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September 9, 2005

Hon. Jaclyn Brilling, Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 05-M-0858 – In the Matter of Statewide Energy Services Company
Referral Program.

Dear Secretary Brilling:

Enclosed for filing with the Commission please find the original and ten (10) copies of the Comments of the Public Utility Law Project of New York on Case 05-M-0858 – Statewide Energy Services Company Referral Program.

Respectfully submitted,

Gerald A. Norlander, Executive Director
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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ORIGINAL

In the Matter of Statewide Energy
Services Company Referral
Program.

Case 05-M-0858

COMMENTS OF PUBLIC UTILITY LAW PROJECT
ON PROPOSED GUIDELINES FOR
STATEWIDE ENERGY SERVICES COMPANY
REFERRAL PROGRAM

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September 9, 2005

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**In the Matter of Statewide Energy
Services Company Referral
Program.**

Case 05-M-0858

**COMMENTS OF PUBLIC UTILITY LAW PROJECT
ON PROPOSED GUIDELINES FOR
STATEWIDE ENERGY SERVICES COMPANY
REFERRAL PROGRAM**

Introduction

By a Notice issued July 26, 2005, the New York State Public Service Commission ("PSC" or "Commission") requests public comment on proposed guidelines for a statewide "energy services company referral program." The Public Utility Law Project of New York, Inc. ("PULP") welcomes the opportunity to submit these comments in response to the Notice. PULP represents the interests of low and fixed income utility consumers in matters affecting universal service, affordability and consumer protection.

PULP urges the Commission to exercise utmost caution in establishing formal or informal guidelines for programs intended to "migrate" residential customers to the new wireless and pipeless gas and electric utilities called "energy services companies" or "ESCOs."¹ New York's residential electric and natural gas customers annually spend more than ten billion dollars for these utility services because these services are essential to their lives, their homes and families. However, many consumers live on fixed incomes or are poor. Many are vulnerable because of advanced age, mental limitations or lack of literacy in English. Care must be taken

¹ An "ESCO" is not defined in any statute or PSC regulation. The Commission described an ESCO as "an entity that can perform energy and customer service functions in any competitive environment, including provision of energy and assistance in the efficiency of its use." *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*, p. 2, n. 1 (Issued May 19, 1997). www.dps.state.ny.us/fileroom/doc1114.pdf

not to confuse or disadvantage customers who can ill afford costly mistakes in their home energy decisions. More importantly, care must be taken that these customers do not, despite their best efforts, which would under current procedures be sufficient to protect them from fraud and misjudgment, find themselves weaker, less protected and worse off than they are today.

The overwhelming majority of New York's utility customers when given the opportunity has chosen fully bundled service from traditional utilities and has opted not to take service from ESCOs, despite years of promotion and exhortation from the ESCOs, the utilities and the Commission. After nearly a decade of availability of unbundled natural gas services from ESCOs, approximately 7.2% of New York State's 4,170,572 residential natural gas customers have chosen service from ESCOs. Indeed, PSC statistical reports indicate that some customers who "migrated" to ESCOs have now returned to receive full service from the distribution company.² There are anecdotal reports of unannounced, but severe, ESCO price spikes that abruptly raised natural gas customer bills in the winter of 2005.³ PSC reports show an apparent one-month decline of nearly 3,700 customers in March 2005 -- a winter month when home heating costs are high and when, presumably, consumers would be most attuned to the cost of gas service and making decisions based on economic value.

Similar to the experience of natural gas customers, more than 94% of New York residential electricity customers have chosen to receive bundled full service from the distribution utility serving their locality, despite the availability of service from ESCOs, and despite major PSC and utility outreach and education campaigns and monetary inducements to switch to ESCO

² In March, 2005 (the last month for which statistics are posted at the PSC website) 302,766 residential natural gas customers received service from ESCOs. http://www.dps.state.ny.us/Gas_Migration.html This is 3,681 fewer ESCO customers than indicated in the February, 2005 PSC Report. http://www.dps.state.ny.us/Gas_Migration_02_05.html. Also, the number of residential natural gas customers taking ESCO service in 2005 is lower by more than 25,000 customers than it was in 2002. In August, 2002, 327,946 residential customers took natural gas service from ESCOs. http://www.dps.state.ny.us/Gas_Migration_08_02.htm

³ After an ESCO price spike, "[t]he first thing I did when I got my bill was quit [the ESCO] and go back to NiMo; unfortunately, switching takes at least 30 days." *Inexcusable Error Made Gas Bills Go Through Roof*, Schenectady Daily Gazette, February 4, 2005. http://www.pulp.tc/html/2005_dereg_a_r_3.html

service.⁴ The cost of these substantial promotional campaigns and incentives for customers who switch to ESCOs and the utilities who switch them is borne by all ratepayers, including those who choose not to take ESCO service.⁵

Despite Commission authorization in recent years of scores of millions of ratepayer dollars spent on inducing customers to switch to ESCOs, and its intention to step up the pace of expenditures and incentives, the Commission does not publish ESCO prices and has made no publicly available study or analysis indicating whether customers who switched to ESCOs fared better in comparison to those who received traditional service.

The overwhelming preference of most consumers in New York State for traditional bundled service from their local utility underscores the importance to consumers of the availability of traditional service. The experience of New Yorkers is not an anomaly. Just as the Commission's retail electric competition regime has not achieved a significant degree of migration of New York's residential customers after more than ten years, the retail competition model still embraced by the Commission is failing to gain new adherents nationally:

The adoption of retail electric power industry restructuring reached a high point in 2000 when 24 states and the District of Columbia had adopted either statutory or legislative mandates for retail competition. Since that time, a number of states have repealed or delayed the implementation of their programs, while others have

⁴ The 5.7% electric customer migration rate probably overstates statewide migration. According to the DPS Electric Retail Access Migration Report for June 2005, 319,361 residential electric customers receive service from an ESCO, out of a total of 5,611,518 customers. http://www.dps.state.ny.us/Electric_RA_Migration.htm This data, however, "does not include Long Island Power Authority, small regulated utilities, or those municipalities or other entities who are supplied power through long term contracts with the New York Power Authority." These utilities likely have even less customer migration to ESCOs, and so the proportion of total electric consumers with ESCO service is likely to be lower than the 5.7% statistic suggests.

⁵ In a March, 2005 Con Edison rate case order, the Commission approved a \$7.8 million ratepayer funded "retail access" outreach and education campaign and up to \$12 million additional incentive payments for Con Edison based on the number of its full service customers who switch to ESCO service for their electricity supply. Four million dollars in incentives are payable to Con Edison if numeric ESCO switching targets are met, and another eight million dollars will be paid to Con Edison based on the number of customers who remain with an ESCO for over one year after being switched. Case 04-E-0572, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York for Electric Service, *Order Adopting Three Year Rate Plan* (Issued March 24, 2005) [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/BFCF5488B5c3620A85256FCD005A5F\)F/\\$File/04e0572.ord.03.24.05.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/BFCF5488B5c3620A85256FCD005A5F)F/$File/04e0572.ord.03.24.05.pdf?OpenElement). See also *PULP Petition for Rehearing* at pp. 3-10, <http://www.pulp.tc/PULPMOTION.405.RHR.pdf>

affirmatively rejected retail competition. No state has adopted a "customer choice" model for its retail market since 2000.

Positioning the Consumer for the Future: A Roadmap to an Optimal Electric Power System, p. 22 (Consumer Energy Council of America 2003) (*Emphasis added*). In light of this national experience, the Commission should investigate the reasons why - despite the Commission's best efforts to encourage switching - so many customers prefer not to take service from the ESCOs, the reasons why customers who do choose ESCO service did take these offers, and the reasons why some customers who switch to ESCOs have now switched back to receive full bundled service from the traditional utility.⁶

Before adopting guidelines for utility "referral" of customers to ESCOs to achieve "migration" of customers who have not chosen to move, the Commission should also articulate further the attributes of a system for customer selection of utility service providers that is not only compliant with legislative standards but which also optimizes customer benefits and interests. Only when these attributes are identified may the proposal for a statewide "energy services company referral program" -- and recommendations of commenters and intervenors -- be assessed on the basis of whether the proposals will advance progress toward that definition of an optimal system.

Before addressing the attributes of an optimal system for customer selection of providers of retail utility service and discussion of the specific Staff proposals, however, these comments provide a brief review of the history of retail utility competition in New York to place a discussion of the attributes of an optimal system for customer selection of utility providers and PULP's review of the proposed ESCO Referral Program guidelines in proper context.

⁶ "Consumer welfare has not been improved by restructuring in the electricity industry, and considerable thought should be given to whether it is wise to extend restructuring to other states before the full range of issues has been resolved and reduced prices or reduced rate of price increase have been demonstrated." Jay Apt, *Competition Has Not Lowered U.S. Industrial Electricity Prices*, *Electricity Journal*, March 2005.
http://www.pulp.tc/html/competition_has_not_lowered_u.html

I

Background

Although utilities commonly are thought of as monopolies, the New York Public Service Law - which establishes the state's utility regulatory paradigm - does not contain the words "monopoly" or "market power," *i.e.*, the ability of a single provider to influence prices for a sustained period of time. Rather our State utility regulation is premised on the nature of utility service and its signal importance to the households who use it, whether or not it is available from one or more providers.

Since at least 1910, the Public Service Law has required safe and adequate utility service to be available to customers to meet their demand at just and reasonable rates supervised by the Commission. Under this filed rate regulation system, no "rate or charge shall be lawful unless it shall be filed with and approved by the commission, and every [rate] classification, rate or charge shall be subject to change, alteration and modification by the commission." Public Service Law ("PSL") § 65.5. Further, "[a]ll charges made or demanded ... for gas, electricity, *or any service rendered or to be rendered* shall be just and reasonable and not more than allowed by law or by order of the commission." PSL § 65.1 (*Emphasis added*). The emphasized phrase clearly establishes that not only the "commodity" elements of service - the "gas" or the "electricity" - are regulated, but that the other services provided in connection with the gas or electricity portion of service are also regulated.

