



can be prepared and submitted and the current schedules does not provide the parties adequate time to prepare their cases as contemplated in the February 8 Order.<sup>3</sup>

For these reasons, and for the reasons specified in more detail below, RESA asks that the ALJs (i) postpone the May 8 due date for initial testimony and exhibits in the evidentiary hearing proceedings; (ii) seek clarification from the Commission concerning the adequacy of the Notice and the scope of the issues to be addressed at any hearing in these proceedings; (iii) use the April 19<sup>th</sup> technical conference<sup>4</sup> date for a procedural conference<sup>5</sup> to hear from the parties as to the time needed to resolve outstanding legal and discovery issues, so that the ALJs can establish reasonable and fair due dates for testimony and exhibits and (iv) recommend to the Commission that it hold the due date for comments on the proposed UBP changes in abeyance until a new due date for initial testimony and exhibits in the evidentiary track is established. Given the fast approaching due date for initial testimony and exhibits, RESA requests expedited consideration of this Motion.

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<sup>3</sup> February 8 Order at 6 (extending originally scheduled due dates because, although parties should have made their plans based on that schedule, “efficient process must nonetheless provide for adequate time for parties to prepare.”)

<sup>4</sup> On March 28, 2017, the ALJs sent correspondence responding to Joint Utilities’ and RESA’s request for a technical conference to discuss Joint Utilities’ responses to DPS Staff IRs. The ALJs scheduled a technical conference starting at 10:00 am on April 19, 2017 at the Commission’s Albany Offices. RESA requests that this date be used for a procedural conference to discuss discovery and scheduling issues raised throughout this Motion. RESA also requests that if the ALJs agree to set such a procedural conference on April 19, 2017, a stenographer should be available to record the meeting, and a conference call-in number should be circulated to accommodate parties who cannot attend the conference in-person.

## **DEVELOPMENTS SUPPORTING NEED FOR SCHEDULE MODIFICATION**

The developments contributing to the need to modify the currently scheduled due dates include the following:

### **1. Unresolved Questions Regarding the Legitimacy and Scope of the Proceedings**

Uncertainty regarding the legitimacy and scope of these proceedings makes it difficult for parties to prepare their cases. Parties have raised those issues in discovery objections,<sup>6</sup> and RESA has filed a motion raising those issues as well.<sup>7</sup> Those objections and RESA's motion raise legitimate questions as to whether the Evidentiary Proceedings were properly noticed, given that the Secretary noticed these proceedings without being specially delegated to do so by the Commission Chair, as PSL and Commission rules provisions contemplate. The absence of a Commission order authorizing Your Honors to conduct the evidentiary hearing in these proceedings, as well as the absence of any formal appointment of Your Honors by the Commission or its Chairman, also raises serious questions concerning the extent to which Your Honors can issue subpoenas to non-parties or require parties to respond to information requests if they refuse to do so. Until these issues are resolved, development of a full and complete record in these proceedings will not be possible.

And even if the Notice is ultimately found to provide sufficient authority for Your Honors to conduct these evidentiary proceedings, issue subpoenas and compel responses to discovery requests, the Utilities, RESA and other parties have also taken issue with the position of DPS Staff

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<sup>6</sup> See, e.g., Opposition of Direct Energy Services LLC to PULP Motion to Compel (April 4, 2017) at 3-4; Response of Consolidated Edison Company and Orange & Rockland Company to DPS Staff IR 1-6 (March 3, 2017); see Response of Constellation to DPS Staff IR 9-11 (March 27, 2017).

<sup>7</sup> Motion of Retail Energy Supply Association to Suspend or, in the Alternative, Limit Scope of Proceedings (April 12, 2017).

that the scope of these proceedings extends beyond mass-market customers to also include large Commercial and Industrial Customers. Indeed, the clear thrust of the Notice is that the market for those customers is functioning well and that the Commission's concerns therefore lie only with ESCO service to mass-market customers.<sup>8</sup>

In addition, RESA and individual ESCOs have taken issue with DPS Staff's position that the scope of the proceeding should extend to issues of ESCO profitability, notwithstanding the acknowledgement in the December 2, 2016 Notice that ESCOs are not subject to regulation under PSL Article 4.<sup>9</sup> Similarly, PULP and UIU have sought to use the discovery process in these proceedings to force ESCOs to turn over a wide array of records concerning their sales and marketing efforts, despite the fact that these compliance issues were not set for hearing in these proceedings.

