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**

PETITION FOR REHEARING, RECONSIDERATION AND/OR CLARIFICATION OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM)[1] hereby submits a Petition for Rehearing, Reconsideration and/or Clarification of the Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process [hereinafter "Order"] issued on December 12, 2019, pursuant to the Commission's regulations at 16 NYCRR 3.7. NEM members have been serving consumers in the New York market for decades with valuable competitive products and services and are committed to continuing to do so in a manner that provides consumer protection. The Order adopts a new and multi-faceted regulatory regime, marking an extraordinary shift in New York retail market policy. Every one of the components of the new regulatory regime is a significant policy change, requiring substantial time and resources to examine, understand and

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

implement compliant processes. The simultaneous implementation of the multitude of the Order's components adds to the complexity of the undertaking.

NEM submits this Petition for Rehearing, Reconsideration and/or Clarification so that ESCOs have an adequate opportunity to understand the scope and detail of the Order's requirements and associated revisions to the Uniform Business Practices, to maximize the efficient use of stakeholder resources, and to facilitate the development of ESCO business processes that are needed to comply with the Commission directives. This Petition is also being submitted to explain the negative effects and consequences of the new regulatory regime on ESCOs and consumers, the challenges associated with complying with the Order that have thus far been identified, and where possible, to offer reasonable alternatives.

NEM specifically requests Commission rehearing, reconsideration and/or clarification of the following requirements adopted in the Order for the reasons set forth herein:

1) The new regulatory regime adopted in the Order exceeds Commission authority as recently decided by the New York State Court of Appeals;

2) The requirement for existing ESCOs to be subject to de novo review of the eligibility to serve consumers imposes significant unnecessary regulatory risk and uncertainty, particularly without a prior showing of good cause;

3) Requiring ESCO price unbundling, in the form of an on-bill comparison and itemized ESCO billing, without corresponding utility delivery rate unbundling to enhance price transparency in the retail marketplace is arbitrary and unreasonable;

4) An affirmative consent requirement for capped variable rate product renewals is unjustified;

5) The utility price benchmark used for the variable rate guaranteed savings product is unjust and unreasonable and must be properly computed;

6) ESCO offerings of non-energy related value-added products and services, pursuant to an otherwise compliant offering, should be permitted;

7) The prohibition on ESCO offerings of energy-related value-added products and services during the pendency of Track II (except when offered with a price capped or renewable energy compliant product) is arbitrary and unreasonable and establishes a two-tier system of regulation of ESCOs and DERPs that is arbitrary, discriminatory and unreasonable;

8) The timing and application process for ESCO offerings of EnergyGuard-like products during the pendency of Track II should be clarified;

9) Track II should include an examination of the regulatory and market barriers that have prevented more widespread availability of energy-related value-added products and services;

10) The utility price benchmark used for computing fixed rate products is unjust and unreasonable and must be properly computed;

11) For fixed rate products, clarification is needed with respect to aligning the "twelve-month average utility supply rate" with ESCO products and contracts of varying durations;

12) The requirement to restrict ESCOs to offering renewable energy products that incorporate a renewable percentage mix at least 50% greater than is required by the Renewable Energy Standard LSE obligation for the year is unreasonable, and

should be reformulated to reflect availability of resources and RECs so as not to make ESCO compliance cost-prohibitive and renewable products excessively expensive for consumers;

13) The requirement of a supplier consolidated billing option should be examined in Track II; and

14) The definition of small non-residential natural gas customer is overly broad and should incorporate a reasonable usage standard for these customers.

I. A Meaningful Transitional Period for ESCO Compliance Should Be Considered

The Order adopts extensive changes to existing retail market policy and replaces it with a radically new regulatory regime. The industry is actively endeavoring to study, understand and implement the associated changes. The issuance of a Recommended Decision and the corresponding opportunity for parties to file exceptions would have helped to identify and crystallize implementation issues and permitted the formulation of collaborative solutions to those issues. The issuance of the Order without the procedural step of a Recommended Decision is raising challenges in meeting ambitious and truncated compliance deadlines associated with the numerous requirements. Accordingly, NEM respectfully requests that the Commission consider the option of a meaningful transitional period for: 1) ESCO compliance with the new requirements for compliant products currently required within sixty days of the date of the Order; 2) ESCO compliance with the requirement that fixed rate products on automatic renewal only renew as a variable rate with guaranteed savings over the utility price unless the ESCO obtains affirmative consent to renew the contract as a fixed rate no greater than five percent of the trailing twelve month average utility supply rate required within sixty days of the date of the Order; 3) ESCO

compliance with the revisions to the Uniform Business Practices currently required within sixty days of the date of the Order; and 4) current ESCOs filing of a new application for eligibility to serve customers within ninety days of the date of the Order.