The transactions between electric corporations and residential customers are more particularly governed by the Home Energy Fair Practices Act ("HEFPA"), PSL §§ 30, *et seq.*, which was enacted in 1981. The Legislature "declared [it] to be the policy of this state that the continued provision of gas, electric and steam service to residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest." PSL § 30. Enacted as Article 2 of the Public Service Law, HEFPA applies "to the provision of residential service" by all gas and electric corporations. PSL § 30.

HEFPA establishes a level playing field for *all* companies providing residential gas and electric service, legislating minimum standards of fair play with residential consumers beneath which *no* company may go.⁷ Under HEFPA, electric and gas corporations are required to provide service in accordance with detailed laws governing matters such as timely provision of service in response to a request, deposits, late payment charges, application denials, grounds for termination of service, billing, collection, and complaint resolution procedures of the utilities and the Commission. HEFPA protects residential consumers from unfair practices and from exploitation and establishes norms of conduct and statutory consumer protections for residential customers.

In 1984, when lower cost natural gas was becoming available from sources other than pipeline companies, including gas produced domestically within New York State, the Legislature authorized the Commission to require utilities controlling natural gas distribution systems to transport gas purchased separately and owned by the consumer, "provided that, the commission finds that the gas corporation has available capacity, that no undue burden shall be placed upon the gas corporation or its ratepayers and that the ability of the gas corporation to render adequate service to its customers is not impaired." PSL §§66-d.⁸ A legislative purpose for allowing consumers to obtain gas from sources other than the gas distribution company was to make gas available at lower prices for those who "must exist on limited fixed incomes."⁹

After the Legislature granted authority for requiring gas distribution companies to transport natural gas sold by other utilities to customers in 1984, the Commission allowed large

⁷ Nothing stops any company from gaining competitive advantages by treating its customers better than the minimum standards required by HEFPA, or by complying with HEFPA in a more efficient manner than other companies.

⁸ Similarly, the Public Service Law authorizes wheeling of electricity to industrial and commercial customers "provided that the commission finds that such arrangements are in the overall best interest of the rate payers of the corporation, and that the rates and fees for the services provided adequately compensate the corporation for the use of its facilities." PSL § 66(12-b)(b)

⁹ The Legislature made findings that "[p]rograms for federal deregulation of natural gas transmission and supply have created chaotic marketing conditions" that "produced serious economic dislocations and caused hardship on a broad and diverse group of state citizens including those who use natural gas for heat but must exist on limited fixed incomes...." L. 1984, C. 519, Sec. 1(b) and (f). (*Emphasis added*)

customers to purchase their gas from sources other than the company providing distribution service. But the Commission did not act to allow residential customers to do so until 1995, eleven years later. When it eventually authorized multiple providers of gas to residential customers, however, the Commission determined to deregulate the new gas utility companies, which the Commission then called "gas marketers,"¹⁰ and decided not to apply the Home Energy Fair Practices Act to them.¹¹ See "*State Forgot Consumer Protection in Deregulating Gas*," Buffalo News, Dec. 10, 2000; "*Retail Choice: A Race to the Bottom*," Public Utilities Fortnightly Jan. 1, 1998.¹² In directing its Staff to monitor market developments, the Commission required reports on customer satisfaction and complaints, but did not require monitoring of the rates of the new providers.¹³

In 1996, the Commission issued orders allowing the provision of portions of electric service by new utilities, called "energy services companies" or "ESCOs." This began with the Commission's *Opinion 96-12*, a general policy statement or "vision order" favoring the introduction of competitive wholesale and deregulated retail electricity supply.¹⁴ The

¹⁰ There is no definition of a "gas marketer" in the Public Service Law or in the official regulations of the Public Service Commission. After the advent of alternative electricity providers, the "gas marketers" are now also called "ESCOs."

¹¹ Case 93-G-0932, Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, *Order Resolving Petitions for Rehearing*, p. 28 (Issued September 13, 1996) ("subjecting marketers to regulation as if they were monopoly utilities is unnecessary").

¹² Court litigation regarding the applicability of HEFPA to the new gas companies was inconclusive. The court held that utility customers, taxpayers, and legislative committee chairs lacked standing. *Public Util. Law Project of New York, Inc. and AARP v. PSC*, 252 A.D.2d 55, 681 N.Y.S.2d 396 (App. Div. 3d Dept. 1998), *lv. denied* 94 N.Y.2d 755 (1999).

¹³ The Commission goal in 1996 was eventually to eliminate completely its policing of competitively available gas service: "Over time, as the market develops and all consumers are able to choose among competing suppliers, the level of monitoring may be significantly reduced or eliminated altogether." Case 93-G-0932, "Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market. *Order Concerning Compliance Filings*, p. 22. (Issued March 28, 1996). [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/0EBBB3F895EBBD9285256DF100756479/\\$File/doc1352.pdf?OpenElement.htm](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/0EBBB3F895EBBD9285256DF100756479/$File/doc1352.pdf?OpenElement.htm)

¹⁴ *Opinion No. 96-12*, 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). <http://www.dps.state.ny.us/fileroom/doc877.pdf>

Commission envisioned a system in which traditional utilities would sell all their power plants, the output of which previously had been sold to customers at the cost of production. In the new system, most if not all of the generation portion of service (i.e., electric energy, in contrast to the wires) would be sold separately in new wholesale and retail markets by new industry entrants whose rates and profits would be largely unregulated, while the transmission and distribution (T & D) components, or the "delivery service," would continue to be regulated in the traditional manner. In such a system, the Commission postulated that eventually -- after a transition period of a few years -- wholesale and retail rates for generation could be set at whatever price the market would bear, in contrast to the traditional statutory system which has resulted in cost-based rates for consumers. Underlying the Commission's theory was the assumption that a price established in a competitive market would always be "just and reasonable" and that it would be possible to lighten if not eliminate traditional rate regulation, at least with respect to the portion of service available from ESCOs. The New York Legislature, however, unlike California and other states that "restructured," never altered the statutes establishing the rate regulation system and never modified the duties of all utilities to provide all customers safe and adequate service at just and reasonable rates.

In 1997, the "vision order" was followed by more detailed orders articulating an alternative regulatory regime for new ESCO providers of retail service. In *Opinion 97-5* the Commission adopted a deregulatory approach regarding electric ESCOs, as it had previously done with respect to gas marketers.¹⁵ *Case 94-E-0952, In the Matter of Competitive Opportunities*

¹⁵ The 1997 PSC paradigm was to set reasonable rates for the traditional utility services but to deregulate the new industry entrants:

"In Opinion No. 96-12, we acknowledged our mandate to ensure that "all New Yorkers have access to safe and reliable service at just and reasonable rates." We stated that "[e]ach customer must be able to count on at least one supplier who will continue to provide [electric] service at reasonable rates in the event that (a) the customer chooses to make no change from its current situation, (b) a new supplier fails to meet its obligations, or (c) competitive alternatives are not yet available in the area."

Regarding Electric Service, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services, Opinion 97-5, p. 3 - 4 (Issued May 19, 1997) (Emphasis added). www.dps.state.ny.us/fileroom/doc1114.pdf On rehearing in *Opinion 97-17*, the Commission adhered to its notion that deregulation is justified in a regime where service is available from multiple providers.¹⁶ The PSC concluded that the statutory consumer protection requirements of the Home Energy Fair Practices Act in Article 2 of the Public Service Law simply did not apply to ESCOs.¹⁷ Case 94-E-0952 - In the Matter of Electric Competitive Opportunities Regarding Electric Service and Case 96-E-0898 - In the Matter of Rochester Gas and Electric Corporation's Plans for Electric Rate/Restructuring Pursuant to Opinion 96-12, *Order Regarding Regulatory Regime For Single Retailer Model*, p. 21 (Issued December 24, 1997). Litigation regarding the PSC's assertion of power to deregulate ESCOs was inconclusive. E.g., *Energy Association of New York v. Public Service Commission*, 169 Misc. 2d 924, 653 N.Y.S. 2d 502 (Sup. Ct. Albany Co. 1996), *affirmed* 273 A.D. 2d 708 (3d Dept. 2000), *lv. denied* 95 N.Y.2d 765 (2000) (Petitioners lacked standing as ratepayers and taxpayers to challenge PSC alternative regulatory regime).

In 2001, pursuant to an order of the Commission, three Administrative Law Judges reviewed the restructured natural gas and electric industries and issued a Recommended Decision

¹⁶ "With respect to retail sales of generation by non-T&D companies, we would expect, under normal circumstances, the following: to cease setting rates directly for the generation, as opposed to transmission and distribution, of electricity when market based pricing establishes "just and reasonable" rates; to make a finding that a market rate is just and reasonable in a given service territory when no owner of a generation facility in that territory has market power or market power concerns are satisfactorily mitigated; and, once that finding is made, *to allow market conditions to govern* and to refrain from reintroducing rate regulation solely to correct market fluctuations." Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, *Opinion and Order Deciding Petitions For Clarification And Rehearing*, p. 8 - 9 (Issued Nov. 18, 1997) (*Emphasis added*). [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/B16654682688FA5885256DF100755FC1/\\$File/doc3346.pdf?OpenElement.htm](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/B16654682688FA5885256DF100755FC1/$File/doc3346.pdf?OpenElement.htm)

¹⁷ "[W]e conclude that HEFPA was designed to apply only to the provision of monopoly services. Since ESCOs are not providing monopoly service, HEFPA does not apply to them."

which generally urged a cautious approach regarding implementation of the Commission's original 1996 vision.¹⁸ In 2002, the Legislature unanimously enacted the Energy Consumer Protection Act of 2002 ("ECPA") clarifying that the Home Energy Fair Practices Act continues to apply to all residential electric and natural gas service -- whether it is provided by a traditional utility or an ESCO.

