

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission to )  
Assess Certain Aspects of the Residential and ) Case 12-M-0476  
Small Non-Residential Retail Energy Markets in )  
New York State )**

**In the Matter of Retail Access Business Rules ) Case 98-M-1343**

**In the Matter of Energy Service Company Price )  
Reporting Requirements ) Case 06-M-0647**

**REPLY COMMENTS OF THE  
NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Energy Marketers Association (NEM)<sup>1</sup> hereby submits reply comments to the stakeholder responses to the questions appended to the Commission’s October 19, 2012, “Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State.” The stakeholders filing comments on the Commission’s questions represent a diverse cross-section of market participants, consumers, and regulators. Despite this diversity of interests, or perhaps because of it, the suggestions to the Commission identified many of the same underlying problems and recommended similar solutions to improve the extremely competitive retail energy market structure that currently exists in the State of New York. NEM submits that the information, allegations and rhetorical statements placed into this record do not support a material and disruptive change in the well-considered and balanced public policies and Orders that have formed the basis for the current competitively restructured energy markets in this State.

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<sup>1</sup>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

NEM further submits that before any substantial modification of the existing market structure is considered, that the extremely volatile residential utility default prices and their departure from competitive levels set forth below and in Endnote One<sup>i</sup> should be fully investigated and ***transparently examined*** by the Commission. Bundled utility rates that are used to form the basis of default service rates should be examined by all stakeholders in sufficient detail so that at the end of this investigation: (1) residential consumers are able to make a true “*Apples-to-Apples*” comparison of retail energy prices to residential consumers can be made, (2) consumers can be properly and accurately educated, (3) the Commission website can be properly informed, (4) misrepresentations/misconduct can be quickly and accurately identified, and (5) all consumers as well as their suppliers can be properly protected.

Clearly, if Low Income Consumers (LICs) are either prohibited from shopping or their prices are arbitrarily tied to utility default rates which have never been transparent in any meaningful manner, or price caps are imposed upon such customers based upon extraordinarily volatile and totally inscrutable utility default service prices, NEM submits it would penalize the very class of customers that this docket is intended to assist.

As noted in NEM’s *National Marketing Standards of Conduct*,<sup>2</sup> ESCOs invest significant financial, intellectual and reputational capital for the opportunity to serve New York consumers, regardless of their income levels or creditworthiness, attributable in large part to New York’s policy leadership. No ESCO obligation to serve exists, nor is a mandate to serve necessary.

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<sup>2</sup>Available on the NEM Website at: <http://www.energymarketers.com/Documents/ACF74.pdf>.

Indeed, NEM members compete for the mere *opportunity* to serve the public, and both the costs and risks associated with doing so are very significant.<sup>3</sup>

Consequently, the rules by which ESCOs conduct business in New York must necessarily be reasonable, prudent, and consistently applied. In New York, the UBPs have been adopted and are now the rules by which all ESCOs must comply. However, to date no definitive case or controversy has been brought by or to the Commission that would suggest the current UBP is grossly inadequate in informing all competitors of the boundaries of their expected conduct in the marketplace. Additional clarity in the UBP may be necessary, but a fundamental unraveling of the existing, highly effective market structure is not.

NEM would submit that clarity as to the measure by which one's conduct will be judged, as well as the facts that may constitute actionable misconduct versus innocent mistake or clerical error is extremely important. Additionally, confidence that the enforcement of the UBP will be fairly, consistently, and prudently applied defines the true costs and risks of doing business in the state of New York. Assuming no rational economic basis exists to select an ESCO product over a similar utility product unless misconduct has taken place is not an acceptable standard for initiating a compliance or enforcement action. Behavioral standards under the UBP as well as competitively neutral enforcement protocols and rational consequences must be clarified and established.

