STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on February 23, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman, concurring

CASE 15-M-0127 – In the Matter of Eligibility Criteria for Energy Service Companies.

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.

ORDER RESETTING RETAIL ENERGY MARKETS AND ESTABLISHING FURTHER PROCESS

(Issued and Effective February 23, 2016)

BY THE COMMISSION:

INTRODUCTION

In this Order, the Commission applies its experience and insight obtained through monitoring and regulation of retail energy markets, as well as information in the record on the above-captioned dockets, and takes action to immediately address the unfair business practices currently found in the energy services industry and to ensure residential and small non-residential commercial customers (mass market customers) are receiving value from the retail energy markets.

Effective ten calendar days from the date of issuance of this order, energy service companies (ESCOs) may only enroll mass market customers and renew expiring agreements with

existing mass market customers based on contracts that guarantee savings in comparison to what the customer would have paid as a full service utility customer or provide at least 30% renewable electricity. Moreover, by this order the Commission clarifies the process by which ESCO eligibility can be revoked.

Further, this order sets forth the issues to be evaluated within 60 days of the date of this order to refine the retail energy markets for residential and small non-residential customers in New York State. Within this 60 day period, the Commission will consider new requirements applicable to entities providing energy to mass market customers.

While competitive retail energy markets continue to function well for large commercial and industrial customers, mass market customers have not seen comparable benefits. The vast majority of ESCOs serving these customers offer only commodity-related services. However, experience shows that, with regard to mass market customers, ESCOs cannot effectively compete with commodity prices offered by utilities. This may be for a number of reasons, including customer acquisition costs, the greater economies of scale of utilities, and the fact that utilities do not profit from the sale of energy commodity. In addition, the Department of Public Service (Department) continues to receive a large number of complaints from ESCO customers about unexpectedly high bills.

The Commission has repeatedly taken strong action in an effort to improve and strengthen these markets. However, based on performance of these markets, an immediate transition away from a retail market focused on commodity only without price protection, to a market in which competitive ESCOs provide services of demonstrated value to consumers, is warranted.

The Commission has begun to reform New York State's energy industry to, among other things, promote increased availability of energy efficiency services, increases in distributed generation, including deeper penetration of market based distributed and grid-based renewable energy resources, and enhancement of customer knowledge with tools that will support effective management of their total energy bill, and animate markets.[1] Development of markets in which vendors offer innovative services of value to consumers, and in which consumers can participate with confidence, is critically important to the success of the Reforming the Energy Vision (REV) initiative. Retail energy markets focused on commodity-only products, and in which ESCOs do not meet expectations of many customers, will thwart these objectives.

In support of the Commission's realignment of energy markets and the regulatory framework, this Order directs that the transformation of retail energy markets commence immediately.

BACKGROUND

Department of Public Service Staff (Staff) reports that, currently, approximately 200 ESCOs are deemed eligible to provide electricity and natural gas in New York State. Recognizing that development of strong, competitive retail

[1] Case 14-M-0101, Reforming the Energy Vision, Order Instituting Proceeding (issued April 25, 2014).

energy markets for mass market customers[2] is an on-going process, the Commission has periodically reviewed the performance of those markets, and assessed the need for changes to improve them.

The most recent comprehensive review concluded that competitive retail energy markets are providing substantial benefits to large commercial and industrial customers, including a wide range of energy-related value-added services that assist customers in managing their energy usage and bills.[3] In contrast, retail energy markets are not providing sufficient competition or innovation to properly serve mass market consumers. As a result, changes were made to enhance price transparency, including requiring utilities to implement an on-line tool for ESCO customers to compare their ESCO charges with

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[2] Mass market customers include residential and small non-residential customers. Regarding the definition of "small non-residential" customer, while the thresholds for electric demand billing vary somewhat by utility, the Commission will continue to define a small non-residential electric customer as a non-demand metered customer. Some parties commented that the proposed definition of small non-residential gas customer is too broad, and would include almost all non-residential gas customers. A few parties proposed usage threshold levels up to 1,000 MCFs. Great Eastern Energy proposed a threshold for the definition of small non-residential customer as at less than or equal to 750 dekatherms per year, which it states is approximately five times the energy usage for a single family residential home. Great Eastern Energy's proposal is adopted and small non-residential customers are defined as either a non-demand metered electric customer or a non-residential gas customer with annual gas consumption that does not exceed 750 dekatherms per year or the equivalent.