A meaningful transitional period is necessary to permit informed ESCO compliance with the new requirements. For instance, ESCOs must compile extensive new reporting data to satisfy the new UBP Section 2 eligibility criteria filing. ESCOs also need time to develop compliant products to serve new and existing consumers, which are contingent upon ESCO access to timely and accurate utility benchmark pricing data. ESCOs need to seek and receive Staff approval of contracts on compliant products by the sixty-day effective date of the new requirement and effectuate the transfer of customers to the new products.

The instant Petition also identifies a number of issues that require clarification in developing compliant products related to the utility price benchmark for variable rate and fixed rate products, as well as ESCO satisfaction of the requirement that renewable products include a renewable percentage mix at least fifty percent greater than is required by the renewable energy standard LSE obligation for the year. The clarification of the application process and permissibility of ESCO provision of EnergyGuard-like products during the pendency of Track II, particularly with respect to ESCO customers currently receiving such products, is also needed.

Just as ESCOs require time to assimilate to these changes, so do the consumers they currently serve. Transitioning existing consumers to new compliant products should be done in a manner that minimizes confusion and dissatisfaction. For example, ESCOs should have a meaningful transitional period to serve consumers currently receiving energy-related value-added products or services with a new compliant product rather than having to abruptly drop those consumers. Such

an approach will also avoid technical and administrative problems associated with potential widespread consumer switches.

Any one of these issues would present compliance challenges. The simultaneous implementation of multiple market rule changes amplifies the complexity. For these reasons, NEM requests that the Commission consider a meaningful transitional period for implementation of the new regulatory regime.

II. The New Regulatory Regime Adopted in the Order Exceeds Commission Authority

The State Court of Appeals determined that the Commission "has no direct ratemaking authority over ESCOs" under PSL Article 4.[2] In doing so, it clearly rejected the notion that ESCOs are "gas corporations" or "electric corporations" under PSL Section 2.[3] The Court of Appeals did, however, decide that "under its authority to regulate utilities' transportation of ESCOs' gas and electricity, the PSC may condition access to utility infrastructure upon ESCOs' compliance with a price cap on gas or electricity."[4] (emphasis in original).

The Order in the instant case represents the first application of this standard.[5] NEM contends that the Order significantly exceeds the Commission authority recognized by the Court by adopting a regulatory regime far in excess of price caps on electricity or gas and that includes elimination of

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[2] National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 33 N.Y.3d 336, 349 (2019), reargument denied, 33 N.Y.3d 1130 (2019).
[3] Id. at 348.
[4] Id. at 349.
[5] The Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits that established this Track I proceeding included a lengthy series of topics for parties to address in Track I testimony. The topics listed make multiple references to the possible regulation of ESCOs under Article 4 (that was rejected by the Court of Appeals) but do not include the new standard of ESCO price regulation through conditional access to utility infrastructure. Cases 15-M-0127 et. al., Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits, issued December 2, 2016, at pages 5-8.

entire ESCO product and service offerings. The Order does so based on the novel but flawed application of utility monopoly costs of service[6] to determine whether competitive ESCO prices are "just and reasonable," rather than competitive market forces.[7] In so doing, the Order adopts price caps on variable and fixed rate products that are arbitrary and unreasonable because they do not reflect the ESCO costs and risks of providing these products, or a fair approximation of such costs and risks. For instance, capping the ESCO price against a utility commodity cost that has no profit or risk premium component and while additional commodity-related costs remain bundled in delivery service rates, is unjust and unreasonable. Utilities make a profit from return on rate base, which ESCOs are not afforded under the price caps.

The Order also requires that ESCO renewable product offerings must include a renewable percentage mix that is at least 50% greater than is required by the renewable energy standard Load Serving Entity obligation for the year without having established that the requirement can currently be met, and met in a manner that is not cost-prohibitive.

With respect to value-added products and services, the Order arbitrarily and unreasonably banned ESCO provision of these offerings. The Order banned ESCO provision of non-Commission-jurisdictional offerings of gift cards, flight miles and the like. The Order also banned[8] ESCO

[6] As is well known, ESCOs are not granted guaranteed cost recovery for the provision of service, nor do they enjoy instant economies of scope and scale as the utility default commodity provider, and the utilities have yet to fully unbundle commodity related costs from delivery rates.

