

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

- Case 15-M-0127 - In the Matter of Eligibility Criteria for Energy Service Companies.
Case 12-M-0476 - Proceeding on Motion of the Commission to Assess Certain Aspects
of the Residential and Small Non-residential Retail Energy Markets
in New York State.
Case 98-M-1343 - In the Matter of Retail Access Business Rules.**

**COMMENTS ON DPS STAFF'S WHITEPAPERS ON BENCHMARK
REFERENCE PRICES FOR ESCO COMMODITY SERVICE, EXPRESS
CUSTOMER CONSENT FOR ESCO CONTRACT CHANGES, AND
PERFORMANCE BONDS**

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Dated: June 6, 2016

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I. Introduction

On February 23, 2016, the Commission issued its *Order Resetting Retail Energy Markets and Establishing Further Process*, (“Reset Order”),¹ taking “action to immediately address the unfair business practices currently found in the energy services industry and to ensure residential and small nonresidential commercial customers (mass market customers) are receiving value from the retail energy markets.”² Key elements of the Commission’s action are to establish and enforce a price limit on ESCO commodity-only service when the ESCO is not providing a green (at least 30 percent renewable) electricity product, require affirmative customer consent to contract changes, and institute security against any ESCO that fails to meet commitments or refund overcharges. The Commission directed:

Effective ten calendar days from the date of issuance of this order, energy service companies (ESCOs) may only enroll mass market customers and renew expiring agreements with existing mass market customers based on contracts that *guarantee savings in comparison to what the customer would have paid as a full service utility customer or provide at least 30% renewable electricity.*

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

Regarding the guaranteed savings requirement, *the ESCO must guarantee that the customer will pay no more, on an annual basis, than the customer would have paid as a full service customer of the utility.*³

¹ CASE 15-M-0127 – In the Matter of Eligibility Criteria for Energy Service Companies; CASE 12-M-0476 - Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State; CASE 98-M-1343 – In the Matter of Retail Access Business Rules; ORDER RESETTING RETAIL ENERGY MARKETS AND ESTABLISHING FURTHER PROCESS (Issued and Effective Feb. 23, 2016).

² *Id.*, at 1. Some ESCOs market their commodity service as a way for residential consumers to save money when, as demonstrated by the evidence in this case submitted by the Utility Project, except for slight initial “teaser” discounts, ESCOs generally charge significantly more than the PSC-approved rates for the same portion of utility service.

³ See, *Reset Order* at 2, 14, 15 (*Emphasis added*).

Finally, the Commission indicated further consideration would be given to “[w]hether and under what circumstances ESCOs should be required to post performance bonds or other forms of demonstrated financial capability.”⁴ Notably, this Order neither creates nor discusses an exception from the savings guarantee based on the type of ESCO contract for commodity service, e.g., whether the ESCO rates vary monthly or are ostensibly fixed for the duration of the contract.⁵

On May 4, 2016, the Department of Public Service (“DPS”) Staff issued three whitepapers for comments: a whitepaper on Benchmark Reference Prices (“Pricing Whitepaper”); a whitepaper on Express Consent (“Consent Whitepaper”); and a whitepaper on security and performance bonds (“Performance Bond Whitepaper”)⁶. Collectively, the purpose of the whitepapers are to compensate for the failure of the ESCO value-added collaborative⁷ to arrive at a consensus definition of “valued-added products or services.” The whitepapers also strive to address two core claims of the ESCO’s lawsuits⁸ against the *Reset Order*; namely that (1) utility pricing was almost impossible to figure out, so a product guaranteeing a discount above the utility default price was impossible; and (2) the surety requirement the DPS sought in response to the ESCO’s successful attempt at seeking a TRO was excessive and unnecessary.

⁴ *Order Resetting Retail Energy Markets* at 21. The Commission also indicated further consideration would be given to “[w]hat penalties may apply to ESCOs that violate the UBP or other Commission Orders or provisions of the PSL (for example, the application of PSL §§ 25 and 25-a).” *Id.* The subsequent DPS whitepapers do not address this enforcement issue.