[3] Cases 12-M-0476 et al., Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets (issued February 25, 2014); Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015).

what they would have paid if commodity was obtained by the utility, and requiring ESCOs to file historic pricing information for certain products with the Department for subsequent publication. In addition, enhancements were made to strengthen rules and procedures applicable to ESCO marketing activities, including requiring all enrollments made through door-to-door and telephonic marketing to be verified by an independent third party.

Additional changes were made to further protect participants in utility low-income programs, by requiring ESCOs choosing to serve those customers to provide only products that guarantee savings in comparison with energy purchased from the utility or include an energy-related value-added component. A collaborative proceeding was initiated to resolve implementation issues associated with that requirement. That Staff-led collaborative filed its Report and comments on that report were recently received.[4]

Parties including the Public Utility Law Project of New York, Inc. (PULP), the City of New York (NYC), AARP, and the Utility Intervention Unit of the Department of State (UIU) recommend that the protections the Commission identified for low-income customers be extended to all residential customers, in view of the Commission's findings that retail energy markets for mass market customers are not providing sufficient innovation or competition. The New York State Attorney General filed a comment supporting that recommendation, as did the NYC Public Advocate in a reply comment filed jointly with PULP.

[4] Case 12-M-0476 et al., supra, Report of the Collaborative Regarding Protections for Low Income Customers of Energy Service Companies (filed November 5, 2015); Cases 12-M-0476 et al., supra, Notice Seeking Comments on Collaborative Report (issued December 1, 2015).

PULP submitted lengthy comments under Case 15-M-0127 asserting that the presence of ESCOs in the residential energy market has not been in the public interest; that the role of ESCOs in the marketplace should not be expanded at this time; and, that the Commission should conduct a further investigation of retail energy markets. PULP also recommends that the Commission take action to remove from the market all ESCOs whose rates are unjust and unreasonable; reform ESCO contracts to reshape the rates of ESCOs that are overcharging their customers; and, grant remedies to consumers overcharged by ESCOs.

UIU reiterates its support for action taken in Case 12-M-0476 to strengthen retail energy markets, and urges that remaining unresolved issues be addressed in that docket.[5] UIU also recommends that the Commission ensure that an expansion of the ESCO market, as contemplated by REV, does not harm residential customers, and that it determine the extent to which ESCO overcharges have led to residential arrears. UIU urges that action be taken against ESCOs which overcharge customers.

Several other initiatives are also relevant. Staff reviewed ESCO eligibility requirements in other states with restructured energy markets and found that several states have more stringent eligibility criteria for ESCOs than New York.[6]

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[5] Case 12-M-0476 et al., supra, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets, February 25, 2014 (February 2014 Order); Order Granting and Denying Petitions for Rehearing in Part, February 6, 2015 (February 2015 Order).

[6] Eligibility criteria in other states include requirements for: demonstrating risk management and customer service expertise; proving the financial integrity of the ESCO including posting of security or a bond; and, requiring disclosure of decisions in other states denying or limiting eligibility.

