

**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**

COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM)¹ hereby submits comments on 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.” NEM wishes to compliment the Commission for twenty years of outstanding public service as well as its comprehensive and groundbreaking public policy analysis and development that has created one of the most intensely competitive retail energy markets in the United States. As will be more fully described in the comments below, under no circumstances should the Commission abandon twenty years of exemplary public policies and analyses as well as the enormous public benefits that have been derived by incenting private capital to displace captive ratepayer guaranteed monopoly market power, investments and prices to create one of the most competitive retail energy markets in the country. Additionally, NEM submits that under no

¹ 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.

circumstances should the Commission reverse course and reimpose artificial price caps or government-mandated pricing formulas on the intensely competitive retail energy market it has created.² Lastly, NEM submits that under no circumstances should the citizens of New York who receive government assistance be discriminated against in any manner in the provision of energy or related services or technologies. To do so would cause enormous inequities and social impacts among the citizens of New York as well as public policy impacts at both the microeconomic and macroeconomic levels that are completely contrary to the public interest.³

I. The Commission is a Long-Standing Acknowledged National Leader in Creating and Sustaining Intensely Competitive Retail Natural Gas and Electricity Markets

NEM strongly supports the Commission and its considerable efforts to date to create well-functioning retail markets. As documented herein, NEM submits that the evidence overwhelmingly supports the Commission’s actions and decisions to date as well as the efficiency and consumer satisfaction with the competitive retail marketplace it has created in the State of New York.⁴

² On January 15, 2013, a search on the Power to Choose website for the ConEd service territory reveals 55 ESCOs competing with 92 different offerings.

³ It would be totally inconceivable for the New York State government to prohibit any class of citizen from purchasing the iPhone 5 because that citizen was receiving government assistance. And the new iPhones happen to cost more than the iPhone 4 or an older model cell phone or land line. Similarly, no citizens regardless of income level or creditworthiness should be deprived of the right to shop for any product or service merely because they receive government assistance, regardless of the basis for the assistance. (e.g. LIHEAP, food stamps, welfare payments, Medicare, Social Security or government pension).

⁴ NYPSC Office of Consumer Services, Monthly Report on Consumer Complaint Activity, November 2012. Note, this is 256 complaints out of 2.6 million otherwise satisfied customer accounts, one of the lowest complaint rates among any industry. The level of initial and escalated ESCO complaints has been in this range since the Commission adopted the UBP Section 10 Marketing Standards in late 2008.

	<u>Nov. 2012</u>	<u>2011</u>	<u>2010</u>	<u>2009</u>	<u>2008</u>
Initial	1570	1356	891	1444	2238
Escalated	256	54	120	298	435

NYPSC Office of Consumer Services, Monthly Report on Consumer Complaint Activity, November 2012, December 2011, December 2010, and December 2009.

As the Commission undertakes the instant examination of the operation of the retail energy markets in New York State, the inquiry should begin with the determination issued nearly a decade ago in the Commission's Retail Policy Statement that the rates produced by competitive markets are per se just and reasonable.⁵ In the Commission's Retail Policy Statement it set forth its Vision Statement as follows,

The provision of safe, adequate, and reliable gas and electric service at just and reasonable prices is the primary goal. **Competitive markets, where feasible, are the preferred means of promoting efficient energy services, and are well suited to deliver just and reasonable prices, while also providing customers with the benefit of greater choice, value and innovation.** Regulatory involvement will be tailored to reflect the competitiveness of the market.⁶ (emphasis added).

The Commission also reiterated in the Retail Policy Statement its, "established values and principles" that were to be followed and adhered to in constructing solutions to facilitate competitive retail markets. These "established values and principles" include:

- 1. The benefits of competition, including increased customer choice, should be available to all customers as soon as possible.**
- 2. Safe and reliable energy supplies and services, provided in a manner that preserves environmental values, should be available to all New Yorkers on reasonable terms.**
- 3. Consumer protection issues, including those associated with Public Service Law §30 et seq. (the Home Energy Fair Practices Act (HEFPA)), and other public policy programs, including low-income assistance programs, must be addressed.**⁷ (emphasis added).

The Commission's Retail Policy Statement is a landmark decision not just for New York State, but other jurisdictions as well. The visionary path cut by the Commission

⁵ Case 00-M-0504, Statement of Policy on Further Steps Toward Competition in Retail Energy Markets, issued August 25, 2004. See also Case 05-M-0858, Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject To Modifications, issued December 22, 2005, note 8,

"Because competitive market forces are sufficient to restrain ESCO prices, there is no reason for us to embark in this proceeding upon a review of rates ESCOs charge or for us to determine that their rates are just and reasonable."

⁶ Id. at 18.

established measures to facilitate informed consumer shopping as well as supplier market entry and participation. These measures include and indeed highlight New York's model for utility Purchase of Receivables programs and its Customer Referral Programs. These measures have come to be seen as "best practices" that NEM has presented and endorsed and other states have implemented as a model to enhance market development. Likewise, the Retail Policy Statement, its reliance upon competitive markets to derive just and reasonable rates for energy consumers, and its identification of retail market enhancements, is the bedrock upon which New York's retail competitive marketplace has been built and upon which billions of dollars in commodity purchases and hedges are made to serve the full service energy requirements of millions of New Yorkers every day. All of the evidence suggests that competitive energy and related technology prices and services serve the public interest. No evidence (other than anecdotal demographics) or policy rationale has been proffered, vetted or analyzed to justify a change to this seminal work of the Commission.⁸

Given the developments that have transpired over the past decade to create an intensely competitive retail market with over one million shopping natural gas customer accounts⁹ and nearly 1.6 million shopping electric customer accounts¹⁰ and numerous participating suppliers, the vision and principles set forth in the Retail Policy Statement have attained even more credibility and significance. At this stage of market development, it is axiomatic that ALL consumers should have the right to shop for the energy products that they personally find to be of value. Likewise, ALL consumers are entitled to be marketed to and served under a uniform set of behavioral marketing standards for which

⁷ Id. at 4.

⁸ No quantitative data has been offered on the record of this proceeding that would permit stakeholders to perform a cost-benefit analysis of the proposed changes to Commission policy that have been suggested and would be required as a basis for the promulgation and adoption of a major rulemaking.

⁹ NYPSC Natural Gas Retail Access Migration Data for April 2012.

there are clear consequences for violations and that are subject to proper scrutiny and oversight.¹¹

Particularly compelling evidence of the efficacy of the Commission's UBP Marketing Standards, is the de minimis level of consumer complaints associated with ESCO service. As of November 2012, the Office of Consumer Services reported that there were 1,570 initial ESCO complaints and 256 escalated ESCO complaints.¹² In the context of the 2.6 million combined gas and electric customer accounts shopping to date and the millions of additional consumer contacts made in the course of marketing to and subsequently enrolling these consumers, these complaint levels reveal a stunningly high level of consumer satisfaction and protection.

NEM submits that New York's own public complaint statistics may represent one of the highest levels of consumer satisfaction in any industry. This Commission should not only be pleased with its twenty years of incredibly successful work, but do everything possible to protect and defend the intensely competitive retail energy marketplace it has created and which has become a model for other retail markets nationwide.