⁵ ESCO contracts typically give the ESCO “outs” from performance of its duties, and allow the ESCO to renege and terminate the contract on relatively short notice for any reason, before the end of the contract term. See, e.g., Just Energy contract at <https://www.justenergy.com/products-and-rates/>, which states: 10. Ending this Agreement Early, Default. * * * *. Our Right to Cancel: We can end this Agreement, at no cost to us, if: (i) required/allowed by law; (ii) the Utility is unable to service your Location; (iii) a legislative or regulatory change materially alters our ability to profitably perform this Agreement; (iv) you move; or (v) you fall into “Default”. You will be given 15 calendar days’ prior notice. You will be in Default if you (a) breach a term of this Agreement or your Utility’s rules; or (b) switch to another energy supplier, including the Utility.; also see, Opinion 97-5, 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 and Effective: May 19, 1997).

⁶ Case 15-M-0127, 12-M-0476, 98-M-1343, DPS Staff filing letter (May 4, 2016).

⁷ Case 12-M-0476 et al., *supra*, Report of the Collaborative Regarding Protections for Low Income Customers of Energy Service Companies (filed November 5, 2015); Cases 12-M-0476 et al., *supra*, Notice Seeking Comments on Collaborative Report (issued December 1, 2015).

⁸ *Retail Energy Supply Assn. v Pub. Serv. Commn. Of the State of New York*, Sup Ct, Albany County, March 3, 2016, Zwack, J., Index No. 870-16.

The Whitepapers operate as a compromise of positions and unfortunately, undercut the stronger stance made in last year's *Reset Order*. Specifically, in the Pricing Whitepaper, Staff proposed (a) to implement the guaranteed savings requirement only for variable rate ESCO commodity service⁹; whereas as explained previously, in the *Reset Order*, the Commission established guaranteed savings for all mass market customers in comparison to what customers would have paid as a full service utility customer unless the ESCO could provide at least 30% renewable electricity. Staff also proposed in the Pricing Whitepaper to allow charges for ESCO fixed rate commodity service to exceed charges the customer would have paid as a full service customer of the distribution utility, up to a "benchmark" rate¹⁰; again, a condition not recognized in the Commission's *Reset Order*. In the Consent Whitepaper, the DPS Staff proposed a system of notification allowing implied customer consent,¹¹ whereas the Commission makes explicit in its *Reset Order* that customer affirmative consent would always be required. Finally, the Performance Bond Whitepaper does nothing to advance the Commission's directive in the *Reset Order* to institute security against any ESCO failure to meet commitments or refund overcharges because the DPS staff merely set forth for consideration five proposals as examples of ways in which surety bonds and/or security instruments could be calculated but without providing any recommendation.¹²

On May 10, 2016, the Commission Secretary issued a Notice providing an opportunity for public comment on the three DPS Staff Whitepapers.¹³ The Utility Project respectfully submits these initial comments in response.¹⁴

⁹ Pricing Whitepaper, p. 2.

¹⁰ Pricing Whitepaper, pg. 1.

¹¹ Consent Whitepaper, pg. 2-3.

¹² Performance Bond Whitepaper, p.6.

¹³ Cases 15-M-0127, et al., Notice Seeking Comments (issued May 10, 2016).

¹⁴ For the sake of brevity, PULP will not re-aver herein all of the consumer protection suggestions and requests, and rebuttal of other parties' suggestions, made on its own, and at different times, individually or collectively with AARP, the Attorney General of the State of New York, the City of New York, the Public Advocate of the City of New York, and the Utility Intervention Unit of the Department of State. However, PULP has not abandoned any of the positions it took earlier in the underlying proceedings concerning ESCOs (e.g., Cases 15-M-0127 - In the Matter of Eligibility Criteria for Energy Service Companies; 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; and 98-M-1343 - In the Matter of Retail Access Business Rules). PULP respectfully requests the DPS and Commission to treat these Comments as if all of those prior positions, requests, and suggestions were made in their entirety in these Comments as well.

II. COMMENTS ON THE DPS STAFF WHITEPAPER ON BENCHMARK REFERENCE PRICES

a. The DPS Staff Proposal for a “Benchmark Reference Price” Should Not be Adopted Because it Allows Charges to ESCO Fixed Rate Service Customers to be Higher than the Charges that Would be Paid to the Utility and Contravenes the Commission’s Guaranteed Savings Principle.