In an effort to promote high quality customer service, increase the range of energy-related services, and continue to increase the benefits obtained by customers from retail energy markets, on April 21, 2015, a Notice of Technical Conference was issued for the purpose of discussing and developing proposals for new eligibility criteria for ESCOs providing service in New York State.[7] The Technical Conference addressed ESCO eligibility requirements including ESCO expertise, the licensing regime, financial integrity of ESCOs, application requirements, and enhancement of PSC enforcement procedures.[8]

On May 12, 2015, Staff led a Technical Conference with interested parties to discuss ESCO eligibility criteria and changes to the Uniform Business Practices (UBP) that may be required to meet market developments and policy initiatives, including REV. ESCOs, utilities, and representatives of consumers actively participated in the conference. After taking into consideration the discussion shared at the Technical Conference, on July 28, 2015, a Staff Proposal was issued for public comment. The Staff Proposal presented proposed changes to the UBP premised upon adoption of new requirements stemming from the Technical Conference discussion. An additional Technical Conference regarding the Staff Proposal was held on August 20, 2015.

In addition, through the REV initiative, efforts are underway to expand the opportunities for vendors to develop and provide services to residential and small non-residential customers that will enhance their abilities to conserve and

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[7] Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Notice of Technical Conference (April 21, 2015).

[8] Case 15-M-0127 et al., supra, Addendum to April 21, 2015 Notice of Technical Conference (April 29, 2015).

manage energy use and bills and resource choices.[9] Further, an alternative energy procurement model is under consideration, Community Choice Aggregation, which may provide a wide range of benefits to customers, including more stable prices, clean energy generation, and deployment of distributed energy resources.[10] In addition, the time it takes consumers to change their energy supply provider has been reduced.[11]

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on August 12, 2015 [SAPA No. 15-M-0127SP1]. The time for submission of comments pursuant to the Notice expired on September 28, 2015. More than 20 parties submitted comments on the Staff Proposal, as identified in Appendix A.

DISCUSSION AND CONCLUSION

The issues presented in this proceeding are discussed below. Comments are addressed within the scope of the discussion.

LEGAL AUTHORITY

The Commission has broad legal authority to oversee ESCOs, pursuant to its jurisdiction in Articles 1 and 2 of the

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[9] Case 14-M-0101, supra, Order Adopting Regulatory Policy Framework and Implementation Plan (February 26, 2015) p.60-61.

[10] Case 14-M-0224, In the Matter of Enabling Community Choice Aggregation Programs; see also id. at 57, 87, 128, Appendix A at 56.

[11] Case 12-M-0476, et al., supra, Order Authorizing Accelerated Switching of Commodity Suppliers (issued December 15, 2014); Order Authorizing Accelerated Switching of Natural Gas Commodity Suppliers and Related Matters (issued December 23, 2015).

Public Service Law (PSL).[12] In addition, the Commission has authority over the tariffed rules and regulations of electric and gas distribution utilities, and has placed conditions on when the distribution utilities may allow ESCOs to use utility infrastructure to distribute electricity and natural gas to ESCO customers.[13] Therefore, the Commission has jurisdiction and authority to establish and modify the conditions under which ESCOs may offer electric and gas commodity service to customers.

ESCO eligibility requirements were originally created in Opinion 97-5,[14] and were reflected in the UBP in 2003.[15] In both instances, the authority under PSL §66(5) was used to direct the distribution utilities to incorporate the applicable requirements in their respective tariffs. Since the eligibility requirements were originally established, those criteria have been amended on a number of occasions. For example, in 2003, ESCOs were required to submit sample standard customer agreements in order to be deemed eligible to provide electricity

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[12] See PSL §5 (Commission's broad statutory grant of authority over the sale of natural gas and electricity); see also Case 98-M-1343, supra, 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 at 10 (issued October 27, 2008) (2008 Order); PSL §53 (stating Article 2 of the PSL applies to "any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers").

[13] PSL §66(5).

[14] Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services (issued May 19, 1997) (Opinion 97-5); Opinion and Order Deciding Petitions for Clarification and Rehearing (issued November 18, 1997) (Opinion 97-17).

[15] Case 98-M-1343, In the Matter of Retail Access Business Rules, Order Adopting Revised Uniform Business Practices (issued November 21, 2003).

and/or natural gas in New York.[16] In adopting ESCO eligibility requirements, the Commission stated that such requirements are necessary to ensure that ESCOs provide consumer protections, to give the public confidence in ESCOs, to ensure competency of providers, to protect system reliability and to oversee development of the market.[17] Eligibility requirements remain a helpful and necessary tool for promoting goals and policies.

