STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on July 14, 2016

COMMISSIONERS PRESENT:

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

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.

CASE 98-M-0667 – In the Matter of Electronic Data Interchange.

ORDER REGARDING THE PROVISION OF SERVICE TO LOW-INCOME CUSTOMERS BY ENERGY SERVICE COMPANIES

(Issued and Effective July 15, 2016)

BY THE COMMISSION:

INTRODUCTION

In its Order Granting and Denying Petitions for Rehearing in Part dated February 6, 2015,[1] the Commission affirmed that, given the critical goal of ensuring that the financial assistance provided to participants in a utility low-income assistance programs (Assistance Program Participant, or APP) is spent most efficiently, when an Energy Service Company

[1] Case 12-M-0476, et al., Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015) (February 2015 Order).

(ESCO) serves such a customer, it must satisfy one of two conditions.[2] First, the ESCO must guarantee that the APP will pay no more than the APP would have paid as a full service utility customer. Alternatively, the ESCO must provide the APP with energy-related value-added (ERVA) products or services in a manner that does not dilute the effectiveness of the financial assistance programs.[3]

In the February 2015 Order, the Commission reiterated its concern that the objective of ratepayer-funded low-income assistance programs administered by the utilities, which augment taxpayer funds that provide financial assistance to utility customers through HEAP, are being subverted by ESCO service to APPs.[4] These significant ratepayer and taxpayer funds are merely passed through to ESCOs for comparatively higher priced gas and electricity, without any corresponding value for APPs. In other words, the higher prices charged by ESCOs often exceed the amount of the assistance provided to the APP, and thus the goal of reducing that customer's bill is undermined.

The Commission directed Department of Public Service Staff (Staff) to lead a collaborative to address implementation issues concerning this requirement, including: (1) identifying a mechanism by which ESCOs can confirm, at the point of sale (POS), whether a potential customer is an APP; (2) defining the ERVA products or services which satisfy the Commission's

[2] In defining APPs, the Commission Order contemplated that for at least one utility, customers could be utility Home Energy Assistance Program (HEAP) recipients but not enrolled in the utility's low-income assistance program. Discussions in the collaborative revealed that is no longer the case. Accordingly, throughout this report, the term APP refers only to utility low-income assistance program participants.

[3] February 2015 Order at 6.

[4] Id. at 5.

criteria and may be offered to APPs; and (3) determining how protections will be provided to existing ESCO APPs and ESCO customers who become APPs.[5]

The Collaborative met on March 19, April 17, June 25, July 23, and October 16, 2015.[6] In addition, several smaller group discussions were held on specific issues. Collaborative participants identified, discussed, and assessed various approaches to addressing the issues identified in the February 2015 Order. A Report of the Low-Income Collaborative was issued for comment on November 5, 2015 (Collaborative Report).[7]

The Collaborative, as discussed below, was unable to reach a resolution of the issues identified in the February 2015 Order. In addition, the Commission, in its February 23, 2016 Order,[8] reaffirmed its concern that mass market customers, including APPs, were not receiving beneficial service from ESCOs. Even more recently, the Commission issued an Order on May 20, 2016 that improved and enhanced the utility low-income

[5] Id. at 7-8.

[6] Collaborative participants included: Staff; all major electric and/or natural gas utilities in New York State; ESCO associations including the Retail Energy Supply Association (RESA) and the New York State Energy Marketers Coalition; several individual ESCOs; representatives of consumers including the Department of State's Utility Intervention Unit (UIU), Public Utility Law Project (PULP), AARP, and the City of New York (City) (collectively Consumer Advocates); and the Office of Temporary and Disability Assistance (OTDA).

[7] Case 12-M-0476, et al., supra, Report of the Collaborative Regarding Protections for Low Income Customers of Energy Service Companies (November 5, 2015).

[8] Case 15-M-0127, et al., ESCO Eligibility, Order Resetting Retail Energy Markets and Establishing Further Process (issued February 23, 2016).

programs to help APPs manage their energy burden.[9] In sum, the inability to address the fundamental concern that APPs are experiencing a diminution in their assistance dollars, funded by all ratepayers and taxpayers, leads us to institute, by this Order, a moratorium on ESCO enrollments and renewals of APPs.

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 December 16, 2015 [SAPA No. 12-M-0476SP13]. The time for submission of comments pursuant to the SAPA Notice expired on February 1, 2016.[10] Comments received are summarized below, with a full summary of comments attached to this Order as Appendix A.

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[9] Case 14-M-0565, Energy Affordability for Low Income Utility Customers, Order Adopting Low Income Program Modifications and Directing Utility Filings (issued May 20, 2016).

[10] Comments were received from: Attorney General Eric Schneiderman (NYOAG); Direct Energy (Direct); Great Eastern Energy (GEE); Consolidated Edison Company of New York, Inc. (Con Edison), Orange and Rockland Utilities, Inc. (O&R), Central Hudson Gas & Electric Corporation, The Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY), KeySpan Gas East Corporation d/b/a National Grid (KEDLI), and Niagara Mohawk Power Corporation d/b/a National Grid (together with KEDLI and KEDNY, National Grid), National Fuel Gas Distribution Corporation (NFG), New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E)(together, the Joint Utilities); the National Energy Marketers (NEM); the City of New York (NYC); the New York State Energy Marketers Coalition (NYEM); Public Utility Law Program (PULP); Retail Energy Supply Association (RESA); and the Utility Intervention Unit (UIU). Reply comments were received from: AG and, Joint Utilities. PULP and the Public Advocate for the City of New York filed a letter on February 11, 2016, in lieu of joint reply comments which are also considered in this Order.

DISCUSSION

Statutory and Regulatory Framework

The Commission has broad legal authority to oversee ESCOs, pursuant to its jurisdiction in Articles 1 and 2 of the Public Service Law (PSL).[11] 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.[12] 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,[13] and were reflected in the Uniform Business Practices (UBP) in 2003.[14] In both instances, the authority under PSL §66(5) was used to direct the distribution utilities to incorporate the applicable requirements in their respective

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[11] 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").

[12] PSL §66(5).

[13] 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).

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

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 and/or natural gas in New York.[15] 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.[16] Eligibility requirements remain a helpful and necessary tool for promoting goals and policies.

The Commission again hereby further restructures ESCO participation in the residential retail energy market. Based upon the record in the above referenced proceedings, the Commission finds that additional restructuring is necessary to further protect consumers, particularly those enrolled in utility low-income programs. Additionally, the Commission seeks to ensure that the ratepayer and taxpayer supported utility low--income programs are not frustrated by ESCOs through a premium charge to customers above the utilities' rates that can exceed the State subsidy provided pursuant to the utility low-income program.

Compliant Products

As previously stated, the Commission directed that when an ESCO serves an APP, it must either guarantee that the customer will pay no more than the customer would have paid as a full service utility customer, or the ESCO must provide the APP with ERVA products or services, including fixed-price products, in a manner that does not dilute the effectiveness of the

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[15] Id.