[7] The Vision Statement adopted by the Commission in the Retail Policy Statement of 2004 recognized,

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

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

[8] Prohibiting ESCOs from offering energy-related value-added products and services "as an additional cost to" the commodity service being rendered is a ban. In other words, a requirement to offer a product for free or not at all, is not a price cap, it's a ban.

provision of nearly all energy-related value-added products and services that aren't offered as part of a compliant product (aside from an EnergyGuard-like offering) despite the fact that distributed energy resource providers are currently offering such products and under far less regulatory oversight and scrutiny.

For the reasons set forth herein, NEM requests rehearing, reconsideration and/or clarification of the new regulatory regime adopted in the Order.

III. ESCO Eligibility Criteria and Review Process

The Order adopts a number of measures to strengthen the ESCO eligibility criteria. (Order at 22). NEM supports the strengthening of ESCO eligibility criteria as a necessary measure to ensure ESCO integrity and fitness to serve consumers. NEM believes the majority of the ESCO eligibility measures adopted in the Order, as further expressed in revisions to UBP Section 2, are reasonable with the exception of the product offering restrictions set forth in UBP Section 2.B.1.a.ii. for the reasons set forth in Section V of this Petition. Additionally, NEM reserves its right to review and comment on Staff's to-be-filed report on forms of financial assurance and a proposed methodology for calculating the amount for entry level and on-going assurance purposes. (Order at 26).

The Order also adopts changes to the ESCO eligibility review process. Of particular note, the Order requires existing ESCOs to file an application in accordance with the modified UBP within ninety days of the effective date of the Order, upon which Staff may recommend that ESCO eligibility to operate be revoked. (Order at 28-30). Subjecting existing ESCOs to de novo review of their eligibility to serve consumers imposes a significant, unnecessary level of regulatory uncertainty and risk, especially without any particularized finding of good cause shown for any specific ESCO. Given that the Commission will simultaneously receive approximately 200

applications, this requirement also appears burdensome and difficult to administer. Moreover, from a practical perspective, the ninety-day filing requirement for ESCOs to gather the information and meet the new application requirements is burdensome and difficult to comply with.

IV. Enhancing Marketplace Transparency with ESCO and Utility Rate Unbundling

The Order states, and NEM agrees, that "[c]ustomers' ability to easily make accurate price comparisons is a critical component of achieving the goals articulated by the Commission when it established competitive markets." (Order at 33). However, the Order's purported means of achieving this goal will fall far short of the mark. By focusing on ESCO price "unbundling" without a concomitant requirement for utility delivery rate unbundling, the market transparency desired by the Commission cannot be achieved and the lack of comparability of ESCO products and utility rates will persist. To require ESCO price "unbundling" while permitting utility rate bundling in a competitive market environment is arbitrary and unreasonable. Indeed, the Commission recognized in 2001 that, "one prerequisite to fostering market development is the conduct of cost studies, the ensuing assignment of costs to the utilities' various functions and services, and the establishment of fully unbundled, cost-based rates for electricity and gas service."[9]

The Order directs the utilities to include a twelve-month on-bill comparison on consolidated bills of ESCO pricing with the price the utility would have charged. (Order at 33-36). The on-bill comparison, under the methodology put forth in the Order, will do more to confuse consumers rather than educate them. An on-bill comparison of ESCO pricing with properly, fully unbundled

[9] Case 00-M-0504, Order Directing Expedited Consideration of Rate Unbundling, issued March 29, 2001, at page 1. The Commission further explained that "unbundling of functions, costs, and rates, performed with an appropriate degree of statewide consistency, will permit charges for each of the utilities' services to be identified for customers, who could then choose to purchase the services from the utility or the competitive market."

utility delivery rates would indeed facilitate transparency in the marketplace, and NEM would be pleased to work with the stakeholders to develop such an accurate presentation. However, in the absence of utility rate unbundling,[10] coupled with the utilities ability to pass on out-of-period commodity price adjustments,[11] the on-bill comparison will be inherently misleading. Moreover, comparing the monthly variable utility rate with an ESCO product that may be a fixed rate product, a renewable product, or value-added product completely undercuts and understates the value of these products.

The Order directs Staff and the utilities to collaborate on Joint Billing Plans for the purpose of satisfying this requirement. Without waiving the foregoing arguments, NEM suggests that ESCOs should have the opportunity to participate in the preparation of such Billing Plans as well as the opportunity to review and comment on the Plans when they are filed with the Commission. ESCO participation is critical as the billing information will be disclosed to ESCO customers and should be a fair and accurate representation of ESCO products.