II. NEM Supports ESCO Pricing Transparency, Flexibility and Maximum Energy and Technology Pricing and Service Competition Coupled with Enhanced Utility Pricing Transparency

In view of the Commission's policy and practices that have supported the development of an intensely competitive retail market to date, a number of the suggestions in the Request for Comments would constitute a major reversal of State policy and the diminution of

¹⁰ NYPSC Electric Retail Access Migration Data for May 2012.

¹¹ See Case 98-M-1343, Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing, issued October 27, 2008, at 12, wherein the Commission decided, "we apply the [UBP Section 10] marketing standards to all ESCO marketing regardless of customer class."(emphasis added.)

¹² See note 4 *infra*. NYPSC Office of Consumer Services, Monthly Report on Consumer Complaint Activity, November 2012, December 2011, December 2010, and December 2009.

basic legal and economic rights of New York consumers. The alleged conduct that the series of questions posed by the Commission implies is in fact occurring appears to fit generally under the categories of “baiting and switching,” “price gouging” or outright fraud. These unsubstantiated implications are based on the assertion that there are entities in an otherwise intensely competitive marketplace that have come to serve New York residents who receive government assistance in numbers disproportionate to the general population of New York and at prices that are higher than a specific utility is charging as its default service rate.¹³

To the extent that fraudulent conduct is ongoing in the New York market or any market, NEM unequivocally supports and extends all of its resources to this and any Commission to take immediate and corrective enforcement actions to prevent fraudulent or otherwise illegal conduct from occurring or reoccurring. The Commission and all of the other stakeholders have relied on its authority to bring enforcement actions against bad actors in the marketplace. NEM, like the Commission, has zero tolerance for fraud or illegal conduct in the marketplace and strongly supports Commission efforts to weed out bad actors. Additionally, NEM urges the Commission not to dispose of, displace or otherwise devalue its longstanding and extremely successful retail energy market structure, policies and market standards based on limited anecdotal demographic observations of consumer behavior that have never been vetted or analyzed or enforcement actions initiated in an otherwise intensely competitive marketplace.

The retail marketplace should be relied upon to develop products to serve the interests of ALL consumers, regardless of income, demographics or creditworthiness. Government

¹³ It must be noted that, during the twenty years over which the New York energy market has been incrementally developed, a series of rate cases and general rulemakings as well as Policy Statements have

mandates and price controls inject distortions into the marketplace that can produce results that are contrary to both the public interest as well as other political and socially desirable goals. In its simplest most basic form, discrimination against low income customers in a fashion that forces them to consume the lowest cost energy supplies in the market place is clearly both contrary to the public interest and produces impacts to the consumption behavior of all citizens of all income levels in New York. NEM submits that forcing any segment of the population to, among other things, consume the lowest cost energy inherently forces another segment of the population to consume high cost energy in order to meet renewable energy mandates that have been superimposed on the marketplace for other valid public policy reasons.

Moreover, comparing a snapshot of utility default rates¹⁴ with supplier rates makes an inherently flawed comparison of rates even worse by misstating the value of competitive products. First, the snapshot would be comparing a variable utility rate with an ESCO rate that may be fixed or variable or include a value added service. Importantly, the desirability of fixed versus variable pricing products versus other products will change over time depending upon conditions in the marketplace (and consumers' individual preferences). In addition, utility rate structures do not lend themselves to easy, or any, comparison with ESCO pricing. **Utility delivery rates have yet to adequately unbundle the full retail costs of providing commodity-related services and continue to cross-subsidize the utilities' provision of default service.** The competitive ESCO

been adopted by the NYPSC that are relevant to the nature, amount and cross-subsidies that are inherent in any given utility default service rate.

¹⁴ On the date of this Request for Comments, the prices on the Power to Choose website showed numerous lower prices, variable rates, fixed price options, and over the months just prior and subsequent to the issuance of the Request for Comments, the utility default prices have fluctuated as much as 50%. This alone makes competitive pricing a challenge. **However, this combined with any sort of government-mandated price cap would potentially destroy nearly twenty years of otherwise outstanding public service and excellent public policy analysis, development and implementation by this Commission and be contrary to consumer privacy interests and basic consumer legal and economic rights.**

rates are therefore being compared to an artificially low, cross-subsidized utility default rate. The lack of utility versus ESCO product comparability coupled with utility rate subsidization not only impedes informed consumer decisions but actually misleads consumers in ways yet to be disclosed by New York utilities despite a decade of requests. However, the solution to that problem is to promote greater price transparency on the part of the utilities rate structure and to eliminate subsidies to the default service until or as they fully exit the commodity merchant function.¹⁵ The Commission already publicly and transparently posts ESCO pricing on the Power to Choose website. Yet, despite Commission Orders to do so, utilities have yet to investigate and appropriately disclose similar price transparency.¹⁶

III. NEM Urges and Supports the Commission’s Immediate and Effective Anti-Fraud Enforcement Actions

In view of the foregoing, NEM urges the Commission to continue its well-reasoned reliance on competitive markets to yield just and reasonable rates for ALL consumers. The type of governmental mandates and price controls suggested to be applied to low income consumers, or any other class of consumers for that matter, would be discriminatory, contrary to the public interest, and would subvert multiple state policies including, for example, satisfying renewable energy standards, avoiding demographic and

¹⁵ As recent events have made clear, utility investments and resources should be focused on reliably maintaining “design day” delivery infrastructure and to promote natural disaster recovery, cybersecurity, outage detection and prevention, and not on competitive commodity functions for which private capital is available to serve the public interest.

¹⁶ To date, there is no utility Schumer Box with the menu of services and prices in nonbypassable charges. It is important to note, NEM has consistently supported Commission efforts and investigations into the proper unbundling of competitive functions from nonbypassable utility charges and bundled default service rate computations. Utility delivery rates should be scrutinized and commodity-related costs should be unbundled and added to default rates to avoid misleading consumers, and to remove both existing inequities and cross subsidies. Until utilities fully exit competitive functions, utility rate design should ensure both market based pricing and full rate unbundling such that the utility commodity rates reflect the full costs of providing 24/7 no notice default service. Current utility provision of default service is and should be merely a transitional step to an ultimate market end state goal of providing a completely competitive retail energy market funded by private risk capital rather than captive ratepayer backed

income discrimination, and deprivation of basic rights including the privacy of all citizens, all of which increase the costs of serving all New York consumers. The concerns implied by the Commission should appropriately be addressed through far more formal regulatory processes, and it is NEM's position that there is a three prong approach, the fundamentals of which are already in place in the market:

- 1) **Delineation of a uniform set of behavioral standards for marketplace actors that are applicable to interactions with ALL consumers, with clear consequences for violations.** The Commission has already accomplished this in its UBP Section 10 Marketing Standards;
- 2) **Reliance upon market-based products to serve ALL consumers.** The creation of a separate governmentally price-controlled product to serve any separately designated class of consumers interjects unnecessary and improper market distortions, and both discriminates and invades the privacy of those consumers that it is purportedly meant to protect;
- 3) **Effective enforcement of behavioral standards is a strong deterrent against potential marketplace misconduct.** The Commission has the ability to take action against ESCOs for violations of UBP Section 10 Marketing Standards. NEM and its members encourage the Commission to adopt a zero tolerance policy for fraud and the adoption of reasonable and prudent standards for enforcement of non-fraudulent conduct that the Commission finds objectionable in the competitive marketplace.