The Commission again seeks to further restructure ESCO participation in the residential and small commercial retail electricity market. Based upon the record in the named proceedings, the Commission finds that additional restructuring is necessary to further protect consumers from high-pressure sales situations, deceptive marketing, slamming, and lack of expected savings. Comments received by parties demonstrate a public desire and need to further strengthen regulatory oversight to enhance consumer protections. The Commission confirms its authority to oversee ESCO participation in the residential and small commercial markets as further described below to ensure sufficient protection of the public interest and that the prices that consumers pay for those services are just and reasonable.

It should be noted that the Commission establishment of ESCO eligibility standards does not create a license under New York law. State Administrative Procedure Act (SAPA) §102(4) provides that a "'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law." Under the interpretation of PSL requirements adopted in Opinions 97-5 and 97-17, ESCOs are not required to obtain any certificate, permit

[16] Id.

[17] Opinion 97-5.

or any other approval required by law. Most notably, ESCOs have not been required to obtain a Certificate of Public Convenience and Necessity (CPC&N) under PSL §68. As such, SAPA §401 does not constrain Commission authority to amend, condition, restrict, or revoke ESCO eligibility.

Rather than grant licenses, the Commission has created utility tariffs governing ESCO access to utility distribution systems. Such tariffs for the provision of access are rules governed by the Commission's general ratemaking powers and the provisions governing adoption of "soft" rules as defined in SAPA §102(a)(ii). The Commission's eligibility requirements do not give rise to any vested rights on the part of ESCOs.[18] Instead, the ESCO's eligibility for access to utility distribution systems is as stated in the Commission UBP, as modified from time to time pursuant to SAPA rulemaking requirements, and reflected in utility distribution tariffs. As such, there is no taking in violation of due process in modifying ESCO eligibility requirements.[19] There is also no interference with existing

[18] Matter of General Motors Corp. v Pub. Serv. Comm'n, 95 A.D.2d 876, 877 (Third Dept. 1983) ("While customers of utilities are entitled to just and reasonable rates (Public Service Law, § 65 subd 1), they do not acquire any interest in the property of the utility or its funds [citation omitted]"). See Matter of Campo Corp. v. Feinberg, 279 A.D. 302, 306 (Third Dept. 1952) ("Petitioners have no vested rights, constitutional or statutory in the practice of submetering . . . . No case has been cited which holds that anyone has a statutory or common-law right to purchase electric current from a public utility and resell it, and to compel a utility to provide service for that purpose.")

[19] See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) ("[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking" (citations omitted)).

contracts as this Order requires changes to ESCO contracting practices only prospectively.

RESTRUCTURING THE ESCO MARKET

Currently, the vast majority of ESCOs in New York continue to offer only commodity resale to mass market customers, in competition with utilities. However, several aspects of the ESCO business model for mass market customers make it unlikely that ESCOs' commodity-only products can provide value to mass market customers. ESCOs must incur substantial costs to market to, and acquire customers, which utilities avoid. ESCOs also expect to make a profit on the sale of energy, whereas the Commission requires utilities to flow through energy commodity to end-users at cost, without any markup. In addition, some ESCOs may not possess the same level of capabilities in purchasing and hedging energy supply that utilities enjoy. As a result, mass market customers purchasing commodity only from ESCOs are unlikely to obtain value commensurate with the premium paid in excess of the cost that would be paid as a full service customer of the utility.

