

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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 12-M-0476

In the Matter of Retail Access Business Rules

Case 98-M-1343

In the Matter of Eligibility Criteria for Energy
Service Companies

Case 15-M-0127

**JOINT COMMENTS OF THE
UTILITY INTERVENTION UNIT AND THE
ATTORNEY GENERAL OF THE STATE OF NEW YORK
ON THE SAPA NOTICES PUBLISHED ON MAY 4, 2016 AND ON THE
STAFF WHITEPAPERS ON EXPRESS CONSENT, PERFORMANCE
BONDS OR OTHER SECURITY INTERESTS, AND BENCHMARK
REFERENCE PRICES**

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INTRODUCTION

The New York Department of State's Utility Intervention Unit ("UIU")¹ and the Office of the New York State Attorney General ("NYAG")² respectfully submit the following comments in response to the Public Service Commission's ("Commission" or "PSC") Notices of Proposed Rule Making published in the New York State Register on May 4, 2016. One of these Notices concerns proposed amendments to the Uniform Business Practices ("UBP") that govern eligibility of Energy Services Companies ("ESCOs") to do business in New York; the remaining three Notices each concern a separate ESCO-related Whitepaper that the Department of Public Service Staff ("Staff") issued on May 4, 2016, and on which the Commission invited comment in a Notice Seeking Comments issued May 10, 2016 in Cases 15-M-0127 et. al., *In the Matter of Eligibility Criteria for Energy Services Companies*.³ Those Whitepapers represent a compilation of ideas that many parties have shared during a series of public collaborative discussions over the past three months, which were held with the purpose of developing a strategy to permanently implement the consumer-protection principles the Commission articulated in its Order Resetting Retail Energy Markets and Establishing Further Process, issued February 23, 2016 in this proceeding ("Reset Order"). UIU and the NYAG appreciate the opportunity to comment upon the proposed UBP revision and the ideas presented in the Whitepapers.

UIU and the NYAG applaud the Commission's ongoing efforts to ensure that consumers are adequately protected from unscrupulous practices in the retail energy market. The Commission's Reset Order made great strides toward solving multiple failures of the Energy Services Company ("ESCO") mass market. These market failures, which have been identified

¹ UIU is an office within the New York Department of State's Division of Consumer Protection statutorily authorized to "represent the interests of consumers of the state before federal, state and local administrative and regulatory agencies engaged in the regulation of energy services." N.Y. Exec. L. § 94-a. UIU focuses particularly on the interests of New York's residential and small commercial customers.

² The NYAG is the chief law enforcement officer in the State and is both obligated and empowered to protect the interests of the people and businesses of New York. The NYAG enforces consumer protection laws, including laws that prohibit fraudulent or deceptive business practices. The NYAG has participated in numerous Commission proceedings advocating for residential and small business customers. In particular, the NYAG has long advocated for the Commission to remedy flaws in New York's retail energy markets in order to protect New York consumers.

³ These Whitepapers comprise a Staff Whitepaper on Benchmark Reference Prices ("Reference Price Whitepaper"); Staff Whitepaper on Express Consent ("Express Consent Whitepaper"); and Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests ("Performance Bond Whitepaper").

by the Commission itself as well as many parties to these proceedings, have enabled ESCO practices, including misrepresenting savings, impersonating utility employees, failing to honor the terms of their contracts, and switching consumers without authorization, that have caused widespread consumer harms. Additionally, the Commission's analyses have shown that the majority of mass market ESCO consumers pay more to ESCOs than they would have paid to their utilities for equivalent service.⁴

UIU and the NYAG largely support the Commission's proposed changes to the UBP. UIU and the NYAG further support several of the recommendations included in the three Whitepapers; however, in some instances, the Whitepapers' proposals would not adequately protect consumers. UIU and the NYAG therefore urge the Commission to incorporate the proposed modifications discussed herein.

DISCUSSION

I. The Proposed Amendments to the Uniform Business Practices Should Be Adopted, with Modifications.

Pursuant to State Administrative Procedure Act ("SAPA") § 202(1), the Commission published a Notice of Proposed Rulemaking in the State Register on May 4, 2016.⁵ The SAPA notice proposes seventeen changes to the UBP, the rules that all ESCOs are required to follow as a condition for the Commission's permission to do business in New York State. These proposed changes are based in part on a Staff Report filed July 28, 2015 in this proceeding, on which UIU has previously submitted comments.⁶ Those comments, attached here as Appendix A, are incorporated by reference as if restated herein.

UIU and the NYAG support the increased protections for mass market energy consumers previously ordered by the Commission including, most recently, the February 23, 2016 Reset Order. As amply demonstrated in these proceedings to date and by the work of UIU, the NYAG,

⁴ See, e.g., Cases 12-M-0476 et al., Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015) at 6.