NEM's responses to the specific questions asked by the Commission are set forth below:

Information for Current ESCO Customers

1. What are the benefits and costs of requiring that utilities develop and make available historic bill calculators through utility websites and/or smart phones to enable ESCO customers to compare their actual charges to what they would have paid if they were a full-service utility customer? How should such tools be designed so that they are easy to use, factually oriented, and produce accurate and useful information for ESCO customers?

NEM always supports increased price transparency in utility rate structures in New York and elsewhere. However, **given the current lack of transparency in utility rates, there are minimal to no benefits of using historic bill calculators, and same could actually be misleading and contrary to the public interest.** In addition, there would be significant costs and distortions caused by misinformation in the marketplace from a "utility bill calculator." To date, the Commission has yet to force disclosure of accurate

guarantees. NEM submits that this Commission should not assume that utility default service and default service rates are a proper basis upon which to base any future Commission retail energy market policy.

utility bill transparency. A utility historic bill calculator presumes that the utility pricing structure is the indicator against which all ESCO products should be measured. This is inherently misleading because the ESCO products can be of a different rate structure (variable, fixed, other rate structure), include other value-added services, or be premium green products. The “utility bill calculator” however only performs the simple math of whether “savings” has occurred as measured against an artificially understated utility default rate and devalues all other measures of consumer value including any innovation in ESCO rates or products.

In order to accomplish the goal of increased product innovation in the future, the solution is not to impose an overly prescriptive, and in fact, misleading regime that forces all ESCO products to be evaluated in this nature. Consumers that value price certainty for budgeting and other reasons should be permitted and encouraged to shop for those types of products. Consumers that value green choices should likewise have those options available to them. Consumers that value energy efficiency products, rewards programs, network marketing opportunities should have those options available as well. The issue to remember is that markets (utility and competitive) are subject to change continuously, prices do vary over time, sometimes dramatically, and post hoc reviews of the “savings” obtained from utility versus competitive products is wrong and misleading unless and until utilities have fully unbundled their rates and auction off their competitive functions into the marketplace for competitive bids while eliminating all subsidies provided to default service.

A longstanding Commission policy has been the publication of fully allocated embedded costs associated with each element of a utility bill. It is precisely this lack of transparency and legacy monopoly power, scale and scope permitted into an otherwise intensely competitive marketplace that undermines the public interest in competitive energy and technology prices to all consumers. As long as a major portion of residential and small businesses are not served by the competitive market but remain captive ratepayers, - generating profits, that may or may not be fully regulated profits, - utilities are incented to decrease regulated service and increase competitive unregulated profits.

To date, the public and the Commission have no such utility unbundled rate information easily understandable or available. Until consumers can read and understand a utility bill in a manner that alternative suppliers can price compete against each competitive function contained in that bill, consumers can and will end up buying products and services they do not want, do not need and may not be able to afford. As long as a utility is permitted to sell competitive products and services for monopoly prices and hide commodity charges in distribution rates, the public interest will not be well-served.

A utility can easily obfuscate the price components of fully bundled services and hide costs in various categories. A market cannot become truly efficient until published utility prices can be properly compared so that competing comparable products can be fashioned and priced to compete. This is true with or without an artificial, subsidized “utility rate calculator.”

There are vital pieces of information to which a consumer must have access to allow informed comparisons to occur. The basic information an educated consumer needs to

know includes their usage and their current applicable utility rate broken down by function. The current applicable utility rate should be conveyed in a transparent manner:

- 1) be fully unbundled on an embedded cost basis,
- 2) disclose whether and how utility hedging is reflected,
- 3) disclose how frequently the utility rate is subject to change,
- 4) disclose that the utility rate is subject to adjustment for true-ups, and
- 5) disclose what current rate adjustments are in effect.

If, contrary to NEM's recommendations, the Commission were to require a "utility historic bill calculator," NEM urges that the utility price calculator should be put out to bid, and that utilities once and for all disclose all of the legacy competitive components of current nonbypassable utility charges.

2. What are the benefits and costs of requiring that utilities include a line item on ESCO customer bills that identifies what the customer would have paid had supply been purchased from the utility? Precisely what information should be published on the bill so that it is most useful to customers?

The creation of a line item on ESCO customer bills that would identify what the customer would have paid had supply been purchased from the utility is both flawed and inherently misleading. This proposal assumes that savings (versus an artificially understated utility commodity rate) is the only value to be derived for consumers from the marketplace. It also assumes that the ESCO product and utility product are comparable products. The lack of comparability of ESCO and utility products is due to: 1) the nature of product as fixed or variable and how frequently it may be subject to change; 2) whether the ESCO product includes value-added products and services; 3) the utility rate includes adjustment riders that preclude a transparent comparison and also distort the timeframe over which the commodity costs are charged; and 4) utility delivery rates have not sufficiently unbundled the fully embedded retail commodity costs of default service and therefore the utility default, no notice last resort rate will be an artificially understated commodity rate.

3. What are the benefits and costs of requiring that utilities explain to payment-troubled ESCO customers contacting the utility, or provide to such customers in a subsequent mailing, what the customer would have paid had the energy supply been purchased from the utility, and the difference between that amount and what they were actually billed for energy supplied by the ESCO? What information should utilities provide to existing low-income and payment-troubled ESCO customers to assist them in making informed decisions and how should utilities provide that information?

The problems inherent in the ESCO versus utility bill comparison discussed in NEM's Response to Question 2 are equally applicable regardless of the consumer's income level. NEM notes that the Commission's ESCO Consumers Bill of Rights makes clear that the consumer is entitled to:

Disclosure, in simple and clear language, of the terms and conditions of the agreement between you and the ESCO including:

- price and all variable charges or fees;
- length of the agreement;
- terms for renewal of the agreement;
- cancellation process and any early termination fees, which are limited by law; and
- conditions, if any, under which the ESCO guarantees cost savings.

These terms and conditions form the benefit of the bargain that the consumer strikes with the ESCO. That these terms and conditions vary by ESCO and, most importantly, vary from the regulated utility default service rate, is exactly the result that energy competition was intended to produce - different product offerings to suit consumer's individual needs and preferences. **NEM urges the Commission not to reverse twenty years of outstanding public policy and adopt a market structure that would force products to be tied in any way to a regulated, volatile and extremely opaque bundled utility default service rate regardless of income, demographics or creditworthiness.**

(ESCO) Data for Potential Customers

4. What are the reasons why the Commission should, or should not, collect monthly data on prices charged by ESCOs to residential and small non-residential customers for all or some of their products? How would Commission publication of all or part of this data assist customers and/or impact retail competition? What level of data aggregation would be sufficient to adequately address the need to maintain the confidentiality of customer-specific data.

