

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to
Assess Certain Aspects of the Residential and
Small Non-Residential Retail Energy Markets in
New York State

Case 12-M-0476

In the Matter of Retail Access Business Rules

Case 98-M-1343

In the Matter of Eligibility Criteria for Energy
Service Companies

Case 15-M-0127

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

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INTRODUCTION

The New York Department of State’s Utility Intervention Unit (“UIU”)¹ and the Office of the New York State Attorney General (“NYAG”)² respectfully submit the following reply comments in response to the Initial Comments to the Public Service Commission’s (“Commission” or “PSC”) Notices of Proposed Rule Making published in the New York State Register on May 4, 2016. One of these Notices³ concerns proposed amendments to the Uniform Business Practices (“UBP”) that govern eligibility of Energy Services Companies (“ESCOs”) to do business in New York; the remaining three Notices each concern a separate ESCO-related Whitepaper that the Department of Public Service Staff (“Staff”) issued on May 4, 2016, on which the Commission invited comment in a Notice Seeking Comments issued May 10, 2016 in Cases 15-M-0127 et. al., *In the Matter of Eligibility Criteria for Energy Services Companies*.⁴

UIU and the NYAG applaud the Commission’s continuing efforts to ensure that consumers are adequately protected from deceptive practices in the retail energy market. As discussed in our prior comments, UIU and the NYAG support several of the recommendations included in the three Whitepapers, subject to certain modifications.⁵ UIU and the NYAG appreciate this opportunity to reaffirm our recommendations and respond to certain comments of other parties that would be detrimental to mass market retail energy customers. UIU and the NYAG urge the Commission to implement the recommendations made in our previous comments as well as the recommendations discussed herein.

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

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

³ SAPA No. 15-M-0127SP3, 2016-18 N.Y. St. Reg. 41-42 (May 4, 2016) (“SAPA Notice”).

⁴ These Whitepapers comprise: Cases 12-M-0476 et al., Staff Whitepaper on Benchmark Reference Prices (“Reference Price Whitepaper”) (May 4, 2016); Cases 12-M-0476 et al., Staff Whitepaper on Express Consent (“Express Consent Whitepaper”) (May 4, 2016); and Cases 12-M-0476 et al., Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests (“Performance Bond Whitepaper”) (May 4, 2016).

⁵ See Joint Comments of the Utility Intervention Unit and the Attorney General of the State of New York on the SAPA Notices Published on May 4, 2016 and on the Staff Whitepapers on Express Consent, Performance Bonds or other Security Interests, and Benchmark Reference Prices (June 6, 2016) (“UIU & NYAG Comments”).

Additionally, UIU and the NYAG note that several parties raised issues, such as the scope of the powers of the Commission, that are the subject of the pending petitions for rehearing on the Commission's February 23 Reset Order⁶ as well as the pending Article 78 proceedings.⁷ In response to these arguments, UIU and the NYAG incorporate by reference our previous statement on these issues, submitted in opposition to the petitions for rehearing on March 18.⁸

DISCUSSION

I. UIU and the NYAG Support the Application of a Reference Price, Consistent with Conditions Described in Initial Comments.

As discussed in initial comments, UIU and the NYAG support the concept of a reference price against which to evaluate fixed rate ESCO contracts for all mass market customers. Rather than basing the reference price on the ESCOs' costs, UIU and the NYAG recommended that the Commission adopt a value-based approach, wherein ESCO prices that exceed the utility's price are only just and reasonable to the extent that the ESCO product delivers customer value in excess of utility service. UIU and the NYAG continue to recommend this approach, and urge the Commission to reject the contrary proposals presented by certain ESCOs.⁹

⁶ Cases 12-M-0476 *et al.*, Order Resetting Retail Energy Markets and Establishing Further Process (Feb. 23, 2016) ("Reset Order").

⁷ *See, e.g.*, Cases 12-M-0476 *et al.*, Direct Energy Services, LLC Comments on Staff Whitepapers (June 6, 2016) ("Direct Energy Comments") at 3; Cases 12-M-0476 *et al.*, Initial Comments of Major Energy Services, LLC, Major Energy Electric, LLC & Family Energy, Inc. (June 6, 2016) ("Major & Family Comments") at 2. Several parties attached legal briefs without citing to specific legal issues. *See, e.g.*, Cases 12-M-0476 *et al.*, Letter from National Energy Marketers Association to the Honorable Kathleen Burgess, Secretary of the New York State Public Service Commission (June 6, 2016) at 1-2; Cases 12-M-0476 *et al.*, Letter from Usher Fogel, Counsel, Retail Energy Supply Association to the Honorable Kathleen Burgess, Secretary of the New York State Public Service Commission (May 23, 2016) (attaching three affidavits plus exhibits from the case *Retail Energy Supply Association, et al. v. New York State Public Service Commission* (Alb. Co. Index No. 870-16)).

⁸ *See* Cases 12-M-0476 *et al.*, Joint Statement of the Utility Intervention Unit & the Attorney General of the State of New York in Opposition to Petitions for Rehearing on Order Resetting Retail Energy Markets for Mass Market Customers (Apr. 8, 2016) ("Joint Statement").