In light of these weaknesses of the predominant ESCO business model for mass market customers, customers continue to voice their dissatisfaction with ESCO service through complaints to the Department. Despite the Department's recent modifications to the UBP to strengthen and enhance customer protections through changes in the marketing standards and customer enrollment procedures that ESCOs and their representatives must follow, abuses continue. These abuses lead to customer complaints filed with the Department, which have been steadily increasing. The total number of initial complaints received by the Department against ESCOs in 2015 was

5,044.[20] Escalated complaints – complaints that are not initially resolved by the ESCO – numbered 1076 in 2015. The majority of the escalated complaints fell into three categories: 1) questionable marketing practices (30%); 2) dissatisfaction with the prices charged - no savings realized (25%); and 3) slamming - enrollment without authorization (22%). Based on the record in these proceedings and experiences in more informal consumer interactions at Public Hearings on many matters, the Commission is also cognizant of the fact that many more customers may not be satisfied with their services, but choose not to formally complain.

The Commission has repeatedly taken strong action in an effort to improve and strengthen these markets. However, based on the continued performance of these markets, the Commission concludes that, with the exceptions identified below, it is not in the public interest for ESCOs to provide commodity supply only products for mass market customers. An immediate transition away from a retail market focused on commodity resale, to a market in which competitive energy service providers provide guaranteed savings to consumers or further clean energy goals, is warranted.

[20] A summary of the complaint process is provided: Upon receipt of a consumer complaint the Department forwards the complaint to the provider for resolution. The service provider is required to contact the consumer by close of business the following day and must respond to the Department within 14 calendar days. If the initial complaint is not resolved by the service provider, the customer can request that the complaint be escalated. When a complaint is escalated, the provider is required to report to the Department regarding the resolution of the complaint. Upon completion of its investigation, the Department sends a written resolution to the consumer.

Effective ten calendar days from the date of this Order, ESCOs shall only enroll new mass market customers[21] or renew existing mass market customers in gas or electric service if at least one of the following two conditions is met: (1) enrollment where the contract guarantees that the customer will pay no more than were the customer a full-service customer of the utility; or (2) enrollment based on a contract for an electricity product derived from at least 30% renewable sources.[22] In addition, ESCOs must receive affirmative consent from a mass market customer prior to renewing that customer from a fixed rate or guaranteed savings contract into a contract that provides renewable energy but does not guarantee savings. Finally, ESCOs that currently serve mass market customers through month-to-month variable rate agreements must enroll those customers in a compliant product at the end of the current billing cycle or return the customers to utility supply service. These actions are consistent with recommendations of parties representing consumers, including PULP, NYC, the NYC Public Advocate, UIU, and the New York State Attorney General.

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[21] Mass market customers are residential customers or small non-residential customers as described in footnote 2, supra.

[22] ESCO service as part of Community Choice Aggregation (CCA) programs is distinct from other forms of mass market customer service, as they evince characteristics more closely aligned with industrial and large commercial customers, and will be dealt with in the appropriate proceeding. Case 14-M-0224, Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs. For that reason, the Pilot CCA program undertaken by Sustainable Westchester shall be exempt from the terms of this Order. Case 14-M-0564, Petition of Sustainable Westchester for Expedited Approval for the Implementation of a Pilot Community Choice Aggregation Program Within the County of Westchester. In addition, government aggregation programs such as the Public Assistance Cooperative for Energy (PACE) program are exempt from the terms of this Order.

Regarding the guaranteed savings requirement, the ESCO must guarantee that the customer will pay no more, on an annual basis, than the customer would have paid as a full service customer of the utility. The ESCO may ensure that this requirement is met by refunding at the end of each year any customers charged more than they would have paid as a full service customer of the utility for that year. For customers who are only a customer of an ESCO for a portion of the year, the ESCO must guarantee that the customer will pay no more than he or she would have paid as a full service utility customer for the period in which the ESCO provided the customer's energy.

With respect to the renewable energy requirement, ESCOs that offered green products including at least 30% renewable energy prior to the date of this Order may continue to offer and enroll mass market customers in that product at this time.

