STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on December 15, 2016

COMMISSIONERS PRESENT:

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

CASE 12-M-0476 - Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State.

CASE 98-M-1343 - In the Matter of Retail Access Business Rules.

CASE 06-M-0647 - In the Matter of Energy Service Company Price Reporting Requirements.

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

ORDER ADOPTING A PROHIBITION ON SERVICE TO LOW-INCOME CUSTOMERS BY ENERGY SERVICE COMPANIES

(Issued and Effective December 16, 2016)

BY THE COMMISSION:

INTRODUCTION

In the Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies issued on July 15, 2016 in these proceedings (July Order), in furtherance of its statutory obligation to ensure continuance of just and reasonable rates in the market for gas and electric commodity, the New York State Public Service Commission (Commission) directed a moratorium on energy service company (ESCO) enrollments and renewals of customers who are participants in

utility low-income assistance programs (Assistance Program Participant, or APP).[1] After years of investigation and numerous thwarted attempts to address the persistent, unresolved problem of ESCO overcharges to residential customers in general and the specific issues arising from overcharges to APPs, the July Order took necessary measures to protect APPs and prevent the diminution of financial assistance provided to those customers.

Those protections were upheld in the Commission's Order on Rehearing and Providing Clarification (September Order), issued September 19, 2016.[2] One issue raised on rehearing was the July Order's compliance with the requirements of the State Administrative Procedure Act (SAPA). In the September Order, the Commission readopted the moratorium on an emergency basis in order to: 1) ensure that the essential consumer protections directed would be implemented in the intended timeframe and before the onset of the 2016 heating season; and 2) provide an additional opportunity for parties to comment on the moratorium, particularly its term and the conditions for lifting it.

Following the issuance of the September Order the National Energy Marketers Association (NEM) and the Retail Energy Supply Association (RESA) sought injunctive relief in the New York State Supreme Court.[3] A temporary restraining order was issued on September 28, 2016 staying the July and September

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[1] Case 12-M-0476, et al., Retail Access, Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies (issued July 15, 2016).

[2] Case 12-M-0476, et al., supra, Order on Rehearing and Providing Clarification (issued September 19, 2016).

[3] National Energy Marketers Association et al. v. New York Public Service Commission, Alb. Co. Index No. 5680-16; Retail Energy Supply Association v. New York Public Service Commission et al., Alb. Co. Index No. 05693-16.

Orders, based largely on SAPA.[4] Now, following a full statutory notice and comment period, the Commission acts on a non-emergency basis to reaffirm the necessity of these protections. In light of the persistent ESCO failure to address (or even apparently to acknowledge) the problem of overcharges to APP customers and the resulting diminution of financial assistance to those customers, by this Order, the moratorium on ESCO service to APP customers directed in the July and September Orders is converted to a permanent prohibition on ESCO service to APPs.

Further, the Department of Public Service is actively pursuing reforms to the retail market for mass-market customers.[5] Through this process, the Commission will evaluate the products and service to be offered to mass-market customers, including energy related value-added products or services, as part of its broader effort to ensure just and reasonable rates for retail access customers. However, a prohibition on ESCO service to APPs is necessary now in order to protect those customers who receive a subsidy on their energy bill, as well as those taxpayers and ratepayers who fund the programs that provide those subsidies. The Commission may revisit the issue of ESCO

[4] Importantly, both the Utility Intervention Unit of the New York Department of State and the New York State Attorney General's office have supported the Commission's efforts to prohibit ESCO service to APP customers; see Memorandum of Law of Amici Curiae Office of the Attorney General and Utility Intervention Unit of the New York State Department of State, Alb. Co. Index No. 5680-16 and Alb. Co. Index No. 05693-16, November 14, 2016.

[5] The Secretary recently issued a procedural Notice in Case 15-M-0127, et al., supra, Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits (issued December 2, 2016) (December Notice).

service to APPs in the future once the broader concerns with the retail market for mass-market customers have been resolved.

BACKGROUND

Since 2012, the Commission has recognized that the objective of ratepayer-funded low-income assistance programs administered by the utilities, which augment taxpayer funds that provide financial assistance to utility customers through HEAP, are being subverted by ESCO service to APPs, and has repeatedly acted to address this critical problem.[6] These significant ratepayer and taxpayer funds are employed to reduce bills that have been inflated by the comparatively higher priced gas and electricity. The higher prices charged by ESCOs diminishes the value of the assistance provided to the APP and thereby undermines the State's energy affordability goals and imposes an unfair burden on other ratepayers and taxpayers.