⁹ *See, e.g.*, Cases 12-M-0476 *et al.*, Comments of the Impacted ESCO Coalition (June 6, 2016) ("Impacted ESCO Coalition Comments") at 5 ("Rather than comparing an ESCO's variable-rate to the utility's rate, the Coalition recommends calculating an average (or mean) of the ESCOs' posted prices on the Commission's Power to Choose website, and then adjusting as deemed appropriate given then present market factors."); Cases 12-M-0476 *et al.*,

The ESCOs' proposals which addressed the fixed-rate reference price either rejected the concept¹⁰ or suggested modifications that would lead to a higher reference price.¹¹ Such recommendations would only exacerbate the problems with the Reference Price Whitepaper's proposal that UIU and the NYAG discussed in our initial comments – chief among them, that the proposal would allow (and even endorse) ongoing overcharging of ESCO mass market customers.¹²

For example, in supplemental comments, Major Energy Services, LLC and Major Energy Electric, LLC (“Major Energy”) provided the Commission with confidential data that, according to Major Energy, show that its energy commodity prices are “very different” from those calculated by Staff.¹³ As UIU and the NYAG do not have access to this redacted information, we cannot evaluate these claims. The Commission should not rely on such confidential, unverifiable information, particularly if Major Energy seeks to use it to advocate for further increases to a likely-excessive reference price. Similarly, the Commission should reject RESA's suggestion that allowable products include a “fixed monthly total commodity bill product,”¹⁴ which has no connection to reasonable market prices or customers' own energy usage, and could lead to further overcharges.

Comments of Constellation on Benchmark Whitepaper (June 6, 2016) (“Constellation Benchmark Comments”) at 2 (supporting an “alternative benchmark” derived from an average of actual ESCO prices offered in the market).

¹⁰ See, e.g., Major & Family Comments at 4-5 (suggesting rejection of the reference price because it 1) conflicts with Commission policies on accelerated switching; 2) denies customers “the acknowledged benefits of their retail choice;” 3) “will make for a less transparent and efficient retail energy marketplace for mass-market customers”). Major Energy Services and Family Energy provide little support for these conclusory statements and, while the Commission has shown an interest in accelerated switching, it has shown greater concern for ensuring that mass market customers are adequately protected from unscrupulous ESCOs. See, e.g., Cases 12-M-0476 *et al.*, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets (Feb. 25, 2014) (“February 2014 Order”). Further, mass market customers will not reap any “benefits of their retail choice” from being entered into fast-track ESCO contracts at unjust and unreasonable rates.

¹¹ See, e.g., Cases 12-M-0476 *et al.*, Letter from Usher Fogel, Counsel, Retail Energy Supply Association to the Honorable Kathleen Burgess, Secretary of the New York State Public Service Commission (June 6, 2016) (“RESA Comments”) at 10-18 (suggesting, among other things, that the retail adder of 2 cents too low and providing Texas' POLR of 6 cents as an example without providing any data or reasoning to explain why RESA believes a higher adder is needed for the “many loads and costs to serve and . . . various retailing costs that need to be recovered”).

¹² See *infra* n. 16.

¹³ See Cases 12-M-0476 *et al.*, Supplemental Comments of Major Energy Services, LLC & Major Energy Electric, LLC (June 6, 2016).

¹⁴ RESA Comments at 8 (proposing that customers pay the same total price for each month, *i.e.*, \$100, and that the price would not change based on actual energy usage or current market prices). RESA offers no support for its claim that “this is an option that customers seem to like as it provides rate stability and a cushion in the event of price volatility or a surge in pricing” and no indication on how this would provide customers with more value than a reference price based on energy usage and actual market factors.

UIU and the NYAG agree with the Joint Utilities' observation that the Reference Price Whitepaper's proposal cannot be compared to real world valuations without a numerical back cast.¹⁵ However, a high-level comparison of the output of that proposal (the "ESCO Price to Compare Worksheet- Electric", available on the Commission's website)¹⁶ and publicly available utility commodity price information suggest that the Reference Price Whitepaper's formulation may result in a reference price significantly higher than both the utility commodity price and current ESCO offerings. For example, consider the prices of a 12-month fixed-price product to SC-1 customers in RG&E's service territory: the commodity price that an SC-1 utility customer would have paid in May 2016 was 5.403 cents per kWh. The Reference Price Whitepaper's formulation, however, would yield an electric reference price for these customers of 6.583 cents per kWh, or about 22% more than the utility's price. In addition, the Whitepaper's reference price is significantly higher than the prices several ESCOs in RG&E's service territory currently offer for 12-month fixed-rate products. According to the New York Power to Choose website, for example, New Wave Energy Corp. offers a 12-month fixed-price contract for 4.9 cents per kWh, or about 25.56% less than the corresponding reference price.¹⁷ Enacting a reference price that is significantly higher than both the utility commodity price and ESCO offers would erode the essential consumer protections established in the Reset Order and lead to continued ESCO overcharging of mass market customers.

The reference price is significantly higher than the electric utilities' commodity cost (and several current ESCO offers) in large part due to the arbitrary Retail Cost Adder, which adds an additional 2 cents per kWh to the base electric reference price calculation (which itself contains additional inappropriate price elements).¹⁸ As discussed previously, UIU and the NYAG object to this cost-based approach on several grounds, one of which is the unreliable and unverifiable nature of the Retail Cost Adder.¹⁹ Other parties' comments bear out this observation; for example, Great Eastern Energy suggested that it would require a Retail Cost Adder of 2.75 to 3

¹⁵ See Cases 12-M-0476 *et al.*, Initial Comments of the Joint Utilities on Staff Whitepapers (June 6, 2016) ("Joint Utilities Comments") at 8.

¹⁶ Available at www3.dps.ny.gov/W/PSCWeb.nsf/All/A6FFDA3D233FF24185257F68006F6D78?OpenDocument (accessed June 14, 2016).

¹⁷ Available at www.newyorkpowertochoose.com/ptc_choose.cfm?CFID=2017462&CFTOKEN=43983431 (accessed June 14, 2016).

¹⁸ Reference Price Whitepaper at 5.

¹⁹ UIU & NYAG Comments at 11-12.

cents to sustain its historic profit margins – yet it provided no accompanying data to support this assertion.²⁰

UIU and the NYAG further recommend that the Commission reject RESA’s suggestion to allow reference prices for contracts longer than 12 months. RESA has not provided data showing the additional value customers receive from extended contracts.²¹ The reverse may be the case. For example, if commodity market prices drop below the contract rate partway through a multi-year contract term, the customer would be stuck paying an excessive rate – potentially for years. On the other hand, if commodity market prices exceed the contract rate midway through the contract, the ESCO would have to operate at a loss for the remainder of the contract, which in some instances may push the ESCO into insolvency. On balance, the risks of a multi-year fixed-rate contract likely exceed its benefits, and thus would not justify a higher price premium.