Any new green product offerings by ESCOs after the date of this Order must guarantee that at least 30% of the energy provided to the customer will be generated by renewable sources, eligible under the Commission's Environmental Disclosure Labeling Program (EDP) rules, to ensure that these products contribute to greater renewable energy achievement. Pursuant to the EDP, energy labels are based on the environmental attributes of the energy purchased by the load serving entity (LSE) and are not affected by the separate purchase of Renewable Energy Certificates (RECs). Efforts are now underway which may substantially change the EDP rules, including concerning treatment of RECs.[23] At this time, to meet

[23] Case 15-E-0696, In the Matter of the Environmental Disclosure Labeling Program, Notice Instituting Proceeding and Soliciting Comments on Environmental Disclosure Labeling Program (issued December 10, 2015).

the requirement, an ESCO must guarantee that at least 30% of the energy provided to the customer will be generated by deliverable renewable energy resources, including biomass, biogas, hydropower, solar energy, and wind energy, and will include renewable attributes. To the extent that any changes are made to the EDP rules, accompanying changes to this requirement will be considered.

For each ESCO that intends to enroll new customers or renew existing customers while the requirements described above are in effect, the Chief Executive Officer (CEO) or equivalent corporate officer of the ESCO must make a filing within ten calendar days of the date of this Order certifying that any enrollments will comply with the conditions of this Order. By submitting an EDI transaction to enroll a customer, the ESCO confirms that the enrollment complies with the requirements in this Order. Department Staff will audit ESCO records to ensure that enrollments contain either guaranteed cost savings or a qualifying green energy component.

ENHANCEMENT OF ENFORCEMENT

Consumer confidence in retail energy markets, as well as development of competitive markets, will be enhanced by improved ESCO compliance with Commission rules, as well as provision of service which meets customer expectations. Several ways to achieve these goals were considered in the ESCO Eligibility proceeding, and are adopted herein with modifications to protect existing ESCO customers. The Commission also anticipates applying these requirements in restructured retail energy markets.

Modifying the "Cure Period"

The UBP establishes Department procedures for review of an ESCO's compliance with the UBP, including notification of failure to comply and requesting in writing that the ESCO take

corrective action within a specified cure period. Staff proposes to modify the UBP to forego the notice and cure period process in situations where an ESCO has multiple UBP violations within a three-year time period, or where an ESCO has committed egregious acts specified in the UBP, such as a security breach affecting customer-specific information of all or most customers. In those circumstances, Staff's proposal removes the current requirement that Staff issue a Notice of Apparent Failure followed by a cure period. In these situations, the Commission has the power to issue an Order to Show Cause demanding the ESCO present a case to maintain its eligibility without prior Staff notice to the ESCO.

PULP asserts that there is no basis for a cure period prior to undertaking enforcement actions in any circumstances. PULP states it may be appropriate to provide due process procedures, such as written notice of violation and an opportunity to respond, but allowing an ESCO to "cure" an unfair, deceptive, or noncompliant practice is neither reasonable nor necessary.

RESA and several ESCOs seek clarification of several terms used in the Staff Proposal. RESA states the Proposal does not identify how the Commission will determine if a prior failure or non-compliance has occurred, nor does it specify from what point the "three-year" period is measured. ETS believes that a security breach should not be considered an "egregious act" which would obviate the need to provide the ESCO with a cure period.

Direct Energy seeks several modifications of the proposed language, including eliminating the cure period requirement only when there have been multiple UBP violations within a specified time period and an ESCO has committed egregious acts. Additionally, Direct Energy suggests that the

Commission should not impose consequences in situations where the company has already corrected the issue.

ESCOs including Direct Energy and NRG seek clarification of several terms used in staff's proposal, including "failures," "multiple UBP violations within a specified time period," and "certain egregious acts" used in the Staff Proposal.

Based upon the record before us, Staff's proposal provides improvements, but falls short of addressing the issues evidenced within the market. The proposal significantly reduces the opportunity for repetitious bad behavior through the modification to the cure period. However, the Commission expects, and customers should be assured, that ESCOs will comply with the UBP at all times and ESCOs should face appropriate penalties for any violations, as PULP recommends. The Commission will not wait for patterns or repetitious behavior to take appropriate action in response to UBP violations.