NEM recommends that upon the conclusion of these comments, the Commission should either expand this docket or open a new docket in which utilities are required to publish a fully

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<sup>3</sup>NEM submits that if this Commission relies on market based solutions to serving low income consumers similar to those in Georgia, Ohio and particularly as implemented in Texas, many of the concerns expressed in this record could be minimized or eliminated, plus no ESCO Obligation to Serve would be required as there would be ESCOs honored to serve such classes of customers given a competitively neutral market-based market structure.

transparent total utility bill with all underlying pricing/cost structures included therein. This would include but not be limited to a delineation of all otherwise competitively provided or available products but it must also necessarily include all overhead and utility accounting allocations both to and from commodity and distribution rates in order to finally identify and determine what a true “Apples to Apples” comparison with ESCO pricing should properly look like, until utilities are completely out of the competitive markets in the State of New York.

NEM submits that this is essential for a truly informed record in this proceeding and any future related dockets. The Commission will then have an analytical foundation which it can use to become more fully informed on whether in fact any ESCO misconduct has occurred or whether, for example, LICs like all other consumers have been paying two or three times for the same costs through no fault of their own or of their ESCO. It is only with this information can the Commission determine what the impact of retaining such costs in distribution rates has on all consumers, including LICs.<sup>4</sup>

NEM also recommends that a separate track of this investigation or a new docket be opened in which the various different types of conduct and misconduct be identified and a reasonable, prudent and understandable system of corrective actions, restitution standards and/or penalties, if and when appropriate, can be fully considered by all stakeholders and clarified by the Commission. Making major revisions to decades of very serious and thoughtful policymaking and Commission Orders based on the alleged actions or mistakes of an errant few does not do justice to the billions of dollars invested to serve the consumers of New York, nor does it necessarily implement the social justice that was the intended focus of this investigation.

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<sup>4</sup> NEM fully supports the recommendations and analysis provided in the Reply Letter of the Joint ESCOS with regard to this most important issue.

## **Summary of Recommendations**

NEM's initial comments recommended that the Commission should: 1) delineate a uniform set of behavioral standards for marketplace actors that are applicable to interactions with ALL consumers, with clear and fair consequences for violations; 2) rely upon market-based products and policy solutions to serve ALL consumers; and 3) implement clear, consistent and prudently applied compliance and enforcement procedures, protocols and processes as an effective incentive for desired conduct and a deterrent for fairly defined misconduct.

NEM and other commenters explained how a lack of utility price transparency, due to a number of factors, prevents accurate comparisons among ESCO products and utility products, plus how the utility bill calculator, billing line item and other proposals would, in fact, limit price competition and the ability of ESCOs to offer innovation. Indeed, the utility pricing data cited by certain parties as evidence of potential wrongdoing by certain ESCOs cannot be properly analyzed in context unless and until utility default service rates have been fully examined and transparently unbundled as mentioned above. If utility rates in fact double or triple charge consumers for products, services or technologies that they have chosen to purchase from ESCOs, this would have a substantial and material impact on the adjudication of any alleged ESCO pricing misconduct. Double or triple charges for competitive functions and completely invisible allocations of overhead and other related and unrelated distribution charges imposed on LICs have a regressive impact and hurt them worse than any other consumer. Moreover, permitting only non-LICs to participate in energy shopping compounds the problem.

The utilities' historical failure to list specifically the embedded but invisible costs associated with products, services and technologies as well as related cost allocation has been a major

impediment to permitting fully competitive markets from developing in New York as they have in other states. Now that the entire nation has had an opportunity to see how underprepared the existing infrastructure is, there is no better time to fully unbundle all otherwise competitively available functions and related cost allocations from utility rates and permit private capital markets rather than captive customers to bear those costs and risks. Instead, all of these currently redundant costs and utility resources can and should be redeployed into infrastructure and reliability upgrades and cybersecurity measures.