UIU and the NYAG also recommend the Commission reject Constellation’s suggestion to create a benchmark reference price derived from the average actual ESCO offer prices in the market.²² Mass market ESCO customers have already been overcharged hundreds of millions of dollars²³ and as the Commission has acknowledged the market as structured is not providing value to mass market customers. Computing a reference price merely based on average ESCO offers would thus perpetuate excessive historical prices, and would not address the market failures that led to the overcharges in the first place. Instead, UIU and the NYAG reaffirm our prior recommendation that the Commission establish a value-based reference price, which would provide mass market customers with adequate protection and improve market function.

II. In Addition to a Reference Price, the Commission Should Consider Extending Price Disclosure Requirements to Other ESCO Products.

²⁰ See, e.g., Cases 12-M-0476 *et al.*, Letter from Robyn Frank, General Counsel, Great Eastern Energy to the Honorable Kathleen Burgess, Secretary of the New York State Public Service Commission (June 2, 2016) (“GEE Comments”) at 3.

²¹ See RESA Comments at 8-9 (June 6, 2016).

²² See Constellation Benchmark Comments at 2.

²³ See Memorandum of Law of Amici Curiae Office of the Attorney General and Utility Intervention Unit of the New York State Department of State, Index Nos. 868-16, 870-16, and 874-16 (Albany County Sup. Ct. 2016) at 21; Affidavit of Luann Scherer in Support of Respondent’s Answer ¶ 21.

UIU and the NYAG’s previous comments concerning the Reference Price Whitepaper’s proposals focused primarily on the calculation and application of a reference price to ESCOs’ 12-month fixed-rate products. As discussed in Part I above, no other parties’ initial comments disturbed the central conclusions we reached in that discussion. However, other parties also raised additional issues concerning the reference price that UIU and the NYAG did not include in our comments. Some parties questioned, *inter alia*, how, and to what extent, a reference price could be applied to ESCO products that combine commodity with energy-related value-added services (“ERVAS”),²⁴ referred to generally herein as “ERVAS products.”

A. Reference Prices Can Be Applied to ERVAS Products to Protect Customers and Improve Market Function.

In our comments in the Low-Income ESCO proceeding, UIU and the NYAG each observed that ESCOs had failed to show that the ERVAS products they proposed to offer to low-income customers would actually deliver value commensurate with their price.²⁵ Those comments remain relevant to this proceeding. As we have argued with respect to “green” products, the mere presence of an ERVAS included in an ESCO product should not exempt the product from any form of price protection; rather, the product’s price should reflect the value it delivers to the customer.²⁶ UIU and the NYAG therefore urge the Commission to extend the principle expressed in the NYAG’s comments in the Low Income Collaborative proceeding to all mass market ESCO customers: namely, ESCOs should be required to guarantee that their ERVAS products provide value that justifies their price premium in excess of basic utility service.²⁷

Upon reviewing and considering the comments of other parties concerning the reference price, and recognizing the difficulty of measuring the dollar value of an ERVAS product, UIU and the NYAG have also developed an additional approach to ERVAS product pricing, which we recommend the Commission adopt if it chooses not to implement the guaranteed-value proposal as described above. Specifically, UIU and the NYAG propose in the alternative that the

²⁴ See, e.g., Impacted ESCO Coalition Comments at 9-10; RESA Comments at 7.

²⁵ Cases 12-M-0476 *et al.*, Comments of the Utility Intervention Unit on Collaborative Report Regarding Protections for Low Income Customers of Energy Services Companies (Jan. 29, 2016) at 9-10; Cases 12-M-0476 *et al.*, Comments of Attorney General Eric T. Schneiderman (Jan. 29, 2016) (“NYAG Initial Comments”) at 4-6.

²⁶ UIU & NYAG Comments at 4.

²⁷ NYAG Initial Comments at 5-6.

Commission adopt a disclosure requirement similar – but different in certain fundamental respects – to that mentioned briefly in the Reference Price Whitepaper.²⁸ We believe that this alternative proposal would allay many of the parties’ concerns with respect to the price of ERVAs products, while also advancing the Commission’s market-function and customer-protection objectives that underlie this proceeding.

The central feature of this alternative proposal is simple: every mass-market ESCO customer’s bill must clearly show the price premium associated with the ESCO product. Specifically, in addition to all other information already required in a customer bill, each bill must show: (1) what the customer’s bill would have been under basic utility service (which can be approximated using a properly-calibrated reference price); (2) the total amount of the customer’s bill above or below²⁹ this basic-service price (i.e., the price premium); and (3) the product’s estimated annual price premium (i.e., the actual cumulative price premium paid over the last 12 months, or if the customer has been enrolled in the contract for less than 12 months, a projected annual price premium). The estimated price premium – and the fact that the premium is paid in exchange for a particular ERVAS product – must also be included in ESCOs’ offers to prospective customers to ensure that customers have an opportunity to meaningfully evaluate their options before entering into a contract.

This proposal fundamentally differs from the Reference Price Whitepaper’s proposal in that it does not rely upon ESCOs’ costs, which as UIU and the NYAG discussed in our initial comments, should not form the basis of a reference price.³⁰ The Reference Price Whitepaper suggests a disclosure mandate that would require an ESCO to disclose the costs it incurred in providing the commodity and the ERVAS:

The fixed price offering could be . . . coupled with an energy related value added product, the price of which would be bundled with the per unit commodity costs but separately disclosed in the customer disclosure statement, including the price of that product. **In either case the reference price must consider the additional risks ESCOs incur when offering a fixed price product.**

²⁸ Reference Price Whitepaper at 2-3.