In August 2004, three years after the opinion of the ALJs, the Commission put aside their reservations and issued another statement of general policy to restart, on an expedited schedule, the implementation of its initial 1996 "vision." The Commission's 2004 policy statement rearticulated an "end state" for the New York electric industry structure in which customers would no longer purchase electricity or natural gas from the companies whose wires and pipes provide it.¹⁹ In the "end state", all customers would deal with an ESCO. Recognizing that longstanding laws still require utilities to provide full service,²⁰ and despite the fact that the vast majority of small customers have not switched to ESCO service, the Commission discussed a variety of means to effectuate more and faster customer "migration" to ESCOs and gas marketers, including the gradual introduction of volatile spot market rates for customers who do not switch, "auctions" of customers who would be transferred in bulk to ESCO providers, and ESCO referral programs. The Commission spoke favorably of Orange & Rockland Utilities'

¹⁸ Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, Recommended Decision* (Issued July 13, 2001). <http://www.pulp.tc/RD-POLR7-13-01.pdf>

¹⁹ "We find it sufficient to conclude that competitive markets are in the public interest, and, if they continue to develop robustly, there may be no need for the utilities to remain in any competitive fields in the future. **** [S]ubject to the requirements of the Public Service Law and Transportation Corporation Law, [footnote omitted] regulated utilities should be replaced by ESCOs when markets become workably competitive." Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, Statement of Policy on Further Steps Toward Competition in Retail Energy Markets*, pp.2 and 17 - 18 (Issued August 25, 2004) ("POLR "Endstate" Policy Statement") (*Emphasis added*).

²⁰ *Id.*, at pp. 17 - 18 and 28, citing PSL §65 and Transportation Corporation Law, §12.

("O&R") "PowerSwitch" program that it believed had worked to switch a comparatively large number of O&R customers to switch to ESCOs.

PULP filed comments in the O&R case, raising questions about the efficacy of "PowerSwitch," and questioned the extension of the "PowerSwitch" model to other utilities.²¹ In addition, AARP expressed concerns on behalf of elderly residential consumers,²² and NYSEG/RG&E questioned the appropriateness of elements of the PowerSwitch type programs.²³

While review of the O&R plan was pending, and during review of the proposed "retail access plans" of other utilities, the Commission issued the notice commencing this proceeding, asking for public comments on proposed statewide guidelines for PowerSwitch-type ESCO referral programs.

II

Attributes of an Optimal System for Consumers Changing Retail Utility Service Providers

While seeking comments on the proposed Statewide ESCO referral program guidelines, the Commission's July 26 Notice does not suggest any analytical reference points by which the current status quo, the proposed guidelines, or any alternative proposal should be evaluated. Consequently, before turning to the specifics of the Staff proposal, these comments will set forth

²¹ See PULP Comments in Case 05-M-0334, *Orange and Rockland Utilities, Inc. Retail Access Plan*, April 25, 2005, <http://www.pulp.tc/PULPRetailaccesscomments.pdf>; PULP Petition for Rehearing and clarification in Case 04-E-0572, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York for Electric Service*, April 25, 2005, <http://www.pulp.tc/PULPMOTION.405.RHR.pdf>; and PULP Comments in Cases 05-M-0453 and 05-M-0454, *NYSEG/RG&E Retail Access Plan*, July 29, 2005 http://www.pulp.tc/PULP_Comments05-m-0453-045407-29-05.pdf.

²² *Consumers Urge PSC to Investigate Customer Consent In EnergyService Switch; Promise of 'Savings' Is Short Term And Could Result In Higher Rates*, AARP Press Release, April 14, 2005. http://www.pulp.tc/html/consumers_urge_psc_to_investig.html

²³ "Retail Choice - Upstate Uproar, Utilities Cry Bait and Switch but Its Not that Simple." Public Utilities Fortnightly, July, 2005. http://www.pulp.tc/html/retail_choice-upstate-uproar.html

the specific criteria by which any program encouraging the referral of customers to ESCOs should be evaluated.

Under the Home Energy Fair Practices Act and the current statutory and regulatory framework, there is an existing system of applicable statutory standards under which customers choose their retail electricity or natural gas supplier. Under any system implemented uniformly statewide through this proceeding or on a utility-specific basis through separate orders, the touchstone for assessment of the system must be whether the customer is or will be better off with the proposed system than he or she would be under the existing system. To test the current and any proposed system, reference should be made to specific criteria that measure customer benefit.

As noted above, the Commission has never defined the parameters by which customer benefits from a switching or referral program could be measured. The Commission has defined measuring tools to assess the "success" of the historic switching program, but these tools have relied on the quantification of the absolute number of customers who are migrated to ESCO service or on the number of migrating customers who are still with the ESCO service one year or more after the switch. Clearly, none of these tools attempt to capture the consumer benefit, if any, that results from the switch or the confidence that may be expressed as to whether the consumer's choice is free from misinformation, manipulation or undue influence. We set forth below common sense guidelines that, in PULP's view, should be used to evaluate the existing and any future system for customer referral or migration to ESCO service.

1. Price visibility.

Under the current system used by ESCOs to recruit customers, the ESCO assumes the responsibility for disclosure of the price of the alternative supply. In many instances, the

consumer considering alternative energy suppliers lacks complete information on the price he or she would pay for the alternative supply, either because the ESCO price was incompletely or ineffectively communicated to the customer or because the assumed price for service has changed. For consumers to make effective economic decisions concerning their electricity or gas supplier, they must be able to discover and understand the competitive price. The price of alternative supplies should be visible for the entire period over which a supply commitment will be made.

The Commission acknowledged in last year's "end state" order that the prices, terms and conditions for ESCO service are part of "critical market information" needed by consumers.²⁴ While the PSC websites were intended to be an important source for this information, a visit to these websites shows that although the Commission expected this "critical market information" to be available it is not now available. On September 7, 2005 PULP was unable to locate on the website a current statement of rates, charges, terms and conditions of ESCO service providers. Instead, the PSC site now advises customers to search on their own for the ESCO prices.²⁵

The lack of ESCO price visibility is a critical defect in New York's current retail utility energy markets. Any new procedures for ESCO customer referrals or recruitment should remedy this deficiency.

²⁴ Case 00-M-0504, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, *Statement of Policy on Further Steps Toward Competition in Retail Energy Markets*, pp.2 and 17 - 18 (Issued August 25, 2004) (*Emphasis added*).

²⁵ "If you are concerned about price, you should ask the ESCO for its price of electricity based on how much it will cost per kilowatt hour of electricity used (usually expressed as cents per kWh). Make sure the prices you get include taxes. Ask if the price is fixed or if it varies by month or day. Are there fees for service besides the cost of electricity?" *Your Energy, Your Choice: How to Shop for Electricity*, <http://www.dps.state.ny.us/howtoshop.htm> (site visited September 7, 2005).

2. Effective comparison shopping.

The essence of the economic decision that customers must make is the comparison between the costs of their current supply service and the anticipated costs of the alternative. If the customer cannot make this fundamental comparison, he or she will not choose the alternative that maximizes benefits to them, and a market failure will occur. The customer's capability for comparison shopping is most often frustrated when an "apples to apples" comparison between the status quo and the alternative cannot be made. Any change in the ESCO information and referral process should enhance, rather than frustrate, the customer's ability to make this comparison.

When "critical" information about the identity of competitors, rates, terms and conditions of service is needed by consumers to make choices but is not available, customer confusion is the result. Under current practices, even the most basic information can not be reliably determined. For example, the Commission's web site purportedly lists ESCOs serving residential customers, but even these lists have been determined to be inaccurate. As the Wall Street Journal reported earlier this year, "[a]ccording to the New York Public Service Commission web site, customers of Consolidated Edison have eight choices of power companies. But one of them, Amerada Hess Corp., told us it wasn't signing up residences and three failed to return our calls."²⁶

3. No undue reliance on utility messages or promotional terms.

Under the current system, the ESCO, not the incumbent utility, undertakes virtually all aspects of customer recruitment. Under these procedures, the utility-customer relationship is largely unaffected as the ESCO bears full responsibility for explaining the proposed alternative

²⁶ See Rebecca Smith, "Cranky Consumer: A Test of the Results of Electricity Deregulation," Wall Street Journal, March 1, 2005. More than six months later, Amerada Hess is still listed on the PSC web site list of ESCOs serving residential Con Edison customers. In response to PULP's telephone inquiry on September 7, 2005 -- after several minutes of recorded messages and hold time -- Amerada Hess' representative stated that residential customers of Con Edison in a single family home or apartment are not being accepted for service.

to the customer and securing the customer's agreement, and the customer bears full responsibility to evaluate the alternative supply without reliance, whether justified or not, on services from the incumbent utility and the existing historic relationship between the customer and that incumbent. Similarly, if the ESCO wishes to provide some inducement to the customer for switching suppliers, it does so directly, and there can be no confusion for the customer as to who is paying for the inducement and no possibility that the customer would be unduly influenced to evaluate the alternative supply proposal less carefully.

Consumers often have a long term relationship based on years of experience with their incumbent utility. Often the consumers' expectations with respect to the incumbent's practices are informed by an understanding that the incumbent has been and continues to be subject to active Commission oversight, and that the incumbent's consumer services practices have been closely scrutinized by Commission staff. Consumers therefore may have a reasonable expectation that the incumbent utility's messages may be more reliable than conventional commercial speech. Conversely, the consumer has likely learned from experience that commercial messages received in telephone or internet solicitations or through mass mailings which are supported by one time promotional offers and expensive commercial advertising campaigns should be reviewed with a healthy skepticism. Because of the incumbent's unique ability to "disarm" the consumer from his or her self-protective skepticism, nothing in new procedures for ESCO customer referral or recruitment should permit or require the incumbent utility to act as a messenger for the ESCO's recruitment program promotions.

4. No slamming.

Each customer is entitled to select an energy supplier knowingly and intentionally and through an express consent. Under the current system, there are explicit guidelines whose

express intent is to prevent the switching of a customer from one supplier to another without his or her consent. No new ESCO customer referral program should be introduced which compromises the customer's capacity to make the choice of a new supplier knowingly and intentionally. In addition, proposed new procedures should be rejected that introduce new ways, likely to be unfamiliar to customers, by which contracts for supplier switches may be completed orally or electronically and through which the customer may assume new obligations without ever knowing the actual rates, terms and condition of service before "signing on the bottom line".

