BEFORE THE
PUBLIC SERVICE COMMISSION
STATE OF NEW YORK

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

POST-HEARING REPLY BRIEF OF NATIONAL ENERGY MARKETERS ASSOCIATION

Jason C. Cyrulnik, Esq.
Motty Shulman, Esq.
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, New York 10504
914.749.8200
jcyrulnik@bsfllp.com
mshulman@bsfllp.com

George A. Carpinello, Esq.
Teresa A. Monroe, Esq.
BOIES SCHILLER FLEXNER LLP
30 South Pearl Street
Albany, New York 12207
518.434.0600
gcarpinello@bsfllp.com
tmonroe@bsfllp.com

Attorneys for National Energy Marketers Association

Dated: May 1, 2018

TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT

National Energy Marketers Association ("NEM") submits this Reply Brief in further support of its Initial Post-Hearing Brief and in response to the arguments and recommendations advanced in the initial post-hearing briefs of the Department of Public Service Staff ("Staff"), the Utility Intervention Unit and the New York Attorney General ("UIU/NYAG"), and the Public Utility Law Project ("PULP") (together, the "non-ESCO parties").[1]

The initial briefs submitted by the non-ESCO Parties ignore away the evidence adduced in the year-long evidentiary process in these proceedings to a remarkable extent. In so doing, they would render the process that the Commission ordered, and the Supreme Court of the State of New York prescribed, a technical formality that afforded no meaningful process to the parties that participated therein, and the parties that will be affected by them. The non-ESCO parties, for example, continue to pretend that all ESCO customers are forced to pay more than they should be paying for energy – notwithstanding Staff's own witnesses' admissions that every aspect of that claim is unsupported by real evidence. That is, (i) there is no evidence that ESCO customers are forced to do anything, as they each voluntarily elect to purchase commodity from the ESCO of their choose; (ii) there is no doubt that many ESCO customers, including many specific examples in the record, have realized significant savings by enrolling with an ESCO; and (iii) Staff

[1] In recognition of the recent Court of Appeals decision granting leave to appeal the issue of the scope of the Commission's jurisdiction over ESCOs, NEM moved to stay the deadline for filing this reply brief. NEM argued that the parties, the ALJs, and the Commission would be best positioned to propose and adopt recommendations with respect to the retail energy markets once they account for the controlling law that the Court of Appeals will pronounce with respect to some of the core issues underlying these proceedings. The ALJs denied NEM's motion, and a single Commissioner issued an order yesterday late afternoon denying NEM's request yesterday for that interim relief as part of its broader motion for interlocutory appeal. NEM therefore submits this reply brief pursuant to the directives of the ALJs (and the day immediately following the Commission's decision on NEM's application), but NEM reserves the right to supplement and/or amend its post-hearing submissions once the Court of Appeals issues its decision.

repeatedly conceded at the hearing that it has no idea what ESCO customers should be paying for the products they purchase – because Staff does not even know the details of those products offerings or the value they represent to individual consumers. In short, the initial post-hearing briefs of the non-ESCO parties are policy preference statements, not appropriate post-hearing briefs that meaningfully undertake to grapple with a robust evidentiary record that the Commission ordered Staff to develop and assess to ascertain whether reforms were warranted and if so what those reforms ought to be based on that evidence.

Similarly, the non-ESCO parties continue to will away the value that ESCO value-add products provide New Yorkers – even though the Staff Panel admitted under oath that (i) individual consumers should and do determine for themselves a particular product's value and (ii) that Staff was unable to quantify the value of the various ESCO product offerings – from fixed to renewable to bundled. The non-ESCO parties are so adamant in their refusal to grapple with the record and the reality that they simply ask the Commission to pretend that those products offer on value at all – because it is easier to proceed (and to recommend radical change) on that assumption. And the non-ESCO parties also continue to pretend that the benefits the Commission itself identified when it deregulated the market in the first place (and that Staff witnesses admitted to have been accomplished in the current market) are somehow no longer relevant and can now be ignored in favor of recommendations to return the market to an antiquated monopoly state.

These are not the words of impartial, fair-minded participants in proceedings designed to achieve the genuine goal of improving consumer choice and experience and honestly assessing the evidence that the parties spent months and months gathering and presenting. The non-ESCO party briefs reveal an unfortunate agenda: advance premature, erroneous claims attacking the ESCO industry as a whole at all costs. Rather than stop to do what the Commission directed in these proceedings – genuinely assess the evidence and determine what the record demonstrates – the

non-ESCO parties appear to have approached their post-hearing briefs with the continued goal of eliminating consumer choice and bad-mouthing all ESCOs in the process.

Simply put, any recommendation that reduces to forcing more than 1.6 million New Yorkers who voluntarily elected to purchase electric or natural gas from an ESCO of their choice to now purchase energy from one and only one provide (the default local utility) cannot be squared with the record, and will not advance consumer or state interests. Those customers were given the opportunity to choose between the utility offering and ESCO product offerings that provided unique value in the form of fixed prices, enhanced renewable energy sourcing, conservation services, lower prices, or better support – each of which Staff admitted could provide value that justifies the customer's choice. As if such choices needed to be justified. The driving force behind a competitive market, across industries, is that customers need not fill out a form and explain to the government what they value, how much value they attribute to the particular item, and how they arrived at the conclusion that a particular brand of milk, a particular type of car, or a particular energy provider was providing sufficient value for the service of product the consumer purchased. There is no dispute that ESCOs uniquely offer a slew of product offerings that consumers may want or need, and that the default utilities do not and cannot offer them.[2] In addition to proving that the Commission's objectives of increasing consumer choice has been advanced by competitive retail markets, these facts demonstrate that any effort to pretend that ESCO product offerings should simply be eliminated from the retail markets would badly impact consumer choice and freedom.