The resolution of these issues concerning the scope of these proceedings has a substantial bearing on the efficiency with which these proceedings are undertaken. If the evidentiary proceedings were not properly commenced, it is extremely wasteful to put the parties to the continued expense of preparing testimony and exhibits on a wide array of issues that Your Honors and the Commission will not ultimately address in these proceedings. If issues relating to large Commercial and Industrial customers, ESCO profitability, and ESCO records documenting compliance with UBP requirements are found to be outside the proper scope of these proceedings, parties can focus their limited resources on the issues that need to be addressed. In either case, it is unreasonable to maintain the May 8 due date for initial testimony and exhibits while these issues remain unresolved. This is particularly true in these proceedings, where the large amount of

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<sup>8</sup> *Id.* at 3-6.

<sup>9</sup> *Id.* at 6-9.

pricing information available to the parties makes it impossible to simultaneously pursue all of these other issues on the accelerated timeline currently in effect.

## **2. Unresolved Discovery Issues**

RESA has been working diligently to resolve discovery disputes with other parties, and believes that other parties have been acting in good faith in complying with discovery requests or addressing discovery objections. However, a number of significant discovery issues remain unresolved. This is not surprising in view of the large number of parties and the sensitive nature of much of the information subject to discovery, among other things. But the fact remains that RESA cannot get access to much of the data it needs until these issues are resolved.

An example illustrates the extent of the problem. Section 5.3(c) of the Commission's discovery rules provide that responses to interrogatories shall be served on any party who so requests, and Judge Moreno confirmed that obligation in her February 8 Order (at 6). In keeping with those provisions, RESA requested copies of all parties' IR responses on February 22, 2017. On March 7, 2017, the Joint Utilities filed a letter in which they objected to turning over to RESA's Outside Consultants certain confidential information in their responses to DPS Staff IRs 1, 4 and 6,<sup>10</sup> even though RESA's Consultants had signed the Protective Agreements. As a result of good faith efforts on both sides, RESA and the Joint Utilities have resolved many of their differences on the disclosure issues, but several critical issues remain unresolved: (1) the Joint Utilities will not provide RESA's Outside Consultants access to the ESCO Keys, *i.e.*, the information necessary to link data to individual ESCOs; and (2) Con Edison and O&R have removed all ESCO identifiers from the data set provided to RESA, making it impossible to understand anything about the relationship between the individual transactions reported and the

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<sup>10</sup> Those IRs call for comparative bill information on an aggregate and customer-specific level, going back in some cases to 2011.

size or scope of the ESCO serving that customer. These omissions severely limit the ability of RESA and its independent consultants to understand this information.

While the ALJs scheduled a technical conference for April 19<sup>th</sup> to attempt to resolve issues raised in the Joint Utilities' March 7 letter, in view of the rapidly approaching testimony due date RESA did not think it is prudent to wait for the conference to seek ALJ intervention. Accordingly, on April 12, 2017, RESA filed a motion to compel the Joint Utilities to disclose the ESCO Keys to its Outside Consultants subject to the terms of the Protective Order. The pendency of that motion means that, even if the ALJs rule in RESA's favor, RESA's Outside Consultants will have as little as two weeks to undertake the analysis made possible by access to the ESCO Keys and incorporate the results in their initial testimony and exhibits. That is simply unworkable.

Access to the data provided by the Utilities in response to DPS-Utility 1-4 is by no means the only unresolved discovery dispute with schedule implications. Other motions to compel such as the DPS Staff Motion to Compel dated March 29, 2017 and the PULP Motion to Strike and to Compel dated March 23, 2017, as updated on March 31, 2017, remain unresolved. The ALJs should allow a reasonable time after these motions are resolved before setting the due dates for initial testimony and exhibits.

Moreover, RESA and DPS Staff had a meet and confer and discussed the RESA IRs propounded on Staff. During this meeting, parties were able to resolve some of their differences and it was agreed that DPS Staff will forward documentation in response to some of the Information Requests. To date, these tasks haven't been finalized. Also, DPS Staff has requested approximately two weeks of extension to respond RESA IRs 15-20, and according to the Staff, the responses will not be available before April 14, 2017. This will give RESA less than 3 weeks to

analyze and incorporate the responses into its testimony, which is simply not workable given all other discovery unresolved discovery issues.

### **3. Unresolved FOIL Issues**

On April 4, 2017, the Secretary issued a Determination in response to a request by Direct Energy, Inc. for review of the ALJs' ruling that parties must turn over confidential information directly to DPS Staff and other state agencies. While finding that existing measures governing DPS Staff handling of sensitive information are insufficient to ensure confidential treatment in response to third party requests for access under the Freedom of Information Law ("FOIL"), the Secretary's Determination remands the matter to the ALJs for further consideration of whether additional measures are needed to safeguard information provided to other state agencies.

It is unclear whether judicial review of the Secretary's ruling will be sought, which could obviously affect ongoing discovery in these proceedings. In addition, under section 6-1.4(a)(4) Commission's procedural rules, Direct Energy has until April 20, 2017 to turn over to DPS Staff the IR responses for which Direct sought confidential treatment in its motion for interlocutory review. But even if judicial review is not sought, parties cannot reasonably be expected to turn over sensitive information to other state agencies until the issues set for remand are resolved.