⁵ SAPA No. 15-M-0127SP3, 2016-18 N.Y. St. Reg. 41-42 (May 4, 2016) ("SAPA Notice").

⁶ Case 15-M-0127, UIU Reply Comments on Staff Proposal (filed November 2, 2015).

and others in this area, those increased customer protections were necessary to address failures in the State's retail energy markets and to curtail the tide of ESCO abuses and overcharges. The additional rule changes contemplated in the May 4 SAPA Notice continue in this positive direction.

A. Items 1, 2, and 4

UIU and the NYAG support the following proposed changes to the UBP, which will assist the Commission in identifying bad actors more efficiently in order to better protect mass market consumers:

- Requiring ESCOs to disclose investigations and complaints in other states.
- Requiring that ESCOs operating in New York have at least three years of experience in financial risk management and customer service.
- Allowing denial of ESCO eligibility applications for good cause, including evidence of poor performance in other jurisdictions.

B. Items 5 and 6 (Definition and Sale of “Green Energy” Products)

Items 5 and 6 of the SAPA Notice invite comment on the definition and sale of “green energy” products. UIU and the NYAG reiterate UIU's prior comments that green products must be subject to price protections.⁷ The Reset Order does not provide such protections. As UIU noted in its prior comments, “[t]he mere procurement of a certain amount of renewable energy commodity should not grant an ESCO carte blanche to charge any price.”⁸ Rather, the price of the green product should be reasonable and proportionate to the product's value to customers. As the NYAG has previously stated, “ESCOs must not be permitted to charge any price they want simply because they have provided a clean energy contract. At a minimum, any premium

⁷ Cases 15-M-0127 *et. al.*, Comments of the Utility Intervention Unit on Resetting Retail Energy Markets for Mass Market Customers (filed March 18, 2016) (“UIU Comments on Reset Order”) at 5-6.

⁸ *Id.* at 5.

charged by ESCOs must be subject to a reasonable cap.”⁹ This Rule Making presents a critical opportunity for the Commission to close this green-product loophole.

C. Item 7 (New Requirements for Standard ESCO Contract for Residential Consumers)

UIU and the NYAG also support a requirement that ESCOs utilize a standard contract for energy commodity service to residential customers. However, the contract cited in the Commission’s SAPA Notice, published along with the July 28, 2015 Staff Report, is out of date.¹⁰ For example, the SAPA Notice contemplates changes to the three-day rescission period, but the contract (in paragraph 7) only mentions the three-day rescission period. This contract also provides for the automatic renewal of a fixed rate contract into a variable rate month-to-month contract at the end of the initial term (in paragraph 2), whereas – as discussed below – any automatic renewal should not apply where there are changes to any material term.

The Commission should also take this opportunity to update the UBP’s definition of “material changes and renewals.” UBP § 5(B)(5)(d) currently provides in part:

Material changes and renewals – no material changes shall be made in the terms or duration of any contract for the provision of energy by an ESCO without the express consent of the customer obtained under the methods authorized in the UBP. . . . Regarding contract renewals, with the exception of a rate change, or an initial sales agreement that specifies that the agreement renews on a monthly basis with a variable rate methodology which was specified in the initial sales agreement, all changes will be considered material and will require that the ESCO obtain the customer’s express consent for renewal.

This definition of “material changes” excludes changes to critical contract terms, and in doing so, undermines the Commission’s intent in its Reset Order to ensure that ESCO customers have ample knowledge of, and expressly consent to, material changes in their service agreements.¹¹

UIU and the NYAG make several recommendations. First, price must be included in the definition of “material change.” Price is one of the most important features of any contract. This is particularly true for ESCO contracts, where the central product provided (i.e., electric or gas

⁹ See, Case 12-M-0476 *et al.*, Reply Comments of Attorney General Eric T. Schneiderman (filed April 4, 2016) (“NYAG Reply Comments”), at 2.

¹⁰ Cases 15-M-0127 *et al.*, Staff Proposal (filed July 28, 2015), at App. B.

¹¹ See Reset Order at 14, 21. The Express Consent Whitepaper is addressed in Part III of these comments.

commodity) is fungible – with the occasional exception of its origin, the commodity is the same across retailers. Price is thus the central feature that allows customers to distinguish and choose among retailers. Furthermore, price transparency is especially critical in an ESCO contract because customers’ usage and bills vary from month to month, making it difficult for customers to notice and respond to changes in their per-kWh or per-therm rates.