5. No cramming.

Under the current procedures for alternative energy suppliers, agreements between customers and alternative suppliers are reflected in contracts. Besides the pricing terms, these contracts may contain extensive non-price provisions. If the supplier from whom the customer has agreed to take service uses the contracting process or the contract amendment process to impose non-price provisions on the customer without the customer's consent, this is "cramming". No new procedures should be introduced into the ESCO customer referral or recruitment process which makes it more likely that a consumer would be victimized by this practice.

6. No redlining.

Redlining is the selective offer of service by an alternative supplier to some, but not all, customers in a particular geographic area or a particular demographic group. Redlining conveys the benefits (if there are benefits) from competitive supply offers to some, but not all, customers. Supply service from an incumbent supplier pursuant to a tariff is available without redlining, since all customers can apply for and receive this service without discrimination. Application of

the standards of Article 4 of the Public Service Law, which require service to be available without discrimination upon any person's request for service, in accordance with filed rate schedules and without rebates would preclude redlining. Thus for 90-95% of the State's residential customers (those that have not switched to an ESCO)), redlining is not a problem. Plainly, no new procedures for ESCO customer referral and recruitment should be introduced which would make this practice more lucrative or more easily implemented by ESCOs. Indeed, the Commission should be exercising its full jurisdiction under Article 4 to prevent redlining from occurring.

7. Protections from remarketing.

Under the current procedures, customers have, for several years, been able to choose alternate energy suppliers. After experiencing intensive marketing programs sponsored by the utilities and the Commission for several years, large numbers of residential consumers have not switched to alternative suppliers. In effect, these customers have "chosen" in the current marketplace to remain customers of the incumbent utility. This choice should be respected, and subsequent efforts to induce these customers to switch should be based on some improvement in the terms being offered by the alternative suppliers, rather than simply a remarketing of the same offers to these customers sweetened only by a short term "promotional" offer or by the incumbent utility's or the Commission's implied assurance about some future customer savings.

8. Level playing field for choice.

In a competitive energy market, the customer will periodically be offered the economic choice to continue with the alternative supplier, to select another, or to return to incumbent utility service. The fact that the customer elects to take commodity from an alternative supplier does not extinguish the availability of these choices to the customer. All the measures that may be

taken to facilitate the customer's transition to an alternate supplier are implemented, presumably, to permit the customer to recognize and act on a perceived economic advantage that lies with the alternative supplier. All of these measures should be equally applicable to the customer who, as a customer of the alternative supplier, now identifies an economic advantage in switching to another alternative supplier or to the incumbent utility. Indeed, only by supporting all switches, including switches to other suppliers or back to the incumbent utility, can the exposure to market failure be minimized or eliminated.

9. Accessible complaint procedures.

Often the consumer's most effective remedy to obtain the benefits of any bargain he or she makes for energy supplies is the opportunity to pursue a complaint. The effectiveness of this remedy, however, depends on ready access to a forum that can hear and decide complaints, that can be accessed without expense, that can efficiently compile a complete record concerning the complaint, that has the authority to provide effective remedies when necessary, and that has the expertise to address complex energy supply and consumer protection issues consistently and fairly. Currently, the forum that most clearly satisfies these criteria is the Commission and its complaint resolution staff. Any new ESCO customer referral or recruitment procedures should assure that the customer is fully and timely advised of the availability of the Commission's complaint resolution process, if it is needed, and of the appropriate steps to be taken to use that process.

III

The Proposed Guidelines Must Be Rejected or Modified.

The proposed guidelines and the accompanying standard-form sales agreement fail to further the residential customer interests defined in the criteria described above. For this reason

alone, the guidelines and sales agreement should be rejected. In addition to the general failure of the proposed guidelines to satisfy these criteria, PULP makes several specific objections to the guidelines and standard agreement, and these objections are set forth below.

Specific Comments on DPS Staff Proposed Guidelines

Guideline 1:

“Each ESCO may continue to sign up and enroll customers directly.”

The awkward formulation of this proposal betrays a less than subtle tilt in Staff's proposed guidelines: it and other of the guidelines appear to be drafted exclusively from the perspective of the ESCO utility, and not the perspective of the customer. Had Staff approached the subject with a consumer orientation, an alternative formulation that comports with an optimal consumer oriented system of utility selection would state: “Each Customer may sign up to receive service from an ESCO without participating in the ESCO referral program.”

While the above formulation would be a more appropriate guideline, it is not, of course, the case today that residential customers have the opportunity to sign up for service from an ESCO. Anyone who pursues ESCO service quickly learns that ESCOs -- although listed as “eligible” providers of residential service published in the promotional materials of the Commission and some utilities -- often refuse to provide residential service to persons requesting it.²⁷ Nearly 10 years since the Commission's “vision” that all customers would receive service from ESCOs, the “vision” is not close to realization.

Examining this proposal further, Staff apparently considers it one thing for an ESCO to “sign up” a customer -- connoting written customer approval which has been, at least since the

²⁷ The Commission has yet to determine whether an ESCO refusing to serve customers on request would violate the Public Service Law requirements to provide service to each customer who requests it, although it suggested in the POLR “Endstate” Policy Statement that an ESCO has no duty to serve customers and that the duty to serve is “binding only on the traditional utilities.” POLR “Endstate” Policy Statement at 45.

advent of the Statute of Frauds, the time tested and consumer understood means of making a binding agreement. However, in addition, the Staff formulation also appears to admit that an ESCO is also able to “enroll” a customer without any written “sign up.”²⁸ The sad history of slamming by alternative providers of telephone and energy services should be enough to close the door on any suggestion that an ESCO can “enroll” a customer without a written agreement signed by the customer.

Further, even if Staff’s formulation contemplates unwritten, oral consents for customer enrollment, say, by telephone or internet, there can still be no knowing or willing “enrollment” of the customer, if all the rates, terms and conditions of service are not adequately disclosed and the customer has not understood and approved them before signing up. Consequently, receiving full written disclosure of all ESCO terms and conditions²⁹ following a customer request for ESCO service must be required as part of any customer recruitment program.³⁰ In addition to the disclosure of ESCO terms and conditions, a meaningful disclosure for the customer would also require the ESCO, before the “signing up” occurs, to disclose, in writing, a comparison between the rates, terms and conditions offered to the customer and those of the utility, and a typical bill comparison in the format of the PSC reports.³¹

²⁸ The Commission’s website advises customers “before you sign a contract with an ESCO, you should ... review terms of any written agreement that may be required. These items may cover special fees, deposits, renewals and switching procedures.” <http://www.dps.state.ny.us/energychoices.htm>

²⁹ In PULP’s view, the requirement for explicit, written disclosure of ESCO terms and conditions before the customer can consent to any agreement for a switch to ESCO supplied service can only be avoided if the rates, terms, and conditions of service have been publicly filed with and approved by the Commission

³⁰ ESCOs generally file their form contracts with staff for a determination of the ESCO’s “eligibility” to provide service in the state, but these filings generally contain no information about rates and neither the rates nor the terms and conditions of service are publicly filed and approved by the PSC in accordance with the State Administrative Procedure Act.

Guideline 2:

“Utilities should continue to assist in the enrollment process. ...”

In this element of its proposal, Staff recognizes the need for “utilities”³² to provide certain services in connection with the establishment of electric or natural gas service from an ESCO. However, while utilities must provide some services to effectuate a customer switch, the Staff proposal hugely inflates the activities that the incumbent utility will perform. Customers have an extensive background of experience in their relationship with the incumbent – a relationship that has relied in part of the customer’s belief that the incumbent, as a fully regulated utility, will be prevented by the regulator from providing unsound advice or suggesting uneconomic energy options. Accordingly, the incumbent utility’s role in the ESCO customer recruitment program must be strictly limited to the strictly ministerial functions that must be undertaken to implement a switch to an ESCO that the customer has independently concluded will be beneficial. In effect, Staff’s formulation should be that the incumbent will “continue to assist the customer in the enrollment process, and that no actions should be taken by the incumbent to effectuate a customer enrollment until the customer has indicated his or her explicit, affirmative consent to the proposed enrollment.”

Guideline 2:

... Additionally, utilities would be required to enroll customers in this program on behalf of the ESCOs. In doing so, the utilities will be acting as the agents of the ESCOs and, therefore, must comply with all UBP requirements that would otherwise apply to the ESCOs, including, but not limited to, the Customer Agreement Procedures, Customer Enrollment

³¹ While the PSC website asserts that “[i]n a competitive market, electricity prices should be lower than what they would be under government regulation” (<http://dps.state.ny.us/energychoices.htm>), it should be well understood that ESCO prices may be higher than those of the traditional utility. *See*, fn. 3, 26, *supra*.

³² The references to “utilities” apparently refer to those electric and gas companies that, respectively, have wires and pipes, while the references to “ESCOs” apparently are to the alternative, competitive wireless electric companies and pipeless natural gas companies. As previously noted, there is no definition of “ESCO” in the Public Service Law or the official regulations of the Public Service Commission.

Procedures, and Customer Notification requirements in Section 5 of the UBP. For example, the utilities must offer all customers the option to enter into sales agreements with the ESCOs via any of the methods allowed under UBP § 5(B)(1) (i.e., telephonic, electronic, or written)."

If selecting service from an ESCO was a value proposition over time for the consumer, then there would be little need for the traditional utilities to aid in the process – customers would leave in droves. Instead of setting out proposed regulations or a standard tariff for the utility enrollment related services, however, the Staff proposal rests on a vague and problematic agent/principal contractual relationship between the “utilities” and the “ESCOs” which disregards the incumbent’s historic obligations to the customer. The “ESCO”, however, is not the customer of the incumbent utility.³³ PULP is aware of no statutory or common law duty in New York law for the utility to aid its ESCO utility competitors.

The primary allegiance of any investor-owned “utility” is to its shareholders, not to ESCOs or to the Commission. Because a utility provides essential electric or natural gas service, it also has duties to customers prescribed by the common law and the Legislature. These are the sources of the duty to provide all services to the customer in a manner that is just, reasonable and non discriminatory. In the provider switching process, the Commission should hold all the utilities accountable to the customer if the customer has any grievance; and should make the utility liable to the customer if the customer suffers loss arising from delay or frustration of the switching transaction.