Based on our review of the initial comments received and suggestions set forth therein, NEM submits that as long as monopolies are permitted to compete in New York's restructured markets, the Commission has a duty and obligation to ensure that utility prices are transparent and consumers are not double or triple charged for competitive functions or utility overhead or administrative allocations when they shop. The Commission should expand this investigation to include these analyses and findings of facts or initiate new proceedings to: (a) require full utility billing transparency and the elimination of duplicative and otherwise invisible utility costs and related allocation structures, (b) clarify facts that the Commission will deem determinative of actionable misconduct versus innocent mistake or clerical error, and (c) implement a reasonable, prudent and understandable system of and process for warnings, corrective actions, restitution standards and/or penalties, if and when appropriate.

### **1. Utility Price Transparency is the Underpinning of Informed Consumer Shopping and Education**

Before any substantial modification of the existing market structure is considered, the Commission should investigate and *transparently examine* the underlying cost and pricing structures that are otherwise invisible in the extremely volatile residential utility default prices as

well as their unpredictable departure from competitive prices set forth in Endnote One. Bundled utility rates used to form the basis of default service rates should be examined in sufficient detail so that at the end of this investigation: (1) a true “*Apples-to-Apples*” comparison of retail energy prices to residential consumers can be made, (2) consumers can be properly and accurately educated, (3) the Commission website can be properly informed, (4) misrepresentations/misconduct can be quickly and accurately identified, and (5) all consumers as well as their suppliers can be properly protected.

There were some commenters that supported use of a historic bill calculator,<sup>5</sup> a historic and prospective bill calculator,<sup>6</sup> and bill line items.<sup>7</sup> NEM disagrees because given the current lack of transparency in utility rates, there are minimal to no benefits of using historic bill calculators and bill items, because to do so would be misleading and contrary to the public interest. NEM submits that the goal of accurately educating and properly informing consumers as to what they are in fact paying for cannot be achieved without a fully transparent utility bill. And such full utility bill transparency is absolutely necessary as long as monopolies are permitted to participate and in many ways dominate an otherwise extremely competitive retail energy market in the State of New York. Any ESCO price comparison versus the utility default rate is false and misleading in the absence of full utility billing and pricing transparency. NEM also agrees with the FTC that a bill line item would “tilt rather than level the competitive playing field” in favor of the incumbent utility by only prompting shopping customers to compare offers but not utility captive customers who never see the offer.<sup>8</sup>

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<sup>5</sup>AG, page 10; PULP, page 6.

<sup>6</sup>UIU, page 7.

<sup>7</sup>UIU, page 9.

<sup>8</sup>FTC, page 5.

Publishing a comparison of ESCO and utility rates without first performing an investigation into the basis for current default service rates will not permit a true apples-to-apples comparison on the Power to Choose website, will not educate consumers, will not permit an evaluation of the comparative values or provide a basis to determine whether misrepresentations/misconduct has occurred. The process of reconstructing the computation of the current total utility default rate is complicated even for experienced market participants,<sup>9</sup> let alone the average residential consumer. Interjecting the artificial construct of a comparison of the utility default rate against the ESCO rate and deeming it valuable information is at the very least a disservice to consumers and at worst misleads consumers and misstates and undervalues the competitive products in the marketplace.<sup>10</sup> Moreover, even assuming all of the utility and ESCO billing variables that are at play could be accurately captured in a bill calculator, there is no value in making a historical and/or prospective rate comparison between the two rates. Historical rates are not a guarantee of future market conditions.

Indeed, utility default rates are volatile, unpredictable, and impossible for ESCOs to competitively price around with accuracy. But that is one of the very reasons why ESCO service is so valuable – shopping allows the consumer to avoid the market volatility of default service rates. The policy direction of this Commission has been to expose consumers to market pricing, even with its accompanying volatility. That is clearly the right policy choice. But a comparison of a stable ESCO price to a volatile utility default price, even under the best of circumstances, will occasionally not appear favorable to the ESCO for reasons totally unrelated to ESCO misconduct. ESCO pricing smoothes out market volatility, and it is a simple fact of markets, that a levelized price may be higher than a spot price.

