

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

- CASE 12-M-0476 - Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State.
- CASE 98-M-1343 - In the Matter of Retail Access Business Rules.
- CASE 06-M-0647 - In the Matter of Energy Service Company Price Reporting Requirements.

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INTRODUCTION

In 1994, the New York Public Service Commission (“PSC”) embraced electricity competition as preferable to regulated monopolies, stating:

Competition has generally resulted in lower prices, expanded customer choice and more rapid technological advance than the regulated monopoly situations that it has displaced. Where genuine competition has replaced regulated monopoly, customers have had little reason for regret.¹

As a result, vertically integrated electric utilities were required to divest generation plants and independent non-utility providers were permitted to purchase, and sell to retail customers, power from newly established wholesale markets. The electricity and gas supplied by these competitive energy service companies (“ESCOs”) would then be carried over the incumbent utilities’ transmission and distribution facilities to each customer’s home or business. Customers choosing to purchase energy from an ESCO would be billed by their utility for delivery services (including meter reading, billing and collection) and a separate portion of the bill would state the supply charges owed to the ESCO.²

To set out specific procedures governing how utilities and ESCOs deal with customers and each other, the PSC adopted the Uniform Business Practices (“UBP”) rules.³ To address chronic complaints about deceptive marketing practices used by some

¹ Case 94-E-0952 – In the Matter of Competitive Opportunities Regarding Electric Service, Op. 94-27, *Opinion and Order Regarding Proposed Principles To Guide The Transition To Competition*, at 5, issued Dec. 22, 1994.

² Most ESCOs do not bill their customers directly, but rely instead on the incumbent utilities’ billing systems.

³ See [http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/8dd2b96e91d7447e85257687006f3922/\\$FILE/UBP%20Manual%206-14-2012%20redlined%20final%202.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/8dd2b96e91d7447e85257687006f3922/$FILE/UBP%20Manual%206-14-2012%20redlined%20final%202.pdf).

ESCOs, the PSC amended the UBP in 2008 by adding Marketing Standards.⁴ These rules forbid deceptive and misleading practices, address marketer training, disclosures to consumers and dispute resolution. The UBP was amended again in 2010 to implement General Business Law § 349-d, mandating that ESCOs provide each prospective consumer a copy of the ESCO Consumer Bill of Rights.

At the PSC's October 18, 2012 session, Department of Public Service ("DPS") Staff ("Staff") reported that while retail competition appeared to be functioning well for industrial and large commercial customers, this was not the case for small business and residential customers. Staff reported that:

[I]t is very difficult for residential and small commercial customers to know and compare the prices for electricity and natural gas that are available from the utility and ESCOs. . . . Further, after selecting an ESCO, it's particularly difficult for most small customers to evaluate whether they obtain the expected benefits [bill savings or value added services] from that service.⁵

Staff's analysis of two utilities' prices compared with the five largest ESCOs' prices showed that while some ESCO bills were lower than those of the utilities, many more ESCO bills were higher, and some ESCO bills were much higher. Staff also expressed concern about some ESCO door-to-door marketers that are:

often perceived by customers to be high-pressure and may not be conducive to customers making an informed decision concerning their energy supply. Many of the marketing-related complaints or inquiries that the Department receives concern door-to-door practices, and include complaints about aggressive sales representatives, marketers

⁴ *Id.*, Section 10.

⁵ Report of Douglas Elfner, Director of the DPS Office of Consumer Policy, Oct. 18, 2012 Session transcript, at 41.

misrepresenting themselves as the utility, an unauthorized change of providers attributed to the account number that is obtained from the customer during door-to-door marketing. These complaints have been increasing recently.⁶

In response to Staff's report, the PSC issued a Notice seeking comments concerning various ESCO business and marketing practices as they relate to small business and residential customers, including in particular low-income customers.⁷ The Attorney General's Office's ("OAG") submits these initial comments in response to this Notice.

INTEREST OF THE ATTORNEY GENERAL

The Attorney General is the chief law enforcement officer in the State and is both obligated and empowered to protect the interests of the residents and businesses of New York. The Attorney General enforces consumer protection and antitrust laws, including laws that prohibit fraudulent or deceptive business practices. OAG has participated in numerous PSC proceedings advocating for residential and small business customers. In particular, OAG has long advocated for the PSC to remedy flaws in New York's retail energy markets and to enforce effective policies preventing ESCOs from deceiving New York consumers. OAG has a keen interest in Commission efforts to apply tougher regulatory requirements to ESCOs in order to protect consumers.

In the fifteen years since the PSC opened New York to retail competition, OAG has received and reviewed hundreds of consumer complaints about numerous ESCOs and has taken six enforcement actions against ESCOs found to have engaged in fraudulent

⁶ *Id.*, at 43-44.