The Commission currently publishes ESCO price data on the Power to Choose website, which provides a comprehensive collection of the pricing options that are available to consumers. The Power to Choose website is an excellent resource for shopping consumers to see and compare the types of products and different suppliers that are making offers in the service territory in which they reside. Encouraging consumers to shop, without a monopoly in the competitive market, is the best way to always assure consumers are getting the best value all of the time.

However, any proposal to require a more extensive collection and publication of ESCO price data would be tantamount to treating ESCOs like regulated utilities. Simply stated, you cannot have a regulated deregulated market. You can have a carefully monitored competitive market, and with NEM's support, effective enforcement, self-regulation and adequate deterrents for poor market conduct and absolute bars to fraudulent or illegal conduct.

The balance that was struck in the Commission's 2006 Order on ESCO price reporting was to provide consumers with a snapshot of ESCO products so they would have a representative idea of the options available but that the reporting would not be so extensive or rigidly constructed so as to prevent ESCO innovation in the marketplace.¹⁷ NEM submits that the Commission's reasoning and result in its prior Orders are still

¹⁷ Cases 06-M-0674 and 98-M-1343, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms, issued November 8, 2006.

correct in the current intensely competitive marketplace and is precisely what has incited dozens of new companies to invest in new businesses and jobs in New York State.

The publication of the highly confidential and proprietary pricing data identified by the Commission would undermine the very marketplace it has labored twenty years to create. Utilities are guaranteed by captive ratepayers and the state Constitution a return of and on all prudently invested capital. However, ESCOs are not. ESCOs invest private capital to serve the public interest of all New York consumers with no guarantee of a return of or on anything. Indeed, there is no such thing as a captive ESCO ratepayer nor should there be. The most an ESCO can expect is some nominal termination fee in the event a consumer wishes to break a costly long-term, fixed price commodity hedge (which in many cases is waived as a courtesy to engender goodwill or more costly to unwind than the termination fee). Indeed, the entire structure of the competitive marketplace in New York is based on the efficiency and the financial and technical creativity, business acumen and risk management skills of numerous privately funded entities, each vying for a better value proposition to serve the public, and in so doing, the public interest.

In addition, its publication would cause substantial competitive injury to ESCOs and result in serious negative impacts on retail competition as it would reveal competitively sensitive information about ESCO business strategies and plans. Indeed, publication of price data on such a granular level as is proposed would provide information on competitive positioning of ESCOs that is intrinsic to each entity's business model and therefore highly proprietary and confidential.

NEM submits that the Commission has, in effect, answered the question of the permissible degree of granularity/aggregation of marketer information that should be subject to disclosure. The Commission makes available on its Power to Choose website an ESCO Directory that lists representative marketer offerings by zip code or as a function of customer type and utility service area. NEM submits that this methodology of disclosure of ESCO product pricing provides transparency to the competitive marketplace and should be continued in its current form. However, NEM submits and strongly urges the Commission to finally force the disclosure of comparably transparent pricing by utilities in the State of New York.

5. What are the advantages and disadvantages of requiring ESCOs to honor rates and terms posted on the Commission's "Power to Choose" website? What are the benefits and costs of requiring that ESCOs post all of their offerings on that website? What other enhancements to the site should be considered to increase its usefulness to consumers?

If the Commission has concerns about illegal behavior with respect to ESCO pricing, it has historically assured all stakeholders that it has the authority to investigate and implement appropriate enforcement actions. NEM urges the Commission not to eliminate one of the most creative elements of a competitive market, namely the art of pricing. The public interest is far better served to ensure that the public is educated and that the market can still meet consumer needs quickly and efficiently. Consumers need to understand that energy commodity is volatile and that market prices can change

frequently. The purpose of online posting and transparency should be to inform the public of actual purchase prices that are reasonably recent and updated. In addition, posting of many varied permutations of rates should be an option left to the competitive marketplace to determine if it helps educate or confuse consumers.

NEM submits that the Commission has struck the correct balance among competing public interests by requiring ESCOs to publish representative offers, thereby promoting a generalized understanding of what is available to the consumer in the marketplace.¹⁸ In addition, the consumer should be encouraged to contact the ESCO should it have any questions about its services and rates inasmuch as the ESCO can then efficiently clarify and explain any areas of potential confusion. Moreover, if the Commission is concerned about the ability to verify ESCO offers, there are other provisions within its regulations to investigate violations of the UBP Marketing Standards.

¹⁸ When the Commission decided to require ESCO price reporting to the Power to Choose website, it determined that the best approach was for ESCOs to publish their generally available offers. The Commission reasoned that,

While the price reporting requirements imposed on ESCOs should be sufficient to obtain the additional information needed to enhance price transparency and price discovery, compelling overly extensive or intrusive reporting could unnecessarily constrain the flexibility that is characteristic of competitive markets. An approach requiring ESCOs to submit snapshots of prices for their generally available offerings would assist customers in obtaining information about pricing alternatives while avoiding impediments to the proper functioning of the market. Therefore, ESCOs shall report, by the 5th day of each month, for each generally-available service they were offering to eligible residential customers, the price they would have charged for each service as of the 1st day of that month. Those prices will then be posted to Power Choose, along with the disclaimer that the prices are illustrative, to alert customers that the Web site is only the starting point for price discovery and that an actual offer to provide service must be obtained directly from an ESCO.

Although ESCOs must post prices for all of the services they offer that are generally available to eligible residential customers, an ESCO that offers only one service need report only the one price for that service. ESCOs may also continue to make offers to consumers at prices other than those reported, in response to emerging market opportunities they deem not adequately met through their generally available offers. Moreover, because reporting is limited to the price snapshots, ESCOs may promptly revise their offers after the snapshots are submitted, to adapt to changes in market conditions or opportunities. This approach properly balances consumers' interests in obtaining reasonably timely and accurate information and ESCOs' interests in retaining the flexibility to nimbly respond to evolving market conditions and opportunities. Cases 06-M-0674 and 98-M-1343, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms, issued November 8, 2006, at pages 3-4.

NEM submits that the Commission's reasoning behind requiring posting of generally available offers, namely to accomplish the goals of consumer education, price transparency and to retain ESCO pricing flexibility, remain equally valid and are well-served by retaining the current price reporting approach. NEM submits that by placing the emphasis on posting representative offers it promotes the goal of providing consumers with pricing transparency while also retaining a necessary level of flexibility for ESCOs to be able to respond to dynamically changing market conditions. **In other words, overly prescriptive price reporting requirements and the release of proprietary competitive data would have the negative consequence of limiting suppliers' ability to offer innovative services and rates in the market.** Moreover, it may be impossible to capture and express the value-added component of some competitive offerings.

To enhance the usefulness of the Power to Choose website, under the utility default service paradigm, if utility commodity pricing were to become more transparent and easily understandable to consumers, then the usefulness of the Power to Choose website would be significantly enhanced. (See Response to Question 1).