²⁹ Price premiums could be negative, indicating customer savings compared to basic utility service.

³⁰ UIU & NYAG Comments at 10. Utilities’ costs – scrutinized and approved through rate proceedings – serve as the basis of their rates because, as monopolies, their rates cannot reasonably be set through the free operation of markets. ESCOs, on the other hand, have not historically been subject to the same level of rigorous procedure, and so the Commission should not presume that their rates are just and reasonable. Indeed, as the Reset Order suggests, ESCOs’ rates have often been unjust and unreasonable.

...

For [month-to-month, variable rate] products, the ESCOs are required to offer the price guarantee with respect to the utility commodity price as articulated in the Reset Order. For ESCOs wishing to bundle energy related value added products or services with a commodity product, **the ESCO must guarantee savings with respect to the commodity portion of the product and disclose in the customer disclosure statement the additional cost attributed to the energy related value added product or service.**³¹

ESCOs have argued vociferously that such cost decoupling is unworkable, asserting that they cannot meaningfully separate their costs of commodity from the costs of ERVAS, and that attempting to do so may harm their competitive positions.³²

Without taking a position on these claims, UIU and the NYAG observe that ESCOs' costs are irrelevant. The amount an ESCO paid to secure its commodity, or its costs associated with providing an ERVAS product, are of little practical interest to the customer. Such information would not help a customer determine whether s/he was receiving value commensurate with her bill, or help him or her compare offerings of different ESCOs. Much more important – and more relevant to the Commission's objective in this proceeding to protect customers – is the price customers pay for these products.

UIU and the NYAG's alternative proposal would therefore require each ESCO customer's bill to clearly show how much the customer pays for each portion of his or her ESCO service. This would give each customer the information s/he needs to determine whether an ERVAS product's price is commensurate with the value the product delivers above basic utility service. This proposal is consistent with the purpose of this proceeding, as well as the theoretical underpinnings of electric market deregulation in general – namely, the hope that a transparent, properly-functioning marketplace (backstopped with reasonable customer protections) will yield just and reasonable prices.³³ Such a marketplace relies on information parity between buyers and

³¹ Reference Price Whitepaper at 5-6 (emphasis added).

³² See Impacted ESCO Coalition Comments at 10; RESA Comments at 9.

³³ See Cases 94-E-0952 *et al.*, Opinion and Order Regarding Competitive Opportunities for Electric Service (May 20, 1996) at 30-31.

sellers, which has been conspicuously lacking in New York’s ESCO markets to this point.³⁴ UIU and the NYAG’s proposal seeks to resolve the information gap between ESCOs and their customers, and in so doing, improve the functioning of the marketplace.

There are a number of additional benefits to ESCOs of this alternative proposal. This proposal would not require ESCOs to split out or divulge any of their costs on customer bills, thereby obviating RESA’s trade secret concerns and easing RESA and the Impacted ESCO Coalition’s objections to decoupling their “all-in” prices. This proposal would also encourage ESCOs to innovate. If an ESCO finds a way to reduce its commodity or ERVAS costs (or costs associated with risk, marketing, or any other operations), this proposal would allow the ESCO to retain the value of these efficiencies – without needing to disclose their sources on customer bills. (Of course, UIU and the NYAG also encourage ESCOs to pass some of the savings associated with these efficiencies on to customers, which should result naturally in a properly-functioning marketplace.) Finally, this proposal would not adversely affect those ESCOs that already offer valuable ERVAS products at reasonable prices. For example, Agway argues that its customers are happy to pay higher prices for ERVAS products because they derive commensurate value from those products.³⁵ ESCOs such as Agway therefore have nothing to fear from our price disclosure proposal – to the contrary, they should embrace the proposal, because it would help drive out the “bad actors” that have derived unfair competitive advantages by exploiting market failures, which has harmed “good” ESCOs as well as customers.

This alternative proposal also conforms to the Commission’s goals in this proceeding. Most importantly, it would advance the Commission’s objective of protecting mass market customers, and would do so while also maintaining a robust ESCO marketplace. The proposal

³⁴ See February 2014 Order at 4 (“In support of this Commission’s realignment of the regulatory framework, this Order addresses major weaknesses in the residential and small non-residential retail energy markets due to the lack of accurate, transparent and useful information and marketing behavior that creates and too often relies on customer confusion”); see also Reset Order at 2-8 (acknowledging that while changes were made to increase price transparency, “the Department of Public Service continues to receive a large number of complaints from ESCO customers about unexpectedly high bills”).

³⁵ See e.g., Cases 12-M-0476 *et al.*, Comments on Staff Whitepaper on Benchmark Reference Prices (May 4, 2016) and Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests (May 4, 2016) by Agway Energy Services, LLC (“Agway Comments”) at 1-2 (discussing its EnergyGuard™ program, whose options include “a home furnace/boiler repair program to all natural gas customers, in which no deductible is applied and coverage is available around-the-dock, including weekends.”) Agway notes its customers “appreciate and have come to depend on these value-added services for peace of mind, which is evidenced by Agway’s high degree of customer loyalty and the vast amount of customer testimonials it receives each year.”

would be relatively straightforward to administer and enforce, and would avoid the procedural “gatekeeper” problem: unlike other options, this proposal would not require the Commission or Staff to evaluate the appropriateness and price of each individual ERVAS product an ESCO seeks to offer. Additionally, this price disclosure requirement could (and should) easily be extended to other types of ESCO products as well, providing further market transparency. For example, price disclosure would complement the price protections UIU and the NYAG have recommended for fixed-price products and “green” products.³⁶

Finally, this proposal would avoid the procedure- and theory-based pitfalls that inhere in the Reference Price Whitepaper’s proposal to use a competitive market participant’s costs as a basis for its prices. As UIU, the NYAG, and the Public Utility Law Project (“PULP”) observed in their prior comments, the use of ESCOs’ costs as a basis for administrative price regulation would contravene the purpose and function of the markets without providing any protection to customers.³⁷ The present proposal would avert such an unfortunate precedent.