And even with respect to the myopic issue of pricing itself, the record demonstrates that competitive retail markets in New York have actually ***reduced*** energy prices, consistent with the

[2] *See, e.g.*, Tr. 1126:1-1137:19.

Commission's objective.[3] Specifically, the Record shows that between 2008 and 2016 electricity prices in New York have declined across all market sectors, residential included.[4] Analysis of the glaring differences in pricing trends in jurisdiction that offer consumers choice as compared with those that remain in an antiquated state of monopoly confirm that the material price reductions since consumer choice took hold in New York are not a mere coincidence.[5] The decline in prices is an intended and achieved product of competition.[6] The non-ESCO parties who ask the Commission to ignore that evidence offered no evidence whatsoever to the contrary, and even admitted that they did not conduct any analysis to prove otherwise or to determine whether and to what extent energy prices for all New Yorkers would like in the absence of competitive retail energy markets.[7] The Commission must credit and act on the unrefuted evidence in the record, which establishes that the competitive market has achieved the Commission's objective of affording consumers better prices.[8]

Against this backdrop, Staff's and UIU/NYAG's recommendations are inscrutable. Staff conceded that its recommendations would (i) force every New York residential consumer to purchase energy from a monopoly option whose prices are far from transparent, (ii) cause at least some consumers to pay more than they would pay if they had the freedom to select for themselves a provider, and (iii) cost all consumers the freedom to choose the retail energy product offering that presents the best value for them and their households.[9] These are not sensible or reasonable recommendations by any measure.

---

3 *See* Hearing Exhibit 1130.
4 *Id.* at 19-20.
5 *Id.* at 16-18 (almost 25% difference between the two types of jurisdictions, in favor of consumer choice jurisdiction).
6 *Id.*; Opinion No. 96-12 at 28.
7 Tr. 2658:24-2659:5.
8 Opinion No. 96-12 at 28.
9 Tr. 2841:4-12.

The record also confirms that the current competitive market affords consumer maximal choice: If a consumer is dissatisfied with an ESCO offering – price, value, or otherwise – the consumer is free to select an alternative ESCO provider or to elect to revert back to default utility service.[10] The unrebutted expert testimony in the record actually calculated the enormous price savings that consumer shoppers can achieve if they in fact actively shopped on a regular basis.[11] No consumer is or should be required to do so; but every consumer should have the option of savings, the option of fixed price offerings, the option of enhanced renewable components.

These consumer choices are particularly important in the context of the State's Reforming the Energy Vision ("REV") initiative and the Clean Energy Standard ("CES"), which the record confirmed are best served by the various offerings that only ESCOs provide. The evidence similarly confirmed that the non-ESCO parties proffered no evidence that those visions can timely or sensibly be achieved under the radical recommendations they have made to the Commission, as reducing or eliminating ESCO offerings will hinder the State's effort to accelerate the development of clean energy and energy efficiency technologies.[12] Instead of advancing those statewide initiatives, the non-ESCO parties' recommendations turn a blind eye to the broader picture and vision that the State has adopted. The Commission should adopt NEM's and other ESCO parties' recommendations that are genuinely supported by the weight of the evidence and resist the invitation to act with a blunt instrument to turn New York back to an antiquated monopoly state and forcibly limit millions of New York energy consumers to largely non-renewable products and return them to a regulatory system that the Commission itself recognized as insufficient for New Yorkers.

---

[10] Tr. 833:11-15.

[11] Tr. 354:15-355:3.

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

II. BACKGROUND[13]

III. ANALYSIS

A. REGULATORY REGIME

1. Commission's Vision in Opening the Competitive Markets

By claiming that the Commission has already determined that the State's retail markets are not "workably competitive" and that the "retail competition experiment has failed,"[14] PULP underscores the core problem with the non-ESCO parties' post-hearing submissions. The purpose of these proceedings, culminating in the evidentiary hearings, was to analyze the actual evidence and to make such determinations in earnest. That is, Staff recognized that the Commission directed a genuine assessment of evidence and even claimed during the hearings that it had not formulated any conclusions prior to the proceedings in which the evidence was to be collected and analyzed.[15] But the recommendations that Staff and the rest of the non-ESCO parties re-advanced in the post-hearing briefs cannot be squared with the evidentiary record.

In citing Opinion 96-12, the non-ESCO parties make the critical mistake of confusing individual product prices with prices ***available*** to consumers generally. That is, the Commission previously posited that "competition should result in lower electric prices in New York State overall,"[16] and ***all*** of the evidence presented at the hearings confirmed that lower prices have been achieved since consumer choice was introduced to New York. Where New Yorkers collectively realize price savings and other benefits, the notion of returning to a regulated monopoly state

---

[13] This Reply Brief addresses certain claims, arguments, and recommendations in advanced in the non-ESCO party initial briefs filed in these proceedings. NEM's Initial Brief addresses multiple issues in detail, including sections that are not further addressed in this Reply Brief. NEM also incorporates by reference the reply briefs of RESA, Constellation Energy & Gas, and Direct Energy.

[14] PULP Brief at 11.

[15] Tr. 2195:3-2196:3.

[16] Opinion No. 96-12 at 26.

because ***some*** choices cost more than others is indefensible. And the notion that the existence of higher and lower priced offerings means that the competitive markets did not result in overall lower prices is similarly inscrutable.

On cross-examination, the Staff Panel expressly conceded that it did not even analyze this core question of the presence of ESCOs in the marketplace has impacted retail energy prices on the whole, let alone that it reached a conclusion based on evidence adduced.[17] Taken together with the uncontroverted evidence in the record that New York has seen a marked ***reduction*** in the overall electricity costs relative to other jurisdictions, including a 25 percent differential between monopoly and consumer choice jurisdictions, the answer to the question Staff failed to analyze is clear.