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<sup>9</sup>USEP, page 2.

<sup>10</sup>See IDT Energy, pages 2-4.



In addition, the comparisons reinforce the false premises that: (1) the total utility default service bill is accurate, (2) its default commodity price has all the proper allocations that now reside invisibly in distribution rates, and (3) that savings from it is or currently can be accurately represented given this vast lack of utility cost allocation data. Not to mention the fact that even if such savings could be accurately assessed by the consuming public (and the ESCOs), savings alone is commonly understood by all commenters not to be the only factor that consumers value. ESCO rebates, gift cards, energy efficiency savings, and other value added products will not be reflected in that computation in any way.<sup>11</sup> As cautioned by the FTC, price comparison mechanisms should not be designed in a manner that restricts or forecloses future energy offerings and innovations.<sup>12</sup>

Moreover, current utility default rates may include procurements and hedging strategies that are virtual black boxes to other market participants. Utility rates are subject to reconciliations in future time periods for previous over/undercollections that further disjoint the rate from being a market-based price signal.<sup>13</sup> The historic regulated monopoly model did not demand the disclosure of this information. However, today *because* the utility continues to compete as a monopoly in an otherwise intensely competitive market, competitive neutrality and parity requires that the Commission investigate the basis of the total utility benchmark default service price and to publish a fully transparent total utility bill so that a valid apples-to-apples comparison with ESCO rates can be communicated on the Commission website to educate consumers and serve as a basis upon which alleged ESCO misrepresentations or misconduct can be identified.

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<sup>11</sup>IDT Energy, pages 2-4.

<sup>12</sup>FTC, page 4.

<sup>13</sup>The Commission cannot know if default commodity prices are understated and therefore ESCO rates are overstated because utility costs and overhead or administrative allocations are hidden from the consumer in distribution rates.

One of the chief concerns cited by the Commission in initiating this proceeding was the comparative pricing data disclosed in the NIMO rate case and the conclusion that many ESCO consumers were paying more than they would have paid for utility commodity service. Of particular concern to the Commission and also NEM is the impact of higher prices on low income consumers. Double or triple utility charges have a regressive impact on low income consumers that would be compounded with a prohibition on low income consumer shopping.

As just discussed by NEM, there are many reasons why making an ESCO versus utility rate comparison is inapposite, misleading and just plain wrong. However, what is even more perplexing in the case of the NIMO commodity rates that are forming the basis of the “comparison,” is how and why the NIMO rates could both fluctuate and diverge so much from market prices. An analysis of the NIMO gas rates compared with NYMEX rates reveals both an unpredictable degree of volatility as well as inscrutable fluctuations in its divergence from published NYMEX prices.<sup>14</sup>

This classic monopoly pricing behavior in an otherwise competitive marketplace should be phased out completely. However, as long as monopolies are permitted to remain in the competitive markets, the Commission should necessarily require full utility bill transparency and heightened scrutiny for unexplainable/apparently irrational or inscrutable pricing behavior. There is no rational way for ESCOs to competitively price around: (1) a monopoly in a competitive market to begin with, (2) a monopoly price in a competitive market that has virtually zero transparency, and (3) a monopoly with no transparent pricing and on top of that a totally inscrutable pricing scheme that can yield spreads that range from 65 cents to over \$4.60 over NYMEX prices, just since the beginning of this investigation.

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<sup>14</sup> See Endnote i.

There is no rational basis upon which to compete against such monopoly market power, scale and scope with monopoly pricing that can range from opportunistic to predatory with no way to discern the difference. NEM urges the Commission to use this investigation to require utilities to publish the details behind total utility prices that have never been revealed in detail to the consuming public.