[16] Opinion 97-5.

financial assistance programs. The Commission directed Staff to identify the ERVA products or services which satisfy the Commission's criteria and may be provided by ESCOs to APPs.

The consensus of the Collaborative is that few, if any, ESCOs intend to offer a product which guarantees that the customer will pay no more than they would have paid as a full service utility customer. With respect to the second criteria, the collaborative identified certain products now offered by some ESCOs to residential customers which have the potential to satisfy the February 2015 Order's directive: fixed-price products; products including home energy management attributes such as advanced thermostats; and products including maintenance and/or repair of home energy-intensive equipment such as furnaces.

Some of the Collaborative participants believe that fixed-price products provide customers with protection from price volatility and may be valuable in household budgeting. The Consumer Advocates submit that any value-added service needs to guarantee APPs either a lower bill or a reduction in energy usage. They believe that a fixed-price product that charges the APP more than the utility rate does not provide value to customers and does not satisfy the intent of the February 2015 Order.

The NYOAG comments that none of the ERVA products or services offered in the Collaborative Report are likely to save APPs money over what the customer would pay under full utility service. The NYAG correctly notes that, consistent with Commission Orders,[17] the ERVA product or service alternative must still be provided in such a way that is designed to reduce the

[17] Case 12-M-0476, et al., supra, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets (issued February 25, 2014).

customer's overall bill. ESCOs, the NYOAG offers, frequently charge customers a premium over utility rates, and NYOAG asserts that none of the ERVA products or service identified would outweigh that premium and provide the customers with savings. Thus, the NYAG proposes that, since no compliant products have been identified, ESCOs should not be permitted to offer ERVA products or services in lieu of offering customers a price guarantee.

The Joint Utilities comment that during the last Collaborative meeting, NFG proposed an approach which would either: (1) direct all APPs take utility commodity service, or (2) propose to remove ERVAS from implementation of the price guarantee for APPs. The Joint Utilities see merit in the second approach, where ESCOs would exclude consideration of ERVAS in performing the price comparison between utility pricing and ESCO pricing necessary to implement the price guarantee. The Joint Utilities propose that ESCOs are free to communicate directly with customers to obtain APP status, and secure consent to store and utilize that information.

The Commission recognizes the significant efforts of the Collaborative to ascertain ERVA products and services that would satisfy the requirements of the February 2015 Order. However, no such products have been identified. The Commission sought ERVA products and services that were designed to reduce the customer's overall bill and would not dilute the effectiveness of the financial assistance programs. Absent both a willingness to provide a guarantee that the customer will pay no more than the customer would have paid as a full service utility customer, and the identification of any compliant ERVA products and services, the Commission directs that a moratorium be placed on all APP enrollments and renewals.

The Moratorium

Analysis of the Collaborative Report and the party comments reveals little consensus among the participants in the proceeding, other than agreement that the Collaborative was unable to define value-added product or service that would satisfy the conditions set forth in the Commission's order. Nor did the Collaborative develop a method of identifying compliant products, in the absence of a comprehensive, definitive list being agreed upon as part of the collaborative process.

Direct Energy, in comments filed in a different but related proceeding, proposed a moratorium on APP enrollments.[18] Direct Energy suggests that, due to the lack of a workable solution for APPs, the Commission suspend an APP's ability to switch to an ESCO, and to effectuate this prohibition through the use of a block placed on all APP customer accounts. The Commission, Direct Energy offers, "should err on the side of protecting APPs from the conditions that led it to conclude that the market is not 'workably competitive.'" Direct Energy proposes that this moratorium be only for a limited period of time and that the customer have the option to opt-out of the block placed in their account.

Stakeholders have invested a great deal of time and resources to identify ways for ESCOs to legally market to APPs, yet despite their best efforts, workable strategies that meet the February 2015 Order's requirements have not been identified. The record contains no evidence of an ERVA product or service that would preserve the value of financial assistance programs. Further, the collaboration to date does not suggest that continuing this proceeding would be likely to produce solutions in the near future.

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[18] Case 15-M-0127, et al., supra, Direct Energy Reply Comments (June 20, 2016).

Given the Collaborative's inability to resolve these issues, combined with the continuing harms to APPs of non-compliant ESCO products, the Commission is suspending the Collaborative and ordering a moratorium on APP enrollments and renewals, effective 60 days after the effective date of this Order, which shall remain in effect until lifted by the Commission. This moratorium is necessary to ensure that the financial benefits provided to APPs through utility low-income assistance programs are not absorbed by ESCOs, who in turn, provide gas and electricity at comparatively higher prices, without any corresponding value to the APP. Implementation of the moratorium with respect to new enrollments, existing APP ESCO customers, and ESCO customers that were not APPs at the time of enrollment, but subsequently become APPs, are addressed in detail below.

1. Customer Privacy Concerns

The Commission recognizes that implementing the moratorium must be done in a way that to the extent feasible protects legitimate customer privacy concerns. During the Collaborative meetings there was extensive discussion regarding access to information about customers. Specifically, the Collaborative discussed whether ESCOs can be provided, without customer consent, the financial status of APPs and disclosure of the identity of those customers participating in assistance programs. As detailed in the Collaborative Report, absent a legal exception to confidentiality, Federal and State law prohibits social services agencies and utilities from disclosing customer information regarding the receipt of or application for public assistance.

Several parties, including Consumer Advocates and Joint Utilities, assert that State and Federal law provides the Commission no flexibility in resolving these issues. The ESCOs take the view that the Commission should further explore the possibility that with appropriate safeguards, a customer's APP status could be released from the utilities to an ESCO without a customer's affirmative consent for the limited purposes of implementing the February 2015 Order.

ESCOs will not be provided with customers' APP status. Instead, the utility shall place a block on all APP accounts preventing future enrollment with an ESCO. For existing APPs served by an ESCO, including customers who were not APP at the time of enrollment but subsequently become APP, the utility will inform the ESCO that a block has been placed on the account, that the ESCO is no longer eligible to serve the account, and that the customer must be de-enrolled at the expiration of the existing agreement.

2. New Enrollments of APPs

The moratorium on the enrollment of new customers will be implemented through a rejection by the utility, through an electronic data interchange (EDI) transaction, of an enrollment of an APP. Beginning 60 days after the effective date of the Order, utilities will be required to place a block on all APP accounts. The ESCO can elect, at the POS, to ask the prospective customer if he or she is enrolled in a utility income assistance program. If the prospective customer indicates that he or she is, the ESCO should cease marketing to the customer. If the prospective customer claims that he or she is not enrolled in a utility low-income program when in fact they are, and the ESCO enrolls the customer, the enrollment will be rejected by the utility. This rejection will not reveal the customer's APP status to the ESCO because customers can have blocks placed on their account at any time, for multiple reasons, or no reason at all. When the enrollment is rejected, the ESCO is not provided with a reason for the rejection, other than that there is a block on the account.