(i) Staff’s Proposal Opens a Gateway to Continued Overcharging

In the *Reset Order*, the Commission expressly limited ESCO enrollment or renewal of mass market customers to contracts that guarantee savings in comparison to what the customer would have paid as a full service utility customer, or that provide at least 30% renewable electricity.¹⁵ However, in its Pricing Whitepaper, the DPS Staff proposed allowing ESCO charges to exceed what the distribution utility would have charged, when the ESCO provides commodity-only service to a customer under a “fixed rate” contract.¹⁶ The Commission should reject Staff’s proposal because it is contrary to the Commission’s guaranteed savings rule for ESCO commodity-only service as stated in its *Reset Order*. If approved, the DPS Staff’s proposal would open the door to continued ESCO overcharging and marketing abuses because “fixed rate” contracts could be set higher than utility prices and customers could be lured into accepting these higher rate contracts under false pretenses. If approved, the DPS Staff’s proposal would also put the Commission in the position of establishing and revising ESCO markups and profit levels – determining whether charges are “just and reasonable” -- outside the rate setting process. Staff’s proposal also does not provide or identify enforcement tools that DPS or the Commission can use when ESCO prices exceed the proposed soft benchmark. Finally, and most importantly, Staff’s proposal should be rejected because it is inconsistent with the Commission’s goal as asserted in the *Reset Order* to reset the retail energy markets by redirecting the focus of retail market participants to the provision of new value-added products or services, and away from the sale of “bare commodity service,” into such new product lines as distributed energy resources.

¹⁶ Pricing Whitepaper, p. 2. However, DPS Staff does not propose to modify the *Reset Order*’s standard for ESCOs who provide variable rate commodity service.

(ii) Fixed-Price Offerings Are Not Per Se Value-Added Products or Services

DPS Staff have incorrectly assumed that a fixed price contract is a “value added” service that would allow ESCOs a non-green escape route from the guaranteed savings rule adopted by the *Reset Order*. DPS Staff did not cite any Commission Orders to support its benchmark reference price for fixed rate ESCO contracts.¹⁷ Nor could they. The Commission has never defined fixed price commodity-only contracts – or any other services -- as “energy related value-added” services that could conceivably warrant an exception from the guaranteed savings rule. Indeed, a product or service that increases the customer’s bill seems an unlikely candidate for the “value added” appellation. As stated by the Commission:

“Currently, the vast majority of ESCOs in New York continue to offer only commodity resale to mass market customers, in competition with utilities.... [M]ass market customers purchasing commodity only from ESCOs are unlikely to obtain value commensurate with the premium paid in excess of the cost that would be paid as a full service customer of the utility.”¹⁸

To illustrate, the vaunted price spike protection potentially offered by a fixed price product may be little in relation to the premium paid, because under the Commission’s policies, distribution utilities already hedge through physical and financial contracts to blunt the volatility of spot markets. Also, to some extent, customers seeking more stability in their bills may be able to smooth cost fluctuations due to seasonal and weather variation through levelized billing plans without paying ESCOs’ higher prices for fixed rate commodity service.¹⁹

In a second illustration, the likelihood or presumption that an ESCO fixed price contract will actually deliver service at a fixed price may be illusory. ESCO contracts often contain early termination fees that penalize customers for early termination. These same contracts also often allow the ESCO to terminate the contract at will, for any reason, with only the minimal notice required by the Commission. Thus, it is far from certain that ESCOs will actually deliver on promises of fixed prices. An ESCO may choose to terminate a customer’s fixed rate contract if wholesale rates soar above the fixed rate because it would be more profitable to cancel a contract than maintain it. Or, an ESCO may choose to terminate a

¹⁷ The putative “value” of higher priced ESCO fixed rate contracts identified by DPS Staff is conjectural, even in Staff’s description: “A fixed price product *could* provide value to customers who are looking to lock in a budget and/or insulate themselves from price spikes.” Pricing Whitepaper at p. 1.

¹⁸ See, *Reset Order* at p. 12.