B. Necessary Features of Alternative Price Disclosure Proposal.

UIU and the NYAG emphasize that the above alternative disclosure proposal is contingent upon certain conditions. Price disclosure, on its own, is not a substitute for other customer protections. The following protections would be essential to the implementation of the alternative price disclosure proposal described above.

(1) The reference price must approximate utilities’ actual commodity prices as closely as practicable.

UIU and the NYAG’s alternative price disclosure proposal relies on the premise that the price of an ESCO product can be compared to the price the customer would have paid for basic utility service over the same period. Such a comparison is easily calculated on a customer’s monthly bill, because the utility’s actual per-kWh and per-therm prices over the preceding month are readily available. But a prospective comparison of utility and ESCO prices, which under this

³⁶ See UIU & NYAG Comments at 4, 5, 12-15.

³⁷ *Id.* 12-15; Cases 12-M-0476 *et al.*, Comments on DPS Staff’s Whitepapers on Benchmark Reference Prices for ESCO Commodity Service, Express Customer Consent for ESCO Contract Changes, and Performance Bonds by the Public Utility Law Project of New York, Inc. (June 6, 2016) (“PULP Comments”) at 6-10.

proposal must be disclosed in ESCOs' offers to customers, will rely on projected utility prices for commodity.

Such projections can be encapsulated in a reference price; however, the reference price calculation presented in the Reference Price Whitepaper would not suffice. As UIU, the NYAG, Constellation, the Impacted ESCO Coalition, Noco Natural Gas LLC, Noco Electric LLC, Mirabito Natural Gas, and PULP observed in prior comments, the Reference Price Whitepaper's formulations contain several subjective, vague, and inappropriate elements that would render the resulting "reference prices" unreliable.³⁸ Furthermore, as discussed above, the Reference Price Whitepaper's approach may yield reference prices well in excess of utilities' actual commodity prices,³⁹ which would defeat the customer-protection purpose of this proceeding.

The large gap between the Reference Price Whitepaper's results and actual commodity prices is likely a consequence of the Whitepaper's attempt to construct a reference price around ESCOs' estimated costs and self-reported profit margins. The present proposal would remove those controversial factors from the reference price calculation entirely. Instead, under the present proposal, the objective of the reference price would be to approximate actual utility commodity prices. The calculation of such a reference price would rely solely on objective, publicly-available data, and would incorporate backcast adjustments to ensure the maximum degree of accuracy.

(2) Projected price premiums in ESCOs' offers to prospective customers should be binding and enforceable.

³⁸ UIU & NYAG Comments at 11-12; Constellation Benchmark Comments at 6-7 (providing numerous questions to consider in order to estimate and confirm the calculations for seven gas and five electricity reference price factors); Impacted ESCO Coalition Comments at 6-8 (noting the following factors Wu = Weather Risk; P=Premium; M=Cushion must be defined further); Cases 12-M-0476 *et al.*, Letter from Mickey Zablonski, General Manager, Noco Natural Gas LLC & Noco Electric LLC to the Honorable Kathleen Burgess, Secretary of the New York State Public Service Commission (June 6, 2016) at 2 (noting "(b)asis" is not specifically defined for the gas reference price, which is not only difficult to do but is arguably the riskiest component in the offered fixed price."); Cases 12-M-0476 *et al.*, Comments of Mirabito Natural Gas, LLC Regarding Reference Price Whitepaper and Performance Bond Whitepaper (June 6, 2016) at 4-5 (noting Mirabito does not support the implementation of a reference price but, if one is adopted, issues must be addressed with five of the natural gas reference price factors); PULP Comments at 9-10 ("Staff's benchmark pricing algorithms are unacceptably vague. There is no analysis by Staff of how its benchmark pricing algorithm impacts the allowed percentage above rates of the distribution utility, or overall profitability of an ESCO, or whether the price is just and reasonable in relation to actual costs based on a factual record.")

³⁹ *Supra* n. 16.

A prospective customer can only make an informed decision with respect to an ESCO product if the information s/he receives about the product is accurate. Consequently, and consistent with UIU and the NYAG's initial comments with respect to the reference price for fixed-price products,⁴⁰ ESCOs must not be allowed to charge their customers more than the price premium identified in the service agreement and disclosed on the customer's bill. Expressing the price premium as a percentage above utility commodity prices, identified and discussed in Part II(b)(3) below as a useful means of ensuring customer awareness, would also aid in the monitoring and enforcement of price premiums.

(3) The information included on customer bills, and the format of the bills, must be designed for maximum clarity.

The method by which price disclosures are presented on a customer's bill is critical to making the information understandable. Price disclosure information should therefore be clear, concise, and central on customer's bill. The characteristics of the information should also be tailored so as to maximize readability and understandability. For example, the amount of the price premium above the price for basic utility service should be expressed as a percentage, as opposed to a nominal dollar premium on a per-kWh or per-therm basis, which can obscure actual bill impacts. Additionally, the information should be presented in the customer's primary language, consistent with UBP rules concerning marketing to residential customers.⁴¹

(4) ERVAS product prices should be subject to "backstop" price protections.

Price transparency would not cure all of the failures of the ESCO mass market. For example, a clear articulation of price premiums would not necessarily prevent aggressive marketers from pressuring vulnerable individuals into high-price, low-value contracts. UIU and the NYAG therefore recommend that any ESCO product that costs more than 150% of the utility's commodity price be presumed unjust and unreasonable. ESCOs wishing to market such

⁴⁰ UIU & NYAG Comments at 15-16.