⁷ Case 12-M-0476, *et al.*, *Notice Seeking Comments*, issued Oct. 19, 2012.

and illegal business practices. The OAG’s investigations have revealed widespread improper practices by ESCOs that have caused considerable consumer harm, including:

- Selling fixed-price contracts that the ESCO fails to honor;⁸
- Misrepresenting energy savings;⁹
- Impersonating utility employees;¹⁰
- Switching consumers’ providers without authorization;¹¹
- Failing to provide consumers notice of their three-day right to cancel;¹²
- Falsely assuring prospective customers they can cancel at any time while concealing its 12-month minimum contract term and then refusing customers’ cancellation requests;¹³
- Misrepresenting early termination provisions;¹⁴
- Failing to provide customers a copy of their contract;¹⁵
- Misrepresenting that consumers would receive fixed monthly bills;¹⁶

⁸ Iroquois Energy Management, LLC , see Case 98-M-1343, *supra*, *Order Allowing Discontinuance of Service*, issued Oct. 26, 2000.

⁹ In the Matter of Total Gas & Electric, Inc. (“Total”) Assurance of Discontinuance (“AOD”) (2001), *People v. ECONnergy Energy Co. (“ECONnergy”), N.Y. County Supreme Court Index No. 401384/02, Sept. 23, 2003*, In the Matter of U.S. Energy Savings (“USES”) AOD (2008), In the Matter of Columbia Utilities, LLC, and Columbia Utilities Power, LLC (“Columbia”) AOD (2011), AODs are available from the Office of the Attorney General upon request.

¹⁰ Total AOD, *People v. ECONnergy, supra*, USES 2008 & 2009 AODs, Columbia AOD.

¹¹ Total AOD, *People v. ECONnergy, supra*, Columbia AOD.

¹² Total AOD, *People v. ECONnergy, supra*,

¹³ Columbia AOD.

¹⁴ USES AODs, Columbia 2011 AOD,

¹⁵ *People v. ECONnergy, supra*,

- Failing to provide UBP-mandated contract disclosures to customers;¹⁷
- Failing to ensure that telemarketers comply with Do Not Call laws;¹⁸
- Failing to ensure that door-to-door marketers comply with home solicitation laws;¹⁹
- Improperly renewing fixed-price contracts without providing adequate advance notice;²⁰ and
- Providing false and misleading responses to PSC Consumer Services Division complaint investigators.²¹

As a result of these investigations, the OAG obtained one court order and six settlements providing for extensive injunctive relief, more than \$4,350,000 in restitution to defrauded consumers and \$800,000 in penalties and costs to the State. Unfortunately, the OAG's actions have not ended ESCO abuses. The OAG continues to receive consumer complaints regarding the deceptive marketing practices of numerous other ESCOs and is currently investigating several ESCOs for engaging in such practices. Yet, over the same time period and despite the growing evidence of improper practices by ESCOs, the PSC has not sanctioned any New York ESCO for marketing misconduct.

¹⁶ USES AOD (Consumers whose utility provides a monthly charge that is constant for eleven months were falsely promised that the ESCO would do the same for the commodity portion of their bills.) Some consumers desire fixed monthly bills for budget management, especially those who live on a fixed monthly income and have difficulty paying for uneven monthly utility charges.

¹⁷ Columbia AOD.

¹⁸ Columbia AOD.

¹⁹ Columbia AOD.

²⁰ In the Matter of ConEd Solutions, Inc. 2000 AOD (2000). AODs are available from the Office of the Attorney General upon request.

²¹ Columbia AOD.

SUMMARY OF COMMENTS

OAG supports the principle that effective market competition can provide important benefits to consumers, including lower prices, innovative alternatives and better service. However, it is not enough to simply allow competitors to solicit consumers and expect that the market will police itself. New York's retail choice experience has documented again and again that some ESCOs will use a host of deceptive practices to the detriment of consumers. As a result, countless New York consumers have had serious reasons to regret their reliance on ESCOs to supply their energy. At the same time, the dishonest minority of ESCOs will further tarnish the reputation of the industry, discouraging consumers from trusting offers received from any ESCO. Unless the Commission monitors the marketing activities of ESCOs, identifying those that treat consumers dishonestly and takes firm action to bar such dishonest ESCOs from continuing to do businesses in New York, retail choice will be more of a burden than a benefit to consumers. Only by vigorously enforcing honest marketing standards, will the PSC drive out dishonest ESCOs and thereby enable honest competitors to thrive and consumers to enjoy the benefits of competition.

Market transparency is also critical to establishing genuine competition. Without price transparency, consumers are unable to make informed choices about which provider is truly competitive, and unable to detect whether the ESCO's below-market introductory price remains competitive a few months after enrollment. Those consumers who prefer to hedge their energy purchases with fixed-price offers need to be able to compare the ESCO's price quote with the alternative rates charged by utilities and other ESCOs. Until the PSC reforms New York's retail choice market by establishing market

transparency, residential and small business customers will continue to be at the mercy of dishonest marketers who falsely promise bill savings. Only once accurate price comparison information is readily available will consumers be able to determine which ESCOs provide real, not phony, savings or other benefits. Transparency will allow ESCOs that are able to compete effectively to thrive, while forcing out of the market those that thus far have depended on deceptive practices to remain in business. Genuine competition requires price transparency to deliver the benefits to residential and small business customers that the PSC anticipated when restructuring was established.