Second, “material change” should not exclude variable rate agreements that renew on a monthly basis under a specified variable rate methodology, for at least two reasons. This exclusion would allow an ESCO selling a compliant variable-rate product (such as a “green” product, which is not currently subject to any price protections) to hide significant future price increases in its service agreements. These price increases would snap into place when the contract automatically renews – precisely the type of deceptive bait-and-switch tactic of which thousands of ESCO customers have complained, and which have contributed to the inception of this important proceeding. Additionally, this exclusion from “material change” could potentially allow for the renewal of contracts that do not comply with the Commission’s Reset Order. This exclusion could potentially be read as “grandfathering” otherwise non-compliant contracts, allowing them to auto-renew in the future. UIU and the NYAG therefore recommend that both exclusions from the definition of “material changes and renewals” be deleted; instead, the final revised sentence of UBP § 5(B)(5)(d) should read, “Regarding contract renewals, all changes will be considered material and will require that the ESCO obtain the customer’s express consent for renewal.”

D. Item 8 (Standardized ESCO Contract Language for Non-Residential Consumers)

UIU and the NYAG support the SAPA Notice’s proposal to standardize key provisions for energy commodity services for non-residential consumers. We note, as well, that contracts should be available for all mass market consumers, residential as well as small non-residential customers, in the six most commonly-spoken non-English languages of New York, as well as the next two most common non-English languages in each utility’s service territory.¹² This would help to ensure that customers understand and are able to consent to receiving ESCO service.

¹² UIU Comments on Reset Order at 8.

E. Item 11 (Requirements for ESCO Brokers)

UIU and the NYAG support the Commission's proposal to require ESCOs to identify and provide contact information for entities that market to customers on behalf of the ESCOs or sell lists of customers to the ESCOs. Indeed, UIU and the NYAG urge the Commission to do more and take steps to regulate ESCO brokers. As the NYAG has previously stated, "[u]nregistered businesses that engage in broker activities should be barred from doing business with New York consumers. Registered brokers should be required to certify that their employees and agents have been trained to comply with the UBP rules."¹³ Moreover, the method of the broker's compensation should be disclosed to the consumer.¹⁴ In summary, the Commission "should prohibit deceptive practices and require the disclosure of all information that consumers need in order to make an informed decision."¹⁵

F. Items 13 and 14 (Changes to Three-Day Rescission Period)

UIU and the NYAG have previously expressed support for extending the rescission period of ESCO agreements with mass-market consumers to at least one billing cycle, in order to allow customers an opportunity to conduct a meaningful comparison of their bills and service under an ESCO and the utility.¹⁶ UIU and the NYAG previously recommended a 45-day cancellation period for all mass market customers.¹⁷ As the Commission has acknowledged, small business owners often fall prey to the same false promises as residential consumers,¹⁸ and so should be entitled to the same protections.

¹³ Case 12-M-0476 *et al.*, Comments of Eric T. Schneiderman, Attorney General of the State of New York (filed January 25, 2013) at 25.

¹⁴ *Id.* (for example, "is [the compensation] paid by the ESCO or the customer, by fixed commission or as a surcharge on each unit consumed"?)

¹⁵ Case No. 12-M-0476 *et al.*, Comments of Attorney General Eric T. Schneiderman (Mar. 18, 2016) ("NYAG Initial Comments"), at 6.

¹⁶ *See id.* at 9-10.

¹⁷ UIU Initial Comments on Reset Order at 9-10; NYAG Initial Comments at 4-5.

¹⁸ *See, e.g.*, Case 12-M-0476 *et al.*, Order Taking Actions to Improve the Residential and Small Non-Residential Markets (issued February 25, 2014) ("February 2014 Order") at 3 ("In light of the apparent scarcity of energy-related value-added products and services available in the residential and small non-residential markets; the high complaint rates; and what appears to be a large number of active ESCOs generating revenues by offering consumers little more than higher prices, it is apparent that these markets are not providing sufficient competition or innovation to properly serve consumers.").

G. Item 15 (Requirement of Performance Bonds)

As discussed in Part IV below, UIU and the NYAG fully support the implementation of a requirement that ESCOs post performance bonds in order to be deemed eligible to operate in the State of New York.

H. Items 16 and 17 (Framework for ESCO Oversight and ESCO Penalties)

UIU and the NYAG reiterate their comments that the Commission should exercise its discretion to apply Article 4 of the Public Service Law (“PSL”) to ESCOs.¹⁹ As the NYAG has previously observed, “[t]he Commission’s Article 4 powers are not limited to setting utilities’ rates; they instead extend to regulating the retail-energy market as a whole and setting the terms of ESCOs’ access to public utility infrastructure. The Commission should assert its power to impose appropriate sanctions under the appropriate circumstances.”²⁰ As discussed in more detail in Part II(C)(2) below, such sanctions may include those authorized under PSL §§ 25 and 25-a, which would provide the Commission with an expanded and more nuanced suite of penalties to employ in instances of ESCO noncompliance.