The Order also directs the implementation of itemized ESCO billing – "a bill that clearly differentiate[s] charges for commodity from charges for non-commodity products and services they receive from the ESCO." (Order at 36). As was previously argued, one-sided requirements for ESCO price disclosures without a corresponding directive for utility price transparency is

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[10] The Order maintains that "[i]nasmuch as the MFC is litigated and adjusted as part of each utility's individual rate case, this proceeding is not an appropriate forum in which to make any changes to the MFC." (Order at 42). However, the Commission could and should require as a general proposition proper utility cost of service allocations and corresponding revisions to the MFC as a necessary prerequisite of its price transparency goal.

[11] The Order erroneously asserts that "out-of-period adjustments by the utilities ultimately are a zero-sum game." (Order at 43). It is not true that this is a "zero-sum game" because utility cost recovery is affected by the impact of weather on actual energy cost versus pricing used in developing monthly utility energy rates while ESCO pricing is impacted by neither. The impact of utility weather normalization is a factor that cannot be ignored unless and until its impacts are unbundled and properly applied to delivery and energy rates. When a consumer looks at price comparison on any monthly bill, the number the consumer is looking at is always incorrect and subject to reconciliations and weather normalization in a future month and in a future year. In addition, if a utility is hedging, the utility will realize gains and losses.

arbitrary and unreasonable. Moreover, the requirement for itemized ESCO billing incorrectly ignores that bundling products together can permit the ESCO to offer them at an overall lower price. In other words, ESCO pricing simply does not conform to the utility cost of service paradigm.

In addition, from a practical perspective, it is unclear whether any of the utilities currently permit ESCOs to separately bill for non-commodity products and services and whether the utilities possess the technological capability to do so. ESCO requests for additional line items on utility consolidated bills to display more product information have historically been rebuffed.

V. Restrictions on ESCO Price and Product Offerings

As previously explained, the Order significantly exceeds the Commission authority recognized by the Court of Appeals by adopting a regulatory regime far in excess of price caps on electricity or gas and that includes elimination of entire ESCO product and service offerings. The new regulatory regime also imposes technical implementation and compliance challenges as discussed in detail for each product below.

A. Variable Rate Products

The Order requires that an ESCO offering a variable rate product must agree to serve consumers at a price below the price charged by the utility on an annually reconciled basis. (Order at 40). To do this, the ESCO must perform a reconciliation on an annual or more frequent basis with a credit/refund to be provided to the customer as needed. (Order at 41). As a general matter, capping an ESCO variable rate product against a utility commodity cost that has no profit or risk premium component and while additional commodity-related costs remain bundled in delivery service rates, is unjust and unreasonable. Utilities make a profit from return on rate base which ESCOs are not

afforded under the variable rate product price cap. To correct this, the MFC must be revisited in a generic proceeding in which utility commodity-related costs that remain bundled in delivery service rates are identified and properly allocated. The utility energy rate used to cap ESCO pricing must include the current utility commodity rate plus the newly adjusted MFC that includes a risk premium, an allowance for ESCO profit and the additional commodity-related costs unbundled from utility delivery rates.

From a practical perspective, aspects of compliance with the Order's requirements for the offering of a variable rate guaranteed savings product are unclear. In particular, the precise "utility price" benchmark that ESCOs are to use for reconciliation should be clarified. The utility price benchmark should include the current utility commodity rate plus the MFC. Utilities have multiple tariffed rates in effect. In addition, for example, ConEd has a daily rate for electric customers – certainly those daily prices should not be averaged for the month to set the benchmark since customer use varies on a daily basis. There is also a timing problem with computing a utility benchmark because the utility rate is subject to reconciliation, so the ESCO will be competing with and comparing against utility rates that are artificially low in some periods and artificially higher in others. ESCOs should be provided with notice and detail when the utility rate is subject to out-of-period adjustments. In order to facilitate responsible ESCO compliance and variable rate product offerings, clarification of this issue is requested.