Throughout these proceedings, the non-ESCO parties consistently confused the Commission's goal of ensuring that consumers have available to them lower pricing options and reducing aggregate market prices[18] with ensuring that every customer pays less than the charge the local utility would have charged for a plain vanilla product, pre-adjustments of the utility price as permitted by the Commission – irrespective of the product being offered.[19] The unrefuted evidence in the record establishes that retail markets have achieved the Commission's goal of reducing overall market prices.[20] The Record also demonstrates that the competitive retail market provides consumers with "a reasonable opportunity to realize savings and other benefits from competition."[21] ***None*** of the parties presented any evidence to the contrary.

---

[17] Tr. 2289:10-17.
[18] Opinion No. 96-12 at 26.
[19] Staff Brief at 1.
[20] Hearing Exhibit 1130 at 15-20.
[21] Opinion No. 95-7 at 5.

Indeed, the error in Staff's reasoning is evident in Staff's claim that the Commission has an "ongoing obligation to ensure that retail markets are providing their commodity offerings at just and reasonable rates."[22] Where the retail markets include even one option that is accessible and just and reasonable, the market is offering the public a just and reasonable rate option.

Just as fundamentally, there was literally ***no evidence*** presented to support the notion that the recommendations the non-ESCO parties urge the Commission to adopt will somehow provide consumers with a "reasonable opportunity to realize savings and other benefits from competition" or drive overall energy prices down. Put differently, Staff and others are baldly recommending changes without any reasonable expectation, let alone compelling evidence, that such recommendations will result in collective price savings or benefits to consumers. Again, the only evidence they rely on concerns the myopic issue of a deeply flawed comparison between different products for individual consumers (which analysis is wrong in its own right, as detailed below), instead of considering the overall savings and benefits New Yorkers realize on a whole from the robust competitive marketplace that New York created.

In fact, implementing Staff's recommended price controls would actually frustrate the Commission's stated intentions for adopting a competitive marketplace where ESCOs are free to innovate and customers are free to choose the energy product that is best for them, from among a variety of market options, including default utility service.[23] Consumer choice through ESCO-supplied alternatives is the ***only*** mechanism by which customers can achieve savings relative to default utility rates and to achieve service by driving down those utility rates themselves through

[22] Staff at 1.
[23] Opinion No. 96-12 at 26.

market pressure.[24] New Yorkers should be free to choose for themselves the energy provider and product they prefer.

2. Application of Public Service Law to ESCOs

a) Scope of Commission Jurisdiction Under the PSL

The critical question of the scope of the Commission's ratemaking authority under the Public Service Law ("PSL") remains the subject of ongoing litigation.[25] As detailed in NEM's Motion for Stay, the parties, ALJs, and the Commission must account for the controlling New York law as pronounced by the Court of Appeals in order to assess what, if anything, can or should be done to introduce new or different regulation into the retail energy marketplace.

The premise of Staff's recommendations is that the "Commission has an obligation under the Public Service Law (PSL) to rectify the situation" of ESCO pricing[26] – something that Staff again simply says, and that cannot be squared with the PSL even if their allegations regarding ESCO prices had been true. Staff again repeats its core premise in boldly stating, in the face of the Court of Appeals' recent ruling granting leave to appeal, that "[t]he Commission's authority to oversee ESCO product offerings, including setting limits on the prices charges [sic] by ESCOs, has been upheld by the courts."[27] The Commission has been criticized by the courts for failing to tailor regulations to the evidence.[28] It should not be led into error again.

---

[24] Hearing Exhibit 1110; *see also* Tr. 843:11-844:5.

[25] In March 2018, the New York Court of Appeals granted NEM and RESA motions for leave to appeal the Third Department's decision regarding the Commission's claimed authority to regulate ESCOs. *See Matter of Retail Energy Supply v. New York State Public Service Commission*, 152 A.D.3d 1133 (3d Dep't July 27, 2017) *appeal docketed*, No. 2018-99 (Mar. 27, 2018); *Matter of National Energy Marketers Assn. v New York State Public Service Commission*. 152 A.D.3d 1122 (3d Dep't July 27, 2017) *appeal docketed*, No. 2018-99 (Mar. 27, 2018). Those appeals are being briefed as these briefs are being submitted, and are currently set to be heard in the September 2018 Term.

[26] Staff at 1.

[27] Staff at 5.

[28] *Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n*, 53 Misc. 3d 641, 651, 37

Although multiple issues are sub judice before the Court of Appeals, what is clear is that the Commission has no ratemaking authority under Article 4 of the PSL – something that the Appellate Division itself confirmed in the *NEM/RESA* decision, as detailed in NEM's Initial Brief. The Legislature did impart to the Commission limited non-ratemaking authority under Article 2 of the PSL.[29] The Commission's authority to regulate under the introductory Article 1 of the PSL is at the center of the appeals that are sub judice before the Court of Appeals.[30] Among other issues, those appeals are set to resolve the question of whether the Commission has any authority to regulate ESCO prices.[31] Although NEM submits that the record developed in these proceedings does not remotely justify any purported need to (or benefit from) imposing ratemaking regulations on ESCOs in any form, if the Commission were to consider adopting such measures, it obviously would have to first confirm that such authority exists by awaiting the resolution of the appeals by the Court of Appeals.

In this vein, Staff's recommendations that the Commission impose rate regulation beyond the Commission's legal authority are wholly improper. The Commission opted to create a marketplace that employs competition to ensure just and reasonable rates overall.[32] Replacing that

---

N.Y.S.3d 178, 186 (N.Y. Sup. Ct. 2016), *aff'd*, 152 A.D.3d 1122, 56 N.Y.S.3d 485 (N.Y. App. Div. 2017), *leave to appeal granted*, No. 2018-100, 2018 WL 1473660 (N.Y. Mar. 27, 2018), *and aff'd sub nom. Retail Energy Supply Ass'n v. Pub. Serv. Comm'n of State*, 152 A.D.3d 1133, 59 N.Y.S.3d 590 (N.Y. App. Div. 2017), *leave to appeal granted*, No. 2018-99, 2018 WL 1473675 (N.Y. Mar. 27, 2018).