¹⁹ ESCOs, like distribution utilities, are required under HEFPA to offer levelized billing plans. PSL Section 38.

contract at will if it has not secured a portfolio of resources to support the fixed price because spot prices unexpectedly soar, or because the company goes bankrupt. In either case, customers are left without recourse.²⁰

Staff's proposal gives into a fallacy advanced by ESCOs that claim they cannot, through more sagacious wholesale power purchasing, possibly beat the price of the utility. The fact that the Pricing Whitepaper states "the reference price must consider the additional risks ESCOs incur when offering a fixed price product" demonstrates how DPS Staff's proposal is retreating from the position asserted in the Commission's *Reset Order* because Staff is setting up its rationale for allowing charges in excess of default utility service charges outside of the green-energy exception granted by the Commission.²¹ To the contrary, there is no good reason to allow charges in excess of default utility service charges because the distribution rates reflect a portfolio of resources, and already include substantial costs for hedging, thus a price below the default utility service rate may still be slight or even substantially above the cost of the bare commodity. Furthermore, there is no inherent reason that an ESCO could not assemble a portfolio of better-priced supply contracts and resources that would support a fixed price offering that beats the fluctuating price of the distribution utility over an annual period, without costly risk adders to its fixed rates. With the advent of more diverse generation sources, it may be possible for ESCOs to obtain a better-priced portfolio than the utility.

There is no basis for Staff to assume that a fixed rate necessarily must be higher than what the utility charges. The Commission should reject the DPS Staff proposal because it contradicts the *Reset Order*. The sensible approach is the one Commission originally intended - enforcement of the guaranteed savings rule – with only one green-energy exception. Enforcement of the guaranteed savings rule across mass-market customers has the best chance at positively impacting the energy market because the result could stimulate ESCOs to vigorously pursue negotiated wholesale physical supply contracts from generators or other sources, rather than passively accept short term spot market prices and pay extra for financial hedging. Even if current practices have not resulted in ESCOs obtaining lower priced supply, that may be because until now it has been easier for them just to markup spot market prices, without

²⁰ An illustrative example is when Iroquois Energy Management, LLC ceased operations in 2000 and owed roughly 19,000 customers in excess of \$1.8 million in refunds. This case also serves as an abject lesson for why a surety bond system should be created. See, <http://www.naturalgasintel.com/articles/95686-ny-assemblyman-targets-retail-gas-marketer>.

²¹ See, Pricing Whitepaper at p. 2.

negotiating for long term contract supply at lower cost.²² Thus, even if the utility does not make a profit on retail resale of its wholesale supply portfolio now because utilities have additional overhead from mandatory hedging, it is not incumbent on DPS Staff to assume that a fixed rate should necessarily higher than what the utility charges.

(iii) DPS Staff's Benchmark Pricing Algorithms are Unacceptably Vague and Incomplete

The Commission should reject the DPS Staff's benchmark pricing contained in its Pricing Whitepaper because the pricing algorithms contain complex formulae for developing the benchmark price for fixed rate electric and gas supply and incorporate future market price indices for gas and electricity services. Meanwhile, the Pricing Whitepaper does not provide an example to show what rates the formulae would generate; does not provide illustrative back casts to show how rates generated with Staff's formulae compare with actual utility prices in recent years, or how the benchmark rates compare with rates of current ESCO fixed rates; and largely leaves to the Commission the task for resolving the inadequacies of its own complex formulae. For example, buried in Staff's electricity reference price formula are major factors to be set by the Commission: the "F" factor (a "Multiplier to cover costs of load shaping, ancillary services etc."), and a "P" Factor (a "Risk premium to cover ESCO customer acquisition, financing, labor, POR costs, taxes").²³ Since Factors F and P are not estimated in the Pricing Whitepaper, these "will be decided periodically by the PSC, based on need."²⁴

DPS Staff's benchmark pricing algorithms are unacceptably vague. There is no analysis by Staff of how its benchmark pricing algorithm impacts the allowed percentage above rates of the distribution utility, or overall profitability of an ESCO, or whether the price is just and reasonable in relation to actual costs based on a factual record. Yet, the Pricing Whitepaper presumes that the 2 cent/kwh retail cost adder²⁵ is right and that any price less than the reference price is just and reasonable. DPS Staff's benchmark pricing algorithms are unacceptably incomplete because Staff places the burden on Commission to modify the adder and other multipliers, but does so without setting any standard as to how

²² We know of no reported case at FERC involving a complaint under Section 206 of the Federal Power Act made by a New York ESCO seeking a wholesale price lower than the rate or contract price demanded by the generator.