ESCO Referral Programs

6. What is the basis for continuing the existing ESCO Referral Programs in the service territories of Con Edison, Orange & Rockland, Central Hudson, and National Grid (upstate)? If these programs should continue, should they be modified, and how long should they be maintained?

The advantages of the ESCO Referral Program remain the same today as when first approved by this Commission. After having endorsed the use of ESCO Referral Programs, in conjunction with POR programs, in its 2004 Retail Policy Statement as a measure to jumpstart competition, the Commission subsequently reviewed whether there was an on-going need for ESCO Referral Programs in a Review of Retail Access Policies that was commenced in 2007. In its 2008 Order, the Commission determined that utilities with existing Referral Programs should continue them and those utilities that did not have a program should develop one.¹⁹ In addition, the implementation costs of the ConEd, O&R, Central Hudson and National Grid programs have already been paid. Therefore, the cost to continue them is de minimis.

The Commission in the instant proceeding is not disputing these fundamental values of the ESCO Referral Program but rather said,

Many ESCOs serving residential and/or small non-residential customers in New York participate in these programs, including ESCOs for which the Department has received a large number of complaints. Customers may be enticed by the introductory discount and then may remain customers of a particular ESCO because of inertia, paying prices substantially above what they would have been charged by the utility. (Order at 8).

The concern appears to be two things – consumer inertia and adequacy of consumer rate disclosures. As to the first concern, **if the Commission is concerned that participating ESCOs in the Referral Program have received an inordinate amount of complaints,**

¹⁹ The Commission reasoned that,

While residential and other small commercial customers have been increasingly attracted to the retail market, ample opportunity exists to increase ESCO penetration into that market. The ESCO Referral Program is one tool for encouraging residential and small commercial customers to try the retail market, by reducing the risks they perceive and thereby overcoming the inertia that induces them to remain with the distribution utility. In addition, these customers traditionally rely on the utility to learn about choosing a service provider, and the referral programs perform that function.

then it should investigate this conduct.²⁰ But it bears noting that: 1) ESCOs are likely operating legitimately within a Commission-sanctioned referral program; and 2) price gouging should not be possible so long as consumers are free to switch. There is no evidence of misconduct in this proceeding, merely an alleged disproportionate sample of one utility's low income consumers that have allegedly chosen energy products or services that someone has determined they cannot or should not afford.

With respect to the second concern, the adequacy of consumer rate disclosures, NEM submits that the two-option structure that is currently utilized by the utilities, either an ESCO Contract Option or an ESCO Service Option, appropriately addresses those concerns.²¹ The Commission previously held that both the ESCO Contract Option and ESCO Service Option adequately protect consumers.²² Under the ESCO Service Option, within five days of utility notice of enrollment, the ESCO will send the customer a contract for the post-introductory period. If the customer does not affirmatively agree to the contract, the customer will automatically revert to utility service at the end of the introductory period.

Under the ESCO Contract Option, within five days of utility notice of enrollment, the ESCO will provide the customer with a sales agreement governing both the introductory and post-introductory periods. The agreement takes effect unless rescinded by the customer within three days of receipt. The Commission required specific terms to be incorporated in a consumer contract under the ESCO Contract Option.²³

The ESCO Contract Option, while not requiring the consumer's affirmative consent, provides the consumer adequate notice of the products terms and conditions and fair

²⁰ See Case 05-M-0858, Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject To Modifications, issued December 22, 2005, note 10, explaining with respect to Referral Program violations,

“An ESCO that attempted to avoid implementing the principles could be expelled from an ESCO Referral Program, and its eligibility to supply commodity service in New York also could be withdrawn.”

²¹ ConEd, O&R and National Grid use the ESCO Contract Option, and Central Hudson uses the ESCO Service Option.

²² Case 05-M-0858, Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject To Modifications, issued December 22, 2005, at pages 33-34.

²³

1. The term of the sale agreement shall be month-to-month, allowing either party to cancel upon notice consistent with that term.
2. The price for electric commodity service shall be set under an "open price" provision allowing the ESCO to change its price upon 15 day's notice to the customer, with that notice provided at least 30 days prior to the customer's next scheduled meter read.
3. Notwithstanding any other provision of the contract, the customer shall be allowed to cancel the contract within the 15 day notice period of a price change from an ESCO.
4. The customer may cancel the contract without payment of a penalty or termination fee to the ESCO. If notice of cancellation is not given at least 15 days prior to the next scheduled meter reading, the customer may request a special meter reading, which is typically subject to a service charge.
5. The ESCO must give 30 days notice, provided 30 days before a meter read, before it may assign a customer's contract to another service provider.
6. Any change to the contract, other than to the open price provision, shall require the customer's affirmative consent, documented under one of the three methods specified in the Uniform Business Practices (telephonic, electronic or written).

Case 05-M-0858, Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject To Modifications, issued December 22, 2005, Appendix B, Attachment II.

opportunity to rescind the agreement. At the same time, it allows for streamlined and efficient implementation by both the utilities and the participating ESCOs. NEM submits that requiring additional regulatory burdens on either the marketer or consumer after the consumer has received adequate disclosure of the contracted for product and its terms and conditions is duplicative and undermines the value of the Referral Program as one that is easy to administer and participate in for both consumers and suppliers.

NEM urges that the Commission refrain from adding requirements that could unnecessarily complicate the process and restrict ESCO participation. All legitimate market participants are focused on protecting their consumers. NEM submits that the same inertia that held utility ratepayers captive customers for decades should not now be used to undermine the very program that has made New York a leader in energy restructuring across the nation.

Low Income Customers

7. What are the advantages and disadvantages of allowing customers participating in any state or federal energy assistance program, such as the Home Energy Assistance Program, or in any utility-sponsored affordability program, to obtain commodity service from an ESCO? How does the analysis change if the ESCO guarantees a price no higher than that charged by the utility?

Prohibiting low income consumers from exercising the choice for energy or any product or service violates basic market tenets, consumer privacy rights and may also potentially violate substantive due process/equal protection rights. All consumers, including low income consumers, benefit from the option of obtaining commodity from an ESCO for the same reason – choice. Choice about product types, rates, and value-added extras. The value of choice cannot be evaluated in a vacuum. It is a completely individualized determination on the part of the consumer as to what is the value of the choice and the benefit to be gained. Prohibiting any class of customers from exercising choice for energy or any other product or service should violate the basic tenets of the very market structure that this Commission has spent decades to create and improve. However, it also violates fundamental tenets of consumer privacy laws and basic rights guaranteed to every U.S. and New York citizen regardless of their income. And, compounding the problems created by redlining low income or state-assisted consumers, is the fact that truly competitive pricing actually helps this class of customer more than any others as energy price savings are regressive.²⁴

After decades of purchasing energy commodity from the utility monopoly, consumers now have a choice of energy providers. The task of educating all consumers about the value of this choice is an on-going obligation of all stakeholders. The Commission has developed a number of excellent tools in this regard including the ESCO Consumer Bill of Rights, the Power to Choose Website and the “Schumer Box” that appears on ESCO contracts. NEM likewise agrees that adequate and appropriate disclosures pursuant to UBP Section 10 are a prerequisite to informed consumer choice and the consummation of

²⁴ Indeed, with respect to the other industry subject to this Commission’s oversight, the telecommunications industry, there is no such income-related restriction on participation. Phone service, like energy, is intrinsically-related to our ability to function in the world. There is no regulatory restriction imposed on the types of phones or calling plans that a consumer can purchase. Nor should there be.

a consumer contract and enrollment. Moreover, if, after a Commission investigation, any person or entity is found to violate UBP marketing practices, that person or entity is and should be subject to the Commission's scrutiny and ultimately corrective actions.