While the ESCO will have incurred costs to market to the customer, no viable alternatives have been identified. The Commission appreciates the effort put forth by Collaborative participants to identify a POS mechanism by which an ESCO can verify a potential customer's APP status. While the utility web portals proposed in the Collaborative Report may satisfy the Commission directive in the February 2015 Order, the cost of developing these portals and the likelihood that few, if any, ESCOs plan to offer compliant products to APPs, lead the Commission to conclude that developing these portals would not be a worthwhile effort. Additionally, even though the proposed mechanism would potentially avoid the privacy issues discussed above, the fundamental concern, the diminution of assistance program funding, is not resolved. Consequently, the need for a moratorium on APP enrollments and renewals is ubiquitous, thus making a POS mechanism to verify APP status unnecessary.

Finally, in the event that an APP is enrolled with an ESCO at any time after the moratorium is in effect, that enrollment shall be void. In such a situation, the enrollment was wrongfully processed and the customer shall be returned to full utility service immediately after the error is discovered.

3. Existing APP ESCO Customers

In the February 2015 Order, the Commission recognized that additional consideration is required regarding how the new retail access protections should be provided to existing APPs of ESCOs and to ESCO customers who become APPs. It directed that the Collaborative consider how to best protect APPs.[19] Identification of these customers is still relevant in light of the moratorium to ensure that all APPs receive full utility

[19] February 2015 Order at 8.

service and thus avoid the diminution of assistance program funds. Ultimately, the Commission is concerned with what is in the best interest of APPs and ratepayers. Thus, an APP status identification method is necessary to minimize financial harm to existing APPs enrolled with ESCOs. At the same time, the validity of existing contracts must be protected and not abrogated prior to the completion of the contract term.

Many Collaborative participants recommended that information be provided to APPs of ESCOs to inform them of their new protections and allow them to make an informed decision consistent with their contract. The Collaborative also concluded that a wide range of informational efforts should be undertaken to inform ESCO APPs of their new protections. Proposed informational efforts include one direct communication with APPs of ESCOs, as well as outreach by ESCOs, DPS, and representatives of consumers including those participating in the Collaborative. Utilities offered to fund and send one letter, or other form of efficient communication, to APPs of ESCOs. That communication would explain that new protections are available that may benefit the APP, and that the customer should contact their ESCO for more information. The Utilities propose that draft letter would be subject to review and comment by interested parties, further review by the utility, and approval by Staff and that it be sent within 30-60 days of the effective date of the Commission Order.

The Consumer Advocates submit that it is the ESCO’s responsibility to alert its customer base to the policy changes in the retail marketplace that have resulted from the Commission’s February 2015 Order, and how such changes will impact customers. Consumer Advocates assert that ESCOs should be required to distribute and fund a letter annually to customers alerting them of the ESCO’s responsibility to APPs.

Additionally, Consumer Advocates proposed that Staff should consider amending the New York ESCO Consumer Bill of Rights to include a provision that addresses APPs. If, in the end, the utilities are tasked with sending such a letter on ESCOs' behalf, the Consumer Advocates submit that the cost of such a letter and its mailing should be borne by the ESCOs and their shareholders, not the Utilities and ratepayers.

ESCOs counter that it is not possible for ESCOs to send a letter to APPs, because the assistance benefits eligibility status of those customers is unknown to ESCOs. Some ESCOs indicated their willingness and intent to inform their customers of these new protections. Staff offered to develop and distribute information regarding new protections for APPs of ESCOs to its network of low-income representatives associated with the Low Income Forum on Energy, a joint initiative of Staff and NYSERDA. Some representatives of low-income consumers participating in the Collaborative also offered to distribute such information through their networks.

The Commission appreciates the effort put forth by the Collaborative to develop the communication channels by which APPs would be informed of the protections directed in the February 2015 Order. Communication to the customer is still necessary, but would now be to inform customers of the moratorium, not the compliant product requirements, and would inform the customer that they will be switched back to utility service at the expiration of their existing contract.

However, contrary to the proposals in the Collaborative Report and in light of the moratorium, the Commission does not believe that communication to the customer alone would effectuate the goal of this Order of preventing the diminution of assistance program funds. Simply providing information regarding the moratorium, regardless of the channel utilized, does not ensure that the customer will be returned to full utility service at the expiration of their existing agreement. Additionally, it is the ESCO, and not the utility that knows the term of the agreement with the customer.

Therefore, within 60 days of the effective date of this Order, the utilities, utilizing their records regarding which customers are enrolled in their low-income program and are served by an ESCO, will communicate to the ESCO which accounts the ESCO is no longer eligible to serve.[20] This communication would not infringe on the customer's privacy with respect to their APP status. Similar to the discussion above regarding new enrollments, the ESCO will not be informed that the customer is an APP, but instead will only be informed that a block has been placed on the account. This situation would be similar to one in which an ESCO customer contacts the utility and wishes to have a block placed on their account and to be returned to utility service.

At or around the same time, but no later than 14 days after the utility contacts the ESCO regarding the accounts the ESCO is no longer eligible to serve, the utility will also send a letter to the ESCO customer, informing the customer: (1) that they are enrolled in the utility's low-income program; (2) of the moratorium directed in this Order; (3) the reason for and protections provided under the moratorium; and, (4) that they will be returned to utility service at the expiration of their existing ESCO agreement. Utilities are required to file drafts of these letters with the Secretary for Staff review within 30 days of the effective date of this Order.

[20] This communication should be transmitted in a secure format of the utility's choosing. An example would be a secure spreadsheet or flat file.

After receiving the communication from the utility, the ESCO shall then de-enroll the identified accounts at the expiration of the existing agreement. With respect to customers on variable rate, month-to-month contracts, the expiration of the agreement is at the end of the current billing period. Therefore, once the ESCO receives the communication from the utility that they are no longer eligible to serve a customer, the ESCO shall de-enrolled the customer at the end of the billing period, as it exists at that time.

4. ESCO Customers Who Subsequently Become APPs

With respect to ESCO customers who become APPs after the moratorium is implemented, communications by the utility, as discussed above for existing APP ESCO customers, will be necessary on an ongoing basis. When a utility enrolls a new customer in its low-income program, at a date more than 60 days after the effective date of the Order, it shall immediately place a block on the account. It shall also, consistent with the discussion above, inform any ESCO serving that customer that the ESCO is no longer eligible to serve that account. As discussed above, after receiving the communication from the utility, the ESCO shall then de-enroll the accounts at the expiration of the existing agreement, which for variable rate, month-to-month contracts, is the end of the current billing period.