In order to resolve these issues, in 2014 the Commission ordered ESCOs to develop lower-cost alternatives for APP customers and required that when serving a APP, the ESCO must provide a product that either (1) offers a guaranteed savings compared to when the customer would have paid under full utility service, or (2) included an energy related value-added (ERVA) products or services that is designed to reduce the customer's overall bill. Subsequently, the Commission directed Department of Public Service Staff (Staff) to lead a collaborative to address implementation issues concerning this

[6] Case 12-M-0476, et al., supra, Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State (issued October 19, 2012); Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets (issued February 25, 2014) (February 2014 Order); Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015) (February 2015 Order).

requirement. A Report of the Low-Income Collaborative was issued for comment on November 5, 2015 (Collaborative Report).[7] The Collaborative was unable to reach a resolution of the issues identified in the February 2015 Order. Specifically, the collaborative effort revealed that no qualifying cost-saving value-added products could be identified and that ESCOs were generally unable, or unwilling, to provide guaranteed price savings to APP customers. Strikingly, nowhere in the collaborative process or the comments following that process did the ESCOs directly dispute that, as a general proposition, ESCO APP customers pay more than utility APP customers.

Moreover, the Commission recently renewed its commitment to assist financially vulnerable customers struggling to pay their energy bills. In a May 20, 2016 Order, the Commission expanded low-income assistance programs by creating a target to limit the energy burden (i.e., the percent of annual income spent on energy) to no more than 6% for low-income households.[8] These improved protections will require greater subsidies from ratepayers and, thus, escalate the need to ensure that the value of those subsidies is fully experienced by the customers that need them.

Given the ESCO community's resistance and rejection of all efforts to protect the State's most economically vulnerable energy consumers, and in accordance with its statutory obligation to ensure that rates remain just and reasonable in competitive markets, the Commission took necessary affirmative action in the July and September Orders by imposing a temporary

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

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

moratorium on ESCO enrollments and renewals of APPs. As part of its ongoing investigation into the retail market, Staff received updated utility bill calculations[9] which only corroborated the bill calculations relied on in previous Commission orders.[10] The bill calculations Staff has relied upon throughout this proceeding are obtained from the utilities. The utility billing systems can compare what a customer paid to the utility for distribution services and ESCO commodity to what the customer would have paid if he or she were a full service customer of the utility.[11] Bill comparison data demonstrates that unsuspecting retail customers, and particularly APPs, are too often and unwittingly paying more for retail electric and gas services when they purchase them from a competitive supplier as opposed to remaining with a utility. Indeed, the foundational concern with ESCOs charging higher prices than utilities has not been resolved; instead, it has persisted and become more egregious. This most recent data compiled by Staff shows that between

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[9] Case 12-M-0476, et al., supra, See Reports filed by: New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation (filed October 18, 20, and 26, 2016); Orange and Rockland Utilities, Inc. (filed October 19, 2016); Consolidated Edison Company of New York, Inc. (filed October 19, 2016); National Fuel Gas Distribution Corporation (filed October 19, 2016); Key Span Gas East Corp, Niagara Mohawk Power Corporation, and the Brooklyn Union Gas Company d/b/a National Grid (filed October 13, 2016); and Central Hudson Gas & Electric Corporation (filed October 13, 2016).

[10] See Case 12-M-0476, et al., supra, Office of the Attorney General Reply to Petitions for Rehearing (June 16, 2014); and February 2014 Order at 5-6, 10-12; and February 2015 Order at 4-6.

[11] Utilities are required by regulation to maintain billing systems which can calculate the amount an ESCO customer would have paid as a bundled utility customer in order to implement the reconnection of service to an account that was terminated under the Home Energy Fair Practices Act (HEFPA); to Public Service Law (PSL) §32(5)(d), and 16 NYCRR §11.9(c)(6).

January 2014 and June 2016, New York State residential (and in some instances small commercial) customers who chose to take service from an ESCO paid over $817 million more than if they had taken full utility service. Similarly, APPs who chose to take service from an ESCO paid almost $96 million more over the same period. Thus, while the Commission continues its efforts to reform the retail market for all mass-market customers, it is imperative that the harm to all customers, particularly to APPs, resulting from ESCO service to APPs be ended immediately.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on October 5, 2016 [SAPA No. 12-M-0476SP14]. The time for submission of comments pursuant to the SAPA Notice expired on November 21, 2016. Comments were received from NEM and are discussed below.[12]

DISCUSSION

Statutory and Regulatory Framework

The Commission has broad legal authority to oversee ESCOs, pursuant to its jurisdiction in Articles 1 and 2 of the Public Service Law (PSL).[13] In addition, the Commission has

[12] Blue Rock Energy Inc., Residents Energy, LLC, and Verde Energy USA New York, LLC also filed letters in support of the NEM comments.