There is no basis in law or regulation that requires the utilities to perform functions for ESCOs.³⁴ In contrast, longstanding provisions of the public service law require utilities to provide to their customers “such service, instrumentalities and facilities and facilities as shall be

³³ If the role of the utility in the switching process is perceived to be that of an “agent,” rather than a provider of service to the customer, then the utility should be acting as agent of the customer with a fiduciary duty to provide services and effectuate a smooth and efficient provider switch when the customer demands that portion of service be provided by a second utility, the “ESCO.”

³⁴ To the extent that the “Uniform Business Practice” guidelines promulgated by the Commission address relationships between “utilities” and “ESCOs,” those guidelines have not been issued as binding regulations. As a result, breach of those guidelines may not provide a remedy to third party beneficiaries, *e.g.*, customers, even if they were designed to protect customers. In contrast, there may be consumer remedies at law when official regulations intended for their benefit are violated.

safe and adequate and in all respects just and reasonable.” PSL § 65.1 . In *Verizon Communications, Inc. v. Law Offices of Curtis Trinko*, 124 U.S. 872 (2004) the Supreme Court held that a utility is not liable to customers under antitrust law for damages caused by alleged failure to effectuate a change in telephone service providers requested by the customer, stating, “Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim” *Id.*, 124 U.S. at 880. A clear lesson of *Verizon v. Trinko, supra*, is that any system established by the Commission involving a role for incumbent utilities in the transfer of services to alternative providers must hold the utilities directly accountable to the customers. This may be the only practical way to align the incumbent utility’s conduct with the customer’s and the public’s interest.

Guideline 3:

“All customers must affirmatively choose a specific ESCO.”

In contrast with other states,³⁵ the New York Legislature has not required customers to receive commodity service from ESCOs and has not expressed any policy preference for one type of provider over another.³⁶ The Legislature only opened the field of utility service to competition, and did not dictate which provider or set of providers should win the competition. Because there is simply no justification for the Commission to require each customer to select an ESCO, a corollary to the proposed guideline should be stated as: “Customers Who Do Not “Affirmatively” Choose a Specific ESCO Will Receive Full Service from the Distribution Company.”

³⁵ Georgia and Texas required all natural gas and electric customers, respectively, to receive commodity service from ESCOs, with disastrous results for consumers. See, Barbara Alexander, *An Analysis of Residential Energy Markets in Georgia, Massachusetts, Ohio, New York and Texas*, NCAP (2002)

³⁶ Legislative history, discussed previously, indicates that the purpose for allowing multiple providers of natural gas service was to give customers an opportunity to save money by selecting an alternative supplier, without unduly burdening other ratepayers who do not choose ESCO service. Also ECPA indicates a legislative intent that customers should be no worse off with respect to their consumer protections if they select ESCO service. These enactments indicate legislative recognition that full service must continue to be available from the traditional distribution company suppliers.

Staff Guideline 3 is also unclear in its reference to an “affirmative” ESCO provider choice. An “affirmative” choice by the customer, while a necessary condition, is not sufficient to satisfy the criteria for an optimal system regarding a knowing choice. A “yes” is not sufficient to accomplish a change of retail utility service providers if, for example, the ESCO rates, terms and conditions of service have not been adequately disclosed.

Guideline 4:

“A standard-form sales agreement, approved by the Commission and consistent with the requirements of the UBP, would govern the business relationship between the customer and the ESCO unless and until changed by agreement between the ESCO and the customer.”

Staff is proposing a system in which a customer - ESCO relationship commences with many standardized terms approved by the Commission, but only for a short duration while the customer receives a promotional rate. Then, after the introductory period, a different, unspecified agreement, apparently not to be supervised by the PSC, would apply. Any sales agreement must be consistent not only with the subregulatory guidelines of the “UBPs” but also must be consistent with the Public Service Law and official regulations of the Commission. This includes the complete disclosure, by Commission-approved public filing or otherwise, of all rates, terms and conditions.

Guideline 4(i):

“Each ESCO must specify its energy commodity price for a minimum two-month “introductory period.” The ESCO’s price during the introductory period must be expressed relative to the utility’s commodity price (e.g., an ESCO offering a discount would specify its price as a percentage off of the utility’s commodity price).”

From the consumer’s perspective, utility prices are most effectively disclosed through filing at the Public Service Commission. Accordingly, ESCO prices should also be filed publicly at the Commission. Any proposal to accept a lesser or less effective form of disclosure may be helpful to the ESCO competitors, but is inimical to the consumer’s interest. Accordingly, this

aspect of the Staff proposal actually frustrates the objective of price disclosure and prevents meaningful price comparison. Furthermore, this aspect of the Staff proposal is also unworkable because the Commission has allowed some incumbent utilities to sell commodity with no stated or predictable rate. It is difficult to understand how, in the absence of price fixing or price leadership in a non competitive market, ESCOs are able to promise sales at a set percentage lower than the price charged by the incumbent utility if that price is not and cannot be known in advance.

Proposal 4 (ii): "After the introductory period, the agreement would be an "open price" contract, allowing the ESCO to change its price upon notice to the customer."

This aspect of the Staff proposal is blatantly one sided. Why not allow the customer to change the rates in the so-called "contract" upon notice to the ESCO and to terminate the contract if the ESCO does not agree to a price reduction? If the answer to that question is that the ESCO could not agree to empower customers with the right to make unilateral price changes, and it is agreed that the incumbent utility cannot make such price changes, it becomes very clear that absent a Commission directive issued in disregard of the customer's plain interests, customers would not agree to provide the ESCOs with this right.

In addition, when service is taken from the incumbent utility, any rate changes must be publicly filed with the Commission, as required by PSL 65. Any unilateral unfilled price change should make the contract voidable.³⁷ Section 65.1 of the Public Service Law makes any charge in excess of the filed rates unlawful, and another section prohibits the collection from customers of any charges greater than the rate publicly filed at the Commission. These are the regulatory protections built in to service provided by the incumbent utility. They must be compared to and

³⁷ In 2001, the Commission announced the investigation of an ESCO that attempted to change its fixed rates during the terms of a contract. "PSC ... announces staff investigation of Energetix Energy Services Company", PSC Press Release, April 2, 2001. The proposed guideline would authorize practices previously disfavored by the Commission. The proposed guidelines and the accompanying materials provide no explanation for this apparent change in policy.

would be found severely deficient in comparison with those suggested by the Staff proposal. Indeed, Staff's proposal for ESCO "open" pricing is essentially a proposal for unlimited discretion for the ESCO to choose any price at all after the two month introductory period. Nowhere does Staff explain how, outside of Commission approval of such a contract in this proceeding, this "open" price contract could be implemented under the existing UBPs, much less under the Public Service Law and its accompanying regulations.

Finally, under the Staff formulation price changes are permitted at any time so long as "notice" is provided to the customer. The proposal, however, does not suggest what constitutes "notice" for this purpose. For notice to the customer to be effective, it must clearly convey the same information as the incumbent utility would provide to justify a price increase in its tariffed rates. Specifically, the notice must state what the new price is, how this differs from the existing price, how this price increase would be implemented in a typical bill, how the typical bill under the price increase compares to a similar typical bill under the incumbent utility's tariffs, when the announced price increase will take effect, what the consumer's remedies for the price increase will be, how the consumer should act to take advantage of those remedies and when these actions must be taken. In the absence of this information, notice to the consumer of the ESCO's new price is ineffective, at best, and possibly harmful and prejudicial.

Guideline 4 (iii):

"The term would be month-to-month."

As is discussed later, the month-to-month form agreement provides for "continuation" of service indefinitely, but at different, undisclosed rates, without a new contract being signed. Also, this provision does not address the situation where a customer moves. Customers should not be required to pay for service they do not receive.

Guideline 4(iv):

“The customer (or the ESCO, after the introductory period) could withdraw at any time without penalty. To avoid being charged the commodity price of the customer's existing ESCO for the next billing period, the customer must give notice of withdrawal to the ESCO at least 15-days before the next scheduled meter reading, or request a special meter reading. Special meter readings, however, are typically subject to a service charge.”

This Staff proposal requires customers wishing to discontinue ESCO service to wait at least 15 days and as much as 45 days to implement the switch. If the customer seeks to discontinue ESCO service because of an ESCO price increase, a forty-five day wait to discontinue the service is more than enough time to impose significant and substantial costs on the consumer for which he or she has no remedy.³⁸ Under the UBPs, a switch to the ESCO can occur “off-cycle” if the costs of a special meter reading are paid or where the customer accepts an interim date for estimating consumption. Where the customer switch away from the ESCO is motivated by a unilateral price change by the ESCO, it is the ESCO, not the customer, who should pay the cost of the special meter read. In addition, and in cases where the switch is not motivated by an ESCO price increase, the customer should have the same option to accept an interim date for estimating consumption as would be available when a switch is made from the incumbent to the ESCO.

Guideline 5:

“Any amendment to the terms and conditions, except price, as allowed under the "open price" provisions, would require the customer's affirmative consent, in a manner consistent with the UBP §(5)(B)(1).”

The so-called “Uniform Business Practices” (“UBPs”) are not rules and regulations of the Public Service Commission. Indeed, the Commission has no statutory authority to promulgate

³⁸ Indeed, under the UBPs a customer seeking to leave the ESCO and providing notice less than 15 days before the meter reading date, could suffer a second, punitive rate increase for the last 30 days of ESCO service and have no remedy to avoid it.

“business practices.” The UBPs lack the force of law because they are not published in the New York State Codes, Rules and Regulations (“NYCRR”). Thus, an ESCO may with impunity violate the UBPs, and remedies normally available to consumers when a regulation intended for their benefit is violated may not be available. Accordingly, the Staff’s invocation of the “standards” imposed for customer “agreement” by the UBPs, may provide consumers no protection at all, and an ESCO that fails to meet these “standards” may harm consumers without significant exposure.