## **2. The NYPSC Should Not Make Changes to the Existing Retail Market Structure; It Should Provide Clarity as to What Constitutes Expected Conduct in the Marketplace**

NEM and nearly all of the commenters noted that effective enforcement of behavioral standards is a strong deterrent against potential marketplace misconduct. The Commission should provide clarity as to processes and procedures for identifying conduct/misconduct; the differences between innocent mistakes, minor infractions and actionable misconduct; and a reasonable, prudent and understandable system of corrective actions, restitution standards and/or penalties, if and when appropriate. Subsequent to the submission of our initial comments in this case, NEM adopted its *National Marketing Standards of Conduct*<sup>15</sup> that bear directly on this point. The *National Marketing Standards of Conduct* set forth a common basis for doing business in today's energy marketplace and are premised on safeguards to protect the consumer and this burgeoning marketplace.

The *National Marketing Standards of Conduct* endorses a zero tolerance policy for any fraudulent, illegal, or unethical conduct of any employee or agent. Likewise, as NEM recommended in its initial comments, if an ESCO in fact engages in fraud or other illegal

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<sup>15</sup>Available on the NEM Website at: <http://www.energymarketers.com/Documents/ACF74.pdf>. The National Marketing Standards of Conduct builds upon the work of NEM to develop and adopt a Consumer Bill of Rights in 2010 and a Network Marketing Code of Conduct in 2011, which are available respectively at [http://www.energymarketers.com/Documents/Consumer\\_Bill\\_of\\_Rightsfinal\\_formatted.pdf](http://www.energymarketers.com/Documents/Consumer_Bill_of_Rightsfinal_formatted.pdf) and [http://www.energymarketers.com/documents/NEM\\_July13\\_2011Network\\_Marketing\\_PRfinal\\_\(2\).pdf](http://www.energymarketers.com/documents/NEM_July13_2011Network_Marketing_PRfinal_(2).pdf)

conduct, the ESCO should be subject to PSC oversight actions. The Commission should clarify the distinction between conduct that is in the nature of innocent mistakes or other actions that result in little to no harm to the consumer versus actionable misconduct. By instituting a reasonable, prudent and understandable system of corrective actions, restitution standards and/or penalties, the Commission will encourage ESCOs to make good faith efforts to correct clerical errors, avoid technical infractions or innocent mistakes once a warning is received and deter misconduct.

Many parties discussed the efficacy of Commission enforcement actions in deterring misconduct, and some suggested further revisions to the UBP as a corollary to such activities. NEM recommends that the Commission initiate a rulemaking proceeding to define rational, prudent and consistently applied behavioral standards. This rulemaking should also examine the Commission's enforcement process, the provision of due process to market participations that may have violated Commission regulations, and the delineation of infractions, clerical errors, mistakes, misunderstandings and intentional misconduct.

### **3. The Evidence Does Not Support the Proposed Changes to the Existing Retail Market Structure**

Certain commenters proposed changes to the existing retail market structure premised on the unsubstantiated allegations of ESCO wrongdoing.<sup>16</sup> Without the full utility bill transparency discussed above, the raw data that has been proffered as evidence of wrong doing in this case is insufficient to justify any of the significant market structure changes that have been suggested.<sup>17</sup>

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<sup>16</sup>This included proposals to eliminate door-to-door sales (AG, page 18; Joint Utilities, page 8); eliminate non-recourse POR programs (AG, page 7; UIU, page 23); prohibit or further limit the use of early termination fees (AG, pages 25-26; UIU, page 19; PULP, page 19); end ESCO referral programs (AG, page 16; PULP, page 10); and require affirmative consent for all contract renewals (UIU, page 21).

<sup>17</sup> Of the AG investigations cited in its initial comments, nearly all were commenced before the most recent round of changes to the UBP to implement marketing standards in late 2008. See AG, page 4-5, and notes 8 and 9.

Adopting these substantial and harmful changes would undermine decades of thoughtful Commission decisionmaking, completely ignore the market-based solutions adopted by other states and undermine the very core of the Commission’s Retail Policy Statement and best practices embedded in the UBP and utility rate settlements.