[13] See PSL §5 (Commission's broad statutory grant of authority over the sale of natural gas and electricity); see also Case 98-M-1343, supra, Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing at 10 (issued October 27, 2008) (2008 Order); PSL §53 (stating Article 2 of the PSL applies to "any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers").

authority over the tariffed rules and regulations of electric and gas distribution utilities, and has placed conditions on when the distribution utilities may allow ESCOs to use utility infrastructure to distribute electricity and natural gas to ESCO customers.[14] Therefore, the Commission has jurisdiction and authority to establish and modify the conditions under which ESCOs may offer electric and gas commodity service to customers.

ESCO eligibility requirements were originally created in Opinion 97-5,[15] and were reflected in the Uniform Business Practices (UBP) in 2003.[16] In both instances, the authority under PSL §66(5) was used to direct the distribution utilities to incorporate the applicable requirements in their respective tariffs. Since the eligibility requirements were originally established, those criteria have been amended on a number of occasions. For example, in 2003, ESCOs were required to submit sample standard customer agreements in order to be deemed eligible to provide electricity and/or natural gas in New York.[17] In adopting ESCO eligibility requirements, the Commission stated that such requirements are necessary to ensure that ESCOs provide consumer protections, to give the public confidence in ESCOs, to ensure competency of providers, to protect system reliability and to oversee development of the market.[18] Eligibility requirements

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[14] PSL §66(5).

[15] Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services (issued May 19, 1997) (Opinion 97-5); Opinion and Order Deciding Petitions for Clarification and Rehearing (issued November 18, 1997) (Opinion 97-17).

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

[17] Id.

[18] Opinion 97-5.

remain a helpful and necessary tool for promoting goals and policies.

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

The Need for a Prohibition on ESCO Service to APPs

Despite repeated attempts in these proceeding in orders issued February 2014, February 2015, July 2016, and September 2016 to address the proven problem of ESCOs charging APP customers more than they would pay if they remained utility customers, the problem persists and customers continue to be harmed. As we have articulated in the past, continuing to allow assistance program funds to be squandered at the expense of APPs and all ratepayers and taxpayers is not in the public interest as it harms consumers in at least two ways. First, it means that our most economically vulnerable consumers are paying more for energy than necessary. Second, because the Commission has sanctioned low-income discount programs that provide energy discounts to low-income customers to help make energy more affordable for these consumers, all utility customers (including the low-income customers) subsidize those programs and are also harmed. Low-income discounts are paid for by other utility customers in the form of higher rates; all utility customers are harmed when the value of the subsidies they are compelled to pay

in their utility rates is diminished by virtue of the ESCOs charging their customers more for the same product, electric and gas service, then they would receive if they remained with their host utility. Imposing higher prices on consumers who are already challenged to pay their bills coupled with the fact that these prices automatically diminish the value of subsidies paid for by all utility consumers is, without question, a waste of utility ratepayer dollars which the Commission has an obligation to remedy.

After rehearing and clarification was requested with respect to the July Order, the Commission provided interested parties with an additional opportunity to comment on the protections that must be afforded to APPs to prevent the diminution of assistance program funds to the detriment of all ratepayers and taxpayers. Previously the Commission had imposed a moratorium on ESCO commodity service to APPs. The NEM comments again fail to offer an answer to the problem of diminution of assistance program funds. In light of those comments the Commission imposes a prohibition on ESCO commodity service to APP customers.

In its comments, NEM raises many of the same contentions raised in its Petition for Rehearing and Clarification of the July Order.[19] Allegations of constitutional violations were fully addressed in the September Order and will not be reproduced here. Likewise, NEM's challenge to the Commission's authority to issue a moratorium, and compliance with SAPA were addressed in the September Order on rehearing and need only be addressed summarily here. NEM's remaining contentions are addressed more fully below.

[19] Case 12-M-0476, et al., supra, Petition for Rehearing and Clarification of the Commission's July 15, 2016 Order (filed August 15, 2016).

In continuing to challenge the Commission's authority to protect APP customers, NEM again ignores that the basis for the retail commodity market is an exercise of Commission rate authority designed to lower customer rates by providing for competitive commodity service.[20] The Commission has to be able to assure itself that commodity rates in the retail market remain "just and reasonable" in order for the market to continue.[21] Given the utility bill comparisons showing that total ESCO bills exceed utility bills there are substantial questions as to whether mass-market prices charged by competitive suppliers are just and reasonable, as described in the December notice. Those bill comparisons in particular show that ESCO commodity rates cannot be considered just and reasonable for APP customers. Given that the Commission has to ensure that rates are just and reasonable for competitive retail access to continue it is not "absurd"[22] for the Commission to bar such access for APP customers who are being overcharged. Rather, such denial of access is required by the underlying condition for continuation of competitive access.