Moreover, the “affirmative consent” provisions of the UBPs were never intended to be used to implement a two- or multi-step process for customer switching. Under the scenario implemented in the Staff proposal, the “contract” applicable to any given customer may be implemented in several distinct phases with, for example, the complaint procedures coming at the end of the two month introductory period, new cancellation requirements showing up a month later, revised billing provisions coming a month after that, and finally new pricing and a fixed term with termination penalties a month after that. Adding to this complexity is the apparent ability to implement some of these contract terms through written agreements, some by reliance on telephone subscription, and some over the internet. In sum, the opportunities for customer confusion, at best, or, at worst, intentional ESCO practices to prey on this confusion are legion, and the Staff’s reliance on the UBP “standards” to meet legitimate consumer concerns and to provide sufficient protection to customers is unfounded.

Guideline 6:

“Once migrated, each customer would remain a customer of the ESCO unless or until the customer, or the ESCO, elects otherwise (e.g., the customer could choose to return to the utility, or switch to another ESCO, or the ESCO may choose no longer to provide service to the customer).”

Unless the ESCO convinces the customer to take service under a contract with post-introductory period pricing, or the customer affirmatively elects, before the promotional offer is accepted, to forego an automatic return to the incumbent’s service, the customer should revert to

the utility without any switching charges or liabilities, unless a new contract with the ESCO is reached. If, as Staff proposes, the default provision leaves the customer with the ESCO in the absence of a new ESCO agreement after the introductory period, the ESCO need not offer any terms that are better for the customer than the incumbent utility's terms in order to keep the customer. In effect, the ESCO can simply match the incumbent's terms and wait, retaining the customer. Under these circumstances, the customer (or those customers that the ESCO has no interest in keeping) may never see any offer from the ESCO better than the incumbent's terms after the introductory period, and may face added costs to switch back later.

Guideline 6(ii):

"For gas customers, the change in providers will occur on the first of the month. The ESCO may offer a longer introductory period. Certain limitations may apply to the ESCO under law."

PULP agrees that certain limitations apply to ESCOs under law. The proposed ESCO referral and recruitment procedures would be more useful for residential consumers if those limitations are specifically and conspicuously identified.

Guideline 8:

"Information about the ESCO Referral Program must conspicuously disclose that (i) savings, if any, offered during the introductory period are not guaranteed beyond the introductory period; (ii) the ESCO may change its price, upon notice to the customer, after the introductory period; and (iii) a residential customer may rescind the sales agreement as follows: (a) if the customer's agreement was obtained telephonically, within three business days after the customer's receipt of a copy of the sales agreement; (b) if the customer's agreement was obtained electronically, within three business days after the customer's electronic acceptance of the sales agreement; or (c) if the customer's agreement was given in writing, within three business days after the customer's signing the sales agreement."

As noted above, Staff's proposal would "cram" new contract conditions on customers regarding the most essential element - price - without written customer consent to the change. Also, the proposal provides little confidence that the right to rescind is effective and meaningful in these circumstances if it must be exercised within three days.

Specific Comments on DPS Staff Proposed Standard-Form Sales Agreement

“Introduction: The following draft provisions are intended to be consistent with the Uniform Business Practices (UBP). For purposes of the ESCO Referral Program, the utility is the agent for the ESCO and may, on the ESCO's behalf, enroll the customer with the ESCO. By participating in the ESCO Referral Program, the ESCO agrees to abide by the Standard Terms and Conditions set forth below. Only after the two-month introductory period, and upon affirmative consent by the customer, may the ESCO provide terms and conditions that differ from these Standard Terms and Conditions.”

As set forth above, written, knowing and willing customer consent must be obtained to establish a contract for service after the expiration of the initial rate agreement.

“Scope of Agreement: Agreement to Purchase Energy. Insert Name ("Company") agrees to sell and deliver, and customer agrees to purchase and accept, the quantity of electricity and/or natural gas, as estimated by Company, necessary to serve customer's consumption profile or as scheduled by the Local Distribution Utility ("utility"). The amount of electricity and/or natural gas delivered is subject to change based upon data affecting consumption obtained by Company or the utility's delivery schedule.”

The scope of the “agreement” is insufficient because it fails to require inclusion of the actual rates and charges for service. It also omits information about the company and its office address(es). Further, this contract language fails to address and clearly state for the customer what happens if the customer actually consumes more or less than the amount of gas that the ESCO estimated, and whether or the extent to which the customer will be exposed to imbalance penalties.

As discussed below, the staff proposed contract provision on price only requires a statement asserting some level of savings in comparison to utility charges, and only for an introductory period. This is a legitimization of a “bait and switch” tactic, to lure customers with a promise of savings (the “bait”) only to change the rates later to the disadvantage of the customer (the “switch”). Because the introductory “bait” rate is expressed only as a percentage discount from standard default utility service, there is no basis for the customer readily to compare the “bait” rate with the “switch” rate, if that is eventually disclosed, in conventional

volumetric rates, *e.g.*, cents/kwh or dollars/therm. At least in some areas where utilities have stopped offering fixed rates, it will be difficult at that time for the customer to know and compare the rates and charges that month for the default service. Also, in the absence of publicly filed ESCO rates, it will be difficult for consumers to compare the post-introductory rate with rates of other ESCOs.

This provision also fails to address what happens at the end of the introductory period if the customer does not sign a new contract. The contract should expire if the customer does not make a separate signed commitment to receive ESCO service after the introductory period.

“Term: This Agreement will commence as of the date the change of provider to Company is deemed effective by the utility and shall continue, on a month-to month basis, until the parties agree to new terms, or either party cancels this Agreement by providing the other party with a minimum of 15-days written notice of cancellation. Cancellation will be without penalty and will be effective at the end of the customer's first full billing cycle after receipt of notice of cancellation. Upon termination or cancellation, customer shall pay, upon being billed, all outstanding balances.”

This proposal fails to establish any criteria regarding the rates, terms and conditions for service beyond an introductory period. Absent a new agreement, the agreement represented by the Staff's form contract expires and the customer would return to the incumbent utility service. The form contract should describe this explicitly.

“Price: Unless otherwise agreed to in writing, or in such other form of customer agreement as authorized under the UBP, the price for the commodity sold under this Agreement for the first two months or billing cycles after the date of commencement of this Agreement (the “introductory period”) shall be expressed relative to the utility's commodity price (*e.g.*, an ESCO offering a discount would specify its price as a percentage off of the utility's commodity price). The price for the commodity sold under this Agreement will remain at the introductory price until changed, with proper notice to the customer, by the Company.”

This provision authorizes an “introductory price”³⁹ intended to induce customers to switch to ESCO service but does not require the ESCO to tell the customer at the outset what the

³⁹ The proposed contract and the related discussion in the Staff proposal do not indicate what the ESCO price will be. PULP assumes that, as indicated in the proposal, each ESCO's version of the standard form contract will be filed with and approved by the Commission, although the Commission will not “rate regulate” the introductory price

price will be after the introductory period. It then allows the ESCO unilaterally to change the "introductory" rate with some unspecified "notice" to the customer. There is no requirement for signed, knowing and willing consent of the customer to receive service at the changed post-introductory rate.

The Public Service Law requires all rates, charges and terms and conditions of service, and changes in those rates, charge and terms to be included in rate schedules publicly filed at the commission. PSL §§65.5, 66.12(a) and (b). The staff proposal deviates from the statutory requirement of rate filing. The staff proposal, by not requiring public filing of all rates and changes in rates, assists sellers in disguising their rates and frustrates buyers seeking to compare them. This is the antithesis of price visibility and transparency and should not be adopted.⁴⁰

ESCO rates must still be just and reasonable and filed in accordance with the Public Service Law. Regardless of Staff approved conditions, agreements between utilities, and

so as to create an anti-trust defense to the utilities and the ESCOs should price fixing or other anti-competitive conduct such as allocating market shares, occur. Accordingly, PULP assumes that, under the proposal, ESCOs will compete on price and each ESCO may choose the discount which it will use to derive its introductory price, and that neither the Commission, nor the ESCOs participating in the same utility territory will agree or collude to fix this price or allocate market shares.

Further, assuming, for example, a 10% discount on a \$50 per month commodity charge, the two month discount provides the customer with a \$10 one time benefit. In contrast, Staff's proposal saves ESCOs hundreds of dollars in savings from avoided customer recruitment costs. On its face and assuming an arms length transaction is possible, a far greater discount should be available to customers.

⁴⁰ The issue is not, however, whether the Commission's subregulatory policies favoring deregulation of the alternative wireless electric and pipeless gas companies are wrong. Even if the Commission is right, that is not justification to disregard the law enacted by the Legislature. The wisdom of deregulating rates of new utilities is an argument to be addressed to the Legislature and simply is not within the competence of the PSC. As stated by Justice Scalia for the Supreme Court in analogous circumstances, where the Federal Communications Commission had set rates for AT&T but dispensed with rate filing by competing telephone companies:

[The Court's] estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the [statute]. For better or worse, the [statute] establishes a rate-regulation, filed-tariff system ..., and the Commission's desire "to increase competition" cannot provide [it] authority to alter the well-established statutory filed rate requirements.

MCI v. ATT, 114 S.Ct. 2223, 2232, 129 L.Ed2d 182, 195 (1994) (citations and internal quotations omitted). State court decisions likewise have not allowed the PSC or utilities to shed their statutory responsibilities regarding rate filing and rate review. *MCI Telecommunications v. PSC*, 169 A.D.2d 143 (3d Dept. 1991) ("This [PSC] filing provision does not satisfy the unequivocal legislative directive that all rates charged be plainly stated and made available for public review.... The unmistakable import of this [PSC] provision is that it effectively nullifies the statute in a very significant respect; it leaves no way for customers of competitors to determine the amount billed.... As the PSC acted in excess of its authority, its determination cannot stand." *Id.*, at 145 (*emphasis added*)). The Staff proposed guidelines would perpetuate this deviation from the statutory scheme.

subregulatory "business practices" encouraged by the PSC, the Public Service Law is quite clear that only properly filed rates may be coercively collected. Public Service Law § 75.