Similar to the discussion above, the utility shall also send a letter to the customer at or around the same time it contacts the ESCO regarding the accounts the ESCO is no longer eligible to serve, but no later than 14 days after enrollment as an APP. Customers of Central Hudson, NFG, and O&R currently receive a communication from the utility confirming that the customer has been enrolled in a utility assistance program. Utilities that provide such communication, shall include information related to the moratorium, as well as inform the customer that they will be switched back to utility service at the expiration of their existing agreement. Other utilities shall notify the customer via a separate mailing.

CONCLUSION

A significant amount of effort, by all of the parties, went into the development of the Collaborative Report in this proceeding. Nonetheless a proposal that satisfies the consumer advocates, ESCOs, utilities, Staff and the Commission has not surfaced. We continue to share the NYOAG's concerns that "publicly supported assistance funds are pocketed by ESCOs, and they frequently charge customers a premium above the utilities' rates that greatly exceeds the subsidy."[21]

We are further compelled by Direct Energy's comments which state in part: "there is no evidence in the record . . . that any ESCO will offer the price guarantee that is one of the two available pathways for an ESCO to serve APP customers going forward. . . . Moreover, it is increasingly likely that the 'value-added' option for complying with the Commission's Order will be difficult or impossible to execute."[22]

In order to protect low-income assistance program participants, in light of evidence that ESCOs are unable or unwilling to serve these customers by way of offering a guaranteed savings product, and because energy related value added products designed to reduce the customer bill have not been developed, we are directing a moratorium on ESCO enrollments of new APP customers and on renewals of existing customers, effective 60 days after the effective date of this

[21] Attorney General's Comments at 4.

[22] Direct Energy's comments at 2-3.

Order, which shall remain in effect until lifted by the Commission.[23] For existing APPs with an existing contract term, the ESCO contract renewal shall be prohibited at the expiration of the existing agreement.

The Commission orders:

1. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to, within 60 days of the effective date of this Order, place a block on all assistance program participant accounts, preventing those accounts from being enrolled with an energy service company.

2. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to, within 60 days of the effective date of this Order, communicate to each energy service company serving assistance program participants which accounts the ESCO is no longer eligible to serve, consistent with the discussion in the body of this Order.

3. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to, within 30 days of the effective date of this Order, file with the Secretary, for Department of Public Service Staff review, drafts of the letters to be sent to energy service company customers that are assistance program participants informing them that they will be returned to utility service, consistent with the discussion in the body of this Order.

[23] This moratorium will not extend to APPs participating in a Community Choice Aggregation (CCA) Program. The appropriate consumer protections for participants in a CCA program, including APPs, are provided in the Commission's Order Authorizing Framework for Community Choice Aggregation Opt-Out Program, issued April 21, 2016 in Case 14-M-0224.

4. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to, within 60 days of the effective date of this Order, send the letters developed pursuant to Ordering Clause 3 to energy service company customers that are assistance program participants, consistent with the discussion in the body of this Order.

5. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to, on a rolling basis, communicate to each energy service company serving customers who subsequently become assistance program participants which accounts the ESCO is no longer eligible to serve, consistent with the discussion in the body of this Order.

6. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to on a rolling basis, notify energy service company customers that subsequently become assistance program participants of the moratorium imposed by this Order and that they will be returned to utility service, consistent with the discussion in the body of this Order.

7. Every energy service company eligible to serve customers in New York State shall, within 60 days of the effective date of this Order, de-enroll any customer accounts identified by the electric and gas distribution utilities pursuant to Ordering Clause 2 and 5 of this Order, provided that existing contracts will continue until their expiration.

8. The Secretary in her sole discretion may extend the deadline set forth in this Order. Any requests 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 deadline.

9. This proceeding is continued.

By the Commission,

(SIGNED) KATHLEEN H. BURGESS
Secretary

SUMMARY OF COMMENTS ON COLLABORATIVE REPORT REGARDING PROTECTIONS FOR LOW INCOME CUSTOMERS

Initial Comments submitted by:

New York Attorney General Eric Schneiderman (NYOAG)

Direct Energy Services, LLC, Direct Energy Business, LLC, and Direct Energy Business Marketing, LLC (collectively, Direct Energy)

Great Eastern Energy (GEE)

Consolidated Edison Company of New York, Inc. (Con Edison), Orange and Rockland Utilities, Inc. (O&R), Central Hudson Gas & Electric Corporation, The Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY), KeySpan Gas East Corporation d/b/a National Grid (KEDLI), and Niagara Mohawk Power Corporation d/b/a National Grid (together with KEDLI and KEDNY, National Grid), National Fuel Gas Distribution Corporation (NFG), New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E)(together, the Joint Utilities)

National Energy Marketers (NEM)

City of New York (NYC)

New York State Energy Marketers Coalition (NYSEMC)

Public Utility Law Program (PULP)

Retail Energy Supply Association (RESA)

Utility Intervention Unit (UIU)

Reply Comments submitted by:

NYOAG

NYC

Joint Utilities

PULP

INITIAL COMMENTS

Proposed Products including Energy Related Value Added Service

The NYOAG remains concerned that "publicly supported assistance funds are pocketed by ESCOs, and they frequently charge customers a premium above the utilities' rates that greatly exceeds the subsidy." The NYOAG believes that the Collaborative Report has cited no evidence that any of the ERVAs considered will provide value to low-income consumers. The Commission has observed "that residential customers are generally paying more for commodity services from an ESCO than if they had purchased their energy from the utility." Given the ESCOs' history of failing to provide consumer savings, and because there is no quantifiable showing that any of the ERVAs discussed would save low-income consumers money over what they would pay to utilities, ESCOs should not be permitted to offer them. A price guarantee is the only acceptable low-income consumer protection on the table.

The NYOAG also discusses two types of ERVAs that might be appropriate for low-income consumers: ones that offer consumers a fixed-price product, and ones that offer consumers home energy management attributes. The NYOAG believes neither type of ERVA would provide sufficient value for low-income consumers to qualify as an acceptable alternative to a price guarantee.

NYC submits that none of the products and services presented in the February 2015 Order will provide a value to customers that would justify charging customers more than the utility rate.

Direct submits that it will not offer a product to new APPs that would comply with the price guarantee option and there is no evidence that any ESCO will serve APPs. Further, Direct asserts that the "value-added" option for complying with the Commission's Order will be difficult or impossible to provide. The recognition of fixed priced products as "value-added" is rendered meaningless by the proposal to regulate those products through a "reference price." Direct has no interest in participating in a price-regulated market segment in which one's ability to lawfully serve customers is determined by a regulatory formula. The "other ERVAS" option described in the Report will also be of no interest to Direct, and likely not to other ESCOs offering such products. This option includes the "no greater than the utility" rate cap for the commodity portion of the offer, plus a regulated approach to cost recovery for the value-added product included with the offer. Direct states it has no products or services that it prices in this manner, and it is highly unlikely that they would have any interest in or the ability to design products subject to the Report's dual regulatory constraints.