Revisions were incorporated to Section 5 of the UBP regarding a material change requiring affirmative consent that require clarification. The Order addresses this issue in some detail with respect to fixed rate products. However, revised Section 5.B.5.d. has been worded in a manner that could be construed to include monthly variable rate products as requiring affirmative consent for a rate change. Specifically, Revised UBP Section 5.B.5.d., is now worded to state that

"Regarding contract renewals or an initial sales agreement that specifies that the agreement automatically renews on a monthly basis, all changes to the terms of the contract, including changes to the commodity rate, product or service type, will be considered material and will require that the ESCO obtain the customer's express consent for renewal." UBP Section 5.B.5.d. previously provided that, "Regarding contract renewals, with the exception of a rate change, or an initial sales agreement that specifies that the agreement renews on a monthly basis with a variable rate methodology which was specified in the initial sales agreement, all changes will be considered material and will require that the ESCO obtain the customer's express consent for renewal." No reasonable justification has been provided to explain why monthly variable rate products should be subject to an affirmative consent requirement. The Commission has historically accepted that customers on monthly variable rate products have been adequately protected from rate changes by the ability to leave the agreement without the imposition of an early termination fee. The Order would also impose the variable rate cap as an additional measure of protection. Requiring affirmative consent for monthly variable rate products is not justified and should not be required.

B. Non-Energy-Related Value-Added Products and Services

The Order prohibits ESCOs from offering non-energy-related value-added products and services,[12] such as gift cards or airline miles, "to prospective customers as inducements to sign a contract." (Order at 44). As a general matter, if an ESCO is making an otherwise compliant product offering, there should be no reason to restrict the ability to include such products and services as a way for the ESCO to differentiate itself to the consumer.

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[12] Non-energy-related value-added products and services are not Commission-jurisdictional.

C. Energy-Related Value-Added Products and Services

The Order directs that Track II of the instant proceeding should examine "which, if any, energy-related products and services are most likely to benefit customers and advance the State's energy policy goals, which products and services can or should be offered by ESCOs and which are more appropriately offered by DER providers, and what rules, including pricing and disclosure requirements, should be applied to ESCO products including such energy-related products and services." (Order at 53). NEM submits that in order for Track II to yield a productive result, it must do more than focus merely on the end-product, i.e., identification of energy-related value-added products and services. Track II should also examine and explore the regulatory and market barriers that have heretofore prevented these products and services from being offered by ESCOs on a broader scale. Track II should include the identification of rule and process changes to facilitate these offerings by ESCOs - the option of supplier consolidated billing, existing utility billing restrictions (bill ready versus rate ready billing) that inhibit ESCO value-added product offerings, measures to promote timely data access, expanding POR and/or creating an on-bill finance mechanism for energy-related value-added products and services on utility consolidated bills, and improvements to the current settlement process to load profiles to incentivize consumer demand response. NEM has explained these persistent problems in multiple proceedings over the years.[13] Expecting a more robust value-added product and service market to develop in the absence of such changes is unreasonable. Moreover, as demonstrated from the evidence adduced about

[13] See, e.g., Cases 12-M-0476 et. al., Comments of the National Energy Marketers Association, dated June 2, 2014; Case 14-M-0101, Comments of the National Energy Marketers Association, dated July 18, 2014 and September 22, 2014.

competitive offerings in other jurisdictions, addressing these regulatory and market barriers will facilitate ESCO value-added product and service offerings to the benefit of consumers.

During the pendency of Track II, "all ESCO products offered following the effective date of the revised UBP must, as discussed elsewhere in this Order, qualify as permitted products under the rules for guaranteed savings products, fixed rate products, or renewably-sourced products; no product that is noncompliant with these rules may be offered on the basis that it includes an energy-related value-added product or service or may charge higher prices than permitted under those rules on the basis that those prices are for the energy-related value-added product or service. ESCOs may offer energy-related value-added products or services as part of an offering that also complies with those rules and meets the price requirements under those rules." (Order at 54). The Order then states that "Track II of these proceedings may result in rules that permit certain energy-related value-added products and services to be offered as an additional cost to or without the requirement of being paired with a compliant guaranteed savings, fixed rate, or renewably sourced product." (Id.). The practical effect of this language is to create the requirement that ESCOs offering energy-related value-added products and services during the pendency of Track II must offer those products for free or nearly so. If the ESCO is complying with the price cap requirements of the variable rate or fixed rate commodity offering, by definition, any additional product or service offering would have to be rendered for free or nearly so without the ability to recover costs or earn a profit on the additional product or service offering. Restricting ESCO product offerings to those conditions is arbitrary and unreasonable.

The Order establishes a two-tier system of regulation of ESCOs and DERPs providing the same energy-related value-added products and services products that is arbitrary, discriminatory and unreasonable. The Order sets forth a list of energy-related value-added products and services, such

as demand management programs, dynamic pricing programs, and energy-efficiency measures, and notes that those products can be provided separately from energy supply services. "Any company, ESCO or not, may currently provide such services separately from energy supply service so long as they comply with established rules for those service [sic], including the Uniform Business Practices for Distributed Energy Resources where applicable." (Order at 53). This two-tier system of regulation of ESCOs and DERPs merely encourages and incentivizes companies to offer products in a form that is less regulated and subject to less oversight under the UBP for DERs. The Order offers no rational basis for distinguishing the treatment and regulatory restrictions between ESCOs and DERPs providing energy-related value-added products and services, and in fact, there is none.