The Commission will proceed directly with an Order to Show Cause for eligibility revocation, or any less severe action it determines is appropriate, against any ESCO that has a single UBP violation. The Show Cause approach meets all relevant due process requirements. Contrary to Direct Energy's suggestion that consequences not be imposed if an ESCO has corrected an issue, the appropriateness of consequences is best addressed after a case-specific review of the relevant facts.

This modification to the Staff Proposal will facilitate timely and forceful Commission action against entities which violate the rules to the detriment of consumers and market development.

Consequences for a Material Pattern of High Complaints

The UBP specifies requirements which, if not satisfied, may subject the ESCO to Commission-imposed

consequences. Staff proposes that the UBP be revised to explicitly detail the Commission's authority to impose consequences on ESCOs where there is a material pattern of consumer complaints regarding matters under the ESCO's control, such as marketing practices, even where those complaints do not reveal any violations of the UBP. Exelon, NRG, UGIES, and RESA all are supportive of this initiative, although NRG and RESA request that the Commission define the term "material pattern of consumer complaints."

As used in this context, a material pattern of complaints means a continuing volume of the same category of complaints, such as slamming or deceptive marketing. The Commission has broad discretion to determine when the volume and pattern of complaints requires action, and that the UBP specifies that in determining the consequences for non-compliance with the UBP, the nature, circumstances and gravity of the non-compliance, as well as the ESCO's history of previous violations, may be considered.[24]

This modification of the UBP will enable prompt action against ESCOs which, as demonstrated by the volume of complaints received by the Department, do not meet customer expectations. ESCOs which do not meet customer expectations reduce consumer confidence in retail energy markets, and may impede market development.

Consequences for Violations of Other Sales or Marketing Regulations

The state and federal governments, as well many local governments, have created a number of generally applicable sales and marketing rules through statutes and regulations. These rules may include restrictions related to door-to-door

[24] Case 98-M-1343, supra, Uniform Business Practices, Section 2 (D) (6).

solicitation, such as requirements that "No Solicitation" signs are respected. While any ESCO that violates these regulations may already face sanctions from the governing body that established them, it is appropriate for the Commission to also take notice of such violations to ensure that ESCOs are held to appropriately high standards in meeting consumer protections. For that reason, this Order modifies the UBP to explicitly state that the Commission may impose consequences on ESCOs that violate any state, federal, or local law, rule, or regulation. Moreover, that modification to the UBP shall also cover instances even where there is not a companion federal, state or local law, rule or regulation prohibiting such marketing, if there is evidence that the mass market customer has posted such a sign and the ESCO proceeded with marketing at the door of the establishment. This "do not knock" rule is reasonable as customers in their premises should have the same freedom from unwarranted intrusion as those that have enlisted in the "do not call" database the Department of State manages.

ISSUES FOR CONSIDERATION

During the sixty-day period described above, the Commission, based upon the existing record in these proceedings, together with additional input from parties, will consider what long-term conditions should be implemented for ESCO eligibility and conditions of service to mass market customers. A notice will be issued that solicits comment on, at a minimum, the following issues:

- Under what conditions ESCOs may enroll mass market customers on a going forward basis, including whether the requirements above should be retained and what other specific energy-related services, where bundled with commodity service, demonstrate sufficient value to customers;
- Whether the three-day period for customer rescission of ESCO contracts should be extended or modified;

- Whether and under what circumstances ESCOs should be required to post performance bonds or other forms of demonstrated financial capability; and
- What penalties may apply to ESCOs that violate the UBP or other Commission Orders or provisions of the PSL (for example, the application of PSL §§ 25 and 25-a).

The Commission orders:

1. Consistent with the body of the Order and subject to the exceptions described therein, effective ten calendar days from the date of this Order, energy service companies (ESCOs) shall only enroll new residential or small non-residential customers (mass market customers) or renew existing mass market customers in gas or electric service if at least one of the following two conditions is met: (1) enrollment where the contract guarantees that the customer will pay no more than were the customer a full-service customer of the utility; or (2) enrollment based on a contract for an electricity product derived from at least 30% renewable sources.