The suggestion in NEM's comments that the Commission should have reconvened the Collaborative to examine changes to ESCO marketing standards to APP customers and/or better enforced consumer protection standards is unavailing for similar reasons. The ESCOs were given a full opportunity to address the

[20] Matter of Energy Assn. of New York State v Public Serv. Commn. of the State of N.Y., 169 Misc. 2d 924, 932-37 (Albany County 1996), affd on other grounds, 273 A.D. 2d 708 (3d Dept 2000).

[21] Energy Assn. 169 Misc. 2d at 936-37 (PSC decision to rely on market to set prices for electric commodity upheld based on PSC oversight to ensure that market rates are "just and reasonable."

[22] NEM Comments at 9.

Commission's concerns about higher ESCO charges in the collaborative and failed to do so, as explained in the July and September Orders.[23] Marketing standards have not worked to keep ESCO rates just and reasonable and the Commission must intervene to satisfy the statutory condition for continued retail access.

NEM's allegations that the Commission's July and September Orders did not comply with SAPA are without merit, as discussed in the September Order and the Notice of Emergency Adoption accompanying that Order. In any event, those claims are moot and NEM offers no objection to the Commission's ability to act on a permanent basis after the October 5, 2016 SAPA notice. The Commission adopts the prohibition in this Order pursuant to that Notice.

NEM also asserts that implementing the prohibition on ESCO service to APP customers will result in a denial of customer privacy. The September Order explained that the Commission protected privacy interests by requiring the utilities to provide lists of all ineligible customers, as opposed to only ineligible APP customers.[24] To the extent a customer's low-income status nevertheless might be surmised, the confidentiality rules for the disclosure of public assistance and HEAP programs are not absolute. The disclosure of a recipients' private information is specifically authorized where, as here, it is done for the purposes of administering the programs. Under 18 NYCRR 357.3, the release of information

[23] NEM continues to assert the possibility of a low-income aggregation program, that the Commission acknowledged might be a basis for lifting the moratorium in the September Order (at 15), even though it was "insufficiently developed." NEM, has, however, done nothing more to develop that proposal, which should not be a basis for avoiding a prohibition otherwise needed to protect retail access.

[24] September Order at 18-19.

(names/addresses) of recipients of assistance is allowed if the purposes are "reasonably related to the purposes of the public welfare program and the function of the inquiring agency."[25] Consistent with the requirements of 18 NYCRR 357.3, to the extent any ESCO is aware of a customer's APP status, either because that information is provided by the customer or otherwise deduced by the ESCO, the ESCO is directed to not reveal such information, and to not use information about such status for political and commercial purposes, unless they secure these customers' written consent, in accordance with the Section 5 of the UBP.

NEM's reliance on the Low Income Home Energy Assistance Program (LIHEAP) and other federal assistance programs is unavailing because, under state law, disclosure is permitted where necessary for the administration of the programs. The LIHEAP form filed by the State Office of Temporary and Disability Assistance (OTDA), precludes only "improper disclosure."[26] That form authorizes "data exchange with utilities," the coordination of payments "among other energy assistance programs to avoid duplication of payments," and the direct payment of benefits to vendors, such as utilities. Disclosure of the customers' economic status to ESCOs that do not do their own billings is proper, because disclosure is necessary to de-enroll the customers and ensure

[25] 45 CFR 205.50(a)(1)(i)(A), (C), cited by NEM, permits disclosure of information concerning applicants and recipients for certain purposes, including "establishing eligibility, determining the amount of assistance, and providing services for applicants and recipients" under certain titles of the Social Security Act, as well as "[t]he administration of any other Federal or federally assisted program which provides assistance].

[26] LIHEAP Form §§ 17.8 and 17.9.

that the value of these public benefits is maximized.[27] Finally, Chapter 23, of the OTDA HEAP manual specifically authorizes disclosure of confidential HEAP information for the purpose of administrating the Commission's low-income programs.[28]

NEM's assertions about the arbitrariness of the Commission's moratorium (and hence any prohibition) fail in light of the utility bill comparisons showing that ESCO charge more than the utilities. For instance NEM asserts that preventing APP customers from taking service from an ESCO will actually harm the customer. It claims that a moratorium will prevent APPs from entering into long-term fixed-rate contracts for commodity supply because only ESCOs can offer such products.