NEM and other commenters strongly opposed the suggestion to prohibit door-to-door sales because this sales channel is an important means of communicating with and educating consumers and to do so would be contrary to New York State law. NEM and others also opposed the proposal to implement POR programs with recourse, for amongst other reasons, the important role it plays in ensuring HEFPA compliance. Notably, the Joint Utilities also opposed requiring recourse POR inasmuch as, “The effect could ultimately be the same as if POR was discontinued. The experience of some of the Joint Utilities has been that POR programs, and specifically, consolidated billing, have been key to growing the number of customers willing to try a competitive supplier.”<sup>18</sup>

NEM and other commenters opposed the suggestion to prohibit or further restrict the use of early termination fees because it would be contrary to recently enacted New York State law and would restrict or possibly eliminate ESCOs ability to offer fixed rate or other hedged products to consumers. The FTC agreed with NEM and pointed out that the early termination fees also permit ESCOs to recover the costs of home automation hardware.<sup>19</sup>

With respect to the possible elimination of ESCO referral programs, NEM and others noted the success of these programs in introducing consumers to the concept of energy choice and that the de minimis on-going cost of continuing the programs argues in favor of retaining them. The

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<sup>18</sup>Joint Utilities, page 13.

<sup>19</sup> FTC, page 6, note 16. NEM supports the recovery of a variety of new products and technologies be considered.

Joint Utilities agreed that individual utilities should be permitted to continue offering beneficial programs.<sup>20</sup>

NEM and others opposed the suggestion that ESCOs be required to obtain affirmative consent from consumers for all contract renewals. The AG suggested that renewal literature highlight the significance of the mailing by utilizing bold type.<sup>21</sup> As NEM explained in its initial comments, a requirement for affirmative consent for all contract renewals would be a costly and unnecessary requirement to impose on ESCOs, particularly given all of the existing regulatory disclosures required throughout the contracting process. The FTC agrees with NEM that, “***Requiring affirmative assent for a price change could discourage an ESCO from cutting prices or from offering a competitive price that it might need to raise later if market conditions change.***”<sup>22</sup> NEM also agrees with the FTC that it could undermine the ability of ESCOs to provide more value to consumers than standard service.

NEM opposes the suggestion made by UIU<sup>23</sup> that the UBP be modified to allow only for consolidated billing by the utility for customers that choose to shop for their energy.<sup>24</sup> By prohibiting ESCOs from issuing their own bills, customers would be severely limited to the pricing structure that a utility, as competitor to the ESCO, is willing to accommodate. In particular, many commercial customers employ complex pricing strategies, such as fixed price

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<sup>20</sup>Joint Utilities, page 5, note 3.

<sup>21</sup>AG, page 20.

<sup>22</sup> “Such a rule – requiring an opt-in to re-enroll – may create significant subscriber retention costs for ESCOs and send large numbers of customers back to standard service. This would likely make it significantly harder for ESCOs to retain consumers and, by raising their costs relative to those of the distribution utilities providing standard service, might undermine ESCOs’ ability to provide more value than the standard service.” (FTC, pages 13-14).

<sup>23</sup> UIU, page 23.

<sup>24</sup> Imagine how the growth of wireless communications would have been stymied if only the local landline phone utility was allowed to issue bills on behalf of wireless carriers.

triggers or layered fixed prices, that ESCOs are able to bill and that utilities would likely be unwilling or unable to support.

#### **4. Low Income Consumers Must be Allowed to Shop in the Marketplace With the Full Rights of All Other New York Citizens**

In our initial comments, NEM strongly opposed the suggestion to prohibit low income consumers from shopping for energy or any other product or service as it would violate basic market tenets and consumer privacy rights; increase the costs of energy to all consumers and undermine other important public policy goals.<sup>25</sup> Most commenters echoed NEM's opposition to the proposals.<sup>26</sup> The Joint Utilities noted multiple operational difficulties attendant with implementing such a proposal.<sup>27</sup>