The Order recognized an exception to its restrictions on ESCO offerings of energy-related value-added products and services during Track II. "If any other ESCO wishes to offer a product like EnergyGuard during the pendency of Track II, it may submit a petition for waiver to the Commission explaining the benefits its product provides and how they will reasonably relate to its cost." (Order at 54). NEM requests clarification of the process under which ESCOs can seek permission to provide EnergyGuard-like products. In particular, when can ESCOs begin making application and what information should the application include. Also, if an ESCO is offering an EnergyGuard-like product now, would the ESCO be required to cease offering the product pending Commission review and approval of its application? If so, this would unfairly discriminate against the ESCO and unfairly prejudice the customer.

D. Fixed Rate Products

The Order requires that ESCO fixed rate products be limited to a price no greater than the trailing twelve-month average utility supply rate plus 5%. (Order at 67). However, the Commission left

"open the possibility that, upon future consideration, fixed-rate products sold at prices higher than utility rates will be disallowed entirely." (Order at 68). While the Order correctly recognizes that ESCOs "face additional risks and incur additional costs when offering a fixed-rate product" (Order at 65), the methodology adopted for determining compliant fixed rate products is unjust and unreasonable. The methodology of equating twelve months of historical pricing to future market pricing ignores the dynamics of energy markets. As a general rule, prices trend upward over time, so using a benchmark based on backward-looking, historical pricing will not accurately depict possible future market conditions and therefore unreasonably undercut ESCOs ability to make offerings. In addition, the 5% is not a risk premium. It is just an assumption of future costs. As a general matter, capping an ESCO fixed rate product against a utility commodity cost that has no profit or risk premium component and while additional commodity-related costs remain bundled in delivery service rates, is unjust and unreasonable. Utilities make a profit from return on rate base which ESCOs are not afforded under the fixed rate product price cap. To correct this, the MFC must be revisited in a generic proceeding in which utility commodity-related costs that remain bundled in delivery service rates are identified and properly allocated. The utility energy rate used to cap ESCO pricing must include the current utility commodity rate plus the newly adjusted MFC that includes a risk premium, an allowance for ESCO profit and additional commodity-related costs unbundled from utility delivery rates.

A likely potential scenario under the Order methodology is that the futures market plus the necessary ESCO margin will be in excess of the twelve months of historical pricing plus 5%, preventing an ESCO from making an offer to a customer and causing the customer to be reverted to utility service. Once the customer is returned to utility service, the ESCO can only regain the customer at some future date subject to a reversal of historic versus future pricing and the ESCO's

ability to successfully compete for that customer again in the competitive marketplace and the ESCO's incurrence of additional customer acquisition costs.

From a practical perspective, clarification is needed with respect to aligning the "twelve-month average utility supply rate" with ESCO products and contracts of varying durations. In other words, it is unclear what date is operative for determining the twelve-month period – the date the contract is signed, when service commences, or some other measure. In addition, for a contract of a duration of more than a year, it is unclear how the ESCO should compute and apply a "twelve-month average utility supply rate."

The Order requires the utilities to post twelve-month average utility supply rates within fifteen days of March 31, June 30, September 30, and December 31 on their websites. (Order at 67). These utility postings should be audited before posting to ensure correctness and accuracy. The utility postings should be based on weighted average monthly pricing using price and volume used in each rate class (and not on straight mathematical averaging of twelve monthly prices). The utility supply rates should be inclusive of the MFC. From a practical compliance perspective, ESCOs need to be apprised as to whether the utilities will publish this data on a timely basis to permit these products to be offered as well as be informed as to exactly where the information will be made available on the utilities' websites. If the utilities have not provided the historical pricing data by the Order effective date for providing a compliant fixed rate product, or any subsequently required quarterly posting dates, it is unclear how ESCOs will be expected to charge customers during such a delay.

E. Renewable Energy Products

The Order provides that "ESCOs will be permitted to offer a renewable product that is less than 100% renewable, so long as: 1) the renewable percentage mix is at least 50% greater than is required by the RES LSE obligation for the year; 2) the ESCO complies with the RES locational and delivery requirements when procuring RECs or entering into bilateral contracts; and 3) there is transparency of information and disclosures provided to the customers." (Order at 75-76). In addition, "Once the Tier 1 LSE obligation reaches 50%, the products will be required to be 100% renewable, and that requirement will remain fixed as the Tier 1 obligation increases above that level." (Order at 77).