The evidence in the record refutes these assertions. The analysis performed by Staff shows that ESCO fixed-rate contracts are not lower than the price their customers would pay to utilities for electric and gas services. There is no public interest basis in using public assistance monies to support such higher bills. In the absence on the part of ESCOs to guarantee the savings that they claim will occur, there is no policy justification to diminish the value of our energy affordability goals and ratepayer funded discounts.

The ESCOs' assertion that the consumer benefit that is achieved from known and fixed monthly bills also does not undermine our determination. While the Commission concurs that

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[27] ESCOs that conduct their own billings already know the LIHEAP recipient status of their customers, because, in accordance with LIHEAP, they receive direct payments on behalf of the low-income customers (LIHEAP Form, Section 17.8 [authorizing direct payment to vendors and permitting direct payment to beneficiaries only in limited circumstances]); see also 45 CFR 205.50(a)(1)(i)(C); and September Order at 27.

[28] OTDA HEAP manual, Chapter 23, Section B (Authorized Disclosures of Case Specific Information), available at http://otda.ny.gov/programs/hOeap/HEAP-manual.pdf.

some customers will value knowing their bills in advance, it is also critical that the prices included in the fixed contracts are just and reasonable. Indeed, in the collaborative there was discussion on how to develop reference prices so that fixed contracts could be offered with the assurance the price would be just and reasonable, but the ESCO community did not support this inquiry. Moreover, all utilities are required to offer budget billing programs which provide customers with a flat bill every month with annual true-ups.[29] These programs have been successful in providing a reasonable level of predictability in customer budgets through avoidance of fluctuating monthly charges. Low-income customers have very little margin for paying premiums for services, so any fixed-rate product would have to come with a minimal premium and perhaps a guarantee of savings for it to be acceptable. The level of scrutiny that would be necessary to allow such products is not achievable in the current climate where ESCOs have not been cooperating in creating meaningful solutions.

NEM also alleges that the moratorium will prevent APPs from obtaining other products and services only offered by ESCOs, including loyalty discounts, reward points, and gift cards. The Commission rejected these other programs as inappropriate "value-added services" for APPs and we find no reason to alter this finding. As previously determined, the value-added services for APPs differ from those that are considered value-added for the larger population of customers. APPs receive discounts on their energy bills from programs that are funded by the larger ratepayer and taxpayer body in order to reduce their bills and maintain essential service. To allow APPs to take more expensive ESCO service because they are interested in receiving "gift cards, electronics, appliances,

[29] 16 NYCRR § 11.11.

and other products" while at the same time, those customers are receiving a subsidy on their energy bill to make their energy costs affordable is not in the public interest. Those ratepayer and taxpayer funded assistance programs are intended to provide energy affordability and maintain essential service, not to fund the provision of additional, non-essential services. Further, with one exception relating to energy efficiency programs sponsored through the New York State Energy research and Development Authority's Green Jobs, Green New York program,[30] the utility bill should only be used to bill for energy-related services. To subject customers to termination of service for non-payment of the cost of airline miles, electronic appliances, and other products is inconsistent with the PSL and HEFPA.

Next, NEM argues that a moratorium is unnecessary and not supported by the record because customer complaints against ESCOs have declined. While it is accurate that customer complaints against ESCOs have decreased, the moratorium was not issued in response to customer complaints. The July and September Orders made it clear that the moratorium was implemented to address higher ESCO charges as compared to the utility bills, resulting in the diminution of assistance program funds. The number of complaints against ESCOs is not what drives the need for a prohibition. Further, while complaints

[30] Cases 11-E-0450 et al., On-Bill Recovery Tariffs, Order Modifying and Authorizing On-Bill Recovery Tariffs (issued December 15, 2011) ("Pursuant to the statute… the rights and responsibilities of residential customers participating in the On-Bill Recovery program will be governed by Article 2 of the Public Service Law and will be substantially comparable to residential customers not participating in the program. Deferred payment agreements, termination or disconnection and reconnection of service for residential customers will be subject to the same provisions of the utilities' tariffs regardless of whether a customer utilizes the On-Bill Recovery program.").

may be decreasing, there are still a significant number of customer complaints against ESCOs,[31] and given the scale of ESCO customers that are being overcharged, it has to be concluded that some customers are unaware of their status or the complaint rate would be significantly higher.