In addition to vigorous enforcement and price transparency, the OAG recommends the following:

- The PSC should ensure that low income consumers receive the benefits of low income subsidies. ESCOs unwilling to guarantee competitive rates to low income consumers need not serve them.
- Door-to-door sales abuses have been a major source of complaints by New York consumers for many years. For too long, ESCOs have avoided responsibility for the tactics used by outside contractors by failing to monitor marketers' activities. As such, the PSC should prohibit ESCOs from engaging in door-to-door solicitations of residential and small business consumers. If door-to-door marketing is permitted, the PSC should require marketers to record the entire sales presentation, should regularly audit such recordings to ensure honest sales practices and should prohibit ESCOs from imposing early termination fees on consumers who were enrolled during a door-to-door solicitation.
- The PSC should level the playing field by removing all subsidies for ESCOs and discontinuing the ESCO referral program. After fifteen years, ESCOs should stand or fall on their own merits. Those ESCOs that assign their account receivables to the utilities should only do so with full recourse, insulating utility ratepayers and shareholders from ESCOs' uncollectible accounts.
- The PSC should require that ESCOs seeking to renew consumers' contracts provide advance written notice conspicuously alerting the consumer to any price changes or other material changes in terms and a comparison of the its prices with those of the utility during the contract period prior to renewal.

- The PSC should restrict early termination fees. The PSC should prohibit such fees where the ESCO offers a variable-rate contract and limit the fees for cancellation of fixed-price contracts so that consumers are not charged amounts that exceed the ESCO's actual loss.
- The PSC should take measures to eliminate unnecessary delays in a consumer's ability to cancel an ESCO contract so that consumers are not unnecessarily forced to continue paying for service from a provider no longer of their choosing.
- The PSC should regulate brokers acting as go-betweens for ESCOs and customers to ensure that consumers are treated honestly, and essential disclosures are provided.

COMMENTS

- 1. Utilities should be required to provide ESCO customers with online bill calculators that enable consumers to readily compare the current and past year's ESCO and utility pricing.**

The majority of residential and small business customers who choose to buy their electricity and/or natural gas from an alternative supplier do so solely to lower their energy bills. Promotions from ESCOs, as well as the PSC and utilities, have persuaded tens of thousands of consumers that they can save money by switching to an ESCO. Very few ESCOs serving mass markets offer any additional value²² other than the promise of a competitive price. However, given the complexity of utility rates and the lack of access to accurate historical rate information, consumers have difficulty determining whether their ESCO's rate is lower than that of their utility had they not made the switch. To compare their ESCO's monthly rate with that of the utility, consumers must obtain the utility's supply prices shown on another customer's bill, and

²² 85 ESCOs currently supply electricity to 1.3 million residential customers and 100 ESCOs supply natural gas to 800,000 consumers. Elfner Report, *supra*, at 39. Most consumers are offered only variable-rate supply contracts, without price hedging, green power, furnace maintenance or other non-monetary benefits.

understand which charges to examine for an accurate comparison. Often, ESCO customers call their utility customer service representatives for such guidance, increasing the utility's cost and the rates charged to all ratepayers, regardless of whether they participate in retail choice.²³ Other consumers call their ESCO customer service line to compare rates, and, as demonstrated by complaints to the OAG, some are given false or misleading responses in an effort to extend the time that they remain a customer of that ESCO.²⁴

Price transparency is necessary to allow genuine competition to exist and to deliver real consumer benefits. The PSC should enable consumers to access accurate unbiased information on the competitiveness, or lack thereof, of their ESCOs' prices. Central Hudson Gas & Electric and National Fuel Gas have successfully tested an online bill calculator tool that enables ESCO customers to compare rates in order to find out whether they are actually saving money or paying more for their energy as ESCO customers. In addition to comparing the most recent month's bill period, the tool compares the ESCO and utility prices for the previous year so that consumers can evaluate the longer-term competitiveness of their ESCO. These pilot programs have received very positive consumer responses.²⁵

²³ These added ESCO customer inquiries to utilities extend the hold time all customers must endure when calling about other billing or repair problems.

²⁴ For example, one ESCO OAG investigated told customers who questioned its pricing that the utility misinformed the consumer about its pricing, or blamed the high bills on the weather, without providing honest apples-to-apples price comparison data to demonstrate the savings promised at the time of enrollment.

²⁵ Elfner report to the Commission, *supra*, at 43.