[29] *See* Initial Brief at 40-47.

[30] *Id.* at 45-46; *see also Matter of Retail Energy Supply Ass'n v. Pub. Serv. Comm'n of the State of New York*, 152 A.D.3d 1133 (3d Dep't 2017), appeal docketed, No. APL-2018-00047 (N.Y. Mar. 27, 2018).

[31] Initial Brief at 46; *see also Matter of Retail Energy Supply Ass'n v. Pub. Serv. Comm'n of the State of New York*, 152 A.D.3d 1133 (3d Dep't 2017), appeal docketed, No. APL-2018-00047 (N.Y. Mar. 27, 2018).

[32] Opinion No. 96-12 at 28 ("Market forces overall are expected to produce, over time, rates that will be lower than they would be under a regulated environment. As we move toward competition, our expectation is that rates overall will be reduced.").

system with an antiquated regulated marketplace that runs counter to the progress the Commission adopted two decades ago is both improper and irrational. The "savings guarantee" requirements that the non-ESCO parties have recommended[33] will effectively eliminate consumer choice, along with the method the Commission adopted for ensuring the availability of just and reasonable rates in the retail energy market overall. In fact, on cross-examination, the Staff Panel admitted that they did not conduct ***any*** studies to determine whether any ESCOs would continue to operate if the Commission were to adopt Staff's recommendations, and no party was aware of any ESCO that would continue to service residential customers in the face of the non-ESCO parties' proposed pricing regulations.[34] It is truly remarkable to consider the drastic measure that Staff recommends in the face of its admitted failure even to analyze the impact such measures would have on New York's consumers and its retail energy markets.[35]

The Commission lacks the requisite legal authority under the PSL to impose Staff's recommended rate regulations on ESCO prices in any event. That fact is consistent with the Commission's stated intention of using consumer choice in the retail markets to empower consumers to choose among a variety of suppliers and products.[36]

b) Should ESCOs Be Required To File Tariffs?

PULP's recommendations regarding ESCO tariffs squarely ignores the PSL and the Staff Panel's testimony regarding tariffs.[37] Staff's arguments concerning the scope of its authority to regulate ESCO rates is addressed by the PSL, and will be further defined in the upcoming Court of Appeals decision. It is premature for Staff to posit any recommendations on its predictions

[33] *See* Staff Brief at 4.
[34] Tr. 2258:8-12.
[35] *Id.*
[36] Opinion No. 96-12 at 28.
[37] Tr. 2227:20-2229:20; 2944:10-2946:9.

regarding the impending Court of Appeals decision, or to ignore the express limitations on its authority of ratemaking set forth in Article 4 of the PSL.

3. Enforcement Powers Over ESCOs

a) Commission's Enforcement Mechanisms and Efforts

The Commission acknowledges that it has enforcement mechanisms that "have been effective in addressing violations of the UBP" but now argues that it has nothing to enforce "because there are no requirements or standards regarding the prices ESCOs can charge."[38] This argument misses the mark. The Commission does not need price regulation to engage in an effective enforcement program. The UBP provides ample mechanisms for the Commission to engage in effective enforcement if they are inclined to do so. Under the UBP the Commission can suspend or revoke an ESCO's eligibility to operate in New York[39] as well as require reimbursements to customers who did not receive savings promised by ESCOs.[40] The Commission has the appropriate surgical tools necessary to eradicate bad-actors. The price controls sought by the Commission is akin to using a hatchet to remove a tumor. It is unnecessary, unwise and will likely do more harm than good.

b) Attorney General's Enforcement Mechanisms and Efforts

UIU/NYAG also acknowledges that it has broad enforcement powers, which it can and has used to deal with challenges in the ESCO marketplace, but largely washes its hands from any responsibility to engage in enforcement claiming that "[i]ndustry-wide problems require industry-wide solutions, which cannot be achieved through case-by-case enforcement against individual companies. This too is just wrong. The evidence in the Record shows that effective enforcement

[38] Staff Brief at 26.

[39] UBP Section 2.D.6.b.1-2 and 6.

[40] UBP Section 2.D.6.b.3-5.

does work on both an individual and industry wide basis. The data on the number of complaints – however imperfect a measure – shows that complaint levels went down following enforcement actions. Additionally, when the NYAG decides to take an action it is usually able to obtain a settlement with injunctive relief and restitution without the need to file suit.[41]

UIU/NYAG's position also flies in the face of well accepted deterrence theory concepts that people are most likely to follow the law when there is an effective enforcement regime in place. Rather than prohibiting ESCO access to mass-market customers, enforcement of the current regulatory schedule should conducted in an effective manner such that is taken seriously by market participants.

B. USEFULNESS & ACCURACY OF COMPARING ESCO AND UTILITY RATES

1. Utility Bill Comparison Methodologies

Remarkably, the non-ECSO parties continue to predicate their recommendations on the outrageous claim that ESCOs "overcharge"[42] their customers (to the tune of $1.2 billion) – even after admitting during the hearings that Staff had no reliable evidence of actual overcharging, as that term is typically understood and used in other contexts. Staff and the other non-ESCO parties offered no evidence whatsoever of ESCO "overcharging" as the term is typically used – that is, no evidence of ESCOs charging more than customers agreed to pay, or even more than the value customers are receiving.[43] Instead, Staff is content to put its claim in scare quotes and use its own definition of the term "overcharge" to mean only that ESCOs charge more than utilities charge (for different products or services), even if that differential is commensurate with the additional value ESCO consumers receive. (UIU/NYAG admitted on cross-examination that they did not

[41] Tr. 1683:19-1684:13; Tr. 1792:5-22.

[42] Staff Brief at 2-3, 28; UIU/NYAG Brief at 26; PULP Brief at 13.