As illustrated in Endnote i to these comments, the variability of the utility default rate as well as the inscrutability and unpredictability of its divergence from market prices, plus its lack of transparency as to its calculation, makes it impractical or impossible for ESCOs to formulate an intelligent competitive offer around it. Even if it could be done, the costs, risks and

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<sup>25</sup>Likewise, prohibiting low-income consumers from purchasing Starbucks coffee when McDonald's coffee is a fraction of the price or otherwise inferring that Starbucks is committing misconduct by selling coffee at such high prices is wrong. Unless off course, it was selling McDonald's Coffee in Starbucks cups and not informing their customers that this was the case. Likewise, selling green energy and delivering brown energy is misconduct. However as a legal and policy matter, all consumers should have the right to buy either brand of coffee or either brand of electricity that they want regardless of whether they are on government assistance. The Commission's proper role is to ensure the consumers have all the relevant facts to the transaction. Hence the absolute necessity for full utility bill transparency. If utility default commodity rates do not contain various costs and allocations that should properly be allocated to this function but remain in distribution rates and remain invisible, this would be the same as selling McDonald's coffee in Starbuck cups and not telling consumers this fact.

<sup>26</sup>For example, FTC explained that, "Allowing low-income consumers to enroll with an ESCO that guaranteed that its total charge would not exceed the incumbent utility's total charge for the same components of the bill seems to harness competition to benefit such customers. The NY PSC may want to couple policies that allow low-income populations to choose a retail electric provider with enforcement against those who would prey on those populations." (FTC, page 15).

<sup>27</sup>The Joint Utilities warned, "it would be very difficult to know all the possible government programs and services customers receive. Administratively, it would be nearly impossible to track customer eligibility status for programs outside of current utility billing systems capabilities. Further, customer movement in and out of programs would create tracking challenges for utility staffing, and program limitations." (Joint Utilities, pages 5-6).

inefficiencies of limiting ESCOs to a price capped product for a segment of consumers would not be justified. Also significant, limiting low-income consumers to pricing plans keyed off of utility variable rates<sup>28</sup> would relegate them to limited utility options and effectively preclude them from shopping for fixed price products at all. The option of utilizing fixed price products to budget expenses on a long-term basis should be available to any and all consumers and arguably is most valuable to those on fixed incomes.<sup>29</sup> As suggested in NEM's initial comments, if the Commission is seeking to implement programs specifically targeted to benefit low income consumers in a retail choice environment, those programs should be market-based.<sup>30</sup>

NEM agrees with the AG's suggestion that utilities should not be allowed or encouraged to make statements to low income or other consumers about the value of competitive offers.<sup>31</sup> It is not competitively neutral, and the utility customer service representatives do not have access to nor should they appear to make judgment about ESCO marketing offers/contract terms. The ESCO is and should be responsible for communicating with consumers about the terms of its product offerings.

## **Conclusion**

The Commission has exercised remarkable leadership over the past twenty years in designing policies that support extraordinarily competitive retail energy markets. The retail market structures that are currently in place, that support consumer choice, supplier market entry and investment in the State, and increasingly innovative competitive energy product offerings, should

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<sup>28</sup>AG, page 15; PULP, page 11.

<sup>29</sup> See Endnote i.

<sup>30</sup> See, e.g. The Texas LITE-UP program. In this program, Texas electric consumers make de minimis monthly contributions to the System Benefit Fund, which are then distributed to eligible customers in the form of a bill discount through the ongoing Rate Reduction Program. See TX PURA Sec. 39.903. SYSTEM BENEFIT FUND; PUCT Rules §25.451, §25.454 and §25.455.

<sup>31</sup>AG, page 15.



be encouraged, supported and continued. This should be supplemented by the expansion of this investigation to require full utility bill transparency and disclosure so that consumers can have actual knowledge of costs that they are required to pay, but have heretofore remained completely invisible to them. Lastly, NEM urges the Commission to clarify and define rational, prudent and consistently applied behavioral standards.

Sincerely,

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