II. UIU and the NYAG Support the Application of a Reference Price, But Significant Changes to the Whitepaper’s Proposals Are Required.

UIU and the NYAG support the concept of a reference price against which to evaluate fixed rate ESCO contracts; however, the formulations presented in the Reference Price Whitepaper would contravene the intent and substance of the Commission’s Reset Order, and would provide no protections to customers. To the contrary; the Whitepaper’s formulations would enshrine many of the very market failures that have allowed ESCOs to overcharge customers for decades – and which provided the initial basis for this proceeding. The Whitepaper’s reference price proposals suffer from other shortcomings as well, as discussed below. UIU and the NYAG therefore recommend the Commission reject the Whitepaper’s reference price formulation, and instead prohibit ESCOs from offering fixed price contracts that

¹⁹ See UIU Comments on Reset Order at 13-14; NYAG Reply Comments at 4-5.

²⁰ NYAG Reply Comments at 5.

do not provide savings. Should the Commission be inclined to permit ESCOs to offer such contracts, a value-based approach should be considered (as described in Part II(C) below).

A. The Commission Should Reject the Reference Price Whitepaper Proposals.

1) *Background: Whitepaper Formulation of Reference Prices*

The Reference Price Whitepaper presents multi-variable calculations for each of a gas and an electric reference price. Most components of these calculations appear designed to mirror the corresponding costs a utility would incur in purchasing and supplying the same commodity over a 12-month period. But both calculations also include factors (P in the gas reference price; P, F, and the Retail Cost Adder in the electric reference price) that are directly or indirectly designed to give ESCOs the ongoing opportunity to charge above-market prices.

The variable P for the gas reference price (or “Pg”) is a “[p]remium [that] includes supplier margin [i.e., profit] and MFC related costs, including purchase of receivables and billing.”²¹ Pg – and thus the profit margin built into the reference price – would be “decided periodically by the PSC, based on need.”²² As used in the electric reference price, the variable P (or “Pe”) would be a “[r]isk premium to cover ESCO customer acquisition, financing, labor, POR [purchase of receivables] costs, taxes;” and the variable F would be a “multiplier to cover costs of load shaping, ancillary service, etc.”²³ Like Pg, both Pe and F would also be “decided periodically by the PSC, based on need.”²⁴

The Retail Cost Adder – whose purpose the Reference Price Whitepaper does not define – would add an additional 2 cents per kWh to the base reference price calculation.²⁵ At a public technical conference held May 31, 2016, Staff explained that the level of the Retail Cost Adder was expressly calibrated to accommodate ESCOs’ historical profit margins, which ESCOs communicated to Staff during the development of the Reference Price Whitepaper. The Reference Price Whitepaper’s Retail Cost Adder of 2 cents/kWh represents the highest of these profit margins, plus 50%. Staff explained that this Retail Cost Adder was designed to give

²¹ Reference Price Whitepaper at 7.

²² *Id.* How and when Pg would be set and reset “based on need” is unworkably vague on its face, which is addressed *infra*.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.* at 5.

ESCOs “reasonable headroom,” and expressed confidence that with this Retail Cost Adder incorporated, no ESCO should experience difficulty pricing its products below the reference price.

2) ESCOs’ Historical Costs Should Not Form the Basis of a Reference Price.

ESCOs’ historical costs and profit margins are not an appropriate basis upon which to develop a reference price. Cost-based ratemaking is acceptable when applied to utilities; because utilities are monopolies, their costs are the only practicable benchmark to use in determining the appropriate price of service. But cost-based price setting is antithetical to a properly-functioning competitive market, which should produce fair prices that reflect the sellers’ costs (and profit margins) as well as the value the buyer derives from the product. Compared to a monopoly, a competitive marketplace should yield lower prices and enhanced customer value. The Commission expressly hoped and expected that competition in the retail commodity market would lead to such results when it opened New York to ESCOs in 1996.²⁶

A competitive marketplace, and the corresponding fair prices it would bring, has not taken hold here. Instead, as the Commission has found, the market for ESCO products sold to mass-market customers has been systematically stacked against customers to the benefit of ESCOs.²⁷ The result has been hundreds of millions of dollars of customer overcharges.²⁸ To use these past excessive rates as a benchmark for determining future prices would contravene the Commission’s primary purpose of this proceeding, i.e., to mitigate the failure of the retail energy markets through enhanced customer protections.²⁹ Any new regulations (such as a reference price) must be designed to protect mass-market customers – not ESCOs. This reason alone is sufficient to warrant the Commission’s rejection of the Reference Price Whitepaper’s proposed approach.