The PSC should require all New York utilities to implement similar online tools for their respective consumers' use. Because not all residential and small business customers have Internet access, utilities should provide similar information by telephone, much as they currently do for customers wishing to check their account balance or recent payments. The cost of these price comparison tools should be borne by the ESCO industry.

With access to this impartial, accurate, price comparison data, ESCO residential and small business customers will less likely be misled by ESCO representatives who in the past have given false information to consumers who inquire about their supply charges. With genuine competition enabled by price transparency, ESCOs unable to compete on price or offer any other benefits of value will lose market share to ESCOs that deliver on their promises.

2. The PSC should modify its retail choice shopping website to require ESCOs to post current and historical prices to assist consumers in evaluating ESCO offers.

The PSC website page offering information about energy competition to consumers includes a hotlink to the Power To Choose website²⁶ where offers from ESCOs doing business in New York can be accessed. Consumers using this website need only identify their service class (residential or commercial), zip code and type of energy (electricity or natural gas) to obtain a list of ESCOs available to them. Each listed ESCO identifies whether they offer fixed-price or variable-price contracts, their offered

²⁶ See <http://www.newyorkpowertochoose.com/>.

rate, the minimum contract term, cancellation fee if any, a hotlink to a sample sales agreement, explanatory notes and a hotlink to the ESCO's website where consumers can obtain more detailed information. The Power To Choose website is intended to assist consumers in shopping for energy supply alternatives to their utility or current ESCO.

While the Power To Choose shopping website is useful to consumers, it has drawbacks that need to be addressed. First, the PSC should require all ESCOs that market to residential and small business customers to update their postings whenever the ESCOs change their offer prices or other terms. At present, ESCOs doing business in New York need only post their offering rates once monthly and are free to change their new customer offer rate and terms at will without updating the posting until the following month. Thus, the price quoted by any ESCO can become obsolete an hour after it is posted. This means that ESCOs that change their rates frequently (as may be necessary during period of wholesale price volatility) may not be giving consumers who access the Power To Choose website current and accurate price quotes.

In addition, because ESCOs offering variable rate contracts may include an introductory, discounted "teaser" rate available only for a month or two, it is insufficient for ESCOs to only tell customers the price they will be charged the first month they enroll with an ESCO. To ensure adequate transparency and to foster genuine competition, the PSC should require ESCOs to disclose on the Power To Choose website the non-discounted price they currently charge similar customers who have remained beyond the ESCO's introductory period. Such mandated disclosure will prevent dishonest ESCOs from deceiving consumers with short-term low-ball pricing gimmicks.

The Power To Choose website should also include data adequate for consumers to compare each ESCO's rates over time with those offered by the utilities. Because seasonal variations in wholesale supply may cause some ESCOs to be competitive with the utility in some months but not in others, to make informed market choices, consumers need access to apples-to-apples price data for an extended time . The website should display the most recent utility monthly average rate for residential and small business customers and a 12-month history of prices by both utilities and ESCOs. Thus, consumers wishing to find an ESCO most likely to save them money will be able to see which ESCOs have under-sold the local utility the most during the prior year. Only when armed with this data will consumers be able to determine which ESCO has been competitive over the long term. As for those consumers who elect to hedge their energy budget with a fixed-price contract, making this historical price comparison data available will enable a more meaningful assessment of the rates offered by ESCOs and the true value of such hedging options. Once the PSC mandates full price transparency, New York's retail choice market will begin to finally deliver the benefits of genuine competition.

- 3. Low income and payment-troubled consumers deserve to receive information that will help them understand whether they are saving money with an ESCO. In addition, ESCOs that market to low income consumers should be required to guarantee that their commodity prices never exceed those of the utility for such consumers.**

The Notice asks for comments directly related to the provision of ESCO services to low income and “payment-troubled” consumers,²⁷ including the kind of pricing information that should be provided to enable such consumers to make informed decisions and whether consumers participating in federal or state energy assistance programs or in any utility-sponsored affordability program should be permitted to obtain service from an ESCO.

The Commission’s focus on low income and payment-troubled customers is in recognition of long-established New York policy to enable all residents to maintain electricity and gas service, protecting their health, safety and general welfare. The Home Energy Fair Practices Act (“HEFPA”) recognizes that “continued provision of gas, electric and steam service to residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest.”²⁸ In the over thirty years since HEFPA became law, the PSC has striven to carry out this public policy in numerous ways, including making HEFPA’s utility customer protections applicable to residential ESCO customers.

²⁷ Low income consumers include households receiving federal Home Energy Assistance Program benefits or individual utility low income discount rates. Payment-troubled consumers include those with bill arrears or deferred payment agreements required by Public Service Law § 37.

²⁸ Public Service Law § 30. *See also* PSL §§ 32 (termination rules), 33-34 (multiple dwelling shut-offs), 35 (reconnection), 36 (deposits), 37 (deferred payments), 38 (budget plans), 40 (third-party notice before termination), etc.