2. ESCOs must receive affirmative consent from a mass market customer prior to renewing that customer from a fixed rate or guaranteed savings contract into a contract that provides renewable energy but does not guarantee savings.

3. For each ESCO that intends to enroll new mass market customers or renew existing mass market customers once Ordering Clause No. 1 has gone into effect, the Chief Executive Officer (CEO) or equivalent corporate officer of the ESCO must make a filing by 4:00pm on the tenth calendar days after the date of this Order certifying that any enrollments will comply with the conditions of this Order.

4. Revisions to the Uniform Business Practices are adopted in accordance with the discussion in the body of this Order. Subsection 2.D.5.l is relettered 2.D.5.n; a new

subsection 2.D.5.l is added reading "a material pattern of consumer complaints on matters within the ESCO's control;" and a new subsection 2.D.5.m is added reading "failure to comply with any federal, state, or local laws, rules, or regulations related to sales or marketing or 'No Solicitation' signage on the premises; or." In addition, a subsection 2.D.6.1 is modified to state "Either (a) notify the ESCO in writing of its failure to comply and request that the ESCO take appropriate corrective action or provide remedies within the directed cure period, which will be based on a reasonable amount of time given the nature of the issue to be cured; or (b) order that the ESCO show cause why a consequence should not be imposed." and subsection 2.D.6.2 is modified to state "The Commission may impose the consequences listed in subparagraph b of this paragraph if (a) ESCO fails to take corrective actions or provide remedies within the cure period; or (b) the Commission determines that the incident or incidents of non-compliance are substantiated and the consequence is appropriate." ESCOs eligible to operate in New York are directed to comply with the revised Uniform Business Practices.

5. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to file tariff amendments or addenda to incorporate or reflect in their tariffs the Uniform Business Practices revisions approved in Ordering Clause No. 4. The tariff revisions shall be filed, on not less than one day's notice, to become effective on or before March 1, 2016.

6. The requirements of Public Service Law Section 66(12)(b) as to newspaper publication of the tariff revisions filed in accordance with Ordering Clause No. 5 are waived because this Order gives adequate notice of the changes.

7. In the Secretary's sole discretion, the deadlines set forth in this order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least one day prior to the affected deadline.

8. These proceedings are continued.

By the Commission,

(SIGNED) KATHLEEN H. BURGESS
Secretary

APPENDIX A
ESCO ELIGIBILITY REQUIREMENTS
LIST OF COMMENTERS

AARP (Reply Comments)

City of New York (NYC)

Committee of Chief Risk Officers (CCRO)

Direct Energy: Direct Energy Business Marketing, LLC; Direct Energy Business, LLC; Direct Energy Services, LLC (collectively, Direct Energy).

Energy Technology Savings (ETS)

Energywiz, Inc.

Ethical Electric, Inc., (Ethical Electric)

Exelon Companies: Baltimore Gas and Electric Company; Commonwealth Edison Company; Constellation Energy Nuclear Group, LLC; Constellation NewEnergy, Inc; Excelon Corporation; Exelon Generation Company, LLC; Exelon Microgrid, LLC; Nine Mile Point Nuclear Station, LLC; PECO Energy Company; R.E. Ginna Nuclear Power Plant, LLC. (collectively, Exelon)

Joint Utilities: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; National Fuel Gas Distribution Corporation; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a/ National Grid; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation (collectively, Joint Utilities).

Mirabito Natural Gas, LLC (Mirabito)

National Energy Marketers Association (Initial and Reply Comments) (NEM)

NRG Energy, Inc. (NRG)

Retail Energy Supply Association (Initial and Reply Comments) (RESA)

Public Utility Law Project of New York, Inc. (PULP)

UGI Energy Services, LLC (UGIES)

Utility Intervention Unit, New York State Department of State (Reply Comments) (UIU)

Commissioner Diane X. Burman, concurring:

As reflected in my comments made at the public session on February 23, 2016, I concur on this item.