### **4. The Sheer Volume of Data Needing to be Analyzed And The Current Inequity In Access To That Information**

Even after all of the issues noted above have been addressed, the complexity of the evidentiary issues in this proceeding will continue to be daunting. The volume of data to be analyzed has turned out to be orders of magnitude greater than RESA anticipated. The clearest example is the data being produced by utilities in response to DPS Staff-Utilities IR 4. That request called for customer level comparative bill information (*i.e.*, comparing what ESCO customers were billed with what they would have been billed if they had taken default service) on

a monthly basis from 2014 through 2016. One utility alone reported that the data turned over to DPS Staff pursuant to this IR comprised “10s of millions of records,” and other utility responses appear to be equally massive.

While DPS Staff has had all of this data since mid-February, due to the need to resolve confidentiality issues, RESA has only recently gained access to the data that Con Edison and O&R provided to DPS Staff in response to this request, with the exception of the keys required to identify the ESCOs involved in the millions of transactions reported in those data bases. National Grid just provided its supplemental response DPS Staff-Utilities IR 1 and 4, which is a voluminous filing for the Parties and their experts to go through in less than three weeks.

DPS Staff presumably requested this data in order to undertake a more thorough analysis of the cost of ESCO service relative to default service than the analysis included in the earlier Reset Order in these proceedings and has had nearly two months to review this information to prepare its case. RESA seeks a fair opportunity to have its consultants undertake a similar analysis. Doing so, and incorporating results therefrom in their testimony and exhibits, in the three weeks remaining for initial filings is exceedingly difficult, especially in light of the numerous other analyses that must be undertaken at the same time, as well as the numerous information requests that RESA and its members that are parties to these proceedings continue to receive. Given the centrality of the difference between the ESCO prices and utility default pricing in these proceedings, it would be patently unfair to require RESA to prepare its initial testimony and exhibits in the short time remaining under the existing procedural schedule.

##### **5. The Broad Scope of the Proposed UBP Revisions**

The December Notice of Evidentiary Hearings set two tracks for consideration of ESCO issues: Track 1, the evidentiary hearings track for issues relating to whether ESCOs should be



prohibited from serving their products to mass-market customers, and whether the current regulatory regime needs to be modified to create mechanisms to deter customer abuses and overcharging; and Track 2, a collaborative track to examine whether new ESCO rules and products can be developed to provide more value to ESCO customers. There was no indication in the Notice that the Commission was contemplating seeking comments in these proceedings of specific UBP changes, much less that any such comments would be due at the same time as initial testimony and exhibits are due in the evidentiary hearing track. Nonetheless, the Commission did just that, in its March 8 Notice.

Responding to the March 8 Notice imposes additional burdens on RESA and other parties at the very time that their resources are heavily stressed by the need to prepare testimony and exhibits in the evidentiary hearing track. Given that one of the central issues in the evidentiary track is whether ESCOs should be permitted to continue to sell their products to mass-market customers, it makes little sense to require parties to comment on proposed changes to the UBPs when a decision on the evidentiary track issues could render the UBP issues moot. At a minimum, if the ALJs extend the due date for initial testimony and exhibits in the evidentiary track, they should recommend to the Commission that the deadline to file comments on the UBP revisions be held in abeyance until a schedule date for initial testimony and exhibits in the evidentiary track is established.

### **CONCLUSION**

RESA respects the important role of the Commission in overseeing retail electricity and gas markets and appreciates the Commission's desire to achieve prompt resolution of the issues in these proceedings. But RESA and its members have much at stake in the outcome of these proceedings as well. However urgent these matters may be from the Commission's viewpoint,

RESA and other parties should not be denied a fair opportunity to present their cases, as would occur if the current due dates remain in effect.

To respect the interest of RESA and other parties in procedural fairness, the ALJs should (i) postpone the May 8 due date for initial testimony and exhibits in the evidentiary hearing proceedings; (ii) seek clarification from the Commission concerning the adequacy of the Notice and the scope of the issues to be addressed at any hearing in these proceedings; (iii) use the April 19<sup>th</sup> technical conference date for a procedural conference to hear from the parties as to the time needed to resolve outstanding legal and discovery issues, so that the ALJs can establish reasonable and fair due dates for testimony and exhibits; and (iv) recommend to the Commission that it hold the due date for comments on the proposed UBP changes in abeyance until a new due date for initial testimony and exhibits in the evidentiary track is established. RESA strongly urges that this Motion be given expedited attention by Your Honors so that these proceedings can continue in the most efficient and fair way possible.

Respectfully submitted,

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Dated: April 13, 2017

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