In the pending Niagara Mohawk Power Corporation (“NiMo”) rate case,²⁹ the PSC has before it evidence that puts in stark terms the impact of uncompetitive ESCO pricing on low income consumers. Analysis of two years of ESCO customer bills by NiMo revealed that the monthly electric bills of 84.3% of all residential customers using an ESCO and 92.1% of the gas bills, charged rates higher than NiMo.³⁰ Only 15.7% of the ESCOs’ electric bills were lower than NiMo’s, and a mere 7.9% of the ESCO gas bills were competitive. The price disparity was even worse for low income customers who buy from ESCOs. Indeed, 91.5% of low income consumer’s electric and 93.4% of their gas bills were higher than NiMo’s rates while only 8.5% of such consumers’ electric and 6.6% of their gas bills were below NiMo’s rates.³¹ Aggregated, low income ESCO customers paid a net premium \$19.2 million more than what they would have paid NiMo for commodity supply service during this two-year period. On a per-bill basis, low income customers paid on average \$19.14 extra each month for participating in retail choice.

The NiMo billing data demonstrates that customers struggling to heat their homes and keep the lights on for their families’ safety have for the most part not reaped the expected savings from New York’s retail choice market.³² In fact, the higher prices paid

²⁹ Cases 12-E-0201 and 12-G-0202 – Proceeding on Motion of the Commission as to the rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a national Grid .

³⁰ Cases 12-E-0201 and 12-G-0202, *supra*, Aug. 31, 2012 testimony of William D. Yates, CPA for Public Utility Law Project, at 6. NiMo’s analysis examined 99% of the ESCO bills issued between August 2010 and July 2012. [Can we trust this analysis? Did we look at the methodology? Couldn’t it be biased?]

³¹ Low income customers were identified as those who qualified for NiMo’s discount or received Home Energy Assistance Program (“HEAP”) benefits. Approximately 1% of residential ESCO bills in NiMo’s region are billed directly by the ESCO and so were not included in NiMo’s bill analysis. *Id.* at 5-6.

by most low income ESCO consumers make it harder for these consumers to pay their utility bills and increase problems like arrears and utility shut-offs. To ensure that such vulnerable consumers learn the true value of their ESCO's pricing and counter years of misleading marketing by ESCOs, the PSC should direct utilities to inform low income and payment-troubled ESCO customers through billing disclosures what they were billed by the ESCO as compared to what the utility would have charged them. As utilities have for years promoted retail choice as a means to lower one's utility bill, the PSC should now require utilities to inform low income consumers that not all ESCOs provide bill savings, and to make utility-ESCO price comparison data available to these consumers.

In addition, given the limited subsidies provided by the federal HEAP grant and the inadequacy of utilities' low income customer subsidy programs to meet the full needs of low income families struggling to pay their utility bills, it makes no sense to subject these consumers to ESCOs that charge prices above those of the local utility, merely to adhere to a theoretical construct that competitive markets can produce lower prices. As shown by the analysis of ESCO bills in NiMo's territory, the stark reality today is the low-income subsidies benefit the ESCOs – not low income consumers.

The PSC should therefore require ESCOs to guarantee low income consumers that they will not pay the ESCO more than the customers would have paid to their utility for energy commodity service. Of course, ESCOs should be free to choose not to make such offers.³³ In this manner, the PSC can ensure that low income customers will benefit

³³ ESCOs will need the utility to identify which consumers are participants in the utility's low income rate or have used the HEAP program in the most recent heating season.

from ESCOs that offer prices competitive with the utilities, and protect such customers from ESCOs that do not.

4. The PSC should discontinue the ESCO Referral Program.

For over a decade, the PSC has encouraged consumers to try out ESCOs by authorizing utilities to promote ESCOs through bill inserts and other mailings that guarantee rates 7% below those charged by the utility for two months. Consumers who accept such offers are free to remain with the ESCO at its normal rates, choose another ESCO or return to the utility's supply service. Consumers who do not express a preference for a specific ESCO are assigned one by the utility in a competitively neutral manner. The referral program was intended to offer a risk-free trial to encourage consumers unfamiliar with electricity or gas competition to participate in retail choice and build up the new market.

Whatever the merits of the ESCO referral program when the industry was new, the program is no longer needed and in fact is misleading to consumers. Today consumers are constantly bombarded by direct mail, telemarketing, and door-to-door sales pitches from ESCOs. By guaranteeing 7% bill discounts for two introductory months, without regard to what prices the ESCO charge consumers after the introductory period expires, the materials promoting ESCOs give consumers the false expectation, reinforced by the fact that these promotions are sponsored by the PSC and the utilities, that consumers will continue to be billed by the ESCO at rates below the utility's rates after the trial period ends. With the lack of price transparency that has existed to date, consumers who are persuaded to experiment with an ESCO by accepting a referral may not be able to discover for several months whether the ESCO's post-discount rates are

significantly higher than the utility's rates. Even then it then can take as long as two more months after cancelling an ESCO contract before the consumer is switched back to the utility. During that period, the unwanted ESCO continues charging consumer its premium rates.