NEM's additional claim that utility rate unbundling is needed to create proper price comparisons is refuted, at least for APP customers, by the utility bill comparisons. Whatever lack of comparability exists between ESCO and utility charges, a whole bill to whole bill comparison demonstrates that APP customers are generally paying overall higher bills and risking service suspension. Fundamentally, ratepayers generally should not be supporting higher ESCO bills. Further, the Commission's repeated concern that the market is not transparent cuts in favor of action to prevent APP customers from paying higher ESCO bills, at public expense. Customers believe they are saving money because their ESCO told them they would, and accordingly pay higher bills than they would if they were utility customers. Again, customers are not complaining because they do not know they are paying excessive rates for ESCO commodity service.

Finally, NEM challenges the use and validity of the utility bill comparison data to demonstrate the extent to which ESCOs overcharge customers. NEM comments that without being able to understand the data's origin, meaning, and context, it is unable to meaningfully test, analyze, or address the data. Comparisons of ESCO and utility bills are perfectly appropriate, inasmuch as they are statutorily required. An amendment to

[31] According to the Consumer Complaint Statistics published on the Department of Public Service Webpage, there have been over 2,600 initial complaints against ESCOs between January and October 2016; see October 2016 Monthly Report on Consumer Complaint Activity, available at http://www3.dps.ny.gov/W/PSCWeb.nsf/ArticlesByTitle/448C499468E952C085257687006F3A82?OpenDocument.

HEFPA permits ESCOs to suspend their customers for failure to pay ESCO charges, but allows customers to end an ESCO-initiated suspension of delivery service, by paying the lesser amount of combined utility delivery and ESCO commodity charges or bundled utility commodity and delivery service.[32] That is, an ESCO may be required to accept a lesser amount for its commodity service for the purpose of allowing a customer to end suspension of services.[33]

In light of this statutory provision, utility bill comparisons have become routine. In 2003, the distribution utilities were required to provide a reasonable bill comparison to allow a customer to reinstate service, by paying a utility-based charge if it is less than the ESCO-based charge. In order to comply with these provisions, the utilities created systems which calculate the amount the customer would have paid as a bundled utility customer. The bill comparisons on which the Commission relies are thus business records, which can be given full credence, absent proof of problems which ESCOs have not supplied.

NEM's complaints about an alleged lack of opportunity to test those comparisons are unpersuasive in light of the established statutory requirement of bill comparisons. Such complaints about utility bill comparisons are also suspect, given that such comparisons are well established in the course of these proceedings. In the February 2014 Order, the Commission directed the utilities to develop historical bill calculators which compare what a customer paid to the utility for distribution services and ESCO commodity to what the customer would have paid if he or she were a full service

[32] See PSL §32(5)(d); 16 NYCRR 11.9.

[33] Case 98-M-1343, et al., Order on Petitions for Rehearing and Clarification, at 28-30 (issued December 5, 2003).

customer of the utility. The utilities were required to develop and test these calculators as well as make the calculators available to ESCOs and their trade associations for testing prior to implementation. Moreover, these comparisons reflect any tax advantages to an ESCO customer. The utilities filed letters with the Commission affirming that these requirements were met.

Utilities have been doing comparisons of their bills with those of the ESCO bills since 2003 and these comparisons are calculated using exactly what the customer was billed as an ESCO customer and comparing that to what the customer would have been billed, had they received full utility service pursuant to the publicly filed utility tariffs. The accuracy of the utility billing systems is audited and verified by the Department. ESCO complaints that the comparisons do not consider ESCO product offerings are of no moment in the context of APP customers because, as discussed above, such customers should not pay extra for ESCO value-added services. Finally, NEM asserts that the Commission should not rely on utility data, but should instead utilize data from ESCOs. However, because the utilities generally bill for ESCO services to residential customers on a consolidated utility bill, the comparisons already reflect ESCO billing data. Such ESCO billing data includes any energy-related savings the ESCOs provide APP customers, since such savings mean lower bills.

Implementation of the Prohibition

The prohibition on ESCO service to APPs shall be implemented in an identical manner, and on an identical schedule, as was directed in the July Order, and clarified by the September Order, for implementation of a moratorium. For new enrollments, the prohibition will be implemented through a rejection by the utility, through an electronic data interchange

(EDI) transaction, if the prospective customer is an APP. Beginning 60 days after the effective date of the Order, utilities will be required to place a block on all APP accounts. In the event that an APP is enrolled with an ESCO at any time after the prohibition is in effect, that enrollment shall be void. In such a situation, the enrollment was wrongfully processed and the customer shall be returned to full utility service immediately upon discovery of the error.