Reimposing price controls on any class of consumers necessarily increases the costs of energy to all consumers and undermines other important public policy goals. Imposing a price cap on ESCO offerings to low income consumers (or any other consumers) would significantly undermine the value of choice, inject distortions into the marketplace and be contrary to multiple New York State laws and public policy goals.²⁵ If it is determined that certain social programs focused on low income consumers is a desirable goal, then the costs associated with that program ought to be separated from the cost of commodity and funded in a manner that does not result in price distortion.

To be clear, some ESCOs now offer products that meet or beat the utility default rate. But, all variable rate offerings, whether they be from a utility or an ESCO, are subject to changing market conditions. Sometimes the variable rates trend up and sometimes they trend down. Certain consumers value price savings from the utility default rate as the predominant feature in making a switch to an ESCO. However, other consumers may prefer a fixed rate because it provides them with budgetary certainty that they need, particularly if they are on a fixed income.

Comparing a variable utility rate with a fixed ESCO rate is not a proper comparison. It is like comparing a variable rate mortgage with a fixed rate mortgage. In addition, if a consumer wishes to purchase energy efficiency products or green products from a competitive provider, consistent with State policy goals, they should not be restricted from doing so merely because of their demographics, income bracket, creditworthiness or the fact that they receive state assistance.

A requirement that any class of consumers only be offered a state-mandated rate would undermine the efficient operation of the market as a whole and increase costs for all New York consumers. The intensely competitive retail energy market in New York has evolved and grown, in part, because of the ability of all suppliers to potentially market to and serve all consumers. Restricting the potential consumer base (aside from the difficulties and inequities of identifying which consumers would be eligible for which offers and the related increase in acquisition costs associated therewith) interferes with the economies of scale and scope that an ESCO would otherwise realize. New York has also adopted renewable portfolio standards and energy efficiency goals. Given that there is a premium associated with offering renewable and energy efficiency products, the corollary impact of mandating a price cap for low income consumers (or any class of consumer) is that these consumers will only be able to be served with the least efficient, least "green" power. The burden of meeting RPS requirements will then be disproportionately shifted to all other consumers thereby increasing the costs of energy and reducing the competitiveness of New York businesses statewide.

The Commission has previously found that competitive energy markets yield just and reasonable rates. It has also nurtured the development of the now intensely competitive retail markets with a series of progressive policies that have encouraged informed

²⁵ This is notwithstanding the impracticability or invasion of privacy rights of being forced to identify which consumers are, in fact, low income consumers.

consumer shopping and supplier entry and market participation. The fundamental tenets favoring retail competition remain unchanged. The Commission should not now overturn nearly twenty years of intensely scrutinized public policy decisions in favor of competitive market solutions because of perceived demographic imbalances. Rather, potential violations of the Commission's regulations and rules should be investigated and ESCO misconduct in the treatment of any consumer is already subject to Commission scrutiny.

Door-to-Door Marketing

8. What are the legal and policy reasons for permitting or prohibiting door-to-door marketing of electricity and/or natural gas to residential and/or small non-residential customers?

Door-to-door sales serve multiple important public interests. Door-to-door marketing is a long-established marketing channel. As is common knowledge, even cultural stereotype, it is not the act of door-to-door sales that is objectionable but the action of bad door-to-door salespeople that is objectionable. Having actual contact with a prospective customer is often the first opportunity to impress a customer with the quality of any given vendor of products or services. However, for NEM and some of its members, it is also the first opportunity that a worthy competitor can both educate and properly sign up a new customer.

Informed consumer consent through adequate disclosures is the cornerstone for all effective and legitimate marketing activities. NEM believes that door-to-door sales can be accomplished consistent with the goals of informed consent and consumer protection. Eliminating door-to-door sales is not necessary or appropriate to ensure adequate disclosure and informed consent. Indeed, merely suggesting that this market channel may be closed imposes both greater business risks and higher costs on all New York energy consumers.

Marketers are keenly interested in providing a superior level of service and satisfaction to all consumers. This is one of the many ways in which marketers offer added value. Marketers must be acutely aware of and focused on identifying and serving their customer needs. Indeed, a sustainable, long-term marketer's business plan can be founded upon nothing less. NEM notes that with the existence of federal and state "do not call" lists, the avenues available for marketers to effectively reach consumers - in terms of message and content - has been dramatically limited, and costs have increased, all to the detriment of the consuming public. Door-to-door sales remain a viable and effective method for contacting residential and small commercial customers. In fact, these types of in-person contacts are another venue for consumers to become educated about product offerings.

If after a Commission investigation, a person or entity is found to violate UBP marketing practices with respect to door-to-door sales, the person or entity is and should be subject to the Commission's enforcement action. The Commission should not eliminate a valid and useful sales channel for the entirety of consumers thereby increasing costs on the entire competitive marketplace. Fraud or otherwise illegal conduct can happen just as easily online (identity theft) as it can at the door (laptop theft). The Commission would

not and should not ban all online transactions because thousands of New York residents experienced identity theft. The rule of reason must apply when regulating otherwise legitimate business conduct. NEM is confident that the Commission will exercise such prudence and judgment in this proceeding.

9. What are the reasons why the Commission should continue to permit termination fees in sales contracts made between ESCOs and residential and small non-residential customers through the door-to-door marketing channel? Are there circumstances under which termination fees for such contracts would be appropriate (e.g., fixed-rate contracts), and what should an ESCO be required to demonstrate to be able to include termination fees for door-to-door marketing in its sales contract?

Termination fees are controlled by law. An initial point that bears noting is that the New York legislature passed General Business Law §349-d,²⁶ including a provision on the use of termination fees, just recently in 2010. The law sets forth a formula for calculating the maximum termination fee that may be assessed but does not ban its use. This, in itself, is strong evidence that the legislature recognized that there are important reasons to permit the use of termination fees.

Termination fees serve an important public purpose for marketers and consumers. Consumers often seek price certainty, and marketers must incur significant costs to hedge that price certainty. If a consumer cancels a fixed price contract prematurely, the marketer must “unwind” the hedge and is subject to substantial cost and market risk in doing so. Moreover, a potential ban on termination fees could encourage consumers to knowingly and willingly enter into contracts that they fully understand and then unfairly back out of the deal without consequence if they later find a lower priced offer. Meanwhile, the marketer that actively hedged to provide fixed price commodity service to that customer would unfairly bear the financial detriment of the customer’s decision.