²³ Pricing Whitepaper, at p. 4.

²⁴ *Id.*

²⁵ See, Pricing Whitepaper at pp. 3-5.

the Commission would determine if the total benchmark price is right, too low, or too high. Finally, the Pricing Whitepaper lacks any explanation of what would occur, procedurally and substantively, when an ESCO charges its customers more than the benchmark reference price. It merely says that [p]rices above the reference price would be subject to staff review and possible compliance action.”²⁶

There are a number of questions left unanswered by the Pricing Whitepaper. For example, if there is no presumption that the price is just and reasonable, could customers ever see a refund of the excessive charges beyond the reference price?²⁷ Or, what happens to ESCOs who charge prices far above the rate of the distribution utility? Or, is the reference price simply giving a “safe harbor” for excessive charges, with the possibility of charging even more than now?²⁸

It would not be in the public interest to approve the benchmarking algorithm proposed by Staff in its Pricing Whitepaper because it is vague, incomplete, and leaves many important issues unresolved. Moreover, if the reference price proposal were to be approved by the Commission, such a proposal might have the effect of steering ESCOs into marketing of fixed price commodity service after a monthly price spike, which would allow them to markup commodity prices far above the distribution utility rates with no value added. Such a continued focus on resale of energy commodity without real value-added energy services will continue to stagnate the ongoing 20-year effort of the Commission to design the energy competitive marketplace on a model that drives prices downward and provides opportunities for innovative new services to be offered by alternative providers of utility service.²⁹ Requiring ESCOs to meet or beat the price of the utility would help realign service offerings in the ESCO marketplace with the Commission’s intended design. In sum, the Commission should not adopt the Staff recommendation to create benchmark prices for fixed rate commodity supply service that exceed, over an annual period, what the distribution utility would charge.

²⁶ Pricing Whitepaper, at p. 5.

²⁷ Currently, the only rate established as just and reasonable is the rate of the distribution utility.

²⁸ Additional questions include the following: What would be different with a reference price that is higher than the utility price? Has Staff ever said an ESCO charged too much when its price was above the utility price? What would be different if an ESCO charged more than the reference price? Moreover, how would the staff be empowered to determine whether a price above the reference price is just and reasonable, when determining reasonableness of rates is the role of the Commission, not Staff? Would an ESCO that charges more than the reference price be able to justify it, and if so, under what procedure, and would customers and others have an opportunity to intervene and seek refunds of excess charges? Or would the “staff review” and consideration of remedies and penalties be closed to public participation?

²⁹ See *Opinion 96-12*, p. 26.

III. COMMENTS ON DPS STAFF WHITEPAPER ON AFFIRMATIVE CONSENT TO CHANGES IN ESCO CONTRACTS

In the *Reset Order*, the Commission considered the transition of customers taking ESCO commodity-only services under current fixed or variable contract rates that exceed the rates of distribution utilities into new compliant rates that would either guarantee savings or provide at least 30 % renewable energy. The Commission allowed fixed rate plans to continue to the end of their terms, and required monthly variable rate plans to be shift to compliant programs at the next billing cycle (or the customer would revert to default service from the distribution utility). The Commission explained the transitioning from an expiring fixed rate contract or a compliant guaranteed savings variable rate contract into an agreement for green energy that costs more than the distribution utility rate as follows:

*“ESCOs must receive affirmative consent from a mass market customer prior to renewing that customer from a fixed rate or guaranteed savings contract into a contract that provides renewable energy but does not guarantee savings”.*³⁰

This requirement was made part of the decretal portion of the Order, where the Commission again stated:

*“2. ESCOs must receive affirmative consent from a mass market customer prior to renewing that customer from a fixed rate or guaranteed savings contract into a contract that provides renewable energy but does not guarantee savings.”*³¹