²⁶ See Cases 94-E-0952 *et. al.*, *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Regarding Competitive Opportunities for Electric Service (issued May 20, 1996) at 30-32.

²⁷ See, e.g., Reset Order; February 2014 Order.

²⁸ See Affidavit of Luann Scherer in Support of Respondent’s Answer ¶ 21, Index Nos. 868-16, 870-16, and 874-16 (Albany County Sup. Ct. 2016); see also Memorandum of Law of Amici Curiae Office of the Attorney General and Utility Intervention Unit of the New York State Department of State at 21 (extrapolating the ESCO overcharges cited in Ms. Scherer’s statewide would yield annual estimated overcharges to residential customers of hundreds of millions of dollars).

²⁹ Reset Order at 2.

3) *The Reference Price Whitepaper's Proposals Are Vague and Unworkable, and Would Not Protect Customers.*

The Reference Price Whitepaper's calculations for reference prices contain inappropriate factors that would not protect customers. The reference prices' factors Pg, Pe, and Retail Cost Adder are not supported. First, the Reference Price Whitepaper includes no guidance regarding the appropriate level of Pg and Pe beyond noting that they would be "decided periodically by the PSC, based on need." The Reference Price Whitepaper does not provide any corresponding procedural standards governing these periodic decisions. For example, it does not explain how often the Commission would reset Pe and Pg, what information it would consider in making such a determination, whether other parties would be able to offer alternative information or viewpoints, or any other procedural elements.

The Reference Price Whitepaper also does not describe how the Commission would determine whether to reset Pe or Pg "based on need." "Need" is not defined. In the case of the variable Pg, which includes gas ESCOs' profit margins, "need" presumably includes the level of allowable ESCO profit. The Reference Price Whitepaper's approach would thus require the Commission to periodically determine how much profit gas ESCOs could earn. Even accepting, *arguendo*, that this is an appropriate role for the Commission (which it may not be), this approach would invite frequent and time-consuming petitions by dissatisfied ESCOs, and could potentially spawn an entirely new class of ESCO rate proceedings.

Pe suffers from the additional flaw of including ESCOs' "customer acquisition" costs. To factor ESCOs' marketing costs into a reference price is inappropriate. ESCOs' long history of deceptive, high-pressure, and fraudulent marketing tactics is a central factor precipitating this proceeding.³⁰ Indeed, ESCOs' marketing practices have been instrumental in enabling ESCOs to overcharge their customers. To institutionalize these costs in a reference price would be to condone them, which would harm customers.

Finally, the Retail Cost Adder is unreliable. Staff has indicated that the Retail Cost Adder was designed around ESCOs' self-reported profit margins. Neither the Commission nor

³⁰ See Reset Order at 12 ("Despite the Department's recent modifications to the UBP to strengthen and enhance customer protections through changes in the marketing standards and customer enrollment procedures that ESCOs and their representatives must follow, abuses continue. These abuses lead to customer complaints filed with the Department, which have been steadily increasing.").

other parties to these proceedings were privy to such information. Thus, it cannot be determined from the Reference Price Whitepaper whether a Retail Cost Adder of 2 cents per kWh actually reflects ESCOs' historical margins. The Reference Price Whitepaper would not provide a means for this figure to be reevaluated or reset in the future. Furthermore, the Reference Price Whitepaper provides no rationale for setting the Retail Cost Adder at 50% above the highest of the profit margins that ESCOs communicated to Staff. Even if ESCOs historic profit margins were an appropriate basis for determining acceptable prices for their products – which, as discussed above, they are not – the Reference Price Whitepaper's proposal to inflate these profit margins by an additional 50% is arbitrary and unacceptable.

B. The Commission Should Reject Fixed Price Contracts That Do Not Provide Savings to Mass Market Customers.

As UIU and the NYAG have previously stated, the Commission should define an energy-related value-added service (“ERVAS”) as a product or service that actually delivers value: any premium paid to ESCOs must be offset by savings that are definitively provided by an ERVAS, including any cost of the ERVAS that is borne by the consumer. Thus, in the case of a fixed price contract, the only time a value is added for the consumer is when the consumer saves money over what the consumer would have paid as a full service utility customer. There is therefore no reason to provide a consumer with any fixed price contract that does not offer price protection.

C. Should the Commission Wish to Allow ESCOs to Offer Fixed Price Contracts at a Premium Over Utility Prices, the Commission Should Adopt a Mandatory Value-Based Reference Price.