Rather than eliminating termination fees, the Commission and marketers should ensure that consumers receive accurate and complete disclosure of the terms and conditions of the service that is being offered up-front, including the termination fee, if applicable. If a consumer is not made aware of the termination fee up front, then none should apply. The UBP currently requires ESCOs to accurately disclose the terms and conditions of a contract to a consumer, including early termination fees. So long as ESCOs have complied with these requirements, there should be no need to ban the use of termination fees, beyond the currently applicable three-day right of rescission. However, if an ESCO is not in compliance with the UBP marketing standards, the Commission should undertake enforcement proceedings for this misconduct.

²⁶ General Business Law § 349-d(d)(5) provides that,

No contract for provision of energy services by an ESCO shall require the customer to pay any fee for termination or early cancellation of a contract in excess of either (a) one hundred dollars for any contract with a remaining term of less than twelve months; (b) two hundred dollars for any contract with a remaining term of twelve months or more; or (c) twice the estimated bill for energy services for an average month. To charge a fee based on the estimated bill for energy services for an average month, an ESCO must have provided the customer, at the time that the contract is offered, with an estimate of the average monthly bill that customer would be charged for energy services and the fee that would be charged based on such estimate.

10. Are there other conditions or requirements that should be imposed on door-to-door marketing by ESCOs, such as a requirement that such marketers begin an interaction with a potential customer with a disclosure statement? An example of a possible disclosure statement is: “My name is _____. I represent _____. _____ can provide you with your electricity and/or natural gas. I do not work for or represent your utility.” How should such a requirement be enforced?

The UBP sets forth specific marketing standards applicable to “in-person contact with customers.”²⁷ This current requirement in the UBP follows quite closely with the proposed language for a possible disclosure statement in this question. It is likely that statements such as this are already standard market practice. If the specific disclosure statement language that is proposed here were to be included in the UBP, NEM is certain that its members would comply and the Commission could initiate enforcement actions against any entities not in compliance.

11. Should the Commission have the authority to preclude or limit an ESCO’s door-to-door marketing in the future in specific circumstances?

NEM has historically supported the Commission’s jurisdictional authority²⁸ to restructure the New York energy markets to permit energy and technology suppliers to compete for that portion of the utility bill that represents competitive products and services. NEM

²⁷ The UBP at Section 10.C.1.b. provides in relevant part that when an ESCO marketing representative is making an in-person contact that she must:

Identify the ESCO which they represent as an independent energy marketer, and identify him or her as a representative of that specific ESCO; explain that he or she does not represent the distribution utility; and, explain the purpose of the solicitation. During the sales presentation, the marketing representative must also state that if customer purchases natural gas and/or electricity from the ESCO, that the customer’s utility will continue to deliver their energy and will respond to any leaks or emergencies. This requirement may be fulfilled either (a) by an oral statement by the ESCO marketing representative, or (b) written material left by the ESCO marketing representative. Further, ESCOs that are affiliates of distribution utilities should not describe or disclose their relationship to the distribution utility unless such information is specifically requested by the customer.

²⁸ The Commission’s regulatory oversight that is applied to ESCOs is derived from its powers under Article 1, Section 5 of the Public Service Law which extends its “jurisdiction, supervision, powers and duties” to, “the manufacture, conveying, transportation, sale or distribution of gas (natural or manufactured or mixture of both) and electricity for light, heat or power, to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same.” The Commission interpreted this statutory authority underpinning its recent Order adopting UBP Section 10 Marketing Standards and remedial measures, (Case 98-M-0343, Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation’s Tariff Filing, issued October 27, 2008, at page 10); in its decision to impose price reporting requirements to ESCOs, (Case 06-M-0647, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms, issued November 8, 2006, at page 10); and in its initial Competitive Opportunities proceeding that established regulatory policies for the provision of retail energy services including ESCO licensing (Case 94-E-0952, Competitive Opportunities for Electric Service, Opinion 97-17 (issued November 18, 1997), at pages 29-35 (and affirming the decision that ESCOs are exempt from Article 4 regulation); Opinion 97-5 (issued May 19, 1997) at pages 30-31, 42-44; and Opinion 96-12 (issued May 20, 1996), at pages 67-69, 74-75.). This same history of jurisprudence encompasses Commission oversight of ESCO door-to-door marketing, the delineation of applicable door-to-door marketing standards as are currently set forth in UBP Section 10, and Commission enforcement activities against any ESCO found not to be in compliance with those requirements.

continues to support the Commission's authority to promote robust, reliable energy price, service and technology competition to all New York consumers, large and small, wealthy and poor. NEM also lends its full support and resources to assist the Commission to help monitor, identify and eliminate fraud, illegal or otherwise improper conduct in the retail energy marketplace.

However, it is inappropriate to prejudge a potential regulatory infraction before it occurs. It is also improper to unfairly penalize otherwise reputable businesses for technical regulatory infractions. When judging the degree of liability or punitive actions that should be taken in response to a given fact or fact pattern, the Commission should necessarily exercise the appropriate judgment and expertise that resides with its Staff and technical experts.

NEM has witnessed outstanding public service from both the Commission and its Staff. **Given 256 escalated complaints out of 2.6 million ESCO customer accounts, it is NEM's opinion that the competitive regulatory structure that all of the stakeholders have worked hard with the Commission to fashion is not only working but working extremely well.** Until there is actual evidence of wrongdoing, it is not proper to prejudge any otherwise legitimate business entity regardless of its channel to reach the consumer.

As noted above, fraud or otherwise illegal conduct can happen just as easily online as is the case with the current rash of identity theft. It can be argued that such online fraud is both harder to enforce and the perpetrators harder to identify. Yet, it should go without saying that the Commission would not ban all online transactions despite the fact that thousands, possibly tens of thousands, of New Yorkers have been the victim of identity theft. The rule of reason must apply when regulating otherwise legitimate business conduct. NEM is confident that the Commission will exercise such prudence and judgment in this proceeding.

ESCO Contracts

12. What are the advantages and disadvantages of modifying the Uniform Business Practices to require ESCOs to obtain affirmative consent from customers for contract renewals involving a change in price? What are the advantages and disadvantages of requiring ESCOs to obtain affirmative consent from customers for all contract renewals?

To be clear, the consumer is afforded multiple notices and layers of protection to ensure that they understand the nature and terms of the contract, including price and its renewal. For example, the original agreement that the consumer enters into makes clear the terms and conditions, including the length of the initial term, renewal terms – including that it is a fixed/variable rate contract and that the rate is subject to change upon renewal, and the contract termination process, etc. Second, depending upon the term of the contract, the consumer will receive a renewal notice informing them of the new rate. Additionally, the consumer is provided with a three-day window after receipt of their first billing statement under the renewed agreement in which they can end the contract without a termination fee.²⁹ As such, the consumer enters into the agreement with the knowledge of the contract terms. When the contract is up for renewal, they are

²⁹ UBP Section 5.B.4.d.

provided with explicit notice of the new rate. So they are fully apprised of the benefits of the bargain on multiple occasions. Particularly given the layers of protection described, NEM supports the Commission's 2010 Order adopting UBP Section 5.B.4.d. and the current regulatory price disclosure requirements.³⁰

These regulatory disclosure and notice requirements protect consumers and represent a significant compliance cost to all market participants. Requiring additional increases to those requirements is costly and unnecessary, especially where variable price products are used on a month-to-month basis. Accordingly, NEM reiterates its support for the Commission's current UBP Section 5.B.4.d. for all the reasons cited by the Commission when adopting same.