It should be clear beyond doubt from the *Reset Order* that ESCOs “must receive affirmative consent” from customers for a change to a renewable energy contract rate that does not guarantee savings. In the Consent Whitepaper however, the Commission’s affirmative consent requirement is rather astonishingly subverted and replaced with a notice scheme that, if adopted, would automatically switch ESCO customers into a new plan that would not guarantee savings. Such a switch would occur with no express or affirmative communication from the customer allowing such a switch. Instead, “consent” would be implied in a quasi-negative option manner, by the customer’s failure to act (e.g., to respond to company communications offering seeking consent to change the customers’ contracts).³²

³⁰ See, *Reset Order* at p. 14 (*emphasis added*).

³¹ See, *Reset Order* at p. 21 (*emphasis added*).

³² Consent Whitepaper, pg. 2-3.

Although the Consent Whitepaper correctly identifies the guiding principles and Commission Orders requiring express customer consent to changes in ESCO contracts,³³ it nevertheless abandons the authority it cites and shifts to a discussion of a scheme by which “affirmative consent” is presumed/implied from the sending of three notices to customers. The first notice simply states changes are coming. The second notice specifies that a contract change that will occur *with no affirmative action by the customer*, and advising how the customer could reject it by taking affirmative action. Finally, in the third notice, a postcard, the customer is advised the customer to read the second notice which, most likely, has already been recycled.

In essence, the Consent Whitepaper completely negates the *affirmative consent* requirement in the Commission Order by turning it into an “implied consent” or “negative option” process, which is clearly not what the *Reset Order* required. In the Consent Whitepaper’s formulation, a customer’s existing contract is automatically switched into a new contract without guaranteed savings unless the customer takes affirmative action to opt out, or to affirmatively consent. Inaction is treated as action despite *no* affirmative or express consent communicated by the customer to the ESCO.

The Consent Whitepaper proposal is unacceptable. It would allow switching a customer to a new contract for renewable energy that does not guarantee savings, with no express or affirmative action on the part of the customer. Under New York General Business Law 349-d(6), the contract change is a material one requiring express customer consent. The statute provides:

“6. No material change shall be made in the terms or duration of any contract for the provision of energy services by an ESCO without the express consent of the customer. This shall not restrict an ESCO from renewing a contract by clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and of his or her option not to accept the renewal offer; provided, however, that no fee pursuant to subdivision five of this section shall be charged to a customer who objects to such renewal not later than three business days after receiving the first billing statement from the ESCO under the terms of the contract as renewed. The public service commission and the Long Island power authority may adopt additional guidelines, practices, rules or regulations governing the renewal process.”³⁴

³³ See, Consent Whitepaper, pg. 1 citing to the Uniform Business Practice Tariffs, UBP Section 5(B)(1), the New York General Obligations Law, and *Reset Order*.

³⁴ See, N.Y. General Business Law 349-d(6).

As is clear from sec. 349-d of the General Business Law, which is known as the ESCO Customer Bill of Rights, the only instance in which a customer can be switched without express consent is a contract renewal. The switch from a fixed rate or variable rate commodity contract, whose rates must guarantee savings, to a contract for 30% renewable energy that does not guarantee savings is a material change under the statute. The Staff's proposal should be rejected because it does not conform with the *Reset Order* that requires ESCOs to obtain affirmative consent before switching a customer.

IV. Comments on DPS Staff Whitepaper Regarding ESCO Performance Bonds or other Security Interests

In the *Reset Order*, the Commission recognized the possibility that ESCOs might be in a situation where they had over collected from customers and would need to refund the difference between ESCO charges and what the distribution utility would have charged, after performing annual reconciliations. Furthermore, the possibility that an ESCO would renege on savings guarantees or refunds due customers, or go bankrupt holding money due customers was not remote, in the Commission's opinion. Accordingly, the Commission sought further input on "[w]hether and under what circumstances ESCOs should be required to post performance bonds or other forms of demonstrated financial capability..."³⁵ In the Performance Bond Whitepaper, comments were sought on the issue of five potential options for security and/or performance bonds.³⁶ The Performance Bond Whitepaper also considers the use of the existing Purchases of Receivables (POR) discount or supplementing existing utility creditworthiness criteria.