5. The PSC should ban door-to-door marketing by ESCOs. In the alternative, the PSC should require such solicitations to be recorded and audited and should otherwise strictly regulate such marketing

Ever since the PSC opened New York's retail market to ESCO competitors, consumers have been plagued by fraudulent door-to-door sales pitches. Many of the investigations conducted by OAG found that ESCOs were marketing to consumers at their homes in illegal and deceptive ways. DPS Staff reported that consumers' complaints about ESCO door-to-door marketers' deceptive practices are increasing.³⁴ These marketers have worn clothes that imitate utility worker uniforms or pretend to work for a utility to mislead consumers about their identity. Some ask to see consumer's utility bill under the guise of checking to see if the consumer is eligible for a special savings program, only to later use the consumers' utility account numbers to switch the consumer's account without consent. Others engage in high pressure and intimidating sales practices to persuade vulnerable consumers to switch providers without taking time to research the ESCO's offer or other available options. Some sales are made to children or other family members who are neither the utility customer nor his/her spouse. Although by law door-to-door marketers are required to deliver to prospective customers

³⁴ Elfner report, *supra*, at 44.

a written ESCO Consumer's Bill of Rights before enrollment³⁵ and must hand new customers a notice explaining the right to cancel the contract in three days,³⁶ these requirements are often ignored by the marketers. Likewise, requirements for door-to-door sales representatives to register with local governments in some parts of New York are frequently ignored. So long as these marketers' compensation is based on a commission for each sale they make, the incentive to cheat will persist. In too many instances, ESCOs delegate compliance with such laws to the contractors, and fail to monitor the activities of the sales team that is enrolling consumers for the ESCO.

Because of the chronic and growing incidence of abuses, the PSC should ban ESCOs from using door-to-door marketers. ESCOs still have a wide range of marketing options available to them that do not suffer from the type of abuses unique to door-to-door marketing.

In the alternative, the PSC should require ESCOs to closely monitor their marketers' sales activities, whether they are ESCO employees or so-called independent contractors. All door-to-door marketers should be required to carry a portable digital voice recorder (available for about \$30) to record the entire interaction between the marketer and the consumer. Consumers are familiar with businesses recording calls to customer service staff, and this is effectively no different. ESCOs should require that

³⁵ See GBL § 349-d and UBP Section 10.C.1(c): An ESCO marketing representative shall provide each prospective residential customer or customer that is marketed to via door to door marketing, with a copy of the ESCO Consumers Bill of Rights, before the marketer makes his or her sales presentation.

³⁶ See PPL Art. 10-A, § 425: The purpose of [the door-to-door sales act] is to afford consumers a "cooling-off" period to cancel contracts which are entered into as a result of high pressure door-to-door sales tactics. See also UBP Section 5.B.2: The ESCO shall provide residential customers the right to cancel a sales agreement within three business days after its receipt (cancellation period). See also UBP Section 10.B.4.

sales recordings be delivered with each marketer's sales reports to the ESCO. Any sale lacking a recording of the entire marketer-consumer conversation at the point of sale may not be processed by the ESCO. ESCOs should be required to regularly audit each salesperson's recordings in a statistically valid manner to ensure that no misrepresentations or other deceptive practices were used, and the sales recordings should be available to verify compliance. The PSC should require that whenever an ESCO's review uncovers improper sales practices by the marketer, the enrollment must be cancelled and no commission paid to that marketer. In addition, a comprehensive audit of the individual marketer's other sales should be mandated to determine if additional improper enrollments occurred.

Further, the Commission should review the ESCO's compliance with the marketing audit requirements upon receipt of consumer complaints. Any ESCO that fails to diligently enforce compliance with the UBP standards by their marketing representatives should be disciplined with sanctions, including penalties, restrictions on marketing activities, and where appropriate, be barred from participating in the New York retail energy market.³⁷

Given the long history of abusive door-to-door sales practices by ESCOs, the PSC should also bar ESCOs from enforcing early termination fee terms on sales obtained through door-to-door marketing if the consumer cancels within six months of enrollment or demonstrates that deceptive practices were used to make the sale.

³⁷ Similar sales recording and auditing requirements should apply to telephone sales, both inbound and outbound, so that ESCO marketers are not able to simply shift their fraudulent practices to telemarketing.

6. The PSC should require enhanced notice of price increases or other material term changes before ESCO contracts are renewed.

The UBP does not adequately address the obligations of ESCOs when they seek to renew consumer contracts at the end of the contract term.³⁸ The current rule permits an ESCO to raise the rate charged with a fixed-rate contract by mailing written notice of the new term to customers in advance, and unless the customer takes action to reject the new price offer, it will go into effect automatically without any explicit customer acceptance. The UBP does not require that material changes be disclosed clearly and conspicuously. Thus, ESCOs can bury new rate information or other changes in terms (like an increase in renewed contract or early termination fee) in renewal notices or contracts without violating the UBP as it is currently worded. Without modification of the UBP, consumers may not be adequately aware of the importance of the mailing they receive or that they are being asked to accept different price or other terms for their energy supply for an extended time period.