[43] *See* Initial Brief at 50-52.

develop their own price comparison analysis and instead simply adopted Staff's analysis in its entirety without conducting their own due diligence to corroborate Staff's conclusions.[44])

Indeed, Staff testified that its "overcharge" claim is valid only to the extent the term is not understood to carry the "negative" implications of the term "overcharge," as that term is typically used in the English language.[45] The non-ESCO parties' insistence on continuing to employ the term belies the agenda that is driving their recommendations in these proceedings. In fact, even with the semantic redefinition that Staff concedes, the "overcharge" claims are still false. Staff admitted that the numbers driving their claim do not even account for final pricing from either side of the ledger – ESCOs or utilities – and that those necessary adjustments could turn the analysis on its head. The raw numbers on which Staff relies are limited to the initial charges ESCOs bill without accounting for big ticket items like customer rebates that do not appear on the consolidated bill from which Staff collected its information, and the utility prices Staff used are placeholders that can be and often are increased after the fact. Predicating any substantive recommendations on such evidence, let alone the type of drastic recommendations the non-ESCO parties have advanced here, demonstrates that the desperation with which these recommendations are being made. This is briefing from a party with an agenda, and one that is not open to assessing the facts on the ground and proposing appropriate resolutions.[46]

---

[44] Tr. 1717:6-9 (UIU/NYAG Panel stating that they conducted no independent analysis of Staff's bill comparison data, which formed the basis for Staff's inaccurate and illogical conclusion that ESCOs "overcharge").

[45] Staff then contradicts its own testimony in writing (again without citation) that these are "pricing abuses ESCOs are committing against their customers" – apparently another term designed to give off the public impression that ESCOs are doing something wrong, but presumably divorced from the actual meaning of the term abuse.

[46] During cross, Staff conceded that more precise recommendations that addressed the problems specifically would impose on them significant amount of additional work. Although we do not have enough evidence to assert the precise basis for Staff's unfair and unreasonable approach in their recommendations, we note that these concerns reflect one of many possible motivations influencing their position in these proceedings.

Staff's efforts to rely on anecdotal claims from 0.0001% of the evidence available to somehow stand in for the scientific evidence it needs and lacks does not warrant a response.[47]

It is time to stop pretending that any party has proffered a reliable study comparing like products and their prices. If the Commission is to take the evidentiary hearings seriously, it must reject the myth that sits at the core of the non-ESCO party briefs – that the overcharging claim is based in reality. Where ESCOs products that are different from the plain vanilla default utility offering, there is no meaningful conclusion to be gleaned from comparing the price of ESCO oranges to the prices utilities charge for their proverbial apple products.[48] Competitive markets across industries function normally with product differentiation and price dispersion.[49] The notion that a market is not workably competitive if two retailers are charging different prices for even the same product is inconsistent with basic understanding of the markets.

And the reason for this became readily apparent (it was not already) during the testimony of the Staff Panel. Mr. Alch repeatedly testified that he did not know, did not undertake to find out, and dos not purport to have evidence showing what individual consumers want – and that he recognizes that different consumers desire and value different things, and to different extents. For the same reason the Staff Panel could not quantify the value presented by fixed-rate mortgage products or particular car brands of their choice, organic oranges, or the prizes associated with Happy Meals, the competitive retail energy markets allow consumers to fix those prices for themselves. The hopeless oversimplification to which the non-ESCO parties resorted in proffering their recommendations – a supposed bill-to-bill price comparison that ignores the realities of what products consumers are paying for, what prices they actually pay, and what prices utilities charge

[47] Staff at 29-35; Tr. 832:16-18.
[48] *See* Tr. 1103:3-1117:13.
[49] Tr. 916:9-917:19 (Dr. Makholm describing the common occurrence of price dispersion in markets, *even for identical products*).

And the reason for this became readily apparent (it was not already) during the testimony of the Staff Panel. Mr. Alch repeatedly testified that he did not know, did not undertake to find out, and dos not purport to have evidence showing what individual consumers want – and that he recognizes that different consumers desire and value different things, and to different extents. For the same reason the Staff Panel could not quantify the value presented by fixed-rate mortgage products or particular car brands of their choice, organic oranges, or the prizes associated with Happy Meals, the competitive retail energy markets allow consumers to fix those prices for themselves. The hopeless oversimplification to which the non-ESCO parties resorted in proffering their recommendations – a supposed bill-to-bill price comparison that ignores the realities of what products consumers are paying for, what prices they actually pay, and what prices utilities charge after the requisite adjustments – should be recognized for what it is: a desperation and all-too-easy proxy for the kind of reliable analysis that a state actor would require even to consider wholesale regulatory change.

Staff repeatedly conceded at the hearings that the core concern underlying their assessment of the retail energy markets is that ESCO pricing and products are not sufficiently transparent to enable consumers to make fully informed decisions in selecting their energy supplier and products of choice.[50] NEM (and other ESCO parties) proposed reforms that addressed such concerns, with the goal of making market information more accessible and transparent to consumers. The Commission should adopt appropriate market reforms supported by the evidence, rather than upend the entire market on unfounded speculation and bad science.

[50] *See e.g.* Tr. 2215:3-5; *see also* Staff Brief at 41.

1. Utility Delivery and Supply Cost Allocations

Staff and UIU/NYAG try to avoid confronting the obvious problems plaguing utility pricing that became evident throughout the hearings on the theory that utility pricing is not the subject of these proceedings. That is obviously wrong, and unavailing. To the extent these proceedings concern the residential retail energy markets – and in particular to the extent the non-ESCO parties insist on using supposed default utility pricing as some kind of barometer against which ESCO products and pricing are to be considered – utility pricing is plainly at issue. If corrected and accurate utility pricing exceeded ESCO pricing, the non-ESCO parties would have retract their erroneous overcharge claims even by their own definition of the term. Simply ignoring the inaccuracy in utility pricing that fuels Staff's data analysis does not make the faulty analysis any more acceptable or usable.