With many millions of ratepayer funds being spent for outreach and education to promote retail access by wireless and pipeless ESCOs, it would not be prudent for the Commission to abdicate its review of ESCO rates, rate schedules, terms, and conditions of service to assure their reasonableness. Rather, the Commission should scrutinize carefully the rates, contracts and practices of all electric companies participating in the new program to ensure compliance with law, and to advance the Commission's vision of a competitive utility structure that actually benefits consumers, rather than confusing or deceiving them.

"Billing and Payment: Following the change in service providers, the utility will continue to issue the customer a monthly [bimonthly] bill that will include the utility's charges for delivery service and the ESCO's charges for commodity service. Bills will continue to be based on the customer's energy consumption as determined by an actual meter reading (or an estimated meter reading where an actual reading was not obtained). The ESCO will also utilize the consumption information provided by the utility to calculate the ESCO's commodity service charges. Payments are due on the date stated on the bill. Interest will accrue at a rate of 1 & 1/2% per month on all past-due amounts from the applicable due date."

There should be no billing of the customer for any ESCO charges after expiration of the introductory period unless the customer signs an agreement knowingly and willingly to receive service on a continued basis from the ESCO at rates which are disclosed. As discussed above, this is an element of the "bait and switch" in that there is no contract for the customer to receive service at any new rate, yet the customer will be billed for it.

The provisions regarding payment due date, payment, and "interest ... on all past-due amounts" are all governed by HEFPA and commission regulations. The biller cannot dictate a payment due date inconsistent with HEFPA. Also, there are exceptions and limitations on imposition of late charges under HEFPA.

If there is to be a section of the contract itemizing specific provisions deemed favorable to the seller, for the sake of completeness this provision should be revised to require that the bills will also include the following information also required by HEFPA:

- name of the company providing service
- location of principal office and one or more business offices at which the bill may be paid
- service classification
- customer name and address and account or meter number
- start and end date of the billing period
- quantity of service billed, description and cost of any charges and total current charges
- date payment is due but not before personal service of the bill or three days after mailing
- date by which payment must be received to avoid late payment charges
- telephone number to call if the customer has any questions about the bill.

See HEFPA regulations on contents of bills, 16 NYCRR § 13.11.

“Agency: In order to carry out Company's obligations during the term of this Agreement, Customer hereby appoints Company as its agent for receiving customer account and billing information from the utility, and for procuring and scheduling the transmission and other services necessary to deliver the commodity to customer's premises.”

This provision should include a privacy requirement forbidding the seller from using customer information for any other purposes and from giving or selling it to other parties, including corporate affiliates of the seller.

“Title: The commodity sold under this Agreement shall be delivered to a location considered the "Point of Delivery" and shall constitute the point at which title transfers and the sale occurs. Company will indemnify and hold harmless customer from all taxes, royalties, fees or other charges incurred with respect to the commodity before title passes.”

“Point of Delivery: "Point of Delivery" means existing and future points of interconnection between a third party system and/or distribution system and utility's transmission system and/or distribution system. All natural gas sold

under this Agreement shall be delivered to a location outside the State of New York, and that shall constitute the point at which the sale occurs.”

These appear to be provisions that structure the transaction so as to avoid certain State taxes by artificially creating a virtual delivery point outside the state. Not only is it unseemly for the PSC to be advocating State tax avoidance, if it is effective, it deprives the state of revenue and provides opportunities for providers to make sales that are economically inefficient. That is, a seller may not offer cheaper gas but the bottom line of his bill is lower than another in-state seller of domestically produced gas because of the tax advantage. From a societal welfare perspective, such competition to bypass taxation, as opposed to obtaining lower cost commodity, is inefficient and should be discouraged.

“Consumer Protections: The services provided by Company are protected by the terms and conditions of this Agreement and, if customer is a residential customer, the Home Energy Fair Practices Act. Company will provide at least 30-days notice prior to any cancellation of service to the customer. In the event of nonpayment of any charges owed to Company, customer may be subject to termination of commodity service and the suspension of distribution service under applicable suspension procedures. Customer may obtain additional information by contacting the Company's Customer Service at _____ or the Department of Public Service (DPS) at 1-800-342-3377, or by writing the DPS at: New York State Department of Public Service, Office of Consumer Services, Three Empire State Plaza, Albany, New York 12223, or through its website at: <http://www.dps.state.ny.us>

This proposal is deficient and should be rejected. Sellers should be obliged to provide consumers with information about their rights and responsibilities under HEFPA.

The information provided here, regarding suspension of service “[i]n the event of nonpayment of any charges owed to Company” does not inform customers of their ability to avoid termination of service for nonpayment by entering into a deferred payment agreement, tailored to their individual financial circumstances, does not inform customers of their right to withhold payment of disputed charges pending resolution of their complaint in writing by the

Commission, and does not give information about medical emergency provisions and other remedies.

The reference to suspension of service in accordance with "applicable suspension procedures" cannot be said to apprise consumers fairly of the existence of any of the critical HEFPA consumer protections in those "applicable suspension procedures."

"Dispute Resolution: In the event of a billing dispute involving Company's service, customer should contact Customer Service at the Company by calling 1-800-_____ or writing to: _____. Customer must pay the bill in full, except for the specific disputed amount, during the pendency of the dispute. If the parties cannot resolve the dispute within 45-days, either party may avail itself of all remedies available under law or equity."

This provision is defective because it does not advise the customer that if the dispute is not resolved by the company, he or she may complain to the Commission and obtain a written administrative determination by the Commission on the merits of the complaint, and that collection of the disputed portion of a bill is suspended pending review by the Commission.

Also, the references to remedies at law and in equity are vague at best and incorrect at worst. The Commission normally has primary jurisdiction over billing disputes. Suggesting to consumers that if they have a dispute with an ESCO they can have their day in court, without first presenting their claims to the PSC for its determination under Public Service Law § 43, may give customers a false sense of security that if there is a serious problem there is some direct or speedy judicial remedy.

"Assignment: Customer may not assign its interests in any obligations under this Agreement without the express written consent of Company; which consent shall not be unreasonably withheld. Company may assign this Agreement to another energy services company upon no less than 30-days prior written notice to the customer and the utility, and provided the assignee is qualified, and eligible, to sell electricity and/or natural gas, as appropriate, in New York State."

This section should be eliminated. It merely diminishes the customers remedies when a material change in the contract terms (assignment) occurs and provides, no appropriate consumer remedy other than "notice".

"Privacy Statement: Company will not give or sell customer personal information to any unaffiliated party without customer consent, unless company is required to do so by law, or it is necessary to protect Company services, enforce Company terms of service, or to prevent a violation of someone's rights. However, Company may share customer information with its agents so that the agent may perform services for Company. If Company's business or any portion of its business is sold, or assigned to, or acquired by another entity, customer information may also be transferred to that entity as one of Company's business assets."

This section barring the provision of customer information to an unaffiliated company would, by inference, allow the ESCO to give or sell customer personal information to an affiliated company, e.g., a subsidiary or affiliate within a holding company system. Also, the proposed language contains no restriction on the affiliate's use of the information. The Commission should not allow the seller to transfer customer information to a corporate affiliate or subsidiary. When the Legislature authorized certain utility subsidiaries to be formed for co-generation, small hydro or alternate energy production, the Public Service Law was amended to prohibit the sharing of "customer proprietary information" between the utility and the new subsidiary.⁴¹ The clear intent of the Legislature was to ban inter-affiliate sharing of customer proprietary information. Since that enactment, the Commission has allowed New York utilities to form holding companies that now have numerous subsidiaries. In addition, Congress recently repealed utility ownership restrictions of the Public Utility Holding Company Act which will soon allow future utility takeovers by non utility holding companies from other states or nations. Unless the language is rejected, a vast amount of personal data regarding New York utility customers may be compromised.

⁴¹ "Any gas , electric or steam corporation affiliated with such a subsidiary corporation shall ... not provide to any such subsidiary corporation any customer proprietary information, unless such information is made available to any member of the public upon request on the same terms and conditions under which such information is made available to the subsidiary." PSL 66-c(4)(b)(2).

This provision would also allow the ESCO to “slam” customers to another service provider without consent of the buyer. If the seller assigns its business to another company, buyers should be notified and should be given notice of their right to terminate the contract and their right to receive default service or service from another ESCO of their choosing without switching charges.

“Severance: If any provision of this Agreement is held by a court or regulatory agency of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall continue in full force without being invalidated in any way.”

This provision suggests a limitation on the power of the Commission, after voiding some contract provisions, to modify other terms and conditions of service if necessary to ensure that all the rates, terms and conditions of service are just and reasonable in all respects. In this way, it is inconsistent with the Public Service Law and must be modified to preserve the Commission’s authority.

“Liability: The remedy in any claim or suit by customer against Company will be solely limited to direct actual damages. In no event will either Company or customer be liable for consequential, incidental or punitive damages. These limitations apply without regard to the cause of any liability or damages. There are no third-party beneficiaries to this Agreement.”

A utility cannot by contract or tariff exculpate itself from liability to customers for gross negligence. Such liability may include consequential damages, such as loss of profits, and punitive damages.⁴² The proposed language relieving the utility of liability for gross negligence is contrary to state policy. Accordingly, the provision should be deleted.

“Choice of Laws: Venue for any lawsuit brought to enforce any term or condition of this Agreement or to construe the terms hereof shall lie exclusively in the State of New York. This Agreement shall be construed under and shall be governed by the laws of the State of New York without regard to the application of New York's conflicts of law principles.”

PULP has no objection to the choice of law provision. However, this section suggests that grievances will be determined in lawsuits when, in fact, the Commission has primary

⁴² The issue of utility gross negligence is a jury question. *Food Pageant, Inc. v. Consolidated Edison Co.*, 54 N.Y.2d 167 (1981). <http://www.pulp.tc/FoodPageantvConEdison.pdf>

jurisdiction over disputes. Any section dealing with grievances should prominently provide information about how the customer may access the Commission's complaint handling process, including the customer's right under HEFPA to obtain a written Commission determination of a complaint. PSL § 43(2).

"Taxes: Except as otherwise provided by law, all taxes of whatsoever kind, nature and description, due and payable with respect to customer's performance of its obligations under this Agreement, shall be paid by the customer."