As stated, the Commission should never require mass market consumers to pay to ESCOs more than they would pay to utilities unless the premium ESCO receives is offset by the value the ERVAS provides to the consumer. A fixed price contract, by definition, provides no value to consumers unless consumers experience savings. In this context, the only scenario in which a consumer could experience savings is the scenario in which a fixed price contract is offered and no reconciliation occurs. Unlike in the utility Budget Billing programs, there is no requirement

that a consumer pay the difference between actual consumption and the agreed fixed price at the end of a specified period. Thus, should the Commission choose to adopt a fixed price, no-reconciliation contract as a value-added service, the premium paid should be based on the value actually realized by the consumer.

1) The Reference Price Should Be Based on Customer Value.

As the Commission observed in its February 25, 2014 Order in Case 12-M-0476, ESCOs in New York have often “generat[ed] revenues by offering consumers little more than higher prices.”³¹ This imbalance between ESCO prices and customer value is unacceptable. As UIU noted in that proceeding, “Commission-approved utility rates represent ‘just and reasonable rates;’ thus, to charge a higher rate without delivering corresponding added value is not just and reasonable.”³² ESCO prices that exceed the utility’s price are only just and reasonable to the extent that the ESCO product delivers customer value in excess of utility service. The reference price should follow this principle.

The 12-month fixed-price product represents an excellent candidate for implementing this principle. Utilities already offer 12-month fixed-price products in their Budget Billing programs. The only substantive difference between a utility’s Budget Billing product and a corresponding 12-month fixed-price ESCO product is that the ESCO product need not include an annual bill reconciliation. At the end of each year, a Budget Billing customer receives a bill or credit to reconcile his/her total bills for the past year with his/her actual consumption over the same time period. An ESCO, in contrast, need not conduct such a reconciliation, and can instead factor the cost of this added risk into its monthly prices.

Thus, the lack of an annual bill reconciliation is the entire extent to which an ESCO’s 12-month fixed-price product is superior to a utility’s Budget Billing product. UIU and the NYAG agree that customers may derive some value from not having an annual bill reconciliation. However, Budget Billing reconciliations award customers with credits as often as they levy extra charges, so the added value of the ESCO product is restricted to the value of the bill predictability itself.

³¹ February 2014 Order at 3; *see also id.* at 2-4.

³² Case 12-M-0476, UIU Comments on Collaborative Report Regarding Protections for Low Income Customers of Energy Services Companies (filed January 29, 2016) at 15.

The added value of the ESCO product may be relatively small. For example, in its Order initiating a Collaborative on protections for low-income customers of ESCOs, the Commission determined that for ESCO commodity-only products sold to low-income customers, “[t]he ESCO must guarantee that the customer will pay no more, on an annual basis, than the customer would have paid as a full service customer of the utility[.]”³³ By forbidding ESCOs from charging low-income customers a premium for a reconciliation-free product, this Order suggests that at least with respect to those customers, the incremental value of not having an annual bill reconciliation is negligible. And if low income customers – who possess the least capacity to absorb rate shocks such as bill reconciliations – derive only negligible added value from a reconciliation-free product, then the added value to all other customers is even less.

Recognizing, however, that the Commission’s Order in the Low Income Collaborative proceeding was motivated at least in part by other policy considerations (including a desire to curtail the transfer of low-income program funds to ESCOs), and in the interest of putting forth a constructive proposal that can achieve consensus, UIU and the NYAG are willing to consider a larger-than-negligible value-based “add” for the 12-month fixed-rate ESCO product reference price. This “add” should be small, should bear a relationship to the actual value realized by the consumer, and should in no instance more than 2% above the utility’s corresponding commodity price. These requirements are necessary for any such arrangement to be consistent with this proceeding’s purpose of enhancing customer protections.³⁴ UIU and the NYAG further suggest the Commission periodically reevaluate the “add” in future collaborative proceedings as more comprehensive data concerning the marginal value of reconciliation-free products become available.

This value-based approach, in addition to maintaining harmony and fundamental notions of fairness, would also advance the Commission’s objectives in the Reforming the Energy Vision (“REV”) proceeding (Case 14-M-0101). As the Commission observed in its Order Adopting a Ratemaking and Utility Revenue Model Policy Framework, issued May 19, 2016 in the REV proceeding:

³³ Cases 12-M-0476 et al., Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015) at 6.

³⁴ For the sake of clarity: under this proposal, the maximum an ESCO could charge for a 12-month fixed-price product would be no more than 2% above the amount a utility would have charged over the same 12 months.

Cost-of-service ratemaking, while it will remain applicable to conventional utility investments for the near future, inhibits innovation in general, and discourages numerous activities that utilities need to undertake to implement REV. . . . Utility revenue opportunities must be expanded to more closely align utilities' financial interests with the consumer benefits from these elements of a modernized electric system.³⁵

This economic principle – that utility revenues should increasingly be linked to customer value, rather than utility costs – is also particularly well-suited to ESCOs. As with utilities, a stronger alignment between ESCOs' prices and their products' value would spur innovation and encourage cost streamlining.