GEE believes the provision of fixed price contracts alone is not enough of a benefit to strip away the safeguards put in place to protect APPs. According to GEE, there is no reason to believe that anything has changed in the market place that would discourage price gouging and other unscrupulous business practices used by certain ESCOs that target APPs. GEE does believe, however, that the provision of other ERVASs could be a sound basis to relax the safeguards that are in place to protect APPs.

With respect to the "price guarantee" product, NEM agrees that there are practical difficulties ESCOs would face in making such offers available, which would result in few ESCOs offering these products. The variability of the utility default rate coupled with the lack of transparency as to its calculation poses a significant barrier to ESCOs being able to offer such a price guarantee. NEM argues that the regulatory costs and risks of making a price guarantee product available will likely prove prohibitive for many ESCOs. Limiting the market to fixed price offers would eliminate the consumers' ability to take advantage of lower-priced competitive products when market conditions allow and would not be in the public interest.

NEM submits that the establishment of a Commission-mandated price cap for APPs is opposite to choice and the operation of competitive markets. NEM believes setting a cap on service to APPs would likely result in a shifting of costs to the rest of the ESCO's customer base.

NEM is concerned that the proposal for establishing an adder for pre-approved energy-related value-added services is akin to utility monopoly regulation. This form of price and product regulation will not incent innovation. To the contrary, it would appear to constrain ESCOs to only offer the narrow category of pre-approved products to APPs. Further, establishing an adder for value-added services must ensure that there is an on-going mechanism for ESCOs to continuously update the "pre-approved" list so that there is some means to capture innovation going forward and make adjustments to the adder price based on price fluctuations in adder-dependent secondary markets.

NYSEMC does not believe the utility commodity price is the most cost effective, market-based, fair starting point and is representative of bad economic and public policy. As ESCOs work diligently to come up with options which will improve the price and value position of low-income consumers, until the utilities are removed from the guaranteed incumbent position of energy supplier, ESCOs will never be able to compete with any products and services. One significant reason is the utility's ability to recover costs associated with past pricing, which renders an ESCO's price vulnerable each and every step of the way.

NYSEMC asserts that value-added products and services – such as an emergency service furnace repair contract, installation of a programmable thermostat, or energy commodity bundled with home energy management tools, are tangible ways in which a consumer can save energy and/or the associated household costs. In addition, NYSEMC asserts that commodity price must be all-in, with all risks, and timed for a true comparison. An assumption that ESCOs should offer a product which guarantees that the customer will pay no more than would have been paid had energy been purchased by the utility is flawed. This suggests that the utility price is the lowest price, without any other costs or value built into it. If it could be guaranteed that utility prices were in no way subsidized, then the comparison of ESCO pricing would be valid. In order to assist the Commission with a methodology that can provide value to low-income consumers and assure commodity pricing is within market tolerances, NYSEMC suggests that a forward-looking "reference price" be designed from statistics associated with an independent (not utility calculated) indexed price applied to a typical residential load shape (i.e., 1,000 therms and/or 9000kWh/year). The methodology outlined in the Collaborative Report which takes into consideration volumetric, holding period, and credit risk provides a good starting point.

PULP believes the Collaborative process has not achieved the Commission's goals. PULP suggests that the Commission forbear from issuing an Order with respect to Staff's Collaborative Report until it can be demonstrated that ESCOs can actually provide value-added services to customers justifying their ability to sell the energy commodity to low-income customers at a price in excess of the utility's rate(s). PULP also asserts here that it believes the Commission should institute a new proceeding to direct the Staff to create an objective definition of value-added services, or to continue this proceeding until such a goal can be met.

RESA opines that low-income customers comprise a highly diverse class that is not necessarily amenable to a one-size fits all solution. RESA believes that the Commission should consider a more flexible and less complex definition of value added service and products. Early in the Collaborative, RESA presented an approach to defining value added products and services that is reasonable and accommodative of the need to implement a flexible and less complicated process. RESA's approach focuses on ensuring that the customer is provided with a value added element that is truly beneficial. This approach potentially increases the efficiency of energy usage in a material manner; helps consumers manage energy usage in an improved manner; provides a product or service that would be valuable on a stand-alone basis; and provides a financial or other tangible incentive to enhance or improve the pattern of energy usage.

UIU submits that the proposed products or services to APPs do not satisfy the Commission's requirements. Fixed-price products do not satisfy the commission's "added value" requirement because the cost of "total risk premium" would be passed on to customers, rendering ESCOs' fixed-price products more expensive than utilities' budget billing. UIU is concerned with the difficulty of developing an appropriate forward "reference price," which would serve as the basis for a fixed-price product. UIU argues that the other ESCO products discussed in the Report will tend to "dilute the effectiveness of the financial assistance programs." UIU agrees that ESCOs may offer products that utilities do not, however they must cost no more than the lower of (1) the lowest price otherwise available to the customer, or (2) the ESCO's cost of providing the product, plus a small "adder" that compensates the ESCO for the value it adds in connecting the customer to the service. UIU contends that any alternative methodology that results in higher costs to APPs would allow excessive transfers of ratepayer-funded low-income benefits to ESCOs' bottom lines, thereby diluting their effectiveness.

UIU supports Staff's proposal that the ESCO use the upfront cost of the product its offering, which would include any discounts it may have, when calculating the adder, however, it is not clear how "the expected costs" of a service such as home heating repair will be valued and stated in the "all in price." UIU is also concerned about the interest rate ESCOs may be allowed to charge APPs and does not believe that Staff's example of a 6% interest rate is a fair interest rate for APPs. Current government programs offer residential customers smart energy and on-bill recovery loans with an interest of 3.49%. Staff has not justified this higher 6% rate, which would further diminish the effectiveness of the utility assistance programs for APPs. Given the many factors that must be considered when establishing this "adder," and the many costs that ESCOs bear beyond the utilities, such as marketing and a higher cost of capital, UIU believes that it is difficult to imagine a scenario in which an ESCO could deliver APPs a product at a price that does not dilute the effectiveness of low-income programs.

Competitive Bidding

The NYOAG asserts that the "competitive bidding" proposal submitted by the ESCO sub-work group would require extensive study and analysis before any variation of it could be considered. Regardless of how this proposal develops, the NYOAG believes it is clear that the proposed "Opt-out Process" would not be an acceptable solution. Putting aside the legal ramifications identified in the Collaborative Report, the NYOAG notes that no amount of notice could substitute for obtaining informed consent of consumers to switch their energy service providers.