13. What are the advantages and disadvantages of requiring ESCOs to provide their rate methodology and related billing calculations to customers with variable rate contracts? What are the advantages and disadvantages of requiring all variable rate methodologies to be based on specified formulas tied to publicly available information, with the formulas varying by ESCO? If this is to be required, when and how should ESCOs provide this information?

This level of reporting of rate methodologies and rate formulas would effectively convert ESCOs into regulated utilities subject to the obligation to submit tariff filings. In other words, requiring each element of the ESCO rate to be filed and/or published would be an inappropriate, time-consuming and cumbersome regulatory burden similar to a utility tariff filing. This type of process is antithetical to the necessary ability of ESCOs to rapidly and efficiently design and offer products that provide value in response to ever-changing market conditions. Requiring ESCOs to disclose formulas for designing rates is equivalent to providing their competitors with highly confidential and proprietary competitive pricing strategies and business strategies. Notwithstanding that utility tariffs are inscrutable and difficult for even energy professionals to understand; imposing similar tariff-like filing regimes on to the lightly regulated competitive marketplace is inappropriate and would restrict innovation and responsiveness to consumer needs as well as undermine the very market conditions that ESCOs specialize in providing.

Purchase of Receivables

14. What would be the impact of requiring utilities to purchase receivables with recourse and thereby have ESCOs assume whole or partial responsibility for the uncollectibles of their customers? Should this be a requirement? What would be the impact of discontinuing POR without recourse for some ESCOs and how would those ESCOs be identified?

The Commission's initial decision to implement non-recourse POR was premised on a number of factors. One of those factors is the desirability of ESCOs being able to serve

³⁰ Case 98-M-1343, Order Implementing Chapter 416 of the Laws of 2010, Issued and effective December 17, 2010, at note 4. UBP Section 5.B.4.d. provides in relevant part that, "Regarding contract renewals, with the exception of a rate change, or an initial sales agreement that specifies that the agreement renews on a monthly basis with a rate methodology which was specified in the initial sales agreement, all other changes will be considered material and will require that the ESCO obtain the customer's express consent for renewal."

all consumers, regardless of income or credit status. Another factor was the cost savings to the industry to be realized by maximizing the efficient use of all of the New York utility legacy infrastructure including their back offices and collections functions, and avoiding duplicative costs on consumers and the competitive market.

There are eight legacy billing, metering and collection infrastructures serving the consumers of New York. Avoiding the added cost of fifty to one hundred new businesses duplicating these otherwise sunk costs already funded once by captive customers made no economic sense. It also avoided adding unnecessarily to energy costs while maximizing the effective useful life of these eight existing utility infrastructures. Repealing New York's longstanding and highly successful POR program would not only have serious negative impacts on the existing retail market but would necessarily require substantial additional regulatory analysis and rule changes.

Clearly, if ESCOs are effectively mandated to provide ESCO consolidated billing then the utilities should clearly be required to discount all of its charges by the same percentages and fees they currently collect from ESCOs for utility consolidated billing (and reverse all such costs out of rate base). Moreover, ESCOs must necessarily be empowered to disconnect service upon non-payment of ESCO consolidated bills in the same manner utilities currently have such power.

However, such changes to this incredibly successful and intensely competitive marketplace are both premature and there is no evidence to support the elimination of the New York POR model. To its credit, this Commission and this public policy not only started a major boom in the emerging energy services industry statewide but in every other state that adopted the New York model as well. As a national leader on this specific issue, NEM supports the Commission's continued long-term success in providing intensely competitive products and services to millions of consumer accounts with less than three hundred escalated complaints.

This Notice has not adduced any evidence to justify a change in POR policy. The utilities implementation of non-recourse POR programs has had a significant positive impact on the cost to serve consumers that may otherwise be uneconomic to serve in a competitive marketplace. POR has provided consumers with greater access to competitive offerings by significantly minimizing consumer income, demographics or credit ratings as an impediment in customer enrollment. It has also facilitated competitive entry by smaller, new ESCOs that would find the cost of recreating the utility back office and collection infrastructure to be prohibitive. These were and remain valid policy goals and outcomes on the part of the Commission. The Commission specifically rejected the notion that energy price and technology competition should be reserved only for the wealthiest and most creditworthy citizens of New York.

The well-functioning, stunningly successful non-recourse POR programs should not be eliminated as punishment for perceived misconduct. Rather, if any consumer, regardless of income or credit status, is being marketed to in a manner that violates the Commission rules, the Commission should investigate that misconduct and take appropriate action against the offending person or entity. NEM reiterates its longstanding support for ensuring proper conduct in the marketplace.

The Commission discussed the difference between non-recourse POR and POR with recourse in the Order Instituting Proceeding in this case. The Order states that, “When receivables are purchased without recourse, the value of the receivables being purchased is generally discounted based on historical net write off percentages, and the utility assumes full responsibility for collections from customers. The applicable discount is based on the payment history of all ESCO customers or all ESCO customers in a specific service class, and does not vary by ESCO.” (Order at 12). Contrary to the explanation in the Order, it is NEM’s understanding that the utilities’ POR discount rates are a function of the utilities’ systemwide (ESCO and utility commodity customers) bad debt rates. Moreover, a consumer’s “willingness and ability to pay” should not change or be impacted by its decision to receive ESCO versus utility commodity service.³¹ Therefore, the low income consumers served by ESCOs should not change the overall debt rate experienced by the utilities.

Other Proposals

15. What other modifications to existing retail market programs or practices, including modifications to the UBPs, should be considered, and why?”

As discussed in detail in response to Question 1, NEM recommends that the consumer understanding of energy choice would be enhanced through increased transparency of utility default service pricing and unbundling of utility rate structures.

Conclusion

NEM appreciates the opportunity to comment on this inquiry into the operation of the retail energy markets in New York State. The Commission has successfully developed and implemented retail access policies over the past twenty years that have resulted in record numbers of consumers shopping in an intensely competitive marketplace. New York has been the leader in identifying low cost, high impact changes that have transformed a historically highly regulated utility monopoly market into a marketplace that relies on competitive forces to drive price and product innovation. This is a noteworthy achievement. Now is not the time to retreat from the Commission’s nationally acclaimed and well-reasoned policies. Rather, NEM urges the Commission to remain steadfast in its reliance on market-based products to serve ALL consumers regardless of income, demographics or creditworthiness and strengthen the efficacy of its

³¹ Particularly given the utilities’ ability to terminate service for nonpayment of ESCO charges.

marketing standards, not devalue twenty years of exemplary public service and policy implementation.

Sincerely,

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