Putting aside the fact that the Performance Bond Whitepaper does not describe in detail any of the surety/performance bond options making it impossible to evaluate the merits of any of them, PULP unequivocally supports the requirement that ESCOs be required to post security. In addition, PULP would institute a rebuttable presumption that all ESCOs should post such security, allowing an ESCO to rebut such a duty only after making its customer charging data public on a bi-annual basis and only after proving that it has not been overcharging its customers (or otherwise violating the UBPs, the terms of the *Reset Order*, the general business law, or any other applicable federal, state or local law, ordinance or

³⁵ See, *Reset Order* at p. 21.

³⁶ See, Surety Whitepaper at pp. 5-7.

rule). For any ESCO successfully providing such evidence that it is in full compliance with all applicable law, ordinance(s) and rules, only then would PULP excuse ESCOs from posting security unless and until it comes out of compliance.

Staff inquires in its Performance Bond Whitepaper what should trigger the need for a security/surety bond. PULP believes that action by the ESCOs that is contrary to the public interest such as, for example, widespread overcharging since at least 2012, and the evidence of slamming, and other unlawful activity in the record of this and other ESCO proceedings, is sufficient to trigger the need for security sufficient to make customers whole after they have been harmed. Further, PULP believes the security should be posted initially in the form of an irrevocable letter of credit (“LOC”) from each ESCO doing business in the State of New York. The LOC should be equal in size to the amount by which the ESCOs jointly overcharge their customers in the State, and should be regressed down to a per capita level for each ESCO based on its number of mass-market customers. PULP also believes that on a semi-annual basis, if the number of an ESCO’s customers increases, it should provide a surety bond sufficient to provide security for those additional customers.

V. CONCLUSION

PULP has three conclusions after review and analysis of the DPS Staff whitepapers.

First, the Commission should not adopt the recommendations of the Pricing Whitepaper insofar as they would allow ESCOs to charge prices for commodity service that is not at least 30% renewable, and which are higher than those allowed by the Commission in the *Reset Order* for supply service from the distribution utilities. There is no basis in the Commission’s 2015 or 2014 Orders, or in its 2015 and 2016 SAPA notices to depart from the principle of guaranteed savings when ESCOs do not provide commodity service that is at least 30% renewable. PULP therefore respectfully requests the Commission to reject the proposals in the Pricing Whitepaper in their totality.

The Commission should also reject the proposals in Staff’s Consent Whitepaper. While ESCOs endorse a business model that allows “opt out” consent, the State and/or DPS should not be strong-armed into a compromise that is not in the public interest. There is no evidence in the record of this or any of the underlying proceedings that “opt out” promotes the public interest. All it does, like the “ESCO referral

program” did in its time,³⁷ is make it easier and less expensive for ESCOs to accrue customers. PULP therefore respectfully requests the Commission to reject in its totality the proposal for “implying” customer consent from failure to respond to three mere notification attempts, without any indicia of express or affirmative consent.

Finally, PULP questions the proposals contained in Staff’s Performance Bond Whitepaper on the basis that they lack any detailed explanation and actually, without recommendation, the proposals read more like options for further comments. Regardless, PULP answers Staff’s questions as to whether surety/performance bond should be required, with a resounding yes, and would support any decision by the Commission to continue discussions in this regard and to direct Staff to actually make recommended proposals. PULP also suggests that the size of the bond should derive from the amount by which ESCOs overcharge customers, and ESCOs should be allowed to rebut the presumption that they must provide such security by making their customer charging data public on a biannual basis.

Finally, as noted above, although PULP did not attach all of its previous individual and group comments from the underlying proceedings, we wish to reassert here all of the consumer protection suggestions and requests in these comments as if re-averred in their totality herein.

Respectfully submitted,

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³⁷ See, e.g., Case 05-M-0858, In The Matter of State-Wide Energy Services Company Referral Programs, Order Adopting Niagara Mohawk Power Corporation's Plan for an ESCO Referral Program (issued December 22, 2005) (Order).