⁴¹ See UBP §§ 10.C.1.f & 10.C.2.g⁴ (requiring that "[a]ny written materials, including contracts, sales agreements, marketing materials and the ESCO Consumers Bill of Rights, [] be provided to the customer in the same language utilized to solicit the customer" during in-person or telephone contact). The UBP requires marketing representatives to conduct business in the customer's primary language when it is apparent the customer's English language skills are insufficient to allow comprehension and discussion of the contract offer. UBP §§ 10.C.1g & 10.C.2.e

products should be required to rebut this presumption, in a fully-noticed proceeding subject to public comment, by presenting evidence demonstrating that the product's price is commensurate with its value.

(5) Price disclosure requirements should be continually monitored and reevaluated in an ongoing collaborative process.

Given the many years that the Commission, Staff, and other parties including UIU and the NYAG have invested in addressing ESCO market failures, it seems unlikely that a perfect solution will emerge fully-formed from this proceeding. However, this is no reason to delay further action to protect mass market ESCO customers, who continue to suffer additional harms with each day that the Reset Order remains stayed. UIU and the NYAG therefore urge the Commission to continue the collaborative on ESCO matters in addition to adopting the regulatory reforms recommended here and in our initial comments. Such ongoing collaborative discussions would provide ESCOs, consumer advocates, and other stakeholders an opportunity to monitor and reevaluate new ESCO customer protections. Specifically with respect to the proposals described above, a collaborative would provide a venue for tailoring price disclosure requirements to maximize their effectiveness and minimize their burden on ESCOs.

III. The ESCO Financial Security Requirement Should Reflect the Fundamental Principle of Ensuring That Consumers Are Made Whole for ESCO Harms.

In previous comments and submissions in these cases, UIU and the NYAG expressed our full support for a requirement that ESCOs post performance bonds in order to be deemed eligible to operate in the State of New York.⁴² UIU and the NYAG also agree with the Joint Utilities that “[s]ecurity requirements must be set based on the financial risk to customers associated with the service commitments made by an ESCO at any point in time.”⁴³ As UIU and the NYAG previously noted, this concern can be addressed if the amount of the security is calculated based on the number of ESCO mass market customers and the amount of premium the ESCO

⁴² See Cases 12-M-0476 *et al.*, Comments of the Utility Intervention Unit on Resetting Retail Energy Markets for Mass Market Customers (Mar. 18, 2016) at 10-11; Cases 12-M-0476 *et al.*, Reply Comments of Attorney General Eric T. Schneiderman (Apr. 4, 2016) at 4; UIU & NYAG Comments at 17-19.

⁴³ Joint Utilities Comments at 2.

historically charged over the utility price – or, in the case of an ESCO that has not historically charged a premium, the calculation should be based on the ESCO’s number of mass market customers and the average premium charged by all ESCOs to mass market customers.⁴⁴ This recommendation is based on a goal shared by the Joint Utilities – that “the security must be adequate to cover each ESCO’s potential obligations to customers, regardless of historic performance or complaint history.”⁴⁵ Indeed, this recommendation is consistent with the overarching aim of the proposed performance bond requirement – as Staff noted, “the security requirements that are the subject of this proposal are intended to serve a distinct purpose, and are necessary to ensure an ESCO’s ability to, at a minimum, ensure the price savings guarantee and other elements of the Reset Order.”⁴⁶ Multiple parties recognize that the amount of the bond should reflect the number of customers served.⁴⁷

The Commission should disregard other parties’ suggestions that the bond need not guarantee that overcharged consumers will be made whole. The Commission’s own staff analysis has shown that ESCOs, taken together, overcharge consumers by the hundreds of millions of dollars.⁴⁸ Recently, the Commission found that multiple ESCOs charged double or triple the rate charged by the utilities, while one ESCO charged *eight times* the utility rate.⁴⁹ The Commission also found that for January 2016 alone, residential ESCO customers in National Grid’s territory paid approximately \$15.9 million more for service than they would have if they were full service utility customers.⁵⁰ ESCOs charging exorbitant rates over those charged by utilities is a long-standing problem that requires the type of solution the Commission is trying to achieve. The Commission’s analysis of ESCO customers in the Niagara Mohawk (“NiMo”)

⁴⁴ UIU & NYAG Comments at 17-18.

⁴⁵ Joint Utilities Comments at 4.

⁴⁶ Performance Bond Whitepaper at 5.

⁴⁷ See, e.g., Impacted ESCO Coalition Comments at 4 (“[t]he Coalition suggests a performance bond/security requirement that consists of a flat amount, and an adder proportional to the ESCO’s mass market customer load”); GEE Comments at 4 (“GEE is in favor of Staff’s performance bond proposal.”).

⁴⁸ See Affidavit of Luann Scherer in Support of Respondent’s Answer ¶ 21, Index Nos. 868-16, 870-16, and 874-16 (Albany County Sup. Ct. 2016); see also Mem. of Law of Amici Curiae Office of the Attorney General & Utility Intervention Unit of the New York State Department of State (Joint Statement Appx. A) (“UIU & NYAG Amicus Brief”) at 28.

⁴⁹ See New York State Press Release, *Governor Cuomo Announces New Consumer Protections for Energy Consumers to Stop Deceptive Business Practices* (Feb. 23, 2016), available at www.governor.ny.gov/news/governor-cuomo-announces-new-consumer-protections-energy-consumers-stop-deceptive-business

⁵⁰ UIU & NYAG Amicus Brief at 11.

territory during 2011-2012 showed that low income ESCO customers in NiMo's region paid a net premium \$19.2 million more than what they would have paid NiMo for commodity supply service during this two-year period.⁵¹ Staff performed another comparison of nearly a half million 2012 Consolidated Edison ("Con Edison") residential customer bills randomly sampled from charges collected by 111 ESCOs. These ESCOs' bills averaged \$130.50 per month more than Con Edison's rates during the same period. One ESCO's residential bills averaged over \$1,073 per month above, and another averaged \$625 above, the utility's monthly bill amounts.⁵² Given the historic level at which ESCOs have overcharged consumers, a bond adequate to make consumers whole when called upon is crucial.