The record demonstrates that the utility "commodity" pricing on which Staff relies in its analysis shifts some of the costs of procurement to the monopoly "delivery" portions of their rates.[51] It is plainly impossible to ignore this reality and undisputed evidence while purporting to compare ESCO pricing to the incomplete, unadjusted utility charges. Staff's refusal to address these obvious problems, let alone to account for these obvious flaws in proposing reforms to the ESCO marketplace that do not even attempt to fix these problems for the benefit of all New York retail consumers, should be rejected.

[51] Tr. 1150:18-1151:2; *see also* Cicchetti Testimony, Tr. 681.

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

1. Should Retail Choice Continue In New York?

a) ESCOs' Role in Residential Markets

Staff recommends that the Commission "cap ESCO commodity prices at the utility rate."[52] Setting aside the utter lack of evidence for such a change, and the lack of authority to implement such a change, Staff's recommendation does not even make any sense. The utility rates themselves are not capped – and can, and often are, adjusted upward after the fact. Staff does not bother to explain why ESCOs would be required to offer prices that are in fact lower than utility rates. More fundamentally, of course, Staff proffers no evidence to support its recommendation that ESCOs be required to offer particular prices to customers in a free market.

b) ESCOs' Role in Non-Residential Markets

2. ESCOs' Place in the Competitive Market

a) Whether ESCOs have "Market Power"

b) The Functionality of Competitive Markets for Retail

c) ESCOs' Impact on Commodity Prices: Rates in the Fully Regulated Market

3. Future Product Offerings

The non-ESCO parties also resort to their pre-hearing claims that ESCO products and services do not provide consumers with sufficient "value" for the price they are paying. What is remarkable about that claim is that the hearings revealed the truth: None of the non-ESCO parties could back up that naked assertion with any evidence. Staff admitted that it performed no calculation of the value that the various ESCO products provided individual consumers, and indeed that such value could be more, less, or equal to the price consumers are paying for the product or

[52] Staff Brief at 5.

service. Staff further conceded that the markets generally determine for themselves the value of a particular product offering, as individual consumers elect to purchase or not to purchase a particular offering at the price it is being offered. That is, Staff admitted that it has no idea what a particular ESCO product is "worth"; that two individual New Yorkers could view a particular ESCO offering as having two different values based on that consumer's preferences and needs; and that the best way to determine value is to allow consumers to make that determination.[53] In the face of this record, it is hard to understand how the non-ESCO parties continue to perpetuate the unfounded, false claims that sit at the foundation of their drastic, dangerous recommendations to the Commission.

The non-ESCO parties seek to excuse their blatant failures in this regard by turning the burden of proof on its head and arguing that the Commission should eliminate ESCOs from the marketplace because ***ESCOs*** did not quantify the value that their products provide to consumers to "justify the differences in ESCO and utility pricing."[54] Staff argues that "ESCOs should have the burden of proof, and should not be allowed to argue that ESCOs have no role in quantitatively defending the value of their products."[55] These arguments are terribly misguided – for two independent reasons.

First, they are wrong. The unrebutted testimony in the record shows that, using multiple objective scales, the value of the ESCO products themselves far exceeds the amounts customers pay for them. Both Dr. Cicchetti (whose testimony was adopted by Dr. Makholm) and Mr. Lacey offered unrebutted testimony regarding the value that fixed-rate, renewable, conservation, and other value-added products and services that ESCOs offer.[56] The non-ESCO parties elected to

[53] Tr. 837:2-7.
[54] UIU/NYAG Brief at 32.
[55] Staff Brief at 62.
[56] *See e.g.* Tr. 678-79; Tr. 1126:1-1149:6.

ignore the testimony rather than confront it. That was their decision, and they should not be heard to baldly claim that there is no testimony concerning the value of the ESCO product offerings.

Beyond that unrebutted expert testimony, the fact remains that these proceedings concern the choices customers should enjoy for themselves – not the products PULP, UIU/NYAG, or Staff members prefer. As in any market, the consumer decides reasonable price, and competitors need to respond to consumer preferences to compete successfully. Staff's claims that the ESCO products values were not quantified ignores their own testimony that there is often no objective quantification available for particular products or services.[57] Mr. Alch, for example, admitted that quantifying the value of price certainty is a fool's errand, where individuals with different levels of risk tolerance and financial means might place entirely different values on price certainty. Staff's claims also ignore the substantial evidence in the Record that ESCO customers pay market-based prices for products they value[58] in a market that was incontestably intended to be driven by competitive, market-based principles.[59] If there were any doubt, Staff itself admitted that adopting its sweeping recommendations may result in customers paying more than they otherwise would have paid if they had stayed with an ESCO.[60]

Second, the Commission noticed these proceedings to discern what if any evidence exists to compel changes to the retail energy markets. The law requires that the Commission base any regulatory changes on appropriate evidence and tailor the regulatory measures to the evidence

---

[57] Tr. 2306:24-2337:20.

[58] *See e.g.* Tr. 1117:19-1118:2 (Mr. Lacey explaining that ESCO customers are smart and they understand the value proposition offered by the ESCOs); *see also* TR. 4221, lns. 12-15 (Suburban Propane/Agway witness describing that "[ESCOs] operate[] in a competitive market, and determining factor of Agway's success or failure is if [the ESCO] offers the proper mix of products and services, at prices demanded by its consumers. Its value proposition must be reasonable in order for [an ESCO] to remain in business.").

[59] Opinion No. 96-12 at 25-30 (describing the market-based goals and vision of the ***competitive*** retail marketplace).