This proposed value-based approach would also be far simpler to implement than the Reference Price Whitepaper's ambiguous reference price formulation. A value-based would still require the development of a calculation that mirrors the utilities' commodity prices, but this calculation would not include the vague and subjective price elements (such as ESCO profit margins in the Pg and the Retail Cost adder, and ESCOs' marketing costs in Pe) that render the Reference Price Whitepaper's proposal particularly opaque and unworkable.³⁶ UIU and the NYAG's revised reference price with value-based "adder" would thus better serve the stated purpose of the reference prices to be "transparent, sufficient, visible, timely provided and easy to administer."³⁷

2) *The Reference Price Should Be a Mandatory, Enforceable Price Cap.*

Reference prices should be directly linked to meaningful enforcement. Under the Reference Price Whitepaper's proposal, both the electric and gas reference prices would be effectively optional, providing only that "Prices [of ESCOs' 12-month fixed price supply products] above the reference price would be subject to staff review and possible compliance action."³⁸ This proposal would add unnecessary ambiguity. ESCOs' prices are already subject

³⁵ Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Order Adopting a Ratemaking and Utility Revenue Model Policy Framework (issued May 19, 2016), at 23.

³⁶ UIU and the NYAG do not, however, endorse the remaining components of the Reference Price Whitepaper's calculations. UIU and the NYAG reserve the right to further address the appropriate content of a reference price calculation in their reply comments.

³⁷ Reference Price Whitepaper at 2.

³⁸ *Id.* at 2, 5.

to Staff review pursuant to the Commission's authority under Articles 1, 2, and 4 of the Public Service Law. There is no reason to imply a narrower scope of authority here.

Furthermore, the mention of "possible compliance action" is unworkably vague. The Reference Price Whitepaper does not specify the type, magnitude, or frequency of such "compliance action." Such details are crucial to any enforcement regime; any attempt to apply the amorphous "compliance action" described in the Reference Price Whitepaper would fail the basic requirements of due process. This "reference price" would not be enforceable at all.

UIU and the NYAG recommend that any reference price adopted in this proceeding be mandatory and unambiguously enforceable. Specifically, the reference price should (1) function as a price ceiling; and (2) be backed by clear enforcement protocols. These enforcement protocols should include a robust set of legal tools. The Commission has historically regulated ESCOs primarily through Articles 1 and 2 of the PSL, which afford the Commission a rather limited and inflexible set of penalties to use against noncompliant ESCOs. UIU and the NYAG therefore recommend, as UIU has in past comments in this proceeding,³⁹ that the Commission also apply the robust enforcement and penalty tools at PSL §§ 25 and 25-a to ESCOs, which will help deter noncompliance and will permit a much more precise tailoring of penalties to fit violations.

III. Express Consent to Changes to Energy Service Should Be Required.

UIU and the NYAG support the Express Consent Whitepaper's three-stage alternative to express consent, but only for renewals of ESCO contracts on the same terms to which the consumers previously agreed. A renewed ESCO contract that includes materially different terms than the original is effectively a new contract altogether. Any material change to an ESCO customer's terms of service (which, as discussed in Part I above, should include changes to price as well as changes that were "pre-programmed" into the original contract to automatically take effect after a period of time) should require the same degree of express consent that is required to enter into an ESCO contract in the first place.

As is required of new ESCO customers, express consent should either be written or, if conducted orally, should be recorded and verified through a recorded third-party verification

³⁹ UIU Comments on Reset Order at 14.

process. To the extent that an ESCO wishes to obtain “written” consent via electronic communication, the ESCO must obtain the customer’s express consent to notice in a manner consistent with best available practices (including, for example, ensuring that such notice is made available in the customer’s primary language; or potentially using a two-step process including both a website sign-up form and a follow-up email that contains instructions to confirm consent). Furthermore, the customer’s consent to the use of electronic notice should be explicitly revocable at the customer’s option. E-mail notice could deliver substantial cost savings to ESCOs and provide green benefits to the State as a whole. But those benefits will be more than entirely negated if customers receive no notice at all.

Ensuring such “strong” customer consent will be increasingly important if the Commission expands the menu of compliant ESCO beyond the two types of products allowed under the Reset Order. ESCO contracts will likely become more complex with the introduction of more renewable energy products and the potential expansion of Energy-Related Value Added Services (“ERVASs”) products. Therefore, the Commission must ensure that consumers receive adequate notice of material changes to their contracts and must require ESCOs to obtain consent to such changes.