There is no analytical support for the alternatives proposed by some parties. A flat fee, as proposed by Agway Energy Services,⁵³ would not provide the needed protection. If each ESCO were subjected to a flat, fixed amount, the amount would have to be large enough to cover the potential liability of the ESCO with the highest number of mass market customers and the historic highest premiums charged to those customers. Such a solution would not be workable or fair for smaller ESCOs, which do not take on the same amount of risk as larger ESCOs. Small ESCOs serve a smaller number of mass market customers and therefore would have a smaller burden to fulfill if overcharges occurred. Capping the size of the bond, as Constellation and RESA suggest, is similarly unworkable – the amount of the bond must be proportional to the potential liability for restitution to overcharged customers and any penalty imposed for non-compliance with the Commission's Orders and the UBP.⁵⁴ RESA proposes a "customers served" adder to a flat amount that would be posted by each ESCO – a calculation that might be workable if there were also a "historic overcharge" adder – but RESA then proposes that the "customers served" adder be capped.⁵⁵ An ESCO cannot be excused from protecting its customers simply because it has many of them. Finally, the Pennsylvania model advocated by

⁵¹ See Cases 12-E-0201 & 12-E-0202, Testimony of William D. Yates, CPA for Public Utility Law Project of New York, Inc. (Aug. 31, 2012) at 7.

⁵² See UIU & NYAG Amicus Brief at 11.

⁵³ Agway Comments at 4 ("the specific amount of financial assurance required of each ESCO should be a flat, fixed amount that does not vary based on the ESCO's number of customers or revenue").

⁵⁴ Cases 12-M-0476 *et al.*, Comments of Constellation on the Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests (June 6, 2016) ("Constellation Other Comments") at 4 ("any scalar that increases the bond requirement as it applies to ESCOs should be capped so as not to become excessive"); RESA Comments at 5 ("a cap would be applied to the 'customers served' adder so that it is not unlimited").

⁵⁵ See RESA Comments at 5.

Major Energy and Family Energy,⁵⁶ which would initially set the bond at \$250,000 and adjust it based on gross receipts, seems woefully inadequate given the amount of overcharges that occur in the New York market – and Major Energy and Family Energy do not provide any analysis to justify this model for New York.⁵⁷

In the alternative, UIU and the NYAG support PULP’s proposal that the letter of credit “should be equal in size to the amount by which the ESCOs jointly overcharge their customers in the State, and should be regressed down to a per capita level of each ESCO based on its number of mass-market customers,”⁵⁸ as a viable alternative to basing the performance bond amount on historic overcharges by any particular ESCO.

In our prior comments, UIU and the NYAG recommended that the financial security initially be posted as an irrevocable letter of credit. We reaffirm this recommendation here, but note that an exception may be appropriate to allow not-for-profit ESCOs with a history of delivering customer savings to post an irrevocable letter of credit or a surety bond. Energy Cooperative of America, Inc. (“ECA”), a not-for-profit energy cooperative serving mass market customers in five of New York’s service territories,⁵⁹ submitted initial comments explaining that an irrevocable letter of credit may not be operationally feasible for a not-for-profit ESCO.⁶⁰ Because ECA has consistently provided its mass market customers with savings over four of the last five years, ECA appears to be at a lower risk of overcharging customers in the future, and hence a surety bond may provide ECA’s customers adequate protection. UIU and the NYAG believe ECA is the only not-for-profit energy cooperative currently operating in New York State;

⁵⁶ Major & Family Comments at 4.

⁵⁷ Perhaps the reason it is inadequate is that the purpose of the Pennsylvania bond requirement is different from the purpose of the New York ESCO bond. The Pennsylvania bond requirement was established to ensure ESCOs can pay taxes on their gross receipts and fulfill retail electricity contractual obligations, while the New York bond is focused on making mass market customers whole: “The purpose of the [Pennsylvania] security requirement is to ensure the licensee’s financial responsibility, the payment of gross receipts tax as required by section 2810 of the code (relating to revenue-neutral reconciliation), and the supply of electricity at retail in accordance with contracts, agreements or arrangement.” 52 Pa. Code § 54.40(b).

⁵⁸ PULP Comments at 14.

⁵⁹ Cases 12-M-0476 *et al.*, Comments of Energy Cooperative of America (June 6, 2016) (“ECA Comments”) at 1 (“ECA supplies natural gas to customers in the National Fuel Gas, New York State Electric & Gas, Rochester Gas & Electric and National Grid utility territories, and electricity to customers in the New York State Electric & Gas, Rochester Gas & Electric, National Grid and Consolidated Edison utility territories across New York State. Its customers fall under the residential and small non-residential commercial customer service classes covered under these proceedings.”).

⁶⁰ *Id.* at 3.

however, if other not-for-profit ESCOs enter the market in the future and are also able to provide consistent savings, it may be reasonable to extend a similar financial security exception to them as well.

Several parties emphasized a need for proper process before bonds are used.⁶¹ UIU and the NYAG agree that due process would be required before any charges against the performance bond funds are made. Such a process already exists: where a performance bond must be called upon, the Commission may proceed directly by an Order to Show Cause process which, as the Commission has noted, “meets all relevant due process requirements.”⁶²

Any such process must also be fair to consumers. The Commission should provide for an expeditious procedure to minimize the harms to customers caused by delay. Furthermore, during the pendency of the proceeding, interest must accrue on any money determined to be owed to consumers.⁶³ This interest accrual provision is necessary because the process of investigating and resolving an ESCO overcharge issue may take months, and consumers should be compensated for both the overcharges and the additional time they had to wait to receive the refund.