NYC opines, the competitive bidding proposal is underdeveloped and fraught with questions of law that must first be answered before it can be adopted as an ERVAS measure. NYC submits that the ESCOs proposed "opt-out mechanism" would be akin to slamming, or forcibly migrating APPs to accept service from an ESCO, with the potential to pay higher energy rates with no commensurate value. Inasmuch as APPs are a vulnerable population, any opt-out method should be accompanied by Staff and ESCO customer outreach, in multiple languages, to ensure that customers understand the offer and terms for commodity service they are being enrolled in, and that they can choose not to participate. In addition, if an opt-out mechanism is considered, it should provide consumer protections that focus on consumer comprehension and responsiveness. NYC respectfully requests that the Commission reject the proposal as presented in the Collaborative Report and remand the issue for further review.

Direct believes the competitive bidding approach is the only viable approach to serving APPs, but acknowledges that this proposal would require significant additional work before it would be in a position to be approved by the Commission and implemented effectively.

The Joint Utilities strongly oppose the proposed competitive bidding process. They express: 1) legal concerns related to the ability to conduct an "APP Aggregation" program, 2) concerns related to consumer protections for APPs, and 3) concerns with the significant administrative burden on the utilities of the proposed RFP process. Moreover, the Joint Utilities urge that before consideration is given to any "APP aggregation" program, Staff and stakeholders must evaluate the merits of this program, which would be unprecedented in New York. If the Commission moves to adopt a competitive bidding process, the Joint Utilities believe that an "opt-out" approach would result in disclosures of APP status in a manner inconsistent with federal and state laws and regulations. Even if it could be done lawfully (and the Joint Utilities concur with the Report's findings that it cannot), an "opt out" program would greatly increase potential administrative difficulties, conflict and customer confusion as compared to an "opt-in" program.

NEM believes it is important that the competitive bidding process be designed in a manner that does not interfere with existing ESCO contracts. NEM is also concerned that smaller ESCOs will not have the financial wherewithal to win the RFPs, thereby diminishing the number of competitive entities in the marketplace. If a competitive bidding approach were to be adopted, it should be structured to encourage participation by multiple qualified ESCO bidders.

NYSEMC believes that the development of a competitive bidding/aggregation model will require significant work due to its complexity, and the inability to create a "one size fits all" option. In addition, NYSEMC believes that the competitive bid/aggregation plan model should not be done at the exclusion of the first option: a forward-looking price index that allows for value-added products and services. To that end, NYSEMC advocates that both methods be further explored and ultimately implemented on a trial basis in specific territories around the State.

UIU contends that the competitive bidding proposal does not establish a procurement process that would bring "added value" products to APPs. UIU is concerned with the proposal to appoint "an entity yet to be determined" to (1) aggregate APPs into their electric and gas distribution service territories; (2) issue a request for proposals (RFP) seeking ESCO fixed price or "value added" products that meet the established Commission criteria; and (3) review bids and make recommendations to the Commission to approve final awards. UIU continues to believe that aggregation is a useful technique for increasing the relative market power of low-income customers, which in theory could yield lower prices, however the RFP proposal does not meet the requirements of the Commission's Order. Specifically, ESCOs have expressed that they cannot guarantee a service at a lower cost than utilities, and have not demonstrated that they can provide value-added products that do not dilute the effectiveness of financial assistance programs. UIU suggests, should the Commission choose to adopt a competitive bidding process, it should not implement an opt-out model. ESCOs are ostensibly intended to provide customers with more choices in energy products and supply; it would be contrary to Commission policy to force APPs into using a particular ESCO service. Further, they believe an opt-out approach would enroll many APPs in ESCO products that will dilute their financial assistance benefits and will not bring them value.

Protecting Low-Income Customer Privacy & Identification of APPs

The NYOAG is very concerned with the manner in which ESCOs would learn the low-income status of consumers. The utilities are obligated to protect consumers' privacy under federal and state law as well as Commission policy. The NYOAG submits that the Commission must ensure, at a minimum, that (a) informed consent is obtained from the consumer before any personal information regarding the consumer's identity and financial status is provided to an ESCO and (b) no more information is transmitted than necessary for an ESCO to determine a consumer's APP status. The NYOAG believes TPV calls or provisions in ESCO contracts obtaining customer consent are not the forum to question consumers about whether they will consent to have their financial status revealed. The NYOAG states that most consumers do not read the fine print in boilerplate contracts – particularly when faced with high-pressure or other deceptive marketing practices. The NYOAG agrees with the consumer groups that participated in the collaborative in that the data provided ESCOs should be limited to whether the customer participates in an assistance program, or not. The NYOAG further opines that ESCOs must be held to the same standard as utilities, as required by state and federal law, when trusted with consumer's personal data.

NYC is a long-time proponent of customer privacy and ensuring that APPs are afforded the protections preserved for them via State and Federal privacy laws is paramount. NYC is very concerned with the ESCOs positions that would require the disclosure of personal information to third parties without customer consent. They believe this approach, if adopted, would be contrary to existing law. Moreover, allowing an ESCO, which is operating in the retail marketplace *for commercial purposes*, to obtain an APP customer's low-income status without consent would be squarely inapposite with the State's practice of protecting and maintaining customer confidentiality." Accordingly, NYC proposes that ESCOs should not be provided with the financial status and/or identity of APPs without customer consent, and respectfully requests that the Commission reject the proposals set forth in the Collaborative Report by the ESCOs.

Direct believes that the method for obtaining a customer's APP status described in the Report could seriously impede or damage the residential retail market in New York. They submit that compliance with the Commission's Order will require the creation of an expensive, complex, and intrusive system, which will turn every interaction between an ESCO and a potential customer into an embarrassing discussion of the customer's financial condition, despite the fact that approximately only 15 percent of customers will be affected by the Order. Direct suggests that a requirement for such a sales pitch would be seen as intrusive if not rude and will likely puzzle, annoy or offend the majority of potential customers. Direct questions whether the Commission expects to implement the policies of REV if the APP program effectively destroys the competitive retail mass market in New York. Direct is keenly interested in the REV vision, but if the market for commodity sales to residential customers is no longer viable because the APP program requires commodity sellers to offend potential customers as a matter of course, their commitment to New York's market will substantially wane. Direct suggests that the Commission should direct Staff to gather actual data about how customers (especially APPs) would react to these kinds of questions and explore other approaches to assisting APPs that would not sabotage the retail market. Further Direct believes that obtaining the customer's account number to obtain the customer's APP status could enable unscrupulous markets to slam those customers. Direct urges "the Commission to continue this proceeding in order to look for more effective options for helping APPs. At the very least, the Commission should explicitly seek to establish some kind of safe harbor for ESCOs to comply with the Order, either by offering a value-added service in a manner that does not result in price regulation (e.g., including LED light bulbs or a smart thermostat with electricity plans) or by allowing ESCOs who cannot address the APP market to avoid those customers completely without having to screen them out in the intrusive manner suggested in the Report."