The PSC should revise the UBP to require that ESCOs take steps necessary to ensure that consumers realize the significance of the renewal notice being mailed. Thus, the front of the envelope containing the renewal offer should state in bold text “IMPORTANT: YOUR [*ESCO NAME*] CONTRACT RENEWAL OFFER IS ENCLOSED. THE PRICE YOU WILL PAY IS BEING CHANGED.” The renewal offer enclosed should highlight all material changes in the contract terms, in a manner similar to the disclosures that are required with the ESCO’s initial offer.³⁹ Renewal

³⁸ See UBP Section 5.B.4(d).

³⁹ See Customer Disclosure Statement requirements, UBP Section 5.B.3(b) and Attachment 4.

offers to consumers should also include a comparison of the ESCO's prices with those of the utility during the period of the expiring contract showing the total savings from or premium paid to the ESCO. ESCOs should also be required to enclose a pre-addressed return postcard or letter with checkboxes for the consumers to indicate their acceptance or rejection of the renewal offer.

7. Utility purchases of ESCO receivables should be with full recourse.

To qualify as independent competitors, ESCOs should bear the full risk of their customers' uncollectible accounts. After fifteen years in existence, ESCOs today have adequate financial resources to stand on their own. To effect a genuine competitive retail energy market, the PSC must provide that utility ratepayers and shareholders are not responsible for ESCO collections.⁴⁰

8. The PSC should vigorously enforce the UBP Marketing Standards.

To date, the PSC has adopted rules in the UBP that prohibit a range of deceptive practices, but so far these rules have been woefully ineffective due to the lack of meaningful enforcement. As evidenced by OAG's investigations and DPS Staff's findings, many ESCOs have engaged in unlawful and deceptive practices. Negative experience with some dishonest ESCOs makes consumers suspicious of all ESCOs, and

⁴⁰ Indeed, New York ESCOs do business in multiple states and some are affiliates of major corporations. *E.g.*, ConEd Solutions is an affiliate of Consolidated Edison Company of New York, the state's largest utility and Orange & Rockland Utilities, Inc.; American Power & Gas states that it serves over 2 million customers in states across the U.S.; Constellation Energy Power Choice, Inc. serves 1 million customers in multiple states and is owned by Exelon Corporation, an electricity generator with \$33 billion in annual revenues; Direct Energy Services, LLC serves customers in 14 states and 4 Canadian provinces; and IDT Energy, Inc. is a subsidiary of the telecommunications conglomerate IDT Corp., to name a few examples.

thus more difficult for legitimate companies to build a healthy reputation and for a competitive market to be established.

For marketing practice regulations to be effective, the PSC must also monitor ESCO practices and sanction ESCOs that violate the PSC's rules and state law. The PSC should adopt formal auditing protocols to be followed whenever clear indicators of abusive behavior becomes known (*e.g.*, through receipt of consumer complaints about ESCOs or from information supplied by OAG and other consumer protection entities). Where the PSC finds that a consumer has been switched to an ESCO without proper authorization, the ESCO should be required to refund to the consumer the difference between what they paid the ESCO for service and what they would have paid their prior provider until the consumer is switched back. Where compliance failures are found, independent monitoring of future marketing activities should be mandated. Those ESCOs found to cross the line of dishonest business practices must be disciplined with marketing restrictions, monetary penalties, and where appropriate, exclusion from doing business with New York customers.

9. Customer requests to cancel ESCO service should be promptly honored.

Currently, there is often a 45- to 60-day lag period (and sometimes even longer) between a consumer telling his/her ESCO to cancel service and the utility switching the consumer back to the utility (or to another ESCO).⁴¹ This delay occurs partly because some ESCOs fail to notify the utility of the customer's request to change providers in a timely manner. Also, utilities do not act on customers' requests to switch service until

⁴¹ Section 5.H of the UBP directs ESCOs to "process the customer's request to return to full utility service" within two days, and "transfers shall occur on the customer's next regularly scheduled meter reading dates. Some utilities only read residential customer meters every other month.

the customer's next regular meter reading is due. Consumers who are dissatisfied with the rates charged by an ESCO should be able to end service promptly, and not be compelled to continue paying an unwanted ESCO's rates for two or more months after cancellation. Where the consumer was victimized by an ESCO marketer's false or misleading promises of competitive prices, such prolonged monetary injury is particularly galling to consumers.