The Climate Leadership and Community Protection Act of 2019 (CLCPA) requires the Commission to establish a program by June 30, 2021, to require "a minimum of seventy percent of the state wide electric generation secured by jurisdictional load serving entities to meet the electrical energy requirements of all end-use customers in New York state in two thousand thirty shall be generated by renewable energy systems; and (b) that by the year two thousand forty (collectively, the "targets") the statewide electrical demand system will be zero emissions."[14] The CLCPA clearly anticipates a ramping of the renewable energy requirement to permit LSE compliance and ensure adequate resources are available. Indeed, the CLCPA even includes a safety valve to permit the Commission to modify the obligations of LSEs and/or the targets.

The 50% requirement is unreasonable and conflicts with recent Commission Order. When the Commission adopted 2018-2021 targets in the CES Phase 2 Order, it did so to "reflect realistic expectations regarding availability of Tier 1 RECs as the RES program ramps up."[15] While the

[14] CLCPA §4, amending Public Service Law §66-p(2).
[15] Case 15-E-0302, Order Approving Phase 2 Implementation Plan, issued November 17, 2017, at 11.

Order does not limit ESCOs to procuring electricity or RECs from Tier 1 resources, allowing resources defined as "renewable" under CLCPA and that meet locational and delivery requirements, the Commission's recently voiced "realistic expectations" should not be ignored. Insufficient evidence has been adduced as to whether the 50% requirement is realistically achievable based on currently available resources and RECs that are New York-specific. Moreover, by adopting the 50% requirement, the Commission has immediately inflated the price for compliant renewable resources and RECs that are available. This increase in costs will make renewable energy products more expensive for consumers. The Commission should not deviate from its previously adopted plan of gradually ramping up renewable energy requirements, which is also complementary to the approach included in the CLCPA. Ramping up the renewable energy requirements should include a relaxation of the New York-specific component for satisfying the 50% requirement, at least during a transitional period, and pending demonstration that renewable resources and RECs are sufficiently available for these purposes. In fact, if the renewable energy requirement is set in a manner so stringent that no or few ESCOs can comply, the State's clean energy goals will have been thwarted, not supported. The Commission is also requested to reconsider allowing ESCOs to offer a companion renewable product for natural gas, such as using carbon offsets or landfill gas.

The Order requires that ESCOs disclose the renewable energy content of each product the ESCO offers, including the percentage of renewable energy in each product, and the amount by which the ESCO percentage exceeds the mix existing in NYISO. This information is to be posted on the ESCO website, marketing materials, and individual contracts. NEM submits that rather than applying an excessively high 50% mandatory requirement for ESCOs offering renewable energy products, the proper focus should be on disclosure of renewable product offerings. As the Order

suggests, an ESCO that is providing a renewable product over and above that which is required by the RES LSE obligation for the year is providing extra value. Those products can and should properly be denominated and marketed as such.

VI. Requirement of a Supplier Consolidated Billing Option

The Order declined to adopt supplier consolidated billing (SCB). While acknowledging ESCO concerns about the restrictions inherent in the utility consolidated bill (UCB) for the ESCO to communicate with its customers, the Order suggested that dual billing was an available alternative. (Order at 95). NEM notes that in requiring consolidated billing many years ago, the Commission recognized consumer preference for the receipt of a single bill,[16] which preference has not changed. As previously discussed in Section V.C. of this Petition, the requirement of a supplier consolidated billing option should be a prominent issue for discussion in Track II of this proceeding. SCB is a crucial component of enabling competitively provided energy-related value-added services and products to be developed and offered.

The current format of utility consolidated bills offers very limited ability for suppliers to include relevant information for their customers. Supplier consolidated billing would provide suppliers with the improved ability to communicate with their customers and offer increased innovation in their product offerings, thereby making the bill and competitive offerings more consumer-oriented as a result. SCB should be an option in concert with the existing UCB and dual bill constructs to maximize the ability of suppliers to participate in the retail electric market consistent with their individual business plans and proficiencies. Suppliers currently operating in jurisdictions such as Texas and Georgia have already made significant investments in billing infrastructure to provide

[16] Case 99-M-0631, Order Providing for Customer Choice of Billing Entity, issued March 22, 2000, at page 1.

supplier consolidated billing. It is clear from the suppliers' performance of the billing function in other jurisdictions that they possess the experience, expertise and operational capability to provide supplier consolidated billing for New York consumers as well.