[60] TR. 2841, lns. 4-12.

adduced during these proceedings, not the other way around. ESCOs are not required to proffer evidence to rebut unfounded charges regarding the value of their products. Where Staff's pre-hearing claims regarding overcharges have been exposed to be invented and badly flawed, ESCOs are not required to muster up additional evidence to respond to those spurious claims. Staff has the regulation process backwards, and the New York Supreme Court has previously outlined that failure.[61]

a) Variable-Rate, Commodity-Only Products

b) Fixed-Price Products

Staff and UIU/NYAG claims that "premiums" associated with fixed-price products are not proportionate to the value they create are simply invented.[62] UIU/NYAG continue to pretend that the "budget billing" options utilities offer are substitutes for the fixed-price products that ESCOs offer and customers regularly choose.[63] Staff conceded on cross that the two products are not remotely equivalent substitutes.[64] Locking in price certainty – a benefit and value that that was explored for hours during the evidentiary hearings and that the non-ESCO parties consistently recognized as valuable – is simply not available in the utility product offerings. That significant benefit that millions of consumers have opted to purchase will disappear if the non-ESCO parties' recommendations are adopted by the Commission. Such a dramatic change in the range of offerings available to New Yorkers will undoubtedly hurt New Yorkers, and families that benefit from (or need) price certainty for budgeting purposes will be adversely impacted by any such regulation.

---

[61] *Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n*, 53 Misc. 3d 641, 644, 37 N.Y.S.3d 178, 181 (N.Y. Sup. Ct. 2016),

[62] UIU/NYAG Brief at 34; Staff Brief at 66-67.

[63] UIU/NYAG Brief at 36.

[64] Tr. 2676:9-2678:10.

Once again, the underlying issue that the witnesses identified during the hearings concerned the transparency of ESCO offerings – something that the ESCO parties (and NEM in particular) have proposed to improve.[65] The Commission should adopt such reforms without sacrificing the critical consumer choice and improved product offerings that ESCOs offer the marketplace.

c) Renewable Energy Products

Staff's position on renewable energy products is illuminating. Apparently recognizing the value – personal and societal – that renewable energy offerings provide, Staff arbitrarily recommends that ESCOs be permitted to offer renewable products to New Yorkers, but only if such products are "100 percent" renewable.[66] That arbitrary requirement was not based on any evidence, and in fact could not be squared with the undisputed fact that increasing renewable energy consumption across a broader section of the market could result in the same benefits to the State's overall energy mix.[67]

UIU/NYAG contends that ESCOs cannot facilitate New York's REV vision or benefit the environment because they do not generate green energy themselves.[68] That obviously does not follow, and it runs counter to multiple pronouncements from the Commission in other contexts, recognizing the value of supporting renewable generation generally, including in the context of its Zero Emissions Credit. In fact, utilities also do not directly generate renewable power. The Commission has recognized the value in supporting the development and operation of renewables even if a particular provider does not generate the energy itself.

---

[65] *See* Staff Brief at 67 (claiming without support that ESCOs maintain a 'buyer-beware' mentality with regard to customer information and market transparency); *see also* UIU/NYAG Brief at 36-37 (alleging that "ESCO customers cannot discern how much price certainty costs").

[66] Staff Brief at 71.

[67] Tr. 2313:3-20.

[68] UIU/NYAG Brief at 38 (citing Tr. 765:8-12).

The record demonstrates that ESCOs uniquely offer products that include greater mixes of renewable energy relative to utilities, and that consumers value such benefits. Consumers who value such environmental benefits should be permitted to purchase them – not be barred from that option simply because Staff decided to allow only one product offering in the marketplace, without regard for whether such restriction would essentially mean that no ESCO products remain available to New Yorkers. The record leaves no room for debate that ESCO presence in the marketplace, including the many renewable offerings they offer, can facilitate the State's goals and improve consumer choice in ways that the Commission itself has recognized to be valuable to individuals and society alike.

d) Value-Added or Bundled Products

The non-ESCO parties simply wish away the value that ESCO bundled offerings offer. The unrebutted testimony in the record demonstrates that variable-rate products bundled with value-added products and services, such as smart thermostats, offer genuine value for consumers in the form of both overall price savings (as a result of consumption reduction) and environmental benefits.[69] Unrebutted expert testimony even seeks to quantify that value and demonstrates that consumers receive far more value than an purported additional costs they incur on an apples-to-oranges comparison basis.

e) CCA Products

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

The non-ESCO parties' briefs are replete with unfounded claims that are not rooted in any evidentiary support. At bottom, the mere assertion that ESCOs do not advance REV or CES is incredible. REV and CES are consistent with the underpinnings of a competitive market with

[69] Tr. 1127:8-1128:15.

robust product offerings, including offerings that reflect the visions the State has set out and is the process of asking consumers and providers to pursue. On the other side of the ledger, Staff has offered no evidence that REV and CES can be achieved if the retail energy markets are forcibly returned to the antiquated state of monopoly. It is even more remarkable that neither Staff nor the UIU/NYAG even undertook to proffer evidence of that fact – notwithstanding that they advocate for such widespread changes to the markets.

5. ESCO Eligibility Requirements

6. ESCO Reporting and Collateral Posting Requirements

7. ESCO Marketing Practices

Staff complains that "ESCOs have deliberately obfuscated prices and resisted market reforms" – as if ESCO preference for or against reforms somehow determines their viability.[70] If certain ESCOs are violating the UBP, they should be taken to task: Staff admitted during cross that there are a minority of bad actors among the ESCOs, but inexplicably seeks to upend the good actors and entire industry in an effort to avoid enforcing the Commission's rules.