Finally, there should be no *mens rea* requirement for finding that an ESCO has overcharged its customers. The standard for determining whether customers were overcharged should be just that – whether the customers were charged more than they should have been. Any unintentional or inadvertent errors on the part of an ESCO must not absolve it of the obligation to make customers whole for any overcharges experienced.

IV. Express Consent Is Required for Material ESCO Contract Changes, Which Include Changes to Price.

UIU and the NYAG reiterate our support for the Express Consent Whitepaper’s three-stage alternative to express consent, but only for renewals of ESCO contracts on the same terms

⁶¹ See Major & Family Comments at 3-4; Constellation Other Comments at 4; RESA Comments at 6.

⁶² Reset Order at 18.

⁶³ An appropriate interest rate would be the utility interest rate on customer overcharges as the ESCO is acting in place of the utility and should be liable for the same interest rate when it overcharges customers. 16 NYCRR § 145.3 (“The rate of interest on such amounts shall be the greater of the unadjusted customer deposit rate or the applicable late payment rate, if any, for the service classification under which the customer was billed. Interest shall be paid from the date when the customer overpayment was made, adjusted for any changes in the deposit rate or late payment rate, and compounded monthly, until the date when the overpayment was refunded.”).

to which the consumers previously agreed.⁶⁴ Consumers must not be roped into contract terms that they never agreed to in the first place. UIU and the NYAG therefore oppose the comments that support the Express Consent Whitepaper’s three-stage alternative to express consent.⁶⁵ None of the commenting parties offered substantive comments to refute the fundamental principle that a material change in a contract term is something that a consumer must agree to, affirmatively and expressly, before the consumer can be subject to its terms. The conclusory and unsupported assertion that “[e]xpress consent is simply not necessary with respect to renewals”⁶⁶ is not true and does not comport with existing legal principles. Moreover, Direct Energy’s assertion that consent requirements have “severely limited ESCO flexibility to make *even helpful changes* to customer agreements”⁶⁷ appears to concede that consent requirements have also limited ESCO flexibility to make *unhelpful changes* to customer agreements. This is precisely why robust consent requirements are necessary.

The City of New York agrees with our position that a price change is a material change and should be subject to the express consent requirement. UIU and the NYAG further agree with the City of New York “that a contract price change should be prioritized as material and require the express consent of the customer” because of the history of a “disparity in energy supply costs charged to mass market customers by ESCOs as compared to utilities.”⁶⁸

Should the Commission adopt the three-notice alternative to express consent – which UIU and the NYAG strongly urge it not to do – the Commission should, at a minimum, prohibit the imposition of early termination fees for mass market customers who were re-enrolled in a materially different contract without express consent, as suggested by the City of .⁶⁹

V. Protections Should Apply to All Mass Market Customers, Not Only Residential Customers.

⁶⁴ UIU and NYAG Comments at 16-17.

⁶⁵ *See, e.g.*, Constellation Other Comments at 5; Direct Energy Comments at 5; Major & Family Comments at 6; RESA Comments at 3.

⁶⁶ Constellation Other Comments at 5.

⁶⁷ Direct Energy Comments at 5 (emphasis added).

⁶⁸ Cases 12-M-0476 *et al.*, Letter from Amanda De Vito Trinsey, Esq., Counsel for the City of New York, to the Honorable Kathleen Burgess, Secretary of the New York State Public Service Commission (June 6, 2016) at 2.

⁶⁹ *See id.*

UIU and the NYAG recommend rejecting RESA's and M&R Energy's proposal that the protections described in the Whitepapers and the SAPA Notice should only apply to residential customers.⁷⁰ RESA claims that these protections should not apply to small commercial customers because they frequently review offers from vendors for goods and services and manage business costs. This argument, weak on its face, quickly collapses upon examination. Small commercial customers are overwhelmingly residential utility customers who also happen to run a small business such as a nail salon, restaurant, or book store. Simply because a person has bills to pay does not mean he or she has the time, resources, or subject-matter background to understand complex ESCO contracts.

The facts bear out this observation. A 2014 New York State Energy Research and Development Authority ("NYSERDA") survey on the progress of NYSERDA's energy efficiency loan program found that small business owners may lack the financial expertise necessary to evaluate energy contract choices.⁷¹ In addition, data show that small commercial customers frequently fall victim to the same deceptive ESCO practices and overcharges as residential customers, and thus, are in need of the same protections.⁷² To the extent RESA's confusion over how customers will be categorized as "small commercial" is genuine,⁷³ this concern can be resolved during the implementation process after the Commission issues an Order in this proceeding; it is not a reason to deny small commercial customers from the protections they need and deserve.

⁷⁰ See RESA Comments at 19-20 (June 6, 2016); Cases 12-M-0476, *et al.*, Comments of M&R Energy Resources Corporation Regarding the Order Resetting Retail Energy Markets for Mass Market Customers (June 6, 2016) at 4-5.

⁷¹ Research into Action, Inc., Small Commercial Energy Efficiency Program Market and Process Evaluation (Feb. 2014) 3-3, available at www.nyserda.ny.gov/-/media/Files/Publications/PPSER/Program-Evaluation/2014ContractorReports/2014-EMEP-Small-Commercial.pdf ("Especially for very-small organizations (i.e., under 10 employees), one individual, often the business owner, may be playing many roles within the business. This interviewee stated, "The best chef is not always the best manager . . . You're managing inventory, books, employees, utilities, payroll . . . It's a new experience for a lot of folks. A lot of folks need an education in that regard.")

⁷² See February 2014 Order at 10 ("We find that as currently structured, the retail energy commodity markets for residential and small nonresidential customers cannot be considered to be workably competitive.")

⁷³ RESA Comments at 20-21.

CONCLUSION

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

Respectfully Submitted,

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