VII. The Definition of Small Non-Residential Natural Gas Customers is Overly Broad

With respect to the definitions of small non-residential electric and natural gas customers, the Order maintained that "no Commission action is needed: already-existing definitions remain appropriate." (Order at 102). As set forth in the Order those definitions are, for small non-residential electric customers - non-demand metered customers; and for small non-residential natural gas customers – customers using less than or equal to 750 dekatherms per year. (Order at 103).

The history of the definition of small non-residential natural gas customer is instructive in this regard. A 2014 Order provided in relevant part that "a 'small non-residential customer' means an electricity customer in a utility service classification that does not have a demand rate element, and/or a natural gas customer in a service classification that provides firm service."[17] NEM and others filed Petitions for Rehearing or Clarification of certain elements of the 2014 Order, including the definition of "small non-residential customer."[18] The definition in the 2014 Order was later stayed by the Commission[19] and then ultimately withdrawn from the UBP in 2015,[20]

[17] Case 12-M-0476, et.al., Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets, issued February 25, 2014, note 1.
[18] Case 12-M-0476, et.al., Petition for Clarification and/or Rehearing of National Energy Marketers Association, dated March 27, 2014, at pages 6-8.
[19] Case 12-M-0476, et. al., Order Granting Requests for Rehearing and Issuing a Stay, issued April 25, 2014, at page 6.
[20] Case 12-M-0476, et. al., Order Granting and Denying Petitions for Rehearing in Part, issued February 6, 2015, note 3.

reflecting industry concerns that had been expressed. The 2016 Reset Order[21] then adopted a definition of "small non-residential customer." The 2016 Reset Order definition differed from the 2014 Order with respect to natural gas customers, choosing to rely on usage as the threshold indicator of whether a customer should be deemed to be a small non-residential gas customer. The 2016 Reset Order definition specifically provided that "small non-residential customers are defined as either a non-demand metered electric customer or a non-residential gas customer with annual gas consumption that does not exceed 750 dekatherms per year or the equivalent."[22] The 2016 Reset Order addressed small non-residential electric customers in a similar fashion to the 2014 Order, with reference to the customer's non-demand status. The 2016 Order was subsequently vacated and remitted to the Commission for further proceedings.[23] The Order Adopting Revised Uniform Business Practices issued on January 19, 2018, in footnote 4, referenced the definition of "small non-residential customer" that was previously included in the 2014 Order.[24] NEM and others filed petitions for rehearing on the 2018 UBP Order,[25] including the issue of the definition of small non-residential electric and natural gas customers. In 2019, the Commission granted rehearing with respect to this and other UBP modifications and declined to adopt the definition of small non-residential electric and natural gas customer.[26]

It was expected that the definition of small non-residential customer, and associated ESCO compliance obligations with serving such customers, would be one of the central issues for

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[21] Case 15-M-0127, et. al., Order Resetting Retail Energy Markets and Establishing Further Process, issued February 23, 2016.
[22] Id. at note 2.
[23] National Energy Marketers Association et al. v. New York Public Service Commission, Alb. Co. Index No. 868-16, Decision/Order, dated July 22, 2016.
[24] Case 98-M-1343, Order Adopting Revised Uniform Business Practices, issued January 19, 2018, at note 4.
[25] Case 98-M-1343 – Petition for Clarification and/or Rehearing of the National Energy Marketers Association, dated February 16, 2018, at pages 7-10.
[26] Case 98-M-1343, Order on Rehearing and Providing Clarification, issued September 23, 2019, at page 11.

resolution in the on-going Track I proceeding. The approach taken in the Track I Order that "already-existing definitions remain appropriate" is contrary to the long record of proposals, debate and revised proposals that have persistently plagued the issue. It also fails to adequately contemplate the appropriateness of applying the Order's compliance obligations to a substantial body of customers that have been deemed to fall within its broad umbrella. The definition of small non-residential natural gas customer should be reconsidered and clarified to incorporate a reasonable usage standard for natural gas customers. Indeed, there is nothing "small" about a gas customer that uses 750 dekatherms annually. A reasonable standard would equate to the 80 percentile of statewide residential customer use.

VIII. Conclusion

NEM requests the Commission issue an Order clarifying, reconsidering and/or rehearing the issues consistent with the arguments set forth herein and implement a meaningful transition period for ESCO compliance with the Order requirements.

Sincerely,

s/Craig G. Goodman

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