This provision is unclear and appears to be unnecessary. If sales taxes are due on the sale of electricity or gas, state and local laws require the seller to disclose and itemize the amount of tax, collect it from the customer, and remit it to the taxing authority. The proponents of the language should identify any other taxes "payable with respect to the customer's performance of its obligations" which would not be paid by the customer but for this language.

In addition this provision opens the door to abusive billing practices such as those of many telephone companies, which advertise a low rate for service, but add spurious surcharges asserted to be reflective of taxes, such as property or other local taxes, but which are not required to be collected as a surcharge.

"Changes in Laws, Rules or Regulations: If at some future date, there is a change in any law, rule, regulation, or pricing structure whereby Company is prevented, prohibited, or frustrated from carrying out the terms of this Agreement, Company shall have the right to cancel this Agreement on 15-days notice to customer."

This provision should be eliminated. A change in law or regulation - for example, a statute such as the pending Proposition 80 in California prohibiting ESCOs from providing residential service to new customers⁴³ -- would normally apply prospectively and would not affect existing contracts.⁴⁴ If a new law or rule were made applicable to existing contracts, then

⁴³ "The Repeal of Electricity Deregulation and Blackout Prevention Act," <http://www.turn.org/TURNInitiativeFinal.html>

⁴⁴ To preclude constitutional contract clause issues, most statutes and rules that affect contracts are prospective in nature, applying only to new contracts and not to contracts previously entered into, before the change in law.

that change in law would override the contract and provide a defense to non performance. Thus, it is transparently clear that this provision is not needed to protect parties from future changes in laws and regulations.

The real purpose of this provision appears to be to give the seller an "out" if there is a change in "pricing structure." There is no explanation of what a change in "pricing structure" would be. Apparently, this means that if the seller, during the term of the contract, finds it unprofitable or less profitable to fulfill his duty to serve the customer, he may be relieved of his commitments. Meanwhile, the customer, who discontinued the incumbent's service on the assurance of a beneficial rate, will find that the seller has reneged and unilaterally deprived the customer of the benefit of the bargain.

"Force Majeure: The term "Force Majeure" shall mean any cause not reasonably within the control of the party claiming suspension and which, by the exercise of due diligence, such party is unable to prevent or overcome, including but not limited to, any act or cause which is deemed a Force Majeure by the utility or any transportation or transmitting entity. If either party is unable, wholly or in part, by Force Majeure to perform or comply with any obligations or conditions of this Agreement, that Party shall give immediate notice, to the maximum extent practicable, in writing and provide particulars to the other party. All obligations or conditions, so far as they are affected by such Force Majeure, shall be suspended during the continuance of any inability so caused, and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during the period. The party claiming suspension of obligations must in good faith attempt to mitigate and/or terminate the Force Majeure."

This provision is unnecessary, confusing and unclear and should be deleted. Utilities have a duty to provide service to their customers and if they fail to do so must be held accountable. No reasonable person would fault utilities when a service interruption occurs due to an extreme disaster such as a hurricane, ice storm, earthquake or terrorist attack and so there is no need for this provision.⁴⁵ The wireless and pipeless utilities are less subject to the physical disruption of their service and so they should see even less need for provisions of this sort.

If the provision is not completely eliminated it should be clarified because it appears to

⁴⁵ On the other hand, a failure to timely restore service after such events may require redress.

relieve the seller from the performance of its duty to serve when that failure is due to any "cause not reasonably within the control of the party claiming suspension and which, by the exercise of due diligence, such party is unable to prevent or overcome...." An ESCO might invoke this provision to halt deliveries to the buyer when wholesale spot market prices unexpectedly spike.⁴⁶

If the Force Majeure provision is retained, it should be made clear that the buyer also may declare Force Majeure and be relieved of obligations under the contract in the event of disability, unemployment, severe illness, high medical expenses, family emergency, fire, flood or other like catastrophe.

"Emergency Service: In the event of an electric outage, gas leak, service interruption, or other emergency, customer should immediately call the utility at (insert phone numbers) and emergency personnel."

Provision of this information makes sense because the wireless and pipeless electric and gas companies have no direct capability to make repairs or provide emergency aid. This information should be prominently stated in type and format that stands out from the rest of the boilerplate.

"Warranty: This Agreement makes up the entire Agreement with Company. Company makes no representations or warranties other than those expressly set forth in these Terms and Conditions, and Company expressly disclaims all other warranties, express or implied, including merchantability and fitness for a particular use."

This boilerplate would make it possible for ESCOs to renege on promises of savings or other advantages made in advertising, on the internet, the telephone or in other sales promotions.

⁴⁶ To avert seller's breach for profit considerations, PULP suggests the following provision:

"No part of this Force Majeure clause shall be construed to provide for the discontinuance of electricity or gas delivery by the seller due to electricity or natural gas not being available at a favorable cost to the seller. The seller shall be obligated to provide electricity or natural gas service to the buyer at the agreed-to price, without regard to the electricity or natural gas cost to the supplier. Ability of the seller to realize a profit on the electricity or natural gas transaction shall not be considered as Force Majeure condition providing for obligation of the seller to provide electricity or natural gas to the buyer."

This express exception or exclusion from Force Majeure is adapted from Studebaker, *Natural Gas Purchasing Handbook* (Fairmont Press 1994), a text for large retail natural gas buyers. PULP modified the author's recommended provision to cover electricity as well as natural gas. The author advises "*Always have this provision in the contract.*" *Id.*, at 158 (*Emphasis added*). The absence of such a provision indicates the one-sidedness of the draft proposal.

This boilerplate disclaimer of all warranties outside the form contract should be prohibited. Indeed, ESCOs should be prohibited by the Commission from making any claims in advertising that are disclaimed or disavowed in the contracts.

Perversely, Commission approval of this standard term of contract would actually grant ESCOs nearly unlimited license to make fraudulent, deceptive and misleading representations in the course of soliciting customers. General Business Law Sections 349 and 350 have been interpreted to allow utilities to "puff" their services with false and misleading representations in advertisements if actual disclosures are contained in boilerplate on file with and approved by the Public Service Commission.⁴⁷

"Parties Bound: This Agreement is binding upon the parties hereto and their respective successors and legal assigns."

It is not clear what is meant by the term "successors and legal assigns" in its application to a residential utility customer.⁴⁸ There is no provision in HEFPA for binding "successors and legal assigns" of residential customers to satisfy any obligations of the customer to a utility. Under HEFPA, individuals have a personal right to receive residential service for their own account. The customer's rights with respect to service and duties are not assignable to others. In general, only the customer is obligated for the service.⁴⁹ Thus, the apparent intent of the language - to make non customer "successors" or "assigns" responsible for a customer's personal obligation to the utility - is contrary to HEFPA.

⁴⁷ "Since the defendants' tariffs were at all times a matter of public record and were in no way concealed, there is no underpinning for any cause of action for fraud, deception, misrepresentation, false advertising, violations of the Public Service Law, or breach of a duty of good faith and fair dealing." *Porr v. NYNEX Corp.*, 230 App. Div.2d 564, 576-577 (2d Dept. 1997), *lv. denied* 91 N.Y.2d 807 (1998).

⁴⁸ If a customer dies, the customer's estate will be liable for unpaid service provided before the customer's death. Continued service at the premises would need to be established in a new account by another person in their name, *e.g.*, an occupant or the administrator of the estate.

⁴⁹ Other persons can be made responsible for service provided to the customer of record with the actual written consent of the person assuming liability: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: **** 2. Is a special promise to answer for the debt, default or miscarriage of another person." GOL § 5-701.

Discussion

PULP submits that the guidelines and the standard form contract, as proposed, are inconsistent with the identified attributes of an optimal system for utility provider switching. They do not advance price visibility, price comparability, or price competition. They exploit, to the customer's disadvantage, the customer's confidence in the incumbent utility's messages merely to advance ESCO customer recruitment. They provide new opportunities for ESCO slamming, cramming and redlining. The procedures facilitate the repackaging of old ESCO offers that have already been overwhelmingly rejected by residential consumers. Finally, they do little or nothing to provide support for a customer's choice to return to incumbent utility service, and fail to fully protect available consumer complaint remedies.

The entire ESCO referral program, as proposed by Staff, rests upon a short discount for utility commodity service followed by the absence of any meaningful price information. Very few people intend to take utility service for only two months. Most intend to receive it continuously for so long as they remain at their premises, and this program, despite its elaborate trappings and promotional expenses, ultimately provides no meaningful benefit to help customers choose among alternative utility energy providers, much less to actually reduce their energy costs.

In addition, the proposed guidelines do not satisfy the objectives Staff itself identified. In the introduction to its proposed guidelines for ESCO customer referral and recruitment program, Staff states it has

identified a need for statewide simplicity, consistency and uniformity, to the extent practicable, in ESCO Referral Programs. Establishing a standardized ESCO Referral Program will promote customer awareness of competitive energy alternatives, encourage greater customer participation in energy competition, help customers make informed decisions when choosing an energy supplier, protect consumer interests, ensure compliance with the Commission's Uniform Business

Practices (UBP), encourage ESCOs to both actively market their services and offer value-added services (such as "green" power and energy conservation measures), promote administrative efficiency, and minimize implementation costs.

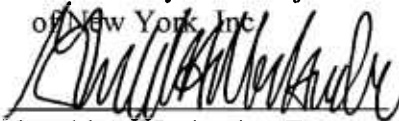
As may be seen from the preceding comments, the Staff proposals raise more problems than they solve. Some proposals would work to strip customers of important rights and remedies. The legal and policy issues raised by the proposed guidelines need to be considered, and new guidelines proposed, before the Commission endorses the mass migration of residential customers to ESCO services through ESCO referral programs or approves the proposed guidelines and standard contract.

Conclusion

The Commission should modify the proposed Staff guidelines for ESCO referral programs to align them with the attributes of an optimal system for switching utility providers. The proposed guidelines and proposed standard agreement in their present form are unfair to consumers and should not be adopted. Revisions are required to assure price visibility and price comparability, promote rational economic choices, establish regulations, tariffs, and standards for utility services related to the switching of providers, and ensure fair practices and uniform consumer protection remedies.

Respectfully submitted,

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