With respect to APPs who are currently ESCO customers, within 60 days of the effective date of this Order, the utilities, utilizing their records regarding which customers are enrolled in their low-income program and are served by an ESCO, will communicate to the ESCO which accounts the ESCO is no longer eligible to serve.[34] At or around the same time, but no later than 14 days after the utility contacts the ESCO regarding the accounts the ESCO is no longer eligible to serve, the utility will also send a letter to the ESCO customer, informing the customer: (1) that they are enrolled in the utility's low-income program; (2) of the prohibition directed in this Order; (3) the reason for and protections provided under the prohibition; and, (4) that they will be returned to utility service at the expiration of their existing ESCO agreement. Utilities are required to file drafts of these letters with the Secretary for Staff review within 30 days of the effective date of this Order.

Within 30 days receiving the communication from the utility, the ESCO shall then de-enroll the identified accounts

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

at the expiration of the existing agreement.[35] With respect to customers on month-to-month contracts, the expiration of the agreement is at the end of the current billing period. Therefore, once the ESCO receives the communication from the utility that they are no longer eligible to serve a customer, the ESCO shall de-enroll the customer at the end of the billing period in progress 30 days after receiving the communication from the utility.

Regarding products where the term is month-to-month, but the customer receives a gift, such as two months of free service, if the customer remains with the ESCO for a designated period, such as six or 12 months, the ESCO should continue to serve the customer until the end of the gift term even though those agreements are month-to-month. This would also be true for agreements that guarantee savings with respect to the utility rate, to the extent they exist, and which effectuate the guaranteed savings through a true-up at the end of a specified time period. With respect to these types of products, the agreement, although month-to-month, will be deemed to expire at the end of the billing period on which the guaranteed savings true-up is provided to the customer. To do otherwise would deny the customer of a potential benefit that was a consideration in entering into the agreement. However, this is not to be construed as creating an ERVA that is an exception to the prohibition on APP service. Therefore, only those "gift-term" agreements that were in effect prior to the issuance of this Order will be permitted to continue until expiration of the gift term.

[35] ESCO are still required to comply with the customer notice requirements of UBP §5.H.4.a, which requires an ESCO to provide customers 15 days' notice of a drop back to utility service.

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

Consistent with the discussion above, the utility shall also send a letter to the customer at or around the same time it contacts the ESCO regarding the accounts the ESCO is no longer eligible to serve, but no later than 14 days after enrollment as an APP. Customers of Central Hudson, NFG, and O&R currently receive a communication from the utility confirming that the customer has been enrolled in a utility assistance program. Utilities that provide such communication, shall include information related to the prohibition, as well as inform the customer that they will be switched back to utility service at the expiration of their existing agreement. Other utilities shall notify the customer via a separate mailing. When a customer, who originally had a block placed on their account because of their APP status, comes off of the assistance program, the utility shall remove the block from the account when the customer is rolled off the utility's low-income program, and that account will be removed from the updated list

of ineligible accounts provided to the ESCO on a periodic basis.[36]

Implementation of the Prohibition In National Fuel Gas Distribution Corporation's Service Territory

There are approximately 20,000 ESCO customers in National Fuel Gas Distribution Corporation's (NFG) service territory who receive their monthly natural gas bills under the ESCO Combined Billing (ECB) Model, where ESCOs render single bills including commodity and delivery charges directly to customers, and for whom NFG has no billing relationship with the customer. Consequently, NFG does not know which customers are low-income and under the ECB model, the ESCO is essentially the utility with respect to all billing practices, and it knows whether or not the customer receives a HEAP payment.

Accordingly, ESCOs that participate in the ECB model in NFG's service territory will be treated as "utilities" for the purpose of implementation of and compliance with the prohibition, except that those ESCOs will not place blocks on customer accounts. The ESCO must notify NFG, within 60 days of the issuance of this Order, which accounts are low-income, and within 30 days of this notification, NFG shall place a block on APP accounts to prevent those accounts from being enrolled with an ESCO. Likewise, within 60 days of the issuance of this Order, ESCOs that participate in the ECB model in NFG's service territory shall begin de-enrolling customer in conformance with the discussion above.

[36] The frequency by which these lists will be updated will vary by utility, with some able to update the list on a weekly basis, and others able to do so only on a monthly basis. In any event, the list of customer accounts that the ESCO will no longer be eligible to serve will be updated no less than once every month.

Additionally, in NFG's territory, direct voucher customers in Chautauqua, Erie, and Niagara Counties receive commodity service under an aggregation program operated by each county's Department of Social Services (DSS Aggregation Programs). Under these programs, the counties arrange for gas supplies from an ESCO on an annual basis. These DSS Aggregation Programs in NFG's service territory shall be exempt from this prohibition and those APPs who are direct voucher customers in the above named counties may receive ESCO service through the DSS Aggregation Programs.