The Joint Utilities are concerned with disclosure of APP status to third parties, including ESCOs. The Report states that existing state and federal law prohibits disclosure of the financial status of APPs and the identity of those customers participating in assistance programs absent individual customer consent. As a result of these restrictions, the Joint Utilities believe they are not be able to disclose APP status to an ESCO to calculate the price guarantee credit once the ESCO is serving the customers, nor are they able to disclose such information to ESCOs at the point of sale. Further, any method the Commission ultimately adopts for ESCO verification of a customer's APP status must provide the utility with adequate assurance that appropriate consent has been obtained from the APP customer before permitting access to such customer information. The Joint Utilities are concerned that relying on an ESCO's assertion that it has obtained the customer consent without requiring any sort of backup or supporting documentation could be construed as an insufficient control over the protection of customer privacy – leaving a utility vulnerable to assertions of noncompliance with applicable federal and state regulations restricting disclosure of customer information pertaining to APP status. To inform APPs of their rights with respect to how they receive service from ESCOs, the Joint Utilities support sending one letter or other efficient form of communication to APPs of ESCOs to notify them of their rights and any additional outreach should be the responsibility of the ESCOs. The Joint Utilities have identified methodologies which would modify existing systems that ESCOs have access to so that ESCOs can obtain accurate and near real-time APP confirmation that varies in cost from $50,000 to $250,000 and could be implemented within two to eight months.

NEM submits that ESCOs need "to be able to identify both potential customers as well as those in the ESCO's existing customer base that are APPs. NEM also states that ESCOs must be given ample time to identify APPs and transition to any new compliance paradigm.

NYSEMC believes that with appropriate safeguards customer program assistance information should be provided to ESCOs who are attempting to comply with the February 6, 2015 Order. In order to comply, access to this information is a necessity. NYSEMC believes that the only practical approach is for APPs to step forward and take some measure of affirmative action and responsibility in this matter. Moreover, this will require considerable awareness and education provided equally by all Collaborative parties. NYSEMC feels that review and change to the Public Service Law may be necessary to ultimately address the issue of disclosure of customer information.

PULP questions whether, based on ESCO past behavior, utilities can presume that ESCOs will obtain proper consent when accessing customer APP information and cautions Staff to consider other options such as opt-out enrollment.

RESA believes that ESCOs should have access to data identifying APPs prior to marketing such as through access to an electronic web site. RESA suggests the Commission consider establishing a process by which this information can be provided to ESCOs prior to reaching the point of sale. RESA submits that initiating the solicitation with the inquiry to the customer seeking to obtain knowledge of such status is inefficient and can be oft-putting to the customer.

RESA further comments that existing contracts must be protected, month to month variable contracts where costs have been incurred up front to serve the customer with the expectation that the customer will continue to take service. Therefore a transition period of 4 months would be reasonable in such a circumstance.

UIU objects to the POS proposal of Con Edison, O&R, NYSEG, and RG&E, which would provide ESCOs with information beyond their APP status, such as customers' sales tax rates, bill cycles, bill rates, usage factors, load profiles, and 24 months of usage for electric and gas. That data does not bear in any way on an ESCO's ability to comply with the Commission's February 6, 2015, Order. UIU prefers NFG and National Grid's POS proposal, where the customer would provide only the customer's APP status. UIU and the Consumer Advocates suggest a secure website that follows the National Institute for Standards and Technology's (NIST) best practices to display a customer's

APP status. By utilizing NIST's Framework for Improving Critical Infrastructure Cybersecurity, utilities can minimize the risk of customer data breaches and ensure the mechanism to confirm a customer's APP status works smoothly.

Customers Must Provide ESCOs with Informed Consent to Verify APP Status

NYC does not consider the modification of contracts so that signatories agree to the release of APP status to be informed consent. Alternatively, NYC recommends an alternative approach to getting the same information is to include a form as an appendix to the contract addressing APP status disclosure. This form would request the customer's explicit written consent to verify their APP status and would notify the customer that: (1) the customer will be revealing their APP status; (2) the ESCO will not use such information for any purpose other than this enrollment process; and (3) the ESCO will not disclose or sell such customer data to any third party. Such a form should be written in English, or whatever language spoken by the customer.

Direct submits that the consensus view among ESCOs is that knowing a potential customer's APP status is essential for complying with the Commission's Order and, since the utilities already have this information, the most straightforward way to allow ESCOs to comply with the Order would be to require the utilities to release the information to ESCOs actively marketing in New York." Direct also believes there is strong legal support for the Commission making available to ESCOs the information that is essential to the administration of the new APP program (Case 07-M-0548, Energy Efficiency Portfolio Standard, Order on Rehearing Granting Petition for Rehearing, (issued December 3, 2010); Sustainable Westchester's petition for approval of a CCA; and the CONnectED Homes Platform" demonstration project.) Direct argues that the goals of the APP program unquestionably justify the release of the very narrow category of customer information, APP status, to ESCOs that is required to make this program function in any meaningful way.

Direct acknowledges that the issues of customer privacy presented by this case differ from those considered by the Commission in the context of the energy efficiency, REV, and CCA cases discussed above.

Joint Utilities submit that the estimates for modifying existing systems that ESCOs have access to so that ESCOs can obtain accurate and near real-time APP confirmation do not address issues highlighted in the Report regarding the need for utilities to obtain and store customer consent, as necessary to share APP status. Additional functionality for obtaining, storing and updating customer consent would need to be evaluated and developed at additional unknown cost and resources needed to administer. Further, Joint Utilities propose that ESCOs communicate directly with customers to obtain APP status, and secure consent to store and utilize that information. Moreover, ESCOs can obtain, for each customer, utility supply cost to determine what the utility would charge for service.

PULP argues that “opt-out” is the antithesis of informed consent because the customer has no information before receiving the service, only an option to release itself from the service in retrospect. There’s no guarantee that even with the most sophisticated of advertising and outreach program that all community members involuntarily and automatically transferred to ESCO services will actually be able to avail themselves of the option to “opt out.”

UIU recommends that affirmative consent and confirmation of customer APP status occur at the Point of Sale.

Further, such consent and disclosure should apply solely to disclosure of a customer's APP status; ESCOs should not be allowed to require unrelated information, such as data on the customer's load profile, bill rate, or other usage information. UIU supports the Consumer Advocates' proposal of requiring disclosure forms similar to real estate transactions.

Rate Protections Should/Should Not be Extended to All Residential Customers

NYC, along with other consumer advocates, submit that the retail marketplace rate protections should apply to all residential customers, and request that the Commission adopt this position. Applying these protections to all residential customers will assist in correcting the market's weaknesses so that the regulatory changes to be made through REV will be more easily implemented through a stable and workable market. NEM and NYSEMC urges the Commission to reject the Consumer Advocates proposal to extend the low-income customer service requirements to all residential ESCO customers. The proposal is clearly outside of the scope of this proceeding and does not aid or contribute to the Commission's consideration of the proposals proffered regarding ESCO service to APPs.

PULP continues to endorse extending the rate protection of low-income customers to all residential ESCO customers to ensure the development of a workably competitive residential and small non-residential retail market.