Staff also makes unfounded (and uncited to evidence) suppositions that "customers [are] being fooled by advertising and marketing tricks into paying substantially more for commodity service than they had remained full utility customers, yet thinking they are getting a better deal."[71] The reality – and undisputed evidence – is that Staff did not perform any studies to support these conclusions, nor did they speak with customers to determine the accuracy any of these theories. Staff admitted that it did not undertake any independent analysis in these proceedings or otherwise to discern what customers are paying for or what value they have

[70] Staff at 1.
[71] Staff at 1.

ascribed to individual ESCO products: "I don't know what is in the mind of the consumers,"[72] and "I frankly have no idea why customers switched from the utility to an ESCO. . . . I don't know why customers switch."[73] On cross examination, Staff ultimately conceded that consumers may also be attributing particular values to the improved customer service experience ESCOs offer relative to utilities, and that the actual value is "unknown to me [Staff] . . . I have no way of determining what they [consumers] value your [ESCO] services at" and that Staff has not conducted any analysis or surveys to determine that.[74] At bottom, after conceding that Staff has extremely limited contact with real consumers and their actual thought processes and valuations, Staff summed up the facts:

> Q. [I]s it fair to say you have no idea what customers perceive to be valuable when they purchase an ESCO – particular ESCO product?
>
> A. Frankly no, I do not understand what the – is going through the consumer's mind when they choose an ESCO product.[75]

Furthermore, the non-ESCO parties' recommendations in their initial briefs concerning ESCO marketing practices, including that affirmative consent be required before enrolling customer at the expiration of ESCO contracts, lack any evidentiary support.[76] Again, it unfortunately appears that non-ESCO parties adopted certain views before the hearings and continued to press them even in the face of a record devoid of supporting evidence. To the extent the parties (ESCO and non-ESCO alike) have proposed measures to improve transparency, NEM

[72] Tr. 2213:5-12.

[73] Tr. 2212:4-14.

[74] Tr. 2333:12-2334:3.

[75] Tr. 2335:14-20.

[76] UIU/NYAG Brief at 45-46.

has endorsed that objective, and believes that the evidentiary record identifies that as the key component needed to resolve multiple concerns expressed by a variety of parties.

8. Customer Information and Cyber Security

9. Purchase of Receivables and Billing Process

a) Purchase of Receivables

b) Billing Methodologies

(1) Utility Consolidated Billing

10. Customer Complaints

11. Transparency

Staff itself identifies two problems that it claims infect the market: (1) an alleged "lack of transparency in the mass markets for commodity service does not allow customers to make rational price comparisons among all competitors in the market (the ESCOs and the incumbent utility" and (2) "the marketing and enrollment practices of many of the ESCOs are not in accord with the Commission's Uniform Business Practices (UBP) for the ESCOS " including in that "their marketing practices rely on pressure tactics and unfulfilled promises that the customer will save money on commodity."[77]

Remarkably, Staff actually recognizes this core problem ("price transparency is a tremendous problem in the retail energy markets") and recommends that "the Commission must direct that mass market ESCO customer bills disclose a relative bill comparison showing the current bill charges and what the customer would have paid had they taken delivery and commodity from their utility."[78] But having recommended that the Commission address this problem with appropriate measures, Staff inexplicably goes on to recommend price-guarantee

[77] Staff at 2.
[78] Staff at 4.

regulations that upend the retail markets and that are entirely unnecessary and inappropriate in the face of the proposed transparency regulations. These twin recommendations represent classic over-regulation and inconsistency that the Commission should reject.[79]

Indeed, the error is glaring: why, for example, would ESCOs be required to disclose to customers detailed price comparisons as proposed by Staff if those ESCOs are being required to guarantee savings? By that measure, why would the Commission permit any customer to be services by a utility if an ESCO is guaranteeing better rate? Why does Staff recommend a prohibition on door-to-door, point of sale, or telephonic marketing for ECSOs[80] who, under Staff's proposal, are receiving guaranteed savings? There is simply no reason or integration amongst Staff's various recommendations.

12. Customer Renewal Process

13. Customer Shopping Tools

14. Customer Choice

15. Examples of Competitive Market Frameworks in Other States

16. State Agency & Consumer Advocacy Group Actions

17. Energy Brokers

IV. CONCLUSION: SPECIFIC RECOMMENDATIONS TO THE COMMISSION

In the absence of record evidence of the claims that fueled these proceedings in the first place, a unified focus on the value of improving pricing transparency emerged. Rather than return New York's retail energy markets to an antiquated state of monopoly and forcibly return

[79] Staff testified that they did not formulate their recommendations in their pre-hearing testimony until after they fully analyzed the evidence, although they conceded that their recommendations did not follow from that evidence, with obvious examples including their anlaysis showing small business savings, and yet their recommendations including closing the market / price guarantees for small businesses anyway. The same fundamentally flawed approach appears to have surfaced again in Staff's post-hearing briefing: they do not retreat from their pre-hearing positions, even in the face of a record that was clearly inconsistent with some of their recommendations.

[80] Staff at 4-5.

consumers to impossible-to-predict, variable rate default utility service, the Commission should credit the evidentiary record that was developed and adopt tailored measures to address concerns that are supported by the record.

A blunt-instrument approach to regulation along the lines of the Staff and UIU/NYAG recommendations for price and product regulations are entirely inconsistent with the law, the Commission's goals for the retail markets, and the State's current stated objectives under REV and the CES. In its brief, Staff cites to a different record – which predating this proceedings – on which it purported to base a regulation regarding service to low-income customers.[81] That proceeding did not have any evidentiary hearing, and in fact these proceedings were designed to cure the defects in the process that the Supreme Court had identified to date. At the same time, the record reveals meaningful reforms that can increase market transparency and allow consumers to make more informed energy supply decisions. NEM thus requests that the Commission implement the reform recommendations outlined in NEM's Initial Brief.

Dated: May 1, 2018

Respectfully submitted,

/s/

Jason C. Cyrulnik, Esq.
Motty Shulman, Esq.
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, New York 10504
914.749.8200
jcyrulnik@bsfllp.com
mshukman@bsfllp.com

George A. Carpinello, Esq.
Teresa A. Monroe, Esq.
BOIES SCHILLER FLEXNER LLP
30 South Pearl Street
Albany, New York 12207

[81] Staff at 13-14.

TEL: 518.434.0600
gcarpinello@bsfllp.com
tmonroe@bsfllp.com

Attorneys for National Energy Marketers Association