The PSC should require ESCOs to notify the utility of a customer's cancellation within one business day and to submit periodic reports documenting compliance with this standard. Those that fail to comply should be required to refund to the consumer the difference between what the ESCO charged and what the subsequent provider charged for the period of the delay. The PSC should also require utilities to effect customer cancellation orders more promptly. Where the consumer's next scheduled meter reading is more than a week after the utility's receipt of the customer's change order, the consumer should be informed that he/she can request a special reading be taken within a week at a reasonable fee (the amount to be determined by the PSC). This kind of special meter reading process is already afforded to non-ESCO utility customers who relocate and need to finalize their accounts. Furthermore, because utilities commonly allow customers to report their meter reading by postcard or telephone when the utility has been unable to read the meter in the routine course of business, similar options should be extended to ESCO customers who desire to accelerate the actual termination of the ESCO's service.

10. The PSC should regulate ESCO brokers.

In recent years, so-called ESCO brokers who represent multiple ESCOs have entered the New York retail choice marketplace. Typically, these brokers solicit consumers with the promise that the broker will evaluate consumers' energy needs and match them with the best available deal (usually claiming to find the lowest available ESCO offer). Consumers believe that such ESCO brokers are similar to independent insurance agents, who have formal connections to a group of insurance carriers the agent represents. These unlicensed entities do not disclose to consumers whether they have established agency relationships with multiple ESCOs, or the source of their compensation. While some brokers are compensated by the ESCO recommended to the consumer, others may be compensated with a portion of the consumer's monthly energy bill for the duration of the contract. Although either arrangement may be legitimate, the lack of disclosure is unfair to consumers.

When the UBP was drafted by the PSC, with industry input, such broker entities were unknown. Recently DPS Staff has solicited input from an industry collaborative to develop new requirements to regulate ESCO brokers. As these discussions have extended for many months, the PSC should not wait for this industry working group to reach a final recommendation. Instead, the PSC should use this notice and comment process to issue its own rules for brokers and prevent unwarranted further delay.

The PSC should expand its supervision to include brokers who purport to represent multiple ESCOs. These entities should be required to register with the DPS and provide basic information identifying the principals of the entity, its form of organization, contact information, history of business in other jurisdictions and any prior regulatory or

law enforcement sanctions. Unregistered businesses that engage in broker activities should be barred from doing business with New York consumers. Registered brokers should be required to certify that their employees and agents have been trained to comply with the UBP rules. Deceptive practices should be prohibited and the nature of the broker's compensation (is it paid by the ESCO or the customer, by fixed commission or as a surcharge on each unit consumed) disclosed to prospective customers before any ESCO contract can become valid. DPS Staff should also be authorized, where appropriate, to investigate an ESCO broker's activities to verify that the claims made in its solicitations are true.

11. The PSC should restrict early termination fees.

There are generally two types of contracts offered to consumers: fixed-rate offers for a specified term, and variable-rate offers that may be month-to-month or for some period of months. Because ESCOs offering fixed-price contracts can incur costs in arranging for supply to meet the anticipated needs of their customers over the life of their contract, an early termination fee that is proportionate to the risk incurred by the ESCO may be justified for cancellation of fixed rate contracts. However, some ESCOs charge excessive cancellation fees that amount to an unlawful penalty.⁴² Because residential and small business usage levels are far lower than for larger commercial and industrial customers, the economic harm to an ESCO from consumer cancellations is modest. Moreover, consumers lack the bargaining power and information to negotiate fair early termination fees with an ESCO. Therefore, the PSC should adopt standards limiting the

⁴² See, e.g., OAG investigation of USES where ESCO was required to reform its early termination fee.

size of early termination fees for residential and small business customers in fixed rate contracts.

On the other hand, the PSC should prohibit entirely an early termination fee of any amount in ESCO variable-rate contracts with residential or small business customers. Allowing the ESCOs to raise their rates without any limit while locking consumers into a contract with an early termination fee is highly inequitable.⁴³

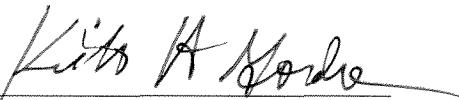
⁴³ Columbia Utilities, *e.g.*, bound consumers to a 12-month contract with no restrictions on the ESCO's variable-rate, although no ETF was involved. Other ESCOs have been known to greatly increase their variable-rate price a few month after enrollment. *See, e.g.*, Petition of George Jepsen, Attorney general for the State of Connecticut, and the Office of Consumer Counsel for an Investigation into the Manner and Operation of Energy Plus Holdings, LLC, filed July 26, 2012 (alleging bait and switch pricing scheme).

CONCLUSION

OAG appreciates this opportunity to make recommendations for reforming and improving the UBP and New York's energy retail choice market. The persistent use of deceptive practices by some ESCOs must be addressed by effective enforcement. The changes discussed will help the PSC establish genuine competition, level the playing field between utilities and ESCOs, bring the benefits of competition to New York consumers and protect consumers and legitimate ESCOs from further fraudulent behavior that has burdened the public.

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Respectfully submitted,
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