Notwithstanding these recommendations, UIU/NYAG suggest that door-to-door marketing still be defined within the definition section of the UBP, with an additional sentence explicitly stating that door-to-door marketing is prohibited for mass market customers.

Q. Does this conclude your rebuttal testimony?

A. Yes.