RESA argues that the APP standards adopted in this proceeding should not be expanded to include all residential customers and contends that this recommendation is inappropriate, irrational and unreasonable. RESA submits that the constriction of market options that would result from expanding the pricing constraints and market options to include all residential customers would be counter to the stated REV goals.

UIU reiterates the Customer Advocates' recommendation that the Commission should extend the rate protection for low-income customers to all residential ESCO customers. As the Commission has noted, the residential retail market is not workably competitive and prices are not just and reasonable, therefore, rate protection for all residential customers is necessary. In addition, UIU recommends the Commission adopt an official rule that prohibits ESCOs from charging more than utilities by establishing a rate cap or maximum rate. As all customers are entitled to just and reasonable rates, UIU urges the Commission to extend the protections under consideration in this proceeding to all residential customers. Extending protections to all residential ratepayers would also ensure that all low-income customers, not only those fortunate enough to be enrolled in utility assistance programs, are protected.

Transition of Current ESCO Customers Should Not Impact Existing Contracts

NYSEMC argues that existing ESCO contracts held by APPs should not be negatively impacted by this proceeding. NYSEMC believes ESCOs entered into those contracts in good faith, and have purchased energy supplies that extend several months or years into the future based on the customer's load. NYSEMC submits that removing APPs from their current customer base would be catastrophic for some ESCOs. NYSEMC claims a period of one year should be allowed for any transition to alternative products and services. Further, NYSEMC states, requiring modifications to future ESCO contracts, including renewals as they come up, makes sense within the 90 day window identified in the Collaborate Staff Report; however, this should not require full implementation for at least one year following the effective date of any final order. NYSEMC also suggests that it makes sense to modify the ESCO Consumer Bill of Rights to indicate special options which may exist for those consumers who identify as low-income.

UIU, along with the other consumer advocates, recommends that APPs already in a non-complaint ESCO contract should not be required to pay an early termination fee to end the contract. Similarly, people who become APPs over the course of a contract should be allowed to terminate the contract without paying a fee and switch back to utility service in the next quarterly billing cycle.

Costs to Implement a Point of Sale Mechanism and Inform Customers of New Retail Marketplace Protections

NYC submits that ESCOs, who will benefit from the information, should be solely responsible for the costs to implement a point-of-sale verification mechanism and database, effectively eliminating the need to collect these costs from ratepayers.

PULP agrees with NYC in that it opposes the transfer of costs associated with developing and maintaining any point-of-sale verification mechanism, and/or changes to utility databases to New York ratepayers and should instead be funded by the ESCOs' shareholders. PULP submits that the entity who is benefiting from participation in the new market should be required to bear the cost of implementation.

UIU believes that ESCOs should be responsible for the costs of developing any point-of-sale verification mechanism. These costs will be incurred for the sole purpose of serving ESCOs' enrollment needs, and should be treated as any other operational expense of an ESCO. UIU promotes the Consumer Advocates' suggestion that ESCOs distribute at least one letter per year, at their expense, to all customers informing them of protections for APPs. This would encourage APPs to contact their ESCOs about compliant products and would also keep non-APP ESCO customers apprised of their options should they become APPs in the future. UIU supports the Collaborative Report's procedure for drafting this letter, which would allow parties to review and comment on the letter prior to Staff's ultimate approval. UIU also appreciates the focus on creating efficient and robust outreach and educational programs which will inform APPs of their new protections.

Continue the Proceeding

Direct and RESA agree that the Commission should continue this proceeding in order to create the most effective ways to improve the treatment of APPs. RESA believes this proceeding should be continued to examine and develop more granular and specific approaches with respect to the individual customer groupings within the APP classes.

Reporting Requirements

UIU supports the Collaborative's work on determining reporting requirements. In addition UIU suggests ESCOs provide information on the actual savings customers experience and further details on the products offered. They believe it would be helpful if customers knew the rates charged in their second or third service term.

Conclusions

NYOAG is focused on assuring low-income consumers are charged a rate no higher than that of the utility. In addition, the NYOAG argues that the Commission cannot permit consumers to be subjected to unwarranted violations of privacy.

NYC submits that the retail marketplace will need to further adapt and become more innovative so that it is competitive and offers just and reasonable rates to APPs.

Direct seeks an efficient and effective way to provide appropriate assistance to APPs while also furthering the other energy policies of the State.

GEE remains concerned that allowing fixed cost pricing may encourage the very predatory practices that the Collaborative and the Commission seek to curtail.

NEM strongly recommends that the Commission allow an adequate transitional period for ESCOs to comply with the new requirements without restrictions on the ability of low-income consumers to exercise choice for energy commodity or energy-related value-added services.

PULP respectfully states the Commission must not permit ESCOs to charge low-income customers more than the utility rate and believes that the Commission should extend such overcharging protections to all residential customers in order to ensure just and reasonable rates for all customers.

REPLY COMMENTS

Bar ESCOs from Charging Low-Income Participants Prices in Excess of the Utilities

The NYOAG, PULP and NYC agree with the recommendation that the Commission issue an order barring ESCOs from charging low-income participants prices in excess of the utilities' prices. They also submit that the Commission immediately pause ESCO sales to APPs while the proceeding continues until value-added services, and protective methods/technologies for identifying APPs, have been identified and defined.

Collaborative Failed to Identify ERVA Products

NYOAG, PULP and NYC argues that the Collaborative has failed to identify any energy-related value-added products or services that meet the criteria established in the Commission's February 2015 Order.

Rate Protections to All Residential Customers Wound Solve Privacy Concern

The NYOAG opines that an equitable solution to the privacy and cost concerns with identifying APP consumers would be to extend rate protection to all residential consumers. This would be a solution to the consent requirements for allowing consumers' APP status to be shared with ESCOs; the privacy implications of providing more information than APP status to ESCOs; and the security with which any information is provided.

The Joint Utilities believe that further discussion is required related to the customer consent process and the requirements of utilities and ESCOs. The mechanisms detailed in the Report for disclosing APP status to ESCOs may not be feasible. The utilities argue that the utilities should be required by the Commission to presume that the ESCO obtained the appropriate consent and relying on an ESCO's assertion that it has obtained customer consent may not be adequate assurance.

PULP and NYC assert that without a method for protecting customer privacy, ESCOs cannot market products and/or services in compliance with the Commission's Order. In addition, some ESCO participants have reached the same conclusion as PULP and NYC that ESCOs are simply not able to sell products to APPs in a manner that complies with the Commission's Order.

ESCO's Obtaining Consent

The Joint Utilities strongly oppose providing APP status information to ESCOs without customer consent and opposes

Direct's request that the Joint Utilities release this information without consent.

Commissioner Diane X. Burman, dissenting:

As reflected in my comments made at the July 14, 2016, 2016 session, I dissent on this item.