Reconsideration and Waiver of Prohibition

The Commission's objective is to obtain the lowest bills possible for APPs. Accordingly, the Commission remains open to reconsidering aspects of the prohibition where ESCOs demonstrate the ability and desire to achieve savings for these customers. As discussed, the Commission is addressing reforms to the retail market for all mass-market customers.[37] In the second track of that process, a collaborative will be convened to continue consideration of value-added products and services for residential customers. If that effort identifies products which result in demonstrated savings to customers, the Commission will reconsider the prohibition on ESCO service to APPs with respect to such products.

In the interim, the Commission remains open to the concept of allowing ESCOs to serve the APP market if they are willing to guarantee that they will save dollars for these customers and develop a process to ensure that the putative savings do in fact occur. Accordingly, if an individual ESCO wishes to offer a guaranteed savings program to APP customers it may petition the Commission for a waiver of the prohibition

[37] See December Notice.

within 30 days of the issuance of this Order. ESCOs seeking such a waiver must be able to demonstrate their willingness to develop a program that ensures delivery of the claimed savings. These assurances should include at a minimum the following: (a) an ability to calculate what the customer would have paid to the utility; (b) a willingness and ability to ensure that the customer will be paying no more than what they would have been paid to the utility; and (c) appropriate reporting and ability to verify compliance with these assurances. In the event an ESCO requests such a waiver the Commission will review it and, in addition to the above elements, will consider other conditions it determines are necessary to protect consumers.

CONCLUSION

The record in this proceeding, developed over years and replete with evidence that there was no other way for the Commission to meet its obligation to protect consumers, fully supports a prohibition against ESCOs serving APP customers. When low-income customers take ESCO service, they are generally paying far more than they would had they remained full-service utility customers. Subsidies provided to these customers through ratepayer and taxpayer funded assistance programs are intended to make APPs' energy bills more affordable. However, when the customer receives more expensive ESCO service, the values of those subsidies is offset, and the customer ends up with a higher bill. This results in increased arrearages and

terminations. In light of the record before the Commission, a prohibition on ESCO service to APPs is appropriate.[38]

The Commission orders:

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

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

3. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to, within 60 days of the effective date of this Order, communicate to National Fuel Distribution Corporation which accounts the ESCO is receiving a HEAP payment on the customer's behalf.

4. Electric and gas distribution utilities that have tariffed provisions providing for retail access and energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to, within 30 days of the

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

effective date of this Order, file with the Secretary, for Department of Public Service Staff review, drafts of the letters to be sent to energy service company customers that are assistance program participants informing them that they will be returned to utility service, consistent with the discussion in the body of this Order.

5. Electric and gas distribution utilities that have tariffed provisions providing for retail access and energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to, within 60 days of the effective date of this Order, send the letters developed pursuant to Ordering Clause 4 to energy service company customers that are assistance program participants, consistent with the discussion in the body of this Order.

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

7. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to, on a rolling basis, communicate to National Fuel Distribution Corporation which accounts the ESCO is receiving a HEAP payment on the customer's behalf.

8. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to on a rolling basis, notify energy service company customers that subsequently become assistance program participants by sending

such customers the letters developed pursuant to Ordering Clause 4, informing them of the prohibition imposed by this Order and that they will be returned to utility service.

9. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to on a rolling basis, notify customers that subsequently become assistance program participants by sending such customers the letters developed pursuant to Ordering Clause 4, informing them of the prohibition imposed by this Order and that they will be returned to utility service.

10. Every energy service company eligible to serve customers in New York State shall, within 30 days of receiving the communication from the electric and gas distribution utilities pursuant to Ordering Clause 2 and 6 of this Order, de-enroll any customer accounts identified by the electric and gas distribution utilities, provided that existing contracts will continue until their expiration.

11. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory shall, within 60 days of the effective date of this Order, de-enroll any customer accounts on whose behalf the Energy service company receives a HEAP benefit, provided that existing contracts will continue until their expiration.

12. The Secretary in her sole discretion may extend the deadline set forth in this Order. Any requests for an extension must be in writing, must include a justification for the extension and must be filed at least one day prior to the deadline.

13. These proceedings are continued.

By the Commission,

(SIGNED) KATHLEEN H. BURGESS
Secretary

Commissioner Diane X. Burman, dissenting:

As reflected in my comments made at the December 15, 2016 session, I dissent on this item.