IV. ESCOs Should Be Required to Post Performance Bonds.

The UIU and the NYAG have previously submitted comments indicating that they fully support the implementation of a requirement that ESCOs post performance bonds in order to be deemed eligible to operate in the State of New York.⁴⁰ Performance bonds are necessary to ensure that ESCOs have the financial resources to make customers whole if they violate the terms of a customer agreement, the UBP, or any other applicable law or regulation.

UIU and the NYAG support the Performance Bond Whitepaper’s first option,⁴¹ with certain modifications. Specifically, UIU and the NYAG propose: (1) all ESCOs must post a financial security; (2) the amount of the security should be calculated based on the number of the ESCO’s mass-market customers and the amount which the ESCO has historically charged those

⁴⁰ Case 12-M-0476 *et al.*, Comments of the Utility Intervention Unit on Resetting Retail Energy Markets for Mass Market Customers (Mar. 18, 2016); NYAG Reply Comments at 4.

⁴¹ See Performance Bond Whitepaper at 5-6.

customers above utility prices; (3) where an ESCO did not charge its mass-market customers more than utility prices in the prior historical period, or where such pricing data are unavailable, the amount of the security should instead be based on the number of the ESCO's mass-market customers and a pro-rated share of the total amount that all ESCOs have overcharged mass-market customers in New York; and (4) initially, the security should be posted as an irrevocable letter of credit, in order to enact this customer protection in a timely and efficient manner.

Point (3) above is designed to ensure that neither temporary market factors nor ESCOs' refusal to disclose pricing information would obstruct the implementation of a performance bond requirement. As the records in this and prior ESCO-related proceedings have shown, mass-market ESCO customers have long suffered significant financial harms.⁴² The precise extent of these harms remains unknown, as individual ESCOs have resisted disclosing historic pricing information,⁴³ but the data available indicate that mass-market ESCO customers are routinely overcharged.⁴⁴ UIU and the NYAG therefore suggest that where an individual ESCO's pricing information is unavailable, the Commission base the amount of that ESCO's financial security on the estimated amount all ESCOs have jointly overcharged mass market customers. This baseline security amount can then be further adjusted on a per capita basis to reflect the number of mass market customers each ESCO serves, a factor which should be included to ensure that the security could be used to make all of an ESCO's customers whole where necessary. This structure could thus provide a security that is large enough to provide ESCO mass market customers with adequate protection and fairly configured to reflect the risk ESCOs take on in their transactions with mass market customers.

⁴² See Cases 12-M-0476 *et al.*, Comments of the Utility Intervention Unit on Collaborative Report Regarding Protections for Low Income Customers of Energy Services Companies 14-15 (filed January 29, 2016) ("UIU ESCO Low-Income Collaborative Comments"); see also Order Taking Actions to Improve Residential and Small Non-Residential Retail Access Markets (issued February 25, 2014) ("We find that as currently structured, the retail energy commodity markets for residential and small nonresidential customers cannot be considered to be workably competitive."); see also PR Newswire, New York ESCOs Charged Highest Electric Prices in Nation Last Year (December 28, 2015), available at <http://www.prnewswire.com/news-releases/nys-escos-charged-highest-electric-prices-in-nation-last-year-aarp-urges-probe-300197352.html> ("New York consumers paid at least 6.7% more to buy their electricity from ESCOs every year going back to 2008, and 5% more in 2007").

⁴³ See Case 12-M-0476 *et al.*, Statement of Necessity of RESA (filed January 11, 2016); Statement of Necessity of Direct Energy (filed January 11, 2016); *et al.*; Determination of Request for Confidentiality Pursuant to Public Officers Law §87(2)(d) (filed February 1, 2016).

⁴⁴ See Affidavit of Luann Scherer in Support of Respondents' Answer, *supra*, ¶ 21. National Grid provided data that indicates in January 2016 alone, residential ESCO customers in its territory paid \$15.9 million more for service than they would have if they had remained with basic utility service.

Additionally, as UIU has previously asserted in this proceeding, the security instrument must be designed foremost to protect consumers. “Such a [performance] bond must be payable to ESCO customers. In the event of an ESCO’s insolvency or bankruptcy, the ESCO’s customers must be assured of first payment from the proceeds of the redeemed bond.”⁴⁵ This is in part because “[m]ass-market customers are substantially more vulnerable to ESCO abuses than are larger commercial or industrial customers[.]”⁴⁶

CONCLUSION

For the foregoing reasons, UIU and the NYAG respectfully urge the Commission to adopt the proposed reforms in the SAPA Notice and the Whitepapers, with the modifications discussed above.

Respectfully Submitted,

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⁴⁵ UIU Comments on Reset Order at 11.

